ANNOTATIONS INCLUDE 172 N. C.

NORTH CAROLINA REPORTS

VOL. 126

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1900

REPORTED BY
RALPH P. BUXTON

ANNOTATED BY
WALTER CLARK
(2D ANNO. ED.)

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FEBRUARY TERM, 1900

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AMENDMENT TO RULE 2

[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.
Schouler on Executors.
Bispham's Equity.
Clark's Code of Civil Procedure.
Volume I, 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

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1900

P. B. CLARK v. LONDON MOORE AND FRANK WILKINS.

(Decided 20 February, 1900.)

Ejectment—Sufficiency of Description—Location of Land—Lightwood Stakes Called For—Common Grantor—Estoppel in Pais.

1. When both parties claim under a common grantor, it is not necessary to go further back than the common source in tracing title—the rule being *quis prior in tempore, potior in jure*, provided the elder deed contains apt words of conveyance, with a sufficient description of the land conveyed to admit of its location.
2. Stakes called for in a deed to indicate corners are too lacking in stability and fixedness to serve as monuments for that purpose; neither will the use of *lightwood* stakes answer any better, as they may be as easily moved as any other sort—such defective designation of corners may be aided, where courses are given and permanent monuments are called for, such as a well-known old ditch, a marl pit, the outer entrenchment of an old fort, and old lines, and where the quantity of land conveyed is specifically described, as one acre; all of which may enable a survey to locate the land.
3. A plaintiff is not estopped by matter *in pais* from asserting his title because one of his mesne grantors had seen the defendant surveying this land, and had not made objection, and had not then set up claim of title.

ACTION for possession of land, tried before *Bowman, J.*, at (2) February Term, 1899, of BEAUFORT.

Both parties claimed the land in controversy, which was a single acre, by mesne conveyances under Harmon Eason, the common source. The plaintiff's chain of title commenced with deed from Harmon Eason and wife to Nelson Morris, in 1872; the defendants claimed through the administrator of Harmon Eason, under a proceeding to sell land for assets. The deed from the administrator, J. L. James, to S. Fleming was dated in 1880.

A copy of the map used upon the trial is subjoined, the one acre in dispute being indicated by the figures A, B, F, O.

The defendant contended that lightwood stakes being mere imaginary points, the description in plaintiff's deed was too indefinite to admit of location, and asked his Honor so to charge. His Honor declined so to charge and defendants excepted.

(3) The evidence was very voluminous, and the exceptions taken by the defendants upon the trial were numerous, but related mainly to the vagueness of the description and uncertainty of location.

It was in evidence, that after the defendant had obtained his deed he had a survey made of the land, and that one of the plaintiff's mesne grantors, Sarah Winfield, was present, and made no objection, and set up no claim of title. The defendants asked his Honor to charge the jury that if this was so, the plaintiff who claimed under her was estopped from setting up title under her. His Honor declined to so instruct the jury, and defendants excepted.

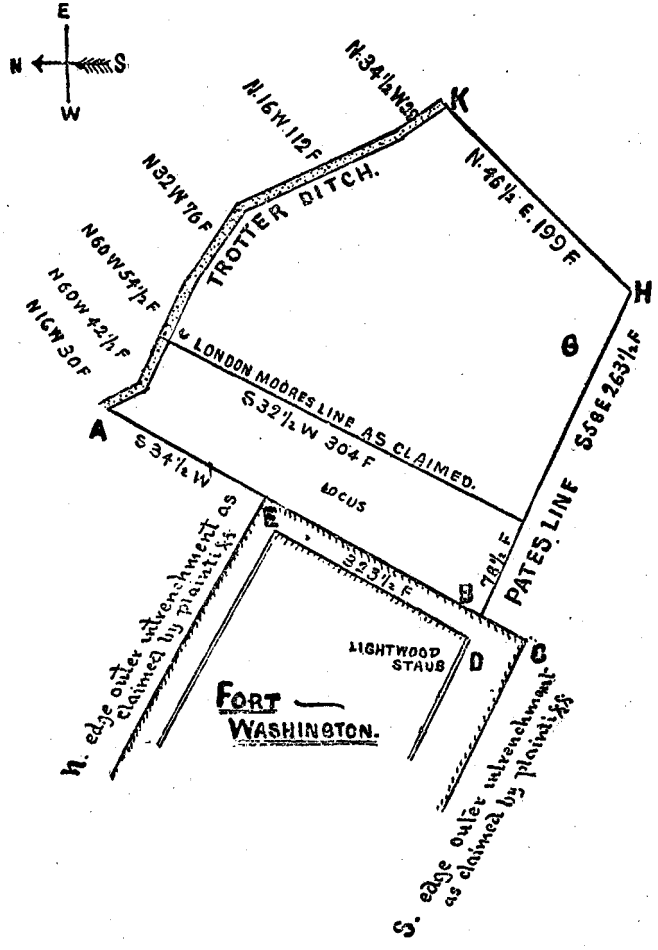
(4) There was a verdict and judgment for plaintiff. Defendants appealed.

W. B. Rodman for appellants.
Chas. F. Warren for appellee.

FURCHES, J. This is an action for the possession of land, and, while other matters were presented and discussed, the principal questions involved were, whether the description in plaintiff's deed was sufficient to locate or authorize a location of the land in dispute, and whether the land had been located. The record is voluminous and is not printed, and, while it may be plain to those acquainted with it, it has given us much labor to understand it, and we hope we do. And, understanding it as we do, it presents to our minds but two real questions, and upon these we hold with the plaintiff.

Both plaintiff and defendants claim title under Harmon Eason and wife. So it is not necessary to go further back, in tracing title, than to said Eason, the common source.

The plaintiff's chain commences by deed from Eason and wife to Nelson Morris in 1872, with mesne conveyances from said Morris


E
N
S
W
N. 34½ W. 30 F.
K
N. 16 W. 112 F.
N. 46½ E. 199 F.
N32W 76F
TROTTER DITCH.
N60W54½F
N60W42½F
N16W30F
LONDON MOORES LINE AS CLAIMED.
S 32½ W 304 F
H
G
A
S 34½ W
LOCUS
PATES LINE S 58 E 263½ F
B
323½ F
78½ F
LIGHTWOOD STAUB
D
C
FORT WASHINGTON.
N. edge outer intrenchment as claimed by plaintiffs
S. edge outer intrenchment as claimed by plaintiffs

(5) to the plaintiff. The defendants' title commences with a proceeding by J. L. James, administrator of Harmon Eason, to sell land for assets to pay debts, and sale and deed thereunder to S. Fleming, dated in January, 1880, and deed from Fleming to the defendant Moore, dated in February, 1894. Both claiming from the common source, and the plaintiff's chain of title starting prior to that of the defendants, the plaintiff has the better title if the description in his deed is sufficient to locate the land intended to be conveyed.

The description contained in the deed is as follows: "Do grant, bargain, and sell unto the said Nelson Morris, of the county and State aforesaid, *one acre* of land lying and being in the State aforesaid, for and in consideration of the sum of $35 to us in hand paid by the aforesaid Nelson Morris for the said *acre* of land, lying near the town of Washington, and adjoining Fort Washington, commencing near a marl pit in the center of a ditch, known by the name of the Trotter ditch, thence running a southwest course on the outside entrenchment of Fort Washington to a lightwood stake in Isaiah Pate's line, thence along Isaiah Pate's line a southeast course to another lightwood stake, thence a northeast course to the said Trotter ditch to a lightwood stake in said ditch, thence up the center of the said ditch to the beginning, a lightwood stake."

This description, as we think, is susceptible of being located, but is not so, for the reason "lightwood" stakes are called for. The reason why a stake is not allowed to be regarded as a monument of title and boundary, in the calls of a deed for land, is its unfixedness—want of stability. *Reed v. Schenck,* 14 N. C., 65. And a lightwood stake would be as easily moved as any other.

But it commences at a point in the Trotter ditch near a marl
(6) pit, thence running a southwest course on the outside entrenchment of Fort Washington. The Trotter ditch is there, and the marl pit is also there. The outer entrenchment of Fort Washington is there. These are what may be regarded in law permanent monuments. And it would then seem that the beginning corner may be established with certainty by running a line along the outer entrenchment of Fort Washington to the Trotter ditch, reversing the first call in the deed, and the point where this line (running the reversed call) cuts the Trotter ditch is the beginning corner. The line from this point, running with the first call of the deed southwest along the outer entrenchment of Fort Washington until it cuts the Pate line, is the second corner; thence with Pate's line southeast, thence northeast to the Trotter ditch, and thence up the Trotter ditch to the beginning. It is seen that we have three of the boundary lines fixed by the calls of the deed, and permanent boundaries.

The fourth line is yet to be established; and it seems to us that this may be established with equal certainty. The land sold was *one acre.* This is expressly stated in the deed—that we, Eason and wife, "do bargain and sell . . . to the said Nelson Morris . . . *one acre* of land," and again, "paid by the said Nelson Morris the sum of $35 in consideration of the aforesaid *acre of land.*" Thus, having the beginning corner and the course and distance of the first line, and the courses of all the lines, and the amount of land sold, to wit, *one acre,* it seems to us that the fourth line, completing the boundary of the lot, can be established with mathematical certainty by running it so as to include one acre of land. And if this is so, the deed is susceptible of being located and fitted to the land intended to be sold, and the plaintiff has the title. 3 Washburn Real Property, 427.

It was alleged by the defendant that the plaintiff was estopped by matter *in pais* from setting up his title against the defendants (7) for the reason that one of the mesne grantors of the plaintiff had seen the defendant and Fleming surveying this land, and had not forbade them to do so, and had then not set up any claim of title. But the evidence of the defendants on this point was so far from amounting to an estoppel *in pais* that we do not feel called on to discuss it. Bigelow on Estoppel, 595; *West v. Tilghman,* 31 N. C., 163; *Mason v. Williams,* 66 N. C., 564; *Holmes v. Crowell,* 73 N. C., 613; *Estis v. Jackson,* 111 N. C., 141; *Rainey v. Hines,* 120 N. C., 376.

There is a vast amount of evidence sent up, to which there are numerous exceptions. This evidence was principally as to declarations and evidence tending to establish the "lightwood" stakes. We have examined this testimony and the exceptions, and it seems to us that some of the exceptions were technically well taken, but under the view we have taken of the case, the exceptions that might have been sustained, were to evidence that was immaterial and harmless. The judgment must therefore be

Affirmed.

Cited: Farris v. R. R., 151 N. C., 492.

(8)

JOHN L. HINTON v. D. T. PRITCHARD, EXECUTOR OF D. L. PRITCHARD, MARY E. HUGHES AND MARY E. HUGHES, JR.

(Decided 20 February, 1900.)

Note of Testator—Statute of Limitations—Partial Payments by Testator; by Executor—"Filed" and "Admitted," Under Section 164 of The Code—Judgment Against Executor.

1. A note, kept alive by partial payments up to death of testator, will be still further extended by partial payments made by his execution within time.
2. The term "filed," used in sec. 164, of the Code, signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim.
3. A partial payment by the personal representative, without objection, is an unequivocal act, from which an admission of the justice of the claim may be inferred.
4. A judgment against an executor, fairly obtained without fraud and collusion, is conclusive against the heir or devisee.

ACTION upon a promissory note under seal, tried before *Starbuck, J.*, at Fall Term, 1899, of CAMDEN.

His Honor ruled otherwise, and they excepted. There was ver-
(9) dict for the plaintiff, and judgment accordingly. Appeal by defendant Hughes.

E. F. Aydlett and G. W. Ward for appellants.
Pruden & Pruden and Shepherd & Shepherd for plaintiff.

FAIRCLOTH, C. J. D. L. Pritchard executed and delivered his note under seal to the plaintiff 23 June, 1882, and died testate in March, 1886 and the defendant D. T. Pritchard was qualified as his executor. The first payment on the note was endorsed 14 May, 1883. The executor made a payment on the note endorsed 25 May, 1886, and made several successive payments, the last being endorsed 25 June, 1892. Action was begun 26 August, 1898.

M. E. Hughes and M. E. Hughes, Jr., heirs at law of the testator, were allowed to become parties defendant, and file an answer setting up the statute of limitations. The executor filed no answer and the defendants introduced no evidence. The third issue: "Is plaintiff's claim barred by the statute of limitations?" The court then told the jury that if they believed all the evidence they should answer the third issue, "No." Defendant Hughes excepted to the charge and appealed.

The plaintiff retained possession of his note until it was
(10) merged in the judgment. These are the material facts.

The contention, which we think is not well founded, is that as the plaintiff did not file his note with the executor, under the Code, sec. 164, the payment by the executor did not intercept the statute, and that the action is barred, as more than ten years elapsed after payment by the testator before the action was commenced.

We must infer that the executor considered and treated the claim as just, by making several payments thereon, and by not denying its correctness. Was it "filed" within the intent of the Code, sec. 164? Notice to the executor for information is the prime purpose of the statute and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. In *Woodlief v. Bragg,* 108 N. C., 571, the creditor's claim was presented within one year and no objection was made, and the administrator filed a petition to sell land for assets to pay it. *Held,* that the running of the statute was saved. In *Stonestreet v. Frost,* 123 N. C., 640, the sheriff presented an execution, issued before the intestate's death, to the administrator and demanded payment, admitted to be correct: *Held,* to be a "filing" within said sec. 164.

The facts in the present case bring it within the principle of the above cases. It would be unreasonable to require the creditor to actually file or deposit his evidence with the personal representative, who might become an adversary party. The judgment against the personal representative is conclusive against the heir or devisee in the absence of fraud and collusion. *Speer v. James,* 94 N. C., 417.

Affirmed.

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(11)

GEORGE CREDLE, H. W. WAHAB AND MAKELY v. STEVEN B. AYERS.

(Decided 20 February, 1900.)

Ejectment—Vendor—Mortgagee—Remedies on Default of Payment—Measure of Damages—Mesne Profits—Surrender of Possession—Case Under Reference—Control by Judge.

1. In default of payment by mortgagor or vendee under contract of purchase, the remedy is by action for possession of the land, for sale and foreclosure, for judgment for the rent, or for all three remedies.

2. Where they are permitted to retain possession, before or after breach, they are entitled to the rents and profits, in the absence of an express stipulation to the contrary in the written contract; but the withholding of possession after suit brought becomes wrongful, and they become liable for mesne profits, like other defendants in ejectment.

3. Where the surrender of possession is made by defendant after suit brought, that does not release him from liability for rents and profits during the wrongful withholding, in the absence of a stipulation to that effect.

4. Ordinarily, under the present practice, damages are recoverable up to the trial; but where the relation of mortgagee and mortgagor exists between the plaintiffs' vendors, who join in the contract of conveyance to the defendant, and he surrenders possession after suit brought, to the mortgagee, who had foreclosed his mortgage against his coplaintiff, the mesne profits, as fruit fallen during the wrongful withholding, go to the mortgagor, and not to the mortgagee plaintiff.

5. In passing upon the rental value of land sued for, it is not competent to admit evidence as to the rental value of adjoining farms, as that would raise collateral issues.

6. The measure of damages is the actual rental value of the land, and not what the defendant actually gathered from the land.

7. The judge retains control of a case under reference, and may find facts for himself from the evidence reported, without a rereference. *Brackett v. Gilliam*, 125 N. C., 380.

(12) ACTION for the possession of a tract of 6,352 acres of land known as the Donnell Farm, heard before *Bowman, J.*, at Spring Term, 1899, of HYDE, upon the report of referee, and exceptions thereto filed by defendant.

His Honor, upon the hearing, confirmed the report, and rendered judgment accordingly. Defendant excepted and appealed to the Supreme Court.

Chas. F. Warren for Wahab and Credle.

(14) *Small & McLean, Shepherd & Shepherd and S. S. Mann for appellant.*

CLARK, J. The vendee having defaulted in payment of the first installment of the purchase-money, due November, 1894, the vendors (and their mortgagee Makely, who had joined in the contract of sale) brought an action of ejectment in December, 1894, at the end of thirty days thereafter under the terms of the contract. The plaintiffs could have brought their action either (1) for possession of the land, (2) for sale and foreclosure, or (3) *in personam* for judgment for the debt, or for all three. They elected to take the first and have sued for possession and damages for withholding. *Allen v. Taylor*, 96 N. C., 37; *Silvey v. Axley*, 118 N. C., 959.

The defendant contends that he is not liable for mesne profits and relies upon *Killebrew v. Hines*, 104 N. C., 182; *Carr v. Dail*, 114 N. C., 284, and *Hinton v. Walston*, 115 N. C., 7. Those cases hold that a vendee or mortgagor, before or after breach, who is permitted to re-

tain possession, is entitled to the rents and profits (unless there (15) is an express stipulation in the contract or mortgage to the contrary, as in *Egerton v. Crinkley,* 113 N. C., 444; *Jones v. Jones,* 117 N. C., 254); but here the withholding by the defendant, after action brought in December, 1894, was wrongful, and he became liable, like any other defendant in ejectment, for the mesne profits. For what other purpose than to secure such mesne profits is the defense bond required under the Code, sec. 237? Had the bond not been given, or not raised to $5,000, as required by the court (*Rollins v. Henry,* 77 N. C., 467), the plaintiffs would have had possession by default, Code, sec. 390, *Norton v. McLaurin,* 125 N. C., 185, and cases cited; or if the defendant had been allowed to defend without bond, by reason of poverty, a receiver would have been appointed to secure the rents and profits. *Horton v. White,* 84 N. C., 297. This case differs from *Leach v. Curtin,* 123 N. C., 25, in that possession is here sued for and demanded in the complaint.

The defendant surrendered possession to Makely in May, 1896. That did not release the defendant's liability for rents and profits for 1895, during the wrongful withholding, unless there had been a stipulation to that effect. Otherwise, any tenant in possession could wrongfully withhold possession of land after action brought, and enjoy the rents and profits till forced to trial, and then release himself and bond from liability for mesne profits by abandoning possession. In such case the plaintiffs take judgment for the mesne profits till they get possession and for the title, but not for the possession. *Woodley v. Hassell,* 94 N. C., 157; Clark's Code, (3 Ed.), sec. 384.

Under the former practice in actions of ejectment, damages were recoverable only up to the time action was begun, but under (16) the present system they are recoverable up to the trial. *Pearson v. Carr.,* 97 N. C., 194; *Arrington v. Arrington,* 114 N. C., at p. 120; 10 A. & E. Enc. (1 Ed.), 537; Sutherland Damages, sec. 848. Here, up to surrender of premises, and by agreement in the order of reference, these are restricted to the rents and profits for the year 1895.

The mortgagee, Makely, foreclosed and bought the premises in May, 1896. That could have no effect upon the liability of the defendant for mesne profits during his wrongful withholding. This being "fruit fallen" by the defendant's own authorities, *Killebrew v. Hines,* and others above cited, would go to the plaintiffs Credle and Wahab, and not to their coplaintiff and mortgagee, Makely. But the defendant is relieved from difficulty, as Makely is a coplaintiff assenting to the recovery of judgment by Credle and Wahab, and, besides, his express agreement releasing such mesne profits to them is in the record.

The referee finds as a fact that the defendant by his negligence and

want of good husbandry materially lessened the productiveness of the land and exposed the crop to the depredation of hogs and cattle. He correctly held as a matter of law that the measure of damages was the actual rental value of the land, and not what the defendant actually gathered from the land. The language of the defense bond required by the Code, sec. 237, is for payment of costs and damages for loss of rents and profits. The object is to put the plaintiffs, when wrongfully kept out of possession, *in statu quo* by giving as compensation the rental value that could have been had if the possession of the premises had not been withheld. 10 A. & E. Enc. (1 Ed.), 542 (c).

(17) The defendant further excepted because the referee failed to pass upon certain objections to evidence, and that the judge, instead of referring the case, found those facts himself. This was admissible. *Wallace v. Douglass,* 103 N. C., 19; *Brackett v. Gilliam,* 125 N. C., 380. And the defendant has had benefit of those exceptions in his exceptions to the rulings of the judge. Nor was there error in the referee rejecting evidence as to rental value of adjoining farms, as that would have raised collateral issues. *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361; *Hinton v. Pritchard,* 98 N. C., 355.

Affirmed.

Cited: *Woodlief v. Wester,* 136 N. C., 165.

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(18)

JOHN L. HINTON v. PENN MUTUAL LIFE INSURANCE CO.

(Decided 20 February, 1900.)

Life Insurance Policy—Extra-territorial Jurisdiction of Foreign Court —Invalid Process, Ineffectual Service, Void Judgment, No Estoppel.

1. The States of the Union being coequals in authority and power, no State, through its courts, can extend its coercive power, nor provide for personal service of process, nor affect by judicial determination property outside of its own territory; any such attempt to extend its jurisdiction beyond its own limits over persons or property in another State is without authority and void.

2. Personal service of process upon residents of one State, who put themselves within the jurisdiction of the foreign State, is valid; but process can not run from the tribunals of one State into another and summon parties, there domiciled, to leave its territory and respond to proceedings against them.

3. Service by publication is permissible, where the property of the nonresident is situated within its jurisdiction; and also to fix the status of a nonresident as to relations with a resident, as in divorce proceedings; but where the suit is merely *in personam* to determine the personal rights and obligations of the defendants, constructive service upon a nonresident is ineffectual for any purpose.

4. A judgment rendered against a nonresident defendant, upon ineffectual service of process, is void; and a recital therein that service had been duly made, and an adjudication that the defendant should be forever barred of any claims in respect to the subject matter of this suit, work no estoppel.

ACTION upon a policy of life insurance issued by defendant upon the life of W. M. Mitchell, and by him assigned to plaintiff. Upon the death of Mitchell, this suit was brought, and tried before *Timberlake, J.*, at July Special Term, 1898, of PASQUOTANK.

The last two issues were as follows:

6. Did B. L. Brothers, administrator of William M. Mitchell, recover judgment against defendant for the amount of said policy (19) in Virginia?

7. Is plaintiff estopped by said judgment?

On the last two issues the court instructed the jury, that if they believed all the evidence to answer "Yes." Plaintiff excepted.

The jury responded in the affirmative to these two issues, and the court rendered judgment in favor of defendant. Plaintiff appealed. The material evidence is stated in the opinion.

Shepherd & Shepherd and Pruden & Pruden for plaintiff.
E. F. Aydlett for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant company the amount mentioned in a policy of insurance issued by the company upon the life of W. M. Mitchell, and payable to his executors, administrators and assigns, and which policy had been assigned by Mitchell to the plaintiff. The defendant in its answer pleaded an estoppel of record in the nature of a judgment which was rendered in the Court of Law and Chancery of the city of (20) Norfolk, State of Virginia. In that suit the administrator of Mitchell brought an action against defendant company for the recovery of the amount mentioned in the policy, and an affidavit was filed therein by one of the officers of the company in which it was stated that the defendant "claimed no interest in the subject-matter of the said suit, but that a third party, John L. Hinton (the plaintiff in the present action), a citizen and resident of North Carolina, had a claim to the amount mentioned in the policy, his claim thereto being that he holds an assign-

ment for value of said policy made to him by the said William M. Mitchell in his lifetime, which alleged assignment has come to the notice of the defendant company;" that the original policy of insurance was in the possession of Hinton, and that he had brought an action against the defendant company in one of the Superior Courts of North Carolina, to recover the amount of the insurance, and that that action was then pending; and that there was no collusion between the company and Hinton, and that the company was ready to pay or dispose of "the subject-matter" of this action as the court might direct; and there was a prayer that Hinton might be required "to appear and state the nature of his claim, and maintain or relinquish it." The prayer was granted by the court, and an order made requiring Hinton "to appear on a day named therein, that he might state the nature of his claim, and maintain or relinquish the same." Upon a duly certified copy of the court's order, a return was made as follows: "I, John H. Duncan, do hereby solemnly swear, on 18 February, 1897, I delivered a true copy of the written order to John L. Hinton, at his residence in the county of Pasquotank, State of North Carolina; and that the John L. Hinton to whom
(21) I delivered said copy is not a resident of the State of Virginia, and is the same John L. Hinton who is mentioned in this order. I am not a party to, or otherwise interested in, the subject-matter in controversy.—J. H. Duncan."

The record shows, as well as the case on appeal, that Hinton did not appear under the notice issued by the court in Norfolk, and judgment was recovered by the plaintiff, administrator of Mitchell, against the defendant company for the amount mentioned in the policy, and it was also decreed that Hinton should "be forever barred of any claims in respect to the subject-matter of this suit against the defendant company."

On the trial of the present action in the Superior Court of Pasquotank County several issues were submitted to the jury, but only the sixth and seventh are material to be considered on this appeal. The sixth issue was, "Did B. L. Brothers, administrator of William M. Mitchell, recover judgment against defendant for the amount of said policy in Virginia?" and the seventh issue was, "Is plaintiff estopped by said judgment?" The court instructed the jury that if they believed all the evidence they should answer the sixth and seventh issues "Yes." The evidence material to be considered in its bearing on the sixth and seventh issues consisted of the record of the Virginia court, the parol testimony of Hinton to the effect that no process was ever served on him in Virginia; that he was never in that State while the suit was pending; that he did not know when the suit was brought, and that the only process of any kind ever served on him was the notice issued by the Law

and Chancery Court of Norfolk. A witness for the company, C. E. Johnson, testified that he saw Hinton, the plaintiff, in Norfolk several times while the suit was pending in that city, in the law (22) office of some of the attorneys in the case, talking to them about the case, and trying to get a settlement of it. That witness further said that he would not say Hinton was present at the trial, or in Norfolk when the case was being tried, as he did not know, but that Hinton knew of the pending of the action, and all about it.

We are of the opinion that the instruction of his Honor was erroneous. All of the evidence showed that the plaintiff, Hinton, did not appear in the action in the court at Norfolk. So there is but one point in the case, and that is as to the effect upon Hinton of the judgment in the Court of Law and Chancery of Norfolk, Va., which recited that John L. Hinton, the defendant in that action (the plaintiff in this) had been duly served with the order making him a party to the suit there. That was the only point argued here, and the contention of the defendant was that the judgment from the Virginia court, because it recited that service of the notice had been duly made on the defendant, Hinton, was an estoppel, complete, against the plaintiff in the present action. The main reliance of the defendant was upon the principle laid down in *Harrison v. Hargrove,* 120 N. C., 96. There is a clear distinction between the law laid down in *Harrison v. Hargrove, supra,* and that which is involved in this case. In *Harrison v. Hargrove* the summons was not found among the papers in the case, and there was no other evidence of the service of the summons or of the appearance of the defendants except that in the decree for a sale of the land. It was declared that personal service of the summons had been made, and this Court held that in such a case the recital of the service of process upon the defendants protected an outsider who purchased the land ordered to be sold in the decree, the purchaser being ignorant that personal service (23) had never been made on the defendants.

In the case before us the record shows that the recital made in the case in the Court of Law and Chancery in Norfolk was an erroneous recital in law, because there appeared in the record the return of the person who was deputized to serve the process upon defendant, Hinton, in that action, and that return shows upon its face that the attempted service was absolutely void.

The court in Virginia, in making the order for the service of the notice upon the defendant, Hinton, claimed the authority to make personal service upon the defendant in North Carolina, under sec. 2998 of the Code of Virginia. Such an order was invalid and void, and the service made under it was therefore void.

Each State in the Union is a coequal with the others in point of au-

thority and power, and it is elementary learning that one State, through its courts, cannot extend its coercive power nor provide for personal service of process nor affect by judicial determination property outside of its own territory. Any attempt by one State to give to its courts jurisdiction beyond its own limits over persons domiciled, or property situated, in another State, is a usurpation of authority and is void. This law would not apply of course in cases where the courts of one State had made personal service of process upon persons who lived in another State, but who had put themselves within the jurisdiction of that other State. And other methods of giving notice of court proceedings to nonresidents are permitted, as service by publication, where the property of the nonresident is brought under the control of the court by attachment or other equivalent act, the theory of the law being that the owner is always in possession of his property, and that its seizure will inform him of the seizure, and that he will look out for his interest. And
(24) also other methods of service of process will be allowed in cases where property is sought to be partitioned between residents and nonresidents; in cases to enforce a contract between such persons concerning property within the jurisdiction; in cases of condemnation of a nonresident's property for public purposes, and also to fix the status of a nonresident as to his relations with a resident within the jurisdiction—as in divorce proceedings. But, as was said in *Pennoyer v. Neff,* 95 U. S., 727, "Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one State can not run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligation upon the nonresident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability." To the same effect is the opinion in *Grover v. Radcliff,* 137 U. S., 287. The attempt, therefore, which was made to make the service upon the defendant, Hinton, through the process from the Court of Law and Chancery in Norfolk being void, it follows that the judgment, based upon that attempted service which "forever barred any claims of Hinton in respect to the subject-matter of this suit against the said defendant, The Penn Mutual Life Insurance Company of Pennsylvania," is also void.

The defendant's counsel here admitted that ordinarily the judgment of another State, when used in this State as a basis of an action
(25) or as a defense to one, woul dbe open to proof in respect to juris-

diction of the court which rendered it, but he argued that the judgment of a court of another State under Article IV, sec. 1, of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and the acts of Congress passed in pursuance thereof, cure the defect in the service of the Virginia process, because the judgment recites that service of the notice was duly made, and because this Court had decided to that effect in the case of *Hargrove v. Harrison,* 120 N. C., 96, and that this Court is bound to give the same faith and credit to the Virginia judgment as was given to the judgment in *Hargrove v. Harrison, supra.* But the two cases stand on an entirely different footing. One difference, as we have already pointed out, is that the return upon the process served upon Hinton, the defendant in the case in the Court of Law and Chancery in Virginia, shows that it was served personally, in North Carolina, upon Hinton. That attempted service was void upon its face, and the court in Virginia made an error in law in declaring in its judgment that its notice was duly served.

In the next place the defendants in *Hargrove v. Harrison, supra,* were residents of North Carolina, and within the jurisdiction of the Superior Court which rendered the judgment, and the fact that the defendants were subject to the jurisdiction of the court was the foundation of the judgment, no summons appearing in the record. If they had been nonresidents, service by publication not having been made, the lack of jurisdiction could have been shown, by all the authorities. There must be a

New trial.

Cited: Warlick v. Reynolds, 151 N. C., 611, 613.

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(26)

L. P. HORNTHALL ET AL. V. COMMISSIONERS OF WASHINGTON COUNTY.

(Decided 27 February, 1900.)

Public Roads—Worked by Taxation—Special Act—Limited Assessment—Lowest Bidder.

1. Where, by a special act for Washington County, Laws 1897, ch. 242 (since repealed), the mode of working the public roads by taxation was adopted, the annual assessment limited to a tax of 30 cents on the poll and 10

cents on the $100 worth of assessed property, and the contract to be let to the lowest bidder; the specified rate may not be exceeded, nor may any part of the general funds of the county be applied in payment of contractor.

2. Where the work was done, but the amount bid was in excess of the fund raised under the permitted rate, an action can not be maintained for the deficiency.

FAIRCLOTH, C. J., and FURCHES, J., dissent.

ACTION upon a county road order payable to Frank Gray for $267.50 on account of fourth quarter's pay keeping in repair the public roads in Plymouth township, and by him assigned to plaintiff L. P. Hornthall, tried before *Starbuck, J.*, at Fall Term, 1899, of WASHINGTON.

The defense set up in the answer was, that under the County Road Law, 1897, ch. 242, the repairs of the public roads were let out to lowest bidder, but that the annual assessment for payment of contractor was limited to a tax of 30 cents on the poll and 10 cents on the $100 worth of assessed property; that the amount bid was in excess of the tax levied, collected and expended in payment of road orders, and that there was nothing left to pay on the order in suit; also, that the said order was illegal and not a valid debt against the county, because issued after the tax levy had been exhausted.

The plaintiff demurred to the answer. His Honor sustained
(27) the demurrer, and gave judgment in favor of plaintiff upon his claim. The defendant excepted and appealed.

A. O. Gaylord for defendants.
H. S. Ward for plaintiffs.

MONTGOMERY, J. This is an action brought by the plaintiff, who is the assignee of Frank Gray, against the present board of commissioners of Washington County, for the recovery of an amount alleged to be due upon a county order made payable to Gray, and issued by a former board of commissioners of that county. There was a judgment below in favor of the plaintiff, from which the defendants appealed.

The General Assembly at its session of 1897 altered the then existing law upon the manner of working the public roads (which was by the impressment of a certain class of its male able-bodied citizens as were either unable or unwilling to pay the pecuniary equivalent of such labor), so far as the county of Washington was concerned. The act established the plan of taxation for the old system, a step wisely progressive, and juster, by far; and provided for the annual assessment and collection of a tax of an amount equal to 30 cents on the poll, and 10 cents on each $100 worth of the assessed property of the county, the

amount to be used in payment for the work to be done each year on the public roads of the county. The roads were to be let out to be worked, to the lowest bidder.

The plaintiff and his assignor, Gray, one of the contractors, knew at the time the roads were let to the lowest bidder that the sum of the bids exceeded, by double, the amount provided for in the act. (28)

The entire amount raised by the act has been disbursed properly.

We are of the opinion that the action can not be maintained. It is true, as appears in the admissions in the pleadings, that the work was done by the contractors, and that the county has gotten the benefit of their work, and it would seem that they ought to be compensated for the same. But as the amount provided for under the act was a specific fund, it is beyond the power of the defendants to use any part of the general funds of the county or to levy any tax in excess of that which was provided by the act for the payment of the order sued upon.

The commissioners, of their own motion, under the old system of working the roads, had no power to levy a tax for any amount whatever to be used for the purpose of having the public roads worked, and the act of 1897 authorized only a specific rate of taxation and amount for that purpose.

There was error in the court below in the rendering of the judgment, and the same must be reversed and set aside.

Error.

FURCHES, J., dissenting: The Legislature of 1897, ch. 242, changed the method of working the public roads of Washington County, and provided that, after July of that year, they should be worked by contract. By sec. 3 of that act it is provided, "That on the first Monday in July of every year the county commissioners of Washington County shall let to the lowest bidder all the different public roads in said county, to be put and kept in good order by the contractor or contractors for the term of twelve months"; and that the lowest bidder or contractor shall enter into bond, the amount of which shall be fixed by said commissioners, for the faithful performance of his or (29) their contract. It is further provided that if the said contractor fails to keep his road in good condition the commissioners may retain any money due such contractor, and may sue him on his bond.

It is admitted that the roads were let to the lowest bidder on 1 July, 1897; that the assignor of the order sued on (for $267.50) was the lowest bidder and contractor for a part of said roads, and that he complied with his contract by giving the bond and keeping up the roads.

But it is provided in said act that the commissioners of the county shall levy a special tax of 30 cents on the poll, and 10 cents on the $100

taxable property; that the money collected from this levy shall be kept separate from the money collected on the general levy, and shall only be used for the purpose of working the roads of the county; and that said contractor shall be paid quarterly for said work. It turned out that all of said contracts, taken together, amounted to something over $2,700, and that the money levied and collected under this special act amounted to something over $1,700, and that the Legislature of 1899 repealed the act providing for working the roads of the said county by contract (ch. 242, Laws 1897); that all the money collected by this special act has been paid out, and payment of the order sued on was refused for the reason that there was no money in the treasury to pay the same, and, also, for the reason, as alleged by the defendant, that the same is illegal and void, because the whole amount for which all the roads in the county were bid off exceeded the amount that was raised, or could be raised under the levy under the special tax provision of said act.

This last contention of the defendant is adopted by a majority (30) of the court, and it is to this view of the case I dissent.

It seems to me that the court has not distinguished between the power to contract and the ability to pay.

A contract is an agreement of two or more parties, for a valuable consideration, to do, or not to do, the thing agreed upon. There must be a contractor, a contractee, and the thing contracted for, or to be done. In this case there is a contractor, a contractee, and the thing to be done, and the consideration—the work to be done, and the price to be paid for the work. If this contract had been between individuals—natural persons—I suppose no lawyer would contend that it was not binding on the parties. And I understand that the same rule obtains, and the same binding obligation exists, between a corporation, or the county of Washington and the plaintiff, that obtains between individuals, if the commissioners had the power to make the contract. It seems to me that it must be admitted they had this power, as the act expressly authorized and required them to let the roads and to make the contract. The only ground that can be urged, as it seems to me, against this power in the commissioners, is that the act provided for the levy of this special tax without its being submitted to a vote of the people. But this was not necessary even to make this tax levy valid, if it was for a necessary county expense. *McCless v. Meekings,* 117 N. C., 28; *Vaughan v. Commissioners, ibid.,* 429. The making, repairing and keeping the public roads of a county in good condition is a necessary county expense. *Broadnax v. Groom,* 64 N. C., 244; *Satterthwaite v. Commissioners,* 76 N. C., 154, citing *Broadnax v. Groom,* with approval; *Vaughan v. Commissioners, supra.*

It was admitted that public bridges were necessary county charges,

and this is only so when they are a part of the public roads, and (31) only so because they are a part of the public roads. *Greenleaf v. Commissioners,* 122 N. C., 30.

It would seem that this was sufficient to establish the validity of the contract, and, if so, to establish the validity of the order sued on. But defendant says not so, because the special tax collected for road purposes was not sufficient to pay the order. Can this be so? Can it be that because a debtor has no means, out of which he can pay his debts, this vitiates and makes void the obligation to pay? Suppose the commissioners of Washington County had contracted with the plaintiff to build a public bridge on one of the highways of the county, and the plaintiff had built the bridge according to contract, but when he got it done, and the defendant accepted the bridge, the defendant had no money to pay for it; will it be contended that this vitiates the contract, and invalidates and renders the plaintiff's claim for building the bridge, void? Suppose the Legislature had changed the mode of working the public roads of Washington County (as it did), and provided and required the commissioners to let them out to the lowest bidder (as it did), without providing for the levy and collection of any extra or special tax; will it be contended that this rendered the contract void? And if it would not, as I think it would not, how can it be contended that, because the act provided for the levy of the special tax to pay or to aid in paying the contractors for working the roads, this would vitiate and make void such contracts?

But defendants say that plaintiff knew that this special tax would not raise money enough. This may be so, and it may not be so. It may be that this was the first contract let, and, if so, he could not tell what the others would be taken at. But suppose he did know it, would that vitiate the contract? Even if this tax were unconstitutional, that would not make the contract to work the road void. Take (32) the case of building the bridge that I have supposed, and suppose that, when he took the contract to build the bridge he knew the county had no money on hand, and that a levy within the constitutional limitation would not raise money enough to defray the ordinary expenses of the county and pay for building the bridge; is it contended that this vitiated and annulled the contract and destroyed the plaintiff's claim for building the bridge? He might have well thought the taxable property of the county would increase, or that the Legislature would pass a special enabling act, and that he would be paid.

As the plaintiff has withdrawn his application for a mandamus, the question of payment is not before us. But as that question was discussed, I will say that this Court has said that where there is the power to contract a debt, that this power carried with it the power and duty

to pay. *City of Charlotte v. Shepard,* 122 N. C., 602. But of course this right can not be enforced when it conflicts with the constitutional limitation of taxation, without legislative aid, and, while the plaintiff has a legal claim against the defendant, for this reason he may not be able to enforce it.

It has been contended that the cases of *Barksdale v. Commissioners,* 93 N. C., 472; *Board of Education v. Commissioners,* 111 N. C., 481, and the same case in 113 N. C., 379, are in point, and sustain the opinion of the court. But upon examination it will be found that they are not in point, and do not bear upon this case. They are all proceedings to compel the levy and collection of unconstitutional taxes, and nothing more. In my opinion the judgment should be

Affirmed.

FAIRCLOTH, C. J., also dissents.

Cited: Bunch v. Commrs., 159 N. C., 339.

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(33)

RICHMOND CEDAR WORKS v. V. S. KILBY.

(Decided 27 February, 1900.)

Grant—Mesne Conveyances—Color of Title—Possession Defective Title—Nonsuit.

Where the plaintiff claimed under a grant referred to in the complaint and with which his deed corresponded, but his chain of paper title was so indeterminate and inconsistent as to fail to connect his deed with the grant, his deed becomes mere color of title, and to be effective must be accompanied by possession for the definite required time; otherwise, the action fails.

ACTION in the nature of trespass on real estate, tried before *Starbuck, J.,* at Fall Term, 1899, of PERQUIMANS, upon the following issues:

1. Is plaintiff owner of the lands described in the complaint?
2. Did defendant wrongfully and unlawfully trespass upon the same?
3. What damage has plaintiff sustained?

The plaintiff claimed under the Elias Stallings patent of 640 acres referred to in the complaint, and claimed the whole of it except 100 acres, in the southeast corner, owned by the Only heirs. Owing to discrepancies in the links, adverted to in the opinion, the plaintiff virtually abandoned his chain of title, and relied upon the last two deeds, which covered the land, and upon possession under them. The possession was indefinite as to duration of the Stallings patent.

His Honor ruled that the evidence was insufficient to be submitted to the jury to warrant an affirmative finding upon the issue. The plaintiff excepted, submitted to a judgment of nonsuit, and appealed.

E. F. Aydlett, Pruden & Pruden, Shepherd & Shepherd for ap- (34) *pellant.*

L. L. Smith for appellee.

MONTGOMERY, J. This action was brought for the recovery of damages growing out of the alleged cutting and removing of valuable timber from the tract of land described in the complaint, and of which the plaintiff alleges it is the owner and in the possession. The boundaries of the land are set out in the complaint, and it is further described as "the whole of the Elias Stallings patent of 640 acres, except 100 acres, owned by the heirs of Joel Only, in the southeast corner of the Stallings patent." It is admitted that the land described in the complaint is embraced in the Stallings patent, and that the cutting of the timber had been done by the defendant on that tract of land. After the evidence on both sides had been completed, the court granted the defendant's motion, made in renewal of one which was lodged when the plaintiff had concluded its evidence, to dismiss the complaint, for the reason assigned that the evidence was insufficient to be submitted to the jury to warrant an affirmative finding on the first issue—"Is the plaintiff the owner of the land described in this complaint?" The plaintiff submitted to a judgment of nonsuit, and appealed.

On the trial the plaintiff introduced the Stallings grant, and, afterwards, numerous successive conveyances, down to the plaintiff, in some of which the plaintiff contended that an undivided interest in common with others, whose names were not mentioned, was conveyed, and in the last two deeds that the whole of the Stallings patent had been conveyed. If it be admitted, for the argument's sake, that part of the Stallings patent had been conveyed in the chain of title down to the deed from Jesse Stallings, son of Elias, to Joseph T. Allyn, executed (35) and registered in June, 1833, yet that deed seems to end the claim of the plaintiff that it is entitled to an undivided interest in common with others in the Stallings patent. In that deed, the land conveyed by Jesse Stallings to Allyn is described as allotted shares in the partition of the Stallings patent, and is as follows: "All my right, title, claim and interest in, and to, three certain pieces or parcels of land situated and being on the northeast side of Perquimans River, in the county and State aforesaid, and being lots No. 5, 9 and 10, agreeable to a division of Elias Stallings patent of 640 acres, made by Levi Munden, Thomas Twine, Benjamin White, and Jacob Riddick, the 22d day of November,

1792." The plaintiff claims under the last-mentioned deed, and that deed shows that partition had been made at the time of its execution, and, inferentially, amongst the ten persons named in the residuary clause of the will of Elias Stallings.

The partition of the Stallings patent, as is shown by the deed from Jesse to Allyn, took place in 1792, while every conveyance, whether by will or deed, of any part of the Stallings patent (if such conveyances really embraced any part of the land) bears date subsequent to the partition of the Stallings patent. In the habendum clause of the deed from Jesse to Allyn, the words were added, "Together with all my right, title, claim and interest in and to any other part or portion of said Elias Stallings patent of 640 acres that may be mine by heirship or otherwise;" but these words, if they could have any force in the habendum clause, are without meaning in this case, for the reasons above set forth. These words in the habendum clause furnished the plaintiff's counsel their strongest contention here. They put no reliance upon that part of the deed which described the land conveyed, as lots Nos. 5, 9 and 10, in the division of the Elias Stallings patent, for on the trial they made no attempt to locate these lots. But the plaintiff, to show that it was the owner of the whole Stallings patent, introduced a deed from Geo. T. Wallace and John S. Wallace to the Richmond Cedar Works (Limited), dated the 3d day of April, 1885, and registered a few days afterwards. In that deed, the grantors, leaving out all former descriptions of the land as set out in the conveyances from Elias Stallings's will down the chain of title first relied on by the plaintiffs to the deed from Brittingham to Wallace, undertook to convey what they called the Stallings patent, and described it as "the Stallings patent *bought of Dr. Perry,* containing about 600 acres." No other description is given. In the deed from the Richmond Works (Limited), to the plaintiff, the land attempted to be conveyed was described as "the Elias Stallings patent for 600 acres *bought of Dr. Perry*" by George T. Wallace, by deed of 21 April, 1870. The claim of the plaintiff under the last two deeds is a clear abandonment of the one for an undivided interest in common with others; for it does not rest upon the deeds introduced by the plaintiff made prior to the one from Wallace to the Richmond Cedar Works, but has its support from an alleged purchase and deed from Dr. Perry. The plaintiffs do not, under that claim, connect themselves with the Stallings grant, for there was no attempt to trace the title back from the Wallace deed of 1885 by the introduction as evidence of any deeds for that purpose. If the description in the last two deeds was sufficient to identify any land whatever, it was only color of title for the reason mentioned above; and there was no evidence introduced by the plaintiff tending to show any definite time during

(36)

which they had been in possession of the Stallings patent. The (37) only witness that testified as to the possession of the plaintiff was Richard Only, who said that no one had been in possession of it (the Elias Stallings grant) since he could recollect, other than George T. and John G. Wallace. That was the whole of his testimony.

We think there was no error in the ruling of his Honor in dismissing the complaint.

No error.

(38)

ED. SHANNON, E. N. SHANNON, MRS. A. B. TENNIS AND W. O. SHANNON v. E. F. LAMB AND GEORGE R. BRIGHT.

(Decided 27 February, 1900.)

Partition Proceeding—Tenants in Common—Equitable Title—Ouster—Adverse Possession—Conveyance of Whole Estate—Statute of Limitations.

1. Where property is conveyed to a trustee to hold in trust for the sole and separate use and benefit of a married woman, her heirs and assigns, to be conveyed at any time, in such way and in such parcels or pieces as she may in writing request the trustee to do; and upon her failure in her lifetime to direct a conveyance of said property, then at her death, the said trustee shall convey the same to her children, or their representatives, share and share alike—she has no power of disposition over it, except such as is clearly given in the instrument creating the trust, and in the manner therein prescribed.
2. In such case, if she and her husband, without the knowledge or consent of the trustee and outside of the powers conferred, join in a mortgage conveying her estate, such deed is invalid; and other deeds following and based upon it convey no title.
3. One tenant in common can not make his possession adverse without an ouster, and it will take twenty years sole possession to ripen his title; should he claim under a deed purporting to convey the whole estate, in entirety, a possession under it will not defeat the rightful title of the true owner, under twenty years.
4. Since the Code, a party may recover possession upon an equitable title.

PETITION for partition, heard upon agreed facts by *Starbuck, J.*, at December Term, 1899, of PASQUOTANK.

The petitioners claimed a half interest in the real estate described, alleging that the defendant owned the other half interest.

The defendants claimed sole seizin. (39)

Upon the facts agreed, his Honor adjudged that the plaintiffs were not tenants in common with the defendants, and that the defendants were sole seized. The plaintiffs excepted and appealed.

The facts agreed are stated in the opinion.

P. H. Williams and E. F. Aydlett for appellants.
R. O. Burton for appellees.

FURCHES, J. This is an action for partition of land in which the plaintiffs allege that they are tenants in common with the defendants; that they are the owners of one undivided half interest in the land described, and that the defendant is the owner of the other undivided half. The defendant denies that the plaintiffs are the owners of any part thereof, and pleads sole seizin.

Upon this state of the pleadings, the case was submitted for the judgment of the court, upon the following facts agreed on by the parties:

1. It is admitted that William T. Muse owned the lands described in the petition on 5 June, 1815, and the title is out of the State, and both parties claim under William T. Muse.

2. That William T. Muse, on 6 June, 1815, conveyed the said lands to James H. Shannon and John L. Shannon equally as tenants in common.

3. That John L. Shannon conveyed his one undivided one-half of said lands on 11 August, 1834, to William Shannon.

4. That J. M. Whedbee recovered judgment against William Shannon for $4,892.40, and execution was issued on 14 February, 1867,
(40) and the said one undivided one-half interest of the said William Shannon in said lot was sold under said execution by L. C. Dashields, sheriff of Pasquotank County, and purchased by Elizabeth Nash.

5. That the deed of L. C. Dashields, sheriff of Pasquotank County, under said execution to Elizabeth Nash, conveyed William Shannon's one undivided one-half interest in the said lot 1 March, 1867.

6. That the said Elizabeth Nash conveyed the said undivided one-half interest in the said lot to William F. Martin on 1 March, 1867, in trust for the purposes set out therein. A copy of said deed is marked Exhibit "A," and made a part hereof. Said trust deed was registered 27 March, 1867.

7. That on 10 June, 1885, Margaret Shannon and husband, William Shannon, executed to E. F. Lamb a deed of trust, marked Exhibit "B," and made a part of the facts, purporting to convey the said one undivided one-half of said lot to secure one A. S. Conklin.

8. That on 30 March, 1887, E. F. Lamb, trustee, sold under said deed of trust, the said undivided one-half interest to G. W. Cobb, deed marked Exhibit "C," and made a part hereof.

9. That James H. Shannon conveyed his one undivided one-half interest in said lot to G. W. Cobb on 7 June, 1887, deed marked Exhibit "D," and made a part hereof.

10. That G. W. Cobb and wife, on 27 June, 1887, executed a deed to A. S. Conklin, attempting to convey the entire lot, copy of his deed marked Exhibit "E," and made a part hereof; and the said Conklin went into immediate possession of the property.

11. That A. S. Conklin, by deed dated 19 July, 1887, attempted to convey the entire property to E. F. Lamb, who took possession thereof under his deed, a copy of which is marked Exhibit "F," (41) and made a part of this statement, and he has remained in actual possession ever since.

12. That William F. Martin died on the —— day of January, 1880, leaving as his heirs, William Martin, who is now 46 years of age; John Martin, who is now 44 years of age; R. B. Martin, who is now 42 years of age; Bessie M. Martin, who married John G. Wood on the —— day of ——, 1880, and who is now 40 years of age, and is still the wife of John G. Wood; C. F. Martin, who is now 33 years of age; E. F. Martin, who is now 27 years of age; Helen Martin, who is now 23 years of age, and Pattie Martin, who married Ed. Wood about 1876, and died in 1881, leaving surviving her her husband and three children, Bessie Wood, who is now 24 years of age; Kate Wood, who married one Folk, and is now 22 years of age, and Ed. Wood, who is now 20 years of age.

13. That William Shannon died in February, 1887, leaving surviving him his wife, Margaret, and their children, William O. Shannon, Ed. Shannon, Enoch N. Shannon and Jennie Shannon.

14. That Margaret Shannon died on 23 October, 1895, not having remarried, and leaving surviving her her children and only heirs, William O. Shannon, Ed. Shannon, Enoch M. Shannon and Jennie, who had married A. B. Tennis before the death of the said Margaret Shannon.

15. That at the time of the death of Margaret Shannon the plaintiffs were all of full age and under no restraint, except Jennie, who is 40 years of age, but was, and is now, the wife of A. B. Tennis. It is admitted by the defendants that the debt secured in the trust marked EXA is paid.

16. That this action was commenced 31 July, 1899.

17. That the plaintiffs are the children and only heirs of Mar- (42) garet Shannon.

Upon the pleadings and the facts agreed, the court below was of the opinion that the defendant was sole seized, and gave judgment accordingly. The plaintiffs excepted and appealed.

The case was ably argued, orally and by briefs which presented many interesting questions. But after a careful examination and a full consideration of the briefs and arguments of counsel, we are of the opinion that the controversy turns upon two points. And this makes it unnecessary for us to discuss the other questions presented.

The first of these questions is, whether any estate passed to E. F. Lamb, trustee, by the trust deed of 10 June, 1885; and the second question is, whether the plaintiffs are barred by lapse of time and the statute of limitations or presumptions.

Margaret Shannon, the mother of plaintiffs, had no interest in the land in controversy, except by and under the deed of trust and settlement made by Elizabeth Nash to W. F. Martin, dated 1 March, 1867. The maker of this deed had two objects in view, and the deed to Martin was made for the purpose of accomplishing both of these objects.

The first was to secure Whedbee, a creditor of Mrs. Nash, to whom she was indebted in the sum of $2,000. The next was for the benefit of Mrs. Shannon, a daughter of Mrs. Nash, and Mrs. Shannon's children. It is admitted that the debt due Whedbee, secured in said deed, has been paid.

The deed of trust to Lamb, of 10 June, 1885, by Margaret and her husband, William, was made during the lifetime of the trustee, Martin, and also during the lifetime of the husband, William, who joined in its execution. But the trustee, Martin, was not consulted,
(43) knew nothing about its execution, and was in no way a party to it. The legal estate was in the trustee, Martin, at the date of the trust deed to Lamb, and Margaret and her husband, William, were both living at that time. The deed of trust made by Elizabeth Nash to the trustee, Martin, after providing for the payment of Whedbee's debt, provides as follows: "And the residue, if any, he shall hold, upon the trusts and for the purposes hereinafter set forth; upon the payment of the said note or bond herein described, either by said Elizabeth or by a sale as herein provided, all the property and estate, real and personal, remaining the said Martin shall hold in trust for the sole and separate use and benefit of Margaret Shannon, wife of William Shannon, and daughter of said Elizabeth Nash, her heirs and assigns, to be conveyed at any time in such way and in such parcels or pieces as the said Margaret may in writing request the said Martin to do; and upon failure of said Margaret in her lifetime to direct a conveyance of said property, then, at her death, the said Martin shall convey the same to her children or their representatives (should any be dead) share and share alike to each child or the representative of such child as may be dead, one share."

It is manifest from the terms of this deed of trust and settlement, that the said Margaret and her husband on 10 June, 1885, had no power or authority to make the deed of trust to Lamb. This it seems to us is too well settled by a long and unbroken line of decisions in this Court to be disputed. It is held in *Monroe v. Trenholm,* 112 N. C., 634, that, "Where property has been placed in the hands of a trustee for the sole

and separate use of a married woman, she has no power of disposition over it, except such as is clearly given in the instrument creating the trust and in the manner therein prescribed." This decision was affirmed in 114 N. C., 590, upon an application to rehear. (44) The same doctrine is held in *Broughton v. Lane,* 113 N. C., 16, where the conditions in the deed of settlement are almost in the exact words contained in this deed of settlement. And the same doctrine is held in *Kirby v. Boyette,* 116 N. C., 244, where these cases are reviewed and discussed. All these cases seem to be based upon *Hardy v. Holly,* 84 N. C., 661, where it is said "that where a *feme sole* makes a deed of marriage settlement of her separate estate, whether real or personal, to a trustee for her sole and separate use, her power of disposition over the same, during coverture, is limited to the mode and manner prescribed by that instrument. And if she and her husband join in a mortgage conveying her estate without the knowledge or consent of the trustee and outside of the power conferred, such deed is invalid."

The learned counsel who argued the case for the defendant distinctly stated that he did not intend to attack the doctrine of *Hardy v. Holly,* so firmly established by many decisions of this Court, but that he hoped to be able to distinguish this case from the doctrine established by that line of authorities. This statement was fair to the Court, and lawyer-like, as we have always found him to be. But we are unable to make the distinction that was attempted to be drawn by counsel, and we are of the opinion that the case under consideration falls directly within the doctrine held in *Hardy v. Holly,* and this line of decisions, and that the mortgage of William Shannon and his wife, Margaret, to Lamb passed no estate whatever.

This brings us to the consideration of the second question—the statute of limitations and presumptions. It is admitted in the agreed state of facts that W. T. Muse once owned the land in controversy, and that he conveyed the same to J. H. Shannon and John (45) L. Shannon, as tenants in common, in 1815; that the said J. H. Shannon continued to own his undivided one-half of said land until 7 June, 1887, when he sold and conveyed the same to G. W. Cobb; that John L. Shannon conveyed his undivided one-half interest in said land to William Shannon on 11 August, 1834; that in 1867, the sheriff of Pasquotank County sold William Shannon's undivided one-half interest in said land, under executions in his hands, as the land of William Shannon; and that Elizabeth Nash became the purchaser, who conveyed to Martin in trust, as hereinbefore stated; that Lamb, in March, 1887, sold under the deed of trust made to him, on 10 June, 1885, by Margaret and William Shannon, in which they attempted to convey one undivided half interest in the land, and G. W. Cobb became the purchaser

at that sale. And said Cobb, having purchased the undivided one-half interest of J. H. Shannon, on 27 June, 1887, sold and undertook to convey the whole tract to A. S. Conklin, and on 19 July, 1887, the said Conklin sold and undertook to convey the whole tract to the defendant Lamb; that said Cobb, upon the purchase of J. H. Shannon's interest in June, 1887, took possession of said land, and that he and Conklin and the defendant Lamb have been in the sole possession of the same ever since that time.

So it appears that all parties claim under Muse. And there is no pretense but what those claiming under John L. Shannon were tenants in common with J. H. Shannon until he sold to Cobb in June, 1887. Therefore there could be no statute of limitations or presumptions in operation before June, 1887, and this action was commenced in July, 1899.

The deed of trust made by Margaret Shannon and her hus-
(46) band to Lamb being void, it follows that the other deeds following and based upon this trust deed conveyed no title. And if they should be held to be color of title, there is but twelve years possession to ripen the same into a title, which is not sufficient to divest the title of a tenant in common, which takes at least twenty years. This seems to be well settled law in this State. *Caldwell v. Neely,* 81 N. C., 114; *Ward v. Farmer,* 92 N. C., 93. This is the general doctrine which seems to be too well settled to need citation of authority. And we did not understand the defendant to controvert this being the general rule, but he undertook to take his case out of the general rule, upon the ground that the defendant held under Cobb, through Conklin, by deeds purporting to convey the entire tract. But it is equally well settled that this fact will not benefit him. While Cobb claimed to own the whole tract, and attempted to convey the same, he acquired the moieties separately. And it is held in *Jeter v. Davis,* 109 N. C., 458, that this will not work an ouster so as to defeat the title of the other tenants, under twenty years.

In *Page v. Branch,* 97 N. C., 97, it is held that one tenant in common can not make his possession adverse without an ouster; that he is presumed to hold for his cotenant, and it will take twenty years to ripen the title, and that he is presumed to hold under his true title. Though a tenant in common may claim under a deed purporting to convey the whole estate, in entirety, a possession under it will not defeat the rightful title of the true owner, under twenty years. This is held in *Covington v. Stewart,* 77 N. C., 148; *Ward v. Farmer, supra; Hicks v. Bullock,* 96 N. C., 164; *Breeden v. McLaurin,* 98 N. C., 307; *Hampton v. Wheeler,* 99 N. C., 222; *Rascoe v. Lumber Co.,* 124 N. C., 42, and
(47) many other cases that might be cited. We therefore hold that the plaintiffs are not barred by the lapse of time and the statute of limitations and presumptions.

Taking the view of the case that we do, it is not necessary to consider the question of limitations as to the heirs of the trustee, Martin. Nor is it necessary to consider the question as to whether Margaret had a legal or equitable estate, nor whether this was held in fee simple or for life only, as it is manifest that she had no right to make a conveyance *during the life of her husband,* and it is not claimed that she ever undertook to convey after his death. Nor is it necessary to decide this question for the purpose of determining whether the plaintiffs now have both the legal and equitable estate in the land, or the equitable title, as it is held in numerous cases that, since the Code, a party may recover possession upon an equitable title. And the defendant having pleaded sole seizin, this is now substantially an action of ejectment, and subject to the same rules of practice and evidence of title as if it had been commenced for the possession. *Alexander v Gibbon,* 118 N. C., 796. There is error, and the judgment is

Reversed.

Cited: Boone v. Peebles, post, 826; *Hallyburton v. Slagle,* 130 N. C., 486; *Bullock v. Bullock,* 131 N. C., 30; *Dunlap v. Hill,* 145 N. C., 314; *Mining Co. v. Lumber Co.,* 170 N. C., 277; *Roberts v. Dale,* 171 N. C., 467.

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(48)

SARAH JENNINGS v. JOHN L. HINTON ET AL.

(Decided 27 February, 1900.)

Life Insurance Policy—Assignment by Wife—Witnessed by Husband—Constitution, Article X, Section 6.

The signature of the husband, as witness, to a written assignment by the wife, of her interest in an insurance policy on his life, taken out by him for her benefit, is equivalent to an assignment by the wife, "with the written assent of her husband," as provided by Art. X, sec. 6, of the Constitution.

ACTION upon a life insurance policy by The American Legion of Honor to B. F. Jennings upon his life for the benefit of his wife, Sarah E. Jennings, plaintiff. She had transferred the policy by a written assignment endorsed thereon, signed by her, and witnessed by her husband, to the defendant John L. Hinton.

Upon the death of B. F. Jennings, his wife instituted this suit. The insurance company paid the money ($5,000) into court—and the question presented to *Starbuck, J.,* at December Special Term, 1899, of

PASQUOTANK, was who was entitled to the money. The plaintiff claimed that she was entitled on the ground that her assignment of the policy was made without the written consent of her husband.

The defendant claimed that he was entitled, for the reason that the signature of the husband, as witness, to her assignment amounted to his written assent.

His Honor instructed the jury that the subscribing by the husband as a witness was not a consent in writing, as the law required.

The defendant excepted. Verdict for the plaintiff. Judgment accordingly. Appeal by defendant.

Pruden & Pruden and Shepherd & Shepherd for defendant.
(49) *E. F. Aydlett for plaintiff.*

FURCHES, J. The plaintiff, Sarah E. Jennings, on 23 June, 1884, was the wife of B. F. Jennings, and continued to be such until the time of his death on 11 February, 1899.

On said 23 June, 1884, the said B. F. Jennings took out a policy of insurance upon his own life, for the benefit of his wife, in the sum of $5,000.

On 22 April, 1897, the plaintiff, Sarah E., made, executed and delivered to the defendant, J. L. Hinton, the following written assignment, which her husband, B. F. Jennings, witnessed:

"ELIZABETH CITY, N. C., 22 April, 1897.

"For value received I hereby assign and set over to John L. Hinton all my right and interest in Benefit Certificate No. 73886 in the American Legion of Honor Insurance Company, the same being insurance on the life of my husband, Benjamin F. Jennings, dated 23 June, 1884, the said certificate or policy being the sum of $5,000, being for my benefit. The said Hinton to have the said $5,000 in the said policy absolute, with power at the death of the said Benjamin F. Jennings to collect the same, and apply it to his own use.

"SARAH E. JENNINGS. (Seal.)

"Witness: B. F. Jennings."

This statement presents the only point in the case necessary for
(50) our consideration: Was this an assignment by the wife "with the written assent of her husband," as provided by Art. X, sec. 6, of the Constitution of this State? The court held that it was not, and so charged the jury, and to this the defendant Hinton excepted.

It has been suggested that the right to property was the right to dispose of it—the *jus disponendi*—and to hold that she could not convey

without her husband's assent would be in violation of that principle of law. But to sustain this suggestion would be to hold that the Constitution was unconstitutional.

At common law, upon the marriage of a woman the whole of her personal property became that of her husband, and he had the sole right to dispose of the same, and this was the law in this State until the adoption of the Constitution of 1868. The husband paid the wife nothing for her property, thus acquired, but it became his, as one of his marital rights. The Constitution of 1868 abolished this fiction and rule of the common law, and said the wife's property should remain hers although she married; but to convey the same she must have the "written assent of her husband." Constitution, Art. X, sec. 6. This provision of the Constitution was an enabling act, giving the wife rights that she did not have at common law—the right to retain all her property, with the simple incumbrance that she could not convey it without the "written assent of her husband." This provision does not restrict her property rights, but greatly increases and enlarges them.

But it seems to us that this discussion is aside from the real point in this case, as we shall take the Constitution to be constitutional. So the question reverts to the original proposition: Did the plaintiff convey this policy of insurance to the defendant with the written (51) assent of her husband? In other words, was the simple fact that the husband witnessed the written assignment of the wife, by signing his name thereto, the "written assent of the husband?"

Had the husband not signed his name to the paper, though he may have negotiated the trade and received the consideration therefor, the conveyance (the assignment) would have been void (*Walton v. Bristol,* 125 N. C., 519), because the husband *wrote* nothing. But where the wife signed a note as the surety of the husband, it was said by the Court that this would be sufficient to satisfy the requirements of law, as that the husband and wife both signed the note, and it must be presumed that the wife signed the note with the assent of her husband. In other words, signing his name to the paper was *a writing,* and his assent would be inferred. *Farthing v. Shields,* 106 N. C., 289. Upon a similar state of facts, where the wife signed as surety, the Court held the same doctrine, using this language: "It is also unnecessary that the assent of the husband should be signified by a separate clause. His execution of the paper jointly with his wife is a sufficient compliance with the law in this respect," citing *Farthing v. Shields, supra; Jones v. Craigmiles,* 114 N. C., 613. Where a husband, as the agent of his wife, made a written statement in the name of his wife to obtain the purchase of goods, and five or six days thereafter the husband made a written guarantee for goods, it was held that the signing of the written state-

ment by the husband, as the agent of the wife, was a signing by the wife, and that his guarantee some days after was his written assent; that the guarantee was a sufficient writing to satisfy the demands of the law, and his assent would be inferred. *Bates v. Sultan,* 117 N. C., 94.

(52) However violent this presumption may be, for the public good, it is presumed that all persons know the law. This being so, both the plaintiff and her husband knew that the wife could not dispose of this policy of insurance without the *written* assent of the husband; and knowing this, the wife signed the instrument "disposing" of the policy to the defendant Hinton, and the husband wrote his name as a witness to this disposition by the wife of her property. But from the transaction we think it may be reasonably inferred that they had actual knowledge that the wife could not convey the policy without the written assent of the husband—as it was not a transaction that required a subscribing witness for any purpose unless it was to meet this requirement —that it must be with the written assent of the husband. But be this as it may, the law presumed the knowledge.

From the logic of the decisions we have cited and the other cases cited in these decisions, it appears to us that there was error in this instruction—"that the fact that it appeared that the husband signed as a witness was not his written consent."

This doctrine may have been carried right far, but to hold that this was not the written assent of the husband would put us in conflict with what has been repeatedly held to be the law by this court.

Error. New trial.

CLARK, J., concurring: I concur that if written assent was required in this instance, the appending by the husband of his signature as witness was sufficient assent, both by the reason of the thing, and upon all the precedents. But I concur in the result for the further reason that the transfer of the policy by the wife was valid without the written assent of her husband.

(53) The Constitution, Art. X, sec. 6, says the property of the wife "shall be and remain her sole and separate estate and property . . . as if she were unmarried." The only exception to that broad provision is that the husband is given merely a veto upon her "conveyances." He is not required to join in them, for he has no interest in her property (*Manning v. Manning,* 79 N. C., 293), and of course, can pass none. This veto power does not extend to devises and bequests, nor to any other disposition of her property, save in those cases which under the law must be made by a "conveyance," *i. e.,* deeds and mortgages of realty and such mortgages of personalty as are made by deed.

To hold that the husband's veto power, by reason of the requirement

of his written assent, extends to all gifts, sales, transfers and assignments of her personal property, oral or written, is to make the veto as broad as the enfranchisement. It is to say that her property shall remain hers, as before marriage, but that in no case whatever shall she own it as if she had remained single. It would be to require the husband's written assent in cases where no writing would be necessary on the part of the wife. There is no possible construction of this provision which would require the husband's written assent to the transfer of this policy which would not require the husband's written assent to the wife's endorsement of a check, or the gift of an old calico dress or a pair of second-hand shoes—in short, a negation of the broad enfranchising clause which guarantees a married woman as full ownership of her property as if she had remained single, save for the veto given the husband upon her "conveyances." The statutes and the decisions point out what are conveyances, and by no stretch of legal construction can the transfer of this policy, the endorsement of a check or bond (often in blank and therefore with no grantee), or the gift or sale of any personal property, be termed "conveyances." It was expressly held in (54) *Kelly v. Fleming,* 113 N. C., 133, that the word "conveyance" did not embrace a sale or any other disposition of personal property which was not required to be by deed.

There should be no difficulty as to the rights of married women if we would follow the plain letter of the constitutional provisions without reference to the barbarous doctrine of the "subjection of women" whose survival in the common law the will of the men of this more enlightened age abolished by this section of the Constitution. It is not by virtue of, but contrary to, this recognition in the organic law of the equality of women before the law, that our statute law, till the last session of the General Assembly, still classed married women in two sections of the Code with "idiots, lunatics, infants and convicts," and still attempts to hamper their freedom of contracting (though the sole restriction by the Constitution is limited to conveyances), and that our decisions still make the husband absolute owner of all the wife's earnings, even though made by her needle.

The common law contained many noble principles which will live for all time, but from the time and nature of its origin it had the alloy of much that was base and barbarous. In the evolution of the race and in the advance of civilization, most of the alloy has disappeared. One of the last survivals was the essentially barbarian doctrine that a woman, upon marriage, became the chattel of her husband, for it was by virtue thereof that he acquired (besides the right to chastise her at will which the courts have abrogated) her property and her earnings. This the Constitution of 1868, in accordance with enlightened progress every-

where else, swept away. It made her the equal of her single
(55) sister, with as full rights over her property in every way, save as to the husband's veto upon her "conveyances." To extend that to a veto upon her gifts, sales or other disposition of property, not required to be made, and in fact, not made by any conveyance, would be, in my humble judgment, a judicial repeal of the constitutional provision.

Prior to 1868, when by a marriage contract a wife retained her separate estate, no assent of the husband, written or oral, was required for the disposition of her personalty. The constitutional provision was not intended to put her in a worse situation. It extends her ownership to all property, both real and personal, but the veto given to the husband does not. It extends only to conveyances, and therefore has no application to any disposition of personalty unless a "conveyance" of it is necessary. It is a novelty in jurisprudence if an oral disposition of personal property, or a written disposition of it by endorsement or assignment of a check, note or other paper, is a "conveyance," especially in view of the context and evident purpose of the clause of the Constitution guaranteeing, not restricting, property rights of married women.

DOUGLAS, J., dissenting: I can not assent to the opinion of the court, because it appears to me to be against both the letter of the law and the current of our decisions. The opinion concedes that if the husband had written *nothing,* even if he had received ample compensation for his verbal assent, the assignment would have been void. Why? Because the Constitution requires the *written* assent of the husband. In this case he has written as near nothing as he well could, and has written absolutely nothing that can be construed into an *express* assent. He can not be considered a party to the assignment, because he expressly and in terms limits his signature to that of a witness, and it would
(56) be a very dangerous doctrine to hold that a mere witness can be construed into a party to a contract in which his name is not even mentioned. But it is said that his signature as a witness is *written,* and it must be held as an *implied* assent because he is *presumed* to know that the law required his *written* assent. I may be too conservative, but I fear that we have already carried the doctrine of implications, waivers, and presumptions too far in this State. Any one goes far enough in itself, and when an implication requires a presumption to support it, I am disposed to stop. It is very easy to comply with the Constitution. Instead of writing the one word "witness," a word in itself of the strictest limitation, the husband could just as easily have written the words "I assent" or "consent" or "agree" or "concur" or some word of similar meaning. He might have at least omitted the qualifying word "witness." It is a common practice for men to witness papers of the con-

tents of which they are ignorant, or have only the most general idea. Even when witnesses are required by law, I understand that they are witnesses merely to the execution of the paper, and not to its contents or legal effect. It is true a witness may be shown to have known what was in the paper, and if so, may be equitably estopped under certain circumstances from denying its truth. But there is no estoppel in this case, because the husband is not asserting any claim by himself or others, and his act could not estop the wife. The wife in such a case can not be estopped even by her own act, as this would completely nullify the constitutional provision. What good would it do to declare an act invalid, and then estop the wife from asserting its invalidity? This Court has repeatedly said that this requirement was for the protection of the *wife* against the wiles and insidious arts of others. *Ferguson v. Kinsland,* 93 N. C., 337, 339; *Green v. Bennett,* 120 N. C., 394; (57) *Slocumb v. Ray,* 123 N. C., 571, 573.

I do not think that the cases cited in the opinion of the court sustain its decision, as in all those cases the husband was a party to the contract, and not a witness. In *Farthing v. Shields,* 106 N. C., 289; and *Jones v. Craigmiles,* 114 N. C., 613, this Court held a note, though signed by both husband and wife, did *not* bind the latter. The case of *Sultan v. Bates,* 117 N. C., 94, decided by a divided Court, goes further than any case I can find in our reports, and yet that case is expressly decided upon the ground that the husband expressly guaranteed in writing the payment of the wife's debt. This Court said, on p. 99: "Consent is embraced in the idea of guarantee. The promise that he will make good his wife's agreement, pay her obligations if she does not, can carry with it no other idea than that he desires and expects her to pay out of her own property her debts, and not cause loss to him as her guarantor for her failure." Nowhere can I find in that case any foundation for the opinion of the Court in the case at bar, and yet it is cited to sustain an implied assent, founded upon a presumption to a contract in which the gross inadequacy of consideration is itself suggestive of fraud.

Cited: Brinkley v. Ballance, post, 396; *Rawls v. White,* 127 N. C., 20; *Jennings v. Hinton,* 128 N. C., 214; *Rea v. Rea,* 156 N. C., 533; *Butler v. Butler,* 169 N. C., 596; *Graves v. Johnson,* 172 N. C., 179, 180, 181, 182.

(58)

STATE EX REL. S. H. LOFTIN, GUARDIAN OF ELLIS AND HANNAH GOLDSTEIN v. G. W. COBB, FORMER GUARDIAN ET AL., SURETIES.

(Decided 27 February, 1900.)

Guardian Bonds—Accounts—Liabilities—Sureties—Evidence—Remedies of Ward.

1. Annual account of guardian competent evidence against him, and presumptive evidence against his sureties. Code, sec. 1345.
2. Guardian and his bond liable for all moneys due his wards which he has collected or ought to have collected.
3. Where the administrator of a former guardian himself becomes guardian, he and his guardian bond become liable for any balance due from the solvent estate of former guardian.
4. Where wards have remedy against different persons in different capacities, they may elect whom to hold liable, leaving it to the parties, after payment, to adjust their own equities. *Harris v. Harrington*, 78 N. C., 202.

ACTION against J. W. Cobb and his official bond as former guardian of plaintiff's wards, tried before *Starbuck, J.*, at Fall Term, 1899, of PASQUOTANK.

J. W. Cobb had been appointed guardian in July, 1897, and was removed in February, 1899. He had had several predecessors, who died indebted to the wards, but leaving solvent estates; upon one of the estates, that of S. Weisel, Cobb had administered, and was also surviving partner of the firm of S. Weisel & Co., and as such had assigned all the partnership effects to himself as administrator.

The plaintiff introduced as evidence the annual account of Cobb, guardian, of record 4 August, 1898, showing a balance in his hands due each ward of $1,282.23. This evidence was objected to by the sureties on the guardian bond, but was admitted by the court. Defendants excepted. In addition to this sum, the plaintiff claimed that there
(59) was due each of his wards the sum of $202, which, it was admitted Cobb's immediate predecessor, C. Guirkin, ought to have collected from Cobb, as administrator of S. Weisel.

The issues being found in favor of plaintiff, the court rendered judgment upon the guardian bond, in favor of plaintiff, against G. W. Cobb and his sureties, for the penalty of the bond to be discharged upon payment of the amount assessed by the jury. Defendants excepted and appealed.

G. W. Ward for appellants.

W. D. Pollock and E. F. Aydlett for appellee.

FAIRCLOTH, C. J. This is an action by the present guardian against the bond of the defendant Cobb, a former guardian of the same wards. It was admitted that S. Weisel qualified as guardian for the infant plaintiffs on 9 April, 1883, and died on 6 June, 1886; that C. Guirkin qualified as guardian for the said wards on 23 June, 1886, and died 27 March, 1895; that G. W. Cobb qualified as guardian for the said wards on 31 July, 1897, and was removed by order of the court on 10 February, 1899, and thereafter, to wit, on 2 May, 1899, the plaintiff, Loftin, qualified as guardian of the said minors.

It was also proved that S. Weisel died in 1886, and that defendant Cobb qualified as his administrator, and, as surviving partner of S. Weisel & Son, assigned all the partnership property to G. W. Cobb (defendant), administrator of S. Weisel. It also appears in the case that the estate of Weisel was solvent, and that C. Guirkin's estate was solvent when the defendant qualified as guardian.

The plaintiff then showed by the records in the clerk's office the amount due by Weisel, guardian, and of Guirkin, guardian, as received from Cobb, administrator. The plaintiff showed further (60) from the clerk's records that Cobb's annual account as guardian, in August, 1898, left a balance in his hands due each ward of $1.282.23. To this evidence the defendant Morris objected, as incompetent against him. It was surely competent against Cobb, the guardian, and was equally competent as presumptive evidence against his sureties on his guardian bond. Code, sec. 1345, and numerous decisions thereunder (Laws 1844).

It was further shown that Cobb was also due each ward net $202, by Cobb's declaration before he was guardian, but when he was administrator. The defendant Morris objected to this declaration against him. Without passing on that question, we find in the statement of the case to this Court by counsel after a statement as to the $202, the following: "It was admitted that C. Guirkin ought to have collected *that money* from G. W. Cobb, administrator of S. Weisel. It was further admitted that C. Guirkin had in his hands $1,335.21 due each of the plaintiffs at his death, which ought to have been collected by G. W. Cobb, as guardian of the plaintiffs." This makes Cobb's declaration before he became guardian immaterial.

His Honor instructed the jury that, if they believed the evidence, the defendants were due each ward the sums of $1,282.25 and $202, with interest. Verdict and judgment accordingly.

It is too well settled to need citation of authority that a guardian and his bondsmen are liable for all moneys collected and for all that ought to have been collected, and that the trust imposed must be faithfully performed. That duty required Cobb, the guardian, upon his qualifi-

cation, to collect from Cobb, the administrator, any balance in the
(61) latter's hands due his ward, if the law *ipso facto* did not make the transfer. In either event the defendants are liable.

When the wards have remedy against different persons in different capacities and against several bonds and bondsmen, they are at liberty to elect whom they will pursue, and the question of contribution and adjusting equities does not arise until the debt is paid by some one of them, with which matters the plaintiffs have no concern. These questions, and many others of like nature, are so thoroughly considered and well expressed in the following case that we refer and call attention to it—*Harris v. Harrison,* 78 N. C., 202.

Affirmed.

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(62)

JAMES B. GOODE AND WIFE, ELIZABETH R. GOODE, JOSEPH M. ROGERS, MARTHA O. ROGERS, JOHN T. ELDRIDGE AND WIFE, MILDRED A. ELDRIDGE AND WILLIAM J. ROGERS v. JESSE V. ROGERS.

(Decided 27 February, 1900.)

Partition of Realty—Owelty—Questions of Fact—Issues of Fact—Payment, Statute of Limitations, Counterclaim—Premature Appeal.

1. When proceedings for partition of realty were prosecuted to final decree in 1876, confirming the allotment in severalty among those entitled, and assessing owelty upon the more valuable share in favor of the less valuable to secure equality in partition, and notice is issued, in 1899, to the owners of the more valuable shares to show cause why execution should not issue for the sums assessed, to which they set up the defense of payment, statute of limitations, and counterclaim—these pleas are not *questions* of fact for the court, but *issues* of fact for the jury.

2. An appeal from the ruling of his Honor, directing the cause to be placed upon the civil issue docket for trial by jury, is premature.

SPECIAL PROCEEDINGS for partition of land, heard upon appeal from the clerk, before *Bowman, J.,* at Fall Term, 1899, of NORTHAMPTON.

The cause had proceeded to final decree in 1879 allotting the shares and adjudging owelty against the most valuable shares in favor of the less valuable.

This was a notice to show cause why execution should not issue for the owelty adjudged—the answer set up the defense of payment, statute of limitations, and counterclaim.

His Honor adjudged these were issues of fact for the jury, and directed the cause to be placed on the civil issue docket for trial. Petitioners excepted and appealed.

Winborne & Lawrence for appellant.
R. B. Peebles and C. G. Peebles for appellees. (63)

FAIRCLOTH, C. J. This was an action for partition, and a final decree was entered in 1876, charging certain lots with the payment of owelty in favor of a certain lot or lots. In 1899, the petitioners moved on notice for an execution to collect the amounts due them by said decree. The respondents answered and pleaded payment, and the statute of limitations, etc. On appeal to the Superior Court, his Honor was of opinion that the record and pleadings raised *issues* of fact to be tried by a jury, and so ordered. The petitioners contended that only *questions* of fact were raised, and that they should be decided by the Court, and appealed from the order directing a jury trial.

The answer of respondents presents important questions. We are, however, not required to consider them, for the reason that the *issues* presented have not been tried below. These pleas present serious and important *issues* of fact. *McDonald v. Dickson,* 85 N. C., 250; *Isler v. Murphy,* 71 N. C., 436.

The appeal was clearly premature, and can not be entertained. *Hailey v. Gray,* 93 N. C., 195; *University v. Bank,* 92 N. C., 651.

Appeal dismissed.

(64)

GEORGE R. GAMMON v. JORDAN W. JOHNSON ET AL.

Mortgage—Judgment Creditor—Foreclosure—Parties—Incumbrancers —Appeal.

1. Incumbrancers, prior or subsequent, by mortgage or judgment lien should generally be made parties in a proceeding for foreclosure, their liens being transferred by the sale from the corpus to the fund arising from the sale, in the order of priority, with the right to assert any credits to which it may be entitled, by the receipt of rents and profits, cutting of timber, or in other ways, before distribution.
2. Subsequent incumbrancers, while proper parties for a full and complete settlement of all liens upon the land, are not necessary parties, but may be allowed upon petition to come in, and the petition need not be verified, as it does not controvert the plaintiff's cause of action.
3. An appeal by the plaintiff from an interlocutory order in regard to alleged credits is premature—his exception should be entered, and appeal taken from the final judgment distributing the fund.

FORECLOSURE PROCEEDINGS instituted by the plaintiff, as assignee of J. W. Sherrod & Bro., of a note secured by deed of trust executed by

defendant 25 March, 1887, in the sum of $1,350 with interest from date at 8 per cent, heard before *Bowman, J.,* at October Term, 1899, of EDGECOMBE.

The sale had taken place and was reported by the Commissioner at the sum of $2,760, as a fair price for the land, with a recommendation for confirmation.

At this term of the Court, F. S. Royster, administrator of O. C. Farrar, filed a petition for leave to intervene; alleging that his intestate on 9 October, 1891, obtained a judgment against the defendant for $2,183.92, which is still due, with interest on $1,594.25, at 8 (65) per cent, and that said judgment is the first lien on the proceeds of sale left after paying the mortgage judgment of plaintiff; that the plaintiff after taking his said judgment had cut from the land much valuable mill timber and cord wood, worth about $500, and had cultivated part of the land for the year 1899, and that the mortgage indebtedness should be reduced accordingly.

The prayer of the petition was: That he be allowed to be made a party to this action, and that a statement of all timber, cord wood and rents taken or received from said land by said plaintiff be made, and that the surplus of the proceeds of said sale, after paying said judgment reduced as aforesaid, be paid over to petitioner.

From the judgment allowing the petitioner to be made a party, ordering an account of timber, wood and rents, and retaining $650 of the purchase price until further order, the plaintiff excepted and appealed.

J. L. Bridgers and J. R. Gaskill for appellants.
G. M. T. Fountain for appellees.

CLARK, J. In general all incumbrancers, whether prior or subsequent incumbrancers, as well as the mortgagor, should be parties to a proceeding for foreclosure, and judgment creditors as well as mortgagees. *Hinson v. Adrian,* 86 N. C., 61; *LeDuc v. Brandt,* 110 N. C., 289. This is because the liens, by the sale, are transferred from the *corpus* to the fund into which it is converted, with their respective priorities preserved and to be asserted in the decree for distribution. *Cannon v. Parker,* 81 N. C., 320. "In effect the lien of a docketed judgment is in the nature of a statutory mortgage" (*Gambrill v. Wilcox,* 111 N. C., (66) 42), though the judgment conveys no estate in the land. *Baruch v. Long,* 117 N. C., 509.

The lien of the judgment creditor being transferred to the proceeds of sale subject only to the priority of the plaintiff's mortgage, the judgment creditor was a proper party as against the defendant to receive the amount due him out of the surplus after the payment of plaintiff,

else such surplus would go into the hands of the defendant, to the destruction of the lien of the judgment creditor, who was also a proper party as against the plaintiff that he might assert the credits which should be charged against the plaintiff by reason of timber cut on the land, since by so doing the surplus to be applied to the judgment, as the second lien, will be swollen. This is not bringing a new cause of action, but it is a necessary step in the just and proper distribution of the fund according to the priorities of the liens upon the land, whose sale produced the fund. The petition set out the judgment creditor's ground for asserting a credit to be charged against the plaintiff, and, if denied, an issue is presented for settlement before the fund is distributed. It is not a debt against the plaintiff, which would be an alien cause of action, but a claim of a larger share in the fund, because of a credit which should be charged against the first lien.

The petition, to be made additional party, does not controvert the cause of action set up in the plaintiff's complaint, and hence is not required to be verified. Code, secs. 189 and 273. Indeed, upon the facts being made known to the court in any satisfactory manner, it could, and should, *ex mero motu,* have ordered the judgment creditor made a party that there should be a full and complete settlement of the rights of all parties holding liens upon the fund. *Pitt v. Moore,* 99 N. C., 85. *Kornegay v. Steamboat Co.,* 107 N. C., 115, and *Williams v. Kerr,* 113 N. C., 306, relied upon by the plaintiff, (67) hold that subsequent incumbrancers, while proper parties, are not necessary parties in all cases.

The appeal is premature, for the facts as to the alleged credit should have been passed upon, and the party against whom it was found might not have appealed. The plaintiff should have entered his exception to the interlocutory order, and have brought up his appeal only from the final judgment distributing the fund, if the disputed credit was found against him.

The point involved in this appeal, however, has been passed upon, as has sometimes been done. *Milling Co. v. Finlay,* 110 N. C., 411; Clark's Code (3 Ed.), sec. 548. But it must be entered.

Appeal dismissed.

Cited: Darden v. Blount, post, 250; *Connor v. Dillard,* 129 N. C., 51; *Bernard v. Shemwell,* 139 N. C., 447; *Clement v. King,* 152 N. C., 460; *Jones v. Williams,* 155 N. C., 188, 195; *Spruill v. Bank,* 163 N. C., 45.

(68)

F. S. ROYSTER GUANO CO. ET AL. *v.* TARBORO.

(Decided 27 February, 1900.)

Municipal Taxation—Property Tax—Privilege Tax—Several Occupations by Same Person—Town Charters—Code Provisions, Chapter 62, Relating to Towns and Cities.

1. Tax on property and tax on privileges are distinct taxes—both may be levied by cities and towns, under sec. 3800 of the Code, upon subjects within the corporate limits which are liable to taxation for State and county purposes.
2. The exemption, by special act, from one of these taxes, does not relieve from the other.
3. Where several occupations are conducted in town by the same individual, a privilege tax on one does not prevent a similar on another.

CONTROVERSY without action submitted to *Allen, J.*, at November Term, 1899, of HALIFAX, upon agreed facts.

The plaintiffs, each of them, conducted business in the town of Tarboro, and each of them was engaged in more than one line of business. The town proposed to assess a separate privilege tax on each line of business engaged in, and the plaintiffs, as taxpayers, united in application to his Honor for an order of injunction against the defendant. The town authorities claimed the right to impose a privilege tax on business, both by their charter, as well as by virtue of the general act relating to towns and cities, ch. 62 of the Code, whereby they are authorized to lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes (sec. 3800).

(69) The plaintiff F. S. Royster Guano Company claimed special exemption from the privilege tax of $25 to be imposed on this company, by reason of section 15, ch. 377, Laws 1899, which provides: "Whenever any manufacturer of fertilizer or fertilizing materials shall have paid the charges hereinbefore provided, his goods shall not be liable to any further tax, whether by city, town, or county." Having paid the charges required, it was insisted that no further tax could be imposed.

The defendant insisted that the "further tax" prohibited was a tax on *goods*, and had no relation to a tax on privilege.

His Honor refused the injunction order asked for, and plaintiffs excepted and appealed. He adjudged that the town of Tarboro be restrained from imposing the $25 privilege or license tax on the Guano Company. The defendant excepted and appealed.

G. M. T. Fountain for plaintiff.
John L. Bridgers for defendant.

MONTGOMERY, J. In this case the facts were agreed upon and submitted to the court for judgment. The main question involved is whether or not the town of Tarboro has authority to levy taxes upon trades and professions, under its charter (ch. 195, Private Laws 1889) other than those mentioned in subsection 8 of sec. 28 of the charter. The taxes complained of by the plaintiffs (who brought this action to enjoin their collection) and which were levied by the defendant town are not specifically mentioned and authorized in the charter—act of incorporation. Certain specific taxes, including license and privilege taxes, are, however, mentioned in the charter. The defendant insists that sec. 33 of the town charter adds to the specific powers (70) granted in the charter the power to levy the taxes complained of by the plaintiffs. Sec. 33 of the charter is in these words: "That secs. 3798, 3799, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, and 3823, of the Code, be incorporated into and made part of this charter, and that all authority not inconsistent with the provisions contained in ch. 62, 'Towns and Cities,' of the Code, is hereby conferred on the commissioners, and other officers, of the town of Tarboro."

Sec. 3800 of the Code confers upon incorporated towns and cities the power to levy taxes "for municipal purposes on all persons, property, privileges and subjects, within the corporate limits, which are liable to taxation for State and county purposes."

We are of the opinion that there is no inconsistency between the powers granted in sec. 3800 of the Code, and the specific powers of taxation mentioned in the charter, and that defendant could lawfully tax other trades and business than those specifically mentioned in the charter.

The contention of the plaintiffs was that the town of Tarboro was bound, in the levy of taxes upon its citizens, to observe the specific limitations laid down in the charter, and that sec. 3800 of the Code could not aid the town in the levying of the taxes complained of, and the cases of *Latta v. Williams,* 87 N. C., 126, and *Winston v. Taylor,* 99 N. C., 210, were cited as authorities to that effect. In answer to that argument, however, it will only be necessary to say that the charters of those towns stood upon their own provisions, and did not have incorporated therein the power to tax conferred under sec. 3800 of the Code as is the case in the matter before us.

That part of the argument of the plaintiff's counsel which (71) questioned the right of the town of Tarboro to levy privilege taxes, even though laid uniformly on all persons embraced in the priv-

ileged classes while others and different classes were exempted, was answered in the cases of S. *v. Worth,* 116 N. C., 1007, and *Rosenbaum v. New Bern,* 118 N. C., 83, and this though the same person may be engaged in different trades or professions. There was therefore no error in the ruling of his Honor in refusing the injunction of the plaintiffs.

No error.

DEFENDANT'S APPEAL IN SAME CASE.

MONTGOMERY, J. Sec. 15 of ch. 377, Laws 1899, provides as follows: "Whenever any manufacturer of fertilizers or fertilizing materials shall have paid the charges hereinbefore (in this act) provided, his goods shall not be liable to any further tax, whether by city, town or county." The plaintiff, the Royster Guano Company, has paid the taxes levied by the State, and insists that no privilege tax could be levied by defendant upon its business of manufacturing fertilizers. The privilege tax levied by the town was not a tax on the goods, but a tax on the privilege of manufacturing guano within the corporate limits of the town.

We are of the opinion, therefore, that his Honor erred in restraining the town from collecting the tax of $25 against the Royster Guano Company, manufacturer of fertilizers.

Reversed.

Cited: S. v. Irvin, post, 992; *Plymouth v. Cooper,* 135 N. C., 8; *Guano Co. v. New Bern,* 158 N. C., 355.

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(72)

BETTIE S. DRAPER AND HUSBAND, B. F. DRAPER, SALLIE NEVILLE, C. E. NEVILLE, AUGUSTUS NEVILLE, IDA J. NEVILLE, E. K. NEVILLE, LEON NEVILLE, AND F. L. NEVILLE, ALSO WILLIAM HOWERTON, v. S. B. BRADLEY, JAMES R. BRADLEY AND JOHN J. ROBERTSON AND WIFE, ELLEN ROBERTSON.

(Decided 27 February, 1900.)

Deceased Collateral Relatives—Heirs—Right of Representation—Third and Fourth Rules of Descent, the Code, Section 1281.

The heirs of deceased collateral relatives represent their ancestors, and take what they, if living, would have taken.

SPECIAL PROCEEDINGS for partition, transferred from the clerk and heard before *Bowman, J.,* at Fall Term, 1899, of EDGECOMBE.

(73) Defendants excepted and appealed.

Day & Bell and Alexander Stronach for appellants.
John L. Bridgers for appellees.

FURCHES, J. This was a proceeding commenced for partition of land and heard upon facts agreed to by the parties. Upon the argument it was agreed that Sarah Narcissa Bradley was the *propositus,* and that all the parties, plaintiffs and defendants, were of the blood of the first purchaser, and that the said Sarah Narcissa died intestate and without lineal descendants in 1894. It was also agreed (as the agreed case shows) that S. B. Bradley, J. R. Bradley and Ellen Robertson are brothers and sister of Sarah Narcissa Bradley, and that the plaintiffs Sallie Neville, E. C. Neville, Augustus Neville, Ida J. Neville, E. K. Neville, Leon Neville, and F. L. Neville are the chidren of Emily Neville, a sister of Sarah Narcissa, and that she died in June, 1891, and that W. B. Howerton and Bettie S. Draper are the children of Henrietta Howerton, a half sister of Sarah Narcissa, who died 28 September, 1869.

That under the rules of our law of descent, Henrietta Howerton, though a half sister of Sarah Narcissa, would have inherited from the *propositus,* Sarah Narcissa, if she had been living at the death of the said Sarah Narcissa. And as she would have inherited, her children will inherit, if nephews and nieces inherit where there are brothers and sisters living at the death of the *propositus,* or ancestor last seized. (74)

It is contended by the defendants that only the "next" collateral relations inherit, and defendants say that they are in equal degree, and are the *next* or nearest collateral relations of Sarah Narcissa, and that as she died without leaving lineal descendant, that they are entitled to inherit the estate of the said Sarah, to the exclusion of the plaintiffs, who are nephews and nieces, and not of the *next* of kin.

But it will be observed that the fourth rule of descent is made subject to the provisions of the two preceding rules, and the third rule provides "That lineal descendants of a person deceased shall represent their ancestor, *and stand in the same place* as the person himself would have done, had he been living."

Then it would seem that the plaintiffs *stand in the same places* that their mothers would have stood had they been living at the time of the death of *their* sister, Sarah Narcissa, and as their mothers would have inherited if they had been living, their children, the plaintiffs, must inherit.

It was stated on the argument that this was a new case—"of first impression"—but it seems to us that every principle involved in this case has been elaborately and ably discussed in the opinion of the Court by *Judge Battle,* concurred in by *Chief Justice Nash;* and while there

is an elaborate and able dissenting opinion by *Judge Pearson,* the dissenting opinion concedes the contention of the plaintiffs in this case. *Clement v. Cauble,* 55 N. C., 82. The same doctrine is held in *Cromartie v. Kemp,* 66 N. C., 382, citing and approving *Clement v. Cauble.* And the same doctrine is again held in *Crump v. Faucett,* 70 N. C., 345, citing with approval *Clement v. Cauble* and *Cromartie v. Kemp.*

We think this doctrine is settled in this State, that the heirs of deceased collateral relatives represent their ancestors and take
(75) what they would have taken, if living. The judgment appealed from must be

Affirmed.

N. B. HERRING v. W. H. HARDISON.

(Decided 27 February, 1900.)

Sale of Growing Timber.

1. A sale to defendant of all pine and poplar timber measuring 10 inches and above on the stump when cut (for mill logs), now growing on a certain described tract of plaintiff, confines the defendant to the cutting of all pine and poplar trees of the required size and suited for milling purposes, and no other trees, and he may convert such trees into lumber, cord-wood, or otherwise as he may prefer.

2. The term "*for mill logs*" is descriptive of the trees that may be cut, and does not restrict the use of such logs by the defendant.

ACTION pending in EDGECOMBE for injunctive relief against the alleged breach of contract in cutting growing timber, heard before *Bryan, J.,* at Chambers, 21 December, 1899.

His Honor restrained the defendant from cutting and removing from the lands described in complaint any trees other than pine and poplar timber which measures ten inches at the stump when cut. Plaintiff excepted and appealed. The contract, contentions of the parties, and construction by the court are stated in the opinion.

(76) *Jacob Battle and Shepherd & Shepherd for appellant.*
John L. Bridgers and Gilliam & Gilliam for appellee.

FAIRCLOTH, C. J. The plaintiff contracted and sold to the defendant "all of his estate, right, title and interest in and to all pine and poplar timber measuring ten inches and above on the stump when cut (for mill logs) now growing, being and situated upon a certain tract of land in Edgecombe County," described as follows, etc.

The plaintiff insists that the defendant can only cut pine and poplar

trees measuring ten inches at the stump, for the purpose of converting the logs into lumber. The defendant claims the right to cut all pine and poplar trees, fitting the description in size, and to convert the logs into lumber, wood or otherwise, as he may prefer.

The injunctive order appealed from restrains the defendant "from cutting and removing from the land described in the complaint *any trees other than pine and poplar timber which measures ten inches at the stump when cut,*" and the order is continued till the final hearing.

In the absence of any direct authority, we must construe the language in the contract reasonably, as it appears to us, and that is that the defendant may cut all pine and poplar trees of the required size and suited for milling purposes, *i. e.,* for lumber, and no other trees, and that he may convert such trees into lumber, wood or otherwise as he may prefer. In this view the plaintiff is compensated, and retains all his pines and poplar trees unsuited for milling purposes, and the defendant is allowed to do as he chooses with his own. The term "for mill logs" is descriptive of the trees that may be cut, and does not restrict the use of such logs by the defendant. The order appealed from is affirmed (77) with this modification.

Modified and affirmed.

C. W. MITCHELL v. W. J. EURE, Z. L. EURE, AND J. D. EURE, AND J. W. WHITE.

(Decided 27 February, 1900.)

Fraudulent Conveyance—Wrongful Detention of Papers—Transaction Between Insolvent Debtors and Near Relative—Burden of Proof—Personalty Exemption.

1. On the trial of an issue of fraud when it appears that the assignment made by insolvent sons preferred their father, as against the plaintiff, another creditor, the burden of proof is shifted upon the defendants to prove the fairness of the transaction.

2. Where a debtor makes a voluntary assignment to secure some creditor, with the purpose to perpetrate a fraud on other creditors, the deed is fraudulent and void, although neither the trustee nor the beneficiary participated in, or knew of such fraudulent intent; such is not the case of an innocent purchaser for value, without notice.

3. Where the defendants had obtained possession of their written agreement, relating to the goods assigned, which they failed to produce when required, alleging as the reason that they had placed it in the hands of their attorney, it will be presumed that his custody of the paper is their

custody, and that the detention is wrongful, in the absence of evidence that it was out of their power to get it from their attorney.

4. Where the plaintiff had become the owner of note given by defendants for the stock of goods assigned, also of a paper-writing executed by them stipulating that upon their failure to pay the note according to its tenor the contract of sale was to become a nullity, upon the assignment being declared fraudulent and void, the defendants were not entitled to claim their personal property exemption, as against the plaintiff, in the stock of goods or in the proceeds of sale thereof.

(78) ACTION to set aside a voluntary assignment of a stock of goods made by the defendants Eure to a trustee, J. W. White, on the ground of fraud, because made to defeat the plaintiff in the collection of his debt; and also for the recovery of a written agreement containing the conditions of sale of the goods, wrongfully detained from the plaintiff. The creditor preferred was Mills Eure, their father.

The cause came on to be tried before *Allen, J.*, at November Term, 1899, of BERTIE.

The jury found the issues of fraud and of wrongful detention against the defendants.

The special instructions asked for by defendants, the charge of his Honor, and their exceptions thereto, are stated in the opinion.

From the judgment rendered in favor of plaintiffs, the defendants appealed to Supreme Court.

Francis D. Winston for plaintiffs.
R. B. Peebles and C. G. Peebles for defendants.

MONTGOMERY, J. The three defendants Eure bought a stock of merchandise from A. L. Burden, at the price of $867.58, and executed their promissory note for the amount to Burden. At the same time a written agreement was entered into between the parties to the effect that the title to the goods was to remain in Burden until the note should be paid —the payments to be made in the sum of at least $20 during each month, while the Eures were to take possession of the goods and sell them, at the same time replenishing the stock. The agreement containing the conditions of the sale was reduced to writing and delivered to Burden, but was never registered. Afterwards the defendants Eure executed a deed of trust to the other defendant, J. W. White, trustee, to secure an amount of money alleged to be due to their father, Burden,
(79) in the meantime, having assigned the note to the plaintiff Mitchell.

This action was commenced to set aside the assignment, made by the Eures to White, trustee, on the ground that it was fraudulent and void because it was made with intent to hinder, delay and defeat the plaintiff

in the collection of his debt, and also for the purpose of recovering the possession of the agreement referred to between Burden and the Eures, containing the conditions of the sale, which the plaintiff alleges the Eures had gotten into possession of and wrongfully detained from them.

Two issues were submitted, one as to whether the assignment was made with intent to hinder and defeat the collection of the note and to defraud the plaintiff; and the other, whether at the time of bringing the suit the Eures wrongfully detained the paper-writing. The defendants made exception to that part of the charge of the court concerning business transactions between insolvent children who had disposed of property to their father as against other creditors. That part of the charge is in these words: "The law scrutinizes transactions between insolvent relations with their near relations, and when it is shown or admitted that the transaction relied upon is between a father and insolvent children, as against another creditor, the plaintiff will have sufficiently made out a case to shift the burden of the first issue to the defendants." There is no merit in the exception. *Redmond v. Chandley,* 119 N. C., 575, and the cases therein cited. His Honor further instructed the jury that if the intent of the Eures (defendants) was fraudulent, it was immaterial whether the father knew it or not. There was no error in the instruction.

This is not a case in which a grantor, with a fraudulent pur- (80) pose himself, conveys property to an innocent purchaser, for value, but it is a case where a debtor makes a voluntary assignment to secure creditors, and if his purpose is to perpetrate a fraud on the other creditors the deed is fraudulent and void, although neither the trustee nor the beneficiary under the deed participated in, or knew of, such fraudulent intent. *Savage v. Knight,* 92 N. C., 493.

Upon the second issue, the defendants requested the following instruction: "That if defendants were not in the actual possession of the conditional sale at the time this action was commenced, and did not part from the possession of the same for the purpose of keeping plaintiff from getting possession of the paper, then the jury should answer the second issue No," and that upon this issue the burden was on the plaintiff. This was refused, and the defendants excepted. The court had previously instructed the jury "that the burden was on the plaintiff as to both issues, and that defendants' contention as to the second issue being that they had delivered the paper (the unconditional sale) to their attorney at his request, and to enable him to write the deed of assignment, that the custody of the paper by the attorney of defendants for them was their custody, and if they refused to give it up simply on the ground that the actual possession was in their attorney, and when it was in their power to get it from their attorney and deliver it, then it would be a

wrongful detaining, and the answer to the issue should be 'Yes'; but if it was otherwise, and not in their actual possession, and not in their power to obtain it, the answer should be No." The instruction given was strictly in accordance with the evidence in the case, was perfectly fair to the defendants, and there was no error in refusing the instructions requested by them.

(81) The other requests of the defendants for instructions in respect to the personal property exemption of the defendants in the goods embraced in the assignment need not be discussed, for the reason that the jury found the deed of assignment was fraudulent, and that the agreement, containing the conditions of the sale of the goods between Burden, the assignor of the plaintiff, and the defendants was fraudulently detained by the defendants; and, upon those findings, the plaintiff was entitled to the possession of the goods, and therefore to the money which had been derived from the proceeds of a sale of the goods by the trustee, made under a former order of the court.

There was no error and the judgment is in all respects

Affirmed.

E. A. GUPTON v. FANNIE HAWKINS, EXECUTRIX OF P. B. HAWKINS.

(Decided 27 February, 1900.)

Note Under Seal—Statute of Limitations—Endorsed Receipts—Evidence.

1. When the statute of limitations is pleaded, the burden of repelling the statute rests upon the plaintiff. Clark's Code (3 Ed.)
2. The maker of a note being dead, payments endorsed, and the dates thereof, relied upon to repel the bar, must be proved by some other person than the plaintiff, who is incompetent under the Code, sec. 590.

(82) ACTION heard, upon appeal from a justice's court, before *Moore, J.*, at April Term, 1899, of FRANKLIN, brought upon the following note:

Due and payable on demand to E. A. Gupton, sheriff, twenty-four dollars, for value received.

As witness my hand and seal, this 9 September, 1871.

PHIL'M B. HAWKINS. [Seal.]

Endorsements—Received 11 September, 1872, two dollars of the within. Received 8 September, 1880, four dollars of the within. 11 December, 1889, received six and 50-100, in part of the within. One-quarter bbl. flour, $1.25.

P. B. Hawkins died in January, 1891.

This action commenced 24 November, 1896.

Among other defenses, the statute of limitations was pleaded.

After the note had been read in evidence, the plaintiff, over objection, was allowed to testify: "The endorsements are all in my handwriting, and were made at the dates shown on back of note, except the last endorsement, I did not make that."

To all this defendant objected. Objection overruled, and defendant excepted.

The endorsements on the note, except the last one, were allowed by the court, and read to the jury. Defendant excepted.

Verdict for the plaintiff. Appeal by defendant.

F. S. Spruill and W. H. Yarborough, Jr., for plaintiff.

C. M. Cooke & Son and A. B. Andrews, Jr., for defendant.

CLARK, J. The statute of limitations being pleaded the burden of proving the debt not barred is upon the plaintiff, for clearly a defendant could not prove the date of a payment which is denied. Clark's Code (3 Ed.), sec. 151, and cases cited. The plaintiff relied upon sundry credits endorsed on the bond by himself, but the statute is only suspended by proof of payment, not by the endorsement of credits, which are mere declarations of plaintiff in his own interest. *Young v. Alford,* 118 N. C., 215. It is necessary for the plaintiff to prove the date of the payments, *aliunde* the endorsement. *Woodhouse v. Simmons,* 73 N. C., 30 (which explains *Williams v. Alexander,* 51 N. C., 137); *White v. Beaman,* 85 N. C., 3; *Grant v. Burgwyn,* 84 N. C., 560. It was not competent for the obligee to testify that the payments were made by the obligor at the date of the credits endorsed, as that is a transaction with the deceased obligor, and forbidden by sec. 590. *Bunn v. Todd,* 107 N. C., 266. To prove *when* the obligor made them necessarily is to prove that *he* made them.

The plaintiff relies upon *Lockhart v. Bell,* 86 N. C., 442, and *s. c.,* 90 N. C., 499, but that merely holds that it is competent for the obligee to show that the payment was made by an agent of the obligor, though the obligor is since deceased. It is competent for the obligor to give in evidence credits endorsed upon a note or bond in the handwriting of a deceased obligee, for this is a declaration against interest, and is the opposite of this case where the obligee seeks to remove the bar of the statute by his own endorsements, which are declarations in (84) his favor.

New trial.

Cited: Ditmore v. Rexford, 165 N. C., 621.

STATE EX REL. WILLIAM H. MITCHELL, WILLIAM F. JOYNER AND I. H. KEARNEY v. WILEY P. ALLEY, W. S. PRUITT, JACOB N. PERRY AND SAMUEL W. JONES.

(Decided 27 February, 1900.)

Quo Warranto—Title to Office of Justice of the Peace—Laws 1895, Chapter 157, Section 4.

Under the legislation of 1895, since continued, each township is entitled to elect three justices of the peace on one ballot, and no more, unless the township shall contain a city or incorporated town with as much as 1,000 inhabitants, in that case one additional Justice for every 1,000 of inhabitants—a ticket containing more names than the elector has a right to vote for, to be void, and not counted.

QUO WARRANTO to test the right of the defendants to hold the office of justice of the peace for Franklinton Township, FRANKLIN County, N. C., tried before *Moore, J.*, at January Term, 1898.

The plaintiffs and defendants were opposing candidates, and each claimed to be elected justice for the township. The verdict and judgment were in favor of plaintiffs, upon grounds fully stated in the opinion. Defendants excepted and appealed.

Plaintiff not represented.
W. M. Person for defendant.

(85) CLARK, J. Section 4, ch. 157, Laws 1895, provide that there should be elected "in each township in the State three justices of the peace, and, for each township in which any city or incorporated town is situated, one justice of the peace for every 1,000 inhabitants in such town or city." By a provision in sec. 20, ch. 159, Laws 1895 (which is continued in sec. 29, ch. 507, Laws 1899), "if any ticket shall contain the names of more persons than such elector has a right to vote for, such ticket shall not be numbered in taking the ballots, but shall be void." The answer admits the allegation in the complaint that the names of all four defendants were printed on all the ballots cast and counted for them as justices of the peace, at the election held in Franklinton Township on 8 November, 1898. The exceptions to evidence are without merit, and require no discussion.

The jury found upon the issues submitted to them that on the ballots cast for the plaintiffs there were only their three names, and that Franklinton (the only incorporated town in that township) had less than one thousand inhabitants at the time of the election. It follows that the tickets cast for the four defendants were void, and that the plaintiffs were legally elected.

This result is not consonant to natural justice, which would seem to require that when four persons are, doubtless *bona fide,* voted for on a ticket which should contain only three names, some method should be provided for the selection of three out of the four, if that ticket receives the highest number of votes. But the provision of the law is explicit. The judgment below is

Affirmed.

Cited: Bray v. Baxter, 171 N. C., 8.

(86)

COMMISSIONERS OF VANCE COUNTY v. J. S. GILL.

(Decided 27 February, 1900.)

Controversy Expiring Pending Appeal—Costs.

1. The Court will not decide the merits of a controversy, which no longer exists, merely to determine who shall pay the costs.
2. Judgment appealed from presumed to be correct, until reversed upon its merits.

SUMMARY PROCEEDINGS in ejectment, tried, upon appeal from justice's court, before *Moore, J.,* at February Term, 1899, of VANCE.

The plaintiffs allege that the defendant entered into possession of a house and lot on the premises of the Home for the Aged and Infirm, as their tenant, that the tenancy expired on 11 January, 1899, and that he was holding over, after demand made.

The defendant admitted the tenancy, but alleged that his term would not expire until 31 December, 1899. The jury under instructions from the court, excepted to by defendant, rendered a verdict in favor of plaintiff.

Judgment accordingly. Appeal by defendant.

T. T. Hicks, W. B. Shaw, and A. C. Zollicoffer for plaintiff.
T. M. Pittman and R. S. McCoin for defendant.

CLARK, J. This was a summary action of ejectment by the county commissioners against the defendant, for a house occupied by him as superintendent of the "Home for Aged and Infirm." The commissioners had passed an order removing the defendant from his position and demanded possession of the building. The defendant, deny- (87) ing the validity of such order, refused to give up possession of

the house. On appeal to the Superior Court, judgment went against the defendant, at May Term, 1899, of VANCE, and he appealed to this Court. Before the appeal was reached for argument in this Court, the term of defendant's office or employment, if it had continued according to his contention, had expired on 1 January, 1900. The Court can render no judgment on the merits, for it can not put the defendant in possession when, by his own showing, he is now not entitled to it. Any decision we could make would be nothing more than a declaration of an abstract proposition of law, for there could be no execution of it.

This Court has repeatedly declared that, in such case, it will not go through the record merely to decide who would have won if the cause of action had not died pending appeal; that it will not decide the merits of a controversy which no longer exists, merely to determine who shall pay the costs. *Herring v. Pugh,* 125 N. C., 437, and numerous cases there cited. Indeed, if the action had been for the office, instead of the house, the term having expired, the action would be dismissed. *Colvard v. Commissioners,* 95 N. C., 515.

It was urged that the costs ought to be divided, but the judgment below in favor of plaintiffs is presumed to be correct until reversed, and unless the Court upon the merits reverses the judgment below, it can not adjudge any part of the costs against the appellee. Code, secs. 525,-527, 540. Whether it was the appellant's fault or merely his misfortune that he appealed so late that the cause of action died before the appeal could be determined, the appellee is chargeable with no responsibility therefor. He has an unreversed judgment of a court of competent jurisdiction. If the defendant had surrendered the
(88) premises under protest, and sued for damages for wrongful eviction, that, unlike the possessory action, would not have died pending appeal. Whether the defendant can now bring such action or is estopped by the judgment in this action, is not now before us.

Appeal dismissed.

Cited: Taylor v. Vann, 127 N. C., 245, 248, 254; *Hardwin v. Greene,* 164 N. C., 102.

D. O. BRINKLEY v. WILMINGTON AND WELDON RAILROAD CO.

(Decided 6 March, 1900.)

Killing Stock—Negligence—Evidence—Motion to Nonsuit, Act 1897.

1. On a motion to nonsuit, the evidence of plaintiff must be accepted as true, and construed in the most favorable light to him, as the jury might take that view of it, if left to them.
2. If there is more than a scintilla of evidence tending to prove the plaintiff's case it must be submitted to the jury.
3. Legal negligence is the absence of that degree of care which the law requires a man to exercise under the peculiar circumstances in which he may be placed for the time being.
4. While it is ordinarily the duty of the engineer, when an animal is on the track, to sound the alarm whistle, yet when it is apparent from the location of the track that the frightened animal can not get off, or that it would be contrary to its natural instincts to do so, and is approaching a trestle which it can not safely cross, the engineer must use his common sense, and stop the blowing and the train, too.

ACTION for damages for negligently killing a horse, tried before *Starbuck, J.*, at Fall Term, 1899, of WASHINGTON.

At the conclusion of the plaintiff's evidence the defendant moved for judgment of nonsuit, under act of 1897. Motion overruled, defendant excepted. The defendant requested the court to charge the jury that from all the evidence defendant was not guilty of negli- (89) gence. Refused. Exception.

The jury found that the defendant was guilty of negligence and assessed the plaintiff's damages at $35. Judgment accordingly. Appeal by defendant.

The evidence and charge of the court excepted to are recapitulated in the opinion.

H. S. Ward for plaintiff.
A. O. Gaylord for defendant.

DOUGLAS, J. This is a civil action for damages on account of the alleged negligent killing of the plaintiff's horse. The following is the evidence for the plaintiff as taken from the record:

Abner Sawyer, for the plaintiff, testified:

"I was in plaintiff's field through which the railroad runs on the day and at the time the horse was killed, and saw the horse and the train; between 12 and 1 o'clock p. m.; it was the freight train coming into town; train was behind time—was due at noon. The horse was on the

track which was through the field, and was 100 yards ahead of the train when I first saw it. My attention was attracted by blowing of whistle; I looked, the train was running at its usual speed, the horse was running ahead of train about 100 yards; horse was running along roadbed at the ends of the crossties. He ran along ends of ties till about fifteen yards from a little trestle which spans a ditch, when he jumped on the track and ran on the trestle. His leg went through and was broken above the knee. Horse pulled himself up, got over
(90) trestle and off the track. From where I first saw horse running along ends of ties, it was 200 yards to trestle; when horse fell through trestle he was still 100 yards ahead of train; along that part of track where horse was running there was a ditch on each side of the roadbed, and a bank outside the ditch; ditch was two feet deep and the bank a foot above the ditch—not room enough between the end of ties and ditch for a horse to turn around; horse could not have gotten off of right of way without jumping the ditch and bank. Near the trestle the ditch bends across the right of way and passes under the trestle. This ditch near the trestle was 12 feet wide and 6 feet deep. Between this ditch and the roadbed it is marshy. Horse could not have gotten off the roadbed near trestle on account of the marsh and the ditch. The roadbed on which horse was running is lower than the field —two or three feet. The train kept blowing its whistle. When the horse got to where ditch bends in towards trestle he jumped upon the track; when horse fell through, train slowed down some, and stopped a few steps before reaching trestle; the horse got off trestle about when the train stopped. The railroad runs straight through field. Where I first saw horse the ditch is two feet wide; it gets wider as it approaches trestle. Roadbed is in good condition."

D. O. Brinkley, the plaintiff, testified that the horse was ruined—worth $35. Ties on the trestle were 18 inches apart.

Defendant moved for judgment of nonsuit under act of 1897. Motion overruled. Defendant excepted.

The defendant then introduced evidence which it is not necessary for us to consider. The record further states as follows: Defendant, in apt time, requested the court to charge the jury that, from all
(91) the evidence, defendant was not guilty of negligence, and they should answer the first issue, No.

Refused. Exception. (Second exception.)

The court charged, among other things: If, when the horse began running along the roadbed, the engineer had reason to believe from the surroundings that the horse would probably run upon the trestle unless he should stop the train as soon as he reasonably could, and that by at once beginning to do so, he could stop the train at such a distance from

the trestle that the horse would probably not run upon it, then it was his duty to stop the train as soon as he reasonably could, and if he failed to do so he was negligent; and if by stopping the train as soon as it could be reasonably done, the injury would probably have been avoided, then this negligence was the cause of the injury, and the issue should be answered, Yes. To this instruction defendant excepted.

The court charged that upon no view of the evidence, other than that above set out, could defendant be found guilty of negligence, and that the burden was on plaintiff to prove the foregoing state of facts. Verdict for plaintiff.

On a motion for nonsuit the evidence for the plaintiff must be accepted as true, and construed in the light most favorable to him, as the jury might take that view of it if left to them, as in the case at bar they appear to have done. *Cox v. R. R.*, 123 N. C., 604; *Dunn v. R. R.*, 124 N. C., 252; *Powell v. R. R.*, 125 N. C., 370.

It is equally well settled, that, if, when so construed, there is more than a mere scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence. *Spruill v. Insurance Co.*, 120 N. C., 141; *Cogdell v. R. R.*, 124 N. C., 302; *Cowles v. McNeil*, 125 (92) N. C., 385.

We think there was sufficient evidence to be submitted to the jury. The only remaining exception is to the charge of his Honor as given above, and in that we see no error. There is not, and in the very nature of things there can not be, any fixed rule as to when an engineer shall blow his whistle. Ordinarily it is his duty to give warning, but having done so, we can not say that he must keep on blowing, regardless of consequences. The engineer is supposed to know the track, and if it is apparent that the horse can not get off, or that it would be contrary to his natural instincts to do so, it is evident that continued blowing would merely increase the danger. This is especially so when there is an open trestle ahead upon which the horse would naturally run in his fright, and across which he could not safely go. In such cases the engineer must use his common sense, and act like a man of ordinary prudence would under similar circumstances. Legal negligence is the absence of that degree of care which the law requires a man to exercise under the peculiar circumstances in which he may be placed for the time being. It is nearly always a mixed question of law and fact peculiarly within the comprehension as well as the province of the jury. We are not inadvertent to those cases in which it is held that the engineer has a right to presume that a man upon the track in his right senses will get off upon being warned of the approaching train; and it may be asked whether the law requires a greater degree of care for the protec-

tion of a brute. The law makes no such comparison, but it presumes that a human being has human intelligence, in the absence of any evidence to the contrary, and it knows that his physical characteristics, guided by that intelligence, will enable a man to extricate himself from dangerous situations in which a horse or cow would be helpless.

(93) But if a man is discovered in such circumstances of danger that he can not reasonably be expected to get off, then the engineer must stop in time. *McLamb v. R. R.*, 122 N. C., 862. While our attention has not been called to any case in which the facts are identical with those now before us, we think the principle is decided in *Snowden v. R. R.*, 95 N. C., 93, where a frightened horse fell into a cattle-guard. The judgment is

Affirmed.

Cited: Meekins v. R. R., 127 N. C., 36; *Bryan v. R. R.*, 128 N. C., 391; *Hood v. R. R.*, 129 N. C., 307; *Coley v. R. R., ib.*, 413; *Hall v. Electric R. R.*, 167 N. C., 286.

J. B. EDGERTON v. THE GOLDSBORO WATER CO., THE MAYOR, THE ALDERMEN, AND TREASURER OF GOLDSBORO.

(Decided 6 March, 1900.)

Waterworks — Necessary Municipal Expense — Illegal Taxes—Illegal Disbursement—Constitution, Article VII, Section 7—Injunction.

1. It is not one of the necessary expenses of a city or town government to furnish the city or town with a supply of water.
2. The fact that the charter said it should be the duty of the city authorities to supply the city with water, does not make it a necessary expense, nor abrogate Art. VII, sec. 7, of the Constitution, which requires the sanction of a popular vote, except for necessary expenses.
3. The illegal disbursement of taxes illegally collected may be restrained by injunction.

CLARK, J., dissenting.

(94) INJUNCTION to enjoin the payment by the city authorities of Goldsboro of a claim of the Goldsboro Water Company for water supply furnished under contract to the city, pending in WAYNE, and heard before *Robinson, J.*, at chambers in Goldsboro, on 9 January, 1900.

The plaintiff, as a taxpayer, claimed that the furnishing of a water

supply to the city was not a necessary expense, and was not incurred with the sanction of a popular vote, as required by the Constitution, Art. VII, sec. 7.

The defendants claimed that it was a necessary expense, and authorized and required by the city charter.

His Honor continued the temporary restraining order until the final hearing. Defendants excepted and appealed.

Allen & Dortch and Aycock & Daniels for plaintiff.
W. C. Munroe for defendants.

FURCHES, J. The plaintiff is a citizen and taxpayer of the city of Goldsboro, and brings this action to enjoin and restrain the city authorities from paying the defendant, the Goldsboro Water Company, $1,395, this being the semiannual rental for water supplies furnished the city of Goldsboro by said water company, which the plaintiff alleges that the defendant city of Goldsboro is about to do. The plaintiff alleges that this money was collected by the levy of taxes upon the citizens and property of said city, and can only be used and paid out for the lawful *necessary* expenses of the city government; that the furnishing of water to the city by the water company is not a (95) *necessary* expense of the city government; and that the same was wrongfully and unlawfully levied and collected, and that it would be unlawful to pay the same to the defendant water company; that defendant city was never authorized by any special act of the Legislature to levy any such tax or to collect the same, or to submit a proposition to the voters of said city, and that, in fact, no such proposition has ever been submitted or voted upon by said city.

It is admitted by defendants that said money was levied and collected as a tax on defendant city; that there has been no act of the Legislature authorizing a submission of the question to the vote of the people, and that no such vote has been taken. And it is not denied but what the city was about to make the payment, as alleged by the plaintiff.

But the defendant alleges and says that the charter of the city of Goldsboro provides (Private Laws, 1899, ch. 171, sec. 27): "That among the powers hereby conferred on the board of aldermen, they shall provide water, provide for repairing the streets," etc.; that this made it their duty to provide a supply of water for the city, and made water a legislative necessity, and did away with the requirement of Art. VII, sec. 7, of the Constitution; that so understanding the law the city contracted with the assignor of the defendant water company to furnish the city of Goldsboro a supply of water (as specified in said contract)

for the public use of the city and for the private use of its citizens—the citizens paying a stipulated price for the use of the water; that under the terms of the contract the city was to pay the water company $2,790 per year in semiannual installments, and the payment of the money sought to be enjoined is one of the semiannual payments; that upon these facts the court below granted the injunction, and the defendants appealed.

This presents a constitutional question—the power of the de-
(96) fendant city to levy, collect and pay out money. But it seems to us that it has been substantially decided by the recent adjudications of this Court. A city has no right to levy and collect a tax unless it has legislative power to do so. It has no powers except those given by legislative authority, in express terms or by necessary implication, in aid of express powers. 1 Dillon Mun. Corp., sec. 89, quoted with approval in *S. v. Webber,* 107 N. C., 962.

But it is contended by defendant, as the charter of Goldsboro provides that it "shall have power to provide water for the city," that this is an express legislative power, and, the power being conferred, the courts will not undertake to direct or supervise the manner in which this shall be done. It must be conceded that if the first proposition be true that it had the power to levy and collect the taxes, the second proposition is necessarily true, and the courts can not, and will not, undertake to supervise their action as to the manner of its execution, unless a manifest abuse of power be shown.

It has been held by this Court that where a town levied a tax in aid of the common schools of the town, under and within the provisions of an act of the Legislature not passed according to the requirements of the Constitution, such levy is void, for the reason that the act had not been passed as provided by Art. II, sec. 14, of the Constitution—common schools not being one of the necessary expenses incident to the corporate government. *Rodman v. Washington,* 122 N. C., 39.

The Court has also held that an electric light plant was not a necessary expense incident to the government of a town, and that an attempt to establish one by the city, to be paid for and supported by taxation, without having the required constitutional legislation, was *ultra*
(97) *vires,* and void. *Mayo v. Commissioners,* 122 N. C., 5.

It has been held by this Court that a waterworks plant was not a *necessary* incident to the administration of the city government, and that an effort to levy and collect a tax out of the city for that purpose, without having the required legislative power to do so, was unconstitutional and void. *Charlotte v. Shepherd,* 120 N. C., 141, and this opinion was cited with approval in *Mayo v. Commissioners, supra.*

From these authorities it must be held that it is not one of the neces-

sary expenses of a city or town government to furnish the city or town with a supply of water. And we do not understand the defendants to seriously contend that this is not generally so, although they cite *Tucker v. Raleigh,* 75 N. C., 271; *Smith v. New Bern,* 70 N. C., 14, and *Smith v. Goldsboro,* 121 N. C., 352. But it does not seem to us that these cases sustain the contention that the water contracted for in this case was a necessity to the town government. In *Tucker v. Raleigh,* it appeared that a part of the little account sued on was for cleaning and repairing public wells. This is covered by the case of *Spaulding v. Peabody,* 153 Mass., 129, cited with approval in *Mayo v. Commissioners, supra,* as being allowed by reason of ancient custom. The cases of *Tucker v. Raleigh* and *Smith v. Goldsboro,* are cited, discussed and disposed of in *Mayo v. Commissioners.* In *Smith v. New Bern, supra,* it is incidentally stated in the argument of the case that the city would have the right to bore an artesian well. If it had held that a city might have such a well, we do not think it would sustain the defendant's contention in this case. But that was not the point in that case and was in no respect necessary to its decision, and it could, at most, be regarded as no more than an *obiter.*

But it was contended with earnestness by the defendants that because the charter said it should be the duty of the city authori- (98) ties to supply the city with water, that this made it a necessary expense. We can not give our assent to this proposition. To put the most favorable construction upon this language, it can only mean that they should do so in a lawful way. To put the meaning upon this provision of the charter that defendants contend for, would be to destroy the provisions of Art. VII, sec. 7, of the Constitution, which provides that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the *necessary* expenses thereof, unless by a vote of the majority of the qualified voters therein."

If the Legislature had the power to make a thing *necessary* by saying that it should be done, or even saying that it was necessary, this wise provision of the Constitution would be utterly destroyed. It seems to us that this proposition is so self-evident that it needs no authority to support it. But we think it is sustained by *S. v. Webber, supra.* In that case it was attempted to make the owners of certain houses guilty of keeping a house of ill-fame, whether they occupied them or not. The court held this could not be done—that saying they were the keepers of such houses did not make them so. (See *S. v. Clay,* 118 N. C., 1234; *S. v. Thomas, ib.,* 1231).

The money sought to be enjoined has been collected, but it is still in

the possession and control of the city of Goldsboro. But if it has been illegally levied and collected, the wrongful paying it out may be enjoined. *Commissioners v. Snuggs,* 121 N. C., 394. If the authority of the city to levy and collect this tax was doubtful (which to us does not seem to be so) that doubt would have to be resolved against the defendants. 1 Dillon, *supra,* sec. 91 and note 2.

(99) We are therefore of the opinion that the levy and collection of this money was *ultra vires* and unconstitutional; that to pay it out to the waterworks company, as it is proposed to do, would be unconstitutional and unlawful, and for this reason the injunction should be continued as to the payment of this money to the defendant water company for water furnished the city of Goldsboro.

Holding, as we do, as to the question of power, we do not find it necessary to consider the question as to the quality of the water. The injunction, modified in accordance with the opinion, is continued.

Modified and affirmed.

CLARK, J., dissenting: Without now calling in question our decisions that waterworks are not a municipal necessity, I think that water for public sanitation and protection of public buildings is such necessity, and that when the Legislature of the State has required the town to procure water, to the above extent at least, it is a necessary purpose. "The courts have nothing to do with the wisdom, policy or necessity of statutes which require an exercise of the police power." *Chicago v. S.,* 53 Am. St., 557, 572, and notes; *Morris v. Columbus,* 66 Am. St., 243, and notes.

Cited: Slaughter v. O'Berry, post, 185; *Wadsworth v. Concord,* 133 N. C., 593; *Water Co. v. Trustees,* 151 N. C., 175.

(100)

W. D. C. RICHARDSON v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 6 March, 1900.)

Wrongful and Malicious Discharge—Breach of Contract—Punitive Damages—Demurrer to Evidence—Nonsuit.

1. Where no duration of employment is specified in the contract, the usual rule is that the contract can be ended at the will of either party.

2. Malice disconnected with the infringement of a legal right is not actionable.

3. Punitive damages are never given for breach of contract, except in cases of promise to marry.

ACTION for punitive damages ($10,000) for a malicious and wrongful discharge of plaintiff from service of defendant, heard before *Moore, J.*, at September Term, 1890, of WAYNE.

The cause assigned for the discharge of the plaintiff, a locomotive engineer, was the alleged *"burning of his engine"* by allowing the water to get too low in the boiler. This the plaintiff denied in his testimony given on the trial. At the conclusion of plaintiff's evidence, the defendant demurred thereto, and moved to nonsuit the plaintiff. Motion allowed. Plaintiff excepted, and appealed.

The salient points of plaintiff's evidence are referred to in the opinion.

Allen & Dortch and W. C. Munroe for appellant.
Geo. Rountree and Aycock & Daniels for appellee.

CLARK, J. This action is not for defamation, for there is neither allegation of publication nor of special damage, which are the gist of such actions. 8 English Ruling Cases, 382-404. Nor can it be sustained for maliciously inducing the Sea Coast Railroad Company (101) to discharge the plaintiff, because it is admitted that that was done, if at all, after this action was brought. The action is brought for punitive damages for a malicious and wrongful discharge. The written contract with engineers put in evidence by the plaintiff shows that no duration is therein specified. Where such is the case, the usual rule is that the contract can be ended at the will of either party. The plaintiff avers in his complaint that such contracts as to engineers are by custom to continue "during good behavior." It is unnecessary to consider whether or not this could be shown by custom (*Moore v. Eason,* 33 N. C., 568; *Morehead v. Brown,* 51 N. C., 367; *Brown v. Atkinson,* 91 N. C., 389), for the plaintiff's evidence does not show it. He testifies merely: "It is a custom (of defendant) to retain the engineers as long as they can render efficient services, even up to the time when old age renders them unfit for active service, when it is a custom to give them other employment which they can perform"—which is likely enough but which does not prove that an agreement to retain during good behavior is a part of the contract of employment—and the plaintiff's witness, Engineer Horne, testifies directly to the point that the engineers have a right to quit whenever they get ready, and the company has a right to discharge any engineer at any time without cause.

But upon the plaintiff's own showing, his discharge was within the

right of the defendant, and not wrongful, and malice disconnected with the infringement of a legal right can not be the subject of an action.

It is immaterial under our present system whether the action is construed to be in tort or *ex contractu*. There are many cases where an action for tort may grow out of a breach of contract, but punitive
(102) damages are never given for breach of contract, except in cases of promises to marry. *S. v. Skinner,* 25 N. C., 564; *Purcell v. R. R.,* 108 N. C., 414; *Solomon v. Bates,* 118 N. C., 315; Bishop Non-contract Law, 72-76. The evidence of a witness offered to construe the meaning of a written contract was properly excluded, and the other exceptions to evidence need no discussion. The demurrer to the evidence was properly sustained.

Affirmed.

Cited: Holder v. Mfg. Co., 138 N. C., 309; *Biggers v. Matthews,* 147 N. C., 303; *Barger v. Barringer,* 151 N. C., 439.

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(103)

J. S. COX, ADMINISTRATOR OF N. L. COX, v. THE NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 6 March, 1900.)

Fatal Injury—Negligence—Contributory Negligence—Approved Issues.

1. Approved issues, the natural outgrowth of the doctrine of *the last clear chance.*
   (1) Did the defendant negligently kill the plaintiff's intestate?
   (2) Was said intestate guilty of contributory negligence?
   (3) Notwithstanding such negligence on the part of the said intestate, could defendant, by the exercise of due care and prudence, have prevented the killing?
   (4) What damage has the plaintiff sustained?
2. The admission by plaintiff of the second issue in regard to contributory negligence still leaves the third issue not only proper, but necessary to be passed on.
3. The opinion of an admitted expert engineer, examined by plaintiff, as to the distance the figure of a man could be distinguished down the road at night, by headlight or starlight, admissible, especially when corroborated by an engineer, examined by defendant, and the result of an actual experiment made with the same view is also competent.
4. There is no error in the failure of the court to instruct the jury that the omission of the defendant to introduce a witness, under subpœna and present, should not be considered in rendering their verdict.

5. Where the sole question was one of fact, as to what extent a certain path was actually used by the public, the question of title is not involved.

6. The court is not required to charge in the very words of counsel, even when the prayer is correct.

ACTION to recover damages for the negligent killing of the intestate of plaintiff by defendant's train, tried before *Allen J.*, at November Term, 1899, of HALIFAX. (104)

Former trial of this cause, reported in 123 N. C., 604. The facts are essentially the same as appeared on the former trial.

The body of the intestate was found on the track, at Hobgood, between 12 and 1 o'clock at night, crushed and mutilated. The deceased had been drinking in the village and had started home that night, along a path used by the public which crossed the track.

The plaintiff contended that the intestate was drunk or asleep, and that the engine passed over him and killed him; that the engineer was not keeping a proper lookout, and did not sound the bell or blow the whistle, and that these were acts of negligence which caused the death of intestate. The plaintiff admits the contributory negligence of the deceased, but says, notwithstanding that, by the exercise of due care and prudence, the defendant could have prevented the injury; that by keeping a due lookout he could have seen the deceased in time to have stopped the train, notwithstanding the negligence of deceased.

The defendant, on the contrary, contended that the engineer was keeping a proper lookout; that he made a proper use of his signals, and that in some way unknown to the defendant the deceased was run over and killed by reason of his own negligence; that the condition of the pilot (cow-catcher) showed that no one could have been run over by the engine, and that the deceased was drunk, and must have gotten entangled in the train, after the engine passed him, and it was too late for the engineer to see him; that the blood on the wheels of the flat car and the hair on the wheels sustained this view of their contention. There were numerous exceptions to the charge of his Honor taken by defendant, none of which were regarded as tenable by (105) the appellate court, which held that the charge as a whole fairly presented the contentions of defendant, and correctly stated the law applying thereto.

The jury found the first and third issues in the affirmative, and assessed the plaintiff's damages at $2,500. Judgment accordingly. Defendant appealed to Supreme Court.

E. L. Travis, W. A. Dunn, and Claude Kitchin for plaintiff.
Thos. N. Hill and Day & Bell for defendant.

DOUGLAS, J. The essential facts in this case are practically the same as they were when the case was before this Court at its September Term, 1898, reported in 123 N. C., 604. Our opinion in that case settles many of the exceptions now brought up, and especially those relating to the sufficiency of evidence and the submission of issues. There are 37 exceptions by the defendant, one being numbered 13½, and it is manifestly impracticable to discuss each one separately. There was sufficient evidence on all the issues to go to the jury, and the issues have been too often approved by this Court in similar cases to be any longer subject to serious question. Their form was substantially suggested by this Court in *Denmark v. R. R.*, 107 N. C., 185, 189; and, in fact, they are the natural outgrowth of the doctrine of the last clear chance.

This doctrine, first distinctly announced in *Davies v. Mann*, 10 M. & W., 545 (Exc.), was adopted in this State in *Gunter v. Wicker*, 85 N. C., 310, and has now become the settled rule of this Court.

(106) *McLamb v. R. R.*, 122 N. C., 862, 883. See, also, *Inland Coasting Co. v. Tolson*, 139 U. S., 551; *Fulp v. R. R.*, 120 N. C., 525.

As the plaintiff admitted contributory negligence, the third issue, which the defendant sought to have withdrawn, was not only proper, but necessary.

It is as follows: "3. Notwithstanding such negligence on the part of the said intestate, could the defendant, by the exercise of due care and prudence, have prevented the killing?"

We see no error in the admission of Smith's testimony, which was substantially corroborated by the engineer Sanford, a witness for the defendant. The witness Cox testifies that he had made certain experiments to see how far down the track a man could be seen. This was objected to by the defendant, but we think was competent as presented to us in the record. *S. v. Graham*, 74 N. C., 646.

We see no error in the failure of the court to instruct the jury that the omission of the defendant to introduce one Massey as a witness should not be considered in rendering their verdict. *Fowler v. Insurance Co.*, 74 N. C., 89; *Goodman v. Sapp*, 102 N. C., 477; *Hudson v. Jordan*, 108 N. C., 10; *S. v. Jones*, 77 N. C., 520.

The authorities cited by the defendant as to what is a public road have no bearing, as there is no question of title involved. The sole question is one of fact as to what extent the path is actually used by the public as tending to affect the degree of care required of the defendant under existing circumstances.

The defendant contends that the plaintiff should not recover because it says there is evidence tending to show that the deceased walked into the train instead of the train running into the deceased. This involves

a question of fact which the jury found it difficult to believe. (107) We think the charge as a whole fairly presented the contentions of the defendant and correctly stated the law applying thereto. The court is not required to charge in *ipissimis verbis* of counsel even when the prayer is correct. *Norton v. R. R.*, 122 N. C., 910, 933.

The other exceptions of the defendant are, in our opinion, equally untenable, and therefore the judgment is

Affirmed.

FAIRCLOTH, C. J., dissents.

Cited: Bogan v. R. R., 129 N. C., 157; *McCall v. R. R., ib.*, 300; *Harris v. R. R.*, 132 N. C., 163; *Ray v. Long, ib.*, 893; *Lloyd v. Bowen*, 170 N. C., 219.

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(108)

HUYETT & SMITH MANUFACTURING CO. v. S. H. GRAY.

(Decided 6 March, 1900.)

Petition to Rehear—Measure of Damage—Amendment—Counterclaim —Recoupment—The Code, Section 965.

1. In a counterclaim, a cross action is distinguished from recoupment under the former practice; where the property has been accepted by the buyer, such as machinery, the rule of damage is the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty.
2. Where, however, the answer (paragraph 5) alleges that the machinery, if as warranted, would have been reasonably worth $2,337, the contract price, and there was evidence only to that effect, there was no detrimental error in holding that the defendant could not recover more than the difference between the contract price ($2,337) and the value of the machinery ($1,500) when received.
3. An amendment to paragraph 5 of the answer by striking out $2,337 and substituting $3,500, asked for by the defendant (petitioner) under section 965 of the Code, can not be allowed, as it is apparent that to allow the amendment would not conform the record to the facts developed on the trial below, and would be unfair to the Court above, which decided the case upon the record as it then stood a year ago.

PETITION of defendant to rehear.

Simmons, Pou & Ward and O. H. Guion for petitioner.
W. D. McIver, contra.

FURCHES, J. This case was before us at February Term, 1899, and is reported in 124 N. C., 322. It is here now on a petition to rehear, restricted to a discussion of the measure of damages.

When it was here before, the defendant's answer contained the following paragraph: "5. That if said apparatus and machinery had been as warranted, it would have been reasonably worth the sum of (114) $2,337, whereas the said machinery, in the condition as it was, in reality was worth nothing."

The plaintiff filed a replication to the defendant's answer, setting up a counterclaim for damages, for breach of warranty, and on the trial the plaintiff offered in evidence the fifth paragraph of defendant's answer, quoted above. The only evidence the defendant offered on the trial as to the value of the machinery, and as affecting the question of damage, was that of D. R. Tilford, who testified as follows: "If the dry kiln had been all right, or what the contract called for, it would have been worth fully $2,337, the contract price." Of course the record is now the same it was on the former hearing, and it is too plain for argument that upon this record, answer, and evidence, the defendant could not recover more than the difference between the contract price ($2,337) and the value of the machinery ($1,500) when received.

This is what was held by the Court when the case was here before, and the defendant being met with these facts, saw his difficulty, and conceded that he could not get along with this record. He then moved the Court to be allowed to amend the record by striking out $2,337, in paragraph 5, and inserting $3,500. This motion is made under section 965 of the Code. This section of the Code does seem to authorize this Court to allow amendments, by making formal parties, or by making formal amendments as to description and such like matters, in the furtherance of justice, when it is apparent that such amendments can work the parties no harm, and only makes the record conform to the facts developed on the trial of the case.

But there are two objections to allowing the amendment in this case —one is, that it would allow the amendment of a record in a case heard a year ago, for the purpose of enabling the defendant to (115) assign error in the opinion of the Court rendered upon that hearing. But there is another reason why we can not allow the amendment asked for, and we prefer to put our refusal upon this ground; that is, that it is apparent to us that to allow the amendment would not be to make the record conform to the facts developed on the trial below, but would be in contradiction of the evidence adduced on the trial below, and the theory upon which the trial must have proceeded. Therefore, we can not allow the motion to amend, nor the petition for a rehearing. As the case went back for a new trial upon the

opinion of the Court when here before, our ruling upon the motion to amend and the petition to rehear will not materially affect the defendant's rights, as he may renew his motion to amend in the court below, and it will then be a matter for the discretion of that court.

But the discussion of the matter has called to our attention the opinion delivered in this case as to the rule by which damages are to be ascertained, and while the ruling is correct as to this case, upon the pleadings and evidence, we are of the opinion that it is not correct as a general proposition of law.

The writer of that opinion and of this fell into this error in treating the action as at law under the old practice, and the defendant's answer as a defense—a recoupment—when it should have been treated as a counterclaim—a cross action. Thus treating the answer, the rule of damage, as we understand it (where the property has been accepted by the buyer as in this case), and the property purchased is machinery (as in this case) is the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty. *Marsh v. McPherson,* 105 U. S., 709, cited by defendant's counsel.

This we say as a matter of justice to the parties, and also for (116) the purpose of correcting an error on the first opportunity we have of doing so. While the opinion delivered at February Term, 1899, is the opinion of the whole Court, the writer of the opinion, as then delivered, thinks it is proper that he should write the opinion correcting the error, as it may be that he is more responsible for the error than the other members of the Court.

Motion to amend denied, and the petition to rehear
Dismissed.

Cited: Mfg. Co. v. Gray, 129 N. C., 440; *Critcher v. Porter Co.,* 135 N. C., 547; *Parker v. Fenwick,* 138 N. C., 218; *Mfg. Co. v. Oil Co.,* 150 N. C., 151; *Cable Co. v. Macon,* 153 N. C., 152; *Underwood v. Car Co.,* 166 N. C., 462; *Winn v. Finch,* 171 N. C., 276.

A. J. WYNN v. GRANT BEARDSLEY, SUPERINTENDENT OF ROADS.

(Decided 6 March, 1900.)

Road Law of 1899, Chapter 581—Superintendent for Warren County—Injunction—Mode of Procedure.

1. Where the county superintendent of roads was proceeding irregularly to locate a public road for his county, the court will correct the irregularity, but will not enjoin the procedure under act of 1899, ch. 581.

2. The proper course of proceeding, under the act, indicated.

INJUNCTION to enjoin the defendant, superintendent of roads of Warren, from locating, constructing and maintaining a public road upon lands of plaintiff, under act of 1899, ch. 581, pending in WARREN and heard at chambers, before *Bowman, J.*, 10 October, 1899, who adjudged that the restraining order be continued until the final hearing.

Defendant excepted and appealed. The requirements of the act, and the facts of the case, are recited in the opinion.

(117) *Cook & Green and Gilliam & Gilliam for plaintiff.*
Pittman & Kerr and H. A. Boyd for defendant.

FAIRCLOTH, C. J. This action is instituted to restrain the defendant from further proceeding under the act of 1899, ch. 581, entitled "An act to provide for the better working of the public roads and highways of the State." The act is elaborate in details, and the defendant is superintendent of roads for Warren County, where this action is pending. Section 1 provides for a tax levy to construct and maintain roads. Section 2 makes it the duty of said superintendent, subject to the approval of the board of county commissioners, to supervise, direct, and have charge of the maintenance and building of all public roads in the county, and submit to the board of commissioners a monthly report of the work in progress, etc.

SEC. 12. "That, subject to the approval of the board of county commissioners, the county superintendent of roads is hereby given discretionary power, with the aid of a competent engineer or surveyor, to locate, relocate or change any part of any public road where, in his judgment, such location, relocation or change will prove advantageous to public travel."

It then provides for the assessment of damage by jury, and for notice and the right to appeal, etc.

It appears that said superintendent, at the request of a large number of neighboring citizens, was proceeding to locate a road over the land

of the plaintiff and others, aided by a surveyor, and with the approval of the commissioners, when he was enjoined by an order from further action. It does not appear that anything has been done material to the construction or building of the road. The surveyor says: "That a few wild persimmon trees may have been trimmed in opening and laying off said road, but affiant saw no other fruit trees on the (118) ground laid off for said road, and he believes there are none."

T. P. Wynn says: "Nothing has been done in the way of laying off the proposed road other than the plowing of two furrows about four hundred yards through a cleared field." A. J. Wynn, the plaintiff, says: "That said road has not yet been constructed upon his land, but that said defendant has entered upon a portion of the same, ploughed a part." It appears that the defendant reported to the board the line of the road which he proposed to follow, and asked the approval of the board, if in his *discretion* the necessity and advantage of the road should be made apparent. The board of commissioners approved the proposed plan and ordered the superintendent to proceed "according to law." This was irregular, and not agreeable to the procedure prescribed by the act. As said act applies, or may apply, to a large number of counties, it may not be improper for this Court now to point out in general terms the proper course of proceeding under this act.

1. The superintendent with a surveyor, in his discretion, on his own motion or at the request of other citizens of the county, should go upon the lands over which he proposes to place the road, and locate the same without unreasonable damage to the premises, make a survey, fixing definitely the termini and the metes and bounds, and make a report of the same to the board of commissioners in meeting. It would be reasonable that the landowners be notified of the time and place of such meeting, and that they be heard. If the board approves the report and makes a record thereof, the road thus located becomes a public road, and the board should direct the superintendent to construct and build it. When the road is completed and reported, the landowner, if he claim damages, should, within thirty days thereafter, petition (119) the board for a jury to assess his damage as prescribed in section 12, and when the jury have reported their assessment, the board will provide for payment of the same in any manner allowed by law. In the argument here, several questions were discussed, but none except the above are now in order to be considered by this Court. We think the injunction was erroneously granted, and that it must be vacated. To that end let this opinion be certified.

Reversed.

Cited: Griffin v. R. R., 150 N. C., 315.

STATE EX REL. WILLIAM W. DOWTIN v. GRANT BEARDSLEY.

(Decided 13 March, 1900.)

Quo Warranto—Title to Office of Superintendent of Roads of Warren County—Two Offices—Constitution, Article XIV, Section 7—Laws 1895, Chapter 449; 1897, Chapter 93; 1899, Chapter 581.

1. One man may not hold two offices under Constitution, Art. XIV, sec. 7.
2. The Legislature may attach additional duties to an existing office, and it may afterwards lop off those duties and assign them to a new office, leaving the original office as it was before the additional duties were attached to it.
3. Where the Legislature by acts of 1895 and 1897 enacted that the county surveyor of Warren should be *ex officio* supervisor of the highways of said county, and designated duties and provided for compensation, but afterwards by act of 1899, created a separate office, that of superintendent of roads of Warren, and assigned to him the additional duties, leaving the original office of county surveyor untouched, the county surveyor must acquiesce, and not claim both offices.

(120) ACTION, in the nature of *quo warranto,* to try the title of defendant to the office of superintendent of roads of Warren, tried before *Bowman, J.,* at September Term, 1899, of WARREN.

Judgment was rendered in favor of the plaintiff, and defendant excepted and appealed.

Cook & Green and T. N. Hill for plaintiff.
Pittman & Kerr for defendant.

CLARK, J. Laws 1895, ch. 449, and 1897, ch. 93, imposed the duty of road supervision in Warren County upon the county surveyor. The act of 1899, ch. 581, established a new system of road construction and supervision, general in its character, and embracing many counties, among them Warren County. It created for each of the coun-
(121) ties embraced in the act the new office of superintendent of roads.

The plaintiff, county surveyor, who has been discharging the additional functions of supervisor of roads, contends that the defendant, who has been elected superintendent of roads, is exercising a part of his office, and receiving emoluments to which he is entitled.

When, under the acts of 1895 and 1897, the duties of road supervision (under the system then in force) were laid upon the county surveyor, there was no office of supervisor of roads created, for if so the county surveyor could not have taken it. He could not fill two offices. Constitution, Art. XIV, sec. 7. The acceptance of the second office would

vacate the first. The duties of road supervision were simply duties temporarily annexed to the office of county surveyor, and which the Legislature could take away at will. When in its wisdom it saw fit to establish a new system of road supervision with wider powers, requiring the entire attention of one person, and the creation of an office for the purpose, the Legislature could not be hindered in the discharge of that essentially governmental function by the fact that a previous Legislature, under a less extensive system of road management, had given its supervision to the county surveyor.

With these duties attached by former Legislatures lopped off, the plaintiff still remains county surveyor, with every duty and every right belonging to that office untouched. It does not appear in the record how much emolument the additional duties of road supervisor brought to the county surveyor. It is found by the jury that the office of county surveyor *per se* is worth but $5 per annum, and that the new office of superintendent of roads, with its broader duties, and presumably increased emoluments, is worth $406. Doubtless the incidental duties of road supervision of the old system cast upon the county (122) surveyor were worth much less, but whatever the amount of compensation the duties were merely incidental and no part of the office of county surveyor, and when taken off in the establishment of a new system of roads he is still county surveyor, with all the functions and emoluments of that office undiminished.

"Upon the admissions in the pleadings and issues found by the jury," the court below rendered judgment for the plaintiff. The issues were as to immaterial matters, not affecting the rights of the parties. Upon the admissions in the pleadings, judgment should be entered for the defendant.

Reversed.

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(123)

MATTHEW VICK ET AL. v. FREEMAN VICK AND GIDEON D. VICK.

(Decided 13 March, 1900.)

Partition—Tenants in Common—Equitable Interest in Land—Parol Agreement—Statute of Frauds—Estoppel—Parent and Child—Heirs.

1. While children, the mother being still alive, have no estate in her land, and can not convey the same by deed, yet they have an expectancy in the land, that they could sell and bind themselves to convey, at their mother's death, if made in writing, so as to avoid the statute of frauds.

2. If two of the children purchase and take a deed from the other children for the latters' interest in their deceased father's land, upon the consideration

that they will claim no interest in their mother's land at her death, and this by a parol agreement, equity will not allow them to hold both.

3. While at the death of the mother, the children all become her heirs, and are tenants in common of her land, the two purchasers will have an incumbrance on their shares in favor of the other children to the value of their interest in their father's land, at the time of conveyance.

4. If not otherwise adjusted, the court in a proceeding for partition will decree a sale, and charge the shares in the proceeds of sale of the two purchasing children with the incumbrance accordingly, when ascertained; and the pleadings may be conformed to this ruling by either side.

5. No estoppel upon the defendants is involved in the case, either by record, or by deed, or *in pais;* as a breach of promise *to do a thing* is no estoppel.

SPECIAL PROCEEDING for partition of land, transferred from the clerk to the civil issue docket, and heard before *Moore, J.,* at Spring Term, 1899, of NASH.

Judgment in favor of plaintiffs. Appeal by defendants.

C. M. Cooke & Son and J. B. Batchelor for plaintiff.
F. S. Spruill for defendant.

(125) FURCHES, J. The plaintiffs and defendants are the children and heirs at law of Gilley Vick, who died intestate, seized of the land in controversy. But the plaintiffs claim that they, alone, are the equitable owners of the land, and bring this proceeding for partition of the same. They allege that, while the defendants are children and heirs at law of their mother, they are not entitled to any part of this land. They allege that their father, R. Vick, was the owner of a tract of land containing about sixty acres, worth five or six hundred dollars, and their mother, Gilley Vick, was the owner of another tract of about one hundred and forty acres; that after the death of their father and before the death of their mother, the plaintiffs sold their undivided interest in the 66-acre tract, inherited from their father, to the defendants for and in consideration of the defendants' interest in their expectancy in their mother's land; that in pursuance of this contract the plaintiffs made and executed to the defendants their joint deed conveying to the defendants their interest in the 66-acre tract; but, through inadvertence, or from the fact that they had entire confidence in the good faith and honest purpose of the defendants not to claim any interest in the land owned by their mother, they did not require defendants to make any deed or to give them a written contract to do so, and none was ever made. But defendants entered upon the 66-acre tract soon after the date of the deed from plaintiffs, which has been more than twenty years ago. And their mother, the said Gilley Vick, remained in possession

of her land until her death, and the plaintiffs have been, and remained, in possession thereof since her death.

The evidence introduced by the plaintiffs seemed to sustain their contention, and the facts as stated above, and the defendants offered no evidence.

The only issue submitted by the court was as follows: "Are (126) defendants G. D. Vick and Freeman Vick tenants in common with the plaintiffs of the 140-acre tract of land?"

There were other issues tendered by the plaintiffs, but not submitted by the court. Had these issues been submitted, a finding upon them might have enabled us to dispose of the case upon this appeal. But from the view we take of it, we will not be able to do so, and the case will have to go back for a new trial.

The 66-acre tract having belonged to the father, became the land of plaintiffs and defendants by descent, upon his dying intestate, and plaintiffs had the right to sell and convey the same. But the mother still being alive, her children had no estate in her land, and could not convey the same by deed. But they had an expectancy in the land that they could sell and bind themselves to convey, at their mother's death, if made in writing, so as to avoid the statute of frauds. *Mastin v. Marlow,* 65 N. C., 695; *McDonald v. McDonald,* 58 N. C., 211. So, if the contract stated by plaintiffs, and which seems to be sustained by the evidence, had been reduced to writing and signed by defendants, it might have been enforced. But as this was not done it cannot be enforced, as it is denied, and the statute of frauds is relied on. *North v. Bunn,* 122 N. C., 766. Still, the defendants had an interest—an expectancy—that they could sell, and which it appears they did sell to the plaintiffs. it is true that this contract can not be enforced, as it was for an interest in land, and is not in writing. But by means of this contract and agreement on the part of defendants to convey their interest in the land of their mother, they induced the plaintiffs to convey to them their interest in the 66-acre tract, which the plaintiffs had inherited from their father, in consideration that defendants would convey to them their interest in their mother's land. The defendants still have (127) this land, or the proceeds thereof, having, as it appears, sold it many years ago, and equity will not allow them to hold both—the 66-acre tract conveyed to them by plaintiffs, and the land they contracted to convey to the plaintiffs upon the death of their mother. *Vann v. Newsome,* 110 N. C., 122.

While the defendants are still tenants in common with the plaintiff of the 140-acre tract now in litigation, and while the plaintiffs can not compel them to convey it to them, equity will not allow them to oust the plaintiffs of their possession until they pay the plaintiffs the value

of plaintiffs' interest in the 66-acre tract, conveyed to them, at the time plaintiffs conveyed. *Vann v. Newsome, supra; Pass v. Brooks,* 125 N. C., 129; *Griffin v. Albea,* 22 N. C., 9.

The question of interest on the purchase money, or price of the 66-acre tract, is not involved, as it must have been taken into consideration at the time the trade was made with defendants that plaintiffs could not get possession of the 140-acre tract until the death of their mother. And it seems that they have been in possession since, or are entitled to receive the rents and profits since the death of their mother, unless the defendants make good to them the price of the 66-acre tract; and then, they would only be entitled to four-sixths of the rent since their mother's death.

The defendants are tenants in common with plaintiffs of the 140-acre tract, but with an incumbrance on their shares in favor of plaintiffs to the value of plaintiffs' interest in the 66-acre tract, at the time plaintiffs conveyed to them.

This being so, the defendants, if so advised, may have the pleadings amended by a consent of the parties or by leave of the court, so as to present the facts necessary to find what was the value of plaintiffs' interest in the 66-acre tract, at the time of the sale to the defend-
(128) ants, and to order a sale for partition. And that defendants' interest be charged with the amount of the value of plaintiffs' interest in the 66-acre tract in favor of plaintiffs, and that defendants should only have the residue of their two shares after paying off and satisfying said incumbrance. But if defendants will do neither—will not make good the value of plaintiffs' interest in the 66-acre tract, nor take the proper steps to have the same ascertained, and for a sale and application of a sufficient amount, out of their two-sixths interest, to pay plaintiffs for their interest in the 66-acre tract, then the plaintiffs may ask such relief, that is, to have the value of their interest in the 66-acre tract found, at the time of the sale to defendants; and to have a sale for partition, with a decree that a sufficient amount of defendant's two sixths shall first be applied to pay such charge.

We do not think the defendants' exceptions to evidence can be sustained.

The 140 acres in controversy, though not the land owned by the mother at the time of the sale, seems to be land taken in exchange for that tract, and falls within the equity of the case. In fact, the learned counsel who argued the case in this Court did not seem to lay stress upon that fact.

There was error in the court's holding that the defendants were estopped, as we know of no rule of estoppel that authorizes this ruling; there was no record to estop the defendants; there was no deed to estop

them, as they had made no deed; and there was no estoppel *in pais,* or equitable estoppel as it is sometimes called, as a breach of promise *to do a thing* is no estoppel. For this error and others not specially pointed out in the opinion, there must be a

New trial.

Cited: *Faircloth v. Kenlaw,* 165 N. C., 231.

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(129)

O. L. ELLIS, ADMINISTRATOR C. T. A. OF LUCY H. MASSENBURG, AND WILLIAM E. MASSENBURG, WILLIAM P. MASSENBURG, J. A. NORWOOD AND WIFE, M. S. NORWOOD, I. G. KING AND WIFE, BETTIE KING, B. B. MASSENBURG AND MARY M. PERRY, HEIRS AT LAW OF LUCY H. MASSENBURG, THE SAID MARY M. PERRY BEING ALSO A CREDITOR, AND SUING FOR HERSELF AND ALL OTHER CREDITORS, v. W. K. MASSENBURG, LILLIAN A. MASSENBURG, WIFE OF B. B. MASSENBURG, AND B. B. MASSENBURG, GUARDIAN AD LITEM OF W. K. MASSENBURG.

(Decided 13 March, 1900.)

Guardian ad Litem—Guardian ad Litem Nunc Pro Tunc—Rights of Infants; Their Legal Protection.

1. A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants.
2. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the court, do not relieve the impropriety of his appointment as *guardian ad litem,* so long as his name appears on the plaintiff side of the docket.
3. Such is the solicitude of the court to protect the interest of an infant defendant at every stage of the proceeding, that it disapproves the appointment of such guardian, *nunc pro tunc,* lest the infant be bound by something already done, when it had no opportunity for defense.
4. A strict compliance with the law, when dealing with the rights of infants and married women, is strongly impressed upon the profession.
5. When the essential facts appear upon the face of the record, they are not affected by the recital in the judgment.

CLARK, J., did not sit.

ACTION to vacate a deed of gift made by Mrs. Lucy H. Massenburg to the wife and children of her son, B. B. Massenburg, on the alleged ground that the grantor was largely indebted beyond the value of her remaining estate, so that the deed was in fraud of the rights (130) of creditors, and void; heard before *Hoke, J.,* and a jury at October Term, 1899, of FRANKLIN.

The action was instituted at the instance of Mrs. Mary M. Perry, who claimed to be a creditor for a large amount, and she was one of the heirs at law. The other heirs at law of Mrs. Lucy H. Massenburg, including her son, B. B. Massenburg, also appear as plaintiffs, although they object that their names were so used without their consent—the record does not show that their names were stricken out.

(133) *B. B. Massenburg for appellant.*
Cooke & Son and F. S. Spruill for appllee.

DOUGLAS, J. This is an action to set aside a deed made by Mrs. Lucy H. Massenburg to the wife and children of her son, B. B. Massenburg. The only consideration named in the deed is the nominal sum of $5, and love and affection. The plaintiffs contend that at that time the grantor was largely indebted beyond the value of her remaining estate, and that therefore the said deed is void as to creditors. The plaintiffs are the administrator and heirs at law of the grantor, including B. B. Massenburg, while one of the heirs is the complaining creditor, in whose interest the suit appears to have been brought. With the exception of this creditor, all the heirs disclaim any interest in the suit and allege that the use of their names as plaintiffs was wholly unauthorized; but their names were not stricken out, and they still appear as plaintiffs of record. B. B. Massenburg, one of such plaintiffs, was appointed guardian *ad litem* for his children, the infant defendants. This we think was a fatal error which can not be cured by any evidence of good faith or want of injustice. It makes no difference that Massenburg accepted and answered for one defendant and refused to act for the others. While he re-
(134) mained even a nominal plaintiff of record he was utterly disqualified to appear for any of the infant defendants. The fact of his partial acceptance of an unlawful trust, and even its most faithful performance, does not alter the principle. We do not mean to impute in the slightest degree bad faith to any one, certainly not to Massenburg, who is defending the interests of his children with an energy and tenacity worthy of a father's love; but for some purpose of her own the complaining creditor made him a plaintiff, and she must now abide by the legal results of her act.

The court has no higher duty than the protection of infant defendants, and there can be no trust more sacred than that of a guardian, who must be absolutely free from any interest or motive that can possibly interfere with the faithful performance of his duties. If he has any interest at all in the suit it must be thoroughly consistent with that of his wards. Even his attorney must be equally disinterested, and a mere colorable interest is a sufficient disqualification for either, if at all

adverse. *Moore v. Gidney,* 75 N. C., 34; *Molyneux v. Huey,* 81 N. C., 106, 113; *Arrington v. Arrington,* 116 N. C., 170, 179; *Cotton Mills v. Cotton Mills,* 116 N. C., 647, 652. We think that this rule is analogous to that forbidding a trustee to deal with himself, which, founded upon natural justice and public policy, has become too firmly imbedded in our jurisprudence by repeated decisions to need citation of authorities.

We may say here that the object of the appointment of a guardian *ad litem* is to protect the interest of the infant defendant, to which protection he is entitled at every stage of the proceeding; and we can not approve of an order appointing a guardian *ad litem nunc pro tunc.* If it is sought thereby to bind the infant by something already done when he had no opportunity for defense, it is manifestly (135) unjust; while if it has no such effect we can see no necessity for making it retroactive.

We can not too strongly impress upon the profession the necessity, and certainly the advisability, of a strict compliance with the law when dealing with the rights of infants, and, we may add, of married women. In the case at bar there can be no question of estoppel, as our decision is not based upon any supposed right or exemption of B. B. Massenburg himself, but purely upon the absolute necessity of affording the proper legal protection to the infant defendants. As the essential facts clearly appear upon the face of the record, they are not affected by the recitals in the judgment.

As we feel compelled to order a new trial, we do not deem it necessary to pass upon all the exceptions, which may not come before us again, or may come in a different light; but we think that the issue should have been framed so as to show whether Mrs. Massenburg, when she made the deed, retained property of sufficient value at that time to pay all her indebtedness. In other words, the issue should relate to her pecuniary condition at the time of making the deed.

New trial.

Cited: Holt v. Zigler, 159 N. C., 278.

(136)

BEACOM BROS. v. D. L. BOING.

(Decided 13 March, 1900.)

Cropper—Crops—Crop Lien — Abandonment by Cropper — Landlord —Merchant.

1. When a cropper abandons the crop before maturity, he forfeits all interest in the crop, which becomes fully the property of the landlord.

2. The contract of a cropper is an entire one, and when he fails to perform his part in full, he can not recover anything for the part performed.

3. When the cropper gives a lien to a merchant for supplies to be furnished and afterwards, without legal excuse and against the consent of the landlord, abandons the crop and fails to perform his part, he loses his interest in the crop and all right to a division of it; and there is nothing left for the lien of the merchant to operate on, and his lien on the cropper's share ceases with it necessarily. *Thigpen v. Leigh*, 93 N. C., 48.

ACTION, heard on appeal from the justice's court before *Hoke, J.*, at October Term, 1899, of VANCE. The defendant was sued "to answer the complaint of plaintiffs for the unlawful and wrongful detention of certain cotton and tobacco belonging to C. E. Pegram and J. Stallings of the value of $25, upon which plaintiffs have a valid mortgage, and which have been demanded by said plaintiffs and the demand refused."

There was a verdict in favor of plaintiffs for one-half net amount defendant admitted to be the value of the entire crop detained by him, to wit, $11.48. Upon the evidence adduced, the defendant asked his Honor to charge that the plaintiffs could recover nothing, which his Honor declined to do. Defendant excepted.

Judgment in favor of plaintiffs for $11.48 and costs. De-
(137) fendant appealed. The evidence is fully given in the opinion, and need not be recapitulated.

A. C. Zollicoffer for plaintiff.
T. T. Hicks for defendant.

MONTGOMERY, J. The defendant, as agent of his wife, rented her tract of land known as the "Ward Place," for the year 1898, to C. E. Pegram and J. Stallings for one-half of the crop as rent, the owner to furnish the team and implements. The croppers during that year executed to the plaintiffs a chattel mortgage on their crop to secure their note given for supplies, to be furnished to them by the plaintiffs, with which to make the crops. In June of that year, the croppers Pegram and Stallings abandoned the crop and left the premises. After all these occurrences, John J. Pegram, father of C. E. Pegram, had a conversation with the defendant—defendant's wife being present—concerning the crop and rental, and it was agreed between them that J. P. Pegram was to "take charge of the crop and work it, and witness and Boing agreed that witness J. J. Pegram should work the crop till it was matured, and pay off the plaintiff's mortgage for supplies advanced, pay one-half the fertilizer, and defendant was to furnish witness the team and to get one-half the product." The larger part of the supplies

had been furnished the original croppers while they were on the place, and the balance was furnished to J. J. Pegram after the new arrangement had been made. The crops were cultivated, according to the new agreement by J. J. Pegram until their maturity, and they were gathered in sufficient quantities to pay off the debt for fertilizers, and then Pegram was ordered off the land, and forbidden to come back for any purpose, the defendant at the same time taking into his pos- (138) session all the crops then remaining on the land.

This action was brought in the court of a justice of the peace, as appears from the summons, to recover a certain part of the crop belonging to C. E. Pegram and J. A. Stallings, which the plaintiffs claimed was applicable to their mortgage and which was wrongfully detained by him. The summons, the issues and the evidence all show that the case was tried in the Superior Court on the theory that the chattel mortgage was valid and subsisting, and that it was kept in force by the new agreement made between the defendant and J. J. Pegram.

In its present form the action can not be maintained. When the original croppers abandoned the crops, they at the same time forfeited all interest in them, and the crops became fully the property of the defendant's wife, and there was nothing left on which the mortgage of the plaintiff could operate. The contract between the defendant and the original croppers was an entire one, and the croppers, when without legal excuse and against the consent of the defendant, they refused to perform the remaining part, can not recover anything for the part performed. *Thigpen v. Leigh,* 93 N. C., 48, is exactly in point. There the Court said: "Thigpen, by his advancements to Riddick, who was a cropper, acquired no right of property in the crop planted and cultivated by him, but only the right to have his advances repaid out of that part of the crop that might fall to Riddick's share thereof on a division between him and the defendant. But Riddick, by his abandonment of the crop and his failure to perform his part of the contract, had lost his interest in, and all right, to a division of it. There was then nothing left upon which the lien of Thigpen could operate, and out of which his demand could be satisfied. Riddick's right to a share of the crop having ceased, Thigpen's lien on the share (139) necessarily ceased with it."

It appears in the record in this case that an order was entered that J. J. Pegram should be made a party-plaintiff, but the order was not carried into effect. If it had been, however, the present plaintiffs could not have been benefited thereby in the present form of the action, for whatever rights either J. J. Pegram or the plaintiffs may have in the crops or in the proceeds of their sale now in the hands of the defendant arose out of the terms of the new agreement made between the defendant

and J. J. Pegram. From this view of the case it is unnecessary for us to consider the other interesting questions raised on the trial. The judgment must be

Reversed.

SAMUEL OWENS v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 13 March, 1900.)

Railroad Passenger—Arrest on Train—Conductor—His Duty—and What Not.

1. While a railroad company must afford protection and safety to its passengers against assaults, insults and ill-treatment from fellow-passengers, strangers, and its own servants, it would be vain and unreasonable to require its conductor to resist a known officer of the law from making an arrest.
2. The mere pointing out to the sheriff by the conductor of a passenger, indicated in a telegram to the sheriff from a South Carolina sheriff, as a party suspected of a capital offense, does not render the railroad company liable for false arrest.

ACTION for damages for false arrest of plaintiff while a passen-
(140) ger on defendant's train, tried before *Brown, J.*, at July Term, 1899, of GRANVILLE. At the conclusion of plaintiff's evidence, his Honor, upon motion of defendant, ruled that plaintiff could not recover. Nonsuit, and appeal by plaintiff. The evidence is stated in the opinion.

Winston & Fuller, S. H. MacRae and Boone, Bryant & Biggs for plaintiff.

George M. Rose and A. W. Graham for defendant.

FAIRCLOTH, C. J. The plaintiff purchased a ticket in South Carolina over defendant's railroad to Selma, N. C., and was seated in defendant's car, and, without fault or blame in his deportment, was arrested on arrival at Fayetteville by the sheriff of Cumberland County, and his armed posse, taken off the train and incarcerated for two days, when he was tried for an alleged crime, acquitted and discharged. Before the arrival of the train at Fayetteville, the sheriff was notified by telegram from the sheriff of Kingstree, S. C., that the plaintiff and two others were on that train, and that they were suspected of having committed a capital offense in South Carolina. The sheriff was directed in said telegram to "arrest them--conductor will point out." The plaintiff

testified: "The conductor was in the car, sheriff and policemen, seven or eight, came in at each end of the car. Conductor was approached by the sheriff, and the sheriff and he were talking. I heard the conductor say 'there are the men I have reference to.' . . . When the sheriff arrested me the conductor was not in the car, after he and the sheriff finished talking the conductor went out on the platform. . . . The conductor did not tell the sheriff to arrest us." At the close (141) of the plaintiff's evidence the court expressed the opinion that he could not recover, and there was nonsuit and appeal.

The plaintiff's contention is that he was entitled, as a passenger, to protection from arrest by the defendant's employees. We are aware of no authority for his position, and we do not think the defendant's duty can be carried to such extent. That would make the defendant's train a sanctuary to which criminals could flee for protection.

It is well settled that a railroad is a common carrier, and that it has the right to establish reasonable rules and regulations for the government of its trains and passengers, and that it is its duty to do so and require its passengers to observe such regulations. The company must afford protection and safety to its passengers against assaults, insults, and ill treatment of their fellow passengers or strangers, and its own servants. Although held to the highest degree of care, the company is not an insurer of the safety and life of the passenger as it is for a package of goods committed to its care.

In the present case the defendant was wholly ignorant of the occurrence, and its conductor did not originate the cause or instigate or participate in the arrest. It would be vain and unreasonable to require him to resist an officer of the law, or the law itself. Whether the officer had authority or probable cause for making the arrest is not material. The conductor was confronted with a known officer of the law, with sufficient force to carry out his purpose.

Gillingham v. R. R., 35 W. Va., 588, cited by the plaintiff's counsel, does not present the same question. The occurrence was a matter between the conductor and an innocent passenger. The conductor ordered the arrest and actively participated in the execution of his order to the extent of expulsion, and the company was held liable. Such (142) misapplication of decided cases, as authority, results from a disregard of the universal principle that the law must fit the facts in every case. We see no error in the trial.

Affirmed.

Cited: Seawell v. R. R., 132 N. C., 859; *Bowden v. R. R.*, 144 N. C., 30.

(143)

J. F. JORDAN AND S. N. NOBLE v. GREENSBORO FURNACE COMPANY, DR. J. M. WORTH ET AL.

(Decided 13 March, 1900.)

Parol Contract for Five Years—Statute of Frauds, Section 1245 of The Code, Compared with 29 Charles II—Compensation for Improvements, Contradistinguished from Damages for Nonperformance—Exceptions to Evidence—Practice.

1. Evidence on the part of the plaintiffs, after objection by the defendants, to prove a parol agreement for a lease for five years of realty from the defendants to plaintiffs, is incompetent under statute of frauds, section 1245 of the Code.

2. The courts of England hold, in construing their statute of frauds, 29 Charles II, that to get the advantage of the statute it should be properly pleaded.

3. The rule here is, in construing the North Carolina statute, that where the plaintiff declares upon a verbal promise, void under the statute, and the defendant either denies that he made the promise, or sets up another and different contract, or admits the promise and pleads specially the statute, testimony offered to prove the promise is incompetent, and should be excluded on objection.

4. While a purchaser of real estate by parol should have compensation for improvements put upon the land, as equitable relief, an action for damages can not be sustained for the nonperformance of such a contract.

5. An exception to evidence is sufficiently stated when it appears in the statement of the case that objection was made to the evidence when offered, that the objection was overruled, and that the exception was entered.

ACTION for damages for the nonperformance of a parol agreement to lease to the plaintiffs for a term of five years the plant of the
(144) North Carolina Steel and Iron Company, tried before *Timberlake, J.*, at May Special Term, 1899, of GUILFORD.

Evidence of such parol agreement between the parties was offered by the plaintiffs, and objected to by the defendants, but admitted by the court. Defendants deny that there was such an agreement, and excepted.

There was a verdict for plaintiffs for $1,500. Judgment for plaintiffs accordingly. Defendants appealed.

Bynum & Bynum and King & Kimball for plaintiffs.

J. A. Barringer and A. M. Scales, Adams & Douglas and J. N. Wilson for defendants.

MONTGOMERY, J. This action was brought to recover damages for the alleged failure of the defendants to execute a parol agreement alleged

to have been entered into between the plaintiffs and defendants by which the defendants were to lease to the plaintiffs, for a term greater than three years, the plant of the North Carolina Steel and Iron Company. The cause of action as set out in the plaintiffs' complaint is stated substantially as follows:

1. That in 1895 the North Carolina Steel and Iron Company, a corporation, was unable to meet its indebtedness, amounting to $26,000, and agreed to sell, and the plaintiffs agreed to buy the plant and all its belongings for the amount of the indebtedness.

2. That before a meeting of the company was called to ratify the sale, J. M. Worth and his associates, defendant, represented to the plaintiffs that they, Worth and his associates, had contributed to the company a large amount of money, which would be entirely lost to them by a sale to outsiders, and asked the plaintiffs to allow him and his (145) associates to purchase the plant from the company.

3. That the plaintiffs had already expended a large sum in trying to effect a sale or lease of the property, and that various persons owning property near the plant had agreed to convey to plaintiffs a large number of valuable lots if the plaintiffs would put the plant in operation, and therefore the plaintiffs could not surrender their interest without some guarantee to receive a lease of it, after Worth and his associates should make the purchase.

4. That the defendants then agreed that if the plaintiffs would assign their interest, that he and his associates would lease for a term of five years, after a new company had been formed, to the plaintiffs upon their making a reasonable proposition, and that the plaintiffs agreed therefore to transfer their rights to Worth and his associates and did so in writing, and asked the said company to sell and convey to defendants the property.

5. That the company thereupon sold and conveyed to Worth and his associates the entire plant, and they then organized the Greensboro Furnace Company, with Worth and his associates as incorporators.

6. That after the new company was formed the plaintiffs offered a reasonable proposition for a lease of the property according to the previous understanding, which the defendants accepted, but afterwards refused to sign when the lease in writing was tendered.

The defendants in their answer denied the main allegations of the complaint, and especially the ninth paragraph in which was alleged the parol agreement for the lease.

His Honor was of opinion that the plaintiffs could recover damages for the amount which they had expended in trying to effect a sale or lease of the property for the company, and also damages for the loss of the lots which they would have received if they had (146)

leased the plant and put it in operation, that is, if the proof offered on those heads should satisfy the jury of the truth of the allegations, and he therefore allowed and received evidence on the part of the plaintiffs to prove the parol agreement for the lease of the plant of the company for five years to the plaintiffs. The evidence was objected to at the time it was offered, and upon the objection being overruled, the defendants entered their exception.

We are of the opinion that his Honor erred in the receiving of the evidence, because it was incompetent. It is true the statute of frauds was not specially pleaded in the answer, but the allegations of the complaint in reference to the parol contract of lease were denied, and upon that denial in the answer all testimony offered to prove the parol agreement should have been rejected That part of our statute of frauds which concerns the lease or sale of land, section 1245 of the Code, has changed somewhat the phraseology of the English statute, 29 Charles II, and that change has brought about a different construction on the part of our Court from that of the English courts on the point before us. The courts of England have declared that the substance of contracts within the statute is not affected by the statute, but that whether they are to be enforced or not is dependent upon the enforcement of a rule of evidence, and therefore it is necessary in order to get the advantage of the statute that it should be properly pleaded. Our Court, however, holds that the statute affects the contract itself, and therefore whenever one is required to prove the contract which he seeks to enforce (if it be one within the purview of the statute) he must show that it has been executed in contemplation of the statute, and that by legal evidence. *Gully v Macy,* 84 N. C., 434. The rule is that "where the plaintiff declares (147) upon a verbal promise, void under the statute of frauds, and the defendant either denies that he made the promise or sets up another and different contract, or admits the promise and pleads specially the statute, testimony offered to prove the promise is incompetent, and should be excluded on objection." *Holler v. Richards,* 102 N. C., 545, and cases there cited.

But the plaintiffs' counsel insisted that this action is not brought to enforce the contract or to have specific performance, but to recover damages because of the refusal of the defendants to execute in due form the parol agreement of lease That is true, but the plaintiffs can not recover damages for a violation of a void contract. In *Wade v. New Bern,* 77 N. C., 460, the city had agreed by parol to make a lease of certain real estate for ten years to the plaintiff, and, on a refusal to sign the lease, the plaintiff declared on a breach of contract and for damages for the breach, and this Court said: "Whether the city is liable to one who has *bona fide* performed labor under a void contract is a question

which does not arise here. The complaint is for a breach of contract, and the prayer is for damages resulting from the breach on the part of the defendant. The position is too plain for doubt that an action can not be maintained for damages for the breach of a void contract."

In *McCracken v. McCracken,* 88 N. C., 272, the Court said, after reciting the principle on which *Albea v. Griffin,* 22 N. C., 9, was decided, that is, that a purchaser of real estate by parol should have compensation for improvements put upon the land, because it would be against conscience to permit the owner, in such a condition, to enjoy the fruits of another's labor or the expenditure of another's money, and thus benefit himself to the hurt of another: "But neither in that case nor in any other in which its principles have been adopted—and there are many such—is there even a suggestion to be found that an action (148) can be sustained in any form or in any court, whether at law or in equity, for damages for the nonperformance of such a contract. And that is simply what this action is, nothing more nor less. To permit it to be done would be for the courts to act in the very teeth of the statute in defiance of the declared will of the Legislature"

Our Court has gone no farther than the case of *Albea v. Griffin, supra,* in the line of granting compensation to injured parties under parol contracts to convey land, and surely this case does not touch that in any respect. The plant of the defendant company has not been benefited or improved with the plaintiff's money to the amount of a cent. According to the plaintiffs' statement, which is denied by that of the defendants, the plaintiffs trusted to the word of the defendant and have been damaged pecuniarily, as they allege. Whatever loss they may have sustained they must bear, for the contract was about a subject-matter which the law required to be in writing, and which we have seen was not.

The plaintiffs made a motion in this Court to dismiss the appeal because the exceptions to the evidence were not specifically assigned as error in the conclusion of the case on appeal. It was not necessary to have made such an assignment of error. It appeared in the statement of the case that objection was made to the evidence when it was offered, that the objection was overruled, and that the defendants' exception was then entered. That was sufficient, and no case can be found in our decisions to the contrary.

New trial.

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

Cited: Hall v. Fisher, post, 209; *Winders v. Hill,* 144 N. C., 617; *Henry v. Hilliard,* 155 N. C., 379.

(149)

STATE EX REL. A. BAKER v. F. P. HOBGOOD, JR.

(Decided 13 March, 1900.)

Quo Warranto—Title to Office of County Superintendent of Schools for Granville County—Two Appointments by Rival de Facto Boards—Officer de Facto—Officer de Jure.

1. When an appointment is made by a *de facto* officer, holding an office to which is annexed the appointing power, such appointee holds a title to the office against the appointee of a *de jure* officer, subsequently made.
2. Where there are two rival boards, both *de facto*, and both exercising as far as possible the duties of the office, and each makes an appointment the same day to the same place, in such case the appointee of the *de facto* board, which is subsequently adjudged to be the *de jure* board, clearly has the title.
3. When both officers are acting and claiming to be *de facto*, possession by the *de jure* officer excludes the consideration of any other claim.

ACTION *quo warranto,* to try the title of defendant to the office of superintendent of schools, tried before *Moore, J.,* and a jury, at January Term, 1900, of GRANVILLE, upon the following issue:

Is the plaintiff relator, A. Baker, entitled to the office of county superintendent of schools of Granville County?

Each party claimed the office, under appointment made the same day, 10 July, 1899, by rival boards—the plaintiff by the board of education under act of 1897, and the defendant by the county board of school directors, under act of 1899; the former, termed "the old board," has since been adjudged to be the legal board. *Dalby v. Hancock,*
(150) 125 N. C., 325.

The special instructions asked for by the plaintiff and declined by his Honor are stated in the opinion. Plaintiff excepted.

The jury having responded in the negative to the issue, judgment was rendered against the plaintiff, and he appealed.

W. A. Devin and R. W. Dalby for plaintiff.
Royster & Hobgood for defendant.

CLARK, J. On 10 July, 1899, the plaintiff was elected "county superintendent of schools" for Granville County, by the board of education, which had been elected in 1897 for a term of three years, and commonly styled "the old board." On the same day the defendant was elected "county superintendent of schools" by the county board of school directors, chosen by the Legislature of 1899, and commonly known as the

"new board." This Court has since held in *Dalby v. Hancock,* 125 N. C., 325, that the "old board" was the legal board.

It is settled in *Norfleet v. Staton,* 73 N. C., 548, and *Jones v. Jones,* 80 N. C., 127, that where a subordinate office is filled by an appointment made by a *de facto* officer holding an office to which is annexed the appointing power to fill the subordinate office, such appointee holds a title to the office against the appointee of a *de jure* officer. But there was here evidence tending to show that both boards were *de facto* and exercising as far as possible the duties of the office. In such case the appointee of the *de facto* board, which is subsequently adjudged to be the *de jure* board, clearly has the title to the office. *Ledford v. Green,* 125 N. C., 254. When both officers are acting and claiming to be *de facto* "possession by the *de jure* officer excludes by its paramount (151) right the consideration of any other claim. Mechem Pub. Off., sec. 322." *Murphy v. Moies,* 18 R. I., 100. To same effect *Hallgreen v. Campbell,* 82 Mich., 255; *Mead v. Treasurer,* 36 Mich., 419; *Williams v. Boynton,* 147 N. Y., 426; *S. v. Blossom,* 19 Nev., 312; *Ex Parte Norris,* 8 Rich. (S. C.), 408.

The second prayer for instruction by plaintiff was, "If you find that the old board, being legally in office, continued to exercise the duties thereof, then the acts of other persons claiming to be such board can not have the validity of *de facto* officers," and it was error to modify it by adding "unless they were recognized by the public generally, the mere election of the defendant would not be sufficient recognition." The evidence tended to show that both boards were acting, and the question of *de facto* office does not depend upon general recognition.

The fifth and sixth prayers for instructions were as follows: "5. In considering the evidence relied on by defendant to show that his electors were *de facto* officers, you will not consider acts subsequent to 10 July, for, in order that defendant may now be adjudged entitled to the office, they must have been so at the time of his election. 6. If you find that Dalby, Sykes, and Fuller met on the 10th of July, and elected the plaintiff and the trustees, then you will find they performed their full duty in regard to these offices."

It was error to refuse to give these prayers.

The seventh prayer for instruction was as follows: "If you find there were two boards contending for the same office and performing, or attempting to perform, the same duties, and both themselves and their appointees were recognized by some of the people, while the other board and their appointees were recognized by others, then the acts of the board found to be the illegal board would not be valid as (152) against the acts of the board found to be the legal board."

It should have been given as asked.

It is unnecessary to consider any other assignment of error, since for the above errors there must be a

New trial.

PER CURIAM: On the motion to dismiss the appeal: 1. Because the response to the issue is omitted in printing. 2. Because the appellant has failed to print the word "exception" and number of each at the proper place on the margin, is denied. As to the first point, the omission of the response "No," is palpably a mere printer's error, for the issue is printed; and besides, the response is recited and printed in the judgment. As to the second point, while the exceptions must be entered in the record and numbered (Rule 19, (3), and 21, *Alexander v. Alexander,* 120 N. C., 472; *Lucas v. Railway Company,* 121 N. C., 506), the amended Rule 28 (121 N. C., 695) expressly says that the exceptions may be printed in the body of the page instead of on the margin, as under the printer's rule the latter course would largely add to the expense. Clark's Code (3 Ed.).

The further motion to tax the appellant with the costs of "making the transcript and printing the testimony of the witnesses which does not bear upon the exceptions of the appellant, and which is not necessary to enable the Court to understand the nature and scope of his exceptions," is allowed. The appellee entered his exception to the incorporation of such unnecessary matter when the case was settled, as is prescribed by Rule 31, as amended, 121 N. C., 696; *Hancock v. R. R.,* 124 N. C., 222. Besides the "case on appeal" shows that the
(153) appellant agreed that if this unnecessary matter, not relative to exceptions taken, was incorporated by the judge in his statement of the case, the costs thereof should be taxed against him if successful in his appeal. The clerk will tax the costs accordingly.

Cited: Brinkley v. Smith, 130 N. C., 225; *Sigman v. R. R.,* 135 N. C., 182.

STATE EX REL. JAMES H. WHITE v. THOMAS J. MURPHY.

(Decided 13 March, 1900.)

Quo Warranto—Title to Office of Clerk of the "Western Criminal District Court" of Madison County—Power of Appointment—Act of 1899, Chapter 371—The Constitution, Article XIV, Section 7.

1. Criminal courts may be established by the Legislature, and clerks appointed for them. *Bunting v. Gales,* 77 N. C., 283.

2. Where the office of clerk for the Criminal Court is created distinct from that of the Superior Court, there must be a clerk of each, as no man can hold two offices. Constitution, Art. XIV, sec. 7.

3. Under the act of 1899, ch. 371, the judge of the "Western Criminal District Court" has the power of appointment of the clerk of Madison Criminal Court until the next general election.

Quo warranto, to try the title of defendant to the office of Clerk of Criminal Court of Madison, heard before *Coble, J.,* at July Term, 1899, of MADISON.

The plaintiff, as clerk of the Superior Court of Madison County, claimed to be entitled *ex officio* to discharge the duties and receive the emoluments of clerk of the District Criminal Court, just as he had done as clerk of the Circuit Criminal Court of Madison County.

The defendant claimed the said office under appointment made by his Honor, *Judge Stevens,* Judge of the "Western Criminal (154) District Court," by virtue of the act of 1899, ch. 371, sec. 11.

Jury trial waived, his Honor to try the case and find the facts.

Judgment rendered in favor of defendant. Plaintiff excepted (156) and appealed.

Moody & Welch for plaintiff.
J. M. Gudger, Jr., for defendant.

CLARK, J. This case comes within the principle laid down in *Bunting v. Gales,* 77 N. C., 283, which is decisive of this. The plaintiff is clerk of the Superior Court of Madison County. When the Criminal Court in said county was first created in 1895 (ch. 75), a separate clerk might have been created for it. It in nowise impaired the legislative power that the Legislature forbore to create the office of clerk of the Criminal Court till 1899 (ch. 371), and in the meantime permitted the clerk of the Superior Court to discharge the duties of clerk of the Criminal Court, and receive the emoluments. The clerk of the Superior Court did not hold the office of clerk of the Criminal Court, for he could not hold two offices (Constitution, Art. XIV, sec. 7), but he discharged the duties of clerk of the Criminal Court, of which emoluments he might have been deprived in 1895, till actually deprived of them in 1899. As was said by *Rodman, J.,* in *Bunting v. Gales, supra,* "He took his office with a knowledge that the Legislature might establish a Criminal Court," and thus deprive him of the fees of the business trans- (157) ferred to the Criminal Court. "This," as was said in *Caldwell v. Wilson,* 121 N. C., 469, was a condition "assented to by the defendant (here the plaintiff) in his acceptance of the office."

The Legislature could either elect the clerk of the Criminal Court

itself, as in *Bunting v. Gales, supra,* and *Ewart v. Jones,* 116 N. C., 570, or devolve his election upon the people, or other constituency. Constitution, Art. IV, sec. 30. In this act it has chosen to place the election in the people. It could not, under the authority in the Constitution, place the filling of the office in the appointive power of any one, and this has not been attempted, but it unquestionably had the power to prescribe some method of filling the vacancy until an election could be had—both this original vacancy as well as any which may hereafter occur. In *Ewart v. Jones, supra* (bottom of p. 572), it is said that, since the amendment to the Constitution, the Governor has no power to fill vacancies in office created by legislative authority, by virtue of constitutional authority, but it is, tacitly at least, recognized in *Cook v. Meares,* 116 N. C., 582, that the Legislature could authorize the Governor to fill vacancies in such offices till an election could be had, and it is expressly so stated in the concurring opinion at p. 589.

If the Legislature could authorize the Governor to fill vacancies by appointment, there is no reason why it can not authorize the judge of the Criminal Court to fill any vacancies in the clerkships of his court until an election by the people—"at the next general election." Indeed, this is in exact analogy to the Constitution which requires (Article IV, sec. 16) that the clerks of the Superior Courts shall be elected by the people, and section 29 of the same article, which provides that vacancies in the clerkships shall be filled by the appointment of the judge. The sep-
(158) arate office of clerk of the Criminal Court having been created by the act of 1899, as the Legislature had the power to enact, the clerk of the Superior Court could not thereafter discharge its duty, as he could until it was made into an office.

The presumption is always in favor of the constitutionality of an act of the Legislature. The settled rule is that the courts will hold no statute unconstitutional unless it is clearly and plainly so. *Sutton v. Phillips,* 116 N. C., 502. Besides, the plaintiff must recover on the strength of his own title and not upon the weakness, if there were weakness, in that of the defendant.

The diminution of the plaintiff's emoluments is his only cause of complaint, and that was held constitutional under exactly the same circumstances, in *Bunting v. Gales, supra.* The ruling of *Judge Coble* is

Affirmed.

Cited: White v. Auditor, post, 578; *Mott v. Griffith, post,* 775; *Wilson v. Neal, post,* 782; *S. v. Hay, post,* 1003.

(159)

E. T. GARSED v. CITY OF GREENSBORO, THE DISPENSARY BOARD, ITS TREASURER AND MANAGER.

(Decided 13 March, 1900.)

Greensboro Dispensary Board—State Agency—Police Regulation—Act 1899, Chapter 254—The Constitution, Article VII, Section 7—Injunction Order.

1. The dispensary system does not create a monopoly in the odious and offensive sense of that term.
2. The powers conferred by the Dispensary Act of 1899, ch. 234, upon the commissioners of Greensboro to incur debts and loan its credit in the establishment of the dispensary, it not being a necessary expense, and not being sanctioned by a popular vote, are repugnant to the Constitution, Art. VII, sec. 7, and were properly enjoined.
3. An act may be constitutional in part, and unconstitutional in part; there is no inhibition upon the dispensary board carrying out the purposes of the act, with their own means, should it see fit to do so. The act so provides.
4. The city of Greensboro has no control over the dispensary board, it is an agency of the State, and the restraining order against the board was properly dissolved.
5. So far as the city of Greensboro is concerned, as it claimed the right to loan pecuniary aid to the dispensary, although not disposed to exercise that right now, it was wise to prevent its exercise in the future by continuing the injunction to the final hearing.

ACTION to annul by injunction the Greensboro dispensary, pending in GUILFORD, at August Term, 1899, and heard before *Bryan, J.*, at chambers, upon a motion by plaintiff to continue the restraining order until the final hearing.

The decision of the cause involved the consideration of the constitutionality of the Dispensary Act of 1899, ch. 234.

His Honor dissolved the restraining order so far as the dis- (160) pensary board was concerned, and the plaintiff excepted and appealed.

So far as the City of Greensboro was concerned, his Honor continued the restraining order until the final hearing. The City of Greensboro excepted, and appealed.

APPEAL OF PLAINTIFF.

Bynum & Bynum and J. N. Staples for plaintiff.
A. M. Scales, J. N. Wilson, and A. L. Brooks for defendant.

MONTGOMERY, J. The purpose of this action is the same as was that in *Guy v. Commissioners,* 122 N. C., 471, the overthrow of the dispensary

system instituted by the General Assembly for the better regulation of the sale of liquor. In this action the plaintiff seeks to enjoin the defendants, the dispensary board, its treasurer and manager, from establishing and maintaining the dispensary in the City of Greensboro, provided for in chapter 254, Laws 1899, and from borrowing any money from the City of Greensboro for that purpose, or for contracting any debt for that purpose, and also to enjoin the city from lending or appropriating any money to the board, or from lending its credit or pledging its faith for the benefit of the board, or any of its officers, for the purposes named in the act. The city was enjoined according to the prayer of the complaint, the injunction prayed for against the dispensary board was refused, and both sides appealed.

In *Guy v. Commissioners, supra,* the main objection which was urged against the legislation was that there was produced thereby an unlawful monopoly inconsistent with section 31 of Article I of the State
(161) Constitution. In the present case, that ground of objection was made, but it was not pressed as the chief point of attack. The opinion in that case is a complete answer to the contention that such legislation creates a monopoly in the odious and offensive sense of that term; and we care to add nothing to what is said on that point in that case.

The strong and open battle of the counsel of the plaintiff was made against the act on the ground that the powers conferred upon the dispensary board in section 4 of the act, and upon the commissioners of Greensboro in section 5, are repugnant to section 7 of Article VII of the Constitution, and that that being so the whole act is void. Section 4 is as follows:

"The said dispensary board shall have power to employ attorneys, agents, and detectives to assist in the detection and prosecution of persons, firms or corporations violating this act, and for other purposes, may employ chemists or other competent persons to test liquors, may borrow money, and shall have power to do all other proper things not contrary to law to carry out the true intent of this act"; and that part of section 5 necessary to the discussion of this part of the case is in the following words: "For the purpose of procuring the necessary funds for the establishment of said dispensary, the board of aldermen of the City of Greensboro shall appropriate such an amount, not exceeding $2,000, as may be demanded by said dispensary board, and said amount shall be repaid out of the profits arising from said dispensary; provided said dispensary board may establish said dispensary without receiving said appropriation."

The contention of plaintiff's counsel that the powers conferred upon the commissioners of Greensboro in that part of section 5 of the act

quoted above are repugnant to section 7 of Article VII of the Constitution must be sustained. The right to question the power (162) of the General Assembly to confer upon municipal bodies the power to incur reasonable expense in regulating the sale of liquors by others can not be questioned; but to authorize municipal authorities to raise money by taxation, or by loan, or by pledging credit, for the purpose of aiding others in the sale of liquors, or to be used by the bodies themselves for that purpose, without a vote of the people, clearly can not be exercised, because such money and the purposes for which it is to be used can not be called necessary expenses of the municipal bodies. County and municipal authorities, under the express sanction of the General Assembly, can reasonably regulate and control the sale of liquors, and in so doing can incur a reasonable expense. But the Constitution, Art. VII, sec. 7, forbids the municipal authorities investing money raised or to be raised by taxation, or using the credit of such municipality, for the benefit of others or of themselves in such traffic, for the reason above stated, unless by a majority vote of the people. Such expenditures are not necessary expenses of the municipalities. But it does not follow, as argued by plaintiff's counsel, that, because that part of the act which authorizes the commissioners to lend the board $2,000, with which to establish the dispensary (and which authority we have seen is unconstitutional) therefore the whole act is void. The contrary opinion was held in *Bennett v. Commissioners,* 125 N. C., 468. There, the act prescribed that the town commissioners of Bryson City should appropriate one-third, and the commissioners of Swain County two-thirds, of the funds necessary to establish and keep in operation the dispensary created in that town. The county and town commissioners declined to make the appropriation, and when, notwithstanding the dispensary officers tendered their bonds to the commissioners and they were refused consideration, this Court, in mandamus proceedings, compelled the commissioners to consider and pass upon the (163) bonds. This Court said: "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." In that case, as in this, the dispensary board did not ask that the appropriation be made, but expressly waived all claim to it.

If the dispensary boards in such cases are able, through their own means or through gifts from others, to proceed and carry out the purposes of the General Assembly, and without receiving the appropriation

of money from the municipal authorities as provided for in the acts, there is no reason why they should not do so, for, as we have seen, there can be no objection on the score of fostering monopolies, as the whole community shares in the profits of the monopoly.

But the plaintiff's counsel insisted strenuously that the dispensary board in this case were not exercising any agency from the State, but were the agents of the City of Greensboro, and as the city could not engage in the liquor traffic through its board of aldermen, neither could it through any appointed agency. The argument was that the whole act, if it had any force, was merely an amendment to the charter of Greensboro, and that under that amendment the city had undertaken not to regulate and control, but to carry on the sale of liquors in a manner forbidden by the charter, and that under the amendment the board of aldermen had elected and named the members of the dispensary board,

(164) and by the act were authorized and empowered to receive the bonds of the treasurer and manager.

We can not concur in the view that the act was simply an amendment to the charter of Greensboro, and that it extended the territory in which liquors were forbidden to be sold beyond the boundaries of the city limits, adds no strength to the argument by the plaintiff. In *Guy v. Commissioners, supra,* it is true the members of the dispensary board were not named in the legislative act, but certainly the General Assembly was not compelled to name them. It could take that course, or it could confer the power upon the municipality to name such agencies as the members of the dispensary board. In the appointment of such agencies the State can act directly, or it can act indirectly by conferring upon others the power to appoint in its name and on its behalf. In *Guy v. Commissioners* the bonds of the dispensary officers were filed with the authorities of the county of Cumberland. The City of Greensboro has no control over the dispensary board. In vacancies occurring by the expiration of the terms of members of the board, it is directed that the board of aldermen shall fill such vacancies. But they can not make removals, that duty in proper cases being left with the resident judge of the district.

We are of the opinion, therefore, that there was no error in the ruling of his Honor in dissolving and dismissing the restraining order which had been granted against the defendants, the members of the dispensary board.

No error.

(165) DEFENDANT'S APPEAL.

MONTGOMERY, J. For the reasons set out in the plaintiff's appeal and because of the matters set out in the last paragraph of the answer of

the City of Greensboro, we think that his Honor committed no error in continuing the restraining order against the city to the hearing, and enjoining it from opening a dispensary in the City of Greensboro and from contracting debts, pledging its faith, loaning its credit, or levying any tax for the use and benefit of any person or corporation in the establishing and operating such a dispensary.

The City of Greensboro in its answer, it is true, declared that it never had any intention of advancing any money to the dispensary board for the purposes of the act, and expressly disclaimed any intention to do so; but in the last paragraph of the answer referred to, the city claimed the right to make the appropriation, and it might be that in the future, under other conditions, it would choose to exercise that right. That, his Honor saw, and took the wise precaution to prevent it.

No error.

Cited: S. v. Smith, post, 1058; *S. v. Newcomb, post,* 1105.

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(166)

W. L. RAY, ADMINISTRATOR OF MRS. C. M. RAY, HIS WIFE, v. THE SECURITY TRUST AND LIFE INSURANCE CO.

(Decided 13 March, 1900.)

Insurance—Life Policy—Application—Condition Precedent.

1. Where the application for life insurance contains these words: "That no insurance shall be in force until the delivery of the policy to and the payment of the first premium by the party whose life is insured while in good health," there is no contract of insurance until the policy is delivered.
2. Such condition is legal and does not contravene public policy, and is important to both parties, as fixing a day certain, when the agreement becomes absolute.
3. Where an action sounds in damages for breach of contract, and it turns out that there was no contract, a claim for money had and received can not be recovered in this action.

ACTION for breach of contract of insurance and failure to deliver policy upon the life of plaintiff's intestate, tried before *Hoke, J.,* at October Term, 1899, of VANCE. The application contained this proviso: "That no insurance shall be in force until the delivery of the policy to, and the payment of the first premium by the party whose life is insured while in good health." The amount of insurance applied for was $1,000, the annual premium was $33.80, the sum paid the local agent was $23.40, he and the applicant supposing that was the proper

amount. The policy was never delivered, although the applicant received information from the home office in Philadelphia that her application was approved and the policy would be filled out and forwarded. It was sent to the general agent at Richmond, Va., who failing to get a settlement of the premium from the local agent at Oxford, N. C.,
(167) returned it to the home office in Philadelphia, and it was canceled 25 January, 1899. Mrs. C. M. Ray died 2 March, 1899.

Upon the trial the defendant asked his Honor to hold and charge: "That plaintiff is not entitled to recover because of the provision in the application that no insurance shall be in force till the delivery of the policy to deceased while in good health, and payment by her of the first premium."

His Honor declined to so hold and charge, and defendant excepted.

The issues submitted by his Honor to the jury were as follows:

1. Did defendant company contract and agree with intestate to issue a policy of insurance on her life in the sum of one thousand dollars?

2. Did defendant wrongfully and in breach of its contract fail and refuse to deliver such policy?

3. What damage is due and owing to plaintiff by reason of such wrong and injury?

The issues submitted were objected to by defendant.

The jury found the issues in favor of plaintiff and assessed his damages at $989.63, with interest from 2 May, 1899 (date of tender of balance due $10.37).

The figures arrived at were derived by deducting the difference between the premium due, $33.80, and the sum paid, $23.43, making $10.37, from $1,000.

There was judgment according to verdict, in favor of plaintiff. Defendant appealed.

A. C. Zollicoffer for plaintiff.
T. T. Hicks for defendant.

FAIRCLOTH, C. J. On 18 November, 1898, the plaintiff's intestate made application to the defendant company for a life insurance policy, with the usual questions, answers, conditions, medical examina-
(168) tion and certificate, etc. On 3 January, 1899, the president of the company addressed the applicant as follows: "I have the pleasure of informing you that your application to this company for insurance has been approved, and that a policy is being issued today, which will reach you in due time through the agent who forwarded the application."

It appeared that the defendant had a general agent at Richmond, Va.,

and another agent at Oxford, N. C., through whom the application was made—the principal office of the defendant being in Philadelphia, Pa. It also appears that the annual premium on $1,000, amount applied for, was $33.80, and that the Oxford agent received $23.40 thereon, he and the applicant supposing that was the amount to be paid annually.

There was some correspondence between the agents and the company. On 18 January the general agent wrote to the Oxford agent for advice, etc., and on 19 January the company wrote: "If not placed, recall policy, Corinne M. Ray, at once." On 17 January Mrs. Ray, the applicant, wrote to the company: "I wrote Mr. Marable, at Oxford, N. C., a few days ago about the policy, but as yet have heard nothing from him. It seems he is quite slow. Can't you hurry him along with it?" The policy was never delivered, and the applicant died 2 March, 1899. There was no change in her health between 18 November, 1898, and 25 January, 1899. No policy being delivered, the action is upon the contract. The plaintiff's contention is that, when the application was received and the company replied, "Your application for insurance has been approved," and that "a policy is being issued today," the contract was complete, as the minds of the contracting parties then met. Admitting the conclusion as a general rule, we must consider the result when (169) conditions and qualifying provisions are a part of the agreement.

One of the provisions in the application is in these words: "That no insurance shall be in force until the delivery of the policy to, and the payment of the first premium by the party whose life is insured while in good health." So we have an agreement with an important provision or condition attached, fixing an event on the happening of which the contract shall become operative. Of course the minds of the contracting parties met as effectually on this provision as on any other part.

This proposition was made by the applicant and accepted by the defendant. How is the applicant to escape the force of this provision? The proviso is not unreasonable. There is nothing in it illegal, nor does it contravene any feature of public policy. The proviso or condition is important to both parties. The applicant wants certainty and desires a certain day, when the agreement becomes absolute, and is stripped of all doubt. The defendant wants protection against unforeseen trouble that may arise after approval of the application and before delivery of the policy. A change of habits and impairment of health may intervene, and misrepresentations in the application may be discovered. These possibilities are understood by the parties, and they would make the subject unfit for insurance. Against these, the proviso affords protection; and to remove all doubt, it is provided that, until the policy is delivered, there is no insurance in force.

We are referred to several decided cases, similar in many respects, but we have found no case in which the facts are "on all fours" with those in the case before us.

According to the view above expressed, the plaintiff has no (170) cause of action, and the consideration of the other exceptions is unnecessary. This being an action for damages, the plaintiff can not recover in this action the $23.43, as money had and received for the use of the plaintiff.

We find error committed on the trial, and that the judgment is erroneous.

Reversed.

Cited: Grier v. Ins. Co., 132 N. C., 546.

PAUL R. HOWARD v. JOHN A. EARLY AND GEORGIANA A. EARLY, HIS WIFE.

(Decided 13 March, 1900.)

Supplemental Proceedings—Husband and Wife—Mortgage on Her Land for His Debt—Presumption of Fraud—Confidential Relations—Issues, Verdict, Judgment.

1. The relation of husband and wife is among those confidential relations, presumptive of fraud in business dealings, *unless rebutted.*
2. Issues submitted should arise on the pleadings, and not be presented only by the evidence.
3. An oral agreement to secure a wife is valid; a fraudulent intent on the part of her husband will not vitiate her title, unless participated in, or known by her.
4. Facts established by a verdict may rebut the presumption of fraud, and the same facts *admitted* are equally efficacious—and this presumption of fraud, growing out of the relations, being out of the way, it becomes an open contest between a creditor and an innocent purchaser for value—and no equitable principle exists for depriving either of his fruits for the benefit of the other.
5. A verdict which finds the transfer of a note was made with a fraudulent intent, but does not find that the wife participated in or had knowledge of such intent, will not justify a judgment against both.

(171) SUPPLEMENTAL PROCEEDINGS upon a judgment recovered in a justice's court against defendant John A. Early, and docketed in Superior Court, heard on appeal from clerk's judgment, before *Allen, J.,* at Fall Term, 1899, of BERTIE.

Defendants appealed.

Francis D. Winston for plaintiff.
R. B. Peebles and C. G. Peebles for defendants.

FAIRCLOTH, C. J. The plaintiff obtained a judgment against defendant on which an execution issued and was returned unsatisfied. The plaintiff then on affidavit before the clerk, obtained an order for supplemental proceedings. The third clause of the affidavit averred the return of the execution, and that the defendant had choses in action which ought to be applied to his judgment. This was denied by answer of the defendants. This is the only allegation of fraud in (173) the record. His Honor, without objection, submitted this issue: "Was the transfer of the note and mortgage referred to in the pleadings made with intent to hinder, defeat, delay and defraud the plaintiff?" Verdict was recorded for the plaintiff.

The plaintiff introduced no evidence. The defendant and his wife were examined, and testified that in 1893 he borrowed $500 from Burden Brothers, and that he and his wife gave Burden Brothers, a mortgage on *her* land to secure the same; that at the same time he promised his wife to secure her, and that she should not lose anything; that he was then solvent. They also testified that he held a note for $325 against one Morris, and that he put said note in his wife's possession. That in January, 1897, when the husband had become insolvent, said note was formally transferred to the wife in the handwriting of one J. M. Early, which note plaintiff demands in payment on his judgment. The plaintiff demands judgment on the ground of the presumption in law of fraud arising from the confidential relation of husband and wife, especially when the husband is insolvent. In *Lee v. Pearce,* 68 N. C., 76, the doctrine of confidential relations is fully discussed, and several are specified, such as trustor and trustee, etc., and the Court held that such definite relations are sufficient to raise a presumption of fraud, as a matter of law, to be laid down by the judge as decisive of the issue, *unless rebutted.* Although not mentioned, we think the relation of husband and wife falls within the principle of that case, and it was so held in *McRae v. Battle,* 69 N. C., 98.

The pleadings in this case are loose and informal, and in violation of the rule that only such issues should be submitted as arise on the pleadings. Code, 395. The parties, however, accepted the issue without regard to such rule, and proceeded to try the real contention (174) as implied in the issue submitted. The rule is useful and important, as it would always prevent the submission of issues presented only by the evidence. The case so much resembles a "case agreed" when allegations and issues are not important, where only a legal inference is to be drawn by the court, that we are not disposed to disturb the judg-

ment on that ground. The validity and *bona fides* of the wife's debt, the promise of the husband to secure her, and the possession and transfer of the note to the wife are not denied by any plea nor contradicted by any evidence, nor was any dispute as to these facts made on the trial, and seemed to be admitted.

It has been decided that the oral agreement to secure his wife was valid, and that a fraudulent intent on the part of the husband to defeat his creditors will not vitiate the wife's title, unless she participated in or had knowledge thereof. *Brown v. Mitchell,* 102 N. C., 347. The same principle is decided where a father, with fraudulent intent, furnished his daughters with money, being indebted to them, to purchase his land at a sheriff's sale, they not participating in the unlawful intent. *Sharpe v. Williams,* 76 N. C., 87.

Is the presumption of fraud in law, by reason of the relationship of his wife, rebutted? If the admitted facts were established by a verdict, it seems clear that the presumption of fraud is rebutted by the above authorities, and surely facts admitted are as efficacious as facts found by a jury. The presumption being out of the way, it is an open contest between a creditor and an innocent purchaser for value, and we have no equitable principle for depriving either of his fruits for the benefit of the other.

The verdict finds that the transfer of the note was made with
(175) the fraudulent intent, but it does not find that the transferee (wife) participated in or had knowledge of such intent. On this ground there was error in the judgment entered. In *Nadal v. Britton,* 112 N. C., 187, the facts are similar, and the issue was the same as in the present case, and the response was the same. The Court used this language on the question we are considering: "But the jury have only found that the deed was made with intent to hinder, delay or defraud creditors; they have not found that Mrs. King had knowledge of that fraudulent intent. Without such a finding by the jury no judgment should have been rendered against her." There was no error in entering judgment against the defendant John A. Early, but there was error in entering judgment against the defendant Georgia Early, and it must be corrected in that respect.

New trial.

Cited: Hatcher v. Dobbs, 133 N. C., 240; *Busbee v. Land Co.,* 151 N. C., 515.

(176)

N. B. FINCH AND W. W. RICHARDSON, PARTNERS TRADING AS FINCH, RICHARDSON & CO., v. JOSEPH GREGG, DEFENDANT, AND SEYMOUR DANNE CO., INTERVENERS.

(Decided 13 March, 1900.)

Damages—Attachment—Draft with Bill of Lading Attached Thereto—Amendment — Intervening Parties—Shipper—Purchaser — Assignee of Bill of Lading and Draft—Liabilities and Rights.

1. Where in the justice's court interveners ask to be allowed to come in and be made parties defendant in attachment proceedings, which is allowed, it is permissible in the Superior Court, on appeal, to allow an amendment of the attachment proceedings by making the interveners parties defendant *ab initio*.

2. Where the shipper assigns the bill of lading with draft attached upon the purchaser, the assignee takes the contract of the shipper and stands in his shoes, with the same rights, no greater, no less. The rights of the purchaser are not impaired or disturbed by the change of ownership in the property, and they have the same defenses against the assignee as against the shipper.

3. While the purchaser could not attach the property, a carload of corn, as the property of the shipper, after the assignment of bill of lading, he could attach it as the property of the assignee, who assumed the liability of the shipper for safe delivery in good condition.

ACTION for $200 damages for breach of contract in failing to deliver *in good condition* 848½ bushels of *good corn,* after payment for same, instituted in the justice's court, with attachment proceedings, and heard before *Hoke, J.,* at Fall Term, 1899, of NASH on appeal. The action and attachment were originally commenced against Gregg alone, a nonresident, who sold the corn to plaintiffs. The draft, with bill of lading attached, he sold to Seymour-Danne Co., a banking house, who collected the draft. They asked and were allowed to be made par- (177) ties defendant in the justice's court, where judgment was rendered against them and Gregg, and both appealed to Superior Court. His Honor allowed an amendment inserting their names as parties defendant in the action from the beginning. To which Seymour-Danne Co. excepted.

It was agreed that the case on appeal from the justice's court contained the facts. His Honor affirmed the judgment of the justice, and the defendants appealed to the Supreme Court.

The opinion contains a succinct statement of the facts.

Cooke & Cooley and F. S. Spruill for plaintiffs.

Jacob Battle for defendants.

CLARK, J. In January, 1899, the defendant Gregg, in Chicago, Ill., sold to plaintiffs, Finch, Richardson & Co., at Spring Hope, N. C., a carload of "green corn." Said Gregg drew a draft on plaintiffs for the price of the corn, and sold it to the Seymour-Danne Company, to which was attached the bill of lading, which was made out to his order, and which he assigned by endorsement to the purchasers of the draft. The plaintiffs paid said draft, but the carload of corn was injured, and the damage sustained thereby is the ground of plaintiff's action. *Love v. Miller,* 104 N. C., 582.

In May, 1899, the defendant Gregg sold another carload of corn to Finch, Richardson & Co., Spring Hope, N. C., and also a carload to Woodard & Copeland at the same place. As with the January shipment, the bills of lading were made out to the order of shipper, who endorsed them to Seymour-Danne Co., with a draft attached, drawn on the purchasers in Spring Hope. On arrival the two carloads were
(178) attached before a justice of the peace (the amount claimed being less than $200) for the damages above stated, as sustained on the January shipment. To this proceeding Joseph Gregg alone was defendant, but the Seymour-Danne Co. appeared before the justice of the peace, through their attorney, and were "allowed to make themselves parties defendant and, intervening, they defended said action." In the Superior Court on appeal, the plaintiffs were allowed to amend the attachment proceedings by making the Seymour-Danne Co. parties thereto.

When the bill of lading, payable to order of shipper, was assigned by him for value (*i. e.,* cashing of draft upon purchaser, attached) to the Seymour-Danne Co., the latter became owners of the corn as against all the world except the shipper, as to whom the assignment was a security for the amount of the draft. *Dows v. Bank,* 91 U. S., 618; Daniel on Neg. Inst., sec. 1734a. Upon the arrival of the corn shipped in May, at Spring Hope, Gregg had no interest therein which could be attached (*Emery v. Bank,* 25 Ohio St., 360), unless, possibly, it had been shown that the amount to be paid for the corn was greater than the amount for which the Seymour-Danne Co. held the bill of lading as security—but that point does not arise here.

But when the Seymour-Danne Co. took the bill of lading on both occasions equally they took the contract of the shipper, and they stood in his shoes, with the same rights, no greater, no less. *Bank v. Bank,* 91 U. S., 92. The rights of the purchasers, the plaintiffs, "were not impaired or disturbed by the change of ownership in the property." They have the same defense against the assignee of the bill of lading as against the shipper. *Bank v. White,* 65 Mo. App., 679.

When the January carload arrived, the plaintiffs could either have

refused to receive and pay for the corn, or they could have received it upon notification of defects to the vendor in a reasonable time, have offered to return the goods, or if sued for the price, have set up loss by reason of such defects. *Kester v. Miller Bros.*, 119 N. C., 475; *McKinnon v. McIntosh*, 98 N. C., 89. But here the corn being shipped on a bill of lading, with draft attached, the vendee was compelled to pay upon the delivery of the corn (if it was otherwise, liberty to inspect should have been shown), and an action lies to recover back money paid for defects in the corn, unless the claim was waived by delay to demand damages from January till this attachment in May. *Lewis v. Rountree*, 78 N. C., 323. (179)

Whether there had been a waiver was an issue of fact for the jury, to have been proven by the party alleging it. Both parties have agreed upon the facts as set out in the justice's return, and no waiver is therein found. The plaintiffs had therefore the same ground of action for damages against the Seymour-Danne Co. for the defects in the January carload that they would have had against their assignor, Gregg, and on the arrival of two carloads in May, likewise assigned to Seymour-Danne Co., while plaintiffs could not attach them as the property of Gregg nor for damages due by Gregg, they could attach said carloads as the property of Seymour-Danne Co., and for the damages sustained by delivery of a defective carload of corn to them by that company in January. *Landa v. Lattin*, 19 Tex. Civ. App., 246, which we find a very clear and able discussion of a case "on all fours" with this.

It is true the action was originally begun against Gregg alone, which could not be sustained, as no jurisdiction as to him was obtained by attaching the two carloads of grain which by the assignment of the bills of lading had become the property of the Seymour-Danne Co., but the latter came in and were made parties before the justice, by which the court was seized of jurisdiction as to them, and on appeal, the judge properly permitted the attachment proceedings to be amended to embrace them, as they were already parties and claiming an interest in the subject-matter of the action. Code, sec. 184. The entry before the justice was, as the judge found, of a general appearance by the Seymour-Danne Co., but if it had been an appearance merely "as interveners" to contest the title to the property, it would not have been an unauthorized change of the action, in a proceeding *quasi in rem*, by attachment of property, to permit the plaintiffs to amend their attachment to embrace the same cause of action against the interveners as they have averred against the original defendant. Why turn the property loose to be again attached by the same plaintiffs, for the same cause of action *eo instanti* it is determined that these defendants (or interveners, if such), are the real owners of the attached property in- (180)

stead of the original defendant? The judgment must be modified by dismissing the action as to Joseph Gregg, who entered a special appearance, with his reasonable costs, but as to the Seymour-Danne Co. it is Affirmed.

Cited: Sloan v. R. R., post, 489; *Perry v. Bank,* 131 N. C., 120; *Mfg. Co. v. Tierney,* 133 N. C., 636; *Mason v. Cotton Co.,* 148 N. C., 495, 517.

(181)

JOHN SLAUGHTER v. N. O'BERRY, CHAIRMAN OF SEWER COMMITTEE OF GOLDSBORO.

(Decided 13 March, 1900.)

Sewerage of Goldsboro—Construction—Inspection—Supervision—Connections—Preservation—Authority of City—Right of Citizen—Mandamus.

1. The city has the right to require that connections with its sewerage system should be made by its licensed officer; that materials furnished should be proper for such work, and subject to inspection and approved by the city inspector, and the work done under his supervision.

2. The citizen has the right to furnish his own material, subject to inspection and approval of the city inspector, and to do his own work on his own premises—and ought not to be compelled to hire the city to furnish material and to do the work.

3. A city can not, in the exercise of its corporate powers, interfere with the rights of the owner over his property, nor with his personal rights, where it is not necessary for the public benefit.

MANDAMUS to compel the defendant chairman of sewer committee of Goldsboro to grant a permit to plaintiff to make connection of his house on John Street, in said city, with the public sewers of the city, heard before *Moore, J.,* at October Term, 1899, of WAYNE.

The plaintiff was duly licensed and had paid the tax required for one year from 16 January, 1899.

The defendant refused the permit, for the reason that plaintiff had not made the deposit estimated to be sufficient to meet expenses of construction and material, but proposed to do the work himself and furnish his own material, under the supervision of the city inspector, which was not in accordance with the city ordinance.

(182) His Honor adjudged that the plaintiff was entitled to the mandamus as prayed for, and so directed. Defendant excepted and appealed.

The case fully appears in the opinion.

W. C. Munroe for plaintiff.
A. C. Davis for defendant.

FURCHES, J. The plaintiff is a citizen and the owner of a house and lot in the City of Goldsboro, and Goldsboro is an incorporated city, and the owner of a public sewerage system. The defendant O'Berry is the chairman of the sewerage committee of said city, with power to grant privileges of connection with said city sewerage, upon specified terms mentioned in the ordinances of said city. Among the specified requirements of the city ordinances are the following: That no connection shall be made but by some person elected and licensed by the city to make such connection. That said work shall then be done under the supervision and direction of the city inspector, and that the city shall furnish the materials and do the work of making such connection to within three feet of the building to be so connected with said sewerage. That the application for such connection shall be in writing, setting forth the location of the building to be connected, and the purposes for which the sewerage is to be used, a survey and plan of said sewerage containing an estimate of the cost of said connection, and that the applicant shall deposit a sufficient amount of money with the city to defray the expenses of such connection.

The plaintiff has been elected and licensed to make such connections, and has made his application in writing and furnished a survey of the premises with estimates of cost of said connection; but declined to make the deposit required by the ordinance, and asked the privilege of furnishing his own material, and of doing his own work in mak- (183) ing the connection, under the direction and supervision of the city inspector. This application of the plaintiff was refused for the reason that he had not made the deposit required by the ordinance, and because he proposed to furnish his own material and do his own work in making the connection. These are the substantial facts as we understand them, and present the question of consideration and determination.

The city being the owner of a public sewerage, it has the right, and it is its duty, to protect the same from improper uses and connections. But this should be done in a reasonable manner, and so as not to affect private rights further than is *necessary* for that purpose. Where it becomes necessary to invade private property, it must be done with the consent of the owner under the doctrine of eminent domain, when the owner would be entitled to compensation. Neither can the city, in the exercise of its corporate powers, interfere with the rights of the owner over his property, nor with his personal rights where it is *not* necessary to do so for the public benefit.

From a consideration of these principles, it seems to us that the city

had the right to say what is a proper connection with its sewerage; that it had a right to require that this connection should be made by its authorized agent and under the direction and supervision of its city inspector, and that only suitable material should be used in making such connection. But with these, it seems to us that its rightful powers ceased.

The plans and specifications for this connection had been made and approved. The connection was a proper one to be made, or the plans and specifications filed by the plaintiff would not have been approved. The plaintiff was a licensed officer of the city to do such work, under the direction and supervision of the city inspector.

(184) So the question comes down to this: Should the plaintiff be allowed to furnish his own material, subject to the inspection and approval of the city inspector, and to do his own work on his own premises, or shall he be compelled to hire the city to furnish this material and to do his work?

We see no reason why he should be required to do so. We can see no benefit the city is to derive from such a requirement, unless it be a profit on the material or the work to be done, or to furnish a job for some favorite of the corporate authorities. We do not say this is so, but we say that, if it is not, then we see no reason for such requirement, and no public benefit to be derived from such requirement. And if it is not required for the public good, it is an unnecessary invasion of the personal and property rights of the plaintiff—*ultra vires,* and unlawful.

Too much stress should not be put upon the fact that the plaintiff is a licensed officer to make the connection—"to tap the main." That fact supplies only one of the points made in this case, and therefore enters into its consideration. But had he not been such licensed officer, it seems to us that it would have been only necessary for the plaintiff to have gotten some one licensed by the city to do such work—to make the connection with the main, and the other work, such as supplying the material, digging the trench and covering the pipe, he might have been allowed to do himself, as the city was in no way interested in that.

Where a city has the power to erect a public improvement, and to control, manage and protect the same, the line of demarcation is so small and so delicately drawn between such power and the rights of the individual citizens of the corporation, that it is difficult to run and

(185) mark it, so as to give the corporation its proper powers without infringing upon individual rights and property rights. But, as delicate as this duty is, it seems to us that in this case the line of demarcation is plainly apparent. But if it was in doubt, it would have to be resolved against the defendants and in favor of the plaintiff's individual rights. 1 Dillon Mun. Corp., par. 89; *S. v. Webber,* 107 N. C., 962; *Edgerton v. Water Co., ante,* 93.

We are therefore of the opinion that the city had the right to require that this connection should be made by its licensed officer; that material furnished should be proper for such work and subject to the inspection and approval of the city inspector; and that the work of putting them in should be done under the supervision of the city inspector.

But we are also of the opinion that the city had no right to compel the plaintiff to buy the material from it; nor had it the right to compel the plaintiff to pay it to do the work we have specified and pointed out above, in this opinion.

The plaintiff was entitled to the mandamus, and the judgment of the court below is

Affirmed.

Cited: *S. v. Higgs, post,* 1024, 1026.

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(186)

J. S. CARR v. THE FIDELITY BANK AND J. O. LUNSFORD.

(Decided 13 March, 1900.)

Bank Deposit—By Agent of Joint Owners—Deposit to Joint Credit—Withdrawn by One Joint Owner by Check in Joint Names—Check Payable to Their Own Order, and so Endorsed—Tenants in Common—Partners—Notice.

1. The defendant Lunsford, as agent of plaintiff, and one J. W. Smith, collected rents of their property held in common, and deposited the fund in defendant bank to the credit of "*Smith & Carr, by J. O. Lunsford, Agent,*" the bank having no notice of the nature of the property whence the fund was derived, but knowing that the fund was treated as partnership property, there was no other course than to pay a check drawn by Smith, signing it "Smith & Carr," payable to their order, and indorsed in the same way.

2. The case presented is not that of a deposit made by two in their individual names, to be paid upon joint order.

3. The plaintiff has mistaken his remedy—it is against Smith, only for half the fund checked out, and not against the bank, or Lunsford.

ACTION for plaintiff's half of a fund deposited in defendant bank, tried before *Moore, J.,* at January Term, 1900, of DURHAM.

The plaintiff and John W. Smith owned some real estate in Durham as tenants in common, and employed J. O. Lunsford to collect the rents which he did, and deposited the same in the Fidelity Bank to the credit of "Smith & Carr, by J. O. Lunsford, agent." When the fund had

accumulated to $1,138.98, John W. Smith drew a check on the bank for $1,120, signed "Smith & Carr," payable to "order of ourselves," and endorsed "Smith & Carr," which the bank paid. A few days afterwards, the plaintiff demanded of the bank one-half of the sum deposited ($1,-
138.98), which demand the bank refused, but offered to pay the
(187) balance of the fund ($18.98), on his signing a check "Smith &
Carr," which he declined to do, and instituted this suit. Upon the evidence, which was uncontroverted, the defendant asked his Honor to instruct the jury that the plaintiff was not entitled to recover; this his Honor refused to do, but instructed the jury that the plaintiff was entitled to recover. Defendant excepted. Verdict and judgment for plaintiff for $569.49. Defendant bank appealed. No judgment asked against Lunsford.

Manning & Foushee and Guthrie & Guthrie for plaintiff.
Winston & Fuller and Boone, Bryant & Biggs for defendant.

CLARK, J. The uncontradicted testimony is in substance this: Deposits to the amount of $1,138.98 were made in the defendant bank in the name of "Smith & Carr," so entered on its books and in the depositor's pass-book; four of the deposit tickets were made out by the depositor's agent in the name of "Smith & Carr," and two as "Smith & Carr, J. O. L., agent." In fact, the deposits came from rents collected from real estate owned by John W. Smith and Julian S. Carr, as tenants in common, and not as partners; but this fact was not known to the bank. The deposits were made by J. O. Lunsford, agent of the owners, to collect said rents. John W. Smith drew a check on the bank for $1,120, signed "Smith & Carr," payable to "order of ourselves," endorsed it "Smith & Carr," and the bank paid it. Some days thereafter Carr made a demand on the bank for half of the $1,138.98; the bank offered to pay him on check signed "Smith & Carr" the $18.98 balance left on deposit, which he refused and brought this action to recover one-half of
said $1,138.98.
(188) The plaintiff has "got the wrong sow by the ear." Smith is the
one who has got the money and should be held to account for it. The plaintiff, fortunately for him, can not possibly lose by looking to Smith, for, according to the evidence, he is indebted to Smith more than this amount, and the half of the money checked out of the bank can be treated as a payment thereon.

Upon the evidence, the court should have instructed the jury to render a verdict for the bank. The deposit was made in the name of "Smith & Carr" by the agent of the owners of the deposits, and the deposits were all so entered on the pass-book of the depositors. The bank had no

notice of the nature of the property whence the fund was derived. It did know that as to the fund itself it was treated as the property of a partnership; and when one of said parties, "Smith & Carr," drew a check on the firm, signing it "Smith & Carr," there was no other course than to pay it. "The proper and only safe rule for the bank is to require the signature to be identical with the credit on its books." 2 Daniel Neg. Inst., sec. 1612. The bank was not called upon to inquire into the nature of the fund or of the supposed partnership. It received deposits in the name of "Smith & Carr," and it paid to the order of "Smith & Carr." It discharged the trust confided to it. It was the plaintiff's own fault, and not the fault of the bank, that he permitted the deposits to be made in the name of "Smith & Carr," and made no objection till after the fund had been drawn out. Indeed the pass-book, if examined by him, gave him notice of the nature of the dealing with the bank.

This case has no analogy to a deposit made by two or more, in their individual names, with notice express or implied not to be paid out except upon their joint order. Morse on Banks, sec. 435; *Neiman v. Trust Co.,* 170 Mass., 452. If it had been all Carr's money, which was deposited in the name of Smith & Carr, the bank, in (189) the absence of notice of Carr's claim upon the money, would be protected in paying the check of "Smith & Carr."

There is no cause of action whatever shown as to the defendant Lunsford. He was agent to collect and deposit, and did it. He has drawn out none of the money. If the ground is that he erroneously deposited in the wrong name, it is not charged in the complaint, and, if it were, it would be a misjoinder to allege such cause against him in this action against the bank, unless it were alleged that there was a conspiracy between him and the bank. On the contrary, the complaint alleges that Lunsford neither consented to nor knew of the drawing of the check by Smith, nor its payment by the bank.

Even if the deposit had been entered in the name of "Smith & Carr by J. O. Lunsford, agent," still "Smith & Carr," as principals, would be entitled to check it out.

This is not a case of following a fund which has been perverted, for, if so, it had already been paid out by the bank, when notice was given by Carr, and the fund must now be followed in the possession of Smith.

Error.

(190)

G. A. STANCILL v. R. S. JAMES AND EASON JAMES, JR.

(Decided 13 March, 1900.)

Trespass—Former Judgment—Estoppel by Plea, by Evidence.

1. When an estoppel is relied on as a defense to the action, it must be pleaded specially.
2. When the general issue (answer now) alone is pleaded in ejectment or trespass, or when the plaintiff has had no opportunity to plead estoppel or has not been required to do so, he may introduce the record in the first suit as *evidence*, without special plea.
3. In trespass or ejectment, the plaintiff is not required to set out his title; it is sufficient to allege ownership, and a plea of estoppel in the complaint, in anticipation of the answer, would seem out of place. The defendant, so far as then appears may admit ownership in plaintiff, and deny the trespass. No reason appears why the record and judgment may not come in, *as evidence*, like any other proof.
4. The judgment in the former case, when introduced either under *a plea or as evidence*, is conclusive on both court and jury, the record being regular.

ACTION for trespass on land, tried before *Hoke, J.*, at December Term, 1899, of PITT. Action commenced 4 September, 1897.

Judgment in favor of plaintiff for $150 and costs. Defendants appealed.

(193) *Aycock, Fleming & Moore, and Gilliam & Gilliam for plaintiff.*
Jarvis & Blow for defendants.

FAIRCLOTH, C. J. In this action of trespass the plaintiff alleges that defendant has cut his timber trees to his damage, etc. Defendant admits cutting and hauling off the said trees, but denies that plaintiff is the owner of the land on which the trees were growing.

Plaintiff in his complaint describes a large tract containing 400 acres. The defendant describes by metes and bounds a tract of 33 acres, on which the trees were cut, and claims to be the owner thereof, and produces his title deeds, etc. The whole controversy is the ownership of these 33 acres, which we understand are embraced by the description of the larger tract.

In the course of the trial the plaintiff offered in evidence the record of an action by him against the defendant and two others for damages in cutting his trees prior to 1892, in which a judgment was entered in favor of the plaintiff. The regularity of the proceedings set out
(194) in this record is not denied. The introduction of this record *as evidence* was objected to by defendant. Plaintiff did not offer

this record as a link in his title, but only as an estoppel on the defendant to deny or dispute plaintiff's title. Defendant excepted to the admission of the record and judgment, on the ground that plaintiff had filed no plea of estoppel. Defendant, as a witness in his own behalf, said "he gave the same testimony as to ownership and possession in former trial, that he did here. That this is same land and same title that was presented by defendant and passed upon in former trial. That he had cut no timber since last suit was tried, but had cut timber on land since last suit was commenced."

We then have this question: In an action of trespass and an answer of general denial, with no special plea, can the plaintiff, for the purpose of an estoppel, introduce *as evidence* the record and judgment in a former trial, between the same parties and involving the same subject-matter, and similar pleadings, without pleading the estoppel? This question has not been heretofore passed on by this Court, and we remember that technical pleadings, formerly, were closely observed by courts. Bigelow Estoppel (5 Ed.), pp. 697, 698, 699, devotes a chapter of three pages to this precise question, and refers to the old and modern practice and the decisions of each period. The earliest case referred to is *Goddard's case,* 2 Coke, 4. This, and the succeeding cases, hold that an estoppel must be pleaded, and that the judgment as evidence was conclusive in England and in America. At the time of Coke and those decisions, the jurors were themselves witnesses, and were sworn as such to speak the truth, and must observe their oath. In this fact the doctrine of *Goddard's case* is supposed to have had its origin as well as in technical pleading.

Since the decision in *Duchess of Kingston's case,* 2 Smith's (195) L. C., and the transition in the jury system, the tendency of decisions in America has been strongly the other way. Bigelow shows, however, by citing cases, that in our sister States the courts are much divided. All the cases agree that the judgment in the former case, when introduced either under a plea or as evidence, is conclusive on both court and jury, the record being regular. The modern doctrine, to which Mr. Bigelow gives the weight of his opinion, is that when an estoppel is relied on as a defense to the action, it must be pleaded specially, and this Court frequently has so decided. *Harrison v. Hoff,* 102 N. C., 126. Further, that when the general issue (answer now) alone is pleaded in ejectment or trespass, etc., or when the plaintiff has had no opportunity to plead estoppel or has not been required to do so, he may introduce the record in the first suit *as evidence* without special plea. This seems to be the rule of all our State courts, which have adopted the modern doctrine, as appears from numerous cases cited in the carefully prepared brief of plaintiff's counsel, and in the notes to Bigelow's text. This view

commends itself to our minds. In trespass or ejectment we do not require the plaintiff to set out his title. It is sufficient to allege ownership. A plea of estoppel in the complaint, in anticipation of the answer, would seem out of place. The defendant, so far as then appears, may admit ownership in the plaintiff and deny the trespass. We can see no reason why the record and judgment may not come in *as evidence* like any other proof. It is no surprise, as the existence of the judgment is equally well known to each party. It is common to allow plaintiff by record or by deed to show that defendant claims under the same grantor as the plaintiff, and thereby save trouble and expedite the trial
(196) without prejudice to either party. The proof in either case is conclusive, and prevents vexatious litigation.

The other exceptions present no other important questions and need not be considered.

Affirmed.

Cited: Alston v. Connell, 140 N. C., 494.

J. F. KING v. L. E. FOUNTAIN.

(Decided 13 March, 1900.)

Livery Business—Sale—Stipulations in Restraint of Trade—Public Policy—Reasonable Restraint.

1. The general rule is, that contracts in restraint of trade and the like are void, as contrary to public policy.
2. The rule has been modified to protect the business of the covenantee, when it can be done without detriment to the public interest; if the restraint is greater in time and space than is required for his protection, the agreement is unreasonable and void.
3. A restriction relating to the operation of a livery business, which in terms is confined to a single county town, and to a period of three years, and applies to one individual only, is not unreasonable.

ACTION for damages for breach of covenant not to operate a livery business in Greenville, N. C., for three years, and for an injunction, heard before *Bowman, J.,* at chambers in PITT, 19 January, 1900, upon notice and affidavits for a continuance of restraining order heretofore granted in the cause.

His Honor, upon a hearing, refused to grant the injunction, and vacated the restraining order heretofore granted.

The plaintiff excepted and appealed.

Fleming & Moore for appellant. (197)
Jarvis & Blow for appellee.

FAIRCLOTH, C. J. On 26 October, 1899, the defendant was engaged in the livery business at Greenville, N. C., and on that day for a valuable consideration sold to the plaintiff his teams, vehicles, etc., and agreed that he would not run or operate any other livery business in the town of Greenville for the period of three years from that date.

Soon thereafter the wife of the defendant opened and engaged in the livery business in said town and employed the defendant, her husband, to superintend the business, which he is now operating and conducting in said town. On the hearing of a restraining order the injunction was dissolved and the plaintiff appealed.

The general rule was, and still is, that contracts in restraint of (198) trade and the like are void on the ground that they are against public policy, similar to contracts illegal and *contra mores.* Clark Contracts, 451-457.

This rule has been modified in order to protect the business of the covenantee or promisee when it can be done without detriment to the public interest. The reasonableness of such restraint depends in each case on all the circumstances. If it be greater than is required for the protection of the promisee, the agreement is unreasonable and void. If it is a reasonable limit in time and space, the current of decisions is that the agreement is reasonable, and will be upheld.

In the present case, the restriction is confined in terms to a single county town and to a period of three years. This seems to this Court not unreasonable. The restriction applies to one individual only, and it is quite probable that if the demands of that place require more extensive livery business, some other enterprising citizen will supply the demand, especially if it be profitable. The defendant has received his consideration, and good faith requires him to perform his agreement. A husband may be his wife's agent, but it requires but little scrutiny to look through these facts and discover who controls the business and enjoys the profits.

The whole ground of this contention was disposed of in *Baker v. Cordon,* 86 N. C., 116. There, the defendant sold his stock of drugs, medicines, etc., to the plaintiff, agreeing not to carry on said business in the town of Tarboro whilst the plaintiff was engaged in it. In a few months he, the defendant, bought other drugs, etc., and sold them to two other parties and promptly engaged in selling them as the manager and superintendent of his vendees. It was held that his contract with the plaintiff was valid, and that engaging in the business as above stated was a breach thereof. That seems to be decisive of the present case.

The defendant referred to 5 A. & E. Enc. (2 Ed.), 480, to (199)

show, as we understand him, that a livery man is a common carrier. The author there has under consideration the distinction between the liability of carriers to passengers and his liability for failing to carry goods, holding that the former depends upon negligence and the latter upon contract of bailment, being liable in the latter case for all injuries not caused by the act of God or the public enemy. The same distinction is pointed out in *Boyer v. Anderson,* 2 Pet. (U. S.), 155. We are unable to make any application of that doctrine to the present case, which is simply for a breach of a contract in the sale of personal property.

Reversed.

Cited: Disosway v. Edwards, 134 N. C., 257; *Anders v. Gardner,* 151 N. C., 605; *Faust v. Rohr,* 166 N. C., 191.

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(200)

J. C. MARCOM, ADMINISTRATOR OF ALEXANDER OVERBY, v. RALEIGH AND AUGUSTA AIR LINE RAILROAD CO.

(Decided 20 March, 1900.)

Negligence—Roadbed—Track—Crossties—Malicious Act of Party Unknown—Derailment—Burden of Proof—Judge's Charge.

1. Where the derailment of the engine resulted in the death of the intestate, a fireman in the employment of defendant company, a *prima facie* case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove negligence on its part.

2. When the plaintiff contends that the fatal accident resulted from the negligence of the defendant company in failure to provide a proper roadbed and track; in using, where the wreck occurred, decayed and rotten crossties, and rusty and decayed track irons, bolts and bars; while the defendant denies negligence in any duty required of it, and contends that the roadbed and track were in proper order, the crossties sound, and that its rails and other irons were not rusty but strong and in every respect suitable for the work required of them, and attributes the injury to the malicious act of some person unknown, who between 9 and 12:20 o'clock that night removed the fastenings of the bolts from the angle bars and rails, and then removed one of these rails into a position which caused the engine and train to leave the track; and there being evidence in support of the contentions of both sides, and the charge of his Honor, taken as a whole, presents fairly and correctly the contentions of the parties, the evidence and the law arising thereon, exceptions to the exclusion of competent, though immaterial evidence, and to isolated expressions in the charge, perhaps too indefinite to stand alone, are not of sufficient importance to justify a new trial.

MARCOM *v.* R. R.

ACTION to recover damages for the death of the intestate of plaintiff, alleged to have been occasioned, while acting as fireman, by the negligence of defendant company in allowing their roadbed, track, crossties, and irons to be in unsafe condition, tried before (201) *Moore, J.*, at October Term, 1899, of WAKE.

The defendant denied being guilty of negligence, and alleged that its roadbed, track, crossties, rail, and irons were in proper condition, and while it admitted the derailment, resulting in the death of the intestate, the fireman in its employment, denied that it was occasioned by any fault of the company, and alleged that it was the wanton and malicious work of some unknown person who, the night of the wreck, withdrew the spikes and loosened the rail and so shifted it as to run the train off the track. The evidence was voluminous and conflicting, each side furnishing testimony in support of their respective views.

His Honor recapitulated the contention of the parties and the evidence introduced and relied upon by each. He, in effect, charged the jury that it was a question for them to determine the real cause of the trouble; if the fatal injury resulted from the defective ties and roadbed, then the defendant is liable. The existence of defects in the roadbed would not render the defendant liable in damages for the death of the intestate, unless these defects were the occasion of his death. If it resulted from the act of some third person, which the defendant had no opportunity to remedy, in opening the track and displacing a rail, then the defendant is not liable. But when the plaintiff shows that his intestate was killed on this track in the manner described by the witnesses and admitted in the pleadings, then it devolves upon the defendant to disprove the negligence, that is, to show that the injury did not result from defendant's negligence, and the question at last for you to determine is whether the defendant has satisfied you by all its evidence that it is not responsible for the death of this man. It is responsible, if its negligence produced his death; it is not responsible if his death was produced by the act of some third party. (202)

The plaintiff excepted.

The verdict of the jury exonerated the defendant, and the court rendered judgment against the plaintiff, who appealed.

Armistead Jones and Womack & Hayes for plaintiff.
J. B. Batchelor and W. Day for defendant.

DOUGLAS, J. This is an action brought by the administrator to recover damages for the death of his intestate, alleged to have occurred through the negligence of the defendant. The deceased was a fireman on defendant's engine, which left the track, resulting in his death. The

defendant contended that the accident did not occur through its own negligence, but was the direct result of the malicious act of some outside party in pulling out the spikes and pressing in the end of the forward rail, thus making what is called in railroad parlance a "jack-switch." The effect of such a switch is to cause the wheels on one side of the engine to run off the open end of the rear rail upon the ties, and as the flange is on the inside of the wheel, to eventually force the engine clear off the rails. Defendant further contended that it was in no way responsible for such malicious act, and could not have prevented its consequences by any reasonable diligence. This view was evidently taken by the jury, who found for the defendant, and there appears sufficient evidence to justify their finding.

It is not necessary to examine all the exceptions in detail, as we think that none of them are of sufficient importance to justify a new trial.

(203) The plaintiff asked one of his witnesses the following question: "State whether by going over the road and examining the ties it could have been ascertained whether any of them were rotten, by a man who was not a railroad man." The defendant objected, and his objection was sustained. We will frankly say that we do not see why the question was excluded nor what substantial benefit it would have been to the plaintiff if allowed. He has not enlightened us as to his purpose in asking it. We think it would have been proper to have allowed the question, but we do not think that any possible answer could have affected the verdict. Of course, it does not take any technical skill to tell when wood is rotten, especially if it is examined, and this the jury must have known.

The plaintiff further contends that the charge of his Honor was misleading as to the burden of proof. While some parts of the charge are perhaps too indefinite to stand alone, we think that, taken as a whole, it presents fairly and correctly the contentions of the plaintiff and the law arising thereon. *Max v. Harris,* 125 N. C., 351.

There is a clear distinction between such cases and those where the charge is calculated to mislead, either by being inconsistent or contradictory, or where any part thereof contains positive and uncorrected error.

The principles governing the case at bar are well settled. It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence *per se.* But while the company is held to a very high degree of care, there must in all cases be some element of negligence to justify a recovery, and it can not be held responsible for the wanton and malicious act of an outsider, unless it could by the exercise of reasonable diligence have prevented the consequences of such act. As the law places upon the company the posi-

tive duty of providing a safe track, including the incidental (204) duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a failure to perform a positive duty imposed by law. The burden of proving such a failure of legal duty rests upon the plaintiff, but when that fact is proved or admitted, the burden of proving all such facts, as are relied on by the defendant to excuse its failure, rests upon the defendant. Its plea, then, is in the nature of confession and avoidance.

When the defendant, in its answer, admitted that the death of the plaintiff's intestate was caused by the unsafe condition of its track, the plaintiff's case was practically made out for the time being, and the further burden was at once shifted to the defendant. Its contention that the accident was caused by the malicious conduct of some one for whom it was not responsible, and the consequences of whose act it could not have prevented by any reasonable degree of care, was an affirmative defense by its very nature, carrying with it the burden of proof. *Wright v. R. R.*, 123 N. C., 280; *Bolden v. R. R., ib.*, 614.

These principles are correctly laid down in the charge of the court, and as we find no substantial error in the conduct of the trial, the judgment is

Affirmed.

Cited: Raper v. R. R., 126 N. C., 566; *Wilkie v. R. R.*, 127 N. C., 210; *Wright v. R. R., ib.*, 229; *Thomas v. R. R.*, 131 N. C., 592; *Willeford v. Bailey*, 132 N. C., 406; *Stewart v. R. R.*, 137 N. C., 689; *Hemphill v. Lumber Co.*, 141 N. C., 489; *Overcash v. Electric Co.*, 144 N. C., 577; *Winslow v. Hardwood Co.*, 147 N. C., 278; *Duvall v. R. R.*, 152 N. C., 525; *Houston v. Traction Co.*, 155 N. C., 8; *Adams v. R. R.*, 156 N. C., 175; *Worley v. Logging Co.*, 157 N. C., 495; *Skipper v. Lumber Co.*, 158 N. C., 324; *Tilghman v. R. R.*, 167 N. C., 167.

(205)

N. L. HALL v. B. J. FISHER.

(Decided 20 March, 1900.)

Contract, Executed, Executory, Relating to Realty—Statute of Frauds—Public Streets—Nudum Pactum.

1. The statute of frauds does not apply to executed, but only to executory contracts.

2. To make an executory, unwritten contract binding, there must be a consideration to support it, or it will be *nudum pactum.*

3. A contract to do something, must be something the contracting party can do, and which it is lawful for him to do, and which is not in violation of law or public policy.

4. If a party to a land trade contracts by parol to open a public street to the land sold, the purchaser knowing at the time that the seller did not own the land over which the street would run, and it being necessary to have the approval of the town authorities, to open a public street, as they have to keep it up, the contract is not enforceable.

5. Where such verbal agreement on the part of the vendor was a part of the consideration which the purchaser was to receive in addition to the money consideration for the lot exchanged in the land trade, without any written contract or memorandum to that effect properly signed, it is barred by the statute of frauds, and can not be specifically enforced, or compensated for in damages.

ACTION to recover damages for breach of contract for sale of a town lot in Greensboro, tried before *Timberlake, J.,* at May Special Term, 1899, of GUILFORD.

(200) The following issues were submitted by his Honor to the jury, the defendant objecting and excepting.

1. Did the defendant Fisher contract and agree with plaintiff Hall at the time Hall bought the lot on Schenck Street, and, as an inducement for him to buy, that he would open Wainman Street from Schenck Street to Green Street? Answer, "Yes."

2. Has the defendant failed and refused to open said street? Answer, "Yes."

3. What damage has plaintiff sustained? Answer, "$1,000."

Judgment accordingly—to which defendant excepted and appealed.

(207) *Bynum & Bynum for plaintiff.*
J. N. Staples for defendant.

FURCHES, J. The plaintiff alleges in his complaint that he owned a house and lot on Clay Street, in the city of Greensboro, which he sold to the defendant for $1,600, and took in part payment therefor a vacant lot on Schenck Street, fronting on what was called Wainman Street, at the price of $600; that defendant expressly promised and agreed to open Wainman Street from Schenck Street south to Green Street, and this was an inducement for him to take the vacant lot at $600 in part payment for his lot on Clay Street; that he executed a deed to defendant for the property on Clay Street, and defendant executed a deed to him for the vacant lot on Schenck and Wainman streets; that Wainman Street had been located on a map, but had only been opened a short

distance farther south than the lot the plaintiff bought from defendant; that he bought this lot for the express purpose of building a residence on it, and this was known to the defendant; that, supposing defendant would open Wainman Street, as he agreed to do, the plaintiff proceeded to build on said lot a residence worth $1,700; that defendant has failed to open said street, and now declines and refuses to do so, whereby plaintiff has been damaged $1,000.

The defendant admits the sale, but denies that he promised, contracted, or undertook to open Wainman Street, and says that he did want to open said street for the benefit of his property, and so stated to the plaintiff, but that he never contracted with the plaintiff to do so; that the land over which Wainman Street would have run belonged to other persons for the greater part of the distance to Green Street, and the plaintiff well knew this; that he did undertake to purchase the right of way, with a view of having said street opened through (208) to Green street, but was unable to do so.

The jury found that defendant did contract with plaintiff to open said street, and assessed plaintiff's damage at $1,000. There were exceptions taken to the introduction of evidence, to the rejection of evidence, to the judge's charge on the measure of damages, and to the issues submitted. But the defendant, among other things, pleaded and relied on the statute of frauds, and it seems to us that this plea and defense dispose of the case.

The statute of frauds does not apply to executed, but only to executory contracts. *Choat v. Wright,* 13 N. C., 289. This contract was executed, so far as it affected the property on Clay Street and the vacant lot on Schenck and Wainman streets, and has no effect as to them. But it was contended, in fact, it is admitted, that neither of the deeds conveying these properties provided for opening Wainman Street, and that there was no writing or written memorandum as to that.

To make an executory unwritten contract binding, there must be a consideration to support it, or it will be a naked contract—*nudum pactum.* If it is a contract to do something, it must be something the contracting party can do, and it must be something that it is lawful for him to do. Parsons on Contracts, 380, 382. It must, also, not be in violation of law or public policy.

In this case it was known to the plaintiff that the defendant did not own the land over which this street would run, if opened to Green street, as the plaintiff contends it was to do. And it would seem that this would relieve the defendant from such a contract. But suppose it be said that the defendant could have bought the right of way with money enough, as was contended on the argument. Parsons on Contracts, *supra.* But to open a public street in a city, it must have the approval

(209) of the city authorities, who are to provide for keeping it up.

And it would hardly be contended that the defendant could have bought them with "enough money," or that he could have done so at any price.

But the plaintiff contends, and so states in his complaint, that this was a part of the consideration he was to receive for his house and lot on Clay Street; that he took the vacant lot which was conveyed to him by deed, and the verbal promise of the defendant that he would open Wainman Street. And if this is so, he can not enforce this agreement, because it is a part of the price—the consideration for the land—without any written contract or memorandum signed by the defendant or by any one authorized to bind him, and is barred by the statute of frauds. *Rice v. Carter,* 33 N. C., 298; *Mizell v. Burnett,* 49 N. C., 349; *Wade v. New Bern,* 77 N. C., 460; *Neaves v. Mining Co.,* 90 N. C., 412.

We are, therefore, of the opinion that if the defendants did make the contract to open Wainman Street, as alleged in the plaintiff's complaint, he can not be forced to do so; nor can he be held liable in damages for not doing so. *Jordan v. Furnace Co.,* at this term.

Error.

Cited: Davison v. Land Co., post, 709; *McManus v. Tarleton, post,* 792; *Brinkley v. Brinkley,* 128 N. C., 506, 508; *Hall v. Misenheimer,* 137 N. C., 187; *Freeman v. Bell,* 150 N. C., 148; *Bailey v. Bishop,* 152 N. C., 385; *Brown v. Hobbs,* 154 N. C., 549; *Herndon v. R. R.,* 161 N. C., 654.

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(210)

W. J. A. CHEEK v. L. G. SYKES AND THOMAS PICKETT.

(Decided 20 March, 1900.)

Summary Ejectment—Landlord and Tenant—Vendor and Vendee—Parties—Practice.

1. In summary ejectment under the landlord and tenant act in the justice's court, when a party who originally placed the tenant in possession makes affidavit that he is a real party in interest in said action; that he is the vendee of plaintiff, and the defendant is his tenant, and moves to be allowed to be made a party to defend his rights, and those of his tenant, who also joins in the motion, the application in the justice's court ought to have been allowed.

2. The error was not remedied in the Superior Court, when upon a renewal of the application the applicant was allowed to be made a party defendant, but was restricted to an answer denying that the defendant is the tenant of plaintiff and alleging that defendant is the tenant of the applicant.

3. The proper practice would have been to remand the cause to the justice's court, directing him to allow the applicant to be made a party defendant, and to plead and defend the action, as he may be advised.

SUMMARY EJECTMENT under landlord and tenant act, commenced in a justice's court, and heard on appeal, by *Brown, J.*, at ORANGE, October Term, 1899.

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

1. Did defendant Sykes lease the property described in the pleadings from the plaintiff? (211)

2. Has said term expired?

3. Does said tenant Sykes wrongfully hold over and detain said property?

4. What rents and damage is plaintiff entitled to recover?

The jury responding in the affirmative to the issues, awarded to the plaintiff $55.33.

Judgment accordingly, and defendants appealed.

The evidence appears in the opinion.

J. C. Biggs for plaintiff.

Boone & Bryant for defendants.

FAIRCLOTH, C. J. The plaintiff brought this action against defendant Sykes for possession of the premises mentioned, alleging that Sykes was his tenant, and had defaulted in paying rent. The defendant Pickett filed an affidavit before a justice of the peace before whom the action was pending, and applied to be made a party defendant, and to plead and defend the action, alleging that he was the owner and that Sykes was his tenant. This motion was refused, and Pickett appealed to the Superior Court, and renewed his motion to intervene. Pickett was made a party defendant and was allowed to plead and try the question of tenancy, but, as we understand, was not allowed to make any other defense, and from this ruling, and the judgment recorded, the defendant appealed to this Court.

From the affidavits and evidence it appears that in 1892 the (212) plaintiff Cheek contracted to sell the land described to the defendant Pickett, took Pickett's notes for the purchase money and gave him a bond for title when the purchase price was paid, and Pickett rented the land to Sykes; that Pickett has made some payments. It also appears that subsequently Pickett agreed that his tenant might pay the rents to the plaintiff, to be credited on his land note; that thereafter the tenant Sykes rented from the plaintiff, agreeing to become his tenant, and that this agreement was entered into without the knowledge or consent of

Pickett, who afterwards, for reasons stated in his evidence, forbade Sykes to pay rents to the plaintiff any longer.

We have recited the above for the purpose of saying that we think Pickett has an interest in the matter, and that he has the right to intervene as a party defendant and make such defense as he may have.

We express no opinion, however, on the rights of the parties, but we think there has been error committed in the course of the proceedings. The justice who had the action before him ought to have allowed Pickett to intervene as a party defendant, and to plead and make his defense, and when the cause came before his Honor by appeal he should have remanded the case to the justice, with directions to allow Pickett to become a party and to plead.

We, therefore, remand the case to the Superior Court, and direct that his Honor set aside the order heretofore made allowing Pickett to intervene in that court, and that he remand the cause to the justice of the peace, directing him to allow Pickett to be made a party defendant, and to plead and defend the action, as he may be advised.

Error and remanded.

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(213)

JOHN L. MOREHEAD ET AL. v. DAVID B. HALL AND THOMAS B. HALL.

(Decided 20 March, 1900.)

Real Action—Joint Demurrer and Motion to Dismiss Under the Act of 1897—Undescribed Half-part of Tract Conveyed—Unnamed Tenants of the Other Half—Possession.

1. Where a deed conveys one-half of a well described tract, and makes no pretense to describe the particular part conveyed, the deed will be construed as conveying a one-half undivided interest in the land.

2. A tenant in common may bring ejectment and recover of a stranger the whole property if he shows that he has title to an undivided part, and by the same evidence of his own title proves that others than the defendant held as cotenants the other interest—and even without the proof in respect to others, he would still be entitled to recover his undivided interest in the land.

3. Although there may be no evidence of possession by some of the defendants, a joint demurrer will conclude them all, when some are shown to be in possession.

ACTION begun 4 September, 1897, for the recovery of land, tried before his Honor, *Bryan, J.*, at Fall Term, 1899, of CARTERET.

At the conclusion of the plaintiffs' evidence the defendants jointly demurred to the evidence, and moved to dismiss the action under the act of 1897.

The motion was allowed and plaintiffs appealed.

The evidence and grounds of demurrer are stated in the opinion.

P. M. Pearsall and Simmons, Pou & Ward for plaintiffs.
W. W. Clark for defendants.

MONTGOMERY, J. This is an action for the recovery of the pos- (214) session of a tract of land. On the trial the plaintiff introduced a chain of paper-title beginning with a grant to John Benthall, dated 30 October, 1765, and concluding with a deed from Joseph A. Perry to John M. Morehead, the plaintiffs being his heirs at law, dated 17 July, 1856, and testimony going to show that the *locus in quo* was covered by the descriptions in the conveyances, and that David B. Hall, one of the defendants, was in possession of the land at and before the commencement of the action.

There was no objection entered to any of the evidence, and at its conclusion, as stated in the case on appeal, "the defendants jointly demurred to the evidence, and moved to dismiss the action under the act of 1897." The motion was allowed, and the plaintiffs appealed.

In each of the muniments of title, the *whole* of the land described in the complaint was conveyed, except that in one of the deeds, the one from Mary Bell and others, the heirs at law of David Bell, to H. G. Cutler, the land was described as "a certain piece of land in the fork of Newport, on the north side of the Southwest branch, adjoining the lands of William C. Wallace, deceased, and others, it being one-half of a tract of land given by Malachi Bell, Sr., to his son David Bell, as will more fully appear by reference to the will of Malachi Bell to David Bell, containing 200 acres, more or less."

The counsel of the defendants contended here, as to the construction of the deed, first, that nothing was conveyed therein because of a totally defective description of a particular portion of the 200-acre tract, which was attempted to be conveyed; and second, that even conceding that there was conveyed in the deed a one-half undivided interest in the 200-acre tract, yet the plaintiffs could recover no part of the land, for the reason that they did not show on the trial who were the owners of the other half of the tract in order that a judgment (215) might be rendered for them, and the plaintiffs as tenants in common.

We think that the contention in neither of its forms can be sustained. We are without a decision on the first point in our Reports, nor have we been able, after a diligent research, to find much in the Reports of the courts of other States, and so we are left to adopt a construction of the deed, as best we may, from the light of reason.

We are of the opinion that there was conveyed in the deed a one-half undivided interest in the 200 acres. Some confusion, it is true, has arisen out of the use of the words "a certain piece of land," but there was no attempt to describe that "certain piece" by metes and bounds, or by any other definite description. If such an attempt, that is, an attempt to convey a specific number of acres, by survey or by metes and bounds, had been made, and the boundaries and description had been fatally defective, then nothing would have been conveyed, for such an attempted description would have shown in its own terms that an undivided interest had not been attempted to be conveyed. The deed on its face conveys only a part, one-half of a well described tract, and makes no pretense to describe the particular part conveyed, and we see no reason why the deed should not be construed as conveying a one-half undivided interest in the land. The view is supported by the opinion in *Grogan v. Bache,* 45 Cal., 610. But in *Gibbs v. Swift,* 12 Cushing, 393; *Jackson v. Livingston,* 7 Wend., 136, and *L. I. Railroad Co. v. Conklin,* 29 N. Y., 572, a contrary doctrine is held, that is, that even if there was an attempt to convey a given part of a larger tract of land, and the deed should fail to locate the quantity by a sufficient description, yet, upon the delivery of the deed, the grantee would become the owner, tenant in common with his grantor. We adopt the other construction because we
(216) think it the more reasonable, and more in conformity with the trend of our decisions on the questions of boundary and description. Either construction, however, is against the defendants' contention.

But, as we have seen, the defendants insist that even if there was conveyed in the deed a one-half undivided interest in the land, yet the plaintiffs could not recover that interest because they failed to name the other tenants in common, and to prove their title, so that a proper judgment could not be entered. The rule is that a tenant in common may bring an action in ejectment and recover of a stranger the whole property, if the plaintiff shows that he has title to an undivided part, and also, by the same evidence of title or possession that showed his own title, proves that others than the defendant held as cotenants the other interest. But if the plaintiff proves title to an undivided interest, and fails to show who are the owners of the other interest so as to entitle him to a judgment in behalf of himself and the other cotenants, if they be some other than the defendants, he would still be entitled to recover his undivided interest in the land. *Allen v. Sallinger,* 103 N. C., 14; *Lenoir v. Manufacturing Co.,* 113 N. C., 513. Under the rule the plaintiffs in this case were entitled to recover a one-half undivided interest in the land.

It was argued by the counsel of defendants that the grant to Benthall was not registered until October, 1899, and that, as the last extension of time by the General Assembly for the registration of grants expired 1 January, 1896, therefore the grant could not have been registered in 1899. Objection to the introduction of the grant does not appear in the record; neither does it appear that the grant was introduced to show only color of title and adverse possession by the plaintiff under it, so as to presume a grant. There is nothing in the record going to show that the plaintiffs tried their case in any other manner than title shown through regular and successive conveyances duly (217) executed—by a chain of paper-title.

There was no evidence tending to prove possession on the part of the defendant Thomas B. Hall, but the demurrer was a joint one, and there having been evidence of possession against David B. Hall, the other defendant, the demurrer on this point also ought to have been overruled as to both the defendants. *Conant v. Barnard,* 103 N. C., 315; *Loughran v. Giles,* 110 N. C., 423.

New trial.

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(218)

McLAMB ET AL. V. McPHAIL ET AL.

(Decided 20 March, 1900.)

Verification of Pleadings—Deed to Wife in 1841—Omission of Words "Her Heirs"—Reformation of Deed—Inconsistent Defenses—Counter-claim—Omission to Reply—Cloud Upon Title, Laws 1893, Chapter 6—Deed to Wife Now, Article X, Section 6, of the Constitution.

1. A verification of answer in these words: "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with the Code, sec. 258.
2. Defendants have a right to plead inconsistent defenses, if separately stated —Clark's Code, sec. 245 (3 Ed.); also, in order to avoid multiplicity of claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under Laws 1893, ch. 6, and the counterclaim required a reply.
3. A deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration; it is otherwise, as to such deed executed now, rendered valid by Art. X, sec. 6, of the Constitution.
4. The counterclaim containing no averment of meritorious consideration, although not replied to, would not authorize the correction of the life estate deed of 1841 into a fee simple deed.

EJECTMENT, tried before *Timberlake, J.*, at May Term, 1899, of SAMPSON.

The plaintiffs claimed as heirs of Felix Fleming, who shortly before his death conveyed by deed a life estate in the land to his wife, Ailey Fleming, in 1841. After his death his widow married Holly Tew, and lived on the land more than thirty years, and then conveyed said land to the various defendants and those under whom they claim,
(219) who are now in possession.

That Ailey Tew, formerly Ailey Fleming, died in 1894, and the plaintiffs became entitled to the possession of said land

The defendants admit being in possession, but deny the title of plaintiffs, they allege that they are not claiming and holding the land under Ailey Fleming, but under Holly Tew, and under Ailey Tew and her heirs, Hinton and John H. Tew, as the widow and children of said Holly Tew.

They also plead the statute of limitations as a second defense.

And for a third defense and counterclaim these defendants say: "That the deed of Felix Fleming to Ailey Fleming, his wife, of date 25 September, 1841, as set forth in the complaint as valid, and alleged by plaintiffs to convey an estate for the life of said Ailey, these defendants say that said deed was intended by the parties thereto to convey a fee simple, and the words of inheritance, to wit, and 'her heirs,' were omitted by the mutual mistake and inadvertence of the parties thereto. Wherefore, these defendants pray that said deed be corrected and reformed, so that the same shall convey a fee simple estate, and that defendants be dismissed hence, and that they recover their costs, and for further relief."

The plaintiffs failed to reply to the counterclaim, and the defendants moved for judgment upon their counterclaim. The plaintiffs moved for leave to file a reply. The court being of opinion that the ends of justice would not be subserved by granting the motion to file a reply, refused the motion of plaintiffs as a matter of discretion, and granted the motion of defendants, the plaintiffs admitting in open court that they can not maintain this action if the deed from Felix Fleming to Ailey Fleming is corrected to convey a fee simple estate.

(220) The plaintiffs excepted and demurred *ore tenus* to the alleged counterclaim. Demurrer overruled, and the court adjudged that the deed be reformed by the addition of the words *"and her heirs,"* after the name of Ailey Fleming, and that defendants go without day. Plaintiffs excepted and appealed.

F. R. Cooper, Shepherd & Shepherd, and Stevens & Beasley for plaintiffs.

J. L. Stewart, Allen & Dortch, and E. W. & J. D. Kerr for defendants.

CLARK, J. The verification of the answer filed 11 June, 1898, "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with section 258 of the Code. *Cole v. Boyd,* 125 N. C., 496; *Payne v. Boyd, ibid.,* 499; *Phifer v. Insurance Company,* 123 N. C., 410. That section says the verification must be "in effect" as therein prescribed, and the cases cited hold that a verbal and literal following of the formula prescribed is not necessary.

The plaintiffs bring this action for the recovery of real estate as heirs at law of Felix Fleming, who conveyed it by deed to his wife, Ailey, in 1841, but without using the words "her heirs." She married, after the death of her said husband, one Holly Tew, and the complaint avers that the defendants are holding under mesne conveyances from Ailey Tew, the grantee of the life estate aforesaid, who died in 1895. The original action in this cause was instituted in 1895, and, having terminated by a nonsuit, this action was begun within one year thereafter. The answer denies that the defendants hold under Ailey Tew, but avers that they hold under Holly Tew, by conveyances from his widow and children, and plead the statute of limitations.

For further defense the defendants allege that the said deed (221) from Felix Fleming to Ailey Fleming, which the plaintiffs allege conveyed only a life estate to Ailey, was intended by the parties thereto to convey a fee simple, that the words "her heirs" were omitted by mutual mistake and inadvertence of the parties thereto, and ask for a correction and reformation of the deed to convey a fee simple.

The defendants had a right to plead inconsistent defenses if separately stated, as was here done. Clark's Code, sec. 245 (3 Ed.), and cases cited. It was also competent in order to avoid multiplicity of suits to ask for the correction of the deed in the answer, for the defendants could not, as under the former system of pleading, have obtained an injunction against proceedings at law to recover the realty until the termination of their own proceedings in equity for the correction of the deed. The plaintiff filed no reply to the allegation of grounds for a decree for reformation of the deed, and his Honor gave judgment by default. The plaintiffs contend that this was error upon the ground that this was not a counterclaim because the defendants could not have maintained an independent action therefor, which is the test between a matter of defense which requires no reply (Code, sec. 268) and a counterclaim. *Askew v. Koonce,* 118 N. C., 526. Since chapter 6, Laws 1893, however, the defendants, though in possession, could have brought such action to remove a cloud upon the title, and it is therefore a valid counterclaim, and not a mere matter of defense, as it would have been theretofore, but the judgment by default is erroneous for a different

reason. Now, by virtue of the constitutional provision (Art. X, sec. 6), it is held that a deed from the husband to the wife is valid. *Walker v. Long,* 109 N. C., 510, which has been followed in *Fort v. Allen,* 110 N. C., 183, and *Sydnor v. Boyd,* 119 N. C., 481, and cases there cited.

But under the law governing the property rights of married wom-
(222) en, as it existed in 1841, the conveyance, if it had been executed as a fee simple deed to the wife, would have been void at law, and sustainable in equity only upon meritorious consideration. *Warlick v. White,* 86 N. C., 139. The court of equity would not correct a deed to insert the word "heirs," though omitted by inadvertence of the draftsman or by mutual mistake, unless the deed is supported by a meritorious consideration. *Powell v. Morisey,* 98 N. C., 426, and cases there cited. The answer contains no averment of meritorious consideration, and the material relation would *per se* be a meritorious consideration only for the wife's maintenance, *i. e.,* for the life estate actually conveyed, and would not, no other consideration appearing, authorize the correction of the deed into a fee simple. Taking the answer in this respect to be true because undenied by a reply, it did not authorize the judgment rendered by default for correction of the deed.

Error.

Cited: Campbell v. Cronly, 150 N. C., 466; *Williams v. Hutton,* 164 N. C., 223; *White v. Gwynn,* 168 N. C., 434.

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(223)

STRAUSE v. ÆTNA FIRE INSURANCE COMPANY.

(Decided 27 March, 1900.)

Attachment—Jurisdiction—Situs of the Debt—Garnishment—Property—"Domesticated" Corporation Domicile.

1. Where jurisdiction has been obtained of the person or subject-matter, the courts of one State give full faith and credit to judgments rendered in the courts of another; otherwise, the judgment of the foreign State is treated as a nullity.
2. The State of Pennsylvania, as a condition of doing business within its borders, may require the appointment by a Connecticut corporation of a resident agent upon whom process may be served.
3. Suability is not the test of the *situs* of a debt for the purpose of garnishment, nor of itself gives jurisdiction in attachment, where neither the creditor, nor debtor, nor garnishee is domiciled in the State.

4. States requiring "domestication" enable plaintiffs to get personal service upon a foreign corporation, but do not remove its property to the State nor the *situs* of its debts, created elsewhere.

ACTION upon a fire insurance policy, tried before *Hoke, J.*, at December Term, 1899, of PITT, upon facts agreed.

Defendant appealed.

Aycock, Fleming & Moore for plaintiff.

H. G. Connor & Son, Burwell, Walker & Cansler, and Jarvis (227) *& Blow for defendant.*

CLARK, J. The defendant is a corporation chartered in Connecticut, and issued its policy of insurance to the plaintiffs, who are residents and citizens of this State, upon property located here. The property was partially destroyed by fire during the existence of the policy, and the amount of the loss has been adjusted, in the manner required by the policy. This action is brought to recover that sum. The only defense set up is that a creditor of the plaintiff in Pennsylvania has instituted an action against him in that State, and attached the liability of the defendant company to said plaintiff by reason of said loss, by garnisheeing the agent of the defendant in that State, which action was instituted before the beginning of this and is still pending in the courts of that State, wherefore the defendant asks that this action be stayed till the determination of that.

The courts of one State give full faith and credit to judgments rendered in another when jurisdiction has been obtained of the person or subject-matter, but when such is not the case, the judgment of the foreign State is treated as a nullity; so the sole question here is (228) whether the Pennsylvania court has acquired jurisdiction by such garnishment (for there was no personal service upon plaintiffs), since if it has not, then as the judgment, if it shall be rendered adversely to these plaintiffs, will be a nullity, a stay of proceedings in the courts here will be useless.

It is true that under the Pennsylvania statute the defendant, a Connecticut corporation, is required to appoint a resident agent in that State upon whom process can be served, and this is a condition which that State can exact of nonresident corporations, but that only renders the Connecticut corporation suable in Pennsylvania by giving personal service upon its agent. It does not carry the *situs* of the debt it owes to the plaintiffs to Pennsylvania and make the plaintiffs Strause suable in Pennsylvania because their debtor, the defendant company, can be sued there for their own indebtedness to a plaintiff. If suability of the defendant were the test, the plaintiffs could be sued in every State and in

every foreign country where their debtor has an agency. Many courts deny that a creditor can be brought into court by attaching a debt due to him, and it is certainly not very logical that a debt should have a *situs* where the debtor resides, for the debt is property of the creditor, not of the debtor. Some courts, however, have gone that far, including the courts of this State, but none have gone so far as to hold that debts may be ambulatory, and well-nigh ubiquitous in this case, by having a *situs* wherever the debtor has an agent who can be served with process for its own indebtedness. An attachment could be levied in Pennsylvania only upon property of the defendant in such action, and these plaintiffs had no property in that State, and the debt due them
(229) by the Connecticut corporation was not in the hands of such company's local agent in Pennsylvania.

To put it as strongly as possible, suppose the defendant was a natural person, a citizen and resident of Connecticut, and was temporarily in Philadelphia, so that he could be personally served with process for his own indebtedness to a plaintiff, would that make him liable to garnishment by any one holding a claim against those whom he owed? This question has often arisen and has uniformly been decided in the negative. *Balk v. Harris,* 124 N. C., 468, and numerous cases cited at pp. 469, 471. Even if the defendant company had become "domesticated," or had taken out incorporation in Pennsylvania, the Pennsylvania corporation would simply be an affiliated company, and would not swallow up or be substituted for the Connecticut corporation which owes these plaintiffs, and the *situs* of whose indebtedness as such would not be affected, however it might be as to their transactions and indebtedness arising in Pennsylvania.

The very point was decided in *Bank v. Blaecker,* 72 Minn., 383; 42 L. R. A., 283, where it is said: "The garnishee has filed the stipulation required by the statute, has established local agencies, and has been insuring property in this State. This did not, in our opinion, give the garnishee a domicile in this State for all purposes, or bring into this State the *situs* of debts which it owes elsewhere by reason of business transacted elsewhere. Neither the creditor nor the debtor resided in this State. None of the transactions out of which the indebtedness arose took place in this State, and the indebtedness was not payable in this State. Under these circumstances the debt has not a *situs* in this State. *Remiers v. Manufacturing Co.,* 70 Fed., 573; *Douglas v. Insurance Co.,* 70 N. Y., 209; *Douglas v. Insurance Co.,* 20 L. R. A., 118; *Renier*
(230) *v. Hurlbut,* 81 Wis., 24; *R. R. v. Dooley,* 78 Ala., 524; *Wright v. R. R.,* 19 Neb., 175; *Keating v. Am. Ref. Co.,* 32 Mo. App., 293."

The Supreme Court of Wisconsin, in *Renier v. Hurlbut,* cited above, says: "It is obvious that if the indebtedness of the Boston Company to

Mrs. Renier had any *situs* outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts; certainly not with the respective agents of that company wherever located in the several States." This same view is taken and strongly reinforced in *Bank v. Furtrick,* 44 L. R. A., 115, decided by the Delaware Court of Appeals in 1897. In that case the Court says: "True, the garnishee is a corporation doing business in this State, but the debt due the defendant arose from its contract for insurance made through its agency in South Carolina with the defendant, a citizen of that State, and concerning property situated there, and was payable there, . . . and is not such a credit or property within this State as will confer jurisdiction. To take any other view would be to hold that it existed, had its *situs,* and was liable to attachment in every State in this Union where the defendant happened to have an officer upon whom process could be served as a condition precedent to its being permitted to do business in such State."

Upon the argument that because the defendant is suable in Pennsylvania by service upon its local agent, that, therefore, the plaintiff, as a creditor of the defendant, is suable also in that State, it may be said, following the *Minnesota case* above cited, that while Strause might have sued the Connecticut company in Pennsylvania by serving his summons upon its agent in Pennsylvania (by service upon the Insurance Commissioner in Minnesota, as required by its laws), this does not prove that the debt has a *situs* in Pennsylvania. Such action would be *in personam* and not *in rem,* and it would be immaterial where the *situs* of the debt would be. Besides the creditor may give the debt a (231) *situs* there, for it naturally follows his person, and he can take it anywhere, but a third person claiming to be a creditor of the creditor can not do this. He has no power to change the *situs* of the debt or give it a *situs* where it would otherwise be.

Statutes requiring domestication, or the appointment of a local agent by nonresident corporations, as prerequisites to doing business in a State, enable any plaintiff to get personal service upon such corporation in an action upon its liabilities to such plaintiff, but it does not remove the corporation's property to such State nor the *situs* of its debts, which have been created elsewhere, and it is only upon the latter ground that the indebtedness of the defendant, a Connecticut corporation, to the plaintiffs could be attached in Pennsylvania.

In *Boyd v. Insurance Co.,* 111 N. C., 372, the point now presented was not discussed nor adjudicated, nor indeed does it appear that the insurance company, the garnishee, was not a Virginia company, which would have made the *situs* of the debt there and attachable. At any rate the validity of the attachment was not questioned. *Chicago R. R. v.*

Sturm, 174 U. S., 710, also relied upon by defendant, does not apply, for it is not contended that the defendant here is a Pennsylvania corporation.

Affirmed.

Cited: Biggs v. Life Ass'n., 128 N. C., 7; *Sexton v. Ins. Co.,* 132 N. C., 2; *Goodwin v. Claytor,* 137 N. C., 235; *Williams v. Heptasophs,* 172 N. C., 789, 790.

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(232)

JENNIE E. KENNON v. WESTERN UNION TELEGRAPH COMPANY.
(Decided 27 March, 1900.)

Telegram—Negligence in Delivery—Tort—Breach of Contract—Mental Anguish—Notice—Damages.

1. Negligence in delivery of a message, whether considered as a tort, or a breach of contract, is to be compensated for by the recovery of damages for the injury done the plaintiff, and which were reasonably in contemplation of the parties as the natural result of the failure of duty on the part of defendant.
2. When the subject-matter of the telegram is a pecuniary transaction, damages are allowed, in case of default, for the pecuniary loss sustained in consequence.
3. So damages should be allowed for injury to the feelings, when the subject-matter of the telegram is a transaction involving feelings; in order to hold the company liable for such damages, while it is not necessary that the message should disclose the relationship of the parties, the defendant must have had notice, either through the wording of the dispatch, or otherwise, of the special circumstances, in consequence of which a failure to transmit seasonably and correctly, will entail mental suffering. Notice of the urgency and importance of the message must be brought to the attention of the company in some way to warrant such recovery.
4. A plaintiff can always recover the sum paid for any message, which is not promptly delivered, as promptness in delivery is of the essence of the contract in sending telegrams.

ACTION for damages for failure to deliver promptly a telegram sent by plaintiff, tried before *Timberlake, J.,* at July Special Term, 1899, of GUILFORD.

The message was in these words:

"GREENSBORO, N. C., 5 December, 1898.

"*To Miss Georgia Kennon, back of Cotton Factory, Reidsville, N. C.:*
"Meet me tomorrow, 12 o'clock. JENNIE."

The message was not delivered until called for the next day (233) by the parties.

The circumstances of urgency and importance requiring prompt delivery testified to on the trial, and adverted to in the opinion, were not brought to the attention of the company.

The defendant asked the following special instruction:

As there was nothing in the message to indicate the importance of prompt delivery, nor was the attention of the company in any way called to such matters, the plaintiff can not recover any damages for mental suffering, and you will not take that into consideration in making up your verdict.

This instruction was not given, and defendant excepted. There was a verdict for plaintiff for $300. Judgment accordingly, and appeal by defendant.

J. A. Barringer for plaintiff.
R. R. King and F. H. Busbee for defendant.

CLARK, J. The plaintiff sues for damages sustained by herself, as sender, for nondelivery of the following message sent from Greensboro to her cousin at Reidsville, N. C.: "Meet me tomorrow, 12 o'clock." The complaint avers that the plaintiff's aunt was very ill in Reidsville; that by reason of the nondelivery of the message her counsin (the sendee) did not meet the plaintiff on arrival of the train, who, having an infant with her, was delayed at the station till she could get assistance to carry the child, and she was thereby prevented from getting to her aunt's residence until just after she had dropped into unconsciousness, death occurring in a few minutes, and that the failure to see and talk with her aunt caused the plaintiff great mental anguish. The rule of damages for breach of contract is "such as would arise in the usual order of things from such breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at (234) the time they made the contract, as the probable result of the breach of it. The courts of this and other States which recognize mental anguish as an element of damages, have not departed from this rule. It is immaterial under our system of practice whether the action is in tort for the negligence in the discharge of a public duty, or for breach of contract for prompt delivery, for the recovery in either case is compensation for the injury done the plaintiff, and which was reasonably in contemplation of the parties as the natural result of the breach of the contract or default in discharging the duty undertaken." *Young v. Telegraph Co.*, 107 N. C., 370.

In Croswell on Electricity, sec. 649, it is said: "As damages are

allowed for pecuniary loss when the subject-matter of the telegram is a pecuniary transaction, so damages should be allowed for injury to the feelings when the subject-matter of the telegram is a transaction involving feelings. Thus messages which on their face show that they relate to sickness or death of relatives, give direct information to the telegraph company of the nature of the damages which may be suffered through its negligence."

In Thompson on Electricity, sec. 386, it is said: "As damages for mental suffering, injury to family affection, and the like are given on the footing of compensation, the rule of *Hadley v. Baxendale* (9 Exch., 353) applies in such a sense that the company, in order to be held liable for such damages, must have had notice either through the wording of the dispatch or otherwise of the special circumstances in consequence of which a failure to transmit seasonably and correctly will entail mental suffering, and such we find to be the law as recognized in several decisions." In the next section he says: "Such messages may sufficiently disclose their urgency without stating the relationship of the parties"
(235) —citing *Telegraph Co. v. Adams,* 75 Tex., 531, which has been cited and approved by this Court in *Lyne v. Telegraph Co.,* 123 N. C., 129.

In this instance it does not appear from the face of the message that any mental anguish would be likely to result from a failure to deliver it, and there was no evidence that the plaintiff gave the agent of the defendant in Greensboro, whence the message was sent, any information concerning the purpose or intent of the message other than is shown in the copy of the message itself. She did not tell him that her aunt was sick, and made no statement beyond the delivery of the message for transmission.

In all the cases in this Court (and in all others so far as our researches go) in which a verdict for damages for mental anguish have been sustained, the telegraph company had notice that a failure to deliver might reasonably cause mental anguish to the sender or sendee, or to some one for whom the sender or sendee was acting as agent. In such case the damages for mental anguish are really actual damages in reasonable contemplation of both parties, if the message should not be delivered. In *Sherrill v. Telegraph Co.,* 116 N. C., 655, it is said: "The plaintiff, if the message was not delivered by reason of the defendant's negligence, the nature of the message *appearing upon its face,* can recover damage for the mental anguish caused thereby."

In *Havener v. Telegraph Co.,* 117 N. C., 540, *Faircloth, C. J.,* says: "When the nature and importance of the telegraphic message *appear upon its face,* as it does here, and through negligence it is not delivered in a reasonable time, damages may be recovered for the mental anguish caused thereby."

In *Lyne v. Telegraph Co.*, 123 N. C., 129, *Furches, J.*, approving *Telegraph Co. v. Adams*, 75 Texas, 531, speaking for the Court, said: "When such communications relate to sickness and death there accompanies them a common sense suggestion that they are of (236) importance, and that the persons addressed have in them a serious interest."

In *Cashion v. Telegraph Co.*, 124 N. C., 459, *Douglas, J.*, quotes the *Lyne case* with approval and in deciding that it was not necessary for the telegram to show upon its face the relationship of the parties, says: "The telegram in question stated that Mr. Cashion had been killed while at work, and upon its face suggested that it was of unusual importance to somebody."

The messages in regard to which damages on account of mental anguish have been allowed in North Carolina are:

Young v. Telegraph Co., 107 N. C., 370—"Come in haste, your wife is at point of death."

Thompson v. Telegraph Co., 107 N. C., 449—"Father, come at once; mother sick."

Havener's case, 117 N. C., 540—"Your mother is not expected to live; come at once."

Sherrill's case, 109 N. C., 527—"Tell Henry to come home. Lou is bad sick."

Lyne's case, 123 N. C., 129—"Gregory met accident; not live more than twenty-four, twenty-six hours."

Cashion's case, 124 N. C., 459—"Come at once; Mr. Cashion is dead. Killed while at work."

Landie's case, 124 N. C., 528—"Frank dead. Meet depot at Wadesboro. Bury him in Chesterfield. Grave three feet."

Dowdy's case, 124 N. C., 522—"Come home at once; baby is very sick."

In every case in which such damages have been allowed, the fact that the telegraph company had notice of the urgency and importance of the message has been relied on to warrant the recovery has been alluded to in the opinion.

The court erred in refusing the first prayer for instructions, (237) which was as follows: "As there was nothhing in the message to indicate the importance of prompt delivery, nor was the attention of the company in any way called to such matters, the plaintiff can not recover any damages for mental suffering, and you will not take that into consideration in making up your verdict."

A case in which the facts are almost identical with the present is *Telegraph Co. v. Bryant*, 46 N. E. Rep., 358.

It is unnecessary to consider the other assignments of error. Of course the plaintiff can always recover the sum paid for any message which is not delivered promptly, for promptness in delivery is the very essence of the contract in sending a telegram.

New trial.

Cited: Darlington v. Tel. Co., 127 N. C., 449; *Bennett v. Tel. Co.*, 128 N. C., 104; *Bowers v. Tel. Co.*, 135 N. C., 505; *Williams v. Tel. Co.*, 136 N. C., 85, 87; *Cranford v. Tel. Co.*, 138 N. C., 164; *Dayvis v. Tel. Co.*, 139 N. C., 83; *Hancock v. Tel. Co.*, 142 N. C., 165; *Helms v. Tel. Co.*, 143 N. C., 390, 394; *Battle v. Tel. Co.*, 151 N. C., 632; *Peanut Co. v. R. R.*, 155 N. C., 157; *Alexander v. Tel. Co.*, 158 N. C., 478; *Penn v. Tel. Co.*, 159 N. C., 309; *Thomason v. Hackney, ib.*, 302; *Lawrence v. Tel. Co.*, 171 N. C., 236.

(238)

F. C. GEER v. ANNIE J. BROWN.

(Decided 27 March, 1900.)

Ejectment—Tax Title—Dower—Publication—Notice.

1. The sale of land for taxes, before resorting to personal property, may render the sheriff liable to the tax debtor, but does not affect the title of the purchaser.
2. Dower land is subject to sale for nonpayment of taxes, and may be purchased by the owner of the reversionary interest after dower right is over.
3. When the answer contains an admission that the land had been advertised and sold for taxes and bought by plaintiff, through an agent, inquiries of the clerk if there was any record in his office of the lands levied upon for sale for taxes, and of the sheriff, if he had sold the land for taxes, and of the editor of the county newspaper in regard to advertisement of tax sales, were properly excluded.
4. A sheriff's deed for land sold for taxes is only presumptive evidence of due publication, and may be controverted by the tax debtor, in a suit by the purchaser. Want of notice through the mails is only an irregularity, not affecting the title of purchaser.

EJECTMENT on a tax title, tried before *Bryan, J.*, at March Term, 1899, of ORANGE.

There was a verdict in favor of plaintiff. The land in controversy was the dower land of the defendant. Her objections urged in defense, overruled by the court, are considered in the opinion.

From the judgment rendered in favor of plaintiff, the defendant appealed.

Manning & Foushee for plaintiff.
C. D. Turner for defendant.

MONTGOMERY, J. This is an action for the possession of a (239) tract of land, bought by the plaintiff, the alleged purchaser thereof, at a sale for the taxes due thereon for the year 1892, against the defendant, who was the owner of the land at the time of its sale. The land is the dower of the defendant, allotted to her as the widow of her former husband, and as it is of small value, and she very poor, as appears from the record, we have given the case close attention, to see if any error was committed in the trial below; for the poor woman, from the pleadings, seems to have been dealt with hardly by the plaintiff. And after such examination we find that there has been no error in the conduct of the trial below.

The first exception of the defendant was to the refusal of his Honor to hear testimony of the defendant that a levy was made by the sheriff on some personal property of the defendant for the year 1891. We suppose the object of that question was to show that probably the defendant had personal property in 1892, and that the sheriff should have levied upon that personal property for the payment of the taxes due on the land before he sold the land itself. There was no error in excluding the testimony, from any point of view, for while a sheriff may be liable to a tax debtor if he sells real estate for taxes before he resorts to the personal property of the tax debtor, yet that will not affect the title to the land sold for taxes passed by the deed of the sheriff to the purchaser. *Stanly v. Baird,* 118 N. C., 75.

The second exception of the defendant was made to the introduction of a deed from one Leathers, administrator, to the plaintiff, in which was conveyed the interest in reversion after the dower right was over. It is needless to pass upon whether the evidence was material or irrelevant, for it could have had no effect on the jury's findings, as his Honor in the charge confined himself strictly to matters growing out of the tax sale. The third exception of the defendant was to the refusal of the court to permit her to answer the question whether or not (240) she ever applied to the court for her dower. There was no error in the ruling of his Honor. The record of the allotment had been introduced, and she was in possession of the dower land. The refusal of his Honor to let the defendant give in evidence a conversation between herself and Holloman, who, as agent of the plaintiff, bought the land at the tax sale, as to why he, Holloman, did not take a deed to the land. The

evidence was clearly incompetent, and we can form no idea even of what its purpose was. Mr. Hamilton, Clerk of the Superior Court, was asked by the defendant if there was any record in his office of the lands levied upon for sale of taxes. His Honor, upon objection from the plaintiff, refused to receive the evidence. The testimony would have been incompetent in any aspect, for the defendant had admitted in article 5 of her answer that the land had been sold by the sheriff for taxes, and bought by the plaintiff's agent, Holloman.

So his Honor properly refused to allow the defendant to ask the sheriff if he had sold the land for taxes. The question was irrelevant because, as we have said, the defendant had admitted that the sale had been made, and that the plaintiff had purchased thereat. The defendant then undertook to prove by the editor of the Orange County *Observer,* and by copies of his paper from 8 April to 8 May, 1892, that no advertisement by the sheriff of the sale of the defendant's land was published in his paper. His Honor refused to allow the testimony to be received, and there was no error in the ruling. The defendant had admitted in her answer that the sheriff had made advertisement of the sale of the land, but she averred that the advertisement was not sufficient in law, in its form and substance. That she did not try to prove on the trial. She made no attempt to prove that a newspaper had been designated (241) by the commissioners of the county in which advertisement of the lands of delinquent taxpayers should be made; and that no such advertisement as would be sufficient in law had been made in such newspaper.

A deed made by a sheriff for lands sold for taxes is only presumptive evidence that due publication of the sale had been made, and it is open to a tax debtor in a controversy in relation to the rights of a purchaser, his heirs or assigns, to prove that such an advertisement was in fact not made. Notice through the mails by the sheriff to the tax delinquent was, and is, required to be given; and, in the recent revenue laws of the State, is put on the same footing as a due publication of the delinquency and intended sale. But in another section of the revenue laws all notices required to be given in the act, if not in fact given, are declared to be only irregularities. And so in *Sanders v. Earp,* 118 N. C., 275, when the publication, advertisement in a newspaper, was made, the notice through the mails to the delinquent was held to be an irregularity only which did not affect the deed from the sheriff to the purchaser.

No error.

(242)

A. M. CHEEK v. IRON BELT BUILDING AND LOAN ASSOCIATION.

(Decided 27 March, 1900.)

Money Loaned—Usury—Concurrent Papers—Construction—Interest—Intent.

1. When a penal bond and deed of trust, referring to each other, were executed April 14, 1893, by the plaintiff to defendant to secure a loan of $1,000, the bond not specifying the rate of interest, but containing a proviso "that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by the laws of the State of North Carolina," but the deed named the rate as 6 per cent, such was the rate to be charged, and to charge and receive 8 per cent was usurious.
2. At the date of the transaction the legal rate was 6 per cent, though as much as 8 per cent might be specially contracted for in writing. The two papers formed one transaction, are to be construed together, and fixed the rate agreed on to be 6 per cent.
3. Where usury is exacted and taken, all interest is thereby forfeited, and the debtor becomes only liable for the principal, and the borrowing member of a Building and Loan Association who has paid usurious interest can recover twice the amount of such usurious interest so paid. In such case the legal consequences follow, irrespective of the question of intent.

ACTION for the purpose (1) of having a deed of trust executed by plaintiff upon real estate declared satisfied; and (2) of recovering double the amount of alleged usury exacted, and paid to defendant.

The answer denied charging and receiving usurious interest; that it was entitled to receive 8 per cent interest upon the contract loan, and contains a counterclaim for balance still due, at that rate, from plaintiff.

The reply denied owing defendant anything, and alleged that 6 per cent interest was the rate agreed on.

The cause was submitted to *Brown, J.* (jury trial waived), at October Term, 1899, of DURHAM. Both parties appealed.

Winston & Fuller for plaintiff.
Manning & Foushee for defendant.

PLAINTIFF'S APPEAL. (244)

FURCHES, J. The answer of the defendant in paragraph 6 admits that it has charged the plaintiff more than 6 per cent interest; that it has charged him 8 per cent, and that the amount of interest paid by the plaintiff is $79. The defendant insists that under its contract with the plaintiff it had the right to charge him 8 per cent. And this brings us to the only question necessary to be discussed in this appeal.

On 14 April, 1893, the plaintiff entered into a penal bond in the sum of $2,000, to take twenty shares of defendant's stock, of the par value of $100 each, "ten of said shares being special advance stock, this day issued to A. M. Cheek."

In the condition to this bond, various amounts and sums are provided to be paid, as interest, premiums, etc., but no rate of interest is named. But a proviso is added "that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by the laws of the State of North Carolina."

On the same day (14 April, 1893), the plaintiff executed a deed in trust reciting the fact that the plaintiff has become a stockholder in its association to the amount of twenty shares of the par value each of $100, and that the plaintiff "has obtained an advance thereon of $2,000, for which he has executed his bond or obligation of even date herewith, conditioned for the payment of said sum to said association, at its home office in Roanoke, Va., . . . with interest at the rate of 6 per cent per annum."

These two papers were executed on the same day, are concurrent, and a part of the same transaction, and must be construed together. It is, therefore, manifest that, as the rate of interest is not specified in the penal bond, the rate fixed in the trust deed made to secure the
(245) money loaned is the rate of interest agreed upon, and the defendant can not legally charge more than 6 per cent. This being so, it only remains to apply the law, as recently held by this Court in several opinions: that any charge made by a building and loan association against a borrowing member of the association, in excess of the lawful rate of interest, is usurious, and the borrowing member who has paid such usurious interest can recover from such association twice the amount of such usurious interest so paid. *Hollowell v. B. & L. Asso.*, 120 N. C., 286.

Where usury is exacted and taken, all interest is thereby forfeited, and the debtor becomes only liable for the principal of the debt. *Smith v. B. & L. Asso.*, 119 N. C., 249.

At the date of this transaction the legal rate of interest in North Carolina was 6 per cent, though as much as 8 per cent might be charged where it was specially contracted for. Code, sec. 3835. But it was just as usurious to exact and take 8 per cent interest when 6 per cent was agreed upon, as if the statute had not allowed 8, when specially agreed upon.

The defendant relies upon the proviso in the penal bond and a paragraph in the discussion of the case of *Meroney v. B. & L. Association*, 116 N. C., on p. 912. That was but an *obiter*, not necessary to be said to reach the conclusion at which the Court arrived. But it is not necessary for us to pass upon what is there said, as it does not apply to this

case, as we have held that the parties here contracted for 6 per cent. The learned judge below was probably misled by what is said in *Miller v. Insurance Co.*, 118 N. C., 612, as to the intent of the defendant. But that discussion proceeds upon the idea that the usurious interest had not been paid, but that it might be exacted under that contract. There, the question of intent became material.

But that can not be the case where the usurious money *has* (246) *been paid,* and an action is brought under the statute to recover it back, and where the defendant insists that he had not taken usury, as in this case. There is error.

New trial.

DOUGLAS, J., dissents.

DEFENDANT'S APPEAL IN SAME CASE.

FURCHES, J. This appeal is disposed of by what is said in the plaintiff's appeal.

No error.

Cited: Cheek v. Association, 127 N. C., 121; *Owens v. Wright,* 161 N. C., 142; *Lutz v. Hoyle,* 167 N. C., 634.

(247)

W. M. DARDEN AND WIFE, CHARITY, v. JOHN W. BLOUNT ET AL.

(Decided 27 March, 1900.)

Clerk's Bonds—Cumulative Liability—Judgment Docketed But Not Indexed—Judgment Docketed and Indexed—Administration Bond—Judgment for Penalty to be Discharged by Payment of Sum Certain and Additional Sum to be Ascertained.

1. Clerk's bonds are cumulative security for performance of official duties.
2. A judgment to be effectually docketed must be properly indexed. The Code, sec. 433.
3. A judgment upon an administration bond for the penalty, to be discharged upon payment of a sum certain and of an additional sum to be ascertained upon a reference becomes at once, upon being properly docketed and indexed, a lien upon the defendant's property to the amount of the penalty, to be discharged upon payment of sums actually due.
4. Where the additional sum for which the bond of the administrator is liable was ascertained and reported at the ensuing term, and judgment entered and docketed, but not indexed, the clerk's bonds were exonerated from

liability for the failure by reason of the judgment at the preceding term which had created and preserved the lien for this portion also of the debt, which could be enforced by execution, so that no loss had occurred from a subsequent mortgage of debtor's property.

FAIRCLOTH, C. J., dissents.

ACTION upon four official bonds of John W. Blount, Clerk of the Superior Court of GREENE, for negligently failing to index a judgment rendered in favor of plaintiff for $1,078.93, against R. J. W. Beaman, administrator of R. C. D. Beaman.

(248) A case agreed was submitted to his Honor at November Term, 1899, of GREENE, who adjudged: That the plaintiffs recover of the defendants the sum of $1,078.93, with interest thereon at 7 per cent per annum from 1 December, 1897, and the costs of this action, to be taxed by the clerk.

The defendants excepted and appealed.

The agreed facts are reviewed in the opinion.

F. A. Woodard and Aycock & Daniels for plaintiff.

Shepherd & Shepherd, Connor & Son, and Swift Galloway for defendant.

CLARK, J. At Fall Term, 1891, the plaintiff recovered judgment against one Beaman for $15,000, "to be discharged upon payment to her" of the sum of $1,908.33, and of a further sum ordered to be ascertained by a reference. At Fall Term, 1892, a further judgment was rendered after reciting that whereas, "At Fall Term, 1891, of this court a judgment was rendered against said R. J. W. Beaman, in the sum of $15,000, to be discharged upon the payment" of $1,908.33, and a further sum to be ascertained by the reference ordered, and that by agreement said further sum is $7,150.65, "It is now by consent adjudged that the said judgment of $15,000 be discharged upon the payment of the aforesaid $1,908.33, as set out in the original judgment, and upon the payment of the further sum of $7,150.65, with interest at 8 per cent from December, 1891, till paid."

The above judgment of Fall Term, 1891, was docketed and indexed, but the discharging or supplementary judgment at Fall Term, 1892, though docketed, was not indexed. The $1,908.33 was paid, but there remains a balance unpaid, upon the $7,150.65, of $1,078.93. Bea-

(249) man gave a mortgage upon his realty in 1893, under which it has since been sold, and he himself has since died wholly insolvent. This action is brought against the defendant Blount, Clerk of the Court in 1892, and his sureties, for the $1,078.93, balance now due on the judgment, by reason of his failure to index said judgment of Fall Term,

1892. *Holman v. Miller,* 103 N. C., 118; *Dewey v. Sugg,* 109 N. C., 328; *Redmond v. Staton,* 116 N. C., 140.

The sole question, therefore, is whether docketing and indexing the judgment of 1891 for "$15,000, to be discharged upon payment of" $1,908.33, and a further sum to be ascertained by a reference then ordered, conferred any lien, for if it did the lien is still enforceable against the realty, and the plaintiff has lost nothing by the clerk's failure to index the judgment of Fall Term, 1892. The judgment of Fall Term, 1891, was an absolute unconditional judgment for $15,000 (*Nimocks v. Pope,* 117 N. C., 315), and was evidently intended to create a lien to that extent upon the realty of the defendant. Else, why take it? Every one who dealt with the defendant named in that judgment knew from the records that his realty was liable to that extent. This lien was in nowise impaired by the fact that the amount thereof might be reduced by further action of the court, but, until such further action, it stood good for $15,000. *Rothgerter v. Wonderly,* 66 Ill., 390.

It is true that where execution can not issue upon a judgment by reason of the defendant being a municipal corporation, an executor or administrator sued for a debt of the estate, and in similar cases, docketing the judgment confers no lien, but that is because the judgment in such cases has no further function than to ascertain the debt, and can not be enforced against the property of the defendant. Black on (250) Judgments, sec. 407. But this case is like those where a lien can be conferred, and is intended to be conferred, but for extraneous reasons an execution is ordered not to issue, as in *Dysart v. Brandeth,* 118 N. C., 968, where it is held that the lien created by docketing a justice's judgment was not impaired by the suspension of execution by an appeal and a supersedeas bond. And the statute expressly enacts that upon appeal to the Supreme Court the lien of a docketed judgment remains unimpaired, notwithstanding execution may not issue after a supersedeas bond is given. Laws 1887, ch. 192; Clark's Code (3 Ed.), sec. 552. To the same effect is Freeman on Judgments, sec. 383: "A stay of execution resulting from agreement of the creditor does not impair the lien. So, if the court direct the stay." The test is not whether an execution can issue instanter, but whether it can issue at all. Here, if the execution had issued for the $15,000, collection could only have been restrained upon payment of the amount which would discharge it, or until that could be ascertained. A judgment is in the nature of a statutory mortgage (*Perry v. Morris,* 65 N. C., 223; *Gammon v. Johnson,* at this term, and cases cited), and a mortgage for future advances not to exceed an amount named is valid. A judgment confessed to provide security against a contingent liability is authorized by section 570 of the Code,

and of course must be a lien for the full amount named till the actual loss is determined at a lesser sum.

This is not like a judgment by default and inquiry where only the cause of action is admitted, and the plaintiff recovers nothing beyond costs, till proved. *Anthony v. Estes,* 101 N. C., 541. This is the opposite of that. Here, there is a judgment for a sum certain $15,000, and upon proper docketing it is a lien for that sum until and unless it
(251) is reduced by further action, *i. e.,* by payment or a supplementary judgment. The docketing and indexing the latter would have reduced the extent of the plaintiff's lien, but would not have impaired the lien itself, and the failure to so index could not impair it. It has been held that jurisdiction was not in a justice of the peace in an action upon an official bond exceeding $200, though the damages alleged from the breach thereof are under that sum because "the *judgment* is for the amount of the bond, the execution to be satisfied by payment of the damages assessed." *Fell v. Porter,* 69 N. C., 140; *Joyner v. Roberts,* 112 N. C., 111, and cases cited.

The case of *McCaskill v. McKinnon,* 121 N. C., 190, is not in point against this view, for there was judgment for the debt, and a further judgment of foreclosure to enforce payment. It was held that the statute of limitations ran against the first from its date and against the latter only from judgment confirming the report of sale. It follows, then, that the first judgment for debt was a lien which was not impaired by there being an interlocutory contemporanous decree for foreclosure and sale.

The lien of the judgment of 1891 has not been discharged, because the judgment itself, by its terms (as well as by the terms of the judgment of Fall Term, 1892), has not yet been discharged, and the plaintiff has suffered no harm by failure of the clerk to index the supplementary or discharging judgment.

Upon the case agreed, judgment should be rendered in favor of the defendants.

Reversed.

FAIRCLOTH, C. J., dissenting: The material question is whether a judgment entered at Fall Term, 1891, in favor of the plaintiff
(252) against R. J. W. Beaman, administrator of R. C. D. Beaman, deceased, was a lien on the property of the defendant. The action was against the defendant on his official bond in the penal sum of $15,000, conditioned for the faithful discharge of his duties as such administrator. At said Fall Term, 1891, the plaintiff recovered judgment against said R. J. W. Beaman for $15,000, the penalty of the bond, to be discharged on payment of $1,908.33 (which has been paid and is out of the case), "and upon the payment to her of one-third of the estate and assets of the estate of the said R. C. D. Beaman, deceased, in his hands,

or which ought to be by reason of his being administrator of said estate; and by consent, this cause is referred to W. C. M., Esq., for the purpose of stating the final account of the said R. J. W. Beaman, administrator of R. C. D. Beaman, deceased, and the said referee is directed to make report at the next term of this court."

A majority of the Court are of opinion that this judgment, being docketed, became at once a lien on the defendant's property, and may now be enforced against such property by execution.

My opinion is that said judgment is only *interlocutory* and creates no lien on anything. It seems to me that the penalty in the bond is the security provided by law to protect creditors and the heirs for the real debt and true amount when ascertained; and when that is ascertained and reduced to judgment, a lien is created. The plaintiff did not sue for or expect to collect that amount, unless the amount of the default was equal to it, and I doubt not that the defendant was of the same opinion, and I doubt if such a proposition has occurred to the mind of any practitioner. The industry of counsel has failed to find a single case in any State of this Union directly deciding and sustaining the proposition. No case in our State has been found declaring such a principle, and the absence of such a decision, in any of the States, is sig- (253) nificant and pregnant proof against the correctness of the proposition. Many decisions are found bordering on the question, but not one is found declaring the affirmative of the proposition.

In *Williams v. Fields,* 60 Am. Dec., 426, it is held that "a decree reserving costs and other matters is interlocutory, until the coming in of the report." A long note is appended, collecting and citing perhaps 150 decided cases, but not one is found "on all fours" or deciding the direct question before us. Several cases are cited in the opinion, but how they help us I fail to see. They certainly do not decide the question nor the principle. For instance, *Perry v. Morris,* 65 N. C., 223, to the effect that a judgment is in the nature of a statutory mortgage. I need not question that, but what kind of a judgment? On examination I find that the judgment in that case was an absolute and *final* judgment rendered by a justice of the peace, and a transcript docketed in the Superior Court. This case is a sufficient sample of the cases cited and relied on by the Court in the present case. If the judgment in question is a lien, why need the plaintiff to have pursued the defendant any further, except by issuing her execution? And why will the court order a reference, necessarily incurring additional labor, expense and cost? I am not disposed to write a list of cases, when none of them fit the case on either side. I think the long-established practice should continue, and I also think that reason is against the defendant's contention.

Cited: Davis v. Pierce, 167 N. C., 138.

(254)

GOLDSBORO LUMBER CO. v. HINES BROS. LUMBER CO.

(Decided 27 March, 1900.)

Injunction—Right-of-way—Exclusive—Location—Timber Deeds—Irreparable Damage—Contingent Right in Timber—Injury to Property—Reserved Rights of Grantor.

1. A right of way of specified width must be located and constructed in order to be exclusive.
2. The grant of such easement does not preclude the grantor from such use of his land himself or permitting the same to others, which is not in conflict therewith.
3. A court of equity will not enjoin a trespass unless the damage is irreparable, and such must be made to appear not merely by allegation, but by statement of facts which will enable the court to see that such would be the result.
4. In timber deeds, the title passes only to those trees of the required measurement at the date of deed. Where the date of "*severance* and *removal*" is substituted for date of deed, the grantor has no estate in the timber under size for a court of equity to protect, but merely a contingent right.

ACTION in trespass and for injunction, heard before *Bryan, J.*, upon motion to continue until final hearing a temporary order of restraint heretofore granted, determined at chambers at New Bern, on 19 December, 1899, in cause pending in JONES.

Both parties claim easements, under timber deeds from the same grantor—plaintiff's deed dated 27 September, 1897, defendant's deed dated 31 October, 1899. The plaintiff claims that his rights were exclusive, and extended to the whole tract of 250 acres. The defendant claims that his rights are not in conflict with the rights conveyed to plaintiff.

(255) The motion was heard upon affidavits and exhibits, and his Honor continued the injunction until the final hearing.

Defendant excepted and appealed.

The facts of the case are fully developed in the opinion.

Simmons, Pou & Ward, Aycock & Daniels, and T. C. Wooten, for plaintiff.

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

FAIRCLOTH, C. J. On 27 September, 1897, Casper sold to the plaintiff all the trees and timber standing and down, growing and dead, measuring at the "time of severance and removal, not less than fourteen inches in diameter, twenty-four inches above the ground," in and upon a certain

tract of 250 acres of land, to be removed on or before eight years from that day. He further agreed that plaintiffs shall have and are thereby granted "exclusive right of way to build, equip, construct and operate over, across, through and upon said lands such tramroads and railroads as shall be necessary for moving said trees and timber from said lands, and from the lands of any and all other persons or for operating a regular railroad for freight and passenger traffic; said right of way to be 60 feet wide and in fee" . . . and providing that said Casper shall have the right to use such timber as is needed for sills, shingles, boards and other plantation purposes, but none to be used for sawmill purposes. On 31 October, 1899, said Casper leased to the defendant for five years a small part of said tract on the east side, about twelve acres, with the right to enter, cut and use crossties out of any timber thereon not heretofore sold.

Plaintiff has not located any right of way anywhere on said land nor constructed or attempted to construct any tramroad or other road on said land. He alleges that defendant is surveying and preparing to lay a tramway over the land leased from Casper, for passing (256) and repassing, etc., and if permitted to do so, the plaintiff will suffer irreparable damage.

Is this a case for interference by a court of equity? The court will not interfere to prevent a trespass unless the damage would be "irreparable." *Howell v. Howell,* 40 N. C., 258. "It is not sufficient for a plaintiff to state that the act complained of will be attended with permanent results, destroying or materially altering the estate; but the allegation must be attended with such a statement of facts as to enable the court to see that such would be the result." *Bogey v. Shute,* 54 N. C., 180. Do the facts here present such a case of irreparable damage? The plaintiff became the owner and has an estate in those trees measuring 14 inches in diameter at the date of his deed, but it does not appear that the defendant has interfered with any of that class of trees. This Court has heretofore said that the title passed only in those trees of the required measurement at the date of the deed. The plaintiff, apparently to avoid that rule, contracted for such trees as would measure 14 inches at the time of "severance and removal," so that no estate in the trees under that size has yet vested, and he has no property therein for a court of equity to protect. He, however, argues that many trees now undersize will grow up to 14 inches before the end of eight years (which is true according to the law of nature) and that he is entitled to have that class of trees protected. It seems enough to say that until the conditions of growth and severance have been performed, the plaintiff has no property interest in such trees as this Court can protect. The loss of such trees may defeat plaintiff's contingent rights, but would not be an injury to his *property.*

Plaintiff insists that the defendant is about to interfere with his easement or right of way under his contract He claims that that
(257) right is coextensive with the entire limits of the tract of land, and that it is *exclusive.* That contention is contrary to his contract, which is only for 60 feet. His fallacy is in assuming that he has a right of way. A right of way is an easement which is property, and requires the same definiteness in its description as a tract of land by metes and bounds. His right of way has not yet been laid out and located, and the result is that he has no right of way with which the defendant is interfering. If the plaintiff is suffering any damage or loss, and if he has any remedy, about which we can not and do not now express any opinion, it seems to be for a breach of contract, trespass or tort. There is no privity between plaintiff and defendant either in contract or estate. It is not denied that the defendant is solvent. The facts recited fail, in our opinion, to disclose an instance of irreparable damage. We conclude that his Honor was in error in continuing the restraining order to the hearing.

Reversed.

Cited: Lumber Co. v. Hines, 127 N. C., 131; *Hardison v. Lumber Co.,* 136 N. C., 175; *Banks v. Lumber Co.,* 142 N. C., 50; *Kelly v. Lumber Co.,* 157 N. C., 178; *R. R. v. McLean,* 158 N. C., 500; *Coit v. Owenby,* 166 N. C., 138; *R. R. v. Bunting,* 168 N. C., 580.

(258)

W. B. FERRELL AND WIFE ET AL. v. E. S. BROADWAY.

(Decided 27 March, 1900.)

Motion to Set Aside Judgment—Infant Parties by Next Friend—Rights Supervised by Court—No Compromise Without Consent of Court—Effect of Verdict and Judgment on Question of Legitimacy.

1. Whether the verdict and judgment rendered against infants after the death of their next friend, by consent of counsel, was submitted to and approved by the court, is a matter material to its validity, and necessary to be ascertained before passing on a motion to set aside for irregularity.
2. While a consent decree may be entered against an infant, when the facts are developed and found by the court who adjudges it to be for the best interest of the infants, yet where issues are joined but no evidence introduced and no explanation made to enable the court to exercise supervision over the interest of the infants, a consent verdict and judgment will not stand.
3. A verdict and judgment establishing the legitimacy of a party to a suit is conclusive, and is *res adjudicata* as to all the world.

FERRELL *v.* BROADWAY.

MOTION upon affidavits to set aside a judgment rendered in this cause at August Term, 1887, for irregularity, heard before *Bryan, J.*, at November Term, 1899, of LENOIR.

His Honor refused the motion to set aside. The plaintiffs excepted and appealed.

The grounds of the application are stated in the opinion.

N. J. Rouse, E. C. Smith, and Womack & Hayes for plaintiffs.

Aycock & Daniels, Allen & Dortch, and T. C. Wooten for Grainger, defendant.

MONTGOMERY, J. At August Term, 1887, of Lenoir Superior (259) Court, there was an action pending in which W. D. Broadway, M. L. Broadway, and Alice (Broadway) Faulkner, were the plaintiffs, and E. S. Broadway, their brother, was the defendant. The object of the suit was to have the defendant declared a trustee for them of a certain tract of land which had been sold by a decree of the Superior Court, made at Fall Term, 1880, and which land at its sale was purchased, as the plaintiffs allege, by the defendant, for their benefit. At the aforesaid August term of the court, the issues joined by the pleadings were submitted to the jury, and the responses thereto were in favor of the defendant, and judgment was rendered accordingly.

The plaintiffs were infants under twenty-one years of age, and their next friend, W. B. Ferrell, had died before the verdict and judgment, and no other next friend had been appointed.

The present proceeding grows out of a motion of the plaintiffs, who are now of full age, to have that verdict and judgment set aside for irregularity. Notice was served upon J. W. Grainger, a purchaser of the land from E. S. Broadway. It was stated in one of the affidavits filed by the plaintiffs (that of C. A. Broadway), "That the alleged verdict and judgment in the cases of *W. B. Ferrell and wife et al. against E. S. Broadway,* was by consent, and no evidence upon the issues nor proof of the facts were ever submitted to the jury, it being a merely formal submission of the issues, and very soon thereafter the property came into the possession of J. W. Grainger; that affiant was present when this matter was submitted as above stated, and affiant verily believes that J. W. Grainger was also present and was aware of the manner in which the issues were submitted by the court. Grainger, in his answer to the motion in his first affidavit, did not unequivocally deny the statements made in the affidavit, above mentioned, but he affirmed that (260) the plaintiffs were estopped by the judgment of 1880, under which the lands were sold and purchased by the defendant. He did deny that he had any connection either with procuring or obtaining the rendition

of the judgment at August Term, 1887, or that he knew of the proceedings in the case; but that was not a denial of the statement in the affidavit of C. A. Broadway that he, the defendant Grainger, knew that the verdict and judgment were made by consent of the counsel of the infant plaintiffs and the defendant E. S. Broadway. But in a second affidavit filed two days after the first he did make a specific denial of knowledge of the alleged compromise. He did not deny, however, that he had knowledge before he took a deed for the land. The defendant E. S. Broadway had conveyed to Grainger the land after the verdict and judgment of 1887.

Whether or not the issues were submitted and responded to by the jury, as was affirmed by C. A. Broadway in his affidavit, and the defendant had knowledge that they had been so submitted, were most material matters to be inquired into in this investigation. His Honor made no finding of fact upon that question, and we are satisfied that no just or intelligent disposition can be made by this proceeding until that fact is found. It is true that his Honor was not requested by the plaintiffs to find that fact, but upon a thorough examination of the matters embraced in this motion, as they appear in the record, we have decided *ex mero motu* to remand the case that that fact may be found. *Fertilizer Co. v. Reams,* 105 N. C., 283.

We are not intimating, by making this order to remand the case, that a next friend of the infants can not agree to a consent decree or judgment in a case where all the facts are developed and found by the court, and an order made that the arrangement would be best for
(261) the interest of the infants. Such a case as that is not before us.

But it may be taken to be the law that, in a case where issues are joined between infants on one side and the adverse party and no evidence is introduced, and nothing is done or said on the trial except that an agreement is entered into by the next friend or counsel of the infants, that the verdict shall be rendered against the infant, the verdict and judgment will not bind the infants. In such a case, the court would have no knowledge of the facts, and therefore could not exercise any supervision over the interest of the infants. The object in having a next friend appointed for infants is to have their rights and interests claimed and protected, and the next friend or their counsel will not be permitted to yield their rights to others by a consent verdict and judgment where the court has exercised no supervision over the arrangement.

His Honor found as a fact that the plaintiffs were not the heirs of J. W. Broadway, deceased, under whom they claim an interest in the land. If that finding were correct, there would be no use in remanding the case. But we think that was not an open question.

It appears from the record that in a proceeding in Lenoir Superior Court for partition of a tract of land of J. W. Broadway, deceased, wherein the movers in this proceeding were plaintiffs and E. S. Broadway was defendant, an issue was submitted to the jury as to whether the plaintiffs and defendants were heirs at law of J. W. Broadway and tenants in common of the land; that the response of the jury to the issue was in the affirmative, and partition was ordered, and no appeal was had therefrom. The legitimacy of the plaintiffs was from that time *res adjudicata* as to all the world. *Ennis v. Smith,* 55 U. S., 400.

Remanded.

Cited: Marsh v. Dellinger, 127 N. C., 363; *Ferrell v. Broadway, ib.,* 404.

(262)

GILBERT LITTLE v. W. N. RATLIFF.

(Decided 27 March, 1900.)

Conversion—Evidence—Receipt—Witness Competent—The Code, Sections 588, 589, 590.

1. The widow of deceased vendor, who was present at the sale of a mule by her husband to plaintiff, is a competent witness under the Code.
2. A receipt written by her and signed in the name of her husband by his direction and in his presence, is competent evidence corroborative of her statement.

ACTION for damages for the alleged conversion of a mule, tried before *Shaw, J.,* at April Term, 1899, of ANSON, on appeal from justice's court.

There was a verdict for the plaintiff with $40 damages.

Defendant appealed.

L. D. Robinson for plaintiff. (263)
Bennett & Bennett for defendant.

FURCHES, J. This is an action commenced before a justice of the peace for the wrongful conversion of a mule alleged to be worth $48. The defendant denied that the plaintiff was the owner of the mule, and alleged that it was his. Verdict for the plaintiff, and defendant appealed.

The plaintiff, for the purpose of proving title to the mule, among other witnesses offered Mrs. Lydia E. Jones, formerly the wife of Washington Ratliff, to prove that he bought the mule from Washington at the price of $90, and paid $80 in cash at the date of said purchase. The

witness testified that she was present when the plaintiff bought the mule from her then husband, Washington Ratliff. That he was to pay $90 for the mule; that he paid $80, which she counted, at the request of her husband, and that her husband told her to write a receipt for the $80, which she did, and handed to the plaintiff, and he took the mule. The receipt was produced by plaintiff, and witness recognized it as the receipt she wrote and had been speaking of. The evidence was objected to by the defendant, and especially the receipt, but was held to be competent, and defendant excepted.

We do not see upon what ground the exception can be sustained. Section 588 of the Code made the witness competent, had the action been between her husband and the defendant. She was also competent under section 589 of the Code, and not excluded under section 590, as she was not a party to the action, and had no interest in the same. The receipt itself would not have been original evidence, as it was not written or signed by the husband, Washington; but when she testified that she wrote it, at the request of her husband, in his presence and handed it to the plaintiff, we think it was at least corroborative evidence of what she had just sworn—that the plaintiff bought the mule and
(264) paid $80 in cash. The defendant seemed to think this made the witness the agent of the husband, and that she was incompetent on that account. But we are unable to see that she was the agent of the husband or that her evidence was incompetent if she had been.

The defendant claimed that he bought the mule of Washington after the time plaintiff alleges he bought it, and that plaintiff was present when he bought—made no objection to the sale by Washington to him, and that plaintiff is estopped thereby from now claiming the mule. The plaintiff denied that he was present when defendant alleges he bought the mule, and this matter was fairly submitted to the jury, and they found for the plaintiff. The case on appeal states that the plaintiff tendered to defendant the $10 still due on the purchase of the mule, which defendant refused to take, and that the court failed to charge the jury that the $10 was a lien, and that if they found for plaintiff that they should deduct the $10 from the value of the mule.

We see no error in this, as the jury must have found that the mule belonged to the plaintiff by reason of his purchase, which was prior to that of the defendant (if he purchased it), and, therefore, the plaintiff owed the defendant nothing. The $10 balance he owed on the mule belonged to the estate of Washington Ratliff, who died before the defendant took and converted the mule, and not to the defendant. Upon an examination of all the errors pointed out by the defendant's exceptions we find no error, and the judgment is

Affirmed.

(265)

W. R. MUSE v. A. S. CADDELL.

(Decided 27 March, 1900.)

Boundary—Admitted Corner—Conflict of Evidence as to Other Corners—Burden of Proof.

1. Where there is a corner of plaintiff's land, known and agreed upon by both parties, but the evidence as to other corners, derived from recollection of living witnesses and statements of deceased persons, submitted to the jury, fails to establish any other corner to their satisfaction, the calls in the plaintiff's deed, commencing at the known corner, must prevail.
2. The defendant need show no title until the plaintiff's evidence has shown a *prima facie* title in him, including the location of his deed.

ACTION for the recovery of land, tried before *Bryan, J.*, at January Term, 1900, of MOORE. The plaintiff's deed for 100 acres of land was dated 9 September, 1856, and possession under it was shown for forty years. The point in controversy was the establishment of the boundary line between him and the defendant, an adjoining owner.

The special instruction asked for by defendant and refused by his Honor is stated in the opinion.

Verdict and judgment for plaintiff. Exception and appeal by defendant.

No counsel for plaintiff.
Seawell & Burns for defendant.

FURCHES, J. This is an action for possession of land (ejectment) involving a question of boundary on the southwest line of plaintiff, and the northeast line of defendant.

The northwest corner of plaintiff's land is admitted to be (266) McIntosh's corner, which was known and agreed upon by both plaintiff and defendant; but no other corner was agreed upon by the parties, nor was there any other monument, marking either the lines or corners of plaintiff's land, called for in his deed. There was much evidence introduced for the purpose of showing where other corners were, according to the recollection of the witnesses, and from what they had been told by persons then dead. It was proper to receive this evidence, and to submit it to the jury with proper instructions. But unless some corner should be established by such evidence, to the satisfaction of the jury, the calls in the plaintiff's deed, commencing at the known corner, should prevail.

It is the location of plaintiff's deed that must determine the plaintiff's right to recover. He must recover upon the strength of his own title,

and not upon the weakness of defendant's title. The defendant need not show any title until the plaintiff's evidence has shown a *prima facie* title in him. These rules are elementary principles, but they seem not to have been observed by his Honor in the trial of this case. Both plaintiff and defendant asked special instructions. Those asked by plaintiff were given, and those asked by defendant were refused. There was error in giving some of plaintiff's prayers and in refusing to give some of defendant's.

But we will only discuss one of these exceptions. The defendant's 10th prayer was as follows: "That even though the jury should find from the evidence that the post-oak at 'n' on the map is a corner of the Caddell land, that is no evidence of the plaintiff's claim, as his deed does not call for Caddell's line, or a corner at that place, and the jury are instructed it is Muse's line, and not Caddell's line, that is to be located by them." This prayer was refused and defendant excepted. The record fails to show any charge given by the court except as shown by (267) the prayers for instructions given and refused.

It seems to us that this prayer was proper, and should have been given.

Error. New trial.

G. C. GRAVES v. JESSE BARRETT, CHARLES BARRETT AND BERTHA BARRETT.

(Decided 27 March, 1900.)

Partition Proceeding—Pleadings—Issues—Deed to "The Heirs" of a Living Man—Construction Under Section 1329 of the Code—After-born "Heirs."

1. A deed to "the heirs" of John A. Barrett, he being still alive, although void at common law, is good under the statute, section 1329 of the Code, and is construed to be a limitation to the children of John A. Barrett, and includes after-born children.

2. In a petition for partition, title is not in issue, unless defendants put it in issue by pleading "*sole seizin*," as the Code, sec. 1892, does not require averment of title, as in ejectment.

3. When the plea of *sole seizin* is not set up, the parties for the purpose of the proceeding are to be taken as tenants in common, and the only inquiry is as to the interest owned.

4. A defective statement of a good cause of action is waived, when it is apparent from the answer that the defendants were fully apprised of the subject-matter of the suit.

GRAVES *v.* BARRETT.

PETITION for partition of a tract of land fully described in the pleadings. The plaintiff claimed that he was entitled to one-fourth undivided interest, and the defendants to the remaining interest. The defendants denied that the plaintiff was a cotenant with them.

The action was transferred from clerk's docket, and tried be- (268) fore *Bryan, J.*, at January Term, 1900, of MOORE upon these issues:

1. Are the plaintiff and defendants tenants in common and seized in fee simple of the land described in the petition?

2. What is the interest of the petitioner in said land?

Upon the evidence and charge of his Honor, adverted to in the opinion, the jury responded "Yes" to the first issue, and "One-fourth" to the second. Judgment of the court in accordance with the verdict. Exception and appeal by defendant.

Black & Adams for plaintiff.
Seawell & Burns for defendants.

CLARK, J. Samuel Barrett in 1867 made a deed for a tract of land to the "heirs of John A. Barrett." Said John A. Barrett is the son of the grantor, and is still living. By section 1329 of the Code, this deed, which would have been void at common law, *nam nemo hæres viventis,* is construed to be a limitation to the children of John A. Barrett. At the time of the execution of the conveyance he had two children, John M. and Jesse, and there are two born since, Charles and Bertha. John M. mortgaged his "one-fourth undivided interest" in said tract, the mortgage was foreclosed, and the plaintiff, who became the purchaser, filed a petition in partition before the clerk, Jesse and Charles Barrett and their sister Bertha, with her husband, being defendants. The answer denies the allegations in the complaint of plaintiff being tenant in common with them of said land, but does not aver *sole seizin* in themselves; on the contrary, it admits (by not denying) that each of defendants owns, as alleged in the second paragraph of the complaint, an undivided one-fourth interest therein, and as the decree awards them that, the defendants have no cause to complain. Upon the above state (269) of facts in proof the court instructed the jury that if they believed the evidence which was uncontroverted, to respond to the issues that plaintiff was cotenant with defendants, and entitled to an undivided one-fourth. The defendants, who excepted and appealed, contend that the plaintiff was not entitled to the instruction given, because the plaintiff has not shown title out of the State. They contend that the denials in the answer converted this into an action of ejectment, and that two of the defendants having been born since the deed of Samuel A. Barrett to

the heirs of John A. Barrett, they do not take thereunder, and hence the "rule of practice" does not apply that where the plaintiff and defendant claim under a common source of title the plaintiff need not prove any title anterior to that.

But in a petition for partition, title is not in issue, unless the defendants put it in issue by pleading *sole seizin*. That was not done in this case. The Code, sec. 1892, does not require averment of title as in ejectment, but simply an allegation of seizin and possession as tenants in common, and the seizin and possession of one are that of all. The allegations in the complaint and the denials in the answer raised only the ordinary issues in partition (1) whether plaintiff and defendants were cotenants, and (2) what interest the plaintiff possessed in said land. These issues were properly framed upon the pleadings, were submitted without exception, and upon the evidence the court could not charge otherwise than it did.

If the defendants Charles and Bertha, by reason of their birth since the date of the deed, have no interest thereunder, they had no reason to oppose partition, and if they have an independent title, it was trifling with the court not to plead *sole seizin,* and put it in issue. If the
(270) defendants had pleaded *sole seizin* the plaintiff would have been put on notice that the title to the land was in issue, and an issue should have been framed in accordance therewith. *Alexander v. Gibbon,* 118 N. C., 796; *Hunnycutt v. Brooks,* 116 N. C., 788. But they have treated this as a petition in partition, denied merely the cotenancy of plaintiff, submitted to issues which raise that question only, and the case having been tried upon that view they can not now contend that the rules applicable to an action of ejectment should be applied. When the plea of *sole seizin* is not set up, the parties for the purpose of the proceeding are to be taken as tenants in common. *Pearson, C. J.,* in *Wright v. McCormick,* 69 N. C., 14.

The defendants further demur *ore tenus* in this Court that the land is not sufficiently described in the complaint. This could be done if the defect were such as rendered this a defective cause of action. But it is in fact a defective statement of a good cause of action and therefore it was waived by the answer which shows that the defendants understood perfectly of what tract of land partition was asked. *Gordon v. Barly,* 114 N. C., 11; *Epley v. Epley,* 111 N. C., 505. They neither raised any question about that nor about the title, but contented themselves with denying that the plaintiff was a tenant in common with them therein. Upon that issue the evidence was against them, and it is too late now to set up new and different defenses. *Allen v. R. R. Co.,* 119 N. C., 710. If John M. Barrett should also have been a party, that question could have been

raised by demurrer, Code, sec. 239(4), and if raised, would doubtless have been cured by making him a party.

Affirmed.

Cited: Gregory v. Pinnix, 158 N. C., 150; *Weston v. Lumber Co.,* 162 N. C., 181; *Haddock v. Stocks,* 167 N. C., 74; *Warren v. Susman,* 168 N. C., 462; *Cooley v. Lee,* 170 N. C., 21.

(271)

F. M. RAWLINGS v. LIZZIE NEAL.

(Decided 3 April, 1900.)

Claim and Delivery—Lien by Husband on Wife's Crops—Charge Upon Separate Estate by Wife Under the Code, Section 1826—Remedy of Creditor—Her Right to Exemptions—Defendant's Judgment in Claim and Delivery.

1. Claim and delivery will not lie for crops produced on wife's land, under a crop lien given by husband without her consent.
2. If a married woman by virtue of section 1826 of the Code, charges her separate personal estate for her necessary expenses or the support of her family, the creditor can not seize the property, but must reduce his debt to judgment, which can be enforced, subject to her rights of exemption.
3. All fraud apart on her side, an unauthorized lien given by husband on wife's crops can not be enforced.
4. The seizure of her crop by claim and delivery under such lien is wrongful, and she is entitled to judgment for their return, or to the value thereof, undiminished by claim for debt due the plaintiff; otherwise, her right to her personal property exemption might be impaired. Her judgment carries all costs.

ACTION for personal property, with auxiliary remedy of claim and delivery, tried before *Moore, J.,* at May Term, 1899, of NASH. Same case reported in 122 N. C., 173.

The plaintiff claimed the crops under a lien made by the deceased husband of defendant to secure account for goods furnished the family. The defendant claimed the crop because made on her land, and mortgaged without her consent.

The following issues were submitted:

1. Was the plaintiff, at the commencement of this action, the owner and entitled to the possession of the crops in controversy?

2. What was the value of the same at the time of the seizure (272) thereof by the sheriff?

3. Is the defendant indebted to the plaintiff; and if so, in what sum?

The jury, under instructions, answered the first issue, "No."

Their answer to the second issue was "$132.28," and to the third issue, "$101.89."

Upon the verdict, the plaintiff contended that the amount of defendant's debt, $101.89, should be subtracted from the value of the property seized, $132.28, leaving $30.39, and defendant should only recover $30.39.

The defendant contended that she was entitled to recover the value of property seized, $132.28, and costs of suit, undiminished by any debt due plaintiff.

The amount of defendant's debt due plaintiff, incurred after her husband's death, was admitted to be $42.27. His Honor deducted $42.27 from the value of crops seized, $132.28, leaving $90.01, and rendered judgment in favor of defendant for this balance, $90.01, together with half costs.

Both parties excepted and appealed.

F. S. Spruill and B. H. Bunn for plaintiff.
Jacob Battle and Shepherd & Busbee for defendant.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. This action was originally begun for the recovery of personal property, including certain crops which had been grown on the land of the defendant. The ancillary remedy for its claim and delivery to the plaintiff was resorted to at the time when the summons was issued. The plaintiff based his claim upon a crop lien executed by the husband, the wife not having joined in the conveyance with him.

(273) The evidence on the first trial was that the husband died, and that the crop was made entirely by the widow and her two children on her own land, and this Court held upon the appeal of the defendant that the mortgage was void as to the wife's property because she had not joined in its execution, and a new trial was ordered. The plaintiff, by leave of the court below, amended his complaint, and in it declared substantially upon three causes of action: First, that he contracted to sell and deliver to the defendant, and did deliver to her, the articles of merchandise mentioned in the complaint, and that they were necessary for the support and maintenance of herself and her family, and that she had no other means of support, her husband being unable to furnish the same; second, that she had authorized and empowered her husband to execute a crop lien to secure the amount of goods so sold and delivered to her, and that he did under that authority execute the crop lien; and third, that if she had not originally authorized the execution of the lien,

she did, after the death of her husband, expressly ratify and confirm the action of her husband by continuing to buy goods necessary for her support, and promising to pay the debt. The defendant filed no demurrer to the amended complaint for misjoinder of causes of action, but in her answer admitted that the plaintiff had seized the crop, that the land was her own, and that her husband had died, but she denied all the other allegations of the complaint. The evidence was that the widow and children made the crop.

The plaintiff certainly was not entitled to the possession of the crop under the contract which he alleges he made with the defendant in selling and delivering to her goods necessary for the support of her family. Under section 1826 of the Code, a married woman is empowered to make an agreement by which she can charge her separate per- (274) sonal estate for her necessary personal expenses or the support of her family without the written consent of her husband. But when such an agreement is made by the wife, the creditor is not allowed to take possession of her personal property to satisfy the charge upon it. He can only proceed through the courts, obtain his judgment and issue his execution. The judgment is a charge only on her separate estate, and she is entitled to her exemptions. Nor is the plaintiff entitled to the crop by virtue of the crop lien. It was an attempt by the husband to convey the wife's personal property without the joining in the execution of the instrument by herself. This Court said in this case, reported in 122 N. C., 173: "But the defendant at the date of the mortgage was a *feme covert,* and would not have been bound if she alone had made it. And certainly she could not be bound by her husband's mortgage because she did not object to his making it, or by assenting verbally to her husband's making it." The allegation of the complaint to the effect that the husband executed the lien as the agent of the wife, and under her authority, and at her request, even if a verbal agency would be sufficient, is not supported by the evidence. The plaintiff himself testified that for five years before the execution of the last mortgage the husband had been executing liens on the crops, that the wife never had joined in the execution of any of them, and had never been asked to do so, as he thought the land was the husband's all the time, and also when the last one was executed. He further testified: "I made contract with Neal. He did not mention his wife. I extended credit to Neal. Contract made with Neal, and not with him as agent. Things were charged on books to J. D. Neal." So it is clear from the evidence of the plaintiff himself that he was dealing with the husband, and that the husband was the agent of (275) his wife was not in the mind of either of them.

But it is contended by the plaintiff that, even if she had not originally authorized the execution of the lien, the defendant, after she became dis-

covert, ratified the act of her husband as her own. There can be no ratification of a void transaction. So far as the defendant was concerned the execution of the lien by her husband was a void act, for it undertook, as we have seen, to convey her property, she not joining in the conveyance; and she also set up that defense in her answer. And there can be no ratification where the act is done by a person not professedly acting as the agent of the person sought to be charged as principal. A. & E. Enc., 1187, and cases there cited.

As we have seen, there was no proof that the husband acted as the agent of the wife in the matter, but, on the contrary, the whole evidence, including that of the plaintiff, was, that the husband was acting for himself, and not as his wife's agent. Neither was there any allegation in the complaint that at the time of the execution of the mortgage by the husband, or before, the wife perpetrated any fraud on the plaintiff in the transaction, or that she was guilty of any act fraudulent in its character which misled the plaintiff to his injury, and by which she would be estopped to claim the property described in the lien. There was no fraud on her part, and it is clear from the evidence that while it might have been as the plaintiff said that he was influenced to go into the arrangement by the representations made by the defendant, in respect to the condition of herself and her husband, yet he was not misled by those representations, for he had been dealing in the same way with the defendant for five successive years, and taking from him just such mortgages. In fact, as the plaintiff said, he thought the husband owned the land all the time.

(276) The special instructions prayed for by the plaintiff contravened the law as we have declared it in this discussion of the case, and were properly refused. The instruction of his Honor that the jury should answer in the negative the first issue, "Was the plaintiff, at the commencement of this action, the owner, and entitled to the possession of the crops in controversy?" was, therefore, also correct, although a part of the reason assigned might not have been the true reason. There was a "broadside" exception to the charge, but the same question, which the plaintiff wished to raise, comes up for consideration upon the plaintiff's exception to the overruling of his motion for judgment, as well as upon the exception to the judgment itself.

The second issue was in these words, "What was the value of the same (crop) at the time of the seizure thereof by the sheriff?" and the third issue was, "Is the defendant indebted to the plaintiff, and if so, in what sum?" The jury responded to the second issue "$132.28," and to the third issue "$101.89." The plaintiff moved that judgment be rendered for the defendant for the sum of $30.39, that amount being the difference between the sum found by the jury to be due to him by the plain-

tiff, and the value of the articles as found by the jury which the plaintiff had converted. We think there was no error in the ruling of his Honor refusing the motion. If the plaintiff's action had been simply for the recovery of money and the defendant had set up a counterclaim in debt, then if the plaintiff's recovery was greater than that of the defendant, judgment for the difference would have been the proper judgment, and *vice versa*. But this is not such a suit. The plaintiff unlawfully and wrongfully seized the personal property of the defendant, and if it had been in his possession the judgment would have been for (277) its return or for its value in money to the plaintiff.

The defendant had not parted with her property by mortgage or pledge. It was wrongfully taken from her by the plaintiff, and if it could be found it would be her property still, and it could not be applied to the debt which the jury had found due to the plaintiff by the defendant, for that would have defeated the right of the defendant to claim her personal property exemption therein. Certainly a sale by the plaintiff of the crop does not alter the rule. A plaintiff, who in the same complaint joins a cause of action for the recovery of personal property and one for debt (no demurrer was filed to the complaint for misjoinder), will not be allowed upon the recovery of a judgment for debt against the defendant to have the judgment satisfied by the application of the proceeds of a sale of the property of the defendant which he has taken into his possession unlawfully. That would be a means of defeating the personal exemption of the debtor, which the law would not tolerate.

The findings of the jury and the admissions of the parties were incorporated in the judgment, and it was adjudged that the defendant recover of the plaintiff and his sureties on his claim and delivery undertaking the sum of $90.01, the difference between the debt contracted by the defendant with the plaintiff after the death of her husband, and the amount of $132.28, due by the plaintiff to the defendant, with interest from November 13, 1896, until paid, and that the costs of the action be paid in equal parts between the plaintiff and defendant. There is error in this part of the judgment, and the same must be reformed. The defendant is entitled to judgment against the plaintiff and the sureties on his claim and delivery bond for the whole amount of the value of the crop sold by him, to wit, $132.28, and for the costs.

This action was brought originally for the recovery of personal property, and that continued to be its main purpose. Code, sec. (278) 525, subsec. 2, and sec. 526.

Modified and affirmed.

DEFENDANT'S APPEAL IN SAME CASE.

MONTGOMERY, J. The defendant excepted to the ruling of his Honor that the amount of the purchases made by the defendant from the plaintiff after the husband's death ($42.27) should be deducted from the amount found by the jury to be the value of the crop seized by the plaintiff, and she also excepted to that part of the judgment by which she was taxed one-half of the costs of the action.

For the reasons we have given in considering the plaintiff's appeal, the defendant's exceptions should have been sustained, and the judgment must be modified and reformed in the court below so far as to give to the defendant $132.28, the value of the crop seized by the plaintiff, and also her costs of action. There was error in the particulars we have pointed out, but a new trial is not necessary, as the judgment can be modified and reformed as above mentioned to fit the finding of the issues by the jury.

Modified and affirmed.

Cited: Flowe v. Hartwick, 167 N. C., 453.

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(279)

MOREHEAD BANKING COMPANY v. MRS. L. L. MOREHEAD ET AL.

(Decided 3 April, 1900.)

Judgment of Supreme Court—Motion in the Cause in Court Below—Power to Allow Amendment Not in Conflict with Court Above.

1. After a decision of the Supreme Court fixing the individual liability of an executrix who had signed as such, a note in renewal of one held by the plaintiff against her testator, it is within the power of the Superior Court to allow an amendment to her answer, in submission to the decision, to ascertain by an issue whether the cosigners were coprincipals or sureties upon the note, as between themselves.

2. The Superior Court has no right or power to alter or modify the judgment or decision of the Supreme Court in any respect. Such a thing could only be done by a direct proceeding alleging fraud, mistake, imposition, or the like.

FURCHES, J., dissenting.

MOTION in the cause, after final decree certified from the Supreme Court, made before *Brown, J.,* at October Term, 1899, of DURHAM.

The motion was made by Mrs. Morehead, while yielding submission to the decision of the Supreme Court, for leave to file an amendment to

her answer. The grounds of the motion, stated upon affidavit, were that the note in suit and reduced to judgment was signed by her as executrix of Eugene Morehead, and by the other defendants—that she submits to the decision of the Court; that she is personally bound, and alleges that the other defendants are coprincipals with her; that one of her codefendants, Lucius Green, is dead, and that the other, B. L. Duke, since the decision of the Court, has purchased the judgment from the plaintiff, and had it assigned to a trustee for the purpose of enforcing it against her in full, whereas she is only liable for one-third of it. The object of the amendment asked for was for the purpose of submitting (280) an issue to the jury to establish the fact that all the signers of the note were principals.

A counter-affidavit was filed by defendant Duke. His Honor was willing to exercise his discretion, and permit said amended answer to be filed, but was of the opinion that he had no such power now, after issues found at a prior term, and under decision of Supreme Court.

The motion is denied upon the ground of want of power solely.

Defendant Morehead excepted and appealed.

Manning & Foushee and Boone, Bryant & Biggs for plaintiff.
Winston & Fuller for defendant.

MONTGOMERY, J. This action was originally commenced by the plaintiff against Lucy L. Morehead, executrix of Eugene Morehead, deceased, Lucy L. Morehead, individually, B. L. Duke and Lucius Green, for the recovery of an amount due on a note payable to the plaintiff. The note was the joint and several obligation of Mrs. Morehead, executrix, Duke and Green, and made no allusion as to who was principal, and who was surety, if such relationship existed. It was sought to charge Mrs. Morehead personally because of her having executed the note as executrix. A judgment by default was taken against Green and Duke at June Term, 1894, of Durham Superior Court. After extended litigation on the part of Mrs. Morehead, this Court decided at February Term, 1899, that she was liable on the bond individually. A rehearing was granted, and the petition dismissed. At October Term, 1899, of the Superior Court, upon motion for judgment by the plaintiff according to the opinion of the Supreme Court, Mrs. Morehead, through her (281) counsel, moved for leave to file an amended answer in which, submitting to the decision of the Court, she desired to plead as follows: That since the decision of the case by the Supreme Court, Duke had purchased the judgment from the plaintiff, and had the same assigned to James Pugh in trust for him; that the estate of Green is insolvent, and that the judgment was obtained in Green's lifetime, and, having been duly dock-

eted, is a preferred lien on his estate; that if she is required to pay the judgment in full, and then to bring an action against Duke and Green's estate, she will recover only a small proportion from that estate; that Duke and Green were not her sureties on the bond, but that they were all principals. Her purpose in making the motion was, first, to have an issue submitted to the jury as to whether she and Duke and Green were joint principals as between themselves, in order that a judgment might be rendered which would determine the ultimate rights of the parties on each side as between themselves. His Honor stated that he was without power to grant the amendment, and on that ground declined to allow it.

The defendant moved further, that the court should pass upon and find the facts as to whether the defendants, Duke and Green, are her sureties or her coprincipals, and to embody such finding in the judgment according to the Code, sec. 424, subsec. 1. This his Honor declined to do on the ground of want of power.

The matter which the defendant Morehead desired to have determined by the amendment raised an issue of fact, and his Honor properly ruled that he could not try that without the consent of all parties; and Duke had answered the statements contained in her motion, and had denied them all, except that he had purchased the judgment.

(282) But we think that he was in error in ruling that he had no power to allow the amendment to the answer in order that an issue might have been joined as to whether the parties were coprincipals as between themselves. The case which would have been presented by such a course would not be like those of *Calvert v. Peebles,* 82 N. C., 334, and *Dobson v. Simonton,* 100 N. C., 56. The principle decided in the last named, and like cases, was that the Superior Court had no right or power to alter or modify the judgment or decision of the Supreme Court in any respect, and that such a thing could only be done by a direct proceeding alleging fraud, mistake, imposition, and the like. Certainly we do not intend in any way or to any extent to alter that rule; but, in the present case, the purpose of the defendant Morehead is not to *alter or modify* in any way the judgment of the Supreme Court. She had contested her individual liability on the note, and the judgment of the Superior Court was in her favor. There was no need then on her part, at the time of the rendition of the judgment in the Superior Court, to make a motion to have the ultimate rights between Green and Duke and herself determined. She, at the first moment after her personal liability on the note had been fixed by judicial decree, desired, not to change or to modify the decision of the Supreme Court, but simply to have the rights and obligations of each of the defendants, who have all been held by the Supreme Court to be joint principals so far as the original plaintiff is concerned, determined and settled between themselves. We do not

have to consider, as we have seen the rights of the original plaintiff in the action, for practically it is not concerned in the result as it has assigned the judgment to a trustee for Duke's benefit. It is simply a matter of the adjustment of the ultimate rights between themselves of three defendants who are joint obligors as to the plaintiff, but among whom different rights and liabilities as between themselves (283) are alleged to exist.

It may turn out on the trial that Mrs. Morehead is principal, and that Duke and Green are sureties to her, or that all are joint principals as between themselves. In *Black v. Black,* 111 N. C., 300, it was decided that, after a final decree in the Supreme Court, a motion for a new trial upon newly discovered evidence could be made, and that it should be made in the Superior Court. If a new trial could be ordered by the Superior Court after a final decision in the Supreme Court, surely such a motion as the one made in this case ought to have been granted it, if the judge in his discretion thought it proper to grant it.

Error.

FURCHES, J., dissenting: The record in this appeal does not disclose the precise date of its commencement, but as early as 1893, and since then, including this appeal, it has been before this Court five times. It made its first appearance at Spring Term, 1895, and is reported in 116 N. C., 410. In that appeal, *Justice Avery* delivered the opinion of the Court, which was concurred in by the entire Court, it being constituted as now, with the exception of *Justice Douglas.* It was held in that opinion that the defendant Morehead was personally liable for this debt—the Court using this language: (syllabus)—"Where an executor executed a note in his representative capacity for money borrowed and used for the purpose of paying debts of the testator, the estate is not liable, but the executor is personally liable therefor, and this is so notwithstanding the fact that the lender knew for what purpose the money was borrowed and how it was used. In such case the executor takes the risk of being reimbursed the amount of the note out of the estate on a final settlement."

The next time it appeared in this Court was at September Term, 1897, and is reported in 121 N. C., 110. It appears that (284) at June Term, 1894, judgment was entered against the defendants Duke and Green by default, they having made no defense to the plaintiff's action. At January Term, 1897, these defendants, Duke and Green, alleged that they were only sureties on the note sued on, and moved to have the judgment rendered at June Term, 1894, corrected by inserting after their names the words "as sureties." The Court entertained this motion, found as a fact that they were only sureties, and ordered that the correction asked for be made. But upon appeal to this

Court, it was held that the court below (*Allen, J.*) had no power to find the facts and make the order amending the judgment.

The next time it was here was at February Term, 1898, and is reported in 122 N. C., 318. The opinion of the Court upon this appeal was delivered by *Justice Montgomery,* who, speaking for the full Court as now constituted, except *Justice Clark,* who did not sit in the case, said (quoting from the syllabus): "The promissory note of an administrator or executor, as such, founded upon the consideration of forbearance or the possession of assets, will bind him in his individual capacity; hence, where an executrix, as such, executed a new note to a bank in consideration of its taking up and paying the old note, she is individually liable thereon." The Court further holds in this opinion (on p. 324), as follows: "In our case there was constant forbearance on the part of the plaintiff, and there were assets in the hands of the executrix, at the time of the execution of the note, and at the time of the trial." Upon the trial of the case from which this appeal was taken (*Timberlake, J.*), the court gave judgment for the defendant Morehead, holding that she was not personally liable for anything on account of the notes sued on. To this the plaintiff excepted. Upon the issues as ten-
(285) dered and found, the plaintiff tendered the following judgment, and requested the court to sign it. But the court declined to sign this judgment, and signed the judgment in favor of the defendant Morehead.

Judgment offered by the plaintiff: "In this action, upon the issues submitted, the jury having found that the note was understood and intended to be made by the defendant Mrs. L. L. Morehead in her representative capacity, and that the provision that she should not be personally bound was not omitted by mistake, it is now adjudged that in accordance with the opinion of the Supreme Court filed in this action, the *feme* defendant is answerable in her individual capacity, and that the plaintiff Morehead Banking Company recover of Mrs. L. L. Morehead individually the sum of $5,000, with interest at 8 per cent from 19 September, 1893, and the costs of this action, to be taxed by the clerk." To the refusal of the court to sign this judgment the defendants Duke and Green excepted and appealed. And upon this appeal (122 N. C., 318) the Court held that there was error in the court's signing the judgment it did sign, discharging the defendant Morehead from personal liability. It also held (on pp. 325 and 326) that the court should have signed the judgment tendered by the plaintiff and quoted above, and that it committed error in not doing so.

The next time it was here was upon a petition to rehear the opinion of February Term, 1898 (122 N. C., 318). This petition was considered at February Term, 1899, and reported in 124 N. C., 622. In that

opinion it is said: "There being no disputed facts in this case, it becomes a question of law for the court, and upon the undisputed facts, the court should have directed a personal judgment to be entered against the defendant Morehead. As that judgment should have been entered at the trial, it will be so entered upon this opinion being certified (286) to the Superior Court of Durham County." That is, that the judgment quoted above should be entered upon the opinion on the petition to rehear being certified to the Superior Court of Durham County. And as the opinion on the appeal (122 N. C., 325), and the opinion on the petition to rehear (124 N. C., 622), both said that that judgment should have been signed, and the last opinion saying that it should be signed upon the opinion of this Court being certified to the Superior Court, it was reasonable to suppose that it would be the last of this case in this Court. But it is here again, and a majority of the Court think it is properly here.

This time it comes here on the application of the defendant Morehead to have the matter reopened, that she may have an *opportunity* of showing that Duke and Green are not her *sureties,* but that they are *principals.* This motion is made upon her affidavits stating that she is advised and believes that the defendant Duke purchased the judgment in 1895, and had it assigned to one Pugh for his use; that she never requested either Duke or Green to sign said note as her surety; that they signed the same of their own volition, and therefore, are not her sureties. Green is dead, but Duke files an affidavit in which he states that he did purchase the judgment by giving his individual note for the same, which he has not paid; that he was forced to do this to prevent his property from being sold under said judgment; but he denies the allegation that he was not solicited to sign said note as her surety, and alleges that he was solicited to do so by Mr. Avery, a near relation and friend of the defendant Morehead. In addition to the defendant Duke's affidavit, he offers the evidence of the defendant Morehead, given on the trial of the case, and stated in the case on appeal as follows: "Mrs. Morehead.—Don't know what bank held Exhibit 'A' (Exhibit 'A' is the note held by the Commercial Bank of New York, given by Eugene More- (287) head, Lucius Green, and B. L. Duke). When it fell due I ascertained the fact through Mr. Morgan, cashier of the plaintiff bank. Mr. Morgan informed me that the note was held by the Commercial National Bank of New York, and that the same was due. I made an agreement with Mr. Morgan, cashier of the plaintiff bank, relative to this note. I gave for this $6,000 note a note of the estate of Eugene Morehead, *with B. L. Duke and Lucius Green as sureties,* for $5,000, to the Morehead Banking Company, which note is here introduced into evidence, and marked Exhibit 'D.'" The italics in the above quotation from Mrs. Morehead's evidence are mine.

The court below says: "Having carefully examined the affidavits, the court finds that the amended answer of Lucy L. Morehead is based upon a meritorious defense, inasmuch as she desires to submit an issue to a jury as to whether she is a coprincipal with the other defendants. The presiding judge is willing to exercise his discretion and permit said amended answer to be filed, but he is of the opinion that he has no power now, after issues found at a prior term, and under the decision of the Supreme Court. The motion is denied upon the want of power solely."

And the opinion of the Court at this term says: "If a new trial could be ordered by the Superior Court after a final decision in the Supreme Court, surely such a motion as the one made in this case ought to have been granted. Error."

Whether the defendant Duke has become the equitable owner of the judgment or not does not affect the status of the defendant Morehead. She stands now just as she did before such purchase. If she was principal, and Duke and Green sureties, before this purchase, she is so now. If she and Duke and Green were coprincipals before, they are so now.

(288) And so far as her liability is concerned, it makes no difference who is the owner of the judgment. So I am unable to see the merits of the proposed amended answer, so far as it relates to the ownership of the judgment. As to whether Duke and Green are coprincipals with the defendant Morehead, or only sureties, we have this state of facts presented by the record: The affidavit of defendant Morehead, upon which this motion is founded, saying that Duke and Green are coprincipals and not sureties; and we have the affidavit of defendant Duke, denying that he is a principal, and alleging that he is only a surety to the note; and, in addition to these affidavits, we have the sworn statement (the evidence of Mrs. Morehead on the trial) in which she says: *"I gave* for the $6,000 note a note of the estate of Eugene Morehead, *with B. L. Duke and Lucius Green as sureties,* for $5,000, to the Morehead Banking Company,"—the note sued on. Upon this state of facts the court below found merits in the defendant's motion. And the opinion of this Court upon this state of facts says that if the court can make such an order it surely should have been done in this case, and finds error in the ruling of the court below for not allowing the motion.

We see things differently. I must say that from these facts I am not impressed with the merits of the motion. It is said in the opinion of the Court that "she had contested her individual liability on the note, and the judgment of the Superior Court was in her favor. There was no need then on her part, at the time of the rendition of judgment in the Superior Court, to make a motion to have the ultimate rights between Green and Duke and herself determined. She, at the first moment after her personal liability on the note had been fixed by judicial decree,

desired, not to change or modify the decision of the Supreme Court, but simply to have the rights and obligations of each of the defendants . . . settled among themselves." The judgment at June Term, 1897, shows that by the consent of Mrs. Morehead it was (289) rendered against her as executrix of Eugene Morehead, as well as against Duke and Green. And she testified that the estate of Eugene Morehead would pay about one-third of its liabilities. The judgment is now as it was then, against all three, except that defendant Morehead is now held to be personally liable.

We may not understand this argument of the court, but as we understand it, it is that when the estate of Eugene Morehead was liable, but not Mrs. Morehead, it made no difference whether she was principal and Duke and Green were sureties, or not. Or, in other words, she was willing that this question might be decided upon her evidence, when she swore that she gave *"the note, and Duke and Green were sureties,"* if the estate alone is liable. But, if she is to be held personally liable, then Duke and Green are principals. It does not seem to me that such reasoning as this is sound, and I can not adopt it. But it should be remembered that it was held at Spring Term, 1895 (116 N. C., 410), that Mrs. Morehead was *personally* liable, and she has had ever since then to make this defense, and the case has been tried three times since that decision. And it seems to me that if she had any such defense as this, it has been within her personal knowledge and should have been made before there was a final determination of the case, upon the pleadings existing for six or seven years, and the facts elicited on so many trials.

But was the judge not correct when he said he had no power to make the order? It is conceded in the opinion of the Court that the Superior Court has no power to disobey the judgment of the Supreme Court, and this is sustained by a great number of authorities. But as this is conceded in the opinion of the Court, I feel that it is not necessary to cite authorities. That when it was said in the opinion (122 N. C., 325) that the judgment tendered by plaintiff, making the de- (290) fendant Morehead personally liable, should have been signed by the court, and that it was error not to do so, and when it was again said on the rehearing (124 N. C., 622), that this judgment should have been signed, and that as it should have been signed at the trial, it should be signed upon the opinion of this Court being certified to the Superior Court, it would seem, as I have already said, that this would be the end of the case in this Court.

But the defendant Morehead says that judgment has been signed and she does not complain of that, and does not ask to set aside or modify it. Is this not arguing in a circle? If this is the end of the matter, why

not let it be the end? If it is the end, how can anything further be done? If no other judgment is to be rendered, why make the motion to file an *additional* answer? It seems to me that these interrogatories and any truthful answer that can be given to them, show the absurdity of the motion to be allowed to file a new answer.

It is taught in the hornbooks of the law that there must be an end to litigation some time, and this motion looks to me like trifling with the Court. Black on Judgments, vol. 2, par. 500, is as follows: "That the solemn and deliberate sentence of the law, pronounced by its appointed organs upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle of public policy. It is not too much to say that this maxim is a fundamental conception in the organization of every jural society. For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable,
(291) the rights of parties would be involved in endless confusion, the courts stripped of their most efficient power would become little more than advisory bodies, and this the most important function of government—that of ascertaining and enforcing rights—would go unfilled."

This doctrine is held by our own Court in an unbroken current of opinions, and by every court whose opinions I have consulted; and I do not believe any opinion can be found to the contrary. *Shehan v. Malone,* 72 N. C., 59; *In re Griffin,* 98 N. C., 225; *Dobson v. Simonton,* 100 N. C., 56; *Calvert v. Peebles,* 82 N. C., 334. The fact that there is a judgment against the defendant Morehead as well as against Duke and Green, does not preclude her from showing that she is only a surety to the debt or that Duke and Green are coprincipals with her, if such is the fact. But as this was not shown while the action was pending and before final judgment, it can only be shown in another action brought for that purpose. 2 Black on Judgments, par. 599; 1 Freeman on Judgments, par. 158. The same is true with regard to our own reported cases, for contribution among joint debtors, whether sureties or principals. I do not believe a single case can be found to the contrary.

The opinion of the Court is put on *Black v. Black,* 111 N. C., 300. I do not think this case justifies the opinion. It is not in harmony with *Shehan v. Malone* and *Calvert v. Peebles, supra,* and other cases. But I think there is quite a difference between giving a new trial upon newly discovered evidence—a party's last chance—and allowing a defendant after final judgment to file a new answer, and raise new issues not

raised or tried in the action while pending. Facts and issues must be properly raised and tried in an orderly way, and this can not be done in a suit after it is ended. The right of contribution between co-obligors upon a note usually arises after the coöbligor has paid (292) the debt, and if it arises before he does this, it must be an exception to the general rule, and no such exception is presented in this appeal. In my opinion the judgment should be affirmed.

FAIRCLOTH, C. J., also dissents.

Cited: Merrimon v. Lyman, post, 542; *Mfg. Co. v. Blythe,* 127 N. C., 327; *Cook v. Bank,* 130 N. C., 184; *S. c.,* 131 N. C., 99; *Smith v. Moore,* 150 N. C., 159; *Lancaster v. Bland,* 168 N. C., 378.

DURHAM DYEING COMPANY v. GOLDEN BELT HOSIERY COMPANY.

(Decided 3 April, 1900.)

Counterclaim—Incompetent Evidence—Res Inter Alios Acta.

1. Where the defendant admits the contract price for work done by plaintiff, but sets up a counterclaim on account of defective character of the work, the burden of proof rests on the defendant.
2. For the purpose of proving the loss on the goods from defective dyeing, the defendant offered in evidence a statement of account of sales contained in the deposition of A. T. Bloomer, who testified he had no experience in dyeing, but conducted the sale of the goods as salesman of the consignee of defendant: *Held,* incompetent, on objection.

ACTION to recover the agreed value of dyeing 29,110 pounds of hosiery at 5½ cents per pound; gross amount claimed $1,601.05, subject to admitted payment of $385.90, tried before *Brown, J.,* at October Term, 1899, of DURHAM.

The defendant set up a counterclaim for $3,000 damages for failure of plaintiff to properly perform the contract.

The counterclaim was denied in the reply. The evidence offered by defendant in support of it was, on objection, excluded by the court. Defendant excepted.

The excluded evidence is stated in the opinion.

The defendant submitted to a nonsuit upon the counterclaim. Judgment in favor of plaintiff for $1,215.15. Appeal by de- (293) fendant.

Boone, Bryant & Biggs for plaintiff.

Manning & Foushee and Guthrie & Guthrie for defendant.

FAIRCLOTH, C. J. The defendant manufactures hosiery goods and plaintiff contracted to dye defendant's hosiery goods skillfully, satisfactorily in quality, and up to the standard grade of similar work in other reputable dye works, and to pay any damage done to the goods, whilst in plaintiff's possession, in the process of dyeing.

This action is brought to recover balance due for said work. Defendant admits the amount due and unpaid, claimed by plaintiff, subject to defendant's counterclaim for defective work and damage in the dyeing process.

Defendant usually, after its goods were dyed, shipped them to Hardt Von Bernuth & Company, to be sold, and statements of sales were rendered the defendants by the Hardt Bernuth Company, through its selling agent, A. T. Bloomer. Pending this action the defendant took the deposition of A. T. Bloomer in New York City, which was read on the trial. Bloomer testified he was a salesman and had no experience in dyeing.

The defendant offered a statement of account of sales of Hardt Von Bernuth & Company, through A. T. Bloomer to defendant, for the purpose of proving the loss on the goods. The plaintiff's objection was sustained, and defendant made its third exception. The case turns upon the competency of this evidence offered in support of the defendant's counterclaim.

When the defendant rested its case his Honor stated that he would instruct the jury that the evidence in support of the counterclaim
(294) was not sufficient to go to the jury. The defendant took a nonsuit as to the counterclaim, and appealed.

The sale statements offered were incompetent against the plaintiff. They were simply the declarations of the defendant's agent. Their admission would violate the rule *res inter alios acta,* which excludes such evidence. *Waters v. Roberts,* 89 N. C., 145.

So is a copy taken from a merchant's books. *Bitting v. Thaxton,* 72 N. C., 541.

Likewise, the entry of a payment made in writing by a codebtor is only his declaration, and, therefore, incompetent as to the creditor. *Morgan v. Hubbard,* 66 N. C., 394.

So it is with the books of accounts of a bank against the customer. *Bank v. Clark,* 8 N. C., 36.

The other exceptions present nothing materially different from the third exception. Without the excluded evidence there was none sufficient for the jury to support the counterclaim.

Affirmed.

Cited: Peele v. Powell, 156 N. C., 500.

(295)

B. B. HAUSER v. THOMAS R. HARDING.

(Decided 3 April, 1900.)

Injunction—Sale of Medical Practice—Restraint of Trade—Definite Limits—Duration—Valid Contract—Issue—Judgment Non Obstante Veredicto.

1. A sale by one physician to another of his medical practice, good will and location, is not a contract void as against public policy, and in restraint of trade, but valid, and will be enforced by injunction, within definite limits.
2. Where no time is mentioned in such contracts they are to endure during the lifetime of the grantor, and the injunction will be perpetual.
3. Where the complaint alleged that the contract included a purchase of the medical practice of the defendant by the plaintiff, and that the plaintiff had performed his part, which allegations are found true by the jury, and the complaint having further alleged that defendant violated the contract by still practicing where he agreed not to, which allegation the answer does not deny, it was unnecessary to submit an issue as to whether the defendant had violated the contract.
4. Whenever any material allegation of a complaint is not controverted by the answer, such allegation is taken as true. Code, sec. 268.
5. A judgment *non obstante veredicto* is only granted in case where the cause of action is confessed, and the matter relied upon in avoidance is insufficient.
6. The prescribed limits must be definite; where, in terms, they include "the town of Yadkinville, and the territory surrounding," the injunction will be confined to the corporate limits only.

ACTION by the plaintiff, Dr. Hauser, to enjoin the defendant, Dr. Harding, from the practice of medicine in the town of Yadkinville, and the territory surrounding, on the alleged ground that the defendant was violating a contract of sale of his practice, good will and location, made with plaintiff, by resuming medical practice within said limits, tried before *Robinson, J.*, at Fall Term, 1899, of YADKIN.

The defendant denied that he contracted to sell his practice, (296) good will and location to plaintiff, and alleges that he had merely sold his house and lot in Yadkinville to plaintiff. He did not deny that he was engaged in medical practice there. A restraining order had been issued, and had been continued to the final hearing.

The issues submitted and found in favor of plaintiff appear in the opinion; so, also, do the various motions submitted after the verdict. There was no exception taken in the course of the trial.

From the judgment rendering the injunction perpetual, the defendant appealed.

E. L. Gaither for plaintiff.
Holton & Alexander for defendant.

MONTGOMERY, J. The plaintiff alleged in the complaint that he and the defendant, on 6 April, 1897, entered into a contract in which the defendant agreed to sell to the plaintiff his house and lot—his residence—in Yadkinville, an incorporated town, and his practice as a physician, good will and location at Yadkinville, and that the plaintiff agreed to buy the same at the price of $1,000; that the defendant was, in the language of the complaint, "to turn over and deliver to the plaintiff, his location, good will and practice, and the territory surrounding Yadkinville," and that the defendant was never to practice as a physician at any time in said territory, with the exception of two patients (named), whom he reserved the right to treat till their recovery; and that the plaintiff was to take charge of said practice and location on 12 April, 1897. The seventh allegation of the complaint is as follows: (297) "That since 12 April, 1897, the defendant has informed this plaintiff that he does not intend to regard said contract and agreement, but that he is going to violate it by practicing as a physician in said location, and that he has violated said contract by practicing as a physician in said location, and is now violating the same, to the irreparable damage of the plaintiff." There was a prayer for injunctive relief against the defendant to prevent his practicing medicine in Yadkinville and the surrounding territory.

The defendant admitted in his answer that he agreed in writing to sell the plaintiff his house and lot in Yadkinville, but denied that he agreed to sell his practice, good will and location. He did not deny that he was practicing as a physician in Yadkinville and the surrounding territory after 12 April, but averred that he had fulfilled the contract by executing the deed in accordance therewith. Without exception on the part of defendant, two issues were submitted to the jury:

1. Did the defendant agree to sell to the plaintiff his dwelling house and two lots in Yadkinville, together with his practice, good will and location at Yadkinville, and the vicinity thereof (subject to the exception mentioned in the complaint), for the consideration of $1,000?

2. Has plaintiff performed his part of said contract?

Both issues were answered in the affirmative, and judgment was rendered perpetually enjoining and restraining the defendant from practicing as a physician within the town of Yadkinville, N. C., and the vicinity thereof.

There was not an exception of any kind made in the course of the trial until after the verdict was delivered. The defendant then moved for judgment *non obstante veredicto*. The foundation of this motion, accord-

ing to defendant's argument, was that an issue ought to have been submitted by his Honor as to whether or not the defendant had violated his contract. He insisted that the violation by the defend- (298) ant of the contract was the *gravamen* of the plaintiff's action. With the last proposition we agree, but it clearly appears from the answer that the defendant did not deny the specific allegations of the complaint, in which it was charged that the contract had been violated by the defendant. The plaintiff in the complaint set out the alleged contract, and charged that the defendant had violated it, in that he had practiced medicine, and was continuing to practice after 12 April, 1897. The defendant in this answer, it is true, denied that he had violated the contract as he understood it, but he did not deny that he had practiced medicine in and around Yadkinville—in the territory in which the plaintiff alleged that he had agreed not to practice. The defendant averred in his answer that there was no contract except the one for the sale of the house and lot, and that "he has in every respect fulfilled the same by executing the deed in accordance therewith."

So, the jury having found that the contract was as the plaintiff had alleged it to be—for the sale of the house and lot, and the practice, location and good will of the defendant, and that the plaintiff had performed his part of the contract, and the plaintiff having alleged that the defendant violated the contract in that he had practiced, and was still practicing in the territory in which he had agreed not to practice his profession, it was unnecessary to submit an issue as to whether the defendant had violated the contract. Whenever any material allegation of a complaint is not controverted by the answer, such allegation is taken as true. Code, sec. 268. But the motion for judgment, notwithstanding the verdict, was properly overruled. Such a judgment is only granted in cases where the cause of action is confessed and the matter relied upon in avoidance is insufficient. Stephen Pleading, 97; *Ward v. Philips,* 89 N. C., 215.

There was an exception entered to the judgment, which can be (299) treated with the motion made here to dismiss the action because the complaint did not state a cause of action, first, because the contract was too indefinite, and therefore void; and second, because it is in restraint of trade, contrary to public policy and void. This Court has held that such contracts do not fall under the head of contracts for the restraint of trade. *Cowan v. Fairbrother,* 118 N. C., 406; *Kramer v. Old,* 119 N. C., 1.

It is argued for the defendant that the contract is uncertain, both as to the time during which it is to continue, and as to the territory over which it extends.

As to the uncertainty as to time, this Court has also held that where

no time is mentioned in such contracts they are to endure during the lifetime of the grantor. *Kramer v. Old, supra.*

We are of the opinion, however, that the language of that part of the contract which undertakes to restrain the defendant from practicing medicine outside the town of Yadkinville is not sufficiently definite to mark and define any certain territory. The territory surrounding Yadkinville—the language of the contract—is so uncertain as to be incapable of being marked out or being identified. Such language does not in law define a prescribed territory. We know of no rule by which the territory could be laid off. The two judges below who heard that part of this case differed as to what was meant by the words "the territory surrounding Yadkinville."

We have examined with care the cases cited by the plaintiff's counsel on this point, and we think they do not sustain his contention.

The limits of the town of Yadkinville, an incorporated town, as appears from the record, are to be taken as well defined, and the
(300) contract is not uncertain so far as it restrains the defendant from practicing medicine within its limits.

The judgment must be modified so as that the defendant will be enjoined and restrained during his life from practicing medicine within the corporate limits of the town of Yadkinville.

Modified and affirmed.

Cited: Shute v. Heath, 131 N. C., 286; *Teague v. Schaub,* 133 N. C., 469; *Disosway v. Edwards,* 134 N. C., 257; *Anders v. Gardner,* 151 N. C., 605; *Wooten v. Harris,* 153 N. C., 45; *Faust v. Rohr,* 166 N. C., 191.

M. E. TURNER, ADMINISTRATRIX OF JOSEPH TURNER ET AL. v. M. BOGER, TRUSTEE OF JOSEPH TURNER.

(Decided 3 April, 1900.)

Deed of Trust—Attorney Fee—By Whom Paid.

1. A stipulation in a deed of trust, among other charges, "*including an attorney's fee of 5 per cent,*" will not be sustained.
2. The debtor is only liable for the debt, interest, actual expense of sale, as advertising and the like, and a reasonable compensation to trustee for his time and trouble in making sale, say not to exceed 2 per cent, Code, 1910. The trustee pays his own attorney.

ACTION by administratrix and heirs at law of Joseph Turner, for partition of certain lands, and sale to close mortgage on other lands

belonging to the intestate, transferred from the clerk and heard before *Timberlake, J.*, at February Term, 1900, of IREDELL.

The case was compromised in every particular, save one. The deed of trust, or mortgage, contained the usual conditions for foreclosure, and in case of sale, the following: "And out of the moneys arising from such sale, the said Martin Boger, trustee, or legal representative, shall pay the principal and interest of the indebtedness hereby mentioned to be secured, together with all legal cost and reasonable charges in executing this trust, *including an attorney's fee of 5 per* (301) *cent.*"

The only question presented to his Honor was: Is the 5 per cent attorney fee charged and mentioned in the deed of trust void as against public policy? If it is, nothing is due the trustee; if it is not, the debt due him is $376.65, subject to a payment of $235.74.

His Honor sustained the charge and rendered judgment in favor of the trustee for $376.65, subject to the credit of $235.74.

Plaintiff excepted and appealed.

Armfield & Turner for plaintiff.
No counsel contra.

CLARK, J. In 1887 the plaintiff's intestate executed a deed of trust to the defendant to secure a debt to defendant's wife, in which it is stipulated that in case sale should be made under the trust, "out of the moneys arising from such sale, the said Martin Boger, trustee, or legal representative, shall pay the principal and interest of the indebtedness hereby secured, together with all legal costs and reasonable charges in executing this trust, *including an attorney's fee of 5 per cent.*" After the death of the plaintiff's intestate, an action was begun by plaintiffs for partition of certain land named in the trust deed, in which the trustor had owned a part interest only, and for a sale of all the land embraced in said deed to make assets to pay debts, including the lien on the debt secured by the trust. This the defendant, who was also defendant in that proceeding, resisted, claiming the right to sell under the deed of trust, and by a consent judgment it was decreed that the defendant should sell the land embraced in the trust deed, and out of the proceeds pay "said debt and interest and all legal and necessary *expenses* of said sale." The lands have since been (302) sold by the defendant, and after allowing him all "expenses" for advertising, traveling, etc., but not including above 5 per cent for attorney's fees, there was a balance due of $235.74, which the plaintiff tendered in legal money before the bringing of this action, and paid the same into the clerk's office to abide the result of this action, and

which the defendant has since received, without prejudice, to be held as a credit, or as payment in full, according to the decision of the Court as to his right to collect the 5 per cent for attorney's fee. This presents the sole question for consideration.

A stipulation in a promissory note "that in case this note is collected by legal process, the usual collection fee shall be due and payable," was held contrary to public policy, and invalid, in *Tinsley v. Hoskins,* 111 N. C., 340. This has since been reaffirmed in *Brisco v. Norris,* 112 N. C., 671; and in *Williams v. Rich,* 117 N. C., 235, such reservation was held not only invalid, but evidence of usury. If this stipulation is contrary to public policy in a note which has to be collected by aid of the courts, for a stronger reason the stipulation would be invalid in a mortgage or deed of trust where the opportunity for oppression is greater.

It is true that a stipulation for compensation to the trustee for making sale, in addition to actual expenses, if reasonable, would be sustained (though if a cloak for usury it would not be, *Arrington v. Jenkins,* 95 N. C., 462; *Hollowell v. B. & L. Association,* 120 N. C., 286), and if the rate of compensation is not specified probably by analogy, the commission allowed for making sale in partition (Code, sec. 1910; *Ray v. Banks,* 120 N. C., 389) would be reasonable; but in this trust deed the stipulation is not only for expenses and reasonable charges in executing the trust (*i. e.,* commissions), but that 5 per cent (303) attorney's fee shall be added thereto. The consent judgment eliminated the provision for commissions to trustee by stipulating that only "legal and necessary *expenses*" of sale should be charged, and all such expenses claimed by defendant have been paid.

The answer avers that the 5 per cent was charged for "service of defendant's attorney and that they were reasonable and just." Probably they were, but they must be paid by the defendant, at whose request they were rendered, and can not be charged against the debtor, who is only liable for the debt, interest, actual expenses of sale, as advertising and the like, and a reasonable compensation to trustee for his time and trouble in making the sale, say not to exceed 2 per cent (Code, 1910), and by the consent judgment only the *expenses* were to be charged, omitting compensation to trustee, who was acting for his wife, and therefore was more like a mortgagee.

In *Cannon v. McCape,* 114 N. C., 580, the amount of the commission was not discussed, but the right to receive it, when a sale was not made, and even on the point decided, it has been virtually overruled in *Pass v. Brooks,* 118 N. C., 397; *Fry v. Graham,* 122 N. C., 773, and *Whitaker v. Guano Co.,* 123 N. C., 368; thus sustaining the dissenting opin-

ion in *Cannon v. McCape,* and in *Smith v. Frazier,* 119 N. C., 157, 5 per cent commissions in foreclosure proceedings were held excessive and disallowed.

Upon the facts agreed, judgment should have been rendered in favor of plaintiff for the surrender and cancellation of the trust, and for costs.

Reversed.

Cited: Machine Co. v. Seago, 128 N. C., 163; *Bank v. Lumber Co., ib.,* 195; *Mfg. Co. v. Gray,* 129 N. C., 442; *Staton v. Webb,* 137 N. C., 41; *Lumber Co. v. Pollock,* 139 N. C., 175; *Loftis v. Duckworth,* 146 N. C., 344; *Banking Co. v. Leach,* 169 N. C., 713.

(304)

W. L. HENDRICKS v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 3 April, 1900.)

Telegrams—Reasonable Diligence—Nondelivery—Notice to the Sender—Inquiries for Sendee—Negligence.

1. Where a telegraph company receives a message for delivery which it fails to deliver with reasonable diligence, it becomes *prima facie* liable and must allege and prove matters of exculpation for the failure to deliver.
2. The same liability is incurred by failure to deliver within a reasonable time, and must be accounted for. The length of the delay may affect the *quantum* of damages in certain cases.
3. Rules without notice to those to be affected by them, and which are not observed by the company itself, afford no protection against liability for failure to deliver.
4. It is the duty of the company, in all cases practicable, to promptly inform the sender of a message, that it can not be delivered; its failure to do so is evidence of negligence, as well as its failure to make diligent inquiry of persons likely to know of the residence or whereabouts of the sendee.
5. Frequently the question of negligence depends on a combination of facts, and not merely on any one fact.

ACTION for damages for failure to deliver two messages to the plaintiff announcing the death of his sister, tried before *Coble, J.,* at Spring Term, 1899, of LINCOLN.

Issues:

1. Did the defendant negligently fail to deliver the messages described in the complaint, or either of them? Answer. "Yes."

2. What are plaintiff's damages? Answer. "$1,000."

Judgment accordingly for plaintiff. Appeal by defendant.

The facts are stated by DOUGLAS, J.

This was an action brought by the plaintiff to recover dam-
(305) ages for the negligent failure of the defendant to deliver two telegrams, one of which was sent by his brother-in-law, George Moore, and the other by his mother. The first of said messages, sent on 12 November, 1895, was as follows: "Lincolnton, N. C., 12 November, 1895. To W. L. Hendricks, care Gaffney Cotton Mills, Gaffney, S. C. Presh died this morning. Geo. Moore."

The second was sent on the 13th of said month, and is in the following words: "Come quick, will bury Presh tomorrow." These messages were addressed to the plaintiff, who was then at Gaffney, S. C., in care of the Gaffney Cotton Mills, the plaintiff being at the time employed in said mills as a "boss" in the card room. The toll on the first message was prepaid in Lincolnton, from which place it was sent, and the second message was sent "collect." Plaintiff lived at Gaffney, S. C., at the time the messages were sent, and had lived there for two months in a house on Limestone street, within three or four hundred yards of defendant's office, which was also situated on said street. The evidence tends to show that plaintiff was well known in said mills, and that he worked in the carding room. He got his mail regularly at the post-office, and was known at some of the leading stores and other places of business in the town. He left Gaffney on 14 November to go to Cherryville, N. C., which is near Lincolnton, in response to a telegram sent to him by one Rhodes, from that place, and which was received at defendant's office in Gaffney, and delivered to him before he left on 14 November.

His sister died on 12 November, and he did not know of her sickness or death till the 15th, the day after she was buried, when he met,
in Cherryville, one of his sisters, who told him of it. When he
(306) returned to Gaffney, about ten days afterwards, he inquired at defendant's office for the two messages, and they were found by the operator in a basket of papers in a corner of the office, and handed to plaintiff. The operator at Lincolnton did not hear anything from the operator at Gaffney concerning the first message he sent on the 12th, nor did he hear anything from him about the second message, which was sent on the 13th, till after the body of Mrs. Moore, the sister of the plaintiff, had been taken to the "burial place," some ten or twenty miles from her home, when the operator at Gaffney informed the operator at Lincolnton by a service message that the plaintiff could not be found, and that he would have to collect the charges on the two messages.

The operator at Gaffney, when he received the first message on the 12th, gave it to the messenger boy, a boy about twelve years of age, and if we accept the latter's testimony as true, though there was much conflicting evidence, he went to the Gaffney Mill and inquired for the plaintiff, and was told by Mr. Wardlaw to go through the mill and look for him, but he did not go through the mill, but only through a part of it. He did not go into the carding room, which was a part of the mill, and the very place where the plaintiff worked. He inquired of only four or five persons, whose names he did not know, and left the mill and made his other inquiries in a few places in the town, and, failing to find the plaintiff, he returned to the telegraph office and hung the message on the file.

What was done with the message that was sent on the 13th does not appear, though it appears to have reached Gaffney about 11:40 o'clock that day, in time for Mr. Hendricks to have reached his sister's home before the funeral.

The messenger did not return to the mill, nor did he ever tell the mill officers that he had a telegram for the plaintiff, or in any way inform them that the message was addressed in their care, nor (307) that it was of serious importance and required prompt delivery, nor did he leave or offer to leave the message with any of them, nor insist that they should receive it for Mr. Hendricks.

The operator at Gaffney did not send any "service message" to the operator at Lincolnton notifying him of the failure to deliver the message of the 12th, and asking if Mr. Hendricks had a residence in Gaffney, and to make inquiry of the sender of the message as to where he lived in the town, nor did he ask the operator at Lincolnton for a better address.

Defendant assigns as errors the following:

1. His Honor's overruling defendant's objection to the question asked the witness, Reinhardt, which question was as follows: "Could you have found out from the plaintiff's family that plaintiff lived in Gaffney, if you had been informed that the telegram had not been delivered?" to which ruling defendant excepted. (Exception No. 1.)

2. His Honor's refusal to give the instructions asked by defendant in the course of the trial, numbers 2, 3 and 4, which are as follows:

(2) That the defendant company was not bound to communicate either with Reinhardt or Moore. The fact that the message could not be delivered, if they believe from the evidence they lived beyond the "free delivery limits" from the office, and unless they find the defendant company negligent in other respects, they should find the first issue "No." (Exception 2.)

(3) That if the defendant company made due inquiry for the ad-

dressee at the Gaffney Cotton Mills, in whose care it was sent, and failed to find him there, they used due diligence, and unless you find that the defendant was guilty of negligence in other respects, they (308) should find the first issue "No." (Exception 3.)

(4) That it would not be negligence in the defendant not to send a message asking for a better address, unless they believe that by sending such message the company could have obtained a better address, and unless they find that the defendant was guilty of negligence in other respects, they should find the first issue "No." (Exception 4.)

3. For errors committed by his Honor in giving the charges requested by the plaintiff, numbered 1, 2, 3 and 6, and which are as follows, with the modification made by the court:

(1) The fact that the messages were addressed in care of the Gaffney Manufacturing Company, or Cotton Mills, and that the defendant's messenger made inquiry at the mill or at the office of the company, and was informed that the plaintiff was not there [or was not employed there], did not excuse the defendant from making diligent inquiry in Gaffney for the plaintiff's whereabouts, and if it failed to make such inquiry, there was negligence on the part of the defendant, and the jury will answer the first issue, "Yes." (Exception 5.)

(2) If the plaintiff, at the time the messages were received by the operator at Gaffney, had a residence or home in the said town, it was the duty of the defendant's servants in Gaffney, who had charge of the message, to have made inquiry for the plaintiff at his residence, and if the jury find the defendant, by its servant, failed to make such inquiry, and by so doing failed to deliver these messages, it was guilty of negligence, and the jury will answer the first issue, "Yes," unless by diligent inquiry the defendant could not have ascertained that the plaintiff had a residence in Gaffney. (Exception 6.)

(3) That it was the duty of the defendant to have made inquiry at the post-office for the plaintiff, if the plaintiff had for some time been receiving mail at the post-office, and if the jury find that defend- (309) ant's servants failed to make such inquiry, it was negligence, and the jury will answer the first issue "Yes." (Exception 7.)

(6) That it was the duty of the defendant's operator at Gaffney, if the plaintiff could not be found and the message delivered, to have notified the operator at Lincolnton of the fact, so that the latter could get a better address or additional information as to the whereabouts of the plaintiff, either from the sender of the message or R. S. Reinhardt, the agent, if Reinhardt was the agent.

"Unless the jury find that by so notifying the operators at Lincolnton, the defendant could not have obtained a better address." (Exception 8.)

Burwell, Walker & Cansler for plaintiff.
Jones & Tillett for defendant.

DOUGLAS, J., after stating the facts: The first exception can not be sustained. The question was competent, but in any event was harmless, as the witness answered that he did not know. Where a party is seeking to prove a fact, and the witness answers that he does not know, the answer is in fact more favorable to the opposite party than if the question had been excluded, because it prevents unfavorable inference. The point so clearly presented and elaborately discussed whether the defendant company was bound to make inquiries beyond the local limits of free delivery, does not appear to arise in this case, in the view we take of it. It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure. *Sherrill v. Telegraph Co.*, 116 N. C., 655; *s. c.*, 117 N. C., 352; Gray Tel., sec. 26; Thompson Elec., sec. 274, and cases (310) therein cited. The failure to deliver within reasonable time is equivalent to nondelivery, as far as the principle of liability is concerned, although the length of the delay may affect in certain cases the actual quantum of damages. The object of using the telegraph is its capacity for almost instantaneous transmission of intelligence, and if this purpose is defeated there is no consideration for the increased cost of its use. In every respect except that of time, the postal service, with its small cost and greater secrecy, would be preferable.

In the case at bar it is admitted that the telegram was not promptly delivered, but the defendant insists that its nondelivery was not due to any negligence on its part, but solely to its failure to find the addressee, after very reasonable effort to do so. It does not set up any contractual limitations of liability. In fact it appears that the plaintiff addressee lived within the free delivery limits of Gaffney. The usual printed terms of the company are not set out in the record, but they are on the back of all blanks of the defendant company, and can be found on page 436 of Croswell's Law of Electricity. The only difference appears to be that the author has omitted the words "any message" in line 27 of the form after the word "forward." The clause under consideration is as follows: "Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery." By its very terms this provision does not apply to the office from which the message is sent. It may be further noted that the company does not say that the message will *not* be de-

livered beyond such limits, but that "a *special* charge will be made to cover the cost of such delivery," which would seem to clearly im-
(311) ply that it would be delivered. No fixed limit of distance nor definite sum is specified, and it is difficult to see how the sender can be presumed to know either in the absence of information from the company.

Many of these printed terms have been held void as contrary to public policy, but even where valid they must be reasonably construed. *Brown v. Telegraph Co.,* 111 N. C., 187; *Sherrill v. Telegraph Co., supra; Dowdy v. Telegraph Co.,* 124 N. C., 522; *Laudie v. Telegraph Co., ib.,* 528.

The following comment by the Court in *Telegraph Co. v. Robinson,* 97 Tenn., 638, is peculiarly appropriate. "A rule merely made without notice to those who are to be affected by it, and without exaction of conformity to it, and which is not in fact observed by the company itself, can not, as a protection against liability, be laid away in the secret consciousness of the agents of the company, unknown and unobserved, until the occasion arises to apply it, on account of liability incurred by failure to deliver."

In the case at bar this limitation of free delivery limits is invoked only to excuse the agent at the terminal office from not informing the agent at the office of transmittal that the message had not been or could not be delivered. This becomes purely a question of reasonable diligence, and we think is answered by the fact that there was a telephone from the depot, where the office of the defendant appears to be, to the home of the sender. It would seem that ordinary care would require the agent at Lincolnton to step to the telephone and notify the sender that a message of such vital interest had not been delivered. This he doubtless would have done if he had been informed of that fact by the agent at Gaffney. We think that it is the duty of the company in all cases where it is practicable to do so to promptly inform the sender of a message that it can not be delivered. While its fail-
(312) ure to do so may not be negligence *per se,* it is clearly evidence of negligence. In many instances, by such a course, the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would *tend* to show diligence on the part of the company.

The question as to what would have been the legal effect if the message had been left with the company in whose care it was addressed, does not arise. The messenger testifies that he went into the office of the Gaffney Cotton Mills and asked Wardlaw if Hendricks was there,

and was told to go and look. He did not show the message to Wardlaw or any one else at the mill, nor did he inform them that it was directed in their care. In spite of a hypothetical answer of the witness Wardlaw, we can not suppose that if he had been informed of the nature of the telegram addressed to one of his employees in his care, he would not have taken some little trouble to have aided in its delivery. The messenger merely asked the postmaster if he knew the plaintiff, but did not ask him if the plaintiff received his mail at that office. These facts, so far from exonerating the defendant, tend to prove its negligence, but as there is some conflicting testimony, as well as other material facts, the matter was properly submitted to the jury, who in all cases have the constitutional right to pass upon the *weight* and *credibility* of the testimony. What is due diligence or reasonable care, the phrases in this case being practically synonymous, are nearly always, if not always, mixed questions of law and fact. Difficult of accurate definition and still more of determination, they depend upon the relative facts of each case and come peculiarly within the province of the jury. Frequently the question of negligence (313) depends not so much on any one fact as on a combination of facts, and therefore the singling out of any one fact which directly or inferentially is made the turning point in the case might of itself be error.

There does not appear to have been made any effort to deliver the second telegram. As we see no error in the trial of the case, the judgment below is

Affirmed.

Cited: Laudie v. Tel. Co., post, 436; *Mfg. Co. v. Bank,* 130 N. C., 609; *Meadows v. Tel. Co.,* 131 N. C., 77; *Bright v. Tel. Co.,* 132 N. C., 324; *Hinson v. Tel. Co., ib.,* 467; *Bryan v. Tel. Co.,* 133 N. C., 605; *Cogdell v. Tel. Co.,* 135 N. C., 434, 436; *Hunter v. Tel. Co., ib.,* 466; *Hood v. Tel. Co., ib.,* 626; *Gainey v. Tel. Co.,* 136 N. C., 264; *Harrison v. Tel. Co., ib.,* 381; *Green v. Tel. Co., ib.,* 492 and 507; *Carter v. Tel. Co.,* 141 N. C., 379; *Mott v. Tel. Co.,* 142 N. C., 537; *Helms v. Tel. Co.,* 143 N. C., 395; *Woods v. Tel. Co.,* 148 N. C., 5; *Holler v. Tel. Co.,* 149 N. C., 343; *Willis v. Tel. Co.,* 150 N. C., 324; *Shaw v. Tel. Co.,* 151 N. C., 642; *Carswell v. Tel. Co.,* 154 N. C., 115, 118; *Kivett v. Tel. Co.,* 156 N. C., 306; *Miller v. Tel. Co.,* 159 N. C., 502; *Hoaglin v. Tel. Co.,* 161 N. C., 395; *Ellison v. Tel. Co.,* 163 N. C., 12; *Betts v. Tel. Co.,* 167 N. C., 79, 80; *Smith v. Tel. Co.,* 168 N. C., 519; *Medlin v. Tel. Co.,* 169 N. C., 505; *Howard v. Tel. Co.,* 170 N. C., 499; *Johnson v. Tel. Co.,* 171 N. C., 131, 132.

R. C. BAZEMORE v. W. E. MOUNTAIN AND PATTIE W. MOUNTAIN, HIS WIFE.

(Decided 3 April, 1900.)

1. A married woman's separate real estate is not liable under section 1826 of the Code.

2. Her separate personal property may be rendered liable by herself, or her agent acting for her with her consent, for necessary supplies for the support of herself and her family. The Code, sec. 1826.

3. The description of her personal property charged as "mules and horses and farming implements, all of which she uses in the cultivation of her said lands for the use of herself and the support of her said family," is not too indefinite.

ACTION for necessary family and farming supplies furnished the *feme* defendant for the support of herself and her family for the year 1894, tried before *Hoke, J.*, at May Term, 1899, of BERTIE.

(314) The complaint alleged that she was the owner of several tracts of land (describing them), and of personal property (describing it), and that the entire support of the family devolves upon her, and that she has no other source of income than arises from her said lands.

The plaintiff's prayer is for judgment for his debt, and that said judgment be specifically and specially declared a lien and charge upon the separate real and personal estate of Pattie W. Mountain as herein described.

The answer denied every allegation of the complaint.

This is the same case reported in 121 N. C., 59.

Two issues were submitted to the jury:

1. Are the defendants indebted unto the plaintiff, and if so, in what sum? Answer: "Yes; in the sum of $225.58."

2. Is the separate estate of the defendant Pattie W. Mountain, set out and described in the complaint, chargeable with said sum? Answer: "Yes."

The judgment was set aside so far as it affects the real estate of Pattie W. Mountain, defendant, described in complaint.

The plaintiff excepted and appealed.

Judgment was rendered against the male defendant for the debt, $222.58, and it was further adjudged that the separate personal property of *feme* defendant set out and described in it, to wit, the horses and mules and farming implements owned and used by her in farming her said real estate, and which were so owned and used at time this action begun, is liable to payment of above debt, to extent necessary to pay same and costs of action, subject to personal property exemption of

said *feme* defendant, and that *ven. ex.* issue from this Court commanding sheriff of Bertie County, after setting apart said exemption, should same be demanded, to sell said personal estate, or so much as may be necessary, and apply proceeds to payment of said debt and costs.

The defendants excepted on the ground that the personal prop- (315) erty was insufficiently described, and also appealed.

St. Leon Scull, B. B. Winborne, and R. B. Peebles for defendants.
Francis D. Winston for plaintiff.

DEFENDANTS' APPEAL.

FURCHES, J. We consider first the defendants' appeal, for the reason that it is much fuller than the record in the plaintiff's appeal—containing the evidence and charge of the court, which is not set out in the transcript of the plaintiff's appeal.

This case was here at Fall Term, 1897, upon a judgment of nonsuit, and appeal by the plaintiff—reported in 121 N. C., 59. In that case, under the repeated rulings of this Court, we were compelled to take every fact which plaintiff's evidence tended to prove, as proved; and under this rule of construction, we set aside the judgment of nonsuit, and awarded the plaintiff a new trial. In doing this, in that appeal, we undertook to lay down the rules of law governing the case. And upon a careful examination of the record of the trial presented upon this appeal, we fail to see any substantial error. It is true that there is an exception to that part of the judge's charge, "That if the supplies were furnished on the faith of the husband's promise that he and his wife would give a mortgage on her separate estate, and he had authority from his wife to make such a contract, and the supplies were to farm the wife's property, on the rents of which she was dependent for support, the jury will find the issue for the plaintiff, Yes."

If the first part of this paragraph had stood alone, "That if the supplies were furnished on the faith of the husband's promise that he and his wife would give a mortgage on the separate estate" of the wife, we think the charge would have been obnoxious to the (316) exception of the defendant; but, when taken in connection with the balance of the paragraph, we do not think that it is.

So far as we are able to see, the court was authorized by the opinion of the Court in this case when here before, to give the instructions it did. Indeed, it seems to us that the case was fairly tried under the rules laid down by the Court on the former appeal.

The exceptions to the judgment, on account of a want of description of the defendant's personal property can not be sustained. This property is described in the complaint as the *feme* defendant's "mules and

horses and farming implements, all of which she uses in the cultivation of her said land for the use of herself, and the support of her said family." It is true that this is not a very specific description, but we think sufficient. Indeed, we do not see how it could have been much more specific. It can not be contended that the plaintiff should have given a description of every horse or mule, or every piece of farming implement.

And as we find no ground upon which the defendants' exceptions to the evidence can be sustained, the judgment of the court below must be affirmed.

PLAINTIFF'S APPEAL IN SAME CASE.

FURCHES, J. The only question presented in this appeal is whether the *feme* defendant's real estate is liable to sale under the plaintiff's judgment. When the case was here before (121 N. C., 59), the opinion of the Court restricted her liability to her personal property, and we will have to do so now. This seems no longer to be an open question, whatever construction section 1826 of The Code (317) may have been liable to, before it was construed. But in *Jones v. Craigmiles,* 114 N. C., 613 and in *Ulman v. Mace,* 115 N. C., 24, the liability was limited to the personal property of the *feme* defendant. And in *Bates v. Sultan,* 117 N. C., 94, it is expressly held that the real estate of the *feme* defendant is not liable; and *Bates v. Sultan* is put upon *Farthing v. Shields,* 106 N. C., 289, where it was held that the *feme's* real estate was not liable.

We have not discussed this question, but have contented ourselves by citing a number of cases where the question seems to have been discussed and settled. We find no error in the judgment appealed from, and it is

Affirmed.

CLARK, J., dissenting in plaintiff's appeal: The Code, section 1826, makes no distinction between realty and personalty. It incapacitates any married woman to make "any contract to affect her *real or personal* estate except for her necessary personal expenses or for the support of the family," etc., without the written consent of her husband, unless she be a free trader. In this case, the articles furnished were for the support of her family, and consequently her contract for them affects her real as well as her personal estate.

No support for the contrary view can be derived from the Constitution, which guarantees that a married woman shall retain the same rights over her property, both "real and personal," in the same plight and condition "as if she were unmarried," save for the veto given her husband upon her "conveyances." There is no distinction there made

between realty and personalty, and if by any conceivable process of reasoning, contracting could be construed to come within the constitutional provision requiring the husband's assent to "conveyances," then it would forbid contracts altogether by a married woman without the written assent of the husband, and set aside section 1826 (318) *in toto*. There is no possible escape from this result.

The only ground advanced has been that, as by the Constitution a married woman can not convey without her husband's written assent, to allow her to contract without it, would be "to permit her to do indirectly that she can not do directly." But for more than two hundred years the statute of frauds has made invalid contracts as to realty, and some other contracts, unless in writing, and no court has ever conceived that verbal contracts did not create a valid liability under which payment could be enforced out of realty "because that would permit to be done indirectly what can not be done directly." Besides, as just said, if forbidding "conveying" without the written assent of the husband forbids "contracting" without such assent, that abolishes section 1826, for that does allow "contracting without assent" in three classes of cases. It would also render unconstitutional all legislation (Code, secs., 1827-1832) permitting a married woman to become a free trader if the constitutional requirement of the husband's assent to "conveyances" embraces "contracts." Yet such legislation has been held constitutional. *Hall v. Walker,* 118 N. C., 377.

If, however, section 1826 is unconstitutional, it is for the directly opposite reason—not because it permits a married woman in three specified instances to make contracts whereby "her real and personal estate" may be subjected to the payment of liabilities incurred thereby, but because it restricts her rights of contracting in other cases, when the Constitution guarantees the retention of her property rights, and of course her property liabilities, except only that the husband is to have a veto upon her conveyances.

In truth, several decisions rendered prior to this Court, as now constituted, made, if not inadvertently, under the strong influence of preconceived views based upon a married woman's status prior to the radical change in that regard effected by the Constitution of (319) 1868, are in direct conflict with that Constitution, and with the statute. The Constitution gives a married woman the same property rights as if she had remained unmarried, save only as to conveyances. The statute (Code, 1826), infringes on that broad guarantee by taking away the right to contract, save in three cases. And the decisions further infringe upon the constitutional guarantee by reducing the power to contract, in the three instances, specified in the statute, by adding by judicial legislation the words, "and even in those three cases,

her contracts can only be enforced out of her personalty." There is no warrant for this anywhere. Our loyalty is due to the Constitution, and the precedents should be made to conform to it. The Constitution should not be bent to fit mistaken precedents. An error, no matter how often repeated, is simply an error still. Ten times zero is only zero.

When this case was here before (121 N. C., 59), nothing was said as to the liability of the defendant's realty, but it was simply held that the *feme* defendant's personalty was liable for her contracts for the support of her family, as provided in section 1826, and that has been reaffirmed in the defendant's appeal, *supra*. But the very same section, 1826, which allows a married woman's personalty to be liable for contracts for the support of her family, equally allows her realty to be subjected for the payment of her contracts for that purpose. The statute has united them; by what authority is the Court empowered to put them asunder?

Cited: Brinkley v. Ballance, post, 395.

(320)

BANK OF TARBORO v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, AND JAMES G. MEHEGAN.

(Decided 3 April, 1900.)

Indemnity Bond—Pleas in Bar—Premature Order of Compulsory Reference—Defect in Complaint Cured by Answer—Breach of Contract by Plaintiff Matter of Defense—Practice.

1. In an action upon a penal bond for alleged breaches, when the answers raised pleas in bar, which if established would end the action, a compulsory order of reference can not be properly ordered, until such pleas are decided.
2. Where the contract of suretyship is not fully set out in the complaint, it is cured by the pleading which sets out the contract in full as part of the answer.
3. Where breaches of the contract by plaintiff are relied upon by defendants, they must be specified and proved.
4. Surety companies are analogous to insurance companies, where the application, made a part of the contract, contains only stipulations which bind the assured; it is in the possession of the defendant, and if there is a breach of its terms it is for the defendant to set out the obligation, and aver and prove the breach upon which it relies.

ACTION to recover damages for alleged breaches of the indemnity bond furnished by defendant company, as surety for faithful

performance of duty by defendant James G. Mehegan, cashier of plaintiff, heard before *Bowman, J.*, at Fall Term, 1899, of EDGECOMBE.

The answer contained pleas in bar, denied the breaches complained of, and alleged nonperformance on the part of the plaintiff of stipulations forming the basis of the contract.

His Honor entered the following compulsory order of reference:

"In this cause, it appearing to the court from an inspection of the pleadings and the record in the cause, that the trial of the (321) pleas in bar raised by the pleadings and other issues of fact herein will involve the examination and taking of a long account, it is ordered that the trial of issues of fact and of law be referred to C. F. Warren, referee, pursuant to the provisions of subsection (1) of section 421, of the Code."

The defendant resisted the motion, contending that the cause was not referable, excepted to the order, and appealed therefrom.

G. M. T. Fountain for plaintiff.
J. L. Bridgers and Gilliam & Gilliam for defendant.

DOUGLAS, J. This is an action brought upon a penal bond given by the defendant, the Fidelity and Deposit Company, to secure the plaintiff against all loss from any fraudulent acts of its codefendant, Mehegan, as cashier of said plaintiff bank. This bond, which seems to have been modeled after some form of insurance policy, is extremely complicated, and is based upon an application containing a large number of questions and subquestions. There appear to be 23 sections in the bond and 31 questions in the application. All the answers are made "conditions precedent." The complaint alleged the execution of the bond and its renewal, and set out the several alleged fraudulent acts of the defendant Mehegan, upon which it relied. It further alleged, "18. That immediately upon ascertaining the several fraudulent acts of the said James G. Mehegan, cashier as aforesaid, the plaintiff bank notified the defendant company thereof, and permitted the agent of said defendant to examine the books of said bank, and furnished said defendant with proof of said loss more than three months before the bringing of (322) this action." After demurrer overruled, the defendant company answered in part as follows:

"5. That in answer to allegation 5 of the complaint, the defendant admits that there was a bond of indemnity executed by the defendant and said Mehegan, the defendant executing the same as the surety of the said Mehegan, upon the date mentioned, and for the amount named, but the defendant denies that the terms and conditions of said bond are properly, correctly and truly alleged. That a copy of the contract of

suretyship entered into by the defendant with the plaintiff, and a copy of the notice of the expiration, statement by bank and renewal receipt, are hereto attached and asked to be taken as a part of this answer.

"6. That allegation 6 of the complaint is admitted. But the defendant further answering same, says and alleges, that said contract and agreement was entered into and based upon the following statement and representations, to wit: those set out in the attached papers set out in the preceding paragraph hereof, which said statement, at the time it was made, to wit, 15 December, 1896, was incorrect and untrue, and by reason of the incorrect and untrue statements contained therein, the defendant was induced to execute and deliver to the plaintiff the said renewal receipt, and the defendant submits that it is not liable on account thereof."

The further defense of defendant company alleges:

"2. That by the terms, conditions and covenant of said contracts of suretyship, the plaintiff assumed, obligated and contracted to do and perform certain obligations therein named, the carrying out and performance of which by the said plaintiff was necessary to make said contract valid and binding upon the defendant; and to entitle the plaintiff to bring and maintain this action. That the said plaintiff has neglected and failed to perform and carry out its obligations as
(323) aforesaid, and therefore is not entitled to recover in this action.

"3. That the plaintiff has failed to set out and allege that it has in all respects complied with and performed its part of the contract made with the defendants, as it was its duty to have so done, and the defendant submits that the plaintiff is not entitled to maintain and prosecute this action.

"4. That the said plaintiff has failed and neglected to carry out and perform its part of said contract, thereby causing and doing a wrong in the premises, and thereby discharging the defendant from liability on account of said contract."

The court below made the following order:

"In this cause it appearing to the court from an inspection of the pleadings and the record in the cause that the trial of the pleas in bar raised by the pleadings and other issues of fact herein will involve the examination and taking of a long account, it is ordered that the trial of issues of fact and of law be referred to C. F. Warren, referee, pursuant to the provisions of subsection 1, of section 421, of the Code." The defendant resisted the motion, contending that the cause was not referable.

In this we think there was error. The answers of the defendants, which were substantially to the same effect, raised pleas in bar which if found in their favor would put an end to the action and render a ref-

erence entirely unnecessary. Until such pleas are decided, a compulsory reference can not properly be ordered. If the plaintiff has no right to recover at all, it makes no difference what amount he might be entitled to recover if he had a cause of action. *R. R. v. Morrison,* 82 N. C., 141, 143; *Cox v. Cox,* 84 N. C., 141; *Neal v. Becknell,* 85 N. C., 299; *Commissioners v. Raleigh,* 88 N. C., 120; *Smith v. Goldsboro,* 121 N. C., 350, and cases therein cited.

In the argument before us, the counsel for defendant company insisted that the complaint did not state facts sufficient to (324) constitute a cause of action inasmuch as it did not set out in full the contract of suretyship, and did not specifically allege that the plaintiff had performed each and all of the conditions and stipulations on which the contract was based. However the plaintiff may have been in fault in not setting out in full the contract of suretyship, it is cured by the pleading of the defendants who have themselves made it a part of their answers. We think, therefore, that the complaint does state a sufficient cause of action. The object of the contract was to secure the plaintiff against the fraudulent acts of its cashier. The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, the alleged fraudulent acts of the cashier, and notice to the defendant company. These facts being proved would have made out the plaintiff's case. Nothing else appearing, the plaintiff would have been entitled to recover, and if the defendant company relied upon breaches of the contract on the part of the plaintiff to defeat a recovery, it should have specifically pleaded them. The burden of proving them would have rested upon the defendant. To require the plaintiff to set out each and all of the fifty conditions and stipulations in the bond and application, and then to prove affirmatively that he had performed each one of them, would practically defeat any recovery, and would amount to a denial of justice. Many of them are mere statements of fact, while some of them are agreements between the coöbligors, and do not concern the plaintiff. One of these conditions is as follows: "And lastly, should the employee become a defaulter and seek refuge in any foreign country, he hereby agrees to the enforcement against him of the laws of such country as they are now or may be hereafter enacted relative to the commission of injuries or offenses against an employer resident in such country." How an agreement between private parties can affect the criminal laws (325) of a foreign country we fail to comprehend, and we are glad the question is not before us. We allude to it only to show the complicated nature of the conditions injected into bonds of indemnity which often tend to defeat the primary object of the contract. The old bond of indemnity was a simple instrument which could be easily comprehended

and promptly enforced. If these new forms of contract are to take its place we hope they will preserve some of its simplicity and efficiency. This is a matter of great importance, as surety companies are now allowed to make the bonds of trustees, guardians, administrators, and all other fiduciaries; and we would much regret to see the right of orphan children, as well as other helpless beneficiaries, depend not upon the substantial merits of their case, but upon a multitude of technicalities in an instrument to which they were not parties.

In the case at bar the defendant company has failed to specify in its answer the breaches of contract by the plaintiff upon which it relies, except in one instance, and that not very distinctly, but we think sufficiently so to admit of proof. It appears to us that section 6, of the answer, means to allege that the defendant company was induced to renew the bond upon the written statement of the plaintiff bank that the books and accounts of the defendant Mehegan had been examined and found correct in every respect, and that all moneys handled by him had been accounted for; and to further allege that this statement was false. These allegations amounted to a plea in bar which the defendant had a right to have passed upon before a reference could be made.

These surety companies are in the nature of insurance companies, and in fact, many of them do an insurance business of one kind (326) or another. The application before us suggests, *mutatis mutandis,* that of an insurance policy. It may therefore be well to see what this Court has said with regard to such applications. In *Bobbitt v. Insurance Co.,* 66 N. C., 70, it was said in what appears to have been really a dictum, that the application must be set out in the complaint, and, being in the nature of a condition precedent, must be proved by the plaintiff. This rule was distinctly overruled in *Britt v. Insurance Co.,* 105 N. C., 175, where the Court says: "The application is by the agreement made a part of the contract, but it contains only stipulations which bind the assured. It is in possession of the defendant, and if there is a breach of any of its terms which will release the defendant company from its obligation, it is for the defendant to set out such obligation, and aver the breach or breaches thereof on which it relies." In that case the point is fully and ably discussed with numerous citations. While the further point is not professedly decided, upon whom rests the burden of proof, we think it is inferentially settled by the universal rule that whoever is required to allege a fact is also required to prove it. The plea of the statute of limitations is an exception to the rule more apparent than real because it is negative in its character. There the plaintiff is required to prove that the transaction alleged by him occurred within the time limited by statute, as otherwise he would have no legal remedy.

The order of reference must be set aside, and the case first heard upon the plea in bar.

Error.

Cited: McCarty v. Ins. Co., post, 823; *Bank v. Deposit Co.,* 128 N. C., 367, 372; *Kerr v. Hicks,* 129 N. C., 144; *Oldham v. Rieger,* 145 N. C., 260; *Alley v. Rogers,* 170 N. C., 539.

(327)

C. A. ROBINSON, J. L. ROBINSON ET AL. v. THOMAS C. INGRAM ET AL.

(Decided 10 April, 1900.)

Deed of Trust for Support and Maintenance of Parents—Description —Admitted Fact—Duty of Trustee—Right of Cestui Que Trust— Invalid Sale—Breach of Covenant—Court of Equity—Mortgage— Execution Sale.

1. An instrument of writing under seal, proved and recorded, executed by a father in 1865 to two of his sons, conveying personal and real property to be managed by them for the support of himself and wife during life, and at death to be divided among all the children, also providing for the support of an imbecile child and the education of another child, is a deed in trust, and not a will.

2. The deed in trust is a valid deed, and no unlawful purpose appears on its face, or is suggested. A clause in the deed that if said grantees should violate any of the trust embraced therein, then the said conveyance to be utterly null and void, and the property revert to the grantor and his heirs, is a covenant, not self-executing, and not enforceable after the death of the grantor, at the instance of third parties, claiming adverse to the trust.

3. The title to the property passed absolutely by the deed and was vested in the trustees for the purpose of the trust. A mortgage made by trustees is invalid; so also, a levy, execution sale and sheriff's deed upon judgment against the grantor in 1883. The title remained in the trustees, for the purposes of the trust, until the death of the grantor in 1894.

4. The description of the land, definite in itself, and admitted in the answer, is sufficient. An admitted fact needs no proof.

ACTION for the recovery of land, tried before *Robinson, J.,* at October Term, 1899, of MONTGOMERY.

The land had belonged to W. H. Robinson, under whom both parties claimed at his death in 1894.

The plaintiffs claimed as heirs at law of W. H. Robinson, also under a deed of trust executed by him in 1865 to two of his sons, William F.

and James L. Robinson, as trustees for the support and main-
(328) tenance of himself and wife, also of an imbecile son, and for the maintenance and education of a younger son, the land at death of himself and wife to be equally divided among all the children. The defendants claimed under a judgment against the grantor, followed by execution sale and sheriff's deed in 1883. The defendants further claimed that in 1882, the surviving trustee and some of the other heirs had mortgaged the land to secure a debt due W. K. Beacham & Co.; also that the trustee had failed to properly support the grantor, and they allege that these two circumstances avoided the deed of trust, put the title back in the grantor, and subjected his land to the execution and sheriff's deed, under which they claimed. The deed of trust contained this clause: That if the trustees should violate any of the trust embraced in the foregoing conveyance, "then the said conveyance to be utterly null and void, and the property revert to the grantor and his heirs."

They also contended that the land was insufficiently described in the complaint.

His Honor submitted two issues to the jury—one as to the support of the grantor and his wife during their lives, which was answered, "Yes"; the other as to the mortgage to Beacham & Co., prior to 21 February, 1883, date of sheriff's deed to defendant Ingram; this also was answered, "Yes."

Judgment was rendered in favor of defendants, and plaintiffs excepted and appealed.

Adams & Jerome and Bennett & Bennett for plaintiffs.
W. C. Douglass for defendants.

FAIRCLOTH, C. J. On 12 December, 1865, W. H. Robinson conveyed his real and personal property by deed, including a 600-acre tract of land, to W. F. and J. L. Robinson, his sons, in trust, as
(329) follows: That the trustees should take and manage the property, and out of the proceeds support and maintain the grantor and his wife during their lives, and after their death divide the property equally among the grantor's children, and shall support and maintain Z. T. Robinson (he being incapable of managing for himself), shall educate their brother, C. C. Robinson, and act as his guardian, until he is of lawful age. It was then convenanted that if said grantees should "violate" any of the trust embraced in the foregoing conveyance, "then the said conveyance to be utterly null and void," and the property revert to the grantor and his heirs.

W. H. Robinson, surviving his wife, died in 1894. On 27 February,

1882, Lawson (meaning, as we understand it, J. L. Robinson) Robinson, Elizabeth Robinson, Z. T. Robinson and C. C. Robinson, some of the children of said grantor, conveyed in a mortgage deed to secure $400 to W. K. Beacham & Co., the same tract of land as that in said trust deed. On 24 February, 1882, the sheriff of Montgomery County, under executions against said W. H. Robinson, levied on said tract of land, and sold all his right, title and interest, when defendant Ingram became the purchaser, and received the sheriff's deed, bearing date 21 February, 1883. The defendants claim title through the above-recited deeds, as well as deeds from others of said children. There are several other mesne conveyances among different parties.

Plaintiffs are some of the heirs at law of said W. H. Robinson. No issue as to title was submitted on the trial, although tendered by the plaintiffs. Only two issues were submitted (1) whether the trustees, up to 1884, did support and maintain W. H. Robinson and wife, as provided in said trust deed; (2) did said W. F. and J. L. Robinson, or the survivor, prior to 21 February, 1883, sell or mortgage any of the property mentioned in W. H. Robinson's deed to them? (330) Each issue was answered, "Yes."

From the above it appears that some of the children of W. H. Robinson are not parties to this action, either as plaintiffs or defendants. It is insisted that some of the children's deeds were without consideration—that Z. T. Robinson was mentally incapacitated to make a valid deed, etc. None of these questions were tried, according to the record before us. There is no allegation by either party, nor is there is any proof, nor does his deed profess in any part of it, that Lawson Robinson in his deed to W. K. Beacham & Co., undertook or intended to make sale or mortgage as *trustee,* and it is insisted that he only mortgaged his *individual* interest with the other children who signed the same deed. It is manifest that a new trial must be directed, when proper parties may be made and the rights of all inquired into and determined. Until then, this Court can render but little service in the action.

Such as we can safely consider in the present condition of the record, we will now dispose of. We think the written instrument, dated 12 December, 1865, is a deed, and not a will. There is a grantor, grantees, and a thing granted. It is valid, as no unlawful purpose appears on its face, and there is no suggestion that it was made with an unlawful intent. In the argument here it was claimed that the description of the land was insufficient, and that the deed was void on that account. The deed describes it as "the tract of land where the said W. H. Robinson now lives, containing 600 acres . . . situate in Montgomery County, on the waters of Pee Dee River." Counsel argued that if that could be aided by parol proof, no such proof was offered. The first allegation

in the complaint is that said tract is specifically described by
(331) metes and bounds in a certain deed, registered in the office in
said county, in book 18, page 462, to which reference is made.
That allegation as to the description is admitted to be true by the answer. When a fact is admitted it needs no proof to establish it. If it be assumed that Lawson (J. L.) Robinson executed his deed to W. K. Beacham & Co., *as trustee* (although it does not so appear), we think he was without authority to do so. When a trust is accepted, the trustee must execute it. He is not permitted to deprive himself of the means and power of doing so by conveying the legal estate to another. We think also that no title or interest in the land passed to T. C. Ingram by the levy and sale made by the sheriff. At the time W. H. Robinson had no interest subject to sale under an execution. He had only the right to be supported and maintained out of the profits of the property during his life, which he has received.

The proposition that any violation of the trust embraced in the deed would nullify and avoid the conveyance, and that the property would revert to the grantor and his heirs, is not sound. It assumes that clause to be self-executing. The learning as to conditions, exceptions and reservations is altogether inapplicable. The title passed absolutely by the deed, and that clause is only a covenant, agreement by the parties, that if the grantees should "violate" any of the trusts declared, then the property *ipso facto* should revert to the grantor, without any entry or other form of transmitting title to real estate. It would seem not to have been so considered by the grantor, inasmuch as he lived ten years or more after the breach now complained of, receiving the support provided in the deed, and without any assertion of right claimed for the alleged violation of duty on the part of the grantees. The courts in such cases will look to the good sense and sound equity, to the object and spirit of the contract. Courts of equity will not *aid* in divesting
an estate for a breach of covenant, a contract, when a just com-
(332) pensation can be made in money or other valuable thing, but will
relieve against forfeitures claimed by strict construction of any common-law rule. It therefore follows, as we have already said, that no interest in the land passed by the sale and deed of Sheriff Rush.

If we correctly understand the record, the children of W. H. Robinson are claiming title, and the right to possess, under and through the deed of their father. This opinion will be certified, to the end that the parties may proceed as they think proper.

Error.

Cited: *R. R. v. Carpenter,* 165 N. C., 468.

(333)

JOSIAH CRUDUP ET AL., DEVISEES OF E. A. CRUDUP, SR., *v.* J. J. THOMAS ET AL.

(Decided 10 April, 1900.)

Sale in Bankruptcy—Purchaser of Land Under Parol Trust, in Favor of Debtor—His Lien—Demise of the Land by Purchaser—Transfer of Judgment by Agent—Sale of Land by Commissioners—Termination of Lien—Statute of Limitations.

1. Where at a bankrupt's sale, his land is bid off by a creditor under a parol agreement to reconvey, upon payment by the debtor of the price bid, and other claims and liabilities, the purchaser in effect becomes a mortgagee.
2. A devise by the purchaser, in these words: "I give to my beloved wife, Columbia Crudup, all my property, of every description, to keep and hold together for her use and the use of my children, after my just debts are paid," transfers to her, as trustee, the property purchased, subject to the parol lien, or mortgage. This will is construed in *Crudup v. Holding*, 118 N. C., 222.
3. In a suit brought by the debtor against the trustee and devisees for a reconveyance, upon the allegation that the lien has been satisfied, when a judgment is rendered ascertaining a sum certain still due, the lien is still in force and the land may be sold by commissioners appointed for that purpose, and the judgment itself may be assigned by the trustee, or her agent, and the proceeds applied in accordance with the will.
4. The statute of limitations being usually a mixed question of law and fact, should be submitted to the jury.
5. The sale of the land itself, by commissioners under order of court, terminates at once the interest of all parties, when the proceeds of sale do not exceed the judgment, and the purchaser obtains a clear title.

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

ACTION to set aside a confirmatory decree relating to the sale of the land, ordered in a former cause, *Archibald D. Crudup v. Columbia Crudup,* administratrix c. t. a, of the will of E. A. Crudup, Sr., and others, devisees, and to have J. J. Thomas, the purchaser, (334) declared a trustee for the benefit of plaintiff, tried before *Moore, J.,* at January Term, 1899, of FRANKLIN.

There was judgment in favor of defendants, and plaintiffs appealed. A full exposition of the case is contained in the opinion.

W. M. Person, Busbee, and Womack & Hayes for plaintiffs.

C. M. Cooke & Co., Armistead Jones, and F. S. Spruill for defendants.

FURCHES, J. Before the death of Edward A. Crudup, Archibald D. Crudup became a bankrupt, and a sale of his property was made by the assignee in bankruptcy, when Edward A. Crudup purchased the

tract of land mentioned in the pleadings; that Edward A. Crudup died in 1876, leaving a last will and testament by which he willed all his estate, real and personal, to the plaintiff Columbia J. Crudup, who is his widow, in the following language: "I give to my beloved wife, Columbia Crudup, all my property of every description to keep and hold together for her use and the use of my children, after my just debts are paid."

This will was construed in *Crudup v. Holding,* 118 N. C., 222 where it was held that Mrs. Crudup holds this estate during her lifetime as trustee for her own use and the use of the testator's children, and that she has no power to sell and convey the same.

After the death of the testator, A. D. Crudup brought suit against the heirs of E. A. Crudup, in which he alleged that the testator, E. A. Crudup, bought said land for him, and was to convey the same upon the said A. D. Crudup's paying him the purchase money, and asked to have the defendant declared trustee of said land, and for a re-
(335) conveyance upon his paying the purchase price for which the said E. A. Crudup purchased the same at the bankrupt sale. The defendant Columbia was not made a party to this action, and the defendants demurred upon that ground, and she was ordered to be made a party defendant. Summons was issued and served upon her, and Joseph J. Davis and C. M. Cooke, attorneys practicing in Franklin Superior Court, after this, appeared as the attorneys of all the defendants, and filed an answer for all of them. The defendants in that action denied that the said E. A. Crudup bought said land for the plaintiff, and denied that the said Edward held said land in trust, as alleged in the complaint. But they further allege that if he did, they were only to reconvey upon the plaintiff A. D. Crudup's paying the purchase price and other indebtedness due the said E. A. Crudup, and some liabilities for which the said Edward was bound to pay for the said Archibald. Upon this state of the pleadings, the case went to trial, when it was found that the said Edward did purchase said land under a parol trust for the plaintiff Archibald; but that the said Archibald was not to have a reconveyance of said land until he repaid the purchase money, the amounts that he owed the said Edward, and the amounts for which the said Edward was liable as his surety. The case was then referred to Robert W. Winston to take and state an account of said debts and liabilities, which he did, and found them to amount to $2,400. This report was confirmed and judgment entered for the defendants against the plaintiff Archibald for $2,400 and costs, including an allowance to the referee, making the whole amount of the judgment (including costs) $2,848.75, at January Term, 1883. The land was adjudged to be a security for the payment of this judgment, and

the plaintiff Archibald was given until August to pay the same. (336) But it was further provided that if said judgment was not paid by that time, Joseph B. Batchelor and Joseph J. Davis were appointed commissioners to sell the same and apply the proceeds to the payment of the judgment.

On 5 May, 1883, this judgment was assigned to the defendant Thomas by C. J. Crudup, administratrix, by her son, E. A. Crudup; and the same not being satisfied by Archibald, the commissioners, Batchelor and Davis, sold the land, when it was bid off by the defendant Thomas at the sum of $2,848.75, this being the amount of the judgment. And it appearing to them that the amount of the bid had been paid to them and to E. A. Crudup as agent of C. J. Crudup, the commissioners made a deed for said land.

Fourteen hundred dollars of the $2,848.75 was paid to Edward A. Crudup in supplies, such as corn, flour, bacon and other articles, and the balance was paid in checks drawn on the defendant by the said E. A. Crudup, and by the commissioners, Batchelor and Davis.

But Mrs. Crudup denied that she had assigned the judgment, or that she had authorized her son, Edward, or any one else to do so—denied that she had the right to do so under her husband's will—denied that she had bought the supplies from the defendant, or that her son Edward had done so—denied that she or her children had ever been served with process in the action of said Archibald Crudup to declare the parol trust, and denied that she authorized or employed any attorney to represent her or her children in said suit, and denied that she was appointed guardian *ad litem* of the infant defendants, or that she was ever served with any summons as such guardian, or that she defended such action as guardian *ad litem*.

These matters were all submitted to the jury, and found against the plaintiffs. It was shown that there was an order making Mrs. Crudup a party defendant, and appointing her guardian *ad* (337) *litem* of the infant defendants, and that she had been served with process. And the jury found that Edward A. Crudup, her oldest son, who was of age, was her agent and manager of her farm; and as such was authorized to buy supplies to run the farm; that he did buy the supplies, charged to him by the defendant Thomas, which were a part of the consideration paid for the $2,848.75 judgment, and that they were used on Mrs. Crudup's farm; and the rest of the purchase money, not paid to the commissioners Batchelor and Davis, was paid to the agent, E. A. Crudup, and used by him for the purpose of cultivating the Crudup farm, and repairing the "Crudup mill."

And as it appears to us that there was testimony upon which these

findings might be made, and as we see no error in the court in submitting them to the jury, it seems to us that this substantially ends the case.

It was contended by plaintiffs that if Edward was Mrs. Crudup's agent to buy supplies, and run the farm, and repair the mill, that this did not authorize him to assign the judgment to the defendant. This seems to us to be a correct proposition of law, and if the case stood alone upon this, our opinion would be with the plaintiffs. But the will of Dr. Crudup gave his whole estate to the plaintiff Columbia for life, to be held and used by *her* for her benefit, and for the benefit of the other plaintiffs, who are the children of the testator. And she, through her son and agent, E. A. Crudup, collected the last dollar of this judgment, and these collections were used for the benefit of Mrs. Crudup and her children, in working their land and improving their property.

As the action of Archibald D. Crudup established the fact that the testator purchased and held said land under a parol trust, first to pay him what he paid for the land and what Archibald owed him,
(338) and what he was bound for as surety of Archibald, and then for Archibald, he only held this land as security for these amounts. He had the legal title, but he held in trust to pay these debts, and the residue for the said Archibald.

The only beneficial interest the testator ever had in these lands was the security they afforded him for his debts and liabilities. His interest was substantially that of a mortgagee, and the amount of the purchase money and the debts due him, and the debts for which he was surety and liable for, were all that he could ever get out of the land. And the plaintiffs under the will of E. A. Crudup took it subject to the conditions that the testator held it. It was in fact but a debt of $2,400 that Archibald owed to the testator, and the land was but security. This being so, it was the duty of the executrix to collect this debt, which she did through her son and agent, and her attorney, Davis. And the matter of assignment of the judgment, whether authorized or not, does not affect this case as to its merits or as to its legal effect. This being so, there is no force in the argument that Mrs. Crudup could not assign the judgment, nor in the argument that her son was not authorized to assign it as her agent. She was authorized to collect it, in person, or by her agent and attorney. This we have seen she did, and that should have ended her claim to the judgment and to the land.

We could not agree with his Honor as to his ruling upon the statute of limitations, as we think from the evidence this question should have been submitted to a jury—it being a mixed question of law and fact, and the evidence being to some extent in conflict, or uncertain, as to

whether it established the fact claimed by the defendant, or not. We think the better rule is in all cases where there is any apparent conflict in the evidence, or where there may be reasonable doubts (339) as to its meaning, to submit the matter to the jury. But in this case it could not have affected the rights of the defendants, if it had been found that it did not bar the plaintiff's action.

The case of *Crudup v. Holding,* 118 N. C., 222, is no authority for the plaintiffs in this case, as it does not prevent the executrix from collecting the debts due her testator's estate, and using the proceeds for the benefit of herself and the testator's children, in working her land or in improving the same. The judgment must be

Affirmed.

Cited: Owens v. Williams, 130 N. C., 169.

A. H. MOTLEY ET AL. v. SOUTHERN FINISHING AND WAREHOUSE COMPANY.

(Decided 10 April, 1900.)

Bailor—Bailee—Defective Structure of Warehouse—Improper Storage—Want of Ordinary Care—Injury Resulting—Damages—Partial Payment—Ignorance and Want of Experience of Bailee Known to Bailor.

1. Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse and the location of the tobacco.

2. The receipt of part of the damage will not exclude the recovery of the balance, in the absence of any such agreement.

ACTION for damages to 73 hogsheads of tobacco, resulting from (340) negligence in storing the tobacco in an unsuitable place, tried before *Timberlake, J.,* at May Special Term, 1899, of GUILFORD.

The plaintiffs offered evidence tending to prove that their tobacco had become mouldy and damaged by reason of dampness through open spaces in the floor and walls, and from improper storage. The defendant introduced controverting evidence.

The plaintiffs had been informed by the defendants that they had no experience in handling tobacco, and had no knowledge of it.

His Honor in his charge confined the jury to the consideration of the evidence relating to negligence, and told them if the damage resulted from any other cause, the defendant would not be liable for it.

The defendant requested his Honor to instruct the jury to direct their attention only to the damage to the tobacco sold on the warehouse floor, and not to the tobacco retained. His Honor declined to give this instruction. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Bynum & Bynum and A. M. Scales for plaintiff.

R. R. King, C. M. Stedman, and Adams & Douglas for defendant.

FAIRCLOTH, C. J. On 16 October, 1894, the plaintiff stored his tobacco in defendant's warehouse, and when he withdrew his tobacco in June, 1895, it was damaged, for which this action is instituted. These facts established the relation of bailor and bailee for the benefit of both parties.

The plaintiff introduced evidence tending to show that his (341) tobacco was in good condition in dry hogsheads, when stored; that the defendant's warehouse was unsuited for such storage; that the walls were damp; that the floor was one or two feet above the ground; that it was laid with open spaces one and one-half inches wide between the planks, over which the tobacco was laid without skids to support it, and too near the walls; that dampness came through the walls and floor; that this defective structure of the warehouse wanting in ventilation and the defendant's inattention and negligence caused the damage complained of to his tobacco.

The defendant, denying negligence, introduced evidence tending to disprove these alleged conditions in the structure of the warehouse, dampness, etc. The jury returned a verdict in favor of the plaintiff.

It was proved and not denied that defendant knew nothing about tobacco, and had no experience in handling tobacco, and that this fact was known to the plaintiff when he stored it with the defendant.

The third issue submitted is: "Was the tobacco of A. H. Motley Co. injured by the negligence of the defendant?" His Honor submitted the contention and evidence of each party to the jury, calling their attention to the particular matters complained of, and instructed them that they must be satisfied by the greater weight of evidence on two questions, otherwise they should answer the third issue, "No":

1. That the defendant was negligent as before explained, and
2. That the tobacco was injured as a result of it.

He directed the jury to consider from the evidence the structure of the warehouse, the location of the tobacco therein, and told them that the defendant was bound to use such ordinary care as a prudent man would exercise, and that if the damage resulted from any (342) other cause, the defendant would not be liable for it.

The defendant excepted because this special prayer was not given, to wit: "If the defendant was known to plaintiff not to possess skill or knowledge in the care and storage of tobacco, and made no pretension to skill or knowledge in its care and storage, the defendant is bound only for a reasonable exercise of the skill it possessed or of the judgment which it can employ, and if any loss resulted or ensued from its want of due skill, it is not chargeable." We fail to see the importance of this prayer, when it is conceded that the defendant is without skill, and his Honor does not allow the jury to charge him with damage on that ground. Taking the facts to be as the jury have found, there is no occasion to consider skill or experience. It requires no skill to discover that damp air will come up through a hole in the floor. That is common knowledge, and any prudent man will guard against damage from such cause, which is no more than ordinary care.

The special prayers, numbers 5 and 6, could not be given, as there is no evidence nor authority to authorize them. The receipt of a part of the damage will not exclude the recovery of the balance in the absence of any such agreement.

His Honor's charge to the jury limits the recovery to damages for failing to exercise ordinary care, and thereby excludes damage for the want of skill and experience on the part of the defendant.

In *Morehead v. Brown,* 51 N. C., 367, a similar question arose on the question of ordinary care. The plaintiff stored cotton bales in the open yard of the defendant, and they were laid on poles on the ground. A wet season prevailed and softened the ground so that the poles and bales partially settled in the mud, and the cotton was injured. The Court said: "There is not the slightest doubt that it was their duty . . . to have had them taken up and put in a drier (343) place. For the neglect to do this, they were responsible as bailees."

The defendant's authorities apply to cases requiring skill, but they miss the mark in this case. We find no error.

Affirmed.

JOSEPH DUNN v. THE WILMINGTON AND WELDON RAILROAD

(Decided 10 April, 1900.)

Contributory Negligence—Prayer for Special Instruction—Judge's Charge—Proximate Cause—Issues.

1. A prayer for special instruction by the defendant upon the issues as to contributory negligence, which is clear and correct, ought to be given, and it is error to refuse; the error is not cured by the general charge of the court as to that issue, which in substance gives the defendant's prayer, but adds thereto the expression, *"and that this was the proximate cause of the injury."*
2. Proximate cause, when the evidence is conflicting is a question for the jury under proper instruction, but not to be considered by them until they find that the plaintiff was guilty of contributory negligence.
3. Where the issues as to negligence and contributory negligence are both found in the affirmative, then the inquiry is raised, under the usual third issue, whether the causes were concurrent, and if not, which was proximate, the usual third issue being: Could defendant, notwithstanding the negligence of plaintiff, have prevented the injury by the exercise of ordinary care?

DOUGLAS, J., dissents.

ACTION to recover damages for personal injury occasioned by negligence of defendant, tried before *Bryan, J.*, at December Term, 1899, of DUPLIN.

Former trial reported in 124 N. C., 252.

The issues, evidence, prayer for special instruction, and (344) charge of the court are recapitulated in the opinion.

There was a verdict in favor of plaintiff for $500. Judgment accordingly. Appeal by defendant.

Allen & Dortch and Simmons, Pou & Ward for plaintiff.
Junius Davis and H. L. Stevens for defendant.

FAIRCLOTH, C. J. The plaintiff alleges that he was injured by the negligence of the defendant, who denies plaintiff's allegations, and avers that plaintiff's negligence caused his injury. Issues submitted:

(1) Was the plaintiff injured through the negligence of the defendant? Answer: "Yes."

(2) Did the plaintiff by his negligence contribute to the injury? Answer: "No."

(3) Could defendant, notwithstanding the negligence of plaintiff, have prevented the injury by the exercise of ordinary care? Not answered.

Plaintiff introduced evidence tending to show that defendant negligently allowed its engine to stand on its side-track in a town, and caused or allowed steam to escape, making it dangerous for citizens to pass and repass along an adjacent street with their teams and vehicles. The defendant introduced evidence tending to show plaintiff's negligence in that he had recently driven by, when his horses became excited and shied at the standing engine, and that he soon returned by the same standing engine along the street, and was not holding his reins, or was holding them so loosely that he could not control his horses, and for that reason the horses dashed on to the street curbing and injured the plaintiff. There was other conflicting evidence on the issues in the case.

His Honor instructed the jury that if they answered the first (345) issue "Yes" and the second issue "No," they need not consider nor answer the third issue. The defendant assigned the following errors, as well as others:

5. That the court erred in refusing to give the fourth instruction asked by defendant, which is as follows: "That if at the time the wagon and horses were about to pass the engine, the plaintiff was not holding the reins of the horses in his hands, or if he was holding them so loosely that he could not control the horses in case of sudden fright, then the plaintiff is guilty of contributory negligence, and the jury must answer the second issue Yes."

6. That the court erred in refusing to give the fifth instruction asked by defendant, which is as follows: "That if the plaintiff knew or had reason to believe that the horses were afraid or shy of the engine, then it was the duty of the plaintiff, in approaching and passing and repassing the engine, to have kept tight hold of the reins so that he could control his horses in case they were frightened, and if he failed to do so, then the plaintiff was guilty of contributory negligence, and the jury must answer the second issue Yes."

We think these prayers should have been given, and that it was error to refuse to give them. They are distinct and without any confusing matter, and specially directed to the second issue, on which there was conflicting evidence. They present the defendant's contention on that issue.

The plaintiff insists, however, that these prayers were substantially given in another part of the charge, to wit: "If the jury believe from a preponderance of the evidence that the plaintiff was driving his horses in a careless manner, either not holding the reins in his hands or holding them so loosely that he could not control the horses, and not acting in the management of the horses in the manner that a man of ordinary care, skill and prudence would have done, and that this was

(346) the *proximate* cause of the injury, then you should answer the second issue Yes."

If it be conceded that this part of the charge does in substance give the defendant's prayer, it is seen that it gives too much by adding to the prayer, "and that this was the proximate cause of the injury." The prayer is confined to the second issue, and his Honor was charging as to the second issue when he submitted to the jury matter (proximate cause in this case) which can not be considered by the jury on the second issue. Proximate cause, when the evidence is conflicting, is a question for the jury under proper instruction, but not to be considered by them until they find that the plaintiff was guilty of contributory negligence; for if they answer the first issue "Yes" and the second issue "No," then proximity of cause does not arise, as the plaintiff is entitled to his judgment. If the first and second issues are answered "Yes," then the inquiry is raised whether the causes were concurrent, and, if not, which was proximate, and, as we have said, this will be determined by an answer to the third issue without allowing it any influence on the second issue.

It may be that this last sentence in the charge had no influence with the jury. The trouble is that no one can tell whether it did or not. It is enough for the Court to know that they were allowed to do so, if they were so inclined. The jury may have reasoned that if the plaintiff was negligent we think the defendant's negligence was the proximate cause of the injury, and being allowed to consider that matter on the second issue by his Honor we will shorten up the matter by answering the second issue "No," and that makes it unnecessary to answer the third issue "Yes," and we can do this as the result to the defendant is the same either way. This shows the danger, and how injustice may follow a mistake in the charge. Litigants have the right
(347) to have their contentions upon the evidence presented to the jury in a plain and correct manner, and the law arising thereon declared and explained by the court. It is not proper for the jury to be left to reason out the better plan to obtain the result and legal consequences of their findings.

As we are compelled for this error to grant a new trial, it is needless to pass upon the numerous other exceptions, as they may not be presented again.

Error.

DOUGLAS, J., dissents.

Cited: Dunn v. R. R., 131 N. C., 449; *Holland v. R. R.*, 137 N. C., 372, 380; *Kearney v. R. R.*, 158 N. C., 548; *Paul v. R. R.*, 170 N. C., 235.

ABRAM LEWIS AND JAMES OVERBY v. J. R. COVINGTON AND M. F. OVERBY; ALSO R. W. GEORGE v. JAMES OVERBY.

(Decided April 10, 1900.)

Ejectment — Reference — Report — Exceptions — Facts Found—When Conclusive—The Law Reviewable—Title Out of the State, by Grant; by Possession Under Color—Character and Duration of Possession.

1. Where there is evidence tending to prove the facts found, and the judge below finds the facts as the referee found them to be, they are as binding on the Court above as the findings of a jury.
2. The plaintiff claiming under a grant covering the land (dated 31 December, 1888), and the defendant admitting possession, make out a *prima facie* case for the plaintiff.
3. The case may be rebutted by showing that the title was out of the State before the grant issued, as by proving twenty-one years adverse possession under color of title before the grant was taken out: the possession need not be continuous, nor immediately preceding the suit, nor is it necessary to show under whom the possession was held to presume a grant and take the title out of the State. It is sufficient, if by counting the time the different parties held possession, it amount to twenty-one years.

EJECTMENT (two cases, names of parties reversed, consoli- (348) dated and tried as one) in ejectment, heard before *Allen, J.*, on exceptions to report of referees.

The plaintiffs, Abram Lewis and James Overby, procured from the State a grant for the land described in the complaint on 31 December, 1888. This suit was commenced in 1891.

The defendants, J. R. Covington and M. F. Overby, relied upon possession under color of title of various deeds for more than twenty-one years before the date of plaintiff's grant.

The referees found as a matter of fact that the defendants' evidence did not show *continuous* adverse possession of any part of the land embraced in the grant to Lewis and Overby for a period of twenty-one years *next preceding the bringing* of their suit on 30 September 1891. As a conclusion of law they reported that the plaintiffs were entitled to recover. Defendants excepted. The report was confirmed, and judgment rendered for plaintiffs. Defendants appealed.

Watson, Buxton & Watson, and A. M. Stack for plaintiffs.
J. T. Morehead and Glenn & Manly for defendants.

FURCHES, J. There were two actions for the same land in which the names of the parties are reversed. These actions were properly con-

solidated by order of court, tried together in the court below, and argued together in this Court; and in this opinion we shall treat the case as *Lewis v. Overby,* this being the first action in point of time. It is then an action of ejectment for possession of land, and after the pleadings were filed by consent of parties, it was referred to J. Y. Philip and R. D. Reid, who took evidence, and in October, 1897, filed (349) their report. This report finds the facts which they think are involved in the controversy and necessary to determine the rights of the parties, and from the facts so found by them, they proceed to find (declare) the law arising and apply it to the facts so found. The defendants file numerous exceptions to the finding of facts, but the judge overrules them all and expressly finds the facts to be as the referees have found them to be. As none of defendants' exceptions are put upon the ground that there is *no evidence* to sustain them, we are bound under the rulings of this Court in many cases, to take these findings as correctly found, as we have no right to review them. *Baker v. Blevin,* 122 N. C., 190, and cases cited; Clark's Code (2 Ed.), pp. 577, 578. Where there is evidence tending to prove a fact found by the court below in cases where the court has the right to find the facts, they are as binding on us as are the findings of a jury.

The referees and the court find as a fact that the Shober grant does not cover the land in controversy (except a small slip, which it is not necessary for us to notice in the opinion). They also find that no grant from the State was produced or shown, covering the land in controversy, and these findings must be taken as true. The plaintiff Lewis claims under a grant from the State, dated 31 December, 1888, and it is found that this grant covers the land in controversy. The defendant having admitted that he is in possession, the introduction of this grant made a *prima facie* case for the plaintiff. But defendant undertakes to defend his title by showing possession in himself, and those under whom he claims by color of title, ripened into actual or perfect title from lapse of time, and adverse possession. To do this the defendant offered in evidence a number of deeds, commencing with a deed from Banner, sheriff, to A. D. Murphy, dated 13 December, 1815; a deed from Murphy to Thomas Ruffin, dated 8 June, 1822, and mesne (350) deeds from Ruffin down to the defendant, which are found to cover the land in dispute. And defendant offers evidence for the purpose, and tending to show, adverse or actual possession of this land under a great number, if not all, of the parties under whom he claims, as well as that of himself and those that claim under him. He offers this evidence for the purpose of showing that the title was out of the State, in December, 1888, and for the purpose of showing title in himself. It seems to be conceded, or at least to be held by the com-

missioners and the judge, that if the title was out of the State when plaintiff got his grant, he would not be entitled to recover. This is shown by their holding that plaintiff was not entitled to recover. This is little strip covered by the Shober grant. But whether it was so considered by the commissioners and the court, or not, it is true that plaintiff could not recover, if the title was out of the State when he obtained his grant.

The commissioners, upon this view of the case, found as follows, Finding of Fact VII: "That evidence on the part of defendant does not show continuous adverse possession of any part of the land embraced in the grant to Lewis and Overby for a period of twenty-one years, next preceding the bringing of their suit on the 30th day of September, 1891."

From these facts so found by them, they conclude as a matter of law, that plaintiff is the owner of this land, and is entitled to recover the same; and his Honor agreeing with the commissioners, adjudges that plaintiff is the owner of the land in controversy, and that plaintiff recover the possession of the same.

The defendant excepts to the conclusion of law declared by the commissioners and the judge, and to the judgment of the court, and says that the findings of fact do not authorize the conclusion of law.

It seems to us that there is error in the judgment; that the (351) finding of fact as to whether the title to the land in controversy was out of the State on 31 December, 1888, did not authorize the conclusion of law that it was not out of the State.

The language of the finding: "That the evidence on the part of the defendant does not show *continuous* adverse possession of any part of the land . . . for a period of twenty-one years *next preceding* the bringing of this suit," *plainly shows* to our mind that it was considered by the commissioners and by the court that it took twenty-one consecutive years immediately preceding the suit to presume a grant, and take the title out of the State. This is not the law. It was held in *Reed v. Earnhardt,* 32 N. C., 516, that it was not necessary that the possession should be continuous, nor was it necessary to show under whom the possession was held, to presume a grant, and take the title out of the State. It is sufficient, if by counting the time the different parties held possession, it amounts to twenty-one years. Code, sec. 139, must be read and construed under the light of *Reed v. Earnhardt, supra,* and like cases. The case of *Reed v. Earnhardt, supra,* is regarded by the profession as the leading case, and it has been followed in a great number of cases from that time down to *Walden v. Ray,* 121 N. C., 237, where a large number of cases are cited with approval. It is

seen that *Worth v. Simmons,* 121 N. C., 357, and *Ruffin v. Overby,* 105 N. C., 78, have no bearing on this case. For the error pointed out there must be a

New trial.

NOTE.—There were more parties than one on each side of the case, but we have used the name of one and the singular number for convenience.

Cited: Lewis v. Covington, 130 N. C., 541.

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J. W. BOLES AND WIFE ET AL. V. N. L. CAUDLE, THOMAS V. CRAUSE, EXECUTOR OF G. H. CRAUSE ET AL.

(Decided 10 April, 1900.)

Will Executed in 1898 *—Transfer of an Expectancy in* 1888*—Reference Thereto in the Will—Issue of Fact in Special Proceeding—Practice.*

1. The transfer of an expectancy by a granddaughter in the estate of a testator amounts, at most, to an executory contract to convey; but not being a contract to convey specific property, specific performance would scarcely be decreed, if enforcible at all. The remedy would be for breach of contract, sounding in damages.
2. The granddaughter is the legatee; the claimant of her interest takes nothing under the will; and a reference to the transfer contained in the will does not have the effect of substituting him in her place as legatee.
3. The contract of transfer being denied in the answer before the clerk, an issue of fact was raised which should have been transferred to the civil issue docket, to be tried at term before a jury.

SPECIAL PROCEEDING, heard on appeal from clerk of Superior Court of STOKES, before *Shaw, J.,* at chambers on 15 December, 1899.

In a special proceeding for an account and settlement and payment of legacies, instituted by the parties in interest against Thomas V. Crause, executor of G. H. Crause, J. W. Boles, whose wife was a legatee, claimed himself to be assignee of the interest of N. L. Caudle, a granddaughter and legatee of testator, and that the transfer was recognized in the will, and that he was entitled to the granddaughter's legacy. The contract of transfer was denied in the answer of N. L. Caudle. The clerk ruled that the pleadings raised a question of law, and transmitted the case to be heard at chambers before his Honor, *Shaw, J.* Both sides excepted.

His Honor adjudged: That the recital in said will that J. (353) W. Boles has bought the interest of N. L. Caudle in the estate of testator is conclusive evidence of this fact, and that under said clause said Boles became the owner, and entitled to said Caudle's interest, and that said N. L. Caudle is not entitled to any interest in said estate, as against Caudle, plaintiff. Cause remanded.

Defendant N. L. Caudle excepted, and appealed to the Supreme Court. The pertinent parts of the will are cited in the opinion.

W. F. Carter for plaintiffs.
W. W. King for defendant.

FURCHES, J. G. H. Crause died in the county of Stokes, in 1899, leaving a last will and testament, in which the defendant Thomas V. Crause is named as executor. Thomas V. caused said will to be admitted to probate, qualified and entered upon the duty of executing said will and settling the estate of his testator. The plaintiff J. W. Boles, who married a daughter of the testator, and others interested in the estate under said will, commenced this special proceeding before the clerk of the Superior Court of Stokes County against said executor, and other parties interested in the estate under said will, among whom is the defendant N. L. Caudle.

In plaintiffs' complaint (called a petition) plaintiffs set out the will of the testator and also a deed which they allege the defendant N. L. Caudle executed to the plaintiff Boles in June, 1888. The only controversy presented by the record is between the plaintiff Boles and the defendant N. L. Caudle. The plaintiff Boles claims that the defendant N. L. Caudle conveyed to him by said deed in 1888 her entire interest in the estate of her grandfather, G. H. Crause, and he also claims that he is the owner of the defendant Caudle's interest in said estate, under the terms and provisions of said will. The defendant (354) denied the execution of the deed. The defendant Caudle is a daughter of Solomon Crause, a son of the testator, who was killed in the Confederate army in 1864, leaving three children, Sarah L. A. Scott, wife of Powell Scott, Ellen Pettitt, who has since died leaving three children, and the defendant N. L. Caudle. The testator wills to the children and grandchildren of his son Solomon the share of his estate that his said son would have been entitled to if he were living—one-seventh—but to be divided between them as follows: Mrs. Scott, $100; Mrs. Pettitt's children, $100, and the residue to the defendant N. L. Caudle. The language of the will which the plaintiff Boles contends entitles him to the defendant N. L. Caudle's share, is as follows: "And N. L. Caudle is to have the remainder of my son Solomon's part of my estate, and J. W. Boles has bought her interest in my estate."

And further on in the will the testator says that the defendant Caudle must leave his house and get her another home at his death. It is contended by the plaintiff Boles that these paragraphs in the testator's will give him whatever interest the defendant Caudle had in the estate of G. H. Crause, under his will. By what reasoning it can be given this effect, we are not able to see. It is certain that the testator does not will it to Boles, but wills it to the defendant Caudle. And if Boles is the owner of what is willed to the defendant Caudle, he must get it from her. It was not the defendant Caudle's until the death of the testator, and the fact that he said in his lifetime that she had conveyed it to the plaintiff Boles did not make it so, if she had not conveyed it. Indeed, it seems that the plaintiff Boles started out with the idea that he was entitled to it under a deed from the defendant Caudle; he so alleges in his complaint, and sets out the deed under which he (355) claims. But for some reason he abandons this contention (at least for the present), and claims under the will, and we must hold that he is not entitled to recover the defendant Caudle's interest in the testator's estate under this contention. Whether he can recover it under the deed is not now before us; but it would seem that the defendant Caudle had no estate in the testator's estate in 1888. At most she could not have had more than an expectancy, if that, and she could not convey such an expectancy, if she had one. The most it could amount to would be an executory contract to convey. *Mastin v. Marlow,* 65 N. C., 695; *McDonald v. McDonald,* 58 N. C., 211. But this not being a contract to convey specific property, the question will be presented as to whether a court *can or will* compel a specific performance; whether it could amount to more than a breach of contract, which would sound in damages, if it is such contract as can be enforced.

We have said this much upon a question presented by the record, but not before us for adjudication, not as a decision of the Court, but as suggestive of what seems to us to be the question presented, and which may be of service to the parties upon a new trial.

While the defendant was obliged to appeal from the judgment of the court or lose her rights, if she had any, it seems to us that, as the defendant's answer raised questions of fact as to the execution of the deed under which plaintiff Boles claimed, the case should have been transferred to the civil issue docket for trial, where the whole matter might have been disposed of. Our decision sends the case back for a new trial when, if it had been tried in term time before a court and jury, one trial and one appeal would likely have settled the whole case. It is "taking two bites at a cherry."

Error. New trial.

Cited: Boles v. Caudle, 133 N. C., 529.

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JAMES F. KERNER, ADMINISTRATOR ET AL. v. BOSTON COTTAGE COMPANY ET AL.

(Decided 10 April, 1900.)

Tax Title—Land Bid in for County—Certificate Sold—Sheriff's Deed —Mortgage.

1. Where land is sold for the taxes and bid in for the county, the county becomes mortgagee, and must collect by foreclosure.
2. If the certificate is transferred to a purchaser he becomes entitled to the mortgage, and the sheriff's deed enables him to collect by foreclosure.

BRANCH of *Kerner v. Cottage Co.*, 123 N. C., 294, and tried before *Shaw, J.*, at November Term, 1899, of FORSYTH.

The land had been sold by a receiver heretofore appointed in the cause, but the purchaser declined to pay his bid, because of an outstanding tax title in one William Palmer. It turns out that Palmer was not an original purchaser at the tax sale; that the land was bid in for the county, and that Palmer became assignee of the certificate, and obtained the sheriff's deed.

His Honor provided in the judgment, that the amount paid by Palmer as taxes, costs, and interest due on the land at the time of the sale and purchase, be declared a lien, and as the amount had been deposited with the clerk the lien for taxes was discharged.

Defendant Palmer excepted and appealed.

Jones & Patterson, Glenn & Manly, and A. H. Eller for plaintiffs.
Watson, Buxton & Watson for defendant.

MONTGOMERY, J. Some time in 1894 an action was com- (357) menced by Kerner, administrator, against the defendants and others, for the recovery of a debt against the defendants, for the appointment of a receiver, and for a sale of the lands of the defendant to pay its debts. The receiver sold the lands to A. H. Eller, who declined to pay for the same, alleging that William Palmer was claiming the lands under a tax title.

Upon motion in the cause an action was docketed and complaint and answer filed, the object of which was to have the cloud produced by Palmer's tax deed removed from the title. An issue was submitted to the jury, "Had the Boston Cottage Company paid all taxes due on the property in dispute before the sale thereof in May, 1895?" It seems that the taxes were paid by Eller by his promissory note given to the sheriff for the amount. His Honor instructed the jury that "if the sheriff accepted Mr. Eller's note in settlement of taxes for the year 1894,

that this was payment." The defendant Palmer excepted, and appealed to this Court. This Court held the instruction of his Honor to be erroneous, and ordered a new trial. *Kerner v. Cottage Co.,* 123 N. C., 294. The plaintiff Herndon, receiver, amended his complaint, in that he alleged that the lands were bid off by the board of commissioners of the county of Forsyth, for the taxes due on the lands at the time of the sale, and that thereafter the certificate of purchase given by the sheriff to the board of commissioners was transferred and assigned to the defendant William Palmer for value. In the original complaint it did not appear that Palmer was not the purchaser at the tax sale, but a purchaser of the certificate from the board of commissioners. Upon issues submitted there was evidence introduced and his Honor instructed the jury that if they believed the evidence, they should respond "Yes" to all except the seventh and he himself answered
(358) the seventh "Yes." The seventh was: "Is the deed from the said McArthur, sheriff, to the said William Palmer, inoperative and void?" That was an erroneous answer to the seventh issue, for in *Wilcox v. Leach,* 123 N. C., 74, it was held that when the board of commissioners of a county purchase land at a sale for taxes they become mortgagees, and they must proceed to collect only by foreclosure, and an assignee of the county can only proceed in the same way. The deed from the sheriff to Palmer, therefore, was valid as a mortgage. But his Honor cured the error by providing in the judgment that the amount paid by Palmer as the taxes, costs and interest due on the lands at the time of the sale and purchase be declared a lien on the lands. The judgment further declared that as the plaintiff had deposited with the clerk a sufficient amount for that purpose for Palmer, the lien for taxes upon the land was discharged, and the deed from the sheriff to Palmer invalid as conveying any interest in the lands, and the lands freed from any incumbrance, right or claim, by reason of said deed.

Affirmed.

Cited: *McNair v. Boyd,* 163 N. C., 480.

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(359)

JAMES R. LLOYD v. P. H. HANES & CO.

(Decided 10 April, 1900.)

"Assumption of Risk"—"Knowledge of Danger"—Safety Appliance—Defective Appliances—Negligence of Independent Contractor.

1. The distinction is wide between "knowledge of the danger" and "voluntary assumption of the risk." Assumption of risk is a matter of defense, anal-

ogous to contributory negligence, to be passed upon by the jury, who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger.

2. Approved safety appliances, which have come into general use, are to be adopted, and it is negligence in the employer not to furnish them to his employees. This does not require that the latest improved appliances be provided, but only such approved appliances and safeguards as are in general use.

3. It is only where machinery is so grossly or clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk.

4. As a general rule the negligence of an independent contractor is not chargeable to his employer.

ACTION for damages for personal injury alleged to have been occasioned by the negligence of defendant in permitting a saw used in their factory to remain without guard or screen, or safety appliance used on such machinery, to prevent injury to operatives, tried before *Robinson, J.*, at February Term, 1900, of FORSYTH.

The defendant denied all negligence on their part, and attributed plaintiff's injury to his own carelessness. The plaintiff was the only witness examined. He testified: "I am forty-two years old, and have been box-maker for ten or twelve years. In 1899 I was working for defendants in their shops in Winston. The shop is not joined to the tobacco factory, but is in the factory lot, and is operated (360) by steam generated from the main boiler in the factory. They own the machinery in the shop. I got part of my thumb cut off as I was sizing box timber. The saw came out of the table about one inch above the boards of the table. I was pushing the timber when the saw struck a knot, or gave way, and thrust my hand against the saw and cut off part of my thumb. It was an open saw without hood or screen. I had never seen or knew of a screen or hood operated in this manner before I was hurt. I have since seen such protection and hoods, especially in the factory of Bailey Brothers. (Hood here introduced and exhibited to the jury.) They make saws less dangerous. If there had been a screen or hood, and the saw had struck a knot or cross grain, it could have thrust my hand on the screen and not on the saw. I was required to size the timber down to a 32d of an inch, which was very careful work. I took particular pains to hold the boxing in place. I can not do the same, or as good work as then. I got $1 per day before I was hurt. I can not get so much now. I can not average over 60 cents per day.

"W. H. Woodward in the shop employed me. I never spoke to Hanes about my employment, and never saw either of the Hanes em-

ploy or pay the hands in the several departments. There was a manager in each department in the factory, that employed and paid the hands. The bills for lumber were made out to P. H. Hanes & Co."

Cross-examined, plaintiff testified: That he was employed by W. H. Woodward in the box shop, and paid by him. That he never spoke to the defendants about employment or his work, nor did his name appear upon their time book, but his time was kept by W. H. Woodward, who run the box shop, and paid for his labor. That the running of a saw of this kind was dangerous, and that he knew it
(361) was dangerous. That his hands were cold the day he was hurt, and he knew it was more dangerous when his hands were cold. That at one time, before his injury, he had a contract to make boxes at Brown & Williamson's factory, similar to W. H. Woodward's contract at defendant's factory. That he employed his own labor, paid his own hands, but they furnished the shop and power to run his saws, but had no control over his hands. That he used a saw similar to the one by which he was injured, without a guard. That he is now working at Taylor Brothers' factory under a contract and has a man hired to do his resawing, and this man uses a saw without a guard similar to the one on which he was hurt. In the tobacco factories in Winston there are managers of the different departments.

At the close of the plaintiff's evidence, his Honor intimated that the plaintiff, on his own evidence, was not entitled to recover:

1. Because his evidence showed that the sawing of box plank was dangerous, and that he knew it was dangerous, and that he had been engaged in similar work for ten or twelve years, and knew the character of the work.

2. Because his testimony did not establish any contractual relation between him and defendants.

The plaintiff, from this intimation, submitted to a nonsuit, and appealed to the Supreme Court.

J. S. Grogan for plaintiff.

Jones & Patterson and Watson, Buxton & Watson for defendants.

CLARK, J. We can not agree with the defendant's counsel that if an employee operates a machine which is lacking in safety appliances which have come into general use, that this is an "assumption
(362) of risk" which releases the employer from liability. That would be simply to hold that if such appliances are not used the defendant is negligent, but if the pressure of circumstances forces some unfortunate man to accept service with such machine it releases the employer. This negatives the liability of the employer by the very

fact of his negligence, and that as to the class most needing protection, those whose urgent need compels them to take work wherever they can get it. As was said in *Sims v. Lindsay,* 122 N. C., 678: "It is not to be held as a matter of law that operatives must decline to work at machines which may be lacking in some of the improvements or safeguards they have seen upon other machines, under penalty of losing all claims for damages from defective machinery. It is the employer, not the employee, who should be fixed with knowledge of defective appliances, and held liable for injuries resulting from their use. It is only where a machine is so grossly or clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk."

To illustrate—if a railroad company fails to use automatic couplers it is negligence *per se. Troxler v. R. R. Co.,* 124 N. C., 189; *Greenlee v. R. R. Co.,* 122 N. C., 977. If one should take service upon a railroad not having such appliances, this would not absolve the railroad from liability for its negligence in not using such life and limb-saving device. The doctrine of "assumption of risk" is more reasonable and extends no further than that if a particular machine has become injured or dangerous, and the employee, seeing the danger, does not report its condition, but goes on with his work in disregard of it, he assumes the risk. The difference between "knowledge of the danger" in the first case (absence of safety appliances which should be in use) and "assumption of the risk" (by working without pro- (363) test at a machine which has become defective and dangerous), is pointed out among many other cases, in a late decision in the House of Lords, *Smith v. Baker,* App. Cases L. R. (1891), 325, in a discussion of the difference between the maxims *"scienti non fit injuria"* and *"volenti non fit injuria,"* the former not being law, for which *Lord Halsbury* cites *Bowen, L. J.,* in *Thomas v. Quartermain,* 18 Q. B. D., 685, and *Lindley, L. J.,* in *Yarmouth v. France,* 19 Q. B. D., 647, 660, and further cites from the latter case that even when an employee reports the defect, if he is told to go on with his work, and does so to avoid dismissal, a jury may properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Whereupon *Lord Halsbury* sums up "in order to defeat a plaintiff's right to recover by the maxim relied on (*volenti non fit injuria, anglice,* 'assumption of risk'), the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself." This has the weight of practical common sense, no matter from what court it came, but with some, common sense has an added value when

it is found in a decision of the House of Lords. The distinction is wide between mere "knowledge of the danger" and "voluntary assumption of the risk."

Besides, "assumption of risk" is a matter of defense, anaiogous to, and indeed, embraced in, the defense of "contributory negligence," *Rittenhouse v. R. R.*, 120 N. C., 544, and it is an error to direct a nonsuit. *Cox v. R. R.*, 123 N. C., 604. The jury, as Lord Halsbury says, must pass upon the question whether the employee voluntarily assumed the risk. It is not enough to show merely that he worked on, knowing the danger.

But the plaintiff, in fact, failed to make out negligence on the part of the defendants upon the evidence because he failed to show that
(364) the safety appliance which he alleges would have prevented the injury was in general use, and, in fact, he shows the contrary. The rule laid down in *Witsell v. R. R.*, 120 N. C., 557, is not that it is required that the latest improved appliances be provided, but only that "It is negligence not to adopt and use all approved appliances and safeguards which are in general use." This has been approved, *Greenlee v. R. R., supra; Troxler v. R. R., supra,* and in other cases. The intimation that upon the evidence the plaintiff could not recover was correct, but not for the reason given by the judge.

It is unnecessary, in this view, to consider the other ground assigned, that the evidence did not establish any contractual relation between the plaintiff and defendants. It may be said, however, that as a general rule the negligence of an independent contractor is not chargeable to his employer. *Engle v. Eureka Club,* 137 N. Y., 100; 33 Am. St., 692, and note.

Affirmed.

Cited: Coley v. R. R., 128 N. C., 537; *Ausley v. Tob. Co.,* 130 N. C., 39; *Elmore v. R. R.,* 131 N. C., 583; *Whitson v. Wrenn,* 134 N. C., 89; *Womble v. Grocery Co.,* 135 N. C., 487; *Bottoms v. R. R.,* 136 N. C., 473; *Avery v. R. R.,* 137 N. C., 135; *Stewart v. Carpet Co.,* 138 N. C., 63; *Hicks v. Mfg. Co., ib.,* 327; *Marks v. Cotton Mills, ib.,* 406; *Pressly v. Yarn Mills, ib.,* 414, 421, 423, 435; *Sibbert v. Cotton Mills,* 145 N. C., 312; *Blevins v. Cotton Mills,* 150 N. C., 498; *Helms v. Waste Co.,* 151 N. C., 372; *Walters v. Sash Co.,* 154 N. C., 326; *Eplee v. R. R.,* 155 N. C., 295; *Brazille v. Barytes Co.,* 157 N. C., 459; *Young v. Fiber Co.,* 159 N. C., 382; *Pigford v. R. R.,* 160 N. C., 97; *McAtee v. Mfg. Co.,* 166 N. C., 457; *Deligny v. Furniture Co.,* 170 N. C., 202, 203; *Wright v. Thompson,* 171 N. C., 93.

(365)

W. W. THARPE v. J. HOLCOMB.

(Decided 17 April, 1900.)

Tenants in Common—Quiet Possession—Presumption, How Rebutted —Adverse Possession—Duration—Statute of Limitation, Section 141 *of The Code.*

1. The possession of one tenant in common is presumed to be the possession of all.
2. A quiet, undisturbed exclusive possession for twenty years by one tenant in common is necessary to bar his cotenants.
3. An adverse possession by one tenant in common is indicated by a hostile attitude apparent to the court or jury, from which it may be seen by some act done that the intent to hold alone is manifested to the cotenants, as if they attempt to assert their claim, as to enter, or to demand an account of rents, etc., which is resisted by the occupant, his possession becomes adverse, and the statute (Code, sec. 141) begins to run and if continued seven years will ripen the title.

ACTION for possession of land, tried before *Timberlake, J.*, at February Term, 1900, of IREDELL.

The land had belonged to Elcana Elliott, who in 1873, devised it to his wife for life. At her death in November, 1882, Angeline Privett, one of the daughters of Elcana Elliott, and wife of Cader Privett, entered into possession, claiming the land as her own under the will of her father until her death in June, 1894. She and her husband had mortgaged the land in October, 1887, to J. S. Ramsey, to secure a debt —which mortgage was foreclosed by sale and deed made to the defendant, Holcomb, the purchaser, who took possession at her death in 1894.

The plaintiff claimed the land as purchaser at commissioner's sale ordered in a special proceeding instituted by heirs at law of Elcana Elliott for partition by sale, his deed being dated 5 December, 1898.

The issues were:

1. Is the plaintiff the owner and entitled to this land as al- (366) leged?

2. Is the defendant in the wrongful possession of the land described in the complaint?

His Honor directed the jury, if they believed the evidence, to find the issues in the affirmative—which they did. The defendant excepted. Judgment for plaintiff. Appeal by defendant.

L. C. Caldwell for plaintiff.
Armfield & Turner for defendant.

FAIRCLOTH, C. J. This is an action of ejectment, and the plaintiff and defendant are tenants in common of the land in controversy. The only material question to consider is whether the defendant has title by adverse possession under color of title by force of the seven-year statute, Code, section 141.

It is conceded that the defendant and those under whom he claims have been in continuous possession of the premises for more than seven years under color. Was the possession *adverse?*

The possession of one tenant in common is presumed to be the possession of all the tenants.

An adverse possession for twenty years by one tenant in common is necessary to bar his cotenants. *Hicks v. Bullock,* 96 N. C., 164.

The evidence is that "Angeline (defendant's vendor) entered into possession of the land, claiming it as her own under the will of Elcana Elliott, . . . claiming it adversely to all others, claiming it as her own under said will." This proof shows only quiet, undisturbed possession,

(367) and that is not inconsistent with a holding for all the tenants in common. It does not indicate a hostile attitude of the occupant towards his cotenants as contemplated by the statute, Code, section 141. To that end, there must be some act done between the parties from which the jury or court can see that a hostile relation exists—that the defendant's intent to hold alone is manifested to the cotenants. Then the statute begins to run. If the cotenants attempt to assert their claim, as to enter, or to demand an account for rents, etc., which is resisted by the occupant, then his possession becomes adverse, and, if it continues for seven years, his title will ripen against his cotenants. *Breeden v. McLaurin,* 98 N. C., 307. This requirement is not met by the facts in the present case, and it follows that there is error.

The judgment might be reformed here if the record furnished the necessary information, but it does not; and a new trial is necessary in order that the proper parties may be made, and their rights and interests ascertained and declared.

New trial.

Cited: Locklear v. Bullard, 133 N. C., 263.

MABEL BAKER v. WALTER BREM ET AL.

(Decided 17 April, 1900.)

Town Constable—Civil Process, How Addressed—Amendment of Process, When Allowable.

1. To render valid the service of civil process by a town constable, it must be addressed to him in the name of the office he holds, that is, as constable of the particular town. The Code, sec. 3810.
2. Process otherwise directed is a nullity, and can not be amended after service.
3. Under section 908 of the Code, process may be amended, but the amendment, to be made, is to show jurisdiction, not to confer it.

CLAIM AND DELIVERY, heard on appeal from justice's court, (368) before *Bowman, J.*, at November Term, 1899, of BURKE.

The summons was served by J. A. Wall, a town constable of Morganton. The defendants' counsel entered a special appearance, and moved to dismiss the action, for the reason that the summons and process were not directed to him in the name of the office he holds, that is, as constable of the town of Morganton.

The motion was disallowed, and the plaintiff was allowed to amend in the respect mentioned. In the Superior Court the defendants renewed their motion to dismiss, upon the ground stated. Motion disallowed. Defendants excepted. And after verdict and judgment for the plaintiff, the defendants appealed.

J. T. Perkins for plaintiff.
Avery & Ervin for defendants.

MONTGOMERY, J. The justice of the peace who issued the summons in this case (the action being for the recovery of personal property) deputized John Wall to execute and return it. The return of the summons was signed "J. A. Wall, D." The letter "D" is supposed to stand for deputy, but whose deputy is not stated, nor do we know. The defendants' counsel moved, in a special appearance for the purpose, to dismiss the action on the following ground:

"That J. A. Wall, being the constable only of an incorporated town, and not a township, or general constable, had no power or authority to serve the summons or other process in this action, for the reason that such summons and process were not directed to him in the name of the office he holds, that is, as constable of the town of Morganton."

The case was heard on its merits by the justice of the peace, (369) after he had overruled the motion of the defendant, and in the Superior Court the same motion was made and overruled. There was a judgment for the plaintiff, and the defendant appealed.

The question presented by the appeal is whether the service of the summons made by Wall is a nullity; if so, the motion of the defendant to dismiss the action should have been allowed, and the permission given to the plaintiff to amend the summons by having it directed to "J. A. Wall, Marshal of the town of Morganton," ought not to have been granted. In the defendant's motion to dismiss the action, Wall is admitted to be the town constable of Morganton, and that is the only evidence of that fact in the record. Under the charter of Morganton, the town constable may execute precepts issued to him by the mayor when such precepts are issued to him as constable; but we do not see in the town charter any civil jurisdiction given to the mayor, except actions upon penalties and fines.

But the plaintiff insists that under section 3810 of The Code, Wall, being a town constable, was authorized to serve the summons directed to "any constable or other lawful officer of Burke County," by virtue of his office as constable of the town of Morganton. That section of The Code authorizes city and town constables to serve all civil or criminal process that may be directed to them by any court within their respective counties, etc., and this Court held in *Davis v. Sanderlin,* 119 N. C., 84, that process could not be served by a constable outside of his town or city, where the process was directed to "any constable or other lawful officer of said county," and that to enable a constable of a city or town to serve court process, such process must be *directed* (addressed) to him, as required by The Code, not necessarily by name, but (370) officially as the constable of his city or town. And the law is the same if a constable undertakes to execute process within the limits of the town or city.

In all cases where constables undertake to execute process under section 3810 of The Code, they can do so only in those cases where the process is directed (addressed) to them as constables of such city or town. *Fort v. Boone,* 114 N. C., 176. The defendant then was not before the Court by a proper service of summons on him when he made the motion in a special appearance for that purpose, to dismiss the action, and, therefore, the amendment allowed by the justice of the peace to the plaintiff to amend the summons on its face so as to have it directed to "J. A. Wall, Marshal of the town of Morganton," ought not to have been allowed. Under section 908 of The Code, there is a liberal system provided for the amendment of process; but while such amendments can be made to show jurisdiction, they can not be extended to confer jurisdiction. *Gilliam v. Insurance Co.,* 121 N. C., 369.

Error.

Overruled: Baker v. Brem, 127 N. C., 322.

ROBERT WINKLER v. CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Decided 17 April, 1900.)

Barb-Wire Fence—Negligently Maintained Right of Way—Nuisance —Injury to Stock.

A barb-wire fence negligently constructed and maintained along defendant's right of way, so as to be dangerous to stock, becomes a nuisance, for which the company is liable to the owner of stock injured by it.

ACTION for damages for injury to plaintiff's horse alleged to (371) have been caused by the negligent construction and maintenance of a barb-wire fence along the defendant's right of way through plaintiff's pasture, tried before *Bowman, J.*, at November Term, 1899, of CATAWBA.

When the plaintiff rested, the defendant moved for judgment as in case of nonsuit.

The court allowed the motion, holding that the railroad was not liable because its fence was upon its right of way and not along a public highway.

Plaintiff excepted and appealed.

E. B. Cline and M. H. Yount for plaintiff.
J. H. Marion and T. M. Hufham for defendant.

CLARK, J. The defendant erected a barb-wire fence along its right of way. There was evidence that it was negligently erected and maintained. "In some places it was 12 inches high and from that to 30 or 35 inches from the ground to the top wire. Three strands of wire were used, and it was put so far apart that, when people crossed it, it sagged down about 12 inches in some places. The posts were old rotten cross-ties 40 or 50 feet apart." There was no top bar. The plaintiff's horse, running in his pasture, got entangled in this wire fence, and was injured, and this action is brought for damages (372) sustained. It was error in the judge to nonsuit the plaintiff.

In *Sisk v. Crump*, 112 Ind., 504 (2 Am. St., 213), it is said, "The act of a land-owner in erecting upon his property along a public highway a barb-wire fence does not in itself render him liable to one who sustains an injury therefrom, but if he negligently constructs and maintains it in such a manner as to be dangerous, he is liable, for instance, for injury to an animal which is attracted by other animals, or by grass growing inside the fence, and in endeavoring to cross such defective

fence becomes entangled therein." The Court says the statute of that State expressly authorizes the erection of barb-wire fences, and the liability comes only from their neglected condition. To exactly the same purport is *Loveland v. Gardner,* 79 Cal., 317, that while the owner of land is not liable from the mere act of constructing a wire fence thereon, for damages sustained by the animals of others, yet he is bound to see that the fence is not so negligently maintained as to become a trap for them from their natural propensities of which he must take notice. The liability of the defendant in this case is that which would attach to any one else putting up a defective fence which is from its peculiar nature thereby made dangerous.

Chapter 65, Laws 1895, makes it unlawful to erect a barb-wire fence along any public road or highway, unless a railing is placed on top of the fence not less than three inches high. It is perhaps to be regretted that this act is restricted to the counties therein named. But, though Catawba (whence this appeal comes) is one of such counties, we think the act has no application here, for the railroad, (373) though a public highway in some senses, is not such within the purview of this act, which was evidently intended for the protection of live stock passing along a public road.

Nor does it make any difference that Catawba County is within the limits of the "no-fence territory" in which stock are prohibited from running at large. Not only the track of the defendant passed through the plaintiff's pasture where his stock had a right to run unless the defendant fenced up its right of way (*R. R. v. Sturgeon,* 120 N. C., 225), but even if it were otherwise, and the plaintiff's horse was illegally running at large, it was not contributory negligence. *Horner v. Williams,* 100 N. C., 230. Nor could contributory negligence be considered on a motion to nonsuit. *Cogdell v. R. R.,* 124 N. C., 302. The plaintiff was liable for the trespasses if the animal was illegally at large, and the horse could be impounded, but the defendant had no right to catch him in a barb-wire trap, and wind him up in its meshes as merciless as the coils which crushed Laocoon and his sons. The defendant was not compelled to put up a fence at all(*Jones v. R. R.,* 95 N. C., 328), but if it did so, it should not be put up in a negligent manner calculated to injure live stock. *Sic utere tuo, ut alienum non lædas.* It is not claimed that the defendant did so intentionally. The ground for damages is the defendant's negligence in maintaining a barb-wire fence in such a negligent condition that the horse, running in his owner's pasture, was caught and cut by an impediment which, in view of the nature of the animal, enticed him to try to cross it, instead of being high enough, and tight enough to hold him back. In *Jones v. R. R., supra,* in which the defendant company was held not liable for the plaintiff's blind horse

falling into the cut, there was no allegation that the cut, which was necessary, was negligently excavated, and that thereby, the injury was caused

Here the negligent method of keeping up the fence is alleged as (374) the direct cause.

This case differs from *Morrison v. Cornelius,* 63 N. C., 346, where the owner of saltpetre vats covered them up, and enclosed them by a sufficient fence, but the plaintiff's cattle got into the enclosure in some unknown way, drank of the liquid and died. It was held there was no evidence of negligence. It was also held that if one digs a well or a trench on his own land, and a neighbor's cattle fall therein, the landowner is not liable. So situated, they are not nuisances *per se,* or likely to injure. But, here the wire fence is dangerous by the manner in which it is put up; it was likely to injure, for it was on the edge of a neighbor's pasture where his live stock would be likely to come and, if they came, would almost certainly be ensnared. By its location and the probability of its causing injury at that place in its defective state, it was a nuisance. S. & R. Negligence, section 702 (5 Ed.), and cases cited; *Rehler v. R. R.,* 28 N. Y. Supp., 286, and cases cited.

Reversed.

A. C. SNIPES v. CITY OF WINSTON.

(Decided 17 April, 1900.)

Alderman as "Street Boss"—Election Void—Contract Against Public Policy.

The election by the board of aldermen of one of their own members as "street boss," an office of pay, at a meeting in which he is present and participating is against public policy, and the contract for services will not be sustained nor compensation enforced.

ACTION against the city of Winston for balance claimed to be (375) due the plaintiff for services as "street boss," taken by appeal from justice's court, and tried before *Shaw, J.,* at November Term, 1899, of FORSYTH. Judgment against plaintiff, who appealed. The whole case is developed in the opinion.

J. S. Grogan for plaintiff.
Glenn & Manly for defendant.

FAIRCLOTH, C. J. The board of aldermen of the city of Winston on March 1, 1898, elected the plaintiff a "street boss," and contracted to

pay him $50 per month for six months. His duties were to superintend, construct and repair the streets, and to keep in order the sewerage system of the city. At the time of said election and contract, the plaintiff was a member of the board of aldermen, and participated in the meeting at which he was elected.

A new board was elected and inducted into office on May 1, 1898, when the plaintiff was discharged and paid for the services then rendered. He now sues for the balance specified in the contract for the next succeeding four months. His Honor held, upon these facts, that the plaintiff could not recover, and rendered judgment for the defendant.

The board of aldermen, of which the plaintiff was a member, was the agent of the city, and its duty was absolute loyalty to the best interests of its principal. The plaintiff was interested in obtaining the best possible contract from himself and his associates on the board. There was then antagonism between his duty to the city and his personal individual interest in making said contract.

It is against public policy to permit such contracts to be enforced.

(376) It would be unsafe for the plaintiff, acting as employer, to become himself by the same bargain, an employee. *Smith v. Albany,* 61 N. Y., 444, is a case in point. The plaintiff, being a member of the common council, contracted with the board to furnish horses and carriages for the procession celebrating 4 July, which the council had in charge. It was held that he could not recover. Story on Agency well states the principle: "It may be correctly said with reference to Christian morals that no man can faithfully serve two masters whose interests are in conflict. If then the seller were permitted as the agent of another to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps in many cases too strong for resistance by men of feeble morals or hackneyed in the common devices of worldly business, would be held out which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest principles of Christianity. This doctrine is well settled at law. And it is by no means necessary in cases of this sort that the agent should take any advantage by the bargain. Whether he has or not, the bargain is without any obligation to bind the principal."

This principle can not be questioned, and experience has shown its wisdom. Common reasoning declares this principle to be sound, and the public is entitled to have it strictly enforced against every public official.

In obedience to this reasoning and upon these authorities we hold that the contract under consideration is void and unenforceable. It, therefore, becomes unnecessary to consider any other question presented in the record.

Affirmed.

Cited: Davidson v. Guilford, 152 N. C., 437.

(377)

J. F. GRIFFITH v. M. H. RICHMOND.

(Decided 17 April, 1900.)

Claim and Delivery—Affidavit—The Code, Sections 322, 890—Chattel Mortgage—Note—Evidence—Debt—Issues—Judgment—Special Instruction.

1. The affidavit required by the Code is indispensable to maintain claim and delivery. Secs. 322, 890.
2. The note secured is to be proved. Chattel mortgage, when registered proves itself, and will estop the mortgagor to deny his responsibility for the forthcoming of the property when called for to be applied to the debt.
3. Where the action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied, the issues and judgment should cover the whole case, including balance due upon the debt.
4. For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured.
5. A charge, if wanted, must be asked for.

CLAIM AND DELIVERY heard on appeal from justice's court, before *Robinson, J.,* at February Term, 1900, of FORSYTH, upon the following issue: Is the plaintiff the owner and entitled to the immediate possession of the property described in the mortgage? Answer. "Yes."

Judgment was rendered in favor of plaintiff for the possession of the property described.

Defendant excepted, and appealed.

The case appears in the opinion.

L. M. Swink for plaintiff.

Jones & Patterson for defendant.

CLARK, J. This is an action begun before a justice of the peace
(378) to obtain possession of personal property alleged to be $50 in value, embraced in a chattel mortgage. The record does not show that the affidavit required by The Code, sections 890 and 322, was made, which is indispensable. (*Hirsh v. Whitehead,* 65 N. C., 516), but it was probably made, as no point was raised for its omission, either in the Superior or in this Court. In the Superior Court, upon appeal, the plaintiff did not prove execution of either note or mortgage, but offered in evidence the chattel mortgage, with certificate of probate and registration, and the note described therein, and rested. The defendant's demurrer to this evidence was overruled. (Exception.) Defendant also excepted because the court instructed the jury that the chattel mortgage, having been probated and registered, this was *prima facie* evidence of its execution. The instruction was correct, *Love v. Harbin,* 87 N. C., 249, The Code, sections 1251, 1271; subject to rebuttal (*Helms v. Austin,* 116 N. C., 751), and defendant offered no evidence.

The mortgage, duly registered, in absence of proof in rebuttal or of payment, entitled the plaintiff to judgment for the possession of the property described in the mortgage, if any sum, however small, was still due upon it, and the burden to prove payment was upon the defendant. *Jordan v. Farthing,* 117 N. C., 181.

The defendant further excepted because the judge "failed to charge" the jury that there was no evidence that the defendant was then or ever had been in possession of the property. The mortgage itself estopped the defendant to deny that he was responsible for the forthcoming of the property, when called for to be applied to the debt, and in failing to do so he would be responsible for the value of the property not to exceed the amount of the debt. Besides, an omission to charge
(379) is not ground of exception unless an instruction on that point is asked and refused. Clark's Code (3 Ed.), section 412 (3), and numerous cases cited on page 514. Indeed, the bond given in this action by the defendant to retain possession of the property is an admission of such possession since action begun.

The note was not proven and was improperly admitted in evidence, but the mortgage admitted an indebtedness, greater than the $50, which sum the complaint and the admission of the parties stated the value of the property would not exceed. The judgment as rendered is not for the debt, but merely for the possession of the property, and if it be not delivered, for recovery of the penalty of the defendant's undertaking "to be discharged upon payment of $50, and the costs of the action." This judgment is erroneous in that the value of the property was not ascertained beyond the admission that it "does not exceed $50." It was also

error to refuse to submit an issue as to the amount of the indebtedness. It is true that upon the issue actually submitted, "Is the plaintiff the owner and entitled to possession of the property?" evidence could have been offered whether anything was due or not, and if anything, the plaintiff was entitled to recover possession. But the recovery of the property is here sought to be applied upon a debt, and the defendant, as he desired, had a right to have the amount thereof ascertained in this action to prevent circuity of action, that he or his sureties might, if they chose, pay off the debt and relieve the property. When the case goes back the value of the property at the time of seizure should also be ascertained, as the sureties are only liable on their undertaking for such value, not exceeding, however, the indebtedness secured. Code, sections 326 and 431; *Hall v. Tillman,* 103 N. C., 276.

No exception was taken for refusal to submit an issue as to (380) the value of the property, but when the value of the property was neither admitted nor found by issue, judgment for the amount of the undertaking "to be discharged upon payment of $50," is error upon the face of the record to be taken advantage of without exception. *Thornton v. Brady,* 100 N. C., 38; *Murray v. Southerland,* 125 N. C., 175; *Huntsman v. Lumber Co.,* 122 N. C., 583. The action was brought simply for recovery of the property, but it being for property conveyed to secure a debt and the indebtedness being denied, issues and judgment should have covered the whole case. *Taylor v. Hodges,* 105 N. C., 344.

Error.

Cited: *Smith v. French,* 141 N. C., 6.

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(381)

PLEASANT FOY v. CITY OF WINSTON.

(Decided 17 April, 1900.)

Negligence—Dangerous Sidewalks—Contributory Negligence—The Blind—Care to Be Exercised.

1. City authorities are responsible for injury occasioned to passers-by, in consequence of negligence of workmen impliedly permitted to dig a ditch across the sidewalk to connect pipes with the city waterwarks for private individuals.

2. It is for the jury to say whether sufficient precautions were taken to enable a person of ordinary prudence with the exercise of ordinary care to have passed along with reasonable safety.

3. It is immaterial that the work was not done by the city or its employees, and that the city had no knowledge that the ditch was being cut, and had been left dangerous and unguarded, it being in evidence that the plumbers were allowed to do their work without special application and permit.

4. The fact that the plaintiff was a blind man did not of itself make it negligent for him to pass along the public sidewalk without a guide and without making every effort to ascertain if any danger was in his way; but the fact of his being blind did not relieve him from exercising ordinary care—ordinary care on his part meaning a higher degree of care than would be required of a person in possession of all his senses.

ACTION for damages for personal injury suffered by the plaintiff, a blind man, from falling into a ditch across a sidewalk in Winston, tried before *Shaw, J.,* at November Term, 1899, of FORSYTH. There were three issues submitted:

1. As to negligence of defendant.
2. As to contributory negligence of plaintiff.
3. As to damages.

The jury responded "Yes" to the first; "No" to the second, and assessed plaintiff's damages at $225. Judgment accordingly. Appeal by defendant.

The evidence, charge of the court, and exceptions by defend-
(382) ant are all stated in the opinion.

Jones & Patterson for plaintiff.
Glenn & Manly and Holton & Alexander for defendant.

MONTGOMERY, J. The city of Winston owns its waterworks, and supplies its inhabitants with water at established rates. There is an ordinance of the town which requires all connections with the water-mains to be made by licensed plumbers, and under a permit from the city engineer, who is also the superintendent of the waterworks (but such a permit was not required at the time of the injury complained of by the plaintiff), to make repairs to the pipes leading from the mains to the buildings, or to change old for new pipes.

In June, 1897, W. E. Beck, a plumber, was employed by J. Jacobs to replace old pipes with new, and to do the work it became necessary to dig a ditch 18 inches deep and 15 inches wide from the curb line of the street across the sidewalk. When the workmen quit for the day they left a plank or planks across a part of the ditch, and hung up a red lantern, lighted, to warn pedestrians. Shortly afterwards the plaintiff, who was blind, and who was regularly accustomed to walk along the street, came along and fell into the ditch, and was injured. The charge of the court was not excepted to, except by "a broadside" and it

will only be necessary to consider it in respect to certain special instructions which the defendant asked the court to give, and to which the defendant was entitled, but were not given in the words prayed for. There were eleven special instructions asked for by the defendant, which may be divided into four groups:

1. Those that are founded on the proposition that the con- (383) tractor having placed a plank or planks across a part of the ditch, and having hung up a red lantern, lighted, to warn passengers, the defendant, as a matter of law, even if responsible for the conduct of the contractor, was not negligent.

2. That the defendant could not be liable at the suit of the plaintiff because the city did not do the work through itself or its agents.

3. That the city having no knowledge of the work, it could not be liable, and

4. That the plaintiff, who was a blind man, was negligent in using the streets without an attendant, or unless with his staff he constantly felt his way before and on all sides of him.

His Honor refused to charge the jury that the placing of a plank or planks across the ditch and hanging up the red lighted lamp, relieved the defendant from the charge of negligence. He added, properly, a qualification, to the effect that those precautions of the contractor should be considered by the jury, and that it was for them to say whether or not they were sufficient to enable a person of ordinary prudence in the exercise of ordinary care, to have passed with reasonable safety.

The court also properly refused to instruct the jury that the plaintiff could not recover because the work was not done by the city or its employees or agents; and he also properly refused to instruct them that the defendant was not liable, unless the city authorities had knowledge that the ditch was being cut, and that workmen had left it in a condition dangerous and unguarded.

McGruder, the city engineer and superintendent of the waterworks, testified that the work being done by Beck was not a new connection, but was simply the changing of pipes, and that no permission by him was necessary in the case; that the city had been permitting plumbers to do this kind of work up to that time without application and without a permit, and that the board of aldermen of the city (384) knew they made repairs without permit.

The court instructed the jury that the fact that the plaintiff was blind did not of itself make it negligent to pass along the public sidewalk without a guide, and without making every effort to ascertain if any danger was in his way; and he also instructed them that being blind did not relieve him from exercising ordinary care in passing along the sidewalk, and that ordinary care on his part meant a higher

degree of care than would be required of a person in the possession of all his senses. *Neff v. Wellesley,* 2 L. R. A., 500; *Smith v. Wildes,* 143 Mass., 556.

The main questions then for determination on the trial below were, whether the defendant was negligent, and whether the plaintiff contributed to its negligence. The jury responded to the first issue, "Yes," and to the second issue, "No." The special instructions asked by the defendant were given in substance where they ought to have been given, and declined where they ought to have been declined. As we have intimated, there might be objectionable features to parts of the charge of his Honor, but they were not excepted to.

Affirmed.

Cited: Foy v. Winston, 135 N. C., 441; *Fann v. R. R.,* 155 N. C., 145; *Bailey v. Winston,* 157 N. C., 259; *Hoyle v. Hickory,* 167 N. C., 622.

(385)

JOHN GRAY, ADMINISTRATOR OF KATIE GRAY, v. H. McD. LITTLE.

(Decided 17 April, 1900.)

Malpractice—Careless, Inhuman, Cruel Treatment—Death Accelerated—Damages, Nominal, Compensatory, Punitive—Judge's Charge—Partial New Trial in Respect to Damages.

1. Expediting the death of a patient by carelessness, inhuman and cruel treatment on the part of the attending physician, is not a mere technical injury, compensated for by nominal damages, but calls for compensatory and even punitive damages at the hands of the jury.

2. Where the error committed below, and appealed from, relates to the measure of damages only, a new trial will be awarded only upon the issue relating to damages.

ACTION for damages at the hands of the defendant, a practicing physician, for occasioning, as alleged, the death of his patient, Katie Gray, intestate of plaintiff, by malpractice and cruel treatment, tried before *Robinson, J.,* at February Term, 1900, of ALEXANDER.

The plaintiff, husband of the deceased, had employed the defendant, Dr. Little, to attend his wife in her confinement.

Judgment on the issues and responses in favor of plaintiff.

Appeal by the plaintiff upon exceptions to the instruction of his Honor, and his refusal of instructions upon the issue of damages.

B. F. Long, F. A. Linney, J. H. Burke and *J. L. Gwaltney filed brief for plaintiff.*

Appellee not represented.

FAIRCLOTH, C. J. The defendant is a practicing physician and surgeon, and was called to attend the plaintiff's wife in her child-bed sickness. The evidence is not in the record in this Court, and there is no exception to anything at the trial, except that part of the (387) charge copied below.

The allegation is that the defendant by his careless, negligent and unskilled conduct, caused great pain and injury to the plaintiff's intestate (wife), and that by inhuman and cruel treatment by the defendant the child's death resulted after delivery and the death of the wife was hastened and accelerated. The answer denies these allegations. The second issue is, "Was the death of the plaintiff's intestate caused by the defendant's carelessness and inhuman and cruel treatment as alleged?" The jury answered, "Yes, accelerated." The third issue is, "What damage, if any, is plaintiff entitled to recover?" Answer. "Nominal damages—5 cents."

His Honor, in charging the jury, substantially followed the charge approved in *Benton v. R. R.*, 122 N. C., 1007, and in addition thereto instructed the jury in these words:

"But in considering the second issue as to the cause of the death of the plaintiff's intestate, if you find that the death of the intestate was only hastened or accelerated by the acts or omissions of the defendant as alleged, then you are instructed that, in answering the third issue as to damages, you can not award the plaintiff any more than nominal damages, that is, such a small sum as for instance 5 cents, or other small sum, because in such state of the case if the death of the intestate was only hastened or accelerated by the defendant, you could only respond to this issue in nominal damages." (Exception.) The error in that part of the charge lies in considering the act expediting death, as a mere technical injury. That is not the language of the law, nor of the textbooks on criminal matters. There are instances in the common law reports where the accelerator paid the severest penalty known to the law. We know of no decision of a final appellate court in (388) this country declaring otherwise.

We will only refer to a few of our own cases which are in point on this question—*Lewis v. Raleigh*, 77 N. C., 229; *Coley v. Statesville*, 121 N. C., 301, and others cited in No. 5024, Womack's Digest. It follows that the prayer referred to in the defendant's second exception was proper for the jury.

Considering the verdict on the second issue, and such evidence as

authorized the jury to make that response, it seems fortunate for the defendant that he is not on trial for a high criminal offense, as well as to answer in an action for damages.

There must be a new trial as to damages only on the third issue.

Partial new trial.

Cited: Gray v. Little, 127 N. C., 305; *Meekins v. R. R.,* 134 N. C., 219; *Rushing v. R. R.,* 149 N. C., 163.

JOHN C. CLAPP v. FARMERS' MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Decided 17 April, 1900.)

Insurable Interest—Equitable Interest—Information to Agent.

1. Where the plaintiff bought the property insured jointly with another and took a bond for title upon payment of the purchase money, and paid his proportional part thereof, he had an equitable interest, and therefore an insurable interest in the property.

2. Knowledge of the agent is knowledge of the principal, and when the agent was correctly informed in advance of the plaintiff's limited interest in the property, and issued the policy with full knowledge, the company will not be allowed to refuse payment for the loss, on that account.

3. The failure to give notice of the fire in writing, and to make proof of loss, as required by terms of the policy, will not avail as a defense, when the jury find that there was a waiver by the defendant of these requirements.

ACTION upon contract of insurance against fire, tried before (389) *Timberlake, J.,* at May Special Term, 1899, of GUILFORD.

The following are the issues, with the responses of the jury:

1. Was the dwelling-house and furniture of the plaintiff insured in the defendant company on the night of 14 January, 1897? Answer: "Yes."

2. Was it insured under a policy the terms of which were like Exhibit A or Exhibit B? Answer: "A."

3. Did the plaintiff at the time of taking said insurance on the house conceal from the defendant insurance association the fact that he was not the owner in fee simple absolute of said land and house and fail to disclose the fact that he only held a bond for title jointly with another, and that the property was not paid for, but a large part of the purchase money was still due thereon? Answer. "No."

4. What was the actual cash value of the house at the time of the fire? Answer. "$450.00."

5. If any furniture was destroyed by fire, what was the actual cash value of the part so destroyed? Answer. "$1.00."

6. Did the plaintiff give notice to the defendant association in writing of the fire, and make proof of loss as required by terms of said policy? Answer. "No."

7. Did the defendant association so waive the giving of notice and making proof of loss as required by terms of policy? Answer. "Yes."

There were no exceptions to the evidence or instructions. Upon the facts found by the jury, his Honor held that the plaintiff was entitled to judgment, and rendered judgment in his favor for $338.25, being three-fourths value of the property destroyed by fire, as per terms of insurance.

Defendant excepted and appealed.

John A. Barringer for plaintiff.
J. T. Morehead and L. M. Scott for defendant. (390)

DOUGLAS, J. This is an action upon an alleged contract of insurance to recover for the loss of property by fire. The defendant refused to pay any part of the loss on the ground that "the interest of the insured in the property was other than an unconditional, unincumbered and sole ownership of the property insured," and that therefore the policy was void in accordance with its express provisions. It further alleged that the insured had failed to give the notice required by the policy, and that the property was overvalued. The plaintiff alleged that at the time the policy was issued he had fully divulged to the agent of the defendant the exact nature of his interest in the property, and that he notified the defendant of the loss immediately after the fire, whereupon the defendant absolutely refused to pay any part of the insurance.

The following are the material parts of the case on appeal:

It was admitted by the plaintiff in his reply, and also in open court, that he held the real estate upon which the building burned was situate at the time the alleged contract of insurance was made, under a bond for title executed by Jacob Clapp to plaintiff and a brother, Simeon Clapp, since deceased intestate, jointly, on 27 December, 1882, and that purchase money, $4,250.00, had not been paid, nor any part thereof except the sum of $2,250.00, paid by plaintiff soon after title bond was executed.

It was in evidence that the estate of Simeon Clapp, coöbligee in the bond for title, was insolvent, and that he left surviving several brothers, his heirs at law, and that an administrator of his estate had been duly qualified as such.

It was further admitted in the course of the trial that the defendant association's liability was three-fourths of the value of the property destroyed at the time of its destruction, if liable at all.

(391) Upon return of the verdict the plaintiff moved for judgment, which defendant met with a counter-motion, that upon the verdict and admissions of fact plaintiff was not entitled to judgment, and insisted that the heirs at law and personal representative of Simeon Clapp should be made parties and one-half of the recovery be for them.

His Honor held that plaintiff was entitled to judgment. The defendant excepted.

The defendant then insisted that if entitled to judgment the plaintiff was entitled to recover only *pro rata* his interest in the value of the property when destroyed, to wit: one-half of three-fourths the value as found by the jury.

The court was of a different opinion and gave judgment accordingly. Defendant excepted and appealed, assigning as error: "The ruling of his Honor in not making the heirs at law and personal representatives of Simeon Clapp parties, and in not rendering judgment for them for one-half amount of recovery; and that plaintiff was entitled to judgment for three-fourths of the value of the property destroyed as found by the jury, and in giving the judgment as set out in the record."

The jury found all the issues in favor of the plaintiff, whereupon the court rendered judgment for three-fourths of the value of the property destroyed.

There are no exceptions to the evidence or instructions, and therefore the facts are settled beyond question. The only exceptions relate to the rulings of his Honor on pure questions of law, and in them we see no error. The plaintiff, having bought the land jointly with his brother and having paid $2,250 of the purchase money, had an equitable interest in the property, and therefore an insurable interest.

(392) This interest he stated fully and correctly to the agent of the defendant, whose knowledge was the knowledge of his principal. There is no question as to the authority of the agent to issue the policy, and, as he issued it with full knowledge of the plaintiff's limited interest in the property, the defendant can not now be heard to dispute the validity of the policy on that ground alone. There was no contract, express or implied, between the defendant and Simeon Clapp, and therefore the representatives of the latter have no interest whatever in the policy. The plaintiff did not profess to be acting for any one else, and insured only his own interest in the property. It is admitted that Simeon Clapp paid nothing on the land, and that his estate is insolvent. If, therefore, he and the plaintiff gave their joint notes for the purchase

money, as is usual, the plaintiff would be personally liable for the unpaid balance. Surely he has an insurable interest in property on which he has already paid a large sum, and the full value of which he may be called on to pay.

These questions have been so fully discussed in the recent case of *Grabbs v. Insurance Co.*, 125 N. C., 389, that it is unnecessary to repeat the argument or the authorities therein cited. See also *Horton v. Insurance Co.*, 122 N. C., 498. The jury found that there was a waiver of the notice and proof of loss required by the terms of the policy, and we find no exception involving the question, nor does anything appear impeaching the propriety of the finding. The judgment is

Affirmed.

Cited: *Modlin v. Ins. Co.*, 151 N. C., 40.

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(393)

A. BRINKLEY & CO., v. J. W. BALLANCE AND WIFE, M. A. BALLANCE, ET AL.

(Decided 17 April, 1900.)

Married Woman's Liability on Contract—Written Consent of Husband, When Necessary—When Not—What Property Liable—The Code, Section 1826.

1. A married woman who is not a "free-trader" is liable in respect to her separate personal property for contracts made with the written consent of her husband.
2. Such consent is not necessary, where her indebtedness is incurred for necessary personal expenses, for support of her family, or to pay her antenuptial debts.
3. Such consent may be given in different ways by the husband, as by his signing the order for goods jointly with her, by attesting her signature, with his name as witness, by a letter urging the credit to be given her, and offering inducements to the creditor—all equally as efficacious as a formal written assent signed by him.

FAIRCLOTH, C. J., dissenting.

ACTION for goods furnished the *feme* defendant, M. A. Ballance, tried before *Hoke, J.*, at Spring Term, 1899, of BERTIE.

The defendant, Mrs. M. A. Ballance, conducted a mercantile business at Lewiston, N. C., in 1893, under the name of "Ballance & Co.," her husband, who was insolvent, being her business manager. She con-

tracted a debt with the plaintiff of $334.01, for goods sold and delivered upon written order, and this action is brought to enforce payment out of her separate estate.

The order was signed Ballance & Co., by J. W. Ballance, and is copied in the opinion. The point involved is whether this was a sufficient written consent signed by the husband, required by the Code, section 1826, to render her separate estate liable. His Honor intimated

(394) an opinion, that in no aspect of the evidence could any recovery be had as to any of defendants other than J. W. Ballance; in deference to said intimation, the plaintiffs entered a *non pros.* as to all defendants except J. W. Ballance, and the jury having found the issue against him, judgment was rendered against him for $334.01. The plaintiffs excepted to the ruling of his Honor and appealed.

Francis D. Winston for plaintiff.
R. B. Peebles for defendant.

CLARK, J. This case in its facts is an almost exact duplicate of *Bates v. Sultan,* 117 N. C., 94. The *feme* defendant was doing a mercantile business in 1893 under the style of Ballance & Co., J. W. Ballance, her husband, the other defendant, being the manager in active charge. It is alleged in the complaint, and admitted in the answer, that the said firm (the wife) contracted with plaintiffs the indebtedness sued for of $334, between 1 January, 1893, and 26 August, 1893, and that on 9 February, 1893, her husband wrote the following letter to the plaintiffs: "Gentlemen:—Yours to hand, and in reply would say that our stock of goods is worth $6,000, and we owe $1,500. We own real estate worth $4,000, unincumbered. We thought we gave these points to your young man, and we also thought the writer was too well known here and in Norfolk to need much reference, as he did business here for many years, pleased the people and made money. I bought these goods because I especially needed them Saturday. If you wish to ship them, and can put them here by Saturday noon, you can do so. Otherwise, I do not want them. Respectfully, Ballance & Co., by J. W. Ballance."

The answer, it is true, denies the legal effect of this letter was

(395) the written consent of the husband, and further avers that the goods so bought have long since been paid for, but payment is a matter to be proved by the defendant, and no evidence was introduced tending to prove it. The complaint avers that all of the account now due was purchased, relying upon said letter as the husband's written consent. On the contrary, at the close of the plaintiff's evidence "the court intimated that in no aspect of the evidence could there be a re-

covery had of *any* personal judgment against the *feme* defendant, nor against any separate estate, *real or personal,* of which she was seized or possessed."

The Code, section 1826, provides that no married woman not a free trader, shall make any contract to affect her real or personal estate without the written consent of her husband, except in three instances specified, to wit, for her necessary personal expenses, for support of her family, or to pay her ante-nuptial debts. It is not contended that the contract for the purchase of these goods was for the support of the family, though the husband was insolvent, and the family was largely supported from the store. Hence the case does not come within the classes dispensing with the necessity of the husband's written consent, as in *Bazemore v. Mountain,* 121 N. C., 59, and *s. c., ante,* 313. The sole question here is whether the letter above set out is a written consent of the husband for the purchase of these goods from the plaintiffs. An examination of it will show that on its face it is an order of goods by the husband as agent for his wife, and there is not only his consent thereto by making the order, but his hearty concurrence by giving a schedule of the property, real and personal, owned by the wife, for she constituted the firm, and an appeal to his own personal standing in Norfolk as a reason why the goods should be shipped. Could there be a more explicit consent than a request to ship the goods because of "the writer's" good standing? It does not appear that any part (396) of the bill of goods, the purchase of which is admitted, was bought at any other time, but, if this had been shown, it was error to hold that "in no aspect of the case could there be *any* recovery against the *feme* defendant, nor against her property, real or personal.' The case of *Bates v. Sultan,* 117 N. C., 94, is too recent to permit of any discussion whether the letter of 9 February, 1893, amounted to a written consent of the husband. The opinion of *Montgomery, J.,* in that case has been cited and recognized as authority in *Bank v. Ireland,* 122 N. C., 571; in *Walton v. Bristol,* 125 N. C., 419, and again at this term by *Furches, J.,* in *Jennings v. Hinton.*

At this term in *Jennings v. Hinton* it was properly held that a husband witnessing a deed of his wife was a sufficient written assent to her making such deed. The Code, section 1826, requires the written consent of the husband to validate his wife's contract (except in those cases in which his consent is unnecessary). Certainly then his writing for the goods, giving a schedule of the real and personal property owned by the firm (his wife), and appealing to his personal standing why the goods should be shipped, and using the pronouns "he" and "I" is as full consent as his signature as a witness to a deed by his wife would have been, or as the letter of the husband in *Bates v. Sultan, supra.* An

examination of the Constitution, Art. X., section 6, and of the statute, Code, 1826, shows no foundation for the "charging" of the wife's property as laid down in some decisions of a former Court. The Constitution requires only the written assent of the husband to "conveyances," and section 1826 requires only the written consent of the husband to contracts affecting the wife's "real or personal" estate, in certain cases, dispensing with it in others. But even under that doctrine of (397) "charging" it is expressly held that it is unnecessary that the assent of the husband should be signified by a separate clause. "His execution of the paper jointly with his wife is a sufficient compliance with the law." *Jones v. Craigmiles,* 114 N. C., 613. Here, the husband not only ordered the goods as agent of his wife, but joins in the letter an appeal to his own personal standing, as a reason for the shipment.

The complaint is specific and complies with the requirement of *Bates v. Sultan.* The wife admits she got the goods and of the value charged. She got them on an order written by her husband as her agent, and he signs his name, and refers to himself as "he" and "I," and "the writer," and insists upon the shipment of the goods. If this is his "written consent," then under section 1826 of the Code the contract is valid and binding on the wife, and in holding that no recovery could be had against her, nor against either her personal or real property, there was error.

The judge should not have taken the case from the jury, but should have left it to them with appropriate instructions upon the disputed issues of fact.

New trial.

Cited: Vann v. Edwards, 128 N. C., 429, 434; *Zachary v. Perry,* 130 N. C., 292; *Harvey v. Johnson,* 133 N. C., 366; *Ball v. Paquin,* 140 N. C., 93, 99; *Bank v. Benbow,* 150 N. C., 785; *Bushnell v. Bertollett,* 153 N. C., 565; *Royal v. Southerland,* 168 N. C., 406.

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(398)

W. T. AND A. B. HOLLOWELL v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Decided 17 April, 1900.)

Life Policy—Cancellation—Nonforfeiture—Payment of Premium—Former Course of Dealing Between the Parties—Transmission by Mail—Rule of Damages.

1. While the policy provides for the payment of the premium at Richmond, Va., on July 25, and that "failure to pay premiums at the stipulated period

shall make the policy void," and the usual "form of notice," issued some days preceding, directed the insured to remit by postoffice or express money order, or bank draft on Richmond or New York, yet if he had for several years paid his premiums through the mail by checks drawn by a certain business firm endorsed by himself, and the company had accepted this method of payment, then he had a right to rely upon a continuance of this method.

2. Forfeitures are not favored—while the former course of dealings between the parties does not change the contract, it will be regarded by the courts to prevent forfeitures on the ground of unfairness and surprise.

3. The regularity of the mail, a public agency, is such that it is not negligence to rely upon it as a method of transmission, especially as it had been so used in the course of dealings between the parties, and there was no express revocation.

4. A letter, containing the usual check for premium due July 25, deposited in the forenoon of that day, in full time to reach Richmond, in due course of mail by 6 o'clock p. m., but which, for some reason unknown, did not reach its destination until 8 o'clock a. m., July 26, is a sufficient transmission in point of time to prevent a forfeiture, and so far operated as a payment that the company had no right to cancel the policy and return the check, as coming too late.

5. The rule of damages in such case is the aggregate of premiums paid, with interest on each payment from its date.

ACTION to recover premiums paid on a life policy of insurance, (399) upon the ground that the policy had been wrongfully canceled, tried before *Brown, J.*, at April Term of WAYNE.

The plaintiffs were brothers, and one of them, A. B. Hollowell, had taken out a policy of insurance upon his life for the benefit of the other in the defendant company for $1,000. Twenty-nine semiannual premiums had been paid, usually by endorsed checks of a business firm in Goldsboro, transmitted through the mail to the defendant at Richmond, Va. The thirtieth premium, due 25 July, 1898, was transmitted the usual way—by letter containing the endorsed check, deposited in the postoffice at Goldsboro in the forenoon of that day in time by due course of mail to reach Richmond that afternoon at 6 o'clock. For some unknown cause it did not reach its destination until 8 a. m. next morning. Thereupon the defendant company canceled the policy, and returned the check, claiming a forfeiture on account of the nonpayment of the premium *ad diem* as stipulated in the policy.

After finding issues establishing these facts the jury assessed plaintiff's damages at $492.85, which sum included all the payments made with interest from date of each.

The special instructions asked for by defendant and refused, and the instructions given, and excepted to by defendant are stated in the opinion.

From the judgment rendered in accordance with the verdict, the defendant appealed.

Battle & Mordecai for plaintiff.
Allen & Dortch for defendant.

CLARK, J. The premium was payable in Richmond, Va., 25 July. The policy provides that "failure to pay premiums at the stipulated period shall make the policy void." The jury find upon issues submitted that the mailing of similar drafts had been the method of
(400) payment acquiesced in by the defendant, and that the letter containing a draft to pay the premium was deposited by the plaintiff on the morning of 25 July, in the post-office at Goldsboro, in ample time to reach Richmond, Va., in due course of mail by 6 p. m. the same day. The evidence was that the letter did not in fact reach Richmond till 8 a. m., 26 July.

The first exception relied on by appellant is the refusal of the court below to give the 8th special instruction prayed for, to wit:

That if the jury find that the defendant notified the plaintiff on or about 15 June, 1898, that the semiannual premium would be due on 25 July, 1898, and directed him to remit by post-office or express money order, or bank draft on Richmond or New York, then it was the duty of the plaintiff to remit in the manner directed by the defendant, or pay the cash, and if he failed to do one or the other, said premium was not paid on 25 July, 1898, although the plaintiff may have mailed his individual check or the check of H. Weil & Bros., in time to reach the office of the defendant on 25 July, 1898.

The court charged on this matter as follows:

That if the jury were satisfied by a preponderance of the evidence that the plaintiff had for several years paid his premiums through the mail by checks drawn by H. Weil & Bros., and endorsed by the plaintiff, and the defendant had accepted this method of payment, then the plaintiff had a right to rely upon a continuance of this method, and the jury would answer third issue, "Yes."

In this there was no error. In *Insurance Co. v. Eggleston,* 96 U. S., 577, the Court says:

"We have recently, in the case of *Insurance Co. v. Norton,* 96 U. S., 234, shown that forfeitures are not favored in law; and that
(401) courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. *Any agreement, declaration or course of action on the part of* an insurance company, *which leads a party insured, honestly to believe that by conforming thereto a*

forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

This line of decisions rests upon the ground not that the course of dealing changes the contract, but that the other party is misled by relying upon it, as he has a right to do until expressly notified that the course of dealings would be discontinued. That was not done by sending the usual "form of notice" which is recited in the prayer for instruction, which form of notice had always been used. In *Hassardshort v. Hardison,* 117 N. C., 60, relied on by the defendant, there was an express notice that the plaintiffs "would take no more of these drafts (which they had been receiving) unless they were secured, and that they would stop delivering logs unless some arrangement was made to secure them." In the present case there was no such notice, but merely the sending of the customary stereotyped formal notice under which the company had been for years accepting drafts or checks, just such as was sent on this occasion. To insist on a forfeiture on that account without express notice would be to mislead the plaintiff, as much as if a trap had been set to catch him.

The next exception insisted upon is the refusal of the court to give this instruction:

"That if the jury believe the plaintiff deposited a letter con- (402) taining said premium in the post-office at Goldsboro in time to be transmitted to Richmond on 25 July, 1898, and said letter was not so transmitted and did not reach Richmond until 26 July, 1898, on account of the negligence of the post-office department or some employee thereof, then said premium was not paid on 25 July, 1898, and the policy would be forfeited, and jury should answer fifth issue, 'Nothing.'"

Refused; defendant excepted.

The judge charged as follows:

"And if the jury should be satisfied by a preponderance of the evidence that the plaintiff mailed the letter addressed to the defendant, in Richmond, Va., on the morning of 25 July, 1898, in time to have reached Richmond by 6 p. m. on that day, and said letter contained a check of H. Weil & Bros., endorsed by the plaintiff to the defendant, and if they shall further believe that the plaintiff has been in the habit for several years of paying his premiums by said checks, sent by mail, and the defendant has been in the habit of receiving said checks, sent by mail, in payment of the premiums, and the defendant received said check on the morning of 26 July, and returned the same to the plaintiff, and can-

celed the policy, then said cancellation was wrongful, and the jury will answer the fourth issue, 'Yes.'" Defendant excepted.

The notices sent to plaintiff by the defendant directed him to "Remit," etc. "Remit" means "transmit, forward, send." Soule's Synonyms.

In *Whitley v. Insurance Co.,* 71 N. C., 480, it is held that when a premium is delivered according to instruction to the express company to be forwarded, it is a payment that prevents a forfeiture. A case exactly in point is *Kenyon v. Association,* 122 N. Y., 247, which says:

"The distance between the place of residence of the assured
(403) and the defendant's home office was such that a payment of assessment by his personal delivery at the latter place evidently was not contemplated, and so far as appears the defendant was satisfied with the method of remittance from him directly to its office by mail; and such means of transmission may have been within the expectation of the parties in view of their situation. And doing it through the postal service might very well be deemed no less safe and appropriate than any other manner to make payments by means of bank checks. As this had been uniformly the manner of transmitting and accepting payment or the means of payment of assessments adopted by the parties, it may be said that the postal medium of transmission had in some sense become a matter of usage between them, having the nature of an implied agreement to that effect."

This case also meets the objection raised in defendant's brief that in the prior dealings all the checks were received before the premium fell due. "And the conclusion was warranted that by the course of dealing by the defendant in that respect, the assured may fairly and in good faith have been led to suppose that the requirement of the defendant upon him was satisfied by mailing as he did, in his customary manner of doing it, the check for the amount of the last assessment. The proposition was not necessarily overcome by the fact that the other checks were received prior to the time the assured had the right to make payment, although that properly may have been a matter of consideration by the jury upon the question submitted to them."

It will be observed that in the case in New York the premium was not received at all, but the Court held that the company could not, after its course of dealings, forfeit the policy.

By this it is not meant that if the money is lost in the mail,
(404) or if the drawee becomes insolvent before presentation of the check or draft, the insured is discharged from making good the loss, on notice, but simply that it is so far a payment that it prevents a forfeiture. A remittance by mail or other method is at the risk of the debtor, unless the creditor expressly, or by a course of dealing, authorized such mode at his risk. *Gurney v. Horne,* 69 Am. Dec., 299;

Tayloe v. Insurance Co., 9 Howard (U. S.), 390. But the regularity of the mail, a public agency, is such that it is not negligence to rely upon it, especially when such method of transmission has been previously the course of dealing between the parties, and there was no express revocation of it.

The rule of damages laid down by the Court follows *Lovick v. Insurance Co.*, 110 N. C., 93; *Braswell v. Insurance Co.*, 75 N. C., 8; *Burrus v. Insurance Co.*, 121 N. C., 62.

Affirmed.

Cited: Higdon v. Tel. Co., 132 N. C., 729; *Gwaltney v. Assurance Soc., ib.*, 930; *Brockenbrough v. Ins. Co.*, 145 N. C., 355; *Green v. Ins. Co.*, 139 N. C., 313; *Coile v. Commercial Travelers*, 161 N. C., 107; *Mill Co. v. Webb*, 164 N. C., 89.

(405)

H. L. WALL, ADMINISTRATOR OF W. N. BLACKBURN, v. JOHN D. WALL, ADMINISTRATOR OF MOLLIE B. BLACKBURN AND OTHERS, HEIRS AT LAW OF W. N. BLACKBURN.

(Decided 24 April, 1900.)

Deed—Reservation for Support of Imbecile Daughter—Charge Upon Rents and Profits—Notice of Charge by Subsequent Vendee—Amount, When Ascertained, a Lien.

1. Where a mother in a deed to one daughter provides that another daughter, imbecile, should be supported out of the income of the property so conveyed during her life, the courts will observe the intention when they can and give effect to it.
2. The reservation for the support of the daughter is a lien on the land, and not a mere personal charge against the grantee. If the grantee subsequently conveys the land subject to such reservation, the subsequent grantee takes the title with express notice, and is as much liable for its performance as the original grantee.
3. A reservation will be considered as made to the grantor, when valuable rights are secured to him, although others may be benefited by it.

PETITION to sell land for assets, transferred to Superior Court docket and heard before *Shaw, J.*, upon statement of facts agreed at Fall Term, 1899, of STOKES.

On 29 October, 1881, Mrs. Margaret Blackburn conveyed to W. B. Vaughan and wife (her son-in-law and daughter), for a consideration of

$1,000, a tract of land in Stokes County, containing 225 acres, more or less—"reserving to herself the possession, use, enjoyment and control of the tract of land for and during her natural life, and reserving also the care and support of her daughter, Margaret Eliza Blackburn, for and during the life of the said Margaret Eliza."

On 22 November, 1883, W. B. Vaughn and wife, in consideration of $2,000, conveyed to William N. Blackburn and his heirs said tract of land, "subject to such reservation as is contained in a deed made (406) by Margaret Blackburn to us on 29 October, 1881."

Upon the death of William N. Blackburn, his administrator filed this petition to sell this land for assets against his heirs at law; Margaret Eliza Blackburn applied to the court and was allowed to intervene in the cause and set up her rights, under the reservation contained in her mother's deed to Vaughn and wife, and referred to and recognized in their deed to William N. Blackburn.

The court adjudged that said land is hereby charged with maintenance, care and support of the said Margaret Eliza Blackburn for and during her natural lifetime, and it being admitted that she is of weak mind, a reference was ordered to the clerk to ascertain the annual sum required.

The plaintiff excepted and appealed.

Watson, Buxton & Watson for plaintiff.
W. W. King for defendant Wall.
Jones & Patterson for defendant Blackburn.

FAIRCLOTH, C. J. This is an action for the construction of a deed executed by Margaret Blackburn to W. B. Vaughn and wife. The deed, for a valuable consideration, conveys a tract of land in fee, and contains the following clause: "The said Margaret Blackburn, reserving to herself the possession, use, enjoyment, and control of the tract of land for and during her natural life, and reserving also the care and support of her daughter, Margaret Eliza Blackburn, for and during the life of the said Margaret Eliza."

Margaret Eliza, her mother having died, alleges that said reservation for her support is a lien on the land, and the defendants contend that it is only a personal charge against the grantee. The grantee (407) subsequently conveyed the land "subject to such reservation." This is the disputed point in the case.

The intention of the parties is clear, and the courts will observe the intention when they can, without violating any settled rule of law and without conflict with any other material part of the contract.

The title of the whole tract passes by the deed to the purchaser, and

the clause quoted is not an exception to the conveying part of the deed. "An *exception* is always a part of the thing granted, or out of the general words and description in the grant. . . . If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made." 4 Kent Com., 468. "A reservation is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before." *Ibid.,* 468 Shep. Touchstone, 80.

It is plain that the mother, in said deed, when conveying her property to one daughter, intended that her daughter Margaret Eliza should be supported out of the income of the property so conveyed during her life. After reserving for herself for her own life, she then says "also" the care and support of her daughter Margaret Eliza, who has no other benefit under the deed. It is not reasonable to suppose that Margaret Eliza should, after the mother's death and at a time when she most needed protection, be turned out on the cold charity of the world, or the pleasure of her more fortunate brother-in-law. The obvious meaning is that, not only that Margaret Eliza should be supported out of the income and profits of the land, but "also" that her support should be as well secured as that of the grantor; and that security is obtained, as we think, by considering the care and support of Margaret Eliza a charge on the thing issuing out of the land, *i. e.,* the rent, income and profits, as the case may be. This meets the intention of the mother and injuries no one. *Ralphsnider v. Ralphsnider,* 71 (408) West Va., 28; *Goodpaster v. Leathers,* 123 Ind., 121.

In *Gray v. West,* 93 N. C., 442, the will provided "that A. G. should have her support out of the land." This was held to be, not a charge on the *corpus* of the land, but only the right to receive a support out of the rents and profits. When the proper amount under the circumstances shall be ascertained in this case, the Court will require that the rents, profits and income be applied to satisfy the ascertained amount. The present owners of the land took title with express notice of this provision in the original deed, and are as much liable for its performance as the original grantee.

A reservation will be considered as made to the grantor, when valuable rights are secured to him, although others may be benefited by it. *Gay v. Walker,* 36 Maine, 54. We are therefore of opinion that his Honor's construction of the deed was right.

Affirmed.

Cited: *Helms v. Helms,* 135 N. C., 169; *Whitaker v. Jenkins,* 138 N. C., 480; *Redding v. Vogt,* 140 N. C., 572; *In re Dixon,* 156 N. C., 28.

(409)

W. J. ECHERD AND H. F. ECHERD v. E. J. JOHNSON ET AL.

(Decided 24 April, 1900.)

Processioning Proceeding Before the Clerk—Act of 1893, *Chapter* 22—*Course and Distance—Natural Object.*

1. In running a line from an agreed corner, if a natural object, as a tree, is called for in the deed, and it or the spot where it stood can be located, the line must go to it; if it can not be located, course and distance will control.
2. The natural object, or boundary, is not to be found alone by construing the deed; it may be aided by parol proof and by reputation.
3. Where the natural object called for was a post-oak, the plaintiff claiming it was at red 2, on the map, and the defendant at blue 2, and there was evidence tending to show that there were two oak stumps, it was the duty of the jury to find from the evidence which natural object was the proper one, and if they could not from the evidence locate the natural object, course and distance would govern.
4. The court decides *what* the boundaries are, and the jury finds *where* they are. If the natural object or boundary can not be found or located, course and distance will control. *Redmond v. Stepp*, 100 N. C., 212.
5. The burden of showing that the red line was the true line (leading from 2 red) by a preponderance of the evidence, was upon the plaintiff.

SPECIAL PROCEEDING to establish lines, heard on appeal from the clerk by *Shaw, J.*, at Fall Term, 1899, of ALEXANDER.

The county surveyor, in obedience to the order of court, ran the dividing line between the parties, according to the contention of each, and reported a map of his survey.

The dividing line, as indicated, ran north and south, the plaintiffs' land lying east of it and the defendants' lying west. The issues,
(410) contentions of the parties and ruling of the Court appear in the opinion.

There was a verdict for the plaintiff, and from the judgment in his favor the defendant appealed. A copy of the map is subjoined.

A. C. McIntosh for appellants.
R. Z. and F. A. Linney for appellees.

FAIRCLOTH, C. J. This is a processioning proceeding under the act of 1893, chapter 22. The line to be located runs practically north and south, the plaintiffs' land on the east side and defendants' on the west side.

After the pleadings were filed with the clerk, an order of survey was

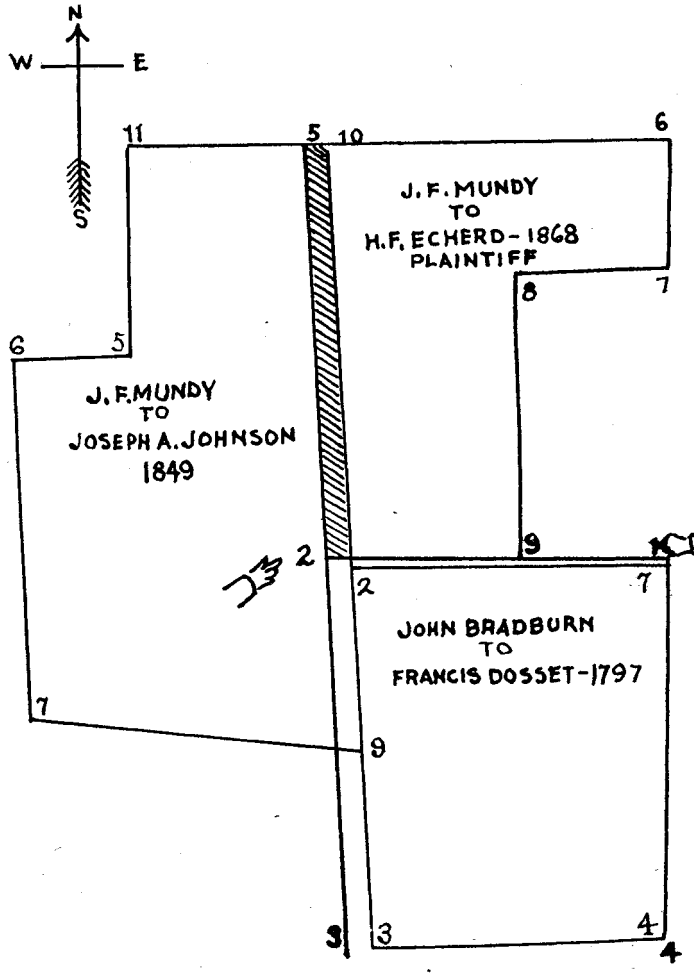
made, and the surveyor was ordered to run said line according to the contention of both parties and to report the same with a map to the court. This was done, and on the trial in the Superior Court this issue was submitted: "Is the line on the map, beginning at red 2 and running to red 5, the true boundary line between the lands of the plaintiffs and defendants?" The jury answered, "Yes." A similar issue as to defendants' contention, from blue 2 to blue 10 was submitted, but not answered.

Numerous witnesses were examined and deeds were introduced, including a deed from John Bradburn to Frances Dorset, in 1797, in which this is the description: "Beginning at a large pine tree in Bradburn's line, thence west 160 poles to two small post-oaks." The beginning corner (1 on the map) is agreed to, and the question turns on the location of the "two small post-oaks." The two old stump places, or holes, claimed by the parties are about three and a half poles apart, one noted on the plot red 2 (plaintiffs'), and blue 2 (defendants'). There was evidence tending each way. Defendant asked for this instruction: "That from a known point course and distance must (411) govern, unless there is some natural object called for in the deed that is more certain; and in this case point 1 being admitted and the natural object called for being uncertain, the corner should be at the end of 160 poles west from 1." In lieu thereof his Honor told the jury that the post-oak called for was a natural object, and that the plaintiff claimed that it was at red 2, and the defendant at blue 2—that there was evidence tending to show that there were two oak stumps, and it was the duty of the jury to find from the evidence which natural object was the proper one, and if they could not from the evidence locate the natural object, then course and distance would govern.

The prayer could not be given, because the jury, upon the evidence, have found and made the natural object certain, which controls, and because the court would have to find as a fact or assume that the natural object could not be located by the jury from the evidence. That has been the province of the jury from a time whereof the memory runs not, and is now considered "familiar learning." The natural object or boundary is not to be found alone by construing the deed. It may be aided by parol proof and by reputation. *Huffman v. Walker,* 83 N. C., 411; *Strickland v. Draughan,* 88 N. C., 315.

The court decides *what* the boundaries are, and the jury finds *where* they are. If the natural object or boundary can not be found or located, course and distance will control. *Redmond v. Stepp,* 100 N. C., 212.

His Honor instructed the jury that the burden of showing that the red line was the true line (leading from 2 red) was upon the plaintiff,



DIVIDING LINE CLAIMED BY PLAINTIFF, RED 2 TO RED 5.
DIVIDING LINE CLAIMED BY DEFENDANT BLUE 2 TO BLUE 10

and if he had by a preponderance of the evidence satisfied them that that was the true line, they should answer the first issue, "Yes"; and in that event they need not consider the second issue; also if they (412) were not so satisfied, they should answer the first issue, "No."

Holmes v. Valley Co., 121 N. C., 410, cited by the defendant, does not apply. In that case there was no effort to establish boundary lines by course and distance, by marked trees and corners, or by calls for natural objects, but it was an effort to identify and locate the first station by evidence, without any chops or signs leading to or from the place, with an imperfect description in the deed. We have discovered no error in the trial below.

Affirmed.

Cited: *Whitfield v. Robeson*, 152 N. C., 100.

LIZZIE C. NEAL v. TOWN OF MARION.

(Decided 24 April, 1900.)

Demand Before Suit, When Necessary Under Section 757 of The Code—Claim Ex Contractu—Contributory Negligence—Voluntary Risk of Known Danger.

1. Under section 757 of The Code, demand before bringing suit against a town is only necessary where the claim is *ex contractu;* it is not required when the claim is for unliquidated damages, and the section does not apply to actions *ex delicto.* *Shields v. Durham*, 118 N. C., 450.

2. If the authorities of a town make and keep in repair a good sidewalk on one side of a public passway, and leave on the other side an abandoned and neglected walk, and these facts are known to a person who chooses in the night time to walk along the neglected path instead of upon the safe walkway, and is injured by reason of a defect therein, then there is contributory negligence, and there can be no recovery for the injuries sustained.

ACTION for damages for injuries alleged to have been sustained, through negligence of defendant, while plaintiff was walking along a passway used as a part of the public street, tried before (413) *Shaw, J.*, at January Term, 1900, of MCDOWELL.

The complaint alleged no demand upon the town authorities for payment of plaintiff's claim, previous to suit, and the defendant moved to dismiss the action on that account. Motion refused. Defendant excepted.

There was evidence tending to show that in the town of Marion there was a passway along the right of way of the Southern Railway Company, used as a public street; that the town authorities had kept in repair a good pavement on the south side of it, but the northern side was neglected, and had become unsafe by reason of holes washed out on that side. Into one of these holes the plaintiff in passing, at night, on that side, fell and received serious injuries. The evidence was conflicting as to whether the plaintiff was aware of the condition of that side of the passway and knew about the holes. She testified that she did not, and if she ever knew about the holes she had forgotten; that she had been absent from Marion for some three months, and there were no holes there when she left; that she fell into one of them on the night of her return; that she had passed there a hundred times.

The charge of his Honor applicable to this part of the case, and excepted to by defendant, is repeated in the opinion.

The jury found by their verdict that the plaintiff had been injured by the negligence of defendant; that she had not by her own negligence contributed to her own injury, and awarded her $500.

Judgment accordingly. Appeal by defendant.

E. J. Justice for plaintiff.
Sinclair & Eaves for defendant.

(414) MONTGOMERY, J. The authorities of the town of Marion in 1881 commenced to use a part of the right of way of the Southern Railway Company as a street. It seems that the street was too narrow to permit of sidewalks on both sides thereof, and that up to 1889 a sidewalk was made and kept up on the north side of the street when the sidewalk was changed to the south side of the street. The plaintiff, who was a resident of Marion, on her return to that place after an absence of a few months, on a train of the Southern Railway Company, upon going to her house along this street at 12 o'clock at night, took the old sidewalk or path on the north side of the street instead of the well kept walkway on the southern side, and fell into a hole in the path, whereby she sustained personal injury, and instituted this action against both the railroad company and the town of Marion for the recovery of damages therefor.

She alleged that she had often walked along that path, and that when she left Marion in January it was in good condition. The defendants in their answer averred that "she (plaintiff) knew of her own personal knowledge that the north side of said thoroughfare was not constructed or prepared or intended to be used by foot passengers, and that the corporation of Marion had provided a sidewalk for foot passengers on the south side thereof, of easy access and perfectly safe. And this de-

fendant further alleges that the plaintiff had knowledge of the excavation, and voluntarily and carelessly, through inadvertence or indifference to exercise due care, and negligently and for convenience refused to go upon the sidewalk prepared for foot passengers, and took the chance of the dangerous path that led over the washout, and was injured, if at all, by her own contributory negligence." After the pleadings were read, the defendant town of Marion moved to dismiss the action on the ground that the complaint did not state facts sufficient to constitute a cause of action in that it did not allege a demand upon the town under section 757 of the Code. There was no (415) error in the refusal of his Honor to sustain this motion.

In *Shields v. Durham,* 118 N. C., 450, this Court unanimously decided that only actions arising *ex contractu* are contemplated under section 757 of the Code, and that that section does not apply to actions *ex delicto.* The opinion was written by Justice FURCHES for the Court, and he discusses the question clearly and forcibly and at some length, going into the reason of the matter. In that opinion the Court said: "This motion has received our careful attention, and has given us some trouble. But after a thorough consideration of the matter we have come to the conclusion that section 757 of the Code does not apply to an action like this, for unliquidated damages." That part of the opinion in that case has been three times affirmed by unanimous decisions of this Court—*Frisby v. Marshall,* 119 N. C., 570; *Sheldon v. Asheville, ibid.,* 606; *Nicholson v. Commissioners,* 121 N. C., 27. It does seem that if there is anything in the doctrine of *stare decisis* it ought to be applicable to the point which we have been discussing. We call it a *point* because it does not reach the dignity of a principle of law or a rule of property.

His Honor, after setting out the contentions of the respective sides to the jury, instructed them, "That though she (plaintiff) may have known of the existence of this defect prior to this time, yet the court further charges you that she is not required to carry around in her memory the defect in the street, and if she may have known of its existence, at the time she did not think about it, and was injured, that would not be contributory negligence." We think there was error in that instruction.

The court most probably had reference to the decision in *Russell v. Monroe,* 116 N. C., 720. It was there held that "all (416) persons had a right to assume that the authorities of a town have used ordinary care in the discharge of their duty, and that the streets are in proper condition," and that the plaintiff in that case "was not required to see and treasure up in her memory the location of every defective place in the sidewalk which she had or might have seen during the day time, nor was she expected to see all such places." But in that

case the plaintiff herself testified that she had been living in Monroe only one year, and had been up town very little, and had never seen the hole before. In the case before us the plaintiff had been long a resident of Marion, and had been thoroughly familiar with the walk, having traveled it hundreds of times, as she testified. Now if she knew that that hole was in the path, and at night walked along it, and through forgetfulness carelessly walked into it, she negligently contributed to her own injury. It was not reasonable care on her part to forget such a menace to her safety; and even if it should be conceded that if the town was negligent, if she, through the want of proper care and prudence contributed to her injury, both parties being negligent, she can not recover.

In *Butler v. Covington,* 69 Ind., 33, it was decided that where a party knows of the existence of an open cellar-way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, even if he had forgotten the existence of the obstruction, and if he receives injury from falling into such cellar-way he is chargeable with contributory negligence and can not recover damages. There are many cases to the same effect cited in the case of *Walker v. Reidsville,* 96 N. C., 382, to which case we refer as authority for our ruling in this matter.

There is nothing in *Bunch v. Edenton,* 90 N. C., 431, inconsistent with what we have here decided; in fact, the decision in that case (417) is a support for the decision in this. But besides, if the authorities of a town make and keep in repair a good sidewalk on one side of a street, and leave on the other side an abandoned and neglected walk, and those facts are known to a person who chooses in the night time to walk along the neglected path instead of upon the safe walkway, and such person be injured by reason of a defect in the path along which he chooses to walk, then there is a contributory negligence on the part of the injured person, to say the least, and there can be no recovery for the injuries sustained. For the error in the charge of the Court as pointed out there must be a

New trial.

DOUGLAS, J., dissents.

Cited: Neal v. Marion, 129 N. C., 346; *Carrick v. Power Co.,* 157 N. C., 382; *Ovens v. Charlotte,* 159 N. C., 334; *Thompson v. Construction Co.,* 160 N. C., 391; *Darden v. Plymouth,* 166 N. C., 494; *Sugg v. Greenville,* 169 N. C., 617.

(418)

B. BLANTON & CO., D. B. F. SUTTLE AND C. M. WEATHERS v. J. B. BOSTIC, T. P. CRAWFORD, AND D. D. SUTTLE AND WIFE, M. J. SUTTLE, AND D. D. SUTTLE, ADMINISTRATOR OF E. H. WRIGHT ET AL.

(Decided 24 April, 1900.)

Deed in Trust to Secure Sureties—Surety, not Secured, is a Party in Interest—Acknowledgment and Privy Examination Taken by Party in Interest—Renewed Notes—Power of Referee to Allow Amendment of Pleadings, Code, Section 422—Right of Subrogation of Omitted Surety and of Payees in the Note Secured—Release by Secured Sureties, Effect of—Probate Before Disqualified Officer—Void Registration—Grantee with Notice of Defective Acknowledgment or Probate.

1. If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrancers.

2. But when the incapacity of the acknowledging or probating officer is latent, *i. e.*, does not appear upon the record, one who takes under the grantee in such instrument gets a good title, unless the party claiming the benefit of the defective acknowledgment or probate is "cognizant of the facts."

ACTION in nature of suit in equity for subrogation, heard before *McNeill, J.*, at Fall Term, 1899, of BUNCOMBE on exceptions to referee's report.

On 4 January, 1890, the defendant D. D. Suttle became indebted to H. D. Lee & Co., by note, in the sum of $1,818, to C. M. Weathers in sum of $1,188.80, and to D. B. F. Suttle in sum of $400, all due by note, with J. B. Bostic, E. H. Wright and J. F. Bostic as sureties. On the same day, D. D. Suttle and wife, M. J. Suttle, to further secure the notes and indemnify the sureties, executed to two of them, (419) J. B. Bostic and E. H. Wright, a trust deed on real estate. The acknowledgment of this trust by the makers and the privy examination of Mrs. M. J. Suttle were had before J. T. Bostic, the remaining surety, who was a justice of the peace, and his certificate was appended thereto, upon which the probate was had, and registration was ordered and made. In August, 1892, D. D. Suttle renewed his notes to his three creditors. H. H. Lee & Co. assigned the note held by them to B. Blanton & Co. In 1895 all the holders reduced their notes to judgment. E. H. Wright, one of the sureties, died, and D. D. Suttle became his administrator.

On 10 December, 1890, D. D. Suttle sold the land to W. C. Bostic, and Suttle and wife made him a deed, and W. C. Bostic assigned his interest

to T. P. Crawford, both of whom have been made parties. By some arrangement made with them and D. D. Suttle, his sureties agreed that the trust deed of 4 January, 1890, should be surrendered and canceled. S. J. Bostic claimed to have acquired an interest in the land under a sheriff's deed, and he has been made a party.

There was a reference ordered to M. H. Justice, Esq., to ascertain and report the facts and law. The case was heard upon exception filed by both sides, and was in all respects confirmed, and both sides appealed.

The plaintiff creditors contended that their right being the oldest took precedence over all others, and that they were entitled to be subrogated to the rights of the sureties in the trust deed executed for their indemnity. The referee so reported and the court so held.

The defendant claimants contended that the said trust deed executed by D. D. Suttle and wife on 4 January, 1890, was null and void as against subsequent purchasers and incumbrancers because the
(420) acknowledgment and privy examination were had before J. T. Bostic, one of the sureties, a justice of the peace, but disqualified to act as such in this case, because he was a party in interest.

Upon this point the case turns.

D. W. Robinson for plaintiff.

T. H. Cobb for defendant.

CLARK, J. D. D. Suttle, on 4 January, 1890, executed his promissory note with three sureties. On the same day he executed his deed in trust to secure two of said sureties, and his acknowledgment of the deed and privy examination of his wife were taken before a justice of the peace who was the other surety and who was not named in the deed. The notes were renewed in 1892, and by successive assignments have become the property of the present substituted plaintiff. The deed in trust was released by the two sureties, beneficiaries named therein, and the grantor then made the conveyance under which defendants claim. This is an action by the payees of the notes to subject the land under the deed of trust. It needs no discussion to say that it was correctly held by the referee and approved by the judge.

1. That the renewal of the notes did not relinquish the lien in the absence of evidence to show such intent. *Hyman v. Devereux,* 63 N. C., 627; *Vick v. Smith,* 83 N. C., 82; *Matthews v. Joyce,* 85 N. C., 266; *Bank v. Manufacturing Company,* 96 N. C., 298; *Bank v. Ireland,* 122 N. C., 574.

2. The referee had power to permit amendments to the pleadings. Code, section 422.

The note having been again assigned, since this action begun, it was also proper to make the assignee a substituted party plaintiff.

It was also correctly held that the surety, omitted in the deed in trust, was entitled to be subrogated to the rights of his co- (421) sureties *pro tanto,* if he had paid the debts, and the payees in the notes had a superior equitable right of subrogation to the benefit of any security given by the principal debtor to his sureties (*Ijames v. Gaither,* 93 N. C., 362; *Sherrod v. Dixon,* 120 N. C., 63; *Harrison v. Styres,* 74 N. C., 290; *Wiswall v. Potts,* 58 N. C., 189), whether they knew of it or not. *Matthews v. Joyce, supra;* Brandt on Suretyship, section 282.

It is also true that if the payees in the note acquired a valid right to subrogation to the security given the sureties, this right could not be released by the sureties to the detriment of the principal creditor. *Matthews v. Joyce* and *Ijames v. Gaither, supra; Ingram v. Kirkpatrick,* 41 N. C., 475; *Southerland v. Fremont,* 107 N. C., 571; *Bizzell v. McKinnon,* 121 N. C., 189; Brandt, *supra,* sections 282, 283.

The effect of the acknowledgment of the trust deed before the third surety, who is not named therein, was earnestly presented. The principle that the probate of a deed taken by one who is disqualified for any cause is void (*White v. Connelly,* 105 N. C., 65), applies equally to invalidate the deed when the officer taking an acknowledgment and privy examination is disqualified. *Long v. Crews,* 113 N. C., 256, and cases cited on page 258; *McAlister v. Purcell,* 124 N. C., 262; 1 Devlin Deeds, 476; 1 A. & E. Enc. (2 Ed.), 493, and cases cited by both.

If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrancers. *Quinnerly v. Quinnerly,* 114 N. C., 145. But when the incapacity of the acknowledging or probating officer is latent, *i. e.,* does not appear upon the record, one who takes under the grantee in such instrument gets a good title. *Bank v. Hove,* 55 Minn., 40; *Heilbroun v. Hammond,* 13 Hun (422) (N. Y.), 474; *Bancks v. Ollerton,* 26 Eng. L. & E., 508, unless, as is said in *Groesbeck v. Steely,* 13 Mich., 329, by *Campbell, C. J.,* (*Judge Cooley,* concurring), the party claiming the benefit of the defective acknowledgment or probate is "cognizant of the facts."

Here the invalidity is not in the execution of the trust deed, but in its registration upon an invalid acknowledgment; and it is valid between the parties without registration. The acknowledgment is valid on its face, but the payees in the note knew who the sureties thereto were, knew the acknowledging officer, though not named in the trust deed, was a beneficiary thereunder, and hence that the registration thereunder was void. If the plaintiffs had proceeded to obtain judgment and execution upon their debt, they could have set the deed in trust for the sureties aside, but they chose to rely upon their rights to subro-

gation to the rights of the sureties under a registration they knew to be invalid. If the grantor had merely made a subsequent conveyance to the defendants, it would have been valid as against the unregistered deed to the sureties, for such it was upon the defective acknowledgment; for though the defect was not upon the face of the papers, . . . the payees were cognizant of the latent defect. It makes nothing either way that the sureties attempted to release the security. Had it been valid, they could not have released it as against the principal creditor, and the deed being invalid (as to third parties) by the defective registration the defendants acquired a good title, not by virtue of the release but by the deed of the grantor to them, irrespective of it.

If the defendants had claimed title under a conveyance from the trustee and *cestuis que trust* (instead of from the grantor in the (423) trust deed) while they would not have been affected by the latent defect in the acknowledgment, and consequently in the registration of the trust deed, they would have been fixed with notice that, by its terms, it was to secure the sureties, and therefore that the principal creditors had acquired rights which the sureties and trustees could not impair. But, here, the defendants rely upon the subsequent deed from the grantor, and it is the principal creditors who set up the trust deed and rights acquired thereunder, and, when they do so, they are barred by the fact that the registration of the trust deed was not valid, because they knew of its defectiveness. In holding that the land was subject to the payment of the plaintiff's debt, there was error. It is unnecessary to consider the plaintiff's appeal.

In defendant's appeal — Error.
In plaintiff's appeal — No error.

Cited: Land Co. v. Jennett, 128 N. C., 4; *Martin v. Buffaloe, ib.,* 308; *Spruce Co. v. Hunnicutt,* 166 N. C., 208.

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(424)

MAGGIE MEANS, ADMINISTRATRIX OF TAYLOR MEANS, v. THE CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 24 April, 1900.)

Negligence — Contributory Negligence — Fellow-servant — Superior — Right to Discharge—Risk Assumed—Conductor—Brakeman—Motion to Nonsuit Under Acts 1897 and 1899—Charge of the Court—Act of 1796 (Code, sec. 413.)

1. The defendant company, which ran a mixed local freight and passenger train regularly between designated places, on schedule time, soliciting

travel, and with growing business, is guilty of negligence in not having a conductor, but requiring an engineer, or some subordinate under him, to perform the additional duty.

2. An engineer in charge of a train, with power of appointment and discharge, is not the fellow-servant of a brakeman, but his superior or vice principal.

3. Such engineer, who required a brakeman to collect and bring him the passenger tickets without giving him opportunity to return safely to his post, leaving him to scramble back over the top of the train in motion at night, in which effort he fell from the train and was killed, is guilty of negligence for which the defendant company is responsible.

4. A brakeman who, at the command of his superior, performed the duties of conductor assumed only the ordinary risk attendant upon the duty, and was not responsible for the extra hazard to which he was exposed, and by which he lost his life.

5. The trial judge who stated to the jury that there were phases of the case apparently admitted by the defendant's counsel, and if not, to be passed upon by the jury, involving negligence, did not violate the act of 1796, The Code, section 413. The uncontradicted facts would have warranted a still more emphatic statement as to negligence.

6. Acts of 1897 and 1899 relating to motions to nonsuit now enable a defendant, as matter of right, should the motion be refused, to introduce evidence; formerly it was matter of discretion of the court to allow it, or not.

ACTION for damages for alleged negligence in occasioning the death of Taylor Means, intestate of plaintiff, tried before *Mc-* (425) *Neill, J.*, at October Term, 1899, of MECKLENBURG.

This case was before the Court at February Term, 1899, and is reported in 124 N. C., 574. The evidence is about the same as on the former trial. Briefly, there was evidence tending to show that the company ran a daily mixed freight and passenger train between Charlotte and Rutherfordton—stopping at regular stations on schedule time. The train had no conductor—his duties were usually performed by the engineer in charge, and sometimes by the intestate of plaintiff, Taylor Means, a brakeman, by his direction. On the night of 4 December, 1894, at Crouse's Station, Taylor Means was directed by the engineer to collect the tickets and bring them to him. This was done; but the train being in motion, his only way to get back to his post was over the top of the cars; in making the attempt, he fell and was killed.

The jury found that there was negligence; no contributory negligence; and awarded $300 damages. Judgment accordingly for plaintiff. Defendant appealed.

The exceptions are adverted to in the opinion.

Osborne, Maxwell & Keerans and McCall & Nixon, for plaintiff.
Burwell, Walker & Cansler for defendant.

FURCHES, J. This case is before us for the third time, as may be seen in 122 N. C., 990, and 124 N. C., 574. The facts stated in this appeal are substantially the same as when here last, 124 N. C., 574, and for that reason it is not necessary for us to restate them.

The plaintiff's intestate was killed before the passage of the
(426) Fellow-servant Act of 1897 (ch. 56, Private Laws), and is governed by the law as it existed before its passage. The train that killed the intestate was composed of freight cars and a passenger coach used for the accommodation of the traveling public. It was run on regular schedule time, and did a considerable passenger business. It was under the control and management of John Hall, who was both engineer and conductor, and the intestate was one of the employees composing the crew. His employment was graded as that of brakeman, and his duties were to act as a brakeman, and also to attend the "shanty" coach, keep it in order, keep up fires, and, when directed to do so by Hall, to collect the passenger fares. Hall had the right to employ the hands composing his crew, the right to discharge them, and had the right to discharge the intestate, Means, and the intestate knew this.

On the night the intestate was killed at a station on the defendant's road, called "Crouse," it is in evidence, offered by the plaintiff, that Hall ordered the intestate to collect the passenger fares and bring them to him. This was denied by the defendant. The plaintiff also offered evidence to the effect that after the train had started, the intestate rushed forward with something in his hand and said, "Let me by, I have to take these tickets to Mr. Hall." It is also in evidence that the intestate got on the moving train and delivered the tickets to Hall; and that by the time the intestate got to Hall and delivered the tickets the train was moving too fast for the intestate to get off the train and get on again at the rear end, where his duties as brakeman were; or if so, not without great risk and danger.

The train moved on for a short distance when a jar was felt; the train slowed up and stopped, and Hall came back inquiring for "Means," saying he was killed, he felt the jar. They went back and found his mangled body, cut in twain, one-half on the outside of the iron rail, and the other half inside.

(427) It is not certainly known how the accident occurred. But upon examination, the glass of the intestate's broken lantern was found on a flat car next to the tender; and it is supposed that, in trying to make his way back over the train after delivering the tickets to Hall, he fell between the tender and the flat car, and was run over and killed. This, we think, fairly presents the case on appeal.

There are a great number of exceptions in this case, and thirty-nine assignments of error—presenting probably different shades of phases,

in which the able counsel of the defendant, from his standpoint, is able to see more merit than we are. They have all been examined and considered, but it could hardly be expected that we should discuss each one of these assignments in the opinion of the Court. We will therefore have to consider them together as we think they bear upon and affect the merits or points involved in the case.

One of the principal matters discussed was the nature of the employment of the intestate, his duties, and assumption of risk. We do not propose to pursue this line of discussion further than to say that if it was embraced in the contract of employment, that it was an extra duty required of a brakeman, and if he assumed any risk above that of a brakeman, it was only such risk as would ordinarily exist in collecting the fares of passengers and taking them to Hall.

Another exception is that the court violated the act of 1796 (Code, sec. 413) in what he said as to the duty and liability of the defendant in not having a conductor on this train. It seems to us—the facts upon this part of the case being the same as they were when the case was here before—that the court might have gone further than it did, and have told the jury that the defendant was guilty of negligence in not having a conductor on this train. And if this is so, it can not be contended that what the judge did say was in violation of (428) the statute.

At the close of the plaintiff's evidence, showing the death of the intestate, the manner of his death, the fact that the road was being operated at that time by Hall as engineer and without a conductor—Hall acting as conductor—that Hall was the vice principal of the intestate, having the right to discharge him from the defendant's service; that he had ordered the intestate just before leaving Crouse's Station to collect the tickets and bring them to him; that the intestate had collected and carried them to Hall, and when he delivered them to Hall the train was running too fast for the intestate to get off and on again with safety; and that Hall did not stop or slow up the train to enable the intestate to get off and on with safety—we say, at the close of this evidence, the defendant moved to nonsuit the plaintiff under the act of 1897. This motion was refused, as we think it should have been. It could not have been allowed, without disregarding what this Court had said was negligence in the defendant's not having a conductor on the train. And besides this, there was other evidence tending to show negligence in the defendant, as we will point out further on.

Upon the defendant's motion to nonsuit being refused, the defendant introduced evidence, and, at the close of the evidence on both sides, renewed the motion to dismiss, on the first motion and also on the second motion. This kind of practice seems to have been authorized under

the act of 1897, chap. 109, as originally passed. *Purnell v. R. R.*, 122 N. C., 832; *Wood v. Bartholomew, ibid.*, 177. But under the amendment of 1899, this practice is not allowable. The defendant may stop his case at the close of the plaintiff's evidence, and move to dismiss upon the ground that the plaintiff has not made a *prima facie*
(429) case. And if his motion is refused, he has the right of appeal from the ruling of the court. But if he does not stop his case and appeal, and introduces evidence, he loses the right of appeal from the refusal to dismiss. When the evidence is all in, he may again move to dismiss upon the ground that the plaintiff has not made out a case. And the only difference between this motion and the one made at the close of the plaintiff's evidence is that the plaintiff's evidence stands as it stood when the first motion was made, and he also has the benefit of any new evidence that may have been introduced, since that motion was made, by either side, favorable to the plaintiff. As we understand the original act and the amendment of 1899, the rule now stands just as it did before the passage of the act of 1897, chapter 109, and the amendment of 1899, except that, under this legislation, it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss, or not; while before these acts, it was discretionary with the court whether it would allow the defendant to introduce evidence after resting his case and making the motion. We can not sustain the defendant's exception upon this ground.

The defendant was guilty of negligence in not having a conductor on this train—same case, 124 N. C., 574. Hall was the vice principal, and, as such, must be treated as the principal. *Mason v. R. R.*, 111 N. C., 482; S. c., 114 N. C., 718. As such, he had the right, the power, to discharge the intestate from the employment of the defendant. This power was admitted by Hall on the witness stand. Hall then had the right to order the intestate to bring him the tickets and the undisputed evidence is that he brought Hall the tickets.

The plaintiff's evidence (Sam Reid) is that Hall ordered the intestate, just before starting the train at Crouse's Station, to bring
(430) him the tickets. It is true that Hall denies this. But as the plaintiff had offered evidence that he did, it was then a question for the jury; and from their verdict, we must take it that they found that he did give the order.

The plaintiff offered evidence that, at the time the intestate gave Hall the tickets, the train was moving too fast to admit of the intestate's getting off the train and on it again, with safety. This is denied by the defendant's evidence, and it then became a question for the jury; and we must take it from their verdict that they believed the plaintiff's evidence.

As it seems to us that these questions were fairly submitted to the jury we can not reverse their findings.

Taking these findings to be true, the defendant was negligent in ordering the intestate to bring Hall the tickets, without giving him time to do so, without having to incur the danger—the hazard—he did in obeying this order.

It is seen that the defendant was negligent in running this train without a conductor and imposing the duties of this position on the intestate; and that it was guilty of negligence in giving this order to the intestate, without giving him time to perform it without danger to his life.

It is admitted that the intestate was killed by the defendant's train, and the jury have found that the killing was caused by the negligence of the defendant. We think there was sufficient evidence of negligence to authorize the verdict, if the jury believed the evidence, and it seems from their verdict they did, and we can not review their findings.

The second issue—contributory negligence—was upon the defendant to establish. *Wood v. Bartholomew* and *Purnell v. R. R., supra.* As we have said, the evidence does not disclose just how the intestate came to fall. But this question has been fairly submitted to the jury upon the evidence in the case, and they have found that the negligence of the intestate did not contribute to his death. (431)

We do not understand the defendant to contest the finding of the jury upon the third issue—the measure of damages, if the plaintiff is entitled to recover anything.

Upon a review of the whole case, we are of the opinion that the defendant has had a fair trial, and we find no legal errors for which we should order a new trial.

No error.

Cited: Carter v. Lumber Co., 129 N. C., 207; *Parlier v. R. R., ibid.,* 263; *Ratliff v. Ratliff,* 131 N. C., 428; *Prevatt v. Harrelson,* 132 N. C., 252; *Jones v. Warren,* 134 N. C., 392; *Rackley v. Roberts,* 147 N. C., 209; *Hollifield v. Telephone Co.,* 172 N. C., 725.

C. L. LAUDIE AND MARGARET E. LAUDIE, HIS WIFE, v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 24 April, 1900.)

Telegram—False Assurance as to Delivery—Embarrassment and Mental Anguish Resulting—Conflict of Evidence—Province of Jury—Duty of Company—Damages.

1. Where it is conceded that the defendant was not guilty of negligence in failing to deliver a telegram, it is liable for its negligent assurance that it had been delivered.

2. On trial of issues of fact, or of questions of mixed law and fact, properly submitted, and there is conflicting evidence sufficient to go to the jury, the court assumes as proved all facts found by the jury either directly or by necessary implication.

3. In case of negligent untrue assurance that a message had been delivered, such assurance is actionable, but the plaintiff can only recover such damages as resulted directly therefrom.

4. When practicable, the sender of a message should be promptly informed when a message can not be delivered.

ACTION for damages for the mental anguish occasioned the *feme* plaintiff by the alleged negligent and untrue assurance that a (432) death message had been delivered, tried before *Allen, J.*, at January Term, 1900, of MECKLENBURG.

The plaintiffs lived in Charlotte, N. C., where on 24 May, 1897, they lost by death a young child whom they desired to bury at Chesterfield, S. C. The telegraph line did not extend to Chesterfield, but did to Cheraw, S. C., and there was a telephone wire from Cheraw to Chesterfield used by defendant.

At the instance and request of his wife, Mr. Laudie, about 10 o'clock that day, sent the following dispatch to a relative of hers residing at Chesterfield:

"T. L. Huntley, Chesterfield, S. C.

"Frank dead. Meet depot at Wadesboro, 8 a. m.; bury him in Chesterfield. Grave 3 feet. C. L. LAUDIE."

He called the attention of the operator to the importance of the message, and paid the charges both for the dispatch and the telephone message. About 12 o'clock he returned, and inquired if the message had been delivered, and he testified that he was assured that it was. It turned out that such was not the fact, as owing to the telephone wire being down, the message was not delivered to Huntley until 10 o'clock next morning. There was a conflict of evidence as to assurance given

Laudie, testified to by him about the delivery of the message. The operator testified that he told Laudie it was sent but could not tell him whether it was delivered.

The *feme* plaintiff, upon receiving information of the delivery of the message, made arrangement for the trip and started off from Charlotte next morning on the train, with the body, and three children. On reaching Wadesboro, about 7 o'clock, there was nobody to meet her. She was detained there until about 10 o'clock before she could get away—having no one to accompany her but the driver of (433) the hack to Chesterfield, a distance of eighteen miles. She testified that she suffered great anguish of mind occasioned by the negligent and untrue assurance of the delivery of the message and from the embarrassment and loneliness growing out of it. When near Chesterfield, she met Mr. Mangum about 1 o'clock. He had been sent by Mr. Huntley to meet her.

The jury found (1) that the *feme* plaintiff was injured by the negligence of the defendant; (2) that the damage she sustained was $1,000.

There were some objections made by the defendant to some of the evidence, which are referred to in a general way in the opinion, as untenable. It was conceded that plaintiff was not entitled to recover for the nondelivery of the message under the circumstances—but it was insisted that she was entitled to recover on account of negligence in the assurance that the message had been delivered, and the mental suffering consequent upon it.

There were exceptions to his Honor's charge, adverted to in the opinion. Judgment in favor of plaintiff for $500. Appeal by defendant.

Osborne, Maxwell & Keerans for plaintiff.
Jones & Tillett for defendant.

DOUGLAS, J. This case was here before, 124 N. C., 528. Nearly all the material facts were then set out and need not be fully repeated. In the case as now before us it appears that the telegraph wires did not go beyond Cheraw, but that from Cheraw to Chesterfield there was a telephone wire which was used for the transmission of telegrams. The defendant included in its charges, which were prepaid by (434) the husband of the plaintiff, the extra amount usually charged by the telephone company. This evidence is material only as tending to show that the defendant undertook to transmit the message to Chesterfield by telephone. It appears that at that time the telephone wire was down, and that therefore the telegram could not be forwarded. It is conceded that the defendant was not guilty of negligence in failing to

deliver the telegram to the addressee, but that does not relieve it from liability for its negligent assurance that it had been delivered. It is true the defendant introduced evidence in contradiction, but where there is conflicting evidence sufficient to go to the jury, they alone can pass upon its credibility, and we must assume as proved all facts found by their verdict either directly or by necessary implication. This rule applies only to issues of fact properly submitted, or to questions of mixed law and fact in the absence of legal error in the trial. The plaintiff testifies that she confidently relied upon her kinsman Huntley meeting her, and that if she had not been assured that the telegram had been delivered, she would have taken her husband with her; and that she suffered great mental anguish in finding herself at Wadesboro practically alone and friendless with three helpless children and the dead body of another. She says the railroad agent, Biggs, was kind to her; but she was much delayed, and suffered greatly, not only from her disappointment but also from being compelled to travel eighteen miles through the country with no one but the driver. This testimony was clearly competent, and was certainly more than a scintilla. What she suffered, or whether she suffered at all, is not for us to say. The jury who heard the testimony in its entirety and had every opportunity to observe the demeanor of the witnesses, have said she did. To them alone belongs by constitutional provision the determination of
(435) the facts, and in the absence of any error in the conduct of the trial we can not disturb their verdict. His Honor properly confined them to the consideration of such damage only as directly resulted from the negligent assurance that the telegram had been delivered. He cautioned them with clearness and precision not to allow any damages on account of the failure to deliver the telegram, or of the consequences solely resulting therefrom; and to distinguish between the mental anguish caused by the negligence of the defendant from the sorrow that would naturally be felt by a mother for the death of her child. While the circumstances of her bereavement must be taken into consideration in determining the question of her anguish, her damages must be measured only by the additional pain caused by the negligence of the defendant. This may be great or little under different circumstances. A degree of exposure which would merely stimulate the blood of vigorous manhood might be fatal to one weakened by age or enfeebled by disease. So, a disappointment, slight and transient under ordinary circumstances, might sorely wound a heart whose bleeding strings were yet quivering with the agony of bereavement.

We think that the assurance of the defendant, false in fact, if not by intention, was actionable negligence, and that the plaintiff can recover such damages as directly resulted therefrom. While this point was

neither argued nor directly decided when this case was here before, it was inferentially determined. It was embraced in the first cause of action, and on page 532 we say: "Even if the male plaintiff had not notified the defendant of the urgency of the message, its importance clearly appeared upon its face; and the negligence of the defendant in failing to deliver it *was aggravated by its negligent assurance that it had been delivered.*" On that trial the defendant relied upon its want of legal liability, and introduced no evidence. As the failure to (436) promptly deliver a telegram is *prima facie* evidence of negligence, we were then compelled to treat the case in that view—coming before us as it did upon a demurrer to the evidence. The main questions then discussed were those decided in *Cashion v Telegraph Co.,* 124 N. C., 459.

In *Hendricks v. Telegraph Co., ante,* 304, we say: "We think that it is the duty of the company in all cases, when it is practicable to do so, to promptly inform the sender of a message that it can not be delivered. While its failure to do so may not be negligence *per se,* it is clearly evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety and would know what to expect. Moreover, it would *tend* to show diligence on the part of the company."

We see no error in the admission or exclusion of testimony, and we think the complaint sufficiently sets out the cause of action. We do not see the irreconcilable contradictions in the charge of his Honor so strenuously urged by the counsel for the defendant. We understand his Honor to charge substantially that, while the plaintiff can not recover for the failure of Huntley or any one else to meet her as resulting from the failure to deliver the telegram, she can recover for such mental anguish as directly resulted from her placing herself unwittingly in circumstances of peculiar embarrassment in strict reliance upon the false assurance of the defendant, and in consequence thereof. The judgment is

Affirmed.

Cited: Cogdell v. Tel. Co., 135 N. C., 434, 436; *Hunter v. Tel. Co., ibid.,* 466; *Hood v. Tel. Co., ibid.,* 626; *Harrison v. Tel. Co.,* 136 N. C., 381; *Green v. Tel. Co., ibid.,* 492; *Helms v. Tel. Co.,* 143 N. C., 394; *Woods v. Tel. Co.,* 148 N. C., 5; *Carswell v. Tel. Co.,* 154 N. C., 115; *Hoaglin v. Tel. Co.,* 161 N. C., 395; *Howard v. Tel. Co.,* 170 N. C., 499.

(437)

STATE EX REL. L. W. CARTER AND E. G. MILLS v. WILMINGTON AND WELDON RAILROAD COMPANY, AND WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY, LESSOR.

(Decided 1 May, 1900.)

Demurrer—Refusal to Receive and Forward Freight, Cattle—Joint Plaintiffs for Their Own Use, The Code, Section 1212—Separate Penalty for Each Article, Section 1964—Misjoinder of State, Surplusage—Penalties, Action Ex Contractu—Aggregate of Penalties—When Given to the State—Constitution, Article IX, Section 5.

1. In actions for penalties, not given to the State, individuals are entitled to sue, and may sue jointly for their joint use.
2. When the article refused to be received and forwarded as freight is cattle, a separate penalty for each head may be recovered of $50 and if the aggregate of penalties exceeds $200, the Superior Court has jurisdiction.
3. Each day's refusal is a separate offense.
4. Penalties and forfeitures belong to the State for free school purposes, only when given by law to the State. Constitution, Art. IX, sec. 5.

FAIRCLOTH, C. J., dissenting.

ACTION to recover penalties aggregating $3,000 under The Code, section 1964, for refusing to receive and forward as freight on two separate days 30 head of cattle at $50 a head, penalty for each day, heard on demurrer before *Timberlake, J.*, at October Term, 1899, of COLUMBUS.

The demurrer was overruled, with leave to answer. Defendants excepted and appealed.

The grounds of demurrer are fully stated in the opinion.

Junius Davis for defendants.

J. B. Schulken for plaintiffs.

DOUGLAS, J. This is an action brought under section 1964
(438) of the Code, to recover penalties amounting to $3,000. The plaintiffs allege that on two consecutive days they offered for shipment to the agent of the defendant company 30 head of cattle, all of which the said agent refused to receive. The defendant demurred on several grounds as follows:

1. That the cause of action, if any, did not accrue to the plaintiffs, but only to the State of North Carolina for the benefit of the school fund under Article IX, section 5, of the Constitution of this State.

2. That the action can be maintained only in the name of the State alone and not on the relation of the plaintiffs.

3. That if the plaintiffs have any right of action they must sue in their own names and not in the name of the State as relator.

4. That the plaintiffs are improperly joined as relators.

5. That the Superior Court has no jurisdiction, the amount of the penalty being within the jurisdiction of a justice of the peace.

6. That the act prescribes only one penalty for the entire shipment offered, and not separate penalties for each head of cattle.

7. That several causes of action are improperly joined.

The demurrer was overruled, and we think properly so. The Code, section 1964, provides as follows: "Agents or other officers of railroads and other transportation companies, whose duty it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company, represented by any person refusing to receive such freight, shall be liable to a penalty of $50, and each article refused shall constitute a separate offense." This section is taken from section 1 of chapter 182 of the Laws 1879. (439)

Section 1212 of the Code (Revised Code, ch. 35, sec. 47), is as follows: "Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use."

The defendant contends in effect that the plaintiffs have no cause of action, that they can not sue jointly or in their own names, and that but one penalty attaches for the refusal of the entire shipment offered.

We will reverse the order of consideration. The statute provides in express terms that each *article* refused shall constitute a *separate offense,* that is a distinct violation of the law. The penalty attaches for such violation, and for each and every violation thereof. Otherwise a party might violate the law once, pay the penalty, and thereafter be free from further prosecution. The law never intended to create a criminal immune by any such process of legal vaccination. This is of course a *reductio ad absurdum;* but is it any more so than the contention of the defendant that a contrary view would force us to hold that a separate penalty would attach to each nail in a keg and to every lump of coal in a car load? All laws must be reasonably construed, and in such a manner as to give effect to all parts thereof, if practicable. As this Court has said in *Chappell v. Ellis,* 123 N. C., 259, 263: "We feel compelled to carry out a principle only to its necessary and logical results, and not to its furtherest theoretical limit, in disregard of other essential principles." To say that "each article" meant simply the

entire shipment offered would be equivalent to saying that it meant nothing, because it would add nothing to the previous part of the section. To say further that, even if each article constituted a (440) separate offense, the statute did not intend a separate penalty, would impose upon the statute a construction utterly foreign both to its letter and spirit. The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should under all circumstances exactly equal the injury; while punishment, to be effective, must exceed the injury, or at least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the carrier to pay a penalty of $50 than to go to any extra expense or trouble to obtain the necessary cars.

Moreover, the usual and primary meaning of the word "article" is opposed to the idea that it means the entire shipment. The Century Dictionary defines it as derived from "articulus," a joint, and as meaning a joint connecting two parts of the body; one of the parts thus connected; a *separate member or portion of anything.* Worcester says: A single clause in any writing; a particular item of several that make up an account; *a portion of a complex whole.* Webster says: A distinct portion of an instrument; a *distinct part.*

In *Hopkins v. Wescott,* 6 Blatch. (U. S. Circuit Court), 64, where the contract limited the liability of the carrier to an amount not exceeding one hundred dollars upon "any article," it was held that the words "any article" in such paper do not mean a trunk or piece of baggage, and its entire contents, in gross, but mean any article contained in a piece of baggage. On page 68 the Court says: "This strict (441) construction is in harmony with the policy of the law, and is essential to the protection of the community, in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unabated."

In *Wetzell v. Dinsmore,* 4 Daly, 495, where three cases of pills were bound together so as to make one package, the Court of Common Pleas in general term, held that each one of the boxes constituted a separate article. On appeal, this judgment was reversed by the Commission of Appeals, 54 N. Y., 496, where the Court said: "We think

'the article' valued at $50, was the *single package* received, in its entirety. . . . If it had turned out that each of the three boxes had contained a different sort of drug and that the defendant had knowledge of the fact, the case might have presented a different question." The distinction here does not seem to us to be very clearly drawn, but we suppose it was intended to meet the line of cases represented by *Earle v. Cadmus,* 2 Daly, 237, where it was held that the limitation applied to the articles in a trunk and not to the trunk collectively as one article. Under any of these cases, as the cattle were not and could not be bound together into *one package,* each head would constitute a separate article.

As we are of the opinion that each head of cattle was a separate article in contemplation of the statute, the refusal of which was a separate offense, it follows that a separate penalty attached thereto. As there were thirty head of cattle refused, thirty separate penalties were incurred by the defendant. Who then may recover these penalties?

We think that all penalties imposed by section 1964 of the Code may, under the provisions of section 1212, be recovered by any one who will sue for the same. While section 1967 is not involved in the case at bar, yet before its amendment by chapter 520, Laws 1891, (442) it was so similar in its nature and purposes to section 1964, that the same general rules of construction apply to both, and cases construing either may be cited by analogy in the interpretation of the other. In fact the latter section, originally enacted in 1879, was evidently intended to supplement the former which was passed in 1875, and which provided a penalty only when common carriers allowed freight *received* by them to remain unshipped for more than five days. Under this section alone, when it was not convenient for the carrier to ship the freight within the five days, it could avoid the penalty by simply refusing to receive the freight.

The principles underlying these sections are fully discussed in *Branch v. R. R.,* 77 N. C., 347, apparently the first case upon the subject, in which they are held constitutional. There, the recovery was by a private citizen suing in his own name for three separate penalties in the same action. That case seems to settle several of the questions in the case at bar; and as it has so long stood the test of uniform approval, we are not inclined to overrule it now. It is cited and approved on different points in *Katzenstein v. R. R.,* 84 N. C., 688; *Keeter v. R. R.,* 86 N. C., 346; *Branch v. R. R.,* 88 N. C., 570; *Middleton v. R. R.,* 95 N. C., 167; *McGowan v. R. R., ibid.,* 417; *Alsop v. Express Co.,* 104 N. C., 278; *State v. Moore, ibid.,* 749; *Purcell v. R. R.,* 108 N. C., 414; *Sutton v. Phillips,* 116 N. C., 502; *Glanton v. Jacobs,* 117 N. C., 427. These citations show that it has been repeatedly cited with approval since the Constitutional Convention of 1875, as well as before.

In the well considered opinion in *Katzenstein v. R. R., supra,* this Court expressly held that the penalty against a railroad company for failure to forward freight is not given by Article IX, sec. 5, of the Constitution, to the county school fund. It also held that an action to recover the penalty under the statute in an action *ex contractu,*

(443) and was properly brought in the name of the real plaintiff. This case is cited with approval on these points in *McDonald v. Dickson,* 87 N. C., 404; *Middleton v. R. R.,* and *McGowan v. R. R., supra; Maggett v. Roberts,* 108 N. C., 174, and *Sutton v. Phillips, supra.*

The defendant lays great stress upon the case of *Hodge v. R. R.,* 108 N. C., 24, but we think that case can be clearly distinguished from the one at bar. The Court expressly states that its opinion does not conflict with *Katzenstein's case,* and bases its judgment upon the distinguishing ground that sec. 1960 of The Code requires the penalty "to be sued for in the name of the State of North Carolina in the Superior Court of Wake County."

Hodges v. R. R. (the present defendant), 105 N. C., 170, also relied upon by the defendant, seems to us to be in favor of the plaintiff. In that case, the head-note by *Justice Clark,* is as follows: "The plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by the roadbed erected by defendant ponding water back on plaintiff's land; the other to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle guards as required by section 1975 of The Code, whereby cattle trespassed upon plaintiff's enclosed lands and crops; on demurrer, held an improper joinder of causes of action, the first being for injury to property, a tort; while the second arose upon *contract* for the breach of an implied contract to perform a statutory duty, and the action should be divided." The defendant can scarcely now be heard to complain at our following a precedent laid down in its favor and upon its suggestion.

In *Middleton v. R. R.,* 95 N. C., 167, the Court expressly held that action for penalties should properly be brought in the name of

(444) the person suing—citing the cases of *Branch v. R. R., Katzenstein v. R. R., Keeter v. R. R., Branch v. R. R.,* (2d case), *supra,* and *Whitehead v. R. R.,* 87 N. C., 255. The same principle is held in *Maggett v. Roberts, supra; Burrell v. Hughes,* 116 N. C., 430; *Goodwin v. Fertilizer Works,* 119 N. C., 120, in all of which cases *Middleton's case* is cited with approval.

It is contended that the plaintiffs can not maintain their action even if they are proper parties, because they have improperly joined the State as a plaintiff. This point is expressly decided in *Warrenton v.*

Arrington, 101 N. C., 109, 113, where the Court says: "The State is not a proper party to the suit, and it has been decided contrary to the former practice that under The Code system the joining improper parties with the plaintiff is a harmless error, as judgment may be rendered in favor of such as are entitled, and therefore the proceeding is not vitiated"—citing *Green v. Green,* 69 N. C., 294, and *Burns v. Ashworth,* 72 N. C., 496.

The different causes of action in the case at bar being all of the same nature, and in contract, may be joined, thus bringing the aggregate sum within the jurisdiction of the Superior Court, as has been repeatedly held by this Court. *Moore v. Nowell,* 94 N. C., 265; *Martin v. Goode,* 111 N. C., 288; *Maggett v. Roberts,* and *Burrell v. Hughes, supra.*

The only question remaining to be considered is whether the plaintiffs can sue jointly. We see no reason why they can not, and the learned counsel for the defendant frankly admits that he can find no case in this State holding against such right. If the defendant is liable for the penalty, it makes no difference who gets it, as long as its liability is in no way increased. While the penalty accrues to any one who may sue for it, it seems peculiarly appropriate that it should go to those who have suffered from the offense. *Branch* (445) *v. R. R.,* 88 N. C., 570 and 573, were two cases brought for penalties against the present defendant by Branch & Pope, suing in their firm name. While both cases were decided against the plaintiff on other grounds, no question was made as to their right to sue jointly. Some of the above cases are worthy of more than passing notice.

In the celebrated case of *McGowan v. R. R., supra,* known as the *Rice case,* the plaintiff recovered, under section 1967 of The Code, 115 separate penalties of $25 each, amounting in the aggregate to $2,875, for the unlawful detention of 27 bags of rice for 115 days. In the well-considered case of *Sutton v. Phillips, supra,* many of the questions now before us were elaborately discussed, with ample citation of authority. In *Burrell v. Hughes, supra, Chief Justice Faircloth,* speaking for a unanimous Court, says: "The person suing for a penalty is the proper party plaintiff, and not the State, unless so expressed in the statute," citing *Middleton v. Railroad* and *Sutton v. Phillips, supra.* And again on page 437: "A party suing for penalties against the same defendant may unite several such causes of action in the same complaint, and if they exceed $200 the Superior Court will have jurisdiction." In *Goodwin v. Fertilizer Works, supra, Furches, J.,* speaking for a unanimous Court, says: "The party suing is a proper plaintiff, unless the statute creating the penalty provides otherwise, (citing) *Burrell v. Hughes, supra.* The second assignment can not be sustained, as the party claiming the

penalty is the proper plaintiff, and not the State, (citing) *Middleton v. R. R., supra.* The third assignment can not be sustained, as this question has been decided and has been expressly held to be consti-
(446) tutional in *Sutton v. Phillips,* 116 N. C., 502, and a number of other cases there cited."

We are of the opinion that all the grounds of demurrer were properly overruled; that the plaintiffs are entitled to sue jointly for their joint benefit, and may recover a separate penalty of $50 for each head of cattle refused, and for each day on which they were refused; that the plaintiffs were the proper parties to sue, and that the misjoinder of the State, being surplusage, does not affect their right to recover; that penalties lie in contract, and may therefore be joined in the same action, which, if the aggregate sum therein demanded in good faith exceeds $200, comes within the jurisdiction of the Superior Court; and that section 5 of Article IX of the Constitution, providing that the clear proceeds of all penalties and forfeitures shall be appropriated for establishing and maintaining free schools, applies only to such penalties as are given by law to the State or some department thereof.

The judgment is

Affirmed.

Cited: Sloan v. R. R., post, 490; *Board of Education v. Henderson, post,* 695, 698; *Carter v. R. R.,* 129 N. C., 213; *Parker v. R. R.,* 133 N. C., 345; *Grocery Co. v. R. R.,* 136 N. C., 404; *S. v. Maultsby,* 139 N. C., 584; *Robertson v. R. R.,* 148 N. C., 326; *Petree v. Savage,* 171 N. C., 479.

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I. F. DUCKER v. S. F. VENABLE, COUNTY SUPERINTENDENT OF SCHOOLS OF BUNCOMBE COUNTY.

(Decided 1 May, 1900.)

School Orders — Teacher — Superintendent — Mandamus — When on Money Demand, When Not—When Returnable to Term, When Not.

1. Where a mandamus is on a money demand it is returnable at term.
2. When it is to enforce the performance of official duty, mandamus may be returnable before a judge at chambers.
3. Mandamus to show cause why the defendant county superintendent of public schools did not sign the school order held by plaintiff, a licensed teacher, is not a money demand; there is no claim that defendant owed anything individually or as a public officer, or had control of money due the plaintiff.

DUCKER *v.* VENABLE.

MANDAMUS against county superintendent of BUNCOMBE, to require him to sign and seal school order issued to teacher in public schools, returnable before *Coble, J.*, at chambers in Asheville, on November 18, 1899.

The defendant moved to dismiss for want of jurisdiction, alleging that the action should have been returnable at term. Motion allowed, and plaintiff appealed.

Davidson & Jones for plaintiff.
Tucker & Murphy for defendant.

FURCHES, J. This is an application for mandamus brought before the judge of the Superior Court at chambers.

The plaintiff alleges in his complaint that he is a teacher of common schools, and is regularly authorized to teach, having stood his examination and received a first-grade certificate as such teacher; that he contracted to teach a school of four months in District (448) No. 5, of Buncombe County; that this contract was made with the school committee of said school district; that he had taught three months, had made all the reports required by law, and had orders signed by three of the committee of said district, made out in regular form, for the pay of the three months so taught; that he presented these orders to the defendant, who is the superintendent of common schools for Buncombe County, for his endorsement and signature as the law provided, and that the defendant arbitrarily and without any good or valid reason refused to endorse and sign the same.

The defendant filed an answer to the complaint, but at the hearing moved to dismiss the plaintiff's proceeding for want of jurisdiction, for the reason, as he alleged, that the defendant is sued upon a money demand, and that the action is returnable before the judge at chambers when it should have been made returnable at term time.

The court sustained the defendant's motion, dismissed the plaintiff's action, and the plaintiff appealed.

This presents the sole question for our determination—whether the judge had jurisdiction or not.

If this action against the defendant is on a money demand, the judgment of the court appealed from is right; but if it is not a money demand, then it is not right. And we must admit that we are unable to see how it is a money demand. The plaintiff did not claim that the defendant owed him anything individually or as a public agent, servant or trustee; nor that the defendant was the holder or had control of any money due the plaintiff.

The question before the court was for the defendant to show cause

why he did not sign these school orders. If they were in regular form, signed by three of the school committee, it seems that it was his (449) duty to endorse them. This is what is termed a ministerial duty, and the writ of mandamus will lie to compel its performance. *County Board of Education v. State Board of Education,* 106 N. C., 81; *Rogers v. Jenkins,* 98 N. C., 129, cases cited by defendant; High Extraordinary Remedies, section 353; *Marbury v. Madison,* 1 Cranch., 49; *Kendall v. U. S.,* 36 U. S., 524. Of course if the defendant had reason to believe and did believe that these orders were forgeries, or were procured unfairly, it was not his duty to endorse them. And it may be that there are other reasons why he should not have signed them. If he had any such reasons, these were matters to be heard and determined by the court.

The defendant relies on *County Board, etc., v. State Board, etc.,* and *Rogers v. Jenkins, supra.* We do not think these cases sustain his contention, but are authority for the plaintiff. We might cite other authorities, but as those cited by defendant sustain the plaintiff's contention, we do not cite more.

Looking at the answer, we suppose this trouble (as many others have) grew out of the legislation of 1899, amending the school law. But we hope (if so) this trouble has been settled by some of the many cases that have been decided, in which this legislation has been involved.

There is error in the judgment appealed from, and the Court should have proceeded to hear the case.

Error.

Cited: Jones v. Commissioners, 135 N. C., 221.

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W. B. FLEMING AND WIFE, MOLLIE L., DORA L. BROWN, JOHN L. BROWN, JR., AND LENA BROWN, v. ARTHUR BARDEN AND WIFE, MAGGIE S. BARDEN.

(Decided 1 May, 1900.)

Deed to Trustee for Wife and Children—Mortgage by Wife for Husband's Debt—Extension of Time by Creditor for Consideration Paid by Principal Debtor—Discharge of Security—Invalid Sale by Mortgagee.

1. A deed to trustee made by a husband for benefit of his wife for life, then for their children, and upon failure of children living at her death, then for himself, his heirs and devisees, and containing a stipulation that he

and his wife, with consent of each other, and joined by the trustee, might unite in a conveyance of the land at any time, absolutely in fee, or otherwise, will authorize a mortgage for a debt of the husband.

2. A payment of an additional sum by the debtor, after death of his wife, for a year's extension of time of payment amounts to a discharge of the land, as security, so far as concerns the rights of the children, and the fact that the additional payment amounted to usurious interest upon the debt, does not affect the result.

3. Nor will the fact that the wife was dead when this agreement for extension of time was made, prevent the discharge of the mortgage. The discharge is by operation of law, and applies in all such cases.

4. The proposition of law, that where the trustee is barred, the *cestui que trust* is also barred, has no application when the trustee, in accordance with a provision of the trust, passes his bare legal title to another, in this instance to the mortgagee of the husband, and there was nothing to descend to his heirs, at his death, which occurred previous to the extension of time of payment.

5. The land, as security, being discharged from the payment of the debt, by reason of the extension of time, the mortgagee has no right to sell under the mortgage, and the defendant who claimed under the purchaser acquired no other right than she would have acquired at a sale by a mortgagee after the debt was paid, which right, although accompanied by possession, would not ripen against the plaintiffs, one of them under the disability of coverture, and the rest being infants.

ACTION for possession of land, tried before *Starbuck, J.*, at (451) November Term, 1899, of BEAUFORT.

The plaintiffs, children of John L. Brown and wife, Maria L. Brown, claim under a deed from their father, made in June, 1880, to Ashley Congleton, trustee, for the benefit of their mother for life, and for their benefit at her death, and should none of them be then living, for his own benefit in fee. There was a provision in the deed that he and his wife, with mutual consent, and joined by the trustee, might convey the property absolutely at any time in fee simple or otherwise.

There was verdict in favor of plaintiffs, and judgment accordingly. Defendants excepted and appealed.

W. B. Rodman for plaintiffs. (452)
A. O. Gaylord for defendants.

FURCHES, J. This is an action for the possession of land in which the defendant denies title in the plaintiffs, alleges title in herself by mesne conveyances from plaintiffs' ancestors, and also by color of title ripened by adverse possession and the statute of limitations. The facts presented are as follows:

That in June, 1880, John L. Brown and wife, M. L. Brown, conveyed the land in controversy to Ashley Congleton in trust for M. L. Brown for life, then for the issue of John L. and M. L. Brown; and

if the said M. L. Brown should die without leaving issue, then for the said John L. Brown. But this deed expressly provided that the said John L. Brown and M. L. Brown shall have full power and authority, by and with the consent of each other, to convey the same at any time, "and said trustee shall join in the said conveyance, whether the same be in fee simple or otherwise"; that on 9 February, 1881, the said John L. borrowed $500 from J. B. Stickney, giving his bond due three years after date at 8 per cent, payable annually, and secured the same by a mortgage on this land, executed by John L. and M. L. Brown and the trustee, Congleton. This mortgage was in the usual form, conveying the fee simple, with the condition that it should become void upon the payment of said bond. On 3 March, 1882, the trustee, Congle-
(453) ton, died, leaving three minor children, two of whom were minors at the commencement of this action; the other had been of age for three years and five months when the action was commenced.

In August, 1884, the said M. L. Brown, died, leaving surviving her her husband, John L., and the plaintiffs Mollie L. Fleming, Dora L., John L., and Lena M. Brown—the last three named being minors under 21 years of age except Mrs. Fleming, who was under coverture when this action was commenced, and is still.

The plaintiffs allege that this was their mother's land; that the debt was that of their father, and that the mortgage was only a security for the debt. And they further allege that the security, the mortgage lien on the land, was discharged by a contract made and entered into by Stickney, the mortgagee, and John L. Brown, the principal debtor, for an extension of time on the debt so secured by the mortgage; that this agreement was in the fall of 1884 to extend for one year for $50; that in January, 1888, Stickney sold under the mortgage when Arthur Barden bought and took deed to W. C. Ayers, who on 3 March, 1888, conveyed the same to the defendant Maggie Barden, and that she has been in possession of the same ever since the date of her deed in March, 1888.

Upon the admitted facts and the evidence in the case, the court submitted the following issues:

1. Did Stickney agree with John L. Brown to extend time of payment of the mortgage debt from 9 February, 1885, to 9 February, 1886, in consideration of the payment by Brown of 10 per cent interest on the debt for the year ending 9 February, 1885, to wit, $50? Answer. "Yes."

2. Was said consideration paid by Brown, and if so, when? Answer. "Yes, April, 1885."

3. Did R. T. Hodges have knowledge of his alleged appoint-
(454) ment as trustee in the proceeding entitled *John L. Brown and others, ex parte?* Answer. "No."

4. Are the plaintiffs the owners of and entitled to recover possession of the land described in the complaint? Answer. "Yes."

5. What is the rental value of the land for the period beginning 4 July, 1894, up to the present time? Answer. "$300."

Thereupon the court rendered judgment that the plaintiffs are the owners of and entitled to the possession of the land, etc.

Upon the close of the evidence, the defendant moved to nonsuit the plaintiffs for the reason that the evidence, all taken to be true, did not make out a case for the plaintiffs. This was refused, and we see no error in its refusal. It seems to us that it could hardly be disputed but what there was evidence tending to prove all the facts alleged by the plaintiffs, and sufficient to authorize the jury to find the issues submitted to them as they did.

But taking the issues as found and the facts as admitted, the case presents some very interesting questions of law, upon the solution of which the rights of the parties depend.

The evidence, with regard to the contract and consideration for the extension of time, was that the mortgagee, Stickney, proposed to Brown, the principal debtor, that if Brown would pay him $50 interest instead of $40, he would extend the time twelve months. This offer was accepted by Brown, and the money paid to Stickney's attorney or agent. The defendant asked the court to charge the jury that this did not constitute a contract to extend the time of payment, first for the reason that the plaintiffs did not receive the money. But the court held that if the agent received it under the contract and agreement of Stickney with Brown, this was the same as if Stickney had re- (455) ceived it himself. And we think this must be so.

The defendant further contended that if he did receive it, that it was usurious interest; that a contract to extend time must be upon a good consideration; that the usurious payment of interest was not a good consideration, and did not support the contract, and cited *Bank v. Lineberger,* 83 N. C., 454, as authority for this contention; and it is so held in that case. But in *Carter v. Duncan,* 84 N. C., 676 (the next term after the case of *Bank v. Lineberger* had been decided), the case of *Bank v. Lineberger* was overruled; and *Carter v. Duncan* has been held to be the law ever since and has been cited with approval in several cases, among them *Forbis v. Shepard,* 98 N. C., 111; *Hollingsworth v. Tomlinson,* 108 N. C., 245. And as was said in *Bank v. Sumner,* 119 N. C., 591, we think this doctrine has been carried far enough. But it seems to us that these cases ought to be considered as settling the doctrine in this State, and the court below properly refused to give this instruction. This covers the defendant's prayers down to the fifth.

The fifth prayer asks the court to instruct the jury that, as Mrs.

Brown was dead when this agreement for extension of time was made, it did not have the effect to discharge the mortgage, as it was not shown that she had an administrator, or that her children had a guardian, and there was no one to pay the debt. The court refused this prayer and the defendant excepted. We can not sustain the exception. The discharge is by operation of law; and we can not say that it shall apply in some cases and not in others. We have not been furnished with any authority for making such exception.

The sixth prayer is that the original trustee, Congleton, was dead, and that his interest descended to his heirs at law; that one of them had been above the age of 21 for more than three years when (456) this action was commenced; that where the trustee is barred, the *cestui que trust* is also barred; and that, as one of the trustees was barred, they were all barred, and the plaintiffs, though infants and *femes covert* were also barred. This is a correct proposition of law, as applied to some trusts. But taking the view of the case we do, it is not necessary for us to decide this question.

The deed of trust to Congleton expressly authorizes John L. and M. L. Brown to convey in fee simple or any less estate, and that it shall be the duty of the trustee, Congleton, to join them in making such deed. They exercised this power in making this mortgage to Stickney, and the trustee, Congleton, joined them in making it. Congleton never had anything but the bare legal title to the land, and when this mortgage was made, which is a deed in fee simple with other trusts attached, all the estate he ever had in the land passed out of him to Stickney.

Congleton died before it is alleged that there was any discharge of the land from this debt on account of extension of time. And when he died, he had no estate to descend to his heirs. It is true that if Congleton had been the equitable owner as well as the legal owner, the equitable right of redemption would have descended to his heirs. But the only thing their father ever had was the naked legal title, and this was gone. He had nothing to descend to his heirs, and they had no interest to redeem. And indeed it does not seem to be claimed that they should have done so. But the defendants claim that the naked *legal* title was in them, and, as they did not bring suit for the *possession* of the land, the statute is a bar to plaintiffs' right to recover. But as it is seen that they had no legal title to the land, and we think no *equitable* estate, the doctrine contended for by defendants does (457) not apply.

For the purposes of this case, it is not necessary for us to decide where the legal title was, after the discharge of the land from the debt, so that it was not in the heirs of Congleton. It may be, that when the mortgage deed was made to Stickney the trust was thereby

terminated, and that Mrs. Brown became the absolute owner subject to the mortgage incumbrance. And if this was not so, it would seem that the legal estate was in the defendant; and, if so, she held the naked legal title in trust for the plaintiffs, and the statute could not run in her favor; and if both the legal and equitable estate was in the plaintiffs, the statute, or presumption, on account of possession, did not run against them on account of their infancy and coverture.

The land being discharged from the payment of the debt by reason of the extension of time, the mortgagee had no right to sell under the mortgage, unless it was the naked legal title, and the purchaser at the sale got nothing more. It is like selling after the debt had been paid. *Jenkins v. Daniel,* 125 N. C., 161. It is true that John L. Brown seems to have been at the sale, made no objection to it, and did not then let it be known that he had obtained an extension of time. And if it had been his land, it would seem that this would be an estoppel *in pais.* But it was no estoppel as against the plaintiffs who are infants and *femes covert.* It may be a hardship on the defendant, if she was an innocent purchaser without notice (which if so, is not presented by this appeal), but such is said to be "the quicksands of the law." The judgment is

Affirmed.

Cited: Fleming v. Barden, 127 N. C., 214; *Barden v. Stickney,* 130 N. C., 63; *Vann v. Edwards,* 135 N. C., 676.

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(458)

J. T. BROWN v. SOUTHERN RAILWAY CO.

(Decided 1 May, 1900.)

Damages—Negligence of Fellow-servant Prior to Fellow-servant Act of 1897.

Injury resulting to the employee of the defendant company in consequence of the negligence and careless disregard of orders by a fellow-servant in 1896 is not to be imputed to the company. *Aliter,* since the passage of the Fellow-servant Act of 1897, ch. 56. (Private Acts.)

ACTION for damages for injury sustained through alleged negligence of defendant, heard before *Shaw, J.,* at November Term, 1899, of FORSYTH. Upon intimation of the court that plaintiff could not recover, he submitted to a nonsuit and appealed.

Statement of case by DOUGLAS, J.: This is an action brought to recover damages for personal injuries received through the alleged negligence of the defendant. At the close of the plaintiff's testimony, his Honor intimated that notwithstanding the similarity between No. 64 and the expected train, in situation, signals and numbers, he would hold that the defendant company was not negligent in failing to notify section 3 of train No. 44 that the train with an engine No. 64 would be on the sidetrack at Lexington. Upon this intimation the plaintiff submitted to a nonsuit and appealed. The material facts appear to be as follows:

"The defendant company was running a freight train north from Salisbury, N. C., to Greensboro, N. C. The train number was 44, and running in six sections, and entitled, respectively, Nos. 1, 2, 3, 4, 5, and 6 sections of train No. 44.

"Said trains were under orders given to each section, and to (459) all others running between Salisbury and Greensboro.

"Plaintiff was the fireman on train entitled 3d section of train No. 44, having an engine, No. 37.

"The orders given to conductor and engineer of 2d and 3d sections of train No. 44—the 3d section being the train on which plaintiff was serving—were as follows: That an extra train from Greensboro to Salisbury, having engine No. 54, had the right of track over 2d and 3d sections of train No. 44 from Greensboro to Lexington. The trains run according to numbers, No. 1 going as first and so on.

"As plaintiff's train to wit, 3d section of train No. 44, approached the siding at Lexington, the engineer and plaintiff saw a train standing on the siding to the left hand. Said train so standing on the siding showing white lights, denoting extra, had steam up and headlight burning, and an engine, No. 64.

"That plaintiff's train slowed up, but did not stop; the engineer and plaintiff read the figures 64 on said engine as 54, and supposing it was extra train No. 54 which they were ordered to stop for at Lexington, and having no notice that train with engine No. 64 would be standing at Lexington, and not seeing the 2d section of train No. 44 standing ahead at Lexington, and supposing it had gone by, passed on by Lexington, and about two miles north of Lexington collided with extra train, having engine No. 54, which was the identical train they were ordered to stop and await the arrival of at Lexington.

"In this collision, plaintiff was injured, and brought this action to recover damages."

Among other allegations, the complaint says:

"That on approaching the station at Lexington, there was, as plaintiff was informed and believes, a mixed train standing on siding,

attached to engine 64, of which they had no notice nor orders, (460) and the figures 64 being so similar to the figures on engine 54, which they expected to find on said siding, that they passed on without stopping, it being in the night time and the figures on the engine being read by artificial light."

It appears that the plaintiff's train was a section of the regular train, and therefore, when within its schedule time, had a right of track superior to all extra trains unless limited by special order. Among the rules of the defendant company in the record we find the following:

"Train Orders, 120. Conductors and engineers will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their train, even if not provided for by the rules."

"95. No train must leave a junction, a terminal, or other starting point, or pass from double to single track, until it has ascertained that all trains due, which have the right of track over it, have arrived or left."

"522. A train or any section of a train must be governed strictly by the terms of the orders addressed to it, and must not assume rights not conferred by such orders. In all other respects it must be governed by the train rules and time tables."

"82. All extra trains are of inferior class to all regular trains of whatever class. When the train of inferior right has reached the designated point, the order is fulfilled and the train must then be governed by time-table and train rules or further orders."

Watson, Buxton & Watson for plaintiff.
Glenn & Manly and W. M. Hendren for defendant.

DOUGLAS, J., after stating the facts: The injury occurred on 2 November, 1896, before the Fellow-servant Act of 1897, and therefore the negligence of the engineer, who was the fellow-servant (461) of the plaintiff, is not imputable to the defendant.

The case was ably and candidly argued, and it is admitted that the negligence of the defendant, if any there be, must consist in its failure to notify the plaintiff's engineer that an extra train, drawn by engine No. 64, would be met at Lexington. Had the collision occurred with this train, which we will call No. 64, the case would be essentially different; but its presence at Lexington did not directly cause any injury to the plaintiff, and did not contribute to his injury, except in so far as it tended to mislead the engineer by its similarity in numbers with the train which he expected to meet. It was a singular coincidence that an extra train drawn by engine No. 64 should be standing on the siding

at the time and place where the plaintiff's engineer was ordered to pass an extra having engine No. 54; but we do not think that it was anything more than a coincidence. It is true the defendant might have notified the plaintiff's engineer that No. 64 would be at Lexington, and have cautioned him not to mistake it for No. 54. This might have avoided the accident. But could the defendant be reasonably required to anticipate that the engineer would make such a mistake under circumstances of such imminent danger when he had the means of accurate information? In the light of subsequent events, we may say that it was unfortunate that the defendant did not notify the engineer of the presence of No. 64; but we must not forget the old and homely proverb that "Our hindsights are always better than our foresights."

The engineer could easily have ascertained the difference in numbers by the exercise of reasonable care, which he was bound to use by (462) the express rules of the company and the inherent responsibilities of his position. He failed to obey the orders of the company, and that failure appears to have been the proximate cause of the accident. As his negligence was not *then* imputable to the defendant, and as we do not think the defendant was required in the exercise of reasonable care to notify the plaintiff engineer of the presence of No. 64, we fail to find any evidence whatsoever tending to prove the negligence of the defendant. The judgment is

Affirmed.

Cited: *Bingham v. R. R.*, 130 N. C., 626.

STATE EX REL. E. W. WILKINSON v. P. M. DELLINGER ET AL.

(Decided 1 May, 1900.)

Register of Deeds—Marriage License, Wrongfully Issued—Official Bond—Penalties—Damages—Demurrer—Misjoinder of Causes of Action—Debt and Tort.

1. A lawful marriage of daughter displaces parental rights, and if damage ensues to the parent, it is *damnum absque injuria*, and is recoverable from no one.
2. A demurrer to such cause of action was properly sustained.
3. A demurrer to the recovery of penalty prescribed by the Code, secs. 1814 and 1816 for issuing license unlawfully for marriage of party under age was properly overruled.

WILKINSON *v.* DELLINGER.

ACTION upon the official bond of defendant Dellinger, register of deeds of Catawba, tried before *Shaw, J.*, at CATAWBA, Spring Term, 1900. The complaint contained two causes of action:

1. For the penalty for issuing license unlawfully for marriage of daughter under age of 18 years, without written consent of her father, the plaintiff, with whom she resided (the Code, secs. (463) 1814 and 1816.)

2. For deprivation of the services and society of his daughter occasioned the plaintiff by the wrongful issue of the license.

His Honor overruled the demurrer to the first cause of action, with leave to defendants to answer over—to which there was no exception. He sustained the demurrer to the second cause of action, and plaintiff excepted and appealed.

D. W. Robinson and C. E. Childs for plaintiff.

M. H. Yount, L. L. Witherspoon and W. C. Feimster for defendants.

FAIRCLOTH, C. J. The plaintiff's daughter Elvey, at the age of 15 years, married one Lawton, and the plaintiff, Elvey's father, sues the defendant on his official bond as register of deeds of Catawba County for unlawfully issuing the marriage license. The complaint assigns two causes of action:

1. For the penalty prescribed by the Code, secs. 1814 and 1816.

2. For damages in depriving the plaintiff of the services and companionship of his daughter.

The defendant demurred to the complaint for misjoinder of causes of action. He demurs to the second assignment in that the marriage was lawful, and the plaintiff thereafter was not in law entitled to the services of his daughter, and had no property in them.

His Honor overruled the demurrer to the first assignment, from which no appeal was taken. He sustained the demurrer to the second cause of action, and the plaintiff appealed to this Court.

The only question now before this Court is the exception to the ruling of his Honor on the demurrer to the second cause of (464) action.

A female may lawfully marry at the age of 14 years. Code, section 1809. From a time where memory runs not, the parent and those in *loco parentis*, have a right to the company and services of the child during its infancy, and any one unlawfully invading that right is liable to the parent in damages. During the same period of time the law requires the parent to feed, clothe and protect the infant. This right and these duties go together, and as a general rule when one legally terminates the other ceases. The same principle pertains to the relation of

husband and wife, and the consequence of its violation is illustrated in *Holleman v. Harward,* 119 N. C., 150, where the defendant was punished in damages for selling laudanum, etc., to the plaintiff's wife, knowing that the use of the same habitually, resulted in loss of companionship and services due the plaintiff from their marital relation.

It is equally well settled that a husband, who has married an infant at a time when she may lawfully marry, *i. e.,* after 14 years of age, is entitled to the company, comfort and services of his wife, and that any interference therewith subjects the offender to punishment in damages. This apparent conflict between the rights of parent and husband is not real. The law of marriage, on the grounds of public policy and the peculiar relationship established by marriage, overrides the right of the parent to the services of the child, and the duties of care and protection are imposed on the husband, and, at the same moment, those duties as to the parent, cease. So the marriage displaces parental rights instead of creating a conflict. The marriage in a case like this emancipates the wife from her former parental duties, and if damage has come to the plaintiff, it is *damnum absque injuria.* Cooley Torts (2 Ed.), 278; *Commissioners v. Graham,* Mass., 578; *Hervey v. Moseley,* 7
(465) Gray, 479; *Grant v. Grant,* 109 N. C., 710; *S. v. Parker,* 106 N. C., 711.

It follows therefore that the plaintiff, having no right to control nor any interest in the services of his daughter, can not recover damages from any one.

There being no error in the record, this will be certified to the end that the case may proceed in the Superior Court as if no appeal had been taken.

Affirmed.

F. H. WHITAKER, ADMINISTRATOR OF E. L. DAVIS, v. J. C. HAMILTON, ADMINISTRATOR OF SARAH DAVIS ET AL.

(Decided 1 May, 1900.)

Opinion of Witnesses as Evidence—General Rule—Exceptions, Opinion of Experts; Opinions on Questions of Identity; Opinions Received from Necessity—As to Mental Capacity.

1. The general rule is that facts and not opinions are heard by judicial tribunals.

2. The exceptions to the general rule embrace (1) opinions of experts, (2) opinions on questions of identity, (3) opinions received from necessity.

3. The last class includes opinions, founded upon opportunities of observation and knowledge, as to mental capacity to make a contract. *Clary v. Clary*, 24 N. C., 78.

4. A mind capable of making a contract is one that had sufficient intelligence to understand what the person was doing, what property he was disposing of, and to whom he was conveying it, and who are excluded by the contract of conveyance.

ACTION for possession of personal property, household and (466) kitchen furniture, notes and money, tried before *McNeill, J.*, at August Term, 1899, of UNION.

This action was consolidated with another action between the same plaintiff as administrator, and same defendants in their individual rights relating to the same property, and were tried together.

Upon the verdict of the jury his Honor adjudged that the contract of conveyance executed by E. L. Davis, referred to in the pleadings, was null and void, and a reference was ordered to ascertain and report the description and value of the articles obtained by the defendants under said contract, with directions to report at the next term.

Defendants excepted and appealed.

R. B. Redwine and Burwell, Walker & Cansler for defendants.
Adams & Jerome and Armfield & Williams for plaintiff.

FAIRCLOTH, C. J. This is an action by the plaintiff, as administrator of E. L. Davis, against the defendant as administrator of Sarah L. Davis, to recover money, notes and personal property.

The material facts are these: The said Sarah L. was the wife of said E. L. Davis, and was the owner of the property sought to be recovered in this action at the time of her death, about 8 April, 1896, leaving her husband surviving, who died intestate in June, 1896. By deed, dated 13 April, 1896, said E. L. Davis sold and conveyed to de- ((468) fendant J. C. Hamilton, and other defendants, all his right, title and interest as husband of said wife, in and to all of such property owned by her at her death or during coverture, with authority to take possession, and renounced his right to administer on his wife's estate. The defendant administrator took and holds possession of said property. Plaintiff demands possession and an accounting by the defendant. It is not disputed that the husband became the owner of said property as provided in the Code, 1479.

The plaintiff alleges that at the time of said deed and sale, the husband was mentally incapable of making a contract, and that the deed was obtained by undue influence by the defendants, and is void. This is the principal matter in controversy. Several witnesses were examined on that question.

1st issue: "At the time of the execution of the contract, set out in the pleadings, whereby E. L. Davis purported to convey to J. C. Hamilton and others the property therein described, did the said E. L. Davis have sufficient mind to know what he was doing and to understand the nature of the contract he was making?" The jury answered, "No."

2d issue: "Was the execution of said contract procured by fraud or undue influence on the part of J. C. Hamilton or any of the other grantees or donees named in the contract?" The jury answered, "Yes."

During the trial the plaintiff called J. D. Griffin, who testified:

"I have known E. L. Davis fifty-five or sixty years; have lived about six miles from him for the last several years; frequent visits were exchanged between us. I visited him during his last sickness, and was there the day his wife was buried, and assisted him to get to her grave, which was about one week prior to the date of the contract men-
(469) tioned in the complaint, and I talked with him for some time. I also visited him a week or ten days after the contract was executed. I have had opportunities of forming an opinion of the mental condition of E. L. Davis at the time of the making of the contract, and I have formed an opinion." Here the plaintiff asked this question: "From your observation, conversation and association with E. L. Davis, what, in your opinion, was his mental capacity with reference to making contracts or disposing of his property after his wife's death?" The defendants' objection was overruled, and they excepted. The witness proceeded: "I do not think he was capable of making a contract or disposing of his property after his wife's death. Mr. Davis was 84 years of age, and was very greatly grieved at his wife's death. Two or three weeks after her death he asked me what day of the week it was, and said he could not recollect anything; he did not have anything to do with his business, but left it all to his wife. His mind was such that he could have been easily influenced to make a contract to his own injury." The witness further said that he did not think that Davis was insane, but he was not competent to manage his affairs, and Davis said so. He could not recollect recent events as well as matters several years back.

The exception is that the *opinion* of the witness was incompetent. All the authorities agree to the general rule that the triers of the matters in dispute—the judge or the jury as the case may be—form their conclusions from the facts before them, and not upon the opinions of others, and that facts and not opinions are heard by judicial tribunals. The same authorities agree that there are some exceptions to this general rule. These exceptions are divided into three general classes: 1. Opinions of experts. 2. Opinions on questions of identity. 3. Opinions received from necessity.

In the third class there are several subdivisions, according to (470) Lawson on Expert and Opinion Evidence. On page 476 (Sub-rule 4), he says: "One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." The exception was first adopted in the English courts, and our courts soon recognized the necessity of permitting any one, whose acquaintance and means of observation of the party whose sanity is in dispute were sufficient, to express his opinion as to his mental condition.

This exception to the general rule has been received in all the States of the Union except Massachusetts, Maine, New Hampshire and Texas.

This question was first presented to this Court in 1841, in *Clary v. Clary,* 24 N. C., 78, in which it was held that "A witness, who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity." In this case *Gaston, J.,* wrote a lengthy and interesting opinion, treating the question in its manifold aspects with clear reasoning. He says: "But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features or handwriting of others, is more than mere opinion. It approaches to knowledge, and is *knowledge* so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others."

This leading case has not been disturbed by any of our predecessors, but has been frequently affirmed and recognized, notably in *McLeary v. Norment,* 84 N. C., 235; *S. v. Ketchey,* 70 N. C., 621; *Barker v. Pope,* 91 N. C., 165; *McRae v. Malloy,* 93 N. C., 160. See also (471) 1 Greenleaf on Evidence, section 441.

Smith v. Smith, 117 N. C., 326, was relied on by defendant as establishing the contrary doctrine. The mere reading the facts therein will show that the case is in nowise in conflict with *Clary v. Clary, supra,* and in fact it expressly recognizes the same principle. The exception was therefore properly overruled. Several other witnesses were examined on the same question as J. D. Griffin, with some exceptions. They were all properly overruled on the same ground as defendants' second exception.

The court at plaintiff's request, gave the jury several special instructions, all of which were assigned by defendants as errors. The instruction, in substance, was that a mind capable of making a contract was

one that had sufficient intelligence to understand what he was doing, what property he was disposing of and to whom he was conveying it, and the capacity to know who are excluded by the contract or conveyance. Whilst the definition is in general terms we do not see anything in it prejudicial to the defendant. The other instructions were a recital of several parts of the evidence, and that if they believed the evidence to be true, they would be justified in finding that E. L. Davis did not have sufficient mind to make the contract. The language of these instructions is general, but we do not find any error calculated to mislead the jury in forming their verdict.

Affirmed.

Cited: In re Peterson, 136 N. C., 29; *Taylor v. Security Co.,* 145 N. C., 396; *Lumber Co. v. R. R.,* 151 N. C., 221; *Daniel v. Dixon,* 161 N. C., 380, 381; *In re Shuford,* 164 N. C., 135.

(472)

E. M. ANDREWS v. W. L. POPE.

(Decided 1 May, 1900.)

Endorsement Without Recourse—Collateral Paper-writing—Guaranty —Agreement to Buy.

1. A guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of some person, who in the first instance is liable for such payment or performance.
2. Where the defendant in a land trade with the plaintiff transfers to him, in part consideration, a couple of notes by endorsement "without recourse," but accompanied with a special written agreement to the effect that if the maker of the notes shall dispute and refuse to pay the same, and litigation shall be necessary to enforce their payment, then he agrees to take them up at once and pay the amount of same and have the notes transferred back to him: *Held,* this was a guaranty, and not an agreement to buy.

ACTION to enforce the payment of a couple of notes, transferred by the defendant to the plaintiff by indorsement "without recourse," but with written agreement, signed by defendant, for their payment in default of the maker, tried by *McNeill, J.,* upon agreed facts.

His Honor construed the written agreement signed by defendant to be a guaranty for the payment of the notes, and not a mere agreement to buy them, as contended for by defendant, and rendered judgment in favor of plaintiff. Defendant excepted and appealed.

The written agreement, and other facts agreed, are recapitulated in the opinion.

Jones & Tillett for plaintiff.
T. W. Hawkins for defendant.

MONTGOMERY, J. The plaintiff sold and conveyed to the de- (473) fendant a lot of land in the City of Charlotte, and received in part payment of the same two notes of $150 each, which were executed by one Johnson to the defendant. Before the sale of the land was completed, the plaintiff had seen Johnson, and had been warned by him not to trade for the notes. Johnson said that they were executed for a supposed balance on a partnership settlement, but that since their execution he believed that the amount was not due. The plaintiff reported that conversation to the defendant, who said that the amount was justly due, and that if the plaintiff would accept the notes endorsed "without recourse" in part payment of the land, he would execute and deliver with the notes a paper-writing in the following words and figures: "Whereas, E. M. Andrews has agreed to take two notes, given by G. S. Johnson to me, each in the sum of $150, as part of the purchase money of the lot of land in the city of Charlotte, on Liddell Street, which I have this day bought from said Andrews, and the notes have been transferred by me to said Andrews without recourse on me. It is understood and agreed by me that if said Johnson shall dispute the said notes and refuse to pay the same, and litigation shall be necessary to enforce the payment of the notes, then I agree to take up the notes at once and to pay the said Andrews the amount of the same, and have the Johnson notes transferred back to me."

The deed for the land was delivered to the defendant, the notes endorsed without recourse and the paper-writing delivered to the plaintiff. The plaintiff, at the maturity of the notes, demanded payment of Johnson and Johnson declined to pay them, stating that he "wanted to investigate and satisfy himself that he owed the notes before he admitted his liability on the notes." A year and a half afterwards the plaintiff made a peremptory demand on Johnson for payment, and the same was refused, whereupon the plaintiff notified the defendant (474) of the last demand on Johnson, and his refusal to pay, and offered to transfer the notes back to the defendant upon the payment of the amount due on them. Johnson was insolvent at the time of the maturity of the notes, and has continued so since that time.

The plaintiff contends that the paper-writing is a guaranty on the part of the defendant for the payment of the notes by Johnson, the maker. The defendant insists that it is simply an agreement on the

defendant's part to *buy* the notes if Johnson should not pay them at maturity, and that the offer to buy was open for a reasonable time only after their maturity, and Johnson's failure to pay on demand. The argument of the defendant's counsel was that the paper-writing shows on its face that the defendant refused to endorse the notes except in a restricted manner (without recourse), that he did not use the word guaranty, and that, from the particularity of the language employed, it is apparent that the intention and agreement of the parties were that a different contract from that of guaranty was being entered into, and that difference was for the advantage and benefit of the defendant. That the agreement was one on the part of the defendant to *buy* the notes.

It was also argued that the words "take up" the notes meant that the defendant would *buy* the notes at their face value at the time of their maturity. Several cases were cited to the effect that where treaties for the sale of personal property are on foot and the property is delivered to be returned if it does not come up to representation within a specified time, and the property is not returned within that time, that the sale becomes absolute. If the paper-writing was in law an agreement on the part of the defendant to buy the notes, then the law in the cases cited would be applicable, and the time elapsing between the maturity (475) of the notes and the demand at that time by the plaintiff upon Johnson to pay the notes, and the notice to the defendant of Johnson's refusal, would be unreasonable, and the defendant would not be bound under his agreement.

But we are of the opinion that the paper-writing is not an agreement on the part of the defendant to buy the notes. Disconnected with the transaction of the sale of the land, it is impossible to conceive of an agreement on the part of a reasonable person to give full value for a note which he knew to be worthless—the maker being insolvent. The agreement must be understood in the light of the surrounding circumstances, and the purposes for which it was made, and the language construed in its ordinary and usual sense.

We think the promise of the defendant is a guaranty that the notes would be paid by Johnson, the debtor, and that in case he should not pay them the defendant would. A guaranty is defined by Chancellor Kent, (3 Com., 121), as "A promise to answer for the payment of some debt or the performance of some duty in case of the failure of some person who, in the first instance, is liable for such payment or performance," and that definition was adopted by this Court in *Carpenter v. Wall,* 20 N. C., 144.

The paper-writing in the case before us falls within that definition, and such contracts being mercantile in their nature, must be interpreted

so as to give effect to whatever is reasonably to be presumed the intention and understanding of the parties. It is not difficult to understand the intention of the parties in this transaction. The plaintiff had received in part payment of his land promissory notes due by another to the defendant, and had conveyed the land to the defendant. The notes were endorsed *without recourse.* The special agreement was to the effect that if the maker of the notes should not pay them at maturity the defendant would. He preferred to be a guarantor (476) rather than an endorser, the latter under our law being a surety, and as such liable to be sued either with or without the principal. The guaranty compelled the plaintiff to do the unpleasant duty of pressing the defendant's debtor, Johnson, for the payment of the notes. Demand was made upon the maker of the notes at their maturity, and we think that the maker, at that time, denied his liability and refused to pay, and, if the maker had been solvent, it would have been the duty of the plaintiff to have given the defendant notice of Johnson's refusal to pay the note. But the maker was insolvent, and continued so up to the bringing of the suit, and the plaintiff's failure to notify the defendant of Johnson's refusal to pay has worked him no harm or damage, and the defendant can not complain. *Sullivan v. Field,* 118 N. C., 358.

If the interest which the defendant had to pay on the notes, after Johnson had refused to pay them was a partial loss, and he would be entitled to exoneration *pro tanto,* he did not claim it. The defendant rested his case on the ground that he was not a guarantor, and in the case agreed it is stipulated that if the plaintiff is entitled to recover he should have judgment against the defendant for $300, the principal amount of the note, with interest and cost.

The judgment below was for the plaintiff, and it is

Affirmed.

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(477)

LUCILE DOGGETT AND ONEIDA DOGGETT BY THEIR NEXT FRIEND, G. O. DOGGETT, v. UNITED ORDER OF THE GOLDEN CROSS.

(Decided 1 May, 1900.)

Benevolent Association, with Life Insurance Features—Benefit Certificate, or Policy—Prima Facie Case—Death, Demand, Certificate—Subordinate Commandery—Effect of Denial and Refusal—Waiver of Notice and Proofs of Death—Forfeiture—Dissolution—Evidence.

1. Demand having been made, the certificate shown, and the death of the assured proved, a *prima facie* case was made out for the plaintiffs.

2. Where, according to the constitution and laws of the society, notice and proofs of death are to be furnished by officers of the subordinate commandery, or lodge, of which the deceased was a member, they are the agents for that purpose of the Supreme Commandery, for whose action the beneficiary plaintiffs are not responsible.

3. If before proofs are made, and before the expiration of the time within which they are to be made, an insurance company should refuse to pay the policy or deny its liability upon other grounds, such denial and refusal would constitute a waiver of notice and proofs of loss.

4. Where the answer alleges that the benefit certificate of plaintiffs was not in force, on the ground that the assured had failed to pay assessments, in strict law the defendant ought not to have been allowed to prove the dissolution of the subordinate commandery of which the deceased was a member.

5. Proof of such dissolution was ineffectual when it was also shown that preliminary conditions had not been complied with by officers of the Supreme Commandery.

ACTION to recover the amount of a benefit certificate for $1,000, issued by the defendant to a deceased member, Leonora C. Doggett, for the benefit of her two daughters, the plaintiffs in this action, tried before *Allen, J.*, at January Term, 1900, of MECKLENBURG.

The complaint contained an averment of due notice given to (478) the defendant of the death of the assured, and of a demand on and refusal of payment by defendant of the sum secured in the benefit certificate.

The answer denied the notice and alleged that plaintiffs had failed to furnish proofs of the death of the assured in the manner required by the laws and regulations of said Order; also, that the assured, Leonora C. Doggett, had forfeited any claim upon the Order on account of said contract of insurance by failing to pay assessment levied by said Order and to comply with its rules and regulations, and had ceased to be a member nine months before her death.

The following issue was submitted to the jury: "Is the defendant indebted to the plaintiffs, and if so, what amount?" His Honor directed the jury, that if they believed the evidence, they would answer the issue "Yes, in the sum of $1,000 with interest from 1 May, 1897." Defendant excepted. Verdict and judgment for plaintiff. Defendant appealed.

The objects, system, and nomenclature of the defendant society are portrayed in the opinion. And the evidence, rulings of the court, and exceptions of defendant are also stated.

Jones & Tillett for plaintiffs.
Osborne, Maxwell & Keerans for defendant.

MONTGOMERY, J. The defendant appellant is a benevolent association incorporated under the laws of Tennessee in the name of "The Supreme Commandery United Order of the Golden Cross of the World." It embraces within its organization of the Supreme Commandery, Grand Commanderies and Subordinate Commanderies. The chief officer of the society is called Supreme Commander, the second Grand Commander, and the third Noble Com- (479) mander.

All of the subordinate officers have titles equally as high sounding as those we have named. The motto of the society is "Fraternity, Beneficence and Protection," and its avowed objects are:

1. To unite fraternally persons of every honorable profession, business or occupation, of good moral character and socially acceptable, and in the case of beneficiary members of sound bodily health and between the ages of 16 and 55.

2. To give all the moral and material aid in its power to its members by holding instructive and scientific lectures, encouraging each other in business and assisting each other in obtaining employment.

3. To establish a benefit fund from which, on satisfactory evidence of the death of a beneficiary member of the Order who has complied with all its lawful requirements, a sum not exceeding two thousand dollars shall be paid, as he or she may have directed while living, and as contained in the benefit certificate.

4. To establish a fund for the relief of sick and distressed members, and

5. To pledge its members that they will not, so long as connected with the Order, use as a beverage any spirituous, malt or fermented liquors, that will intoxicate.

Certainly no insurance company could have nobler aims.

The charter and laws of the Order provide for the issuing of benefit certificates to members, the beneficiaries to be entitled to the amount named in the certificates from the benefit fund, if the insured have complied with the laws of the society and are in good standing at the time of death. This fund is to consist of assessments levied by the Supreme Commandery upon, and paid by the several members of the subordinate lodges.

On 19 December, 1895, the appellant issued a certificate to (480) Leonora C. Doggett, who died on 1 May, 1897, and this action is brought by the plaintiff beneficiaries to recover the sum of $1,000, the amount named in the certificate. The defendant contests the payment of the same on the grounds, first, that the plaintiffs failed to give notice of the death of Mrs. Doggett in the manner required by the laws and regulations of the Order, and second, that at the time of her death

she was not a member of the society in good standing, but on the other hand had failed to pay assessments levied upon her, and had thereby ceased to be a member of the Order. The plaintiffs on the trial introduced the benefit certificate and proved the death of the assured. The defendant in its answer did not deny the allegation of the plaintiffs that they had made demand of the defendant for the amount of the policy.

Demand having been made, the certificate shown, and the death of the assured proved, a *prima facie* case was made out for the plaintiffs. *Kendrick v. Insurance Co.,* 124 N. C., 315; *Kumle v. Grand Lodge,* 110 Cal., 204; *High Court v. Zak,* 136 Ill., 185; *Tobin v. Aid Society,* 72 Iowa, 261.

As to the first alleged defense of the defendant, it appears from an inspection of the certificate and the constitution and laws of the society that notice and proofs of death are not required to be made by the beneficiaries. That duty is devolved upon the Noble Commander and keeper of the records of the subordinate lodges by section 4 of the laws of the Order. The Subordinate Commandery chose those two officers of the subordinate commanderies to perform that duty; they made them their agents for that purpose.

On the death of a member those two officers were to immediately forward to the Supreme Keeper of Records a notice of such death, in which they were required to state the name, age at the date on which
(481) the first degree was conferred, the number of the benefit certificate, the date and cause of death and the amount paid into the benefit fund. Certificates, also under oath, from the last attending physician and officiating clergyman and undertaker were to accompany the notice.

It being evident therefore that the notice and proofs of death were to be furnished the Supreme Commandery by the two officers named of the subordinate commandery of which the deceased was a member, the question as to whether the plaintiffs did or did not furnish such proof to the defendant is immaterial. *Millard v. Supreme Council,* 22 Pac., 864 (Supreme Court of California). No proofs of Mrs. Doggett's death were furnished by the officers of the subordinate commandery of which she was a member, but that failure on their part can not prejudice the plaintiff's right to recover. In *Supreme Council v. Boyle,* 37 N. E., 1105 (Indiana Appellate Court), the Court said: "There is nothing in the by-laws that required the appellee to make proof of the death of her husband either to the Subordinate or Supreme Council. When the subordinate council received information of the death of one of its members, it was its duty to make the necessary proof to the Supreme Council. St. Julian (the subordinate) Council was an agency or instrumentality created by the appellant. If its own instrumentali-

ties failed to act, it can not be heard to interpose their delinquencies to defeat this action. The appellant had ample time in which to ascertain the fact of the death." In *Anderson v. Supreme Council,* 135 N. Y., 107, it appeared by Article III, section 2, of the Relief Fund Laws of the society, that it was made the duty of the secretary of the subordinate council, on the death of a member, to notify the Supreme Recorder thereof according to a form prescribed by the Supreme Council, a provision similar to the one on this point in the laws of the defendant in the case before us, and the Court of New York said: (482) "That no duty is cast upon a claimant to furnish proofs of death as a prerequisite to maintaining an action on the certificate, and that the plaintiff was not required to do more than to notify the officers of the subordinate council of her husband's death. The duty was thereby cast upon the council to make investigations and proofs for the information of the Supreme Council." It would seem that the last mentioned Court held that it might be necessary that the beneficiary was compelled to give notice to the subordinate lodge of the death of the assured as a prerequisite to the commencement of the action against the Supreme Council for the recovery of the amount of the policy. But that was not the point in the case, and it was not said that a failure to give such notice would have been fatal to the case. That announcement is different from the decision in the cases of *Millard v. Supreme Council,* and *Supreme Council v. Boyle, supra.*

We are of the opinion that, as the constitution and by-laws of the defendant society in the case before us placed no duty upon the plaintiffs (the beneficiaries) to give any notice of any kind to either the Supreme Commandery or to the subordinate commandery of which she was a member, nothing was required of the plaintiffs before suit brought except to demand of the Supreme Commandery the amount of the policy, which was done in this case, as appears from an allegation to that effect in the complaint and not denied in the answer.

Especially should that be the rule in this case, for the assured lived and died in the same town in which the officers of the subordinate lodge lived, and where its meetings were held.

The plaintiffs contended that, as the defendant denied its liability, it should not therefore be allowed to plead and insist upon a failure by the plaintiffs to give notice and proofs of the death (483) of the assured, even if notice and proofs had been necessary under the terms of the policy and by-laws. The consideration of that proposition is not necessary to the decision of this case, but it may be useful to state what we think is the law on that question:

If an insurance company should refuse to pay the amount of the policy, or deny its liability upon an independent ground, or put its re-

fusal exclusively on other grounds, before proofs of loss are made, and before the expiration of the time within which such proofs are by the terms of the policy to be made, such denial and refusal would constitute a waiver of the condition requiring notice and proofs of loss. Such a denial and refusal would be just the same as a declaration and notice to the beneficiary that payment would not be made in any event. The law does not require a vain thing to be done, and such a refusal and denial would make it unnecessary to give notice and proofs of death, since the company had refused absolutely to pay, for such reasons. *Gerling v. Insurance Company,* 20 S. E., 691 (Court of Appeals of West Virginia). If, after the time during which notice and proofs of death are required to be given, such notice and proofs should be given, or if during the time when such notice and proofs are to be given, defective notice and proofs are made, and the insurance company, in such cases, without making objection to such notice and proofs of death, should deny liability or refuse to pay on other distinct and independent grounds, then such denial and refusal would be regarded as a waiver of such notice and proofs. *Knickerbocker Insurance Co. v. Schnider,* 100 U. S.; Niblack on Benefit Societies, p. 804; *Brink v. Insurance Co.,* 80 N. Y., 108; *Insurance Co. v. Pendleton,* 112 U. S., 696.

The defendant, under its second alleged defense, that is, that (484) the assured had forfeited her interest in the certificate by a failure to pay assessments and failure to comply with the rules and regulations of the Order, undertook to show first that the subordinate commandery in the lifetime of the assured had been dissolved by the Supreme Commandery, and in consequence thereof all the members, including Mrs. Doggett, had lost their rights under the benefit policies, and in the second place to show that Mrs. Doggett had forfeited her rights by a failure to pay assessments, especially assessment No. 247. To prove that the subordinate commandery had been dissolved, the defendant introduced as a witness John N. Moore, formerly the Financial Keeper of the Records of the subordinate commandery, who testified that before Mrs. Doggett's death numerous assessments had been sent out by the Supreme Commandery to the subordinate commanderies; that none of them had been paid, and that no report concerning them had been made to the Supreme Commandery. There was no direct evidence that, for that default, the Supreme Commandery had dissolved the subordinate commandery. But the defendant contended that under section 9 of the general laws of the defendant, the subordinate lodge stood dissolved for that default. That section reads as follows:

"Whenever the amount due from a subordinate commandery upon an assessment is not received by the Supreme Treasurer within twenty days

from the date it is called, the Supreme Keeper of Records shall thereupon record such commandery as dissolved, and forward notice of its dissolution immediately to the Supreme Commander, to the Grand Commander, and to the Grand Keeper of Records of the jurisdiction in which such commandery is located, and to the Noble Commander, Noble Keeper of Records, Financial Keeper of Records and Treasurer of the Commandery so dissolved, each separately, giving the cause and (485) date of dissolution in such notices."

The defendant insisted that the failure of the Supreme Keeper of Records to make entry on his books of the dissolution of the subordinate commandery, and his failure to forward notices of its dissolution to the Financial Keeper of the Records and Treasurer of the Commandery so dissolved, were not necessary to effect the dissolution of the subordinate commandery, because as is alleged, the law is self-acting, and the subordinate commandery was dissolved although that officer neglected to perform his duty. If that had been the end of the matter, there might be something in the contention of the defendant; but by section 11 of the defendant's general laws, the commandery so dissolved had the right to be reinstated on receipt by the Supreme Treasurer within thirty days of the assessment, of the nonpayment for which the records of its dissolution was made; and, that being so, it necessarily follows that notice of the dissolution of the subordinate commandery should have been received, in order that it might have the benefit of the thirty days within which to send forward the assessment for the nonpayment of which it was dissolved.

Besides, we think that by the defendant's answer, although it denied that the certificate was in force, yet as it specifically put that denial on the ground that the assured had failed to pay the assessment made on her and had thereby ceased to be a member of the Order, the defendant ought not in strict law to have been allowed to prove the dissolution of the subordinate commandery.

The witness Moore was shown a book and page, taken therefrom, which contained the entry and statement that for failure to pay an assessment of 54 cents (assessment No. 247) Mrs. Doggett had been disconnected. Section 13 of the General Laws of the Su- (486) preme Commandery makes it the duty of the Financial Keeper of Records of a subordinate commandery, upon notification that an assessment has been made, to notify every member liable to the assessment. The assessment notices to the members are required to bear the official stamp of the Financial Keeper of Records, or the seal of the commandery, and its form is prescribed by the Supreme Commandery. Each member is required to pay the amount due as stated in the notice within thirty days of the date of the notice, and any member failing to pay the

assessment within thirty days shall *ipso facto* stand disconnected from the commandery, without sentence by the commandery. The defendant contends that under said section 13, and upon the evidence of Moore and the entry in the book of the disconnection of the assured, the forfeiture of the rights of the assured in the benefit certificate was worked, notwithstanding the fact that the defendant failed to show on the trial that the notice, in form and substance, as required by section 13, was given to the assured. We are of the contrary opinion. In the case of the *Supreme Lodge Knights of Honor v. Bertha Dalburgh,* 138 Ill., 508, it appears that the assured, Isaac Dalburgh, became a member of one of the subordinate lodges, and that he was suspended for failure to pay an assessment, no notice having been served on him of the assessment. The Court held that "the evidence failed to show that Dalburgh, the deceased, was notified of either of the assessments for the nonpayment of which the appellant claimed he stood suspended at the time of his death. That he could not legally be deprived of his membership in the Order without such notice, is well settled, and not here questioned.

The exceptions to the rejection of the evidence of the defendant (487) were not well taken, and can not be sustained. There is

No error.

Cited: Bragaw v. Supreme Lodge, 128 N. C., 360; *Gerringer v. Ins. Co.,* 133 N. C., 417; *Wilkie v. National Council,* 147 N. C., 368; *Shuford v. Ins. Co.,* 167 N. C., 551; *Harris v. Jr. O. U. A. M.,* 168 N. C., 359; *Lyons v. Knights of Pythias,* 172 N. C., 410.

J. H. SLOAN v. CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 1 May, 1900.)

Demurrer—Bill of Lading—Right of Consignee to Inspect—Request "to Notify" Treasurer of Purchaser, Same Right Implied—Charge for Demurrage, or Storage—Joinder of Separate Causes of Action—Jurisdiction—Admission by Demurrer.

1. A common carrier has the right to permit a consignee to inspect the article before delivery, and where the bill of lading therefor says "to order, notify S. B. Tanner, treasurer" (who was the treasurer of purchasing mill), he also may be permitted to inspect.

2. Where the complaint, in addition to claim for damages for alleged wrongful allowance of inspection, joins a further claim for wrongful charge for demurrage paid under protest amounting to $99, the latter claim is admitted by a demurrer applicable to the first cause of action only.

3. An answer should have been filed to the second cause of action, and may still be by permission of the court, when the case goes back.

4. It makes no difference, that by sustaining the demurrer as to damages alleged for wrongful inspection of the cotton, the other damages alleged are reduced below $200.

5. It is the sum demanded in good faith which confers jurisdiction, even though each of the several distinct causes of action are below $200.

ACTION for damages upon two alleged causes of action: (1) claim for damages for alleged wrongful allowance of inspection of a lot of cotton; (2) for wrongful claim for demurrage, amounting to $99, paid under protest, tried before *Allen, J.*, at March Term, (488) 1900, of MECKLENBURG. There was a demurrer filed applicable to the first cause of action. The demurrer was sustained and the cause dismissed. Plaintiff excepted, and appealed.

Osborne, Maxwell & Keerans for plaintiff.
Burwell, Walker & Cansler for defendant.

CLARK, J. The complaint avers that one Warlick had a contract with the Henrietta Cotton Mills for the purchase of cotton, under which he bought a lot of cotton; that he took a bill of lading therefor, "to order, notify S. B. Tanner, treasurer" (who was treasurer of the Henrietta Mills); that he drew a draft on said Tanner, treasurer, for the price of the cotton, which he endorsed with the bill of lading attached, for value, to the plaintiff. It is further alleged that the defendant company wrongfully and carelessly permitted the Henrietta Mills to examine the cotton without production of the bill of lading, in consequence whereof the said Henrietta Mills refused to accept the cotton and pay the draft as they otherwise would have done, and also that, for many days after the said mills refused to accept the cotton the defendant carelessly and negligently retained part of the cotton unloaded, in the cars, without notifying the plaintiff, and wrongfully required the plaintiff to pay $99 demurrage therefor, which he paid under protest, and alleges that by reason of the above negligence and wrongful acts he has sustained altogether $842.30 damages.

The defendant demurs, in substance, because it was not a wrongful act to permit the Henrietta Mills to examine the cotton, and that, if it were, it does not sufficiently appear from the complaint how any legal or actionable injury was done to the plaintiff, and that it does not sufficiently appear from the complaint how the requirement of payment of demurrage was wrongful. The court below sustained (489) the demurrer and dismissed the action.

The plaintiff does not contend that if the cotton had been consigned

to the Henrietta Mills it would have been wrongful to have permitted it to examine the cotton, but says that the bill of lading being "to order, notify S. B. Tanner, treasurer," was notice that the plaintiff retained ownership till the production of the bill of lading by said Tanner, treasurer of the Henrietta Mills. This point might well be taken if the action were for wrongful delivery to the cotton mills without the production of the bill of lading endorsed to the mills or its treasurer, but the request to "notify" certainly conferred upon the cotton mills as full right to inspect the cotton as if it had been the consignee. No injury to the cotton from the inspection is averred. Construing the complaint liberally, as is now required (Code, sec. 260), it means, if it legally means anything, that by reason of permitting the Henrietta Mills and its agents to inspect the cotton they were made dissatisfied and refused payment, whereas if they had been compelled to "buy a pig in a poke" the cotton would have been accepted and the draft paid. If the cotton was wrongfully rejected, the plaintiff's cause of action is against the Henrietta Mills, for, as assignee of Warlick, he stood in Warlick's shoes. If it was rightfully rejected, it can not be contended that there was a cause of action, for even if the Henrietta Mills had taken the cotton without opportunity of inspection, it could have immediately recovered back from the plaintiff, assignee of the bill of lading, for any deficiency in the quality or weight of the cotton, or otherwise. *Finch v. Gregg,* at this term.

The allegation as to the detention of the cotton in cars at place of destination without notice to the plaintiff, and wrongfully com-
(490) pelling him to pay $99 for demurrage, which was paid under protest, is admitted by the demurrer. It may be denied by an answer and a different state of facts may be found on the trial, but it was error to sustain the demurrer in that regard.

There was no demurrer for misjoinder of causes of action, and there was no ground therefor, for both matters of complaint (even if treated as separate causes of action) were transactions "connected with the same subject of action." Clark's Code (3 Ed.), 267 (1); *Hamlin v. Tucker,* 72 N. C., 502; *Cooke v. Smith,* 119 N. C., 350; *Benton v. Collins,* 118 N. C., 196, and other cases there cited. Nor does it make any difference that by sustaining the demurrer as to damages alleged for wrongful inspection of the cotton, the other damages alleged are reduced below $200. It is the "sum demanded in good faith" which confers jurisdiction, even though each of the several distinct causes of action are under $200. *Burrell v. Hughes,* 116 N. C., 430; *Martin v. Goode,* 111 N. C., 288; *Maggett v. Roberts,* 108 N. C., 174; *Moore v. Nowell,* 94 N. C., 265; *Carter v. R. R., ante,* 437.

Under the former system of practice, a party might be turned out

of equity and told to bring his action at law, or be dismissed by one door of the court room because he had sued in debt or covenant, when he might come back through another door with an action of trespass on the case, or replevin or detinue. But now, these refinements have been abolished because not conducive to the administration of justice; and if a party gets into court legally, he will not be turned out to come into court some other way. It would put additional costs on the plaintiff and be additional trouble to both plaintiff and defendant, with no benefit to either. Except when the coming into the Superior Court is a fraud upon the jurisdiction, the jurisdiction in that (491) court will not be ousted by the failure of a plaintiff to sustain part of his causes of action. The present law is thus stated in *Martin v. Goode, supra:* "Should the sum demanded be reduced under $200, by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted, except when the sum demanded is so palpably in bad faith as to amount to a fraud on the jurisdiction." The case of *Howard v. Insurance Co.,* 125 N. C., 49, does not overrule this settled practice. The head-note is: "The Superior Court has no original jurisdiction when in no event the plaintiff can recover as much as $200." There was, it is true, also a prayer for an injunction, but the Court dismissed that, because on the face of the complaint the courts of this State had no jurisdiction of the subject-matter, and as to the injunction the action was, as it were, *coram non judice.* When the case goes back the defendant will have the right to answer over. Code, sec. 272.

Error.

Cited: Austin v. Stewart, post, 527; *Boyd v. R. R.,* 132 N. C., 187; *Shankle v. Ingram,* 133 N. C., 259; *Brown v. Southerland,* 142 N. C., 227; *Thompson v. Express Co.,* 144 N. C., 392; *Mason v. Cotton Co.,* 148 N. C., 497, 508, 517; *Brock v. Scott,* 159 N. C., 516; *Fields v. Brown,* 160 N. C., 300; *Petree v. Savage,* 171 N. C., 439.

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C. H. ROBINSON ET AL. v. E. F. LAMB.

(Decided 8 May, 1900.)

Elizabeth City Ferry—Franchise a Gratuity Subject to Legislative Control—Jurisdiction of Board of County Commissioners—The Code, Section 2014—Superior Court by Appeal.

1. The right to operate a public ferry is a public franchise, granted by legislative authority, and exercised under supervision of the county commissioners by virtue of section 2014 of the Code and subject to right of appeal to the Superior Court.

2. Being simply a license and gratuity, it is subject to legislative restriction and may be revoked. Where one act granted an exclusive ferry franchise within an area of three miles, a subsequent act may reduce the limit to two miles; and when the public needs require it, additional ferries may be established, otherwise the ferry first established would amount to a monopoly, forbidden by the Constitution, Article I, section 31.

3. The matter of tolls is left to the discretion of the county commissioners, subject to right of appeal, if exorbitant, but to be fixed by them in the first instance.

PETITION for ferry across Pasquotank River from Elizabeth City, in Pasquotank, to Goat Island, in Camden, refused by the board of county commissioners, and heard on appeal before *Starbuck, J.*, at December Term, 1899, of PASQUOTANK.

The petition was opposed by the defendant, who was operating a ferry from Elizabeth City to Camden County, and claimed the exclusive right to do so under his charter from the Legislature within the limit of three miles, and that another ferry was not needed for the good and convenience of the public.

Issues submitted:

(493) 1. Is the proposed ferry necessary for the public good and convenience? Answer. "Yes."

2. Is the proposed ferry within two miles of another ferry? Answer. "No."

3. Is the proposed ferry within three miles of E. F. Lamb's ferry? Answer. "Yes."

Upon the findings of the jury, his Honor adjudged that the board of county commissioners of Pasquotank County lay out and establish the ferry petitioned for, and that the plaintiffs be authorized to build and operate it at their own expense, and to charge as toll the sum of ten cents and no more for a cart, buggy, carriage or wagon, going either way. Defendant excepted and appealed.

The various private acts relied upon by the defendant in support of his exclusive right of ferry franchise are cited and commented on in the opinion.

P. H. Williams, E. F. Aydlett and G. W. Ward for plaintiff.
Shepherd & Shepherd, Busbee & Busbee for defendant.

CLARK, J. In 1784, Private Laws, ch. 66, the Legislature, in consideration of Enoch Sawyer making a road through the swamp opposite Sawyer's Ferry, twenty feet wide and one foot above high tide, conferred on him the right to charge certain tolls, therein specified, for persons, vehicles and animals, "who should pass through the same and across his ferry," said rates to be allowed "during the term of twenty-five years, and no longer." There was another provision imposing a penalty of 20 shillings upon any other person transporting persons, horses, carriages and effects across said ferry, "one-half to be paid the informer, the other half to said Enoch Sawyer, his heirs and assigns." It seems the ferry was already existing, and the fran- (494) chise was in consideration of making the road and keeping it in repair, and was remunerated by tolls for the use of the road and ferry which were not conferred beyond 1809.

In 1790, Private Laws, ch. 42, the Legislature reduced the required width of the road to 16 feet, on account of "the expenses of making" a 20-foot road, and recouped the public by prescribing that the rate for ferriage should be fixed by the county court of Camden, by a majority of all the justices of the peace of the county.

In 1810, Private Laws, ch. 33, all the rights which had been attached to Enoch Sawyer, as keeper of a public ferry across Pasquotank River, were transferred to him as keeper of a public bridge at the same place, and were extended for fifty years, *i. e.*, to 1860, with an addition that "no other bridge shall be established within three miles or on the plantation of said Enoch Sawyer," during the continuance of that act. This was after the expiration of the franchise for levying tolls for traveling over a road, granted in 1784 for twenty-five years, in consideration of building such road, and being granted without any consideration was a mere gratuity or privilege.

In 1848-49, Private Laws, ch. 128, the "privileges and immunities" granted in the last act were extended fifty years from the expiration of the time mentioned therein, and granted to "Samuel D. Lamb, his heirs and assigns claiming under Enoch Sawyer." Said Lamb was required to keep the bridge and road in good condition, and the maximum tolls "for passing said bridge and road" were specified in the act, and he is granted permission to use boats for the transportation of passengers, "whenever

the bridge is removed by winds, tides, or the contact of vessels," provided the bridge is restored within four days after its removal.

In 1865, Private Laws, ch. 3, the last-named act was amended to authorize Dorsey Sanderlin to construct and use a ferry boat
(495) in the place of the bridge required by the previous act. This grant of a ferry was also gratuitous, and was to expire in 1875.

In 1873-74, Private Laws, ch. 27, the two last-named acts were amended to authorize the heirs of Samuel D. Lamb to establish a ferry with a boat such as that prescribed in the act of 1865, "instead and place of the bridge required by the charter ratified on 29 January, 1849," and its duration was "extended to the heirs of Samuel D. Lamb for thirty years from the expiration of the extension allowed in the act ratified on 29 January, 1849," and the act of 1810, was "amended to declare that no other bridge, boat or ferry shall be established within three miles of the one allowed by said act." The defendant contends that this extended the prohibition to erect a bridge or ferry within three miles either way over Pasquotank River till 1940, and that he has a contract right in such prohibition till that date.

In 1897, Private Laws, ch. 103, the General Assembly amended the last act by striking out "three" and inserting "two" miles.

The plaintiffs filed a petition with the commissioners of Pasquotank County to establish a ferry over the Pasquotank River from Elizabeth City to Goat Island in Camden County, at a spot designated, and at which the county commissioners of Camden had authorized such ferry, alleging that the proposed ferry was not within two miles of any other, and that it was necessary for the public good and convenience. The defendant filed a counter-petition, and alleged that the proposed ferry was not required by the public good and convenience, and that it was within two miles of his ferry. The county commissioners sustained the defendant's contention, and the plaintiff appealed to the Supe-
(496) rior Court. In that court, doubtless the defendant's pleading was amended to aver that the proposed ferry would be within three miles of the defendant's ferry, for the following issues were submitted without exception:

1. Is the proposed ferry necessary for the public good and convenience? Answer. "Yes."

2. Is it within two miles of another ferry? Answer. "No."

3. Is it within three miles of defendant's ferry? Answer. "Yes."

Thereupon it was adjudged that the county should lay out and establish the ferry as prayed, that the petitioners be allowed to build and operate the ferry at their own expense, and be allowed to charge for passing over said ferry the sum of ten cents, and no more, for a cart, buggy, carriage or wagon. The defendant appealed.

It is clear that all the above-recited legislation was without consideration, and lacks this essential element of a contract, save the act of 1784, which by its terms expired in 1809. Further, that all rights conferred by the act of 1810 expired by its terms in 1860, and that the "privileges and immunities" conferred by the act of 1848-49 had elapsed, and were so treated by the act of 1865, which authorized Dorsey Sanderlin to establish and operate a ferry at that point for ten years. Whatever rights the defendant has acquired are by virtue of the act of 1873-74. This act was not only a mere gratuity, but a franchise or license of this nature is an attribute of sovereignty, and it would be beyond the power of the Legislature to forbid a future Legislature (if it had been attempted) from conferring the right to establish other bridges and ferries across streams whenever in its judgment the growth of population and trade demand it. In 1784 the town of Elizabeth City was a very small village. Today it has a population of many thousands, and is rapidly growing. To restrict its population from (497) crossing the river in front of it, and the transportation of freight across it for the distance of six miles, three miles on either side, save at the defendant's ferry, would be a monopoly forbidden by the Constitution, Art. I, sec. 31. *Toll Bridge Co. v. Commissioners,* 81 N. C., 498; *McRee v. R. R. Co.,* 47 N. C., 186; *Carrow v. Toll Bridge Co.,* 61 N. C., 118. From the earliest times the legislation of this State, as now repeated and summed up in the Code, sec. 2014, recognized that the right to operate ferries was a public franchise and under supervision of public authority. The above-recited legislation was therefore simply a license, revocable at will of the General Assembly. Whether the defendant acquired any property right to maintain a ferry at the place at which he operates it, we are not called upon to decide, though it is intimated in *Greenleaf v. Commissioners,* 123 N. C., at p. 35, that the commissioners "may discontinue his ferry." There is no attempt to revoke his license to do so or to interfere with his operations in any way. But the provision of the Legislature of 1873-74, that other ferries or bridges would not be authorized within three miles thereof until 1940, was simply legislation restricting the general power of the county commissioners given by the Code, sec. 2014 (and previous legislation there summed up), to authorize public ferries wherever they saw fit, and the General Assembly of 1897 had the power to remove such restriction from the county commissioners of Pasquotank and Camden, and to reduce the distance to two miles, as it did. Just so, any Legislature might change the two miles restriction in the general act. Code, sec. 2038.

There was no contract with the defendant that this should not be done, and the contract would have been invalid if made, for it would be

(498) "an alienation of sovereign powers and a violation of public duty." Greenleaf, cited by *Smith, C. J.*, 81 N. C., 499, and Cooley Const. Lim., 125, cited *ibid.*

If the defendant's claim were well founded, it would equally render illegal the railroad bridge which has been built within three miles of the defendant's ferry.

The defendant files in this Court a motion reciting certain propositions of law which he desires the Court to pass upon. This is an irregular practice which we can not recognize. This is an appellate court, and we pass only upon exceptions taken to proceedings in the trial below or upon defects apparent upon the face of the record proper.

The discretionary power of the county commissioners to establish ferries and public roads is subject to review by the Superior Court on appeal, and of course to reversal. The case of *Ashcraft v. Lee*, 79 N. C., 34, relied upon in the brief of defendant's counsel, was reversed on rehearing, 81 N. C., 135; Code, sec. 2039. The matter of tolls is left to the discretion of the county commissioners (Code, sec. 2046), but doubtless could be reviewed if exorbitant. While we do not see that the defendant has any right to complain, whatever the rates of toll allowed to the plaintiffs, it was error in the Superior Court, appearing on the face of the record, for that court to fix the tolls in the first instance. It should have contented itself with directing the county commissioners to grant the petition to establish the ferry, and the matter of tolls should be fixed by the county commissioners, subject to review on appeal if excepted to for proper and sufficient cause by any one interested.

Modified and affirmed.

Cited: Robinson v. Lamb, 129 N. C., 17; *S. c.,* 131 N. C., 230; *In re Spease Ferry,* 138 N. C., 222.

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(499)

HELEN CONKEY, EXECUTRIX AND DEVISEE OF JANE E. ROSCOE, v. JOHN L. ROPER LUMBER COMPANY.

(Decided 15 May, 1900.)

Tenants in Common—Adverse Possession—The Code, Sections 143 and 146 Construed Together.

1. Where plaintiff and defendants were tenants in common, the possession of the defendants, not having been adverse for twenty years, was the possession of the plaintiff.

2. In cases where there is no tenancy in common, a plaintiff who establishes a legal title to the premises is presumed, under section 146 of the Code, to have been possessed thereof within the time required by law; and the defendant can not under section 143 shift upon such plaintiff the burden of showing that he has been in possession of the property within twenty years before suit. The two sections are to be construed together—the defendant must show that he himself has been in possession adversely for twenty years. *Johnson v. Pate*, 83 N. C., 110.

ACTION for recovery of an undivided half interest in land, and for partition by sale, tried before *Starbuck, J.*, at Fall Term, 1899, of GATES. There was a verdict, with judgment for plaintiff. Defendant appealed. This is the second trial of the case, reported in 124 N. C., 42, and this appeal is but a rehearing upon the same evidence on the first trial under the guidance of the opinion then delivered.

W. M. Bond and Battle & Mordecai for plaintiff.
L. L. Smith and Shepherd & Shepherd for defendant.

MONTGOMERY, J. This action was before this Court at February Term, 1899, on appeal of the plaintiff, and is reported in 124 N. C., 42, the plaintiff at that time being Jane E. Roscoe. Since that time she has died, and in the court below Helen Conkey was made (500) the present plaintiff as sole devisee of all of the lands of Jane E. Roscoe. By leave of the court, when the case was called for trial the plaintiff was allowed to strike out of sections 3 and 4 of the complaint, all the lands described therein, except the "Hill tract" and the "Mills Riddick tract."

It was agreed by both sides that the damages which the plaintiff might be entitled to recover should be assessed after the issue of title had been settled. There was no change in the pleadings on the part of the newly made plaintiff, and she adopted those which had been filed by the original plaintiff.

The claim of the plaintiff is that she is the owner as tenant in common with the defendants of a one undivided half interest in the Hill tract and the Mills Riddick tract. In support of her claim she introduced in evidence a properly certified copy, from the book of wills of Gates County Superior Court, of the will of H. E. Roscoe, in which was devised to his widow, Jane E. Roscoe, the former plaintiff, all of his property, personal, real and mixed; also from the same book of wills a certified copy of the will of Jane E. Roscoe, in which was devised all of her real estate in fee simple to her sister, Helen Conkey, the plaintiff.

The plaintiff then introduced sections 3 and 5, of the complaint, in which the plaintiff alleged that on the 1st day of January, 1853, J. R. Riddick conveyed by deed in fee simple to H. E. Roscoe and S. W. Wor-

rell as tenants in common the said "Hill tract" and "Mills Riddick tract" of land, and that under deeds from Worrell and others the defendants have become and are now the owners of an undivided one-half interest in the lands described in the complaint; and she also introduced sections 5 and 8, of defendants' answer, in which they admitted the execution of the deeds specified, but they averred that in those
(501) deeds the whole estate and interest in and to the lands were conveyed to them, and not one-half only, and that the defendants are the owners of all the lands and have entered upon the lands conveyed to them in the aforementioned deed, and have cut and are cutting timber from them. The plaintiff further introduced the deed from Riddick to H. E. Roscoe and S. W. Worrell as tenants in common, then the deed from S. W. Worrell purporting to convey the entire estate in the lands to Brady, Bond, Roberts and Wiley in fee simple, and then subsequent conveyances to the defendant company. The plaintiff then introduced testimony going to show that the land embraced in the deeds included within its boundaries the Hill tract and the Mills Riddick tract. The defendants in the answer had made an averment that many years before the commencement of this action H. E. Roscoe had conveyed the land described in the complaint to S. W. Worrell, and that the deed after its execution and delivery had been lost and never registered. The defendants tendered no issue as to the execution of such a deed by H. E. Roscoe, nor of its loss, and did not offer any evidence to sustain such a contention. The defendants offered some evidence intended to show adverse possession of the land for such a length of time as in law would presume a grant, and also to give a title under color of the deed from Worrell. But the evidence was not sufficient to be submitted to the jury for that purpose, and on the argument here it was not contended that it was sufficient. The exception to the evidence of the probate of the will of H. E. Roscoe was abandoned here.

When the case was formerly before us, the pleadings were the same and the evidence the same, and we held that the plaintiff and the defendants were tenants in common, each owning a one undivided half interest in the lands, and for the reasons given in the opinion in that case we are of the same opinion still. The evidence showed no evi-
(502) dence of an adverse possession by the defendants for twenty years, by which an ouster of the plaintiff was had.

In truth this appeal is but a rehearing of the first case, and the only marked feature of the new argument of counsel was an insistence that section 143 of the Code was a plea of the statute of limitations, and that the same having been pleaded in the case, the burden of showing that the plaintiff had been in possession of the land within twenty years next preceding the commencement of the action was devolved on the

plaintiff. The construction of that statute is not called for in this case for the reason, as we have said, that the plaintiff and defendants were tenants in common, and the possession of the defendants not having been adverse for twenty years was the possession of the plaintiff.

But in cases where there is no tenancy in common, section 143 of the Code must be construed with section 146. While section 143 declares that no action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff or those under whom he claims had been seized or possessed of the premises in question within twenty years before the commencement of the action, yet that is explained in section 146 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of the action.

The pleading then by a defendant in suits for real estate, of section 143 does not shift upon the plaintiff the burden of showing that he has been in the possession of the property within twenty years before the commencement of the action, but the presumption (503) created by section 146 can only be rebutted by proof on the part of the defendant that the defendant has been in possession adversely of the premises for twenty years.

In *Johnson v. Pate,* 83 N. C., 110, the defendant demurred to the complaint, one of the grounds being a failure on the part of the plaintiff to assert a possession in himself or in those under whom he claimed within twenty years before the action was instituted, and the Court held that the demurrer could not be sustained "for it is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought. For if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action."

Affirmed.

(504)

HENRY H. PERSON, JOHN R. HAZELL, RECEIVERS OF THE BANK OF COMMERCE IN BUFFALO, N. Y., v. S. S. LEARY ET AL.

(Decided 15 May, 1900.)

Receivers—Evidence of Appointment — Matter of Record —Appointment by Foreign Court, Reappointment Here.

1. The appointment of receivers is matter of record, and should be shown by the record.
2. The plaintiffs suing as receivers of the Bank of Commerce in Buffalo, N. Y., allegation not being admitted in the answer, were put upon proof, and the only proof that could be made is a certified copy of the order of dissolution and of their appointment as receivers.
3. Their failure to produce the certified copy was a defect of proof below, which can not be supplied, after appeal, by amendment under section 965 of The Code.
4. *Semble.* Foreign receivers, like foreign administrators, should apply for appointment here, previous to suit.

ACTION in nature of trespass, heard before *Starbuck, J.*, at September Term, 1899, of TYRRELL, upon a motion to continue a restraining order heretofore granted until final hearing. His Honor allowed the motion, and defendants excepted and appealed.

Among other exceptions, the defendants excepted that plaintiffs have failed to show that they are receivers of the Bank of Commerce in Buffalo, N. Y., by any proper evidence, that is, by record evidence.

Busbee & Busbee and Shepherd & Shepherd for plaintiffs.
F. H. Busbee for defendants.

CLARK, J. The defendants except to the continuance of the restraining order to the hearing upon several grounds, among them:

"2. The plaintiffs have failed to make out a *prima facie* case in that they have failed to show any title, having failed to show that
(505) they are receivers of the Bank of Commerce in Buffalo, New York, by any proper evidence."

"3. That if they are receivers, it is a matter of record and should be shown by the record."

"8. That the receivers, even if their appointment had been shown, have no permission to prosecute this action in the courts of North Carolina; that they have never qualified as receivers in North Carolina, and have no interest in the property in controversy."

These same plaintiffs attempted to prevent a judgment being taken in *Kruger v. Bank,* 123 N. C., 16,, and the Court then said that their

affidavit, averring their appointment as receivers by the court in New York, was "entitled to no consideration" as they were not parties to the action, and "the affidavit is not even accompanied by a certified copy of the alleged judgment of dissolution and appointment of receivers."

That they are plaintiffs now does not give them rights as receivers of the bank unless, as a matter of law, they are authorized to bring this action as such receivers. Their alleged appointment as receivers is denied by the answer. The only proof that could be made is a certified copy of the order of dissolution and appointment of receivers. That not having been filed, the Court could not recognize their authority to bring this action and invoke the equitable jurisdiction of the Court. Upon the record, the Bank of Buffalo is the party in interest, and in the absence of a certified copy of the decree dissolving the corporation and appointing Person and Hazell receivers, they have no standing in court, and have not made out a *prima facie* case entitling them to any relief.

After the decision of this Court, above cited, it is singular that the plaintiff should not have produced a certified copy of the decree of the court under which they claim to be receivers; for, in the (506) absence of it, they are simply individuals suing in their own names, and as such showing no equity to a restraining order against the defendants.

After argument here, the plaintiffs offered a certified record of their appointment as receivers, and asked to amend under The Code, section 95. In its discretion, this Court can in proper cases permit amendments, but this is a defect of proof in making out a *prima facie* case, and can not be cured by offering, after appeal, and argument thereon in this Court, the omitted evidence which might have entitled the plaintiffs to maintain the action. If offered below, there would be opportunity to controvert it, its purport, or showing a later decree. None of these things can be done here, as this is an appellate court.

When the case goes back, they can again move for a restraining order, if so advised, upon proper evidence to justify it.

This renders it unnecessary to pass upon the 8th exception, as well as the other exceptions in the record, not recited above. But an administrator appointed in another State can not maintain an action in this State. Administration must be taken out here. *Morefield v. Harris,* at this term. If there are any reasons why receivers should not in like manner be appointed in this State to take charge of property in this State belonging to a deceased corporation, at most, the authority of such foreign receivers to proceed to enforce their claim in our courts is a matter of comity, as was said in *Kruger v. Bank, supra,* and hence should probably not be exercised without leave of the court. The better rule is to have receivers appointed here.

The plaintiffs having pleaded their appointment as receivers, it is not a case for dismissal of the action, but a defect in the proof (507) which would entitle them to the relief sought; and the absence of leave to sue was waived by not insisting on it below. The restraining order was improvidently granted.

Error.

Cited: Person v. Leary, 127 N. C., 115.

WILLIAM LASSITER v. NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 15 May, 1900.)

Removal of Cause for Trial—Matter of Discretion, Code, Section 195.

1. It is within the discretion of the court to change the place of trial, when the convenience of witnesses and the ends of justice would be promoted by the change. Code, section 195 (2.)
2. Such discretion is not reviewable, and its exercise is not restricted to the expiration of the time of answering, nor to cases in which the action is brought in the wrong county, nor must the removal be necessarily made to some county in the same judicial district.

ACTION for injury alleged to be occasioned by diverting water upon land of plaintiff, heard before *Allen, J.,* at November Term, 1899, of BERTIE, upon motion and affidavit of defendant for the removal of the cause to some other county for trial, for the convenience of witnesses and to promote the ends of justice. Motion allowed. Plaintiff excepted and appealed.

Francis D. Winston for plaintiff.
George Cowper for defendants.

CLARK, J. The Code, section 195, provides that if an action (508) is not brought "in the proper county, the action may, notwithstanding, be tried therein *unless* the defendant, before the time of answering expires, demands in writing that the trial be had in the proper county." This gives the defendant a right to remove in such cases upon written motion in apt time (*Manufacturing Co. v. Brower,* 105 N. C., 440), otherwise the objection is waived. But the same section further on gives the court the discretion: "It may change the place of

trial" in three cases named in as many subsections, the second of which is "When the convenience of witnesses and the ends of justice would be promoted by the change." The court in its discretion granted the removal upon that ground, in this case, and such action is not reviewable. The discretion of the court to remove is not restricted to the expiration of the time of answering, nor to cases in which the action is brought in the wrong county, as is the right of the defendant to remove.

The further objection that the cause was removed to a county in another judicial district is without ground in the statute, or decisions to support it. The appeal was not premature (*Roberts v. Connor,* 125 N. C., 45), but there was

No error.

Cited: Staton v. R. R., 147 N. C., 442; *Oettinger v. Live Stock Co.,* 170 N. C., 153; *Craven v. Munger, ib.,* 425.

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(509)

WILEY J. LASSITER v. NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 15 May, 1900.)

Diverting Water on Land—Damages to Crops—Permanent Damages—Judgment—Statute of Limitations—Act of 1893, Chapter 153, and Act of 1895, Chapter 224.

1. Where the jury found that the defendant wrongfully diverted and ponded water on plaintiff's lands, causing injury thereby, (2) that the amount of permanent injury was $90; (3) that the damage to the crops for three years next preceding the action was $60: *Held,* that plaintiff was entitled to judgment for damages to crops in addition to the permanent damages.

2. The settled rule is that neither a corporation, nor an individual, can divert water from its natural course so as to damage another. They *may increase and accelerate, but not divert.*

3. By the act of 1893, chapter 153, amended by act of 1895, chapter 224, actions for damages occasioned by the construction of railroads are to be commenced within five years after cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done.

ACTION for damages for injury to land and crops of plaintiff by wrongfully diverting water upon his land, tried before *Allen, J.,* at November Term, 1899, of BERTIE.

Upon issues submitted the jury found that the defendant wrongfully diverted and ponded water on plaintiff's land, causing injury thereby; that the damage for permanent injury to the land was $90, and the damage for three years next preceding the action was $60. His Honor rendered judgment in favor of plaintiff for $90 only, and he excepted and appealed.

(510) *Francis D. Winston for plaintiff.*
George Cowper for defendant.

DOUGLAS, J. This is an action brought to recover damages for the unlawful diversion of water on to the lands of the plaintiff, who claimed damages for his yearly injury for three years next preceding the bringing of the action, and consented "that all of the damage done to said land, past, present and future, may be estimated and recovered in this action." The defendant denied the diversion and damage, and pleaded the usual statute of limitations. It does not, however, appear to have relied upon any of these statutes, as it tendered no issue as to any of them. There are only two exceptions appearing in the record, one to a special instruction given at the request of the defendant and the other to the judgment. The former does not appear to have hurt the plaintiff, and his exception is inconsistent with his prayer for judgment on the third issue.

The judgment is as follows: "This cause coming on at this term of the court to be heard by the court and a jury, duly sworn and empaneled, all the parties being before the court, and the following issues submitted to the jury having been answered by them as set forth, at the end of each: 1. Did the defendant wrongfully and unlawfully pond and divert water on and upon the lands of plaintiff as alleged in the complaint, causing injury to the plaintiff thereby? Answered, 'Yes.' 2. What amount of permanent damage was done said land by reason of such wrong and injury? Answered, '$90.' 3. What amount of damage, if any, was done to the crops thereby for the three years next preceding the bringing of this action? Answered, '$60.'

"Now it is adjudged that the plaintiff recover of the defendant the sum of $90, with interest thereon from 6 November, 1899, till
(511) paid, and the cost of this action, to be taxed by the clerk."

The plaintiff excepted to the refusal of the court to give judgment for the yearly damages found by the jury on the third issue. In such refusal we think there was error. There was no objection to the submission of the issue, which we think was entirely proper, and the court did not pretend to set aside the finding thereon. Indeed, it does not appear that any motion was made to set aside the verdict in any par-

ticular. The defendant seemed willing to take its chances upon the third issue, as it requested the following special instruction, which was given by the court over the objection of the plaintiff, to wit: "That there is no evidence to be considered by the jury of any damage to the crops on the land during the three years before bringing this action except such as was caused by the diminished productiveness of the land caused by the permanent damage, and the jury shall assess no damages in answer to the third issue, except such as come from such diminished productiveness." The plaintiff is content with the finding and the defendant has neither excepted nor appealed.

We presume that the court refused to render judgment for the $60 yearly damage on the supposition that when permanent damages were awarded the easement thereby acquired dated back to the time of the original injury. For this ruling we see no warrant in law. This Court has repeatedly held that there is appurtenant to all lands a natural easement entitling the owner to discharge surface water *in its natural course* regardless of the ownership of the lower lands; but this does not include diverted waters which in their natural flow would find a different outlet. Such diversion would be a trespass which would entitle the injured party to compensation for all resulting damage, and under certain circumstances to an abatement of the nuisance. It is true that the works of certain *quasi*-public corporations are not liable to abatement (512) on the theory that to interfere with such works might seriously affect the proper performance of their public duties; but this does not exempt them from liability for any unlawful damage. Any attempt to do so would be unconstitutional, and therefore all laws tending to that result must be reasonably construed. The settled rule of this Court is that "Neither a corporation nor an individual can divert water from its natural course so as to damage another. They *may increase and accelerate, but not divert.*" *Hocutt v. R. R.*, 124 N. C., 214, 219; *Mizell v. McGowan*, 125 N. C., 439, 444. When the defendant diverted unlawfully, that is, without having acquired the right to do so, the waters of Heart's Delight pocoson to the lands of the plaintiff, it committed a trespass. This trespass continues as long as the defendant continues to discharge upon the lands of the plaintiff diverted water in greater quantities than can be carried off by the natural outlet; or until the defendant acquires the *right* to discharge such waters. This right is simply an easement, which may be acquired by grant, prescription or condemnation. *Beach v. R. R.*, 120 N. C., 498. The act of 1893, ch. 152, was merely a statute of limitation. The act of 1895, ch. 224, professedly an amendment to the act of 1893, provides that all actions for damages caused by the construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess

the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property."

As in actions on the case, the damage is the real cause of action, it is clear that the statute does not begin to run until the damage is done.

Railroads are *quasi*-public corporations charged with important
(513) public duties, which in their very nature necessarily invoke the power of eminent domain; and therefore the courts with practical unanimity have created a species of legal condemnation by the allowance of so-called "permanent damages." Our leading case upon this subject is *Ridley v. R. R.,* 118 N. C., 996, where apparently for the first time in this State the rule is distinctly enunciated and defined. It is further developed and affirmed in *Parker v. R. R.,* 119 N. C., 684; *Beach v. R. R., supra; Nichols v. R. R.,* 120 N. C., 496; *Hocutt v. R. R., supra.* The provision in the act of 1895 incidentally providing for a statutory easement, rather by implication than direct terms, seems to us to be in effect but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in *Ridley's case,* which was decided a year after the act was passed. It is true the act uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This act does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong, while the other is the conveyance of a right, as the allowance of permanent damages under this act is in effect the condemnation of land to the use of a statutory easement.

But suppose the damage is not permanent and the defendant does not wish to acquire the easement. Can he be made to do so regardless
(514) of the cost to himself or damage to the plaintiff? We think not.

The confusion liable to arise from the word "permanent" as applied to damages is pointed out in *Beach's case, supra,* on page 502, where the nature of such an easement is discussed. Whether the damage is permanent or not, must appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the Court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if

they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the damage to his land, but also the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop.

In *Ridley's case, supra,* it appeared that the damage was caused by the construction of the roadbed and bridge of the defendant, which were clearly permanent structures, the removal of which would involve not only great expense to the defendant, but also great inconvenience to the traveling public. Therefore, the defendant tendered the issue of permanent damage, to which it was clearly entitled. But can mere ditches which may be run in one direction one day and changed the next, or opened in the morning and filled up at night, be considered permanent structures? Their continuance may not be necessary, (515) and the defendant may well prefer to close them up rather than pay a large sum for an easement that it does not need. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction. Could not the railroad fulfill its obligations by abating the nuisance and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and in any event must pay for the injury already done. Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as clearly intended by the statute.

In the case at bar, both parties have agreed to the awarding of permanent damages; but the defendant insists that its acquisition of the easement condones the trespass. This contention can not be sustained upon any principle of law. Of course if one issue were made to include all damages, past, present and prospective, the plaintiff would recover all to which he is entitled. But we think the better plan is to submit two issues, and clearly instruct the jury as to the nature of each.

(516) In this way, there will be less chance of confusion and greater ease of review.

The judgment will be amended in the court below, so as to allow the plaintiff the sum awarded by the verdict for damages to crops, in addition to that found for permanent damage. The judgment is therefore

Modified and affirmed.

Cited: Geer v. Water Co., 127 N. C., 354; *Shields, v. R. R.,* 129 N. C., 4; *Mizell v. McGowan, ib.,* 94; *Mullen v. Canal Co.,* 130 N. C., 501; *Rice v. R. R., ib.,* 376; *Phillips v. Tel. Co., ib.,* 527; *Leigh v. Mfg. Co.,* 132 N. C., 172; *Dale v. R. R., ib.,* 708; *Craft v. R. R.,* 136 N. C., 51; *Stack v. R. R.,* 139 N. C., 368; *Thomason v. R. R.,* 142 N. C., 331; *Briscoe v. Parker,* 145 N. C., 17; *Beasley v. R. R.,* 147 N. C., 365; *Roberts v. Baldwin,* 151 N. C., 408; *Ludwick v. Mining Co.,* 171 N. C., 62.

CAPITAL PRINTING CO. v. CITY OF RALEIGH.

(Decided 15 May, 1900.)

Overflow of Water—Defective Sewerage—Demurrer to Evidence—Effect of Demurrer—Extraordinary Rainfall—Different Conclusions to Be Reasonably Drawn as to the Effect of the Evidence—Negligence, or No Negligence.

1. Upon demurrer to the evidence, the plaintiff's evidence will be considered as true and taken in the most favorable light for it.
2. In reviewing a judgment of nonsuit, the court will assume every fact proved necessary to be proved when the evidence tends to prove it.
3. When the facts are not conflicting and only one inference can be drawn from them by a reasonable mind, it becomes a question for the judge alone.
4. When the facts are not clear to the mind of prudent and reasonable men, or if the evidence is not so plain that reasonable men might not reach different conclusions on the subject, it is a question for the jury to consider, under proper instructions by the court, whether there was or was not negligence, which is a mixed question.

ACTION for damages for injury caused by the alleged negli-
(517) gence of defendant in the construction and maintenance of a city sewer, tried before *Brown, J.,* at April Term, 1899, of WAKE.

At the close of plaintiff's evidence, defendant moved to dismiss, as in case of nonsuit. His Honor held that there was no evidence of negli-

gence on the part of defendant to go to the jury, and rendered judgment as in case of nonsuit, and dismissed the action; to which ruling and judgment plaintiff excepted, and appealed to Supreme Court.

The evidence is recited in the opinion.

R. O. Burton and A. J. Field for plaintiff.
W. L. Watson for defendant.

FAIRCLOTH, C. J. The plaintiff alleges that its property was damaged by the negligence of the defendant. At the close of the plaintiff's evidence the defendant moved to dismiss the action, as in case of nonsuit. His Honor held that there was no evidence of negligence by the defendant to go to the jury, and rendered judgment of nonsuit. The plaintiff excepted, and assigned said holding and judgment as error. In the argument in this Court the merits of the controversy were discussed at length, but the only question we can consider is whether the plaintiff's evidence was sufficient to authorize and require his Honor to submit an issue to the jury on the question of the defendant's negligence.

G. V. Barnes, president of the plaintiff printing corporation, testified that the plaintiff's printing house fronted on Martin street in Raleigh, and the paper, stock, books, forms, etc., were damaged in the basement several feet below the level of the street; that the water overflowed the street and sidewalk and entered the basement through windows fronting the street, which windows extended below the level of the street, and were protected by area-ways. The stock was on shelving and tables in the basement, and the overflow and damage occurred at (518) night on 15 May, 1898.

G. Norwood, the bookbinder, after describing the extent of the loss, said that nearly all of the articles ruined were damaged by water coming through the Martin Street window.

C. B. Edwards testified:

"Remember rain of 15 May, 1898. I saw high-water line on my fence. I live on Martin street adjoining printing shop. I think water rose high enough to flow over area-ways and into plaintiff's windows on Martin street. On Martin street culvert runs under street. There are two openings to culvert, one on each side of street, which are covered with iron gratings.

(It is admitted that there is a stone culvert crossing Martin street three by four feet which empties into a terra-cotta pipe two feet in diameter. The length of pipe is 175 feet and has a fall of ten feet from top of street to the end of pipe. The openings into the culvert are 3 feet 3 inches long by 18 inches wide, and 4 feet 10 inches long by 2 feet 2 inches wide, respectively. These openings are covered with gridiron

gratings, the open spaces between the bars being 2½ and 2¾ inches respectively. The street is paved with Belgian block with stone curbing from 6 to 8 inches in height.)

"Saw openings to culvert morning after storm. They were covered with trash. As water flows over the bars to gratings, leaves and paper catch on bars and gradually lap over one another and finally cross to the next bar and prevent the water from flowing through into the culvert. Then the sidewalk would become flooded. I saw the trash taken off the next morning after the storm. It consisted of green leaves, green twigs, branches of trees, pieces of wood, and a few strips of paper. It
(519) was not ordinary trash. Was mostly leaves and twigs beaten off of trees by the storm. The reason that the sidewalk was overflowed was because the openings to the culvert became stopped up. If it had not been for the obstruction to the openings I think the culvert could have easily carried off any amount of water that might have fallen on the street. Remember the rain storm of 18 May, 1894, when the sidewalk was overflowed. The arrangement of the gratings was the same on the night of 15 May, 1898, that is, they were flush with the surface of the street. That when the gratings were flush with the street the openings were liable to become stopped up as already described. I have been out in the rain on two occasions and taken the trash off of the gratings with a rake to prevent the sidewalk from overflowing. After the storm of 18 May, 1894, I complained to Mr. Blake, the Street Commissioner and City Engineer, about the gratings, and the city had them raised about four inches on iron legs so that the trash would pass under the bars to the gratings instead of over them. They remained in that condition for some time and were less liable to become obstructed than they were when flush with the street. The legs to the gratings were broken off by wagons or the street sweepers of the city some time before the storm of 15 May, 1898, and were flush with the street on the night of the storm. I never knew the sidewalk to overflow on but two occasions, 18 May, 1894, and 15 May, 1898, when the storm was excessive and unusual. On every other occasion the culvert has been ample to carry off the water. I think it would have carried off the water on 15 May if the openings had not become obstructed. The street had not been swept for several days just before the storm. It was closed on account of my daughter, who was very sick. There was no need of sweeping the street. It was clean."

C. F. Von Hermann, who has been in the United States
(520) Weather Service for many years, and is now Chief of the Weather Bureau at Raleigh, deposed that, "The rain storm of 15 May, 1898, was most unusual for this section. It was excessive, extraordinary and abnormal; never knew of one inch to fall in ten min-

utes before. Such an abnormal rain is popularly denominated a 'cloud burst.'" After a more particular account of the precipitation at short intervals, he said: "The rain storm of 18 May, 1894, was also an abnormal storm. These two exceeded by far any others which we have recorded." To the question, "Although the storms of 18 May, 1894, and 15 May, 1898, were unusual, excessive and abnormal, may they not reasonably be expected to occur occasionally?" the witness said that they might be expected to occur again.

A. W. Shaffer was examined, and testified:

"Reside in Raleigh, and am a civil engineer by profession; made a survey and map of locality of plaintiff's shop; examined the locality on the morning of 16 May, 1898, after the storm, and examined the gratings over the openings to the culvert. The accumulations on the gratings were not the ordinary street refuse, but leaves and green branches and other extraordinary accumulations. That he fixed the highwater line by evidences on the buildings and fences; that the water rose high enough, as shown by the high-water line he found, to flow into plaintiff's windows. The water was surface water only. That the culvert and terra-cotta pipe leading south under the adjacent lots are of ample capacity to carry off any storm of rainfall that we reasonably expect to happen in this climate. That it can carry off such extraordinary rainfalls as usually occur, but that he did not think that the terra-cotta pipe was sufficient to carry off the rainfall of 18 May, 1894, or 15 May, 1898. That if the pipe had the same capacity as the culvert it could carry off any rainfall that might happen. The (521) street paving and the curbing and the grading of the street were properly done, and that the gratings over the openings to the culvert were such as are usual in cities and towns where the streets are kept clean. That the gratings were constructed skillfully, and were placed in the usual position. That he has seen some gratings that were raised on legs above the surface of the street, but they always had flaps or inclined sides to them, and were more likely to become obstructed than if the grating were flush with the surface of the street. He has never seen any gratings on legs without the side gratings anywhere but at this particular locality. The universal method is to put them flush with the street. If the gratings were raised on legs, as these gratings had once been and are now, the liability to become obstructed would be much less than if flush with the street. That the area-ways to the Martin Street windows were sunken and broken away from the wall and in bad condition. That they had since been built higher. That if they had been at their present height on the night of 15 May the water would not have flowed over them."

These were the only witnesses examined. The defendant's motion to

dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be considered as true, and taken in the most favorable light for it. *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551.

An appellate court reviewing a judgment of nonsuit will assume every fact proved necessary to be proved, when the evidence tends to prove it. *Howell v. R. R.,* 124 N. C., 24.

It is easy to lay down the general rule, but the difficulty lies in applying the rule to the facts in individual cases as they arise. When the facts are not conflicting and only one inference can be drawn (522) from them by a reasonable mind, it becomes a question for the judge alone. When the facts are not clear to the minds of prudent and reasonable men, or if the evidence is not so plain that reasonable men might not reach different conclusions on the subject, it is a question for the jury to consider, under proper instructions by the court, whether there was or was not negligence, which is a mixed question.

It is not necessary to refer to the numerous authorities and decided cases on this subject. The principle is recognized and stated in *Tillett v. R. R.,* 118 N. C., 1031, and *Russell v. R. R., ib.,* 1098.

In the case at bar, the defendant relies on evidence that it had skillfully prepared every reasonable protection against damage, and that the storm on the night of 15 May, 1898, was so extraordinary and abnormal, that it should not be held liable for the result, because it was not produced by its negligence. On the other hand, the plaintiff relies on evidence showing that the lower end of the drain-way was smaller than the upper end, and that the defendant had the knowledge and the experience of a similar rainfall in 1894, against which it provided, but allowed the improved protection to become worthless before 15 May, 1898, which improved condition would have prevented the overflow. The plaintiff insists that these facts tend to show negligence and culpable liability.

From this condensed statement of the evidence, at present admitted to be true, we think there is room for different conclusions to be drawn by reasonable men. We intimate no opinion on the weight of the evidence, either way, nor on the ultimate liability of the defendant, either in its *quasi judicial* or *ministerial* character. Such questions, to which (523) the argument before us was mainly addressed, were not considered in the Superior Court, and are not before this Court.

Reversed.

DOUGLAS, J., concurs in result only.

Cited: *Moore v. R. R.,* 128 N. C., 457; *Thomas v. R. R.,* 129 N. C., 394; *Coley v. R. R., ib.,* 413; *Lewis v. S. S. Co.,* 132 N. C., 922; *Butts v. R. R.,* 133 N. C., 83; *Craft v. R. R.,* 136 N. C., 51; *Kearns v. R. R.,* 139 N. C., 482; *Milhiser v. Leatherwood,* 140 N. C., 235.

CLINE & WILKIE v. ALICE RUDISILL.

(Decided 15 May, 1900.)

Tender and Payment Into Court by Defendant—Money Withdrawn by Plaintiffs—Effect—The Code, Section 574.

1. Money tendered and deposited into court by defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by plaintiffs pending the litigation, amounts to a satisfaction of their claim, and subjects the plaintiff to all subsequently accruing costs.
2. The plaintiffs can not counteract the legal effect of their withdrawing and appropriating the money, by claiming a balance as still due from the defendant—they accept the money upon the condition and terms annexed.

ACTION for work and labor and materials furnished in building house for defendant, tried on appeal from a justice's court, before *McNeill J.*, at October Term, 1899, of LINCOLN.

Before judgment the defendant tendered and deposited with the justice $18.93 and accrued costs, for the use of the plaintiffs, "in full tender of all indebtedness of defendant to plaintiffs." The justice afterwards rendered judgment in favor of plaintiffs for $33.95 (of which $18.93, as stated, had been paid into court). The defendant appealed to the Superior Court, and while the case was there pend- (524) ing, the plaintiffs withdrew the money, leaving the following receipt: "Received of S. P. Sherrill, J. P., the $18.93 paid into court, and the fees to use of plaintiffs. This money is taken out and receipt given after the judgment, the plaintiffs claiming still the balance due." Upon the foregoing facts, his Honor adjudged that the defendant go without day and recover of plaintiffs the cost accruing since the appeal, to be taxed by the clerk.

Plaintiffs excepted and appealed to Supreme Court.

L. B. Wetmore for appellant.
D. W. Robinson for appellee.

FAIRCLOTH, C. J. This action commenced before a justice of the peace on 4 March, 1899, for work and labor and materials for building a dwelling-house. On 13 March, 1899, the defendant tendered and deposited with the justice of the peace $18.93 and accrued costs, for the use of the plaintiffs "in full tender of all indebtedness of defendant to plaintiffs." On 14 March the justice rendered judgment in favor of the plaintiffs for $32.95 ($18.93 of which has been paid into court as above stated) against the defendant, who then and there appealed to the Superior Court.

On 15 April following, the plaintiff's attorney filed this receipt (the appeal then pending in the Superior Court): "Received of S. P. Sherrill, J. P., the $18.93 paid into court, and the fees, to use of plaintiffs. This money is taken out and receipt given after judgment, the plaintiffs claiming still the balance due."

At the trial his Honor adjudged that the defendant go without day, and recover costs accruing since the appeal.

(525) The facts were agreed to by counsel. When the plaintiffs accepted and received the amount of the tender and deposit, they did so with the condition and terms annexed, to wit, "In full tender of all indebtedness of defendant to plaintiffs." They could not inject other terms into the contract without the defendant's consent.

The question presented is sufficiently discussed in *Kerr v. Sanders*, 122 N. C., 635. Code, sec. 574.

Affirmed.

Cited: Ore Co. v. Powers, 130 N. C., 153; *Drewry v. Davis*, 151 N. C., 297; *Aydlett v. Brown*, 153 N. C., 336; *Woods v. Finley, ib.*, 499; *Bank v. Justice*, 157 N. C., 375.

J. W. AUSTIN v. COLEMAN STEWART.

(Decided 15 May, 1900.)

Premature Order of Reference—Plea in Bar—Dismissal of Cause by Referee—Mortgage Sale—Purchase by Mortgagee—Right of Mortgagor.

1. An order of reference is premature while a plea in bar is pending.
2. A referee has no power to dismiss a cause for want of jurisdiction in the Superior Court.
3. A mortgagor may move to disaffirm the sale, when the land is purchased by the mortgagee, but not to disaffirm in part and affirm in part. He must make his election.
4. When the sale is affirmed, the mortgagee is responsible for what the land brought; if the sale is disaffirmed, it is a nullity.

ACTION to hold a mortgagee responsible for real value of land bought at his own sale. Defendant denied the purchase by him. There was an order of reference at previous term of the court, excepted to by defendant.

AUSTIN *v.* STEWART.

Cause came on to be heard upon report and exceptions thereto by defendants, before *Allen, J.*, at January Term, 1900, of UNION. From the judgment rendered the defendant appealed.

(526)

Adams & Jerome for appellant.
Redwine & Stack and Burwell, Walker & Cansler for appellee.

CLARK, J. The complaint alleges that the defendant (mortgagee) sold the land of the plaintiff (mortgagor) and bought the same through an intermediary who afterwards conveyed to a son of the defendant, but that the real purchaser was the defendant; wherefore the plaintiff alleges that he "has the right to disaffirm said sale as a nullity or to affirm the same and hold the defendant to an account for the full value of said land (which he holds to be $565), which he now elects to do."

The answer denies that the defendant was interested in anywise in the purchase at the mortgage sale, and that the land is worth what the plaintiff alleges, avers that it brought full value, and that the plaintiff was present and made no objection at the sale, and the defendant sets up a counterclaim for sundry amounts due upon bonds executed by the plaintiff; wherefore he demands judgment for the difference.

The court referred the cause, and the defendant excepted.

The referee dismissed the action because the complaint did not state a cause of action within the jurisdiction of the Superior Court, on the ground, as we understand, that the plaintiff having in his complaint affirmed the sale, the difference between the amount the land brought and the mortgage debt was within the jurisdiction of a justice of the peace. The court reversed this action and re-referred the case, and the defendant appealed.

The plaintiff moves in this Court to dismiss the appeal as (527) premature. An appeal from an order of re-reference is premature. Clark's Code (3 Ed.), sec. 548, p. 750, and cases there cited. But that is where the original reference is not called in question. Here the original reference was erroneous because there was a plea in bar, and a reference before such plea is passed upon is appealable at once. *Smith v. Goldsboro,* 121 N. C., 350, and cases cited. It is true the defendant, instead of appealing then, as he could have done, noted an exception, but that now comes up and makes this appeal valid.

The referee had no jurisdiction to dismiss the action, which power belongs to the court alone, but taking his action as substantially a ruling that the complaint did not state a cause of action within the jurisdiction of the Superior Court, it was erroneous. The jurisdiction depends upon the sum demanded in good faith (which here exceeded $200), and was not ousted by reason of the plaintiff being mistaken in his right

under the law to recover the sum he claimed. *Sloan v. Railroad,* at this term; *Martin v. Goode,* 111 N. C., 288.

The plaintiff could have disaffirmed the sale, and have procured an order of resale, upon proof of his allegation that the defendant was the real purchaser. *Gibson v. Barber,* 100 N. C., 192. But having elected to affirm the sale, such election once made is binding (*Syme v. Badger,* 92 N. C., 706; *Horton v. Lee,* 99 N. C., 227); and he is entitled only to the sum the land brought after deducting the mortgage debt, and the legitimate costs entailed by the sale, subject of course to any sum proved upon the counterclaim which is pleaded. He can not affirm in part and disaffirm in part.

The plaintiff relies upon *Froneberger v. Lewis,* 79 N. C., 426, which is a case where an administrator bought at his own sale and was held liable for the value of the property. But, there, the sale was not affirmed, but disaffirmed, and it was held that in such case the heirs (528) at law could elect to treat the sale as a nullity, *i. e.,* recover the land or hold the administrator liable for its value. If they had affirmed the sale, as the plaintiff has done, they could only have recovered the sum the land brought.

The reference was probably made under the authority of *Brothers v. Brothers,* 42 N. C., 150, which was followed by *Froneberger v. Lewis, supra* (though in the latter case the re-reference was upon an original reference by consent), without adverting to the fact that the first was a case under the old procedure in equity. A failure to note this distinction has not infrequently caused new trials. *Ferrell v. Broadway,* 95 N. C., 551. The Superior Court had jurisdiction, but the order of reference was erroneous.

Error.

Cited: Hahn v. Heath, 127 N. C., 28; *Kerr v. Hicks,* 129 N. C., 144; *Norwood v. Lassiter,* 132 N. C., 56; *Oldham v. Rieger,* 145 N. C., 260; *Pritchett v. Supply Co.,* 153 N. C., 346; *McCullers v. Cheatham,* 163 N. C., 64; *Chilton v. Groome,* 168 N. C., 641.

H. F. MERRELL ET AL. *v.* C. A. McHONE.

(Decided 15 May, 1900.)

Justice's Court—Attachment—Recordari.

An attachment wrongfully issued from a justice's court against a citizen of the State, transiently absent, is remedied by *recordari.*

ATTACHMENT PROCEEDINGS from a justice's court, heard before *Starbuck, J.,* at Fall Term, 1899, of MADISON. A petition for *recordari,* as substituted for appeal, had been granted by *Norwood, J.,* at a previous term but the writ had not been complied with. The order was reiterated at present term, and upon the return to it, the plaintiff moved to dismiss, which was refused. Plaintiffs excepted. Upon the trial, judgment was rendered for the defendant. Plaintiffs excepted and appealed.

W. W. Zachary and J. M. Gudger, Jr., for plaintiffs. (529)
No counsel for defendant.

CLARK, J. The Code, sec. 876, provides: "If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days after personal notice of the rendition of the judgment to serve the notice of appeal herein provided for." Judgment was rendered, in an action based upon an attachment, by a justice of the peace against the defendant who was absent at work in another State. Within a short time he returned to the State, and as soon as he had information of the judgment he applied to the justice for a rehearing (Code, sec. 845) or an appeal, both of which were refused on the ground that the papers in the cause had already been sent up to the clerk of the Superior Court, as is required in attachments upon realty. Code, sec. 354. It is not contended that any personal notice of the judgment was ever given the defendant.

At the first term of the Superior Court, an affidavit and petition for *recordari* were filed, and an order for the *recordari* issued. Not being obeyed, an alias issued, and on its return the plaintiff moved to dismiss, which was refused. No appeal lay from such refusal (*Perry v. Whitaker,* 77 N. C., 102), and it was properly entered as an exception. The final judgment being against the plaintiff, it now comes up for review. Had the final judgment been in favor of the plaintiff, the exception would then have become immaterial, and an appeal unnecessary.

There was no laches on the part of the defendant. He was entitled to an appeal upon learning of the judgment. He applied (530)

immediately to the justice of the peace, and he having refused to make a return of an appeal to be docketed in the Superior Court, it would have been useless to give notice to the plaintiff of an appeal which was not allowed to be taken. Besides if, as the defendant avers, he was not a nonresident he could have applied to the court for a writ of *recordari* without applying to the justice of the peace for an appeal at all. *McKee v. Angel,* 90 N. C., 60; *Caldwell v. Beatty,* 69 N. C., 365; *Clark v. Manufacturing Co.,* 110 N. C., 111. The defendant applied at the first succeeding term of the Superior Court for a writ of *recordari.* Notice was given of its issue to the plaintiff as well as to the justice of the peace. The defendant averred merits, as required in such application, and the result of the trial has shown he was right therein also.

No error.

(531)

BATTERY PARK BANK ET AL. *v.* WESTERN CAROLINA BANK ET AL.

(Decided 15 May, 1900.)

Receivers—Commissions, Erroneous, or Excessive, or Inadequate—Allowance Appealable—May Be Paid at Intervals—Rate in Excess of 5 Per Cent—Unnecessary Number of Receivers Disapproved.

1. An order allowing commissions is a final judgment in respect to the matter decided, and is properly appealable.
2. Caution to the judges not to appoint more receivers than are necessary and to avoid making excessive allowances.
3. Allowances to receivers as well as to administrators and executors are reviewable when made on a wrong principle, or when clearly inadequate or excessive.
4. A rate not exceeding 5 per cent on receipts and disbursements seems to be the statutory limit for both receivers and personal representatives. The Code, sections 379 (4), and 1524.

ACTION in the nature of a creditors' bill, heard upon exceptions by defendants to partial report of referees in relation to commissions and allowances, by *Bowman, J.,* at chambers in Asheville, December 31, 1898, in suit pending in BUNCOMBE.

His Honor overruled the exceptions, and defendants appealed.

The exceptions are stated and discussed in the opinion.

T. H. Cobb for plaintiffs.

Davidson & Jones, Merrimon & Merrimon, and Bourne & Parker for defendants.

MONTGOMERY, J. A report (not final) was returned on 27 (532) August, 1898, by George H. Smathers, receiver of defendant bank, to the Superior Court of Buncombe County, and the same was confirmed by his Honor, *Judge Bowman*. Numerous exceptions were filed by the plaintiffs, who are creditors of defendant bank, to the commissions and charges allowed to the receiver, Smathers, and to his former corecciver, L. P. McLoud. The exceptions were overruled, and the plaintiffs appealed.

Our first impression in respect to the appeal was that it was fragmentary, and therefore premature, regarding, as we did, the order of *Judge Bowman* allowing the commissions and charges as interlocutory. But upon further consideration and examination, we have concluded that the order was a final judgment in respect to the matter decided, and that the appeal is properly before us.

The action was originally begun in the name of the Battery Park Bank, in its own behalf and all other creditors, against the Western Carolina Bank. The insolvency of the defendant was alleged and temporary receivers appointed. Afterwards, George H. Smathers and L. P. McLoud were appointed permanent receivers, and they at once filed their bond and took possession of the assets of the bank. The purpose of the action then was the collection of the assets of the bank by a receiver appointed by the court, and the proper distribution of the assets amongst the creditors of the defendant bank. Hundreds of claims have been proved by creditors of the bank, and so far as the record discloses there have been no exceptions filed to the admission of any of them as just claims against defendant bank.

There is nothing then *at issue* in the action, and the only matter, as we have said before, involved in the case is the reduction of the assets of the bank into money, and the distribution of the same by the receiver amongst the creditors according to law. The allowances and charges therefor made by the court in favor of the receivers affect a substantial right of the plaintiffs in that it disposes of a (533) part of the assets of the bank, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. The order of the judge was a final one because it appropriated a part of the assets, affecting thereby a substantial right of the plaintiffs. The appeal does not have the effect either to delay or hinder the receiver from the discharge of his duties, nor can it delay the final settlement.

If the order of the judge allowing the commissions could be regarded as interlocutory, under the practice exceptions would have been entered and the appeal brought up upon the final order distributing the assets.

Therefore, in point of economy of time, if that were alone involved, no harm can come to any one interested in the result of the suit, by regarding the order as final.

We are supported in this view by the decision in *Trustees v. Greenhow*, 105 U. S., 527. In that case the principal suit was commenced in the nature of a creditors' bill by the holder of bonds of the Florida Railroad Company against the trustees of the Internal Improvement Fund of Florida, and against the board itself as a corporation. The fund consisted of millions of acres of land belonging to the State of Florida, and was pledged for the payment of the interest accruing on the bonds and installments of the sinking fund for meeting the principal, which was in arrears. The charge of the bill was that the trustees were wasting the fund, making fraudulent sales of the land, and refusing to provide for the payment of the bonds and interest. There was a prayer that the fraudulent conveyances be set aside, the trustees enjoined from selling any more land; and that a receiver be appointed to take charge of the fund. The management of the fund was taken out of the hands of the trustees, the court appointed agents to sell the land, and they (534) made large sales, realizing a considerable amount of money therefrom, and dividends were made amongst the bondholders, most of whom came in and took the benefit of the litigation. The litigation, which was very expensive and vigorously conducted, resulted in securing and saving a large amount of the trust fund. The complainant Vose, a creditor, bore the whole burden of this litigation, and advanced most of the expenses for conducting the action. While the proceedings were being had Vose filed a petition setting forth his efforts and the advances made by him, and prayed for an allowance out of the fund for his expenses and services. A large amount was allowed him by the court, from which order the other creditors appealed. The court said: "The first question, however, is whether these orders do or do not amount to a final decree upon which an appeal lies to this Court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of a receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances we think that the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

In *Williams v. Morgan*, 111 U. S., 684, where, in a suit for the fore-

closure of a mortgage made by the New Orleans, Mobile and Chattanooga Railroad Company, upon its railroad and franchises, in the order of sale compensation was fixed by the court as to what was to be paid to the trustees making the sale from the fund to be realized (535) from the sale, it was held that such a decree was final as to that matter, and the Supreme Court had jurisdiction on appeal from the Circuit Court.

In *Hovey v. McDonald,* 109 U. S., 150, an appeal was allowed to be brought against a receiver from an order made in his favor.

The appeal then being properly before us, we will examine the matters complained of by the creditors, appellants. In the first order made by his Honor, *Judge Norwood,* in regard to the receivership, three temporary receivers were appointed, L. P. McLoud, John A. Nichols and George H. Smathers. In his order appointing permanent receivers, Nichols was left out, and Smathers and McLoud retained. The necessity of the appointment of more than one receiver, we can not see; and while we do not intend to criticise harshly the action of the judges who made these appointments, it may be well for us to call attention to the almost universal habit throughout the whole country to make use of receiverships as ordinary remedies, to appoint more than one receiver, and to allow them for their services, not a proper compensation for their services, but large and excessive commissions and charges; and that unless the judges, who have these appointments and allowances to make, exercise cautious scrutiny and diligent care, great injustice to creditors must result.

It does seem to us, speaking generally, that these matters of receivership are not conducted with such a view to economy and dispatch of the business in hand as characterizes the conduct of prudent business men in their ordinary business transactions.

In the main report of the receiver, the receipts were stated to be $118,367.71, and the disbursements $116,076.73. That report embraced many entries which could not be called receipts and disbursements, upon which commissions could be allowed. Most of those (536) entries were concerning transactions which were connected with the settlement of the affairs of the bank, and which were proper to be considered by his Honor in estimating the value of the work and labor performed by the receiver; but they were not alone such receipts and disbursements as are in contemplation of the statute, Code, sec. 379 (4). And this view seems to have been adopted by the receiver in his amended report, wherein the receipts are stated to be $34,205.49, and the disbursements $31,914,51.

His Honor allowed to McLoud for his services as joint receiver with Smathers, for five months and twenty days service from 13 October,

1897, to 2 April, 1898, $850. McLoud put in a bill for $200 a month. He was the former cashier of the defendant bank while it was a going concern, and his salary then was $150 per month.

The amount applied for by Smathers as receiver for ten and a half months, was $1,825. His Honor allowed him $1,500. The amount allowed to both receivers then was $2,350, and much business connected with the settlement of the defendant's affairs remained to be done before a final order in the cause could be hoped for.

The receiver was also allowed quite a thousand dollars for legal advice and services rendered to him by other attorneys at law, and $1,066.13 for the wages of a clerk and stenographer. Rankin was the clerk, and he had been for a number of years in the employment of the defendant bank, first as bookkeeper, and for the last two years of the bank's existence, as its teller. It appears he was a most competent man for the work.

But the receivers contend that, as the amount of commissions allowed to them did not exceed 5 per cent on the amount received and
(537) disbursed by them, this Court has no supervisory power over the allowance, and that the action of the court below rests in the discretion of that court and is not reviewable by this Court. We are not of that opinion. The Code, sec. 1524, concerning the compensation to be allowed to executors and administrators, is in almost the identical language as section 379 (4), concerning the commissions allowed to receivers. In the first-mentioned section commissions are allowed "not exceeding 5 per cent on the amount of receipts and expenditures," and under section 379 (4) commissions are to be allowed "not exceeding 5 per cent on the amount received and disbursed by them." Section 29 of chapter 46 of the Revised Statutes provides that clerks of the courts of Pleas and Quarter Sessions should make allowance of commissions to executors and administrators "not exceeding 5 per centum for the amount of receipts and expenditures."

In *Shepherd v. Parker,* 35 N. C., 103 (the Revised Statutes being in force), it was contended by the administrator, Parker, that, while this Court could review the decision of the Superior Court on the question of his commissions, if those commissions had been allowed through a mistake and contrary to law, it could go no further than to correct such error. The argument there was that "this Court has jurisdiction when commissions are allowed upon a wrong principle, but not where it is suggested that the commissions are excessive; for the *amount* of commissions is a matter of *discretion,* restrained by statute to 5 per cent, and this Court has no right to review the exercise of this discretion." The Court said, "We admit the distinction, but do not concede to it the effect contended for, except to this extent: when the objection is put on

the ground of inadequacy or of excess, this Court is not disposed to interpose unless the amount is clearly inadequate or clearly excessive, for the reason that it most usually happens a more minute investigation of the entire subject of the account takes place in the (538) court below than it becomes necessary to give it in this Court, and it is therefore proper to presume that the rate adopted in the court below is correct." And the Court in the same opinion, as a reason for its decision, said: "But it is asked upon what principle can this Court review a matter of discretion which has been acted on in the court below? The distinction is this: when the exercise of discretion is in reference to a matter arising collaterally, and which does not present itself as a *question in the cause,* the decision of the court below is conclusive, as in cases of amendment; but when the discretion is used in reference to a *question in the cause,* the decision is subject to review, for, although in one sense it is a matter of discretion, still being a question in the cause, the appeal which brings up the whole case necessarily brings it up." This Court then can review the matter of commissions allowed an executor or administrator when they have been given on a wrong principle, or when the allowance appears to be clearly inadequate or excessive.

Upon a review of all the facts in this case, including the report of the referee, when we consider the amount allowed to the receivers for the wages of a clerk and stenographer, the amount allowed them for the aid and counsel and advice of attorneys at law, we are of the opinion that the amount allowed to the receivers is clearly excessive. We can not see from the report of Receiver Smathers that the Receiver McLoud rendered any service whatever. We think, all things considered, that $150 per month, for the ten and a half months specified in the receiver's report, the time for which compensation was asked, would be sufficient to be allowed as commissions to the receivers, and the matter must be remanded to the court below that that amount may be apportioned between the two receivers, Smathers and McLoud, according to (539) the services rendered by each.

The counsel for the plaintiffs contended in this Court that the receivers were not entitled to any commissions whatever until the closing up of the business in their hands and the final order for the distribution of the fund. We have no precedents in this State on the subject, but we find it stated in Beach on Receivers, sec. 758, "That, as a general rule, the receiver may be paid, at stated intervals during the continuance of his functions, and so need not wait until the termination of the receivership." The same rule we find in substance in High on Receivers, sec. 789, and we are disposed to adopt that as the rule here.

The counsel of the plaintiffs also contended that the statute [Code,

sec. 379 (4)] fixing the compensation of receivers "not to exceed 5 per cent" on the amount received and disbursed should be construed to mean that full commissions are allowable only for the performance of the two acts of receiving and disbursing, one-half for doing either act, and Beach on Receivers, sec. 766, was cited as authority for the position. The citation bears him out in his contention.

We have no decision on this point as to *receivers,* but we have decisions on this point in reference to the commissions of executors and administrators; and the language, as we have seen, as to the allowance of commissions to executors and administrators and to receivers being identical, the same principle would apply to both.

It has been held by this Court that commissions can be allowed to executors and administrators on both receipts and disbursements, to the extent of 5 per cent on receipts and 5 per cent on disbursements. In *Peyton v. Smith,* 22 N. C., 349, the Court said: "It is so difficult for this Court to ascertain, by any means in its power, what is the reason-
(540) able rate of commissions called for in any case by the nature of the services, labor and responsibility of the trustee, that it is much disposed, in general, to rely in this respect on the judgment of the master. In this case, however, the Court perceives a safer guide for the exercise of its discretion, and will follow that guide. It appears that on one occasion when the accounts of the executor were audited in the county court of Warren, and when the auditors recommended that there should be allowed to the executor a commission of 5 per cent on his receipts and 5 per cent on his disbursements, the court, nevertheless, ordered that his commissions should be limited to 4 per cent on each. The Court therefore overrules the allowance of 5 per cent as made by the master, and sanctions the rate established by the county court." The same manner of allowing commissions to administrators is laid down in *Potter v. Stone,* 9 N. C., 30. There are no later decisions of the Court on that point, but allowances to executors and administrators are, we believe, universally in this State allowed upon both receipts and disbursements, as separate acts.

There was error in that part of his Honor's order allowing commissions to the amount of $2,350, because they were clearly excessive. The commissions will be adjusted according to this opinion, and the costs of this appeal will be taxed against the funds in the hands of the receiver.

Error.

Cited: *Graham v. Carr,* 133 N. C., 450; *Talbot v. Tyson,* 147 N. C., 274.

(541)

J. H. MERRIMON ET AL. *v.* A. H. LYMAN ET AL.

(Decided 15 May, 1900.)

Judgment of Supreme Court, Final—Tax Sale—Motion to Amend Answer.

1. Certificate from Supreme Court announcing no error in the judgment appealed from, precludes the court below from all right or power to modify that judgment in any respect. This can only be done by a direct proceeding alleging fraud, mistake or imposition.
2. A motion by defendant to amend his answer and raise an issue upon a matter decided against him by the jury in the former trial, viz., that the land had been redeemed from tax sale at the time defendant bought and took his deed, is without precedent.

ACTION for recovery of land, heard on petition to amend answer after affirmation of judgment by Supreme Court in favor of plaintiff, before *Coble, J.*, at August Term, 1899, of BUNCOMBE.

Application denied; defendant appealed.

Same case reported in 124 N. C., 434.

Merrimon & Merrimon and G. A. Shuford for plaintiffs.
Davidson & Jones for defendant.

MONTGOMERY, J. At July Special Term, 1898, of Buncombe Superior Court a judgment was rendered in favor of the plaintiffs to the effect that they were the owners of the land in dispute; that the alleged tax title under which the defendant Lyman claimed and the proceedings and sale were null and void, and that the possession of the defendants was wrongful and unlawful, and that the plaintiffs recover of the defendants possession of the land and their costs.

On appeal by defendants the judgment of the Superior Court was affirmed by this Court at February Term, 1899, and the cer- (542) tificate sent down. *Merrimon v. Lyman,* 124 N. C., 434.

At August Term, 1899, of the Superior Court, the plaintiffs moved for judgment according to the certificate of the Supreme Court, when the defendant Lyman made an application to be allowed to set up a lien on the land for the taxes of 1892, which the defendant, in his answer, averred that he had paid when he bought the land at the tax sale. The judgment was entered and the application of the defendant was denied, and he appealed.

A bond to stay the execution of the judgment was allowed by the court below to be filed by the defendant, notwithstanding the refusal of

the court to grant the defendant's application to set up a lien on the land for the taxes alleged to have been paid by him.

The application of the defendant was, in effect, a motion to be allowed to amend his answer and to raise an issue upon a matter which had been decided against him by the jury in the former trial, viz., that the land had been redeemed from tax sale at the time the defendant bought and took his deed. Certainly such a proceeding would have been an unheard of one in North Carolina. In *Calvert v. Peebles,* 82 N. C., 334, it is declared that when the Supreme Court announces by its decision that there is no error in the judgment of the court below, that court has no right or power to modify that judgment in any respect, and that this can be done only by a direct proceeding alleging fraud, mistake, imposition, etc. *Dobson v. Simonton,* 100 N. C., 56; *Morehead Banking Co. v. Morehead,* at this term.

It seems that the defendant's claim to be reimbursed for the amount which he paid for the land at the tax sale is based on the case of *Huss v. Craig,* 124 N. C., 743. But this case is not like that. Here the
(543) jury found that the land was redeemed at the time the defendant got his deed for the same, and we are to presume that it was redeemed by the payment of the taxes of 1892 by the party entitled under the law to redeem. The facts in *Huss v. Craig* were just the other way.

The decision of this Court affirming the judgment below was properly entered in the Superior Court of Buncombe County, and the application of the defendant was properly refused.

The stay of execution ought not to have been allowed, and that was the only error in the proceedings. With that exception, they are

Affirmed.

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(544)

W. W. LADD, JR., ET AL. v. J. F. TEAGUE, SHERIFF.

(Decided 15 May, 1900.)

Motion to Set Aside Judgment—Record Evidence—Attorneys of Record—Records Import Verity.

1. While the finding of facts by the trial judge is final, the judgment applying the law to these facts is reviewable.
2. When the *record proper* differs from the statement of the case on appeal, the former must control.
3. Where an order of the court recites that it was made by consent of all the parties, this Court is bound by the statement, and neither party will be heard to say that his attorney was unauthorized to consent to the order.

4. An attorney once appearing, continues to appear for all purposes until the judgment is satisfied, unless he retires in the meanwhile by leave of the court.

5. Where the recitals of record show that a party has been represented by attorney and has had the benefit of his professional services in the conduct of the cause, including the trial, the legal inference is that the attorney was the attorney of the party, and an averment to the contrary will not be permitted two or three years after final judgment.

DOUGLAS, J., dissents.

CLAIM AND DELIVERY PROCEEDINGS and motion to set aside a judgment rendered therein by *Norwood, J.*, at Fall Term, 1897, in favor of plaintiff, heard before *Coble, J.*, at Fall Term, 1899, of SWAIN. The ground of the motion was that the judgment was rendered out of term time, under what purported to be a consent order, the defendant having no counsel. The motion was allowed, and plaintiff appealed.

Merrimon & Merrimon and T. H. Cobb for plaintiffs.
No counsel contra.

FAIRCLOTH, C. J. The plaintiff instituted this action on 9 (546) September, 1896, in the Superior Court of Buncombe County, against the defendant Teague, *alone,* sheriff of Swain County, returnable to December Term, 1896, for certain property and for damages, which property was held by the defendant by levy under certain executions in his hands. At the return term, to wit, 8 December, 1896, the defendant signed and filed an affidavit for the removal of said action to Swain County for trial, suggesting that the execution and attaching creditors ought to be made parties. The action at that term was removed to Swain County. At Spring Term, 1897, of court in Swain County, on motion of counsel for the *defendant,* several other persons were made parties, and time was allowed to file an answer. On 8 July, 1897, the defendant Teague filed a verified answer; on the back thereof was endorsed Bryson & Black and F. C. Fisher, attorneys for *defendants.* At August Special Term, 1897, "*defendants* allowed to answer" was entered, and Bryson & Black for *defendants.* A notice by plaintiff addressed to Fred. Fisher and T. D. Bryson to take depositions was served by defendant Teague, and an agreement to open said depositions without prejudice was signed by plaintiff's attorney, and by Bryson & Black and F. C. Fisher, "attorneys for *defendants.*" At Fall Term, 1897, on the docket, this entry appears: "Counsel for both parties waive trial by jury and consent that the court may try the case and find the facts and adjudge the law."

Norwood, J., who tried the case, says in his finding of facts that

both parties agreed in open court that the judge who tried the cause, "might take the records and testimony and may find the facts and sign the judgment in Haywood County after the circuit closes, and that said action of said judge and said judgment so rendered may be entered upon the records of Swain County as of this Fall Term, 1897, of the
(547) Superior Court of Swain County." *Judge Norwood* accordingly tried the case at chambers and filed his judgment against defendants, 21 December, 1897. Notice of appeal was given, but at November Term, 1898, of the court in Swain County, the judge presiding entered his judgment: "That said appeal has been abandoned and the same is hereby dismissed." At said Spring Term, 1897, forty-one additional persons were made parties defendant. His Honor finds as a fact that Bryson & Black were never employed by defendant Teague, and that Fisher was never employed by any of the parties except Summers and Conley, and that Teague did not employ any attorney to represent him in said action, also that Fisher was employed by Bryson to go to Asheville to make a motion on said affidavit of Teague for removal of said cause from Buncombe to Swain County. After Teague's appeal was dismissed, he made a motion, at Fall Term, 1899, to set aside the judgment of *Norwood, J.*, on the ground that he had never consented for that judgment might be rendered at chambers outside of Swain County. His Honor, *Judge Coble,* at Fall Term, 1899, after finding the above facts, set aside the judgment as to said Teague and no further, and the plaintiffs appealed to this Court.

On the trial in Swain County before *Norwood, J.*, the defendant Teague was examined as a witness.

In reviewing this judgment we do not assume to review the finding of the facts. Such finding by the judge below is final. The judgment applying the law to those facts is reviewable. *Johnson v. Duckworth,* 72 N. C., 244; *Emry v. Hardee,* 94 N. C., 787; *Clegg v. Soapstone Co.,* 66 N. C., 391.

The defendant's contention is that the attorneys were never by him employed (and the judge so finds), and that the agreement that
(548) *Judge Norwood* could render judgment in another county was not by his consent, and therefore the judgment is void as to him.

Looking through the record we find that when the motion for removal was made, and at Spring Term, 1897, of Swain Superior Court, on motion "of counsel for the *defendant*" to make new parties, the defendant Teague was the only *defendant.* On 8 July, 1897, the *defendants* file an answer verified by Teague and endorsed by Bryson & Black and F. C. Fisher, "attorneys for *defendants.*" On 9 November following, the defendant Teague, as sheriff, served a notice on Bryson "attorney for the

defendants." Such entries were continued at the term when a jury trial was waived and until final judgment entered on 21 December, 1897.

The legal inference from these parts of the record is that said attorneys represented all the defendants, and this presumption can not be rebutted, two or three years after final judgment, by an averment of the principal defendant that he had never employed counsel. He was cognizant of the course of the case, including the trial, and had all the advantage and benefit of representation by counsel. Any other rule would not only disturb orderly procedure, but would be disastrous to the rights of third parties—as the assignee of the judgment in this case.

We have referred with some particularity to the record proper, in order to call the attention of attorneys to their duties in their close relations to the court. It is an easy matter for an attorney, appearing only for some of the parties, to so inform the court or to indicate it on the record.

An attorney once appearing, continues to appear for all purposes until the judgment is satisfied, unless he retires in the meantime by leave of the court. On this subject, *Chief Justice Taney* said, in *U. S. v. Curry,* 6 Howard (U. S.), 106: "No attorney or solicitor can withdraw his name after he has once entered it on the record without the (549) leave of the court. And while his name continues there, the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial with the sanction of the party, expressed or *implied,* to withdraw his name after the case was finally decided. . . . And so far from permitting an attorney to embarrass and impede the administration of justice, by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

The same principle is declared by this Court in *Branch v. Walker,* 92 N. C., 87; *Walton v. Sugg,* 61 N. C., 98.

Where an order of the court recites that it was made by consent of all the parties (the plaintiff and defendants in this case), this Court is bound by the statement, and neither party will be heard to say that his attorney was authorized to consent to the order. *Henry v. Hilliard,* 120 N. C., 479.

When the *record proper* differs from the statement of the case on appeal, the former must control. *Threadgill v. Commissioners,* 116 N. C., 616.

From this review we are led to the conclusion that there was error in setting aside the judgment rendered by *Norwood, J.*

Reversed.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court because, in my opinion, it is not only erroneous in law but inconsistent in itself. The Court says: "In reviewing this judgment we do not assume to review the finding of the facts. Such finding by the judge below is final."

(550) And yet the judge below has found as a fact that Teague did *not* employ any attorney to represent him in said action, and that therefore he is not liable. This Court reverses that judgment. Does it reverse the finding of facts? If it does not, and it says it does not, then it must hold that a man, perhaps a thousand miles away, may be bound by a judgment in a case of which he has never heard, because some attorney may have entered an appearance for him without any authority whatever. In fact, it would seem that the attorney need not specifically appear for the party, and need not have any intention of appearing for him or have any idea that he is doing so. He may unconsciously do some act from which the court may "infer" an appearance for the particular individual in question; but why this *inference* of fact, for it is nothing else, should outweigh the *finding* of fact by the court below, which this Court in its opinion says is final, I can not understand.

Where there are a large number of defendants having different counsel, it is quite common for the counsel to sign their names collectively for the defendants, each supposing that some one of the other attorneys represents each of the other defendants. The Court says that, "It is an easy matter for an attorney, appearing only for some of the parties, to so inform the court or to indicate it on the record." Of course it is; but is a party who never employed the attorney responsible for his failure to do so?

It is urged that Teague had already appeared in the case and was presumed to know all that was done in the orderly procedure of the trial. Of course he was; but he was not presumed to take notice of all *irregular* proceedings, such as rendering judgment outside the county, which could not be done without his actual consent.

We have already carried the doctrine of waivers, implications and presumptions to its furthest reasonable extent, and I hope that questions of jurisdiction may not be made to depend upon implied

(551) assent to unusual and irregular methods of procedure in cases where the defendant may have had no actual knowledge of the facts. There is a great difference between a waiver of the right to object to some regular proceeding in the course of the trial, and an actual consent to some unusual course of procedure which without such consent would be utterly invalid. It should be borne in mind that nowhere in the record does any one sign as attorney for Teague. That fact is

assumed by this Court merely as a legal inference from the fact that different attorneys sign at different times as "attorneys for the defendants." Admitting for the sake of argument that Fisher had appeared for Teague at some previous stage of the trial, his name does not appear to the written assent; and neither he nor his supposed client was required to take notice that the court would take the case outside the county. It is just as easy to presume an original appearance as it is to presume assent to a removal of the case. Suppose that Teague had been in the Philippines, or dead for that matter, would the mere fact that the name of some attorney appeared on the back of some paper as "attorney for the defendants" bind him, his heirs, executors and administrators? I'm afraid so, under the opinion of the Court.

In my view of the case the citations by the Court have no bearing. This is not a question as to whether an attorney can withdraw from the case without leave of the court, because he has never been in the case as attorney for Teague.

Again it is said: "When the *record proper* differs from the statement of the case on appeal, the former must control." Certainly. But this rule applies only where the case on appeal misstates some part of the record, and not to findings of fact based upon merely evidential facts appearing in the record. In fact such findings of fact are an essential part of the record. (552)

Great stress is laid upon the principle that third parties should not be made to suffer. Have third parties any greater claim to protection than the original parties where both are innocent? The assignee of a judgment takes it subject to existing equities. He is a willing purchaser. Has he any greater equities than an unwilling and perhaps unconscious defendant? I am well aware of the danger of lightly impugning court records, but the public at large are entitled to some measure of protection. The plaintiff can always protect himself by seeing that every proper step is taken to secure the validity of the judgment which he is seeking to procure. He is the actor. He can require all attorneys to state specifically for whom they appear, and can demand the production of their authority if he so desires. The courts themselves can protect the sanctity of their own records. The Federal courts generally require counsel to enter a written appearance, stating specifically for whom they appear. Why can not our courts do the same?

I will readily admit that there are facts in the case tending to *prove* the essential fact that Teague was represented by counsel; but the court below has found to the contrary, and that finding is final and irreviewable. We are thus placed in the position of saying that we legally infer

that Teague had counsel, while we admit as a fact that he had no counsel. This is too much for me. I must respectfully dissent from the opinion as well as the judgment of the Court.

Cited: *Teague v. Collins,* 134 N. C., 63; *Bank v. Peregoy,* 147 N. C., 295; *Stokes v. Cogdell,* 153 N. C., 182; *Bank v. McEwen,* 160 N. C., 425.

(553)

JORDAN & PARKER ET AL. v. JOHN F. NEWSOME AND GEORGE COWPER, TRUSTEE.

(Decided 22 May, 1900.)

Deed of Assignment—Feigned Debt—Bona Fide Debts—Irregular Allotment of Homestead—Non-joinder of Wife in the Assignment.

1. A preferred debt secured to a mother in law of the assignor, who lives with him, and which will absorb most of the assets, without any evidence of its correctness, should be regarded as a feigned debt, and as such should be eliminated from the assignment.
2. When the deed of assignment is made part of the complaint, the debts included and not assailed are to be regarded as *bona fide.*
3. A homestead reserved, but irregularly allotted, will be reallotted under direction of the court.
4. Where homestead is reserved, the wife of assignor is not a necessary party to the deed of assignment.

ACTION to impeach and set aside a deed of assignment from Newsome to Cowper, trustee, for fraud and irregularity, heard before *Bowman, J.,* at Spring Term, 1899, of HERTFORD.

There was evidence on the part of the plaintiff that the homestead reserved and allotted was worth over $2,000, and was allotted by friends and neighbors without notice to creditors; that one of the largest preferred creditors was Mrs. Parker, mother in law of Newsome, and who lived with him; the deed of assignment was made part of the complaint; the wife of Newsome was not a party to it.

At the close of plaintiffs' evidence the defendants moved for judgment as of nonsuit, which was allowed by his Honor. The plaintiffs excepted and appealed.

MONTGOMERY, J., writes the opinion.

(554) FURCHES, J., writes dissenting opinion.

Winborne & Lawrence for plaintiffs.
George Cowper for defendants.

MONTGOMERY, J. This action was commenced by the plaintiffs, creditors of the defendant John F. Newsome, for the purpose of having a deed of assignment made by Newsome declared fraudulent and set aside, and that the allotment of the homestead to the debtor be declared irregular and void. The deed of assignment was made to George Cowper, Trustee, was dated 2 January, 1893, set out the defendant's insolvency, and, after reserving to the debtor the homestead and personal property exemptions allowed him by law, conveyed the property, real and personal, of the debtor. The trustee was authorized to take possession of the property, collect the assets, sell the property and dispose of the proceeds as follows:

"1. Allot and set apart to said Newsome his homestead and personal property exemptions allowed him by law.

"2. Deduct and retain such costs and expenses as shall be necessary for the proper execution of the trust, together with 5 per cent commissions on receipts and disbursements.

"3. Pay the Camp Manufacturing Company, a corporation duly chartered and organized, the sum due it by account, which is supposed and believed by the grantor to be about $1,500.

"4. Pay George Cowper $200.

"5. Pay Mrs. Elizabeth A. R. Parker, widow of the late King Parker, $1,500, for money borrowed of her and now due.

"6. The remainder, the said George Cowper shall distribute *pro rata* amongst each and every one of my creditors according to their respective claims. But before any sale is had, the said George Cowper shall allot and set apart to said Newsome his homestead and per- (555) sonal property exemptions allowed him by law."

The plaintiff on the trial introduced evidence tending to prove that the real estate of the defendant debtor had been allotted to him, at the request of the trustee, by three of his neighbors, without notice to creditors, and that the land was worth from $2,000 to $3,000 at the time of the allotment; that Mrs. Parker, one of the preferred creditors, lived with Newsome at the time when the assignment was made, and was his wife's mother. At the conclusion of the plaintiff's evidence, the defendant moved to dismiss the action under the act of 1897. The plaintiff requested the Court to instruct the jury that if they believed the evidence they should answer in the affirmative the first and second issues: 1. Was the deed of assignment . . . made with intent to hinder, delay and defraud the creditors of John F. Newsome? 2. Were the debts set out in the deed of assignment or any substantial part of

them feigned and fictitious? That the homestead exemptions had been allotted contrary to law; that the deed of assignment having been attacked for fraud, the defendants were required to show that the debts therein secured, or some substantial part of them, were genuine, and unless they had been so shown, the jury should answer the first issue "Yes"; that there was no evidence of the genuineness of these debts or any part of them, and the jury should respond to the first and second issues, "Yes"; that the assignment having been executed by John F. Newsome alone, and his wife not joining with him, and the judgments of the plaintiffs having been taken subsequently to the assignment and the defendant Newsome being insolvent at the time the assignment is void as to creditors and the plaintiffs.

The instructions were all, except the one which concerned the second issue, properly refused. Neither the preference by the debtor of the claim of his mother in law, Mrs. Parker, nor the manner of the
(556) allotment of the homestead constituted a presumption of such a fraudulent intent, on the part of Newsome in the execution of the deed of assignment, as to make it void as to the genuine debts embraced in it. On that issue they were only badges of fraud to be left to the jury upon all the facts and surrounding circumstances. Even if Mrs. Parker's debt was and is feigned and fictitious, that would not render the deed fraudulent as to the other creditors. That debt could be eliminated from the assignment and the deed would stand as to the good debts. *Morris v. Pearson,* 79 N. C., 253.

We think, however, that his Honor should have instructed the jury on the second issue to have answered that the debt of Mrs. Parker was feigned and fictitious. That debt was assailed by the plaintiffs. She was, as we have said, living in the home of the defendant debtor at the time of the execution of the deed of assignment, and she was the mother of his wife. With the exception of this one creditor, she was given the preference over all the others, and according to the evidence, the preferred debts would have absorbed all of the property of the debtor outside of his exemptions. Neither she nor the defendants made any effort on the trial to show the *bona fides* of her debt. *Brown v. Mitchell,* 102 N. C., 347; *Hinton v. Greenleaf,* 118 N. C., 7; *Redmond v. Chandley,* 119 N. C., 575.

We have said enough to send this case back for a new trial already, but there are other matters of importance before us in the case, which will be sure to arise on the next trial, and which we will consider now.

The plaintiff's fourth and fifth prayers for instruction embrace the contention that, because the deed of assignment was attacked as fraudulent, the defendants were required to show that the debts
(557) therein secured, or some substantial part of them, were genuine,

and that as there was no evidence of the genuineness of any of these debts, the jury should find the first and second issues affirmatively. It is a sufficient answer to that position of the plaintiffs to say that their complaint alleges that their debts were in existence at the time of the execution of the deed and they make the assignment a part of their complaint, and, in it, it appears that the plaintiffs' debts are included as general creditors. Besides, the plaintiff Parker, in his evidence, speaks of his debt against Newsome, and declares it to be a valid debt, not in so many words, it is true, but by an implication so strong as to amount to a positive declaration about it. He said, "I had not sued Newsome when the deed of assignment was made." There was no need of any evidence in this case to show the existence of genuine debts, for the plaintiffs had alleged such debts in their complaint, and no issue therefore could have arisen on the pleadings. There can be no application of the rule that where a party intends to use pleadings as evidence he should put them in evidence, and therefore that the defendant, before he could avail himself of the plaintiffs' complaint in reference to the existence of genuine debts, should have introduced that part of the complaint in evidence. The court had charge of the pleadings, and it was its province to act upon the record and to apply the admissions of the parties and such other evidence as might appear in it. As we have said, there was no need for the intervention of a jury on this point, as no issue was raised on it by the pleadings. *Smith v. Nimocks,* 94 N. C., 243.

The seventh of the plaintiffs' prayers for instruction, was to the effect that as the assignment had been executed by Newsome without the joinder of his wife, and that as the plaintiffs had procured judgments against Newsome subsequently to the assignment, and that as Newsome was insolvent at the time, the assignment was void as to creditors. *Thomas v. Fulford,* 117 N. C., 667, is cited as authority for the (558) position. That case is verily a Pandora's Box, and we will not open it. It does not support the contention of the plaintiffs. The execution of the deed of assignment by defendant Newsome does not violate section 8, of Art. X, of the Constitution of North Carolina. Newsome reserved most carefully to himself his homestead exemptions from the operation of the deed. And one of the special trusts in the deed was that the trustee should lay off and allot to him his homestead exemptions before a sale of any of the property conveyed in the deed was made by the trustee.

The allotment of the homestead by the trustee was irregular and can not stand. The *statutory* methods by which homesteads are allotted are by petition and by execution. But this Court held in *Littlejohn v. Edgerton,* 77 N. C., 379, and also in *Benton v. Collins,* 125 N. C., 83, that

there were other methods besides those, and that where the Superior Court got control of the homestead lands the court itself could appoint three commissioners or instruct the clerk of the court to appoint the commissioners to lay off the homestead, giving at the same time notice to the homesteader "and in all particulars to observe as near as may be the requirements of the Constitution and of the Homestead Act." We suggest that the last-named plan for the allotment to the defendant of his homestead be followed in this case by the court below.

New trial.

FURCHES, J., dissenting: I dissent from the opinion of the Court in this case upon two grounds:

First. For the reason that the only mention made in the deed of assignment to the homestead is the following paragraphs: "1. Allot and set apart to said Newsome his homestead and personal property (559) exemptions allowed him by law." "6. But before any sale is had, the said George Cowper shall allot, lay off and set apart to the said Newsome his homestead and personal property exemptions allowed him by law."

These paragraphs are contained in the powers conferred on the assignee Cowper, and nowhere else. They undertake to authorize him to do what he can not do—to lay off the assignor's homestead and personal property exemptions. There is not a word excepting the homestead or personal property exemptions, unless it is contained in the paragraphs I have quoted; and I do not understand them to amount to an exception of a homestead.

Second. In my opinion the deed is void for the reason that the wife did not join in its execution. Constitution of North Carolina, Art. X, section 8.

Cited: Friedenwald v. Sparger, 128 N. C., 449.

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(560)

LOUISA BEST (NEE DUNN), NANCY CROOM AND HUSBAND, WILLIAM CROOM, v. ELIZABETH LANCASTER, REDDING LANCASTER AND JOHN W. DUNN.

(Decided 22 May, 1900.)

Partition Proceedings—Motion to Remand to the Clerk—Motion for Judgment for Insufficient Verification of Answer—Counter-motion to Amend Verification—Premature Appeal.

1. An appeal from the ruling of the court refusing to remand the case to the clerk and allowing the verification to the answer to be amended, is premature. The plaintiff should have had his exception entered.

2. DOUGLAS, J., concurring: It is not intended to limit in any degree even by disapproval, the power of the court below to allow amended verification in the interest of substantial justice.

PETITION in the cause to set aside decree and report of commissioners for mistake and for redivision of land, transferred to civil issue docket, and heard before *Moore, J.*, upon motions in the cause at May Term, 1899, of WILSON.

The plaintiffs moved to remand to the clerk, motion disallowed. Plaintiffs excepted. Plaintiffs moved for judgment for insufficient verification of answer. Motion disallowed, being met by counter-motion to amend the verification of answer on part of defendants.

Plaintiffs excepted and appealed.

Deans & Cantwell for plaintiffs.
J. E. Woodard for defendants.

CLARK, J. This was a proceeding to correct a mistake in a partition under The Code, sec. 1918, and was transferred by the clerk to the civil issue docket upon issues joined. In the Superior Court a motion by the plaintiff to remand to the clerk, without trial of the issue, (561) was denied. A motion for judgment on the ground of insufficient verification of the answer, was met by a counter-motion to permit a new verification, which was allowed. Thereupon the plaintiff appealed.

The appeal is premature. The plaintiff should have had his exceptions noted in the record, and on the appeal from the final judgment the rulings excepted to would have come up for review. There is no judgment to appeal from, but simply the refusal of a motion to remand and the allowance of a verification.

In *Kruger v. Bank,* 123 N. C., 16, there was no answer and no time allowed to file answer, or to demur, and the refusal of judgment under such circumstances was the denial of a substantial right given by sec. 386, of The Code. *Phifer v. Insurance Co.,* 123 N. C., 410, and *Cole v. Boyd,* 125 N. C., 496, held that the verification of the complaint being insufficient, a judgment by default final should be corrected into default and inquiry, but it was not held that the court could not permit a proper verification. As was said by *Merrimon, J.,* in *Grant v. Reese,* 90 N. C., 3, "Slight attention to the decisions of the Court would prevent miscarriages like the present and facilitate the administration of justice."

Appeal dismissed.

DOUGLAS, J., concurring: I merely wish to emphasize the fact that this Court did not intend by its decisions in *Phifer v. Insurance Co.,* 123 N. C., 410; *Cole v. Boyd,* 125 N. C., 496; and *Payne v. Boyd, ibid.,* 499,

to limit in any degree, even by disapproval, the power of the court below to allow amended verifications in the interest of substantial justice.

The object of those decisions was to compel a sufficient verifica-
(562) tion, so that a pleader who took advantage of the form of the statute would be equally bound by its substantial purpose. In *Cole v. Boyd,* the Court says: "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 obligation 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." Again, the Court says in *Payne v. Boyd:* "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." Where the allowance of such an amendment tends to a fair trial of the case upon its merits, I think it is eminently proper that the court should grant it, giving of course to the adverse party a reasonable opportunity to meet the amended pleadings.

Cited: Cantwell v. Herring, 127 N. C., 84.

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(563)

MARTIN RAPER, ADMINISTRATOR OF W. H. RAPER v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 22 May, 1900.)

Damages—Dangerous Construction — Crossing Highway — Evidence—Similar Construction Elsewhere—Dangerous, Defective Construction, How Remedied—Different Construction Elsewhere—Crossings to be Safe and Convenient.

1. Where the intestate's foot was caught between a T-rail and a guard-rail at a crossing, while it was competent to show the defective and dangerous construction resulting in the accident, it was incompetent for that purpose to show that at another crossing a different construction was in use.

2. It was competent for that purpose to show that at another crossing a similar construction was in use, and that people have got their feet caught in it between main rail and guard-rail.

3. It was evidence of negligence in the construction, that instead of filling in the space between the two rails with dirt, the space was left open wide enough and deep enough to catch a man's foot and confine it.

4. While railroad corporations are given the right and power to construct their roads across streets, highways, etc., Code, section 1957 (5), they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built.

ACTION for damages for occasioning the death of intestate, W. H. Raper, by the defective and dangerous construction of its road at a public crossing near Lucama in Wilson County, N. C., tried before *Moore, J.*, at May Term, 1899, of WILSON.

There was evidence tending to show that on 20 March, 1897, the plaintiff's intestate on his way home from Lucama, about 10 o'clock at night at a public crossing got his foot caught and held fast between a T-iron and guard-rail, and was run over by defendant's train and instantly killed. The negligent, defective and dangerous con- (564) struction at this crossing is the alleged cause of the accident. The defendant introduced no evidence. The jury found that there was no negligence, and judgment was rendered in favor of defendant. Plaintiff appealed.

F. A. Woodard and Connor & Son for plaintiff.
Aycock & Daniels and F. H. Busbee for defendant.

DOUGLAS, J. This is an action brought by the plaintiff for the recovery of damages for the alleged negligent killing of his intestate. The testimony tended to show that the plaintiff's intestate was killed at a point on the defendant's track where it crossed the public highway, at which point a guard-rail had been placed upon the cross-ties and attached to them, curving at each end, being about two and one-half inches at center from the rail on the main track. The guard-rail was shivered at a point about one foot from where the shoe worn by plaintiff's intestate was found wedged in between the guard-rail and the rail of the main track. There seems to be no question but that the plaintiff's intestate was killed by the defendant's train.

The plaintiff contends that the defendant was guilty of negligence in the construction of its track at said crossing; that the guard-rail was made out of an old worn out rail, which by wear and tear had become shivered; and that the defendant was also negligent in failing to fill in the space between the guard-rail and the main rail with dirt, so that a person walking along or crossing the track would not be in danger of having his foot caught between the guard-rail and the main track. There was testimony tending to support these contentions.

(565) The defendant introduced no evidence, and the jury found that the defendant was not negligent. There are no exceptions to the charge, and therefore the only questions before us are the plaintiff's exceptions relating to the exclusion of evidence.

The plaintiff proposed to show the manner in which the guard-rail was placed at the crossing of defendant's tracks over the streets at Wilson, for the purpose of showing that the crossing at which the intestate was killed was defectively constructed. This evidence was excluded, and we think properly so. It was competent to show that the crossing in question was defectively constructed, or that it was constructed in an unusual, unnecessary and dangerous manner; but the mere fact that two or three other crossings were constructed in a different manner does not of itself even tend to prove either of these essential facts.

The second and third exceptions are for the exclusion of the following testimony: The plaintiff asked the witness, "If the roadbed between the rail and guard-rail had been filled to within two inches of the top of the rail, would it have been possible for the shoe to have been caught in the rail?" The plaintiff further proposed to show the depth of the space necessary to protect the flange of the wheels. We think this evidence was clearly competent, and that there was consequent error in its exclusion. It directly tended to prove the material fact in controversy—the defective construction of the crossing. We presume no one will question the duty of a railroad company to construct and maintain a safe and convenient crossing where it intersects the public highway. *Bullock v. R. R.*, 105 N. C., 180; *Hinkle v. R. R.*, 109 N. C., 472; *Tankard v. R. R.*, 117 N. C., 558; Wood Railway Law, sec. 420.

(566) The public highway, in olden times the King's Highway, is the highest form of easement known to the law, and, whether by land or water, can not be interfered with except under the direct stress of circumstances. The invention of steam locomotion introduced a new form of common carriers whose peculiar nature, with its resulting benefits, as well as duties to the public, necessitated the creation of a new form of highway. Railroad companies can not run their trains on the ordinary public roads, and if they could, by so doing they would practically destroy their use to the public. They must have a road of their own constructed in such a manner as to meet the peculiar requirements of their business, in the construction and operation of which they necessarily acquire peculiar privileges and exemptions with their corresponding duties and liabilities. These peculiar privileges can be given only in consideration of public service and are limited by the necessities of such service. Thus they are given the right to cross the public highway and even to change its location, if necessary; but this they must do with as little inconvenience as possible to the traveling public.

Where they interfere with the highway in any manner, they must, as far as they can, make it as safe and convenient to the public as it would have been had the railroad not been built. Otherwise they become guilty of obstructing a public highway with its consequent civil and criminal liabilities. The Code, sec. 1957, subsec. 5, provides that: "Every railroad corporation shall have power to construct their road across, along or upon any stream of water, watercourse, street, highway, plank road, turnpike or canal which the route of its road shall intersect or touch, but the company shall restore the stream or watercourse, street, highway, plank road and turnpike road, thus inter- (567) sected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness." Section 1954 gives the company the right to carry the highway under or over its track, as may be found most expedient, and to acquire by condemnation or otherwise such land as may be necessary to use in restoring the highway.

The granting of such powers presumes their use when necessary, and clearly indicates the purpose of the law that the highway shall be fully restored as far as possible at any reasonable expense.

In the case at bar, if the highway was obstructed or its use rendered dangerous by any unnecessary act of the defendant, either in its negligent construction of the crossing or its failure to keep it in proper repair, then the plaintiff is entitled to recover such damages as resulted therefrom. The plaintiff was entitled to show the dangerous condition of the crossing. This dangerous condition when proved would be *prima facie* evidence of negligence on the part of the defendant whose duty it was to keep the crossing in proper condition. *Marcom v. R. R., ante,* 200.

The defendant might then either rest upon its denial of the fact, or show that the dangerous condition arose from circumstances and conditions beyond its control. For instance, the defendant might deny that the guard-rail was dangerous to travelers on the highway, or, admitting its danger, might show that the guard-rail was necessary for the safety of its train; that it was laid down so as to cause as little obstruction or danger as possible to the highway; that it was at the proper distance from the main rail, and that it would be dangerous to fill up between the rails with dirt to any extent. In other words, it might deny the dangerous condition of the crossing, the burden of proving which would rest upon the plaintiff, or it might assume the burden and show that such condition did not arise from any negligence of its own. (568)

The plaintiff's fourth exception is to the exclusion of the following testimony, as shown by the record: "Plaintiff proposes to show by this witness that the crossing near his house on same road is constructed like this one, and that people have got their feet caught in it between main rail and guard-rail." We think the evidence was compe-

tent. It is essentially dissimilar from the first exception, because it is proposed, not simply to show that this crossing was like another crossing, but that this crossing was dangerous because another crossing of similar construction had proved to be dangerous. Similar causes under similar circumstances produce similar results, and if a machine of a certain make prove dangerous in ordinary handling, it is fair to presume that other machines of the same make may be equally dangerous. Where, however, the danger arises from some flaw or defect peculiar to the individual machine and not arising in any way from its method of construction, this rule may not be applicable. In the present case the evidence was clearly competent.

We have treated this case as depending upon the negligent construction of a crossing at the intersection of a public highway, and so it is presented to us. But there is a suggestion in the evidence that we think proper to notice: If the crossing was so constructed and maintained by the defendant as to be perfectly safe to any one crossing its track upon any part of the highway, we think it has sufficiently fulfilled its duty to the public, even if it were possible for a person walking down the track to get his foot caught in such a manner as would be impossible were he simply in the ordinary use of the highway. A railroad company using machinery of the most dangerous nature is held to a high degree of care in the performance of its legal duties; but its track is not a public foot-way, and it is not required to keep it in repair for such (569) purpose.

Of course this want of previous negligence would not relieve the defendant from liability for injury to one on its track, when such injury might have been avoided by reasonable care and diligence on its part. But that question is not developed by the evidence.

It is alleged in the complaint and admitted in the answer that the crossing in question was "a public crossing for the passing of persons and vehicles over said track." Whether the crossing was defective, and if so, whether such defect was the cause of the injury, are questions for the jury under proper instructions from the court. If there was no defect, either in the construction or maintenance of the crossing, there was no negligence on the part of the defendant in that regard, who, unless shown to have been negligent in some other respect, would not be liable to the plaintiff for the death of his intestate.

These are questions to be settled by the jury upon a new trial, which must be ordered for the exclusion of competent testimony.

New trial.

Cited: Edwards v. R. R., 129 N. C., 80; *Goforth v. R. R.*, 144 N. C., 570; *Britt v. R. R.*, 148 N. C., 40; *Tate v. R. R.*, 168 N. C., 526, 528; *Pennington v. R. R.*, 170 N. C., 476.

(570)

THEOPHILUS WHITE v. H. W. AYER, STATE AUDITOR, AND W. H. WORTH, STATE TREASURER.

(Decided 22 May, 1900.)

Chief Inspector of Shellfish, Act of 1897, Chapter 13—Shellfish Commissioners, Act 1899, Chapters 18, 19, 21 — Salary — Mandamus— White v. Hill, 125 N. C., 194.

1. The plaintiff's office of Chief Inspector of Shellfish, to which he was appointed under the Legislature of 1897, still exists, and having performed its duties he is entitled to compensation.

2. While the office was not abolished by the Legislature of 1899, the effect of it was to reduce the compensation to $400 per annum, and 5 cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum.

3. As the prescribed manner of issuing the warrant can not be literally complied with, it should be conformed to, "as near as may be"; that is, the certificate should be issued by the clerk of the present board, and countersigned by the plaintiff, as chairman, and the Auditor's warrant should issue upon this certificate.

CLARK and MONTGOMERY, JJ., dissenting.

CONTROVERSY submitted without action, under The Code, secs. 567 and 568, to *Starbuck, J.*, holding the Superior Court of PERQUIMANS, and determined 4 December, 1899.

Upon the facts agreed, which are copied into the opinion, his Honor rendered the following judgment:

This cause coming on to be heard before *Starbuck, J.*, upon the facts agreed, it appears that the Supreme Court, in the cause entitled "*State ex rel. Theophilus White v. George H. Hill et al.,*" has held that chapter 19, Public Laws 1899, is void in so far as it undertakes to appoint the persons therein named to the offices of Shellfish Commissioners therein undertaken to be established, and that chapter 18, Public Laws 1899, is void in so far as it undertakes to repeal that part of (571) chapter 13, Public Laws 1897, which created the office of Chief Inspector of Shellfish, to which office plaintiff was duly appointed.

The Court is of opinion that the plaintiff is entitled to receive salary and expenses as provided under chapter 13, Laws 1897, unless payment of the same has been prohibited by chapter 21, Public Laws 1899, which directs that the State Treasurer shall not pay any compensation for services rendered concerning the shellfish industry unless such persons are authorized to render such services under the provisions of chapter 19, Laws 1899.

It is manifest that the General Assembly, by enacting said chapter

21, did not intend that the Chief Inspector should perform the duties of his office without compensation therefor.

It is equally manifest that said chapter was enacted upon—and would not have been enacted but for—the assumption that by chapter 18 the office of Chief Inspector had been abolished, and that by chapter 19 the persons named therein had been appointed to the offices of Shellfish Commissioners.

The court is therefore of opinion that said chapter 21 is dependent upon and falls with those parts of chapters 18 and 19 which have been held to be void.

It further appears that said chapter 19, Laws 1899, which provided for the appointment of seven persons as Shellfish Commissioners, further provides that "each of the said commissioners shall receive as compensation the sum of $400 per annum."

It is manifest that by said provision the General Assembly did not intend to increase the salary of the Chief Inspector to $2,800 or to diminish it to $400, but to provide compensation for the seven com-
(572) missioners undertaken to be appointed.

The court is of opinion that said provision as to compensation can not be construed as amendatory to chapter 13, Laws 1897, but is dependent upon and falls with the void provision as to the appointment of Shellfish Commissioners.

It is hereupon adjudged that plaintiff is entitled to receive a salary of $75 per month and actual traveling expenses, as provided under chapter 13, Public Laws 1897, from 15 March, 1899, up to the present time; and it is further ordered and adjudged that a *mandamus* issue directed to H. W. Ayer, the State Auditor, commanding him to issue a warrant for the amount due the plaintiff under chapter 13, Public Laws 1897; and that a mandamus issue directed to W. H. Worth, State Treasurer, commanding him to pay to plaintiff said amount.

H. R. STARBUCK,
Judge Presiding First Judicial District.

To the foregoing judgment the defendant excepted. Exception overruled. Appeal prayed by defendants. Notice waived. Appeal bond adjudged unnecessary. The controversy without action and the judgment to constitute the case on appeal.

J. C. L. HARRIS,
Attorney for Plaintiff.
F. H. BUSBEE,
Attorney for Defendants.

4 December, 1899.

J. C. L. Harris for plaintiff.
F. H. Busbee and Cook & Green for defendants.

FURCHES, J. This is a controversy without action under sec- (573) tions 567 and 568, of The Code. The facts agreed, upon which the judgment of the Court is asked, are as follows:

The General Assembly of North Carolina, in 1897, passed an act to provide for and promote the oyster industry of North Carolina, ratified 23 February, 1897, being chapter 13 of the Laws of 1897. This act is made a part of the case.

That on 23 February, 1897, the plaintiff was duly appointed by the Governor of North Carolina, under the provisions of said act, Chief Inspector for the constitutional term of four years, and was duly commissioned as such, and was inducted into said office and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in section 13 of the act.

The General Assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shellfish industry of the State, ratified 2 March, 1899, being chapter 19, Laws 1899. Under this act, the persons named in section two (2), namely: George H. Hill, of Washington, Beaufort County; B. D. Scarboro, of Avon, Dare County; Daniel L. Roberts, of New Bern, Craven County; Robert W. Wallace, of Beaufort, Carteret County; C. C. Allen, of Elizabeth City, Pasquotank County; J. M. Clayton, of Englehard, Hyde County, and Daniel B. Hooker, of Bayboro, Pamlico County, undertook to discharge the duties of Shellfish Commissioners, under the claim that the act of 1897 was repealed by the act of 1899.

That the persons named in the preceding paragraph, having undertaken, under the title of Shellfish Commissioners, to discharge the duties devolving upon the plaintiff as Chief Inspector, and having taken possession of the steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the Supreme Court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case.

That since 15 March, 1899, up to 20 November, 1899, the defendant H. W. Ayer, Auditor of the State, has refused to issue to the plaintiff a warrant for the sum of $75 per month and his actual (574) traveling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the act of 1897; and the defendant W. H. Worth, State Treasurer, for the same period of time, has refused to pay the salary and traveling expenses of the plaintiff as Chief Inspector, and also the $50 per month claimed by the deputy inspectors.

That since the opinion of the Supreme Court has been filed, the plaintiff has again demanded of the Auditor the issuance of a warrant in his

favor for the amount of his salary and expenses, and the same has been refused by the defendants. The defendants base their refusal upon the Laws 1899, chapter 21, which is made a part of this controversy.

The plaintiff insists that by the decision of the Supreme Court, hereinbefore mentioned in the facts agreed, he is entitled to a salary of $75 a month and actual traveling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chapter 21, Laws 1899, above mentioned. He asks that a *mandamus* issue to the defendant, the State Auditor, requiring him to issue a warrant for the amount due him under the law, and also that a *mandamus* issue, directed to the State Treasurer, requiring and compelling him to pay the same, and for all further relief which, under the facts above mentioned and the law of North Carolina, he is entitled to.

It is further agreed that no part of the compensation as provided in chapter 19, Public Laws 1899, has been paid to the persons therein named as Shellfish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and traveling expenses as the plaintiff may be entitled to.

(575)

Upon these facts the plaintiff contends that he is entitled to a writ of *mandamus* against the defendants. This contention is disputed by the defendants, and the plaintiff's right to a *mandamus* is denied.

It has been decided by this Court that the plaintiff is entitled to hold his office of Chief Inspector, to which he was appointed in 1897, for the remainder of his term of four years. *White v. Hill,* 125 N. C., 194. This is settled, and the question is now presented as to whether or not he shall have pay for his services.

The plaintiff was duly appointed and inducted into his said office in March, 1897, for a term of four years, under an act of the Legislature ratified 23 February, 1897—being chapter 13, of the Public Laws of that year. Under this act he was entitled to a salary of $75 per month, or $900 per annum, payable monthly. This is not denied by the defendants, but they say that chapters 18, 19, and 21, of the Public Laws of 1899, had the effect to destroy the plaintiff's right to pay. They say that chapter 18 repeals section 13 of the act of 1897, and this is true; and they say that chapter 21 prohibits them from paying a salary to any one not acting under chapter 19 of said act; and it is true that this act so provides. And the defendants say that the plaintiff is not acting under the act, chapter 19, and is not entitled to any pay for his services. But, as it is seen that the plaintiff's office to which he was appointed in 1897, still exists, and that he is entitled to hold the same and

perform its duties, it would seem that he is entitled to receive the salary attached thereto. *Dalby v. Hancock,* 125 N. C., 325; *Gattis v. Griffin, ibid.,* 332.

The Legislature may abolish a legislative office, and this is the end of it. *White v. Hill, supra; Hoke v. Henderson,* 15 N. C., 1. When the office is abolished this ends the term of the officer holding it, as there can be no officer without an office, and of course no salary (576) without an officer.

The Legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent and to starve him out. But if it clearly appears that it was done for that purpose, it would be void. *Bunting v. Gales,* 77 N. C., 283; *Hoke v. Henderson, supra.* In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. *Hoke v. Henderson, supra.*

But if the Legislature should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent would so plainly appear that the act would be declared void. *Hoke v. Henderson, supra; Cotten v. Ellis,* 52 N. C., 545.

The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may be passed, and in force, during his term of office.

The Legislature on 28 February, 1899, passed an act expressly amendatory of chapter 13, Laws 1897—this being the act under which the plaintiff was appointed. And on 2 March, two days thereafter, it passed another act upon the subject of oysters and shellfish. This act does not state that it is an amendment of the former acts, nor does it purport to repeal the previous legislation on the subject of oysters and shellfish, except so far as they are in conflict with the act of 2 March, 1899. And on 8 March, 1899, it passed chapter 21, which is stated to be "supplemental to chapter 19, passed on 2 March." (577) This last act prohibits the Treasurer from paying any compensation claimed for services, unless the person so claiming them, shall be authorized to render such services under chapter 19, of which act this act is a supplement.

The Legislature having general powers of legislation, all these acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff. (We say the constitutional rights of the plaintiff, for the reason that his rights alone are before us for our consideration.)

It is then the duty of the plaintiff to administer his office under the

law as it now exists; that is, under the act of 1897, as modified and changed by the Legislature of 1899, chapters 18 and 19, Public Laws 1899.

For the purposes of this action it is not necessary for us to decide whether chapters 18 and 19, Laws 1899, were intended as amendments of the act of 1897, or not. They are both a part of the Public Laws of the State, and must be observed when not in conflict with the plaintiff's vested rights. Chapter 18 is expressly stated to be an amendment to the act of 1897; and chapter 19 does not state whether it is an amendment or not. But both acts are on the same subject, and must be considered together and treated as amendments. And where they expressly repeal the former act or are in conflict with its provisions, the provisions of the latter act must prevail, unless they are in conflict with vested rights. It is so held in *White v. Hill, supra,* which is expressly put on *Abbott v. Beddingfield,* 125 N. C., 256, and *McCall v. Webb, ibid.,* 243. And as the plaintiff is not only authorized to perform the duties required by chapter 19, but it is in fact his duty to do so, there can be no reason for applying the provisions of chapter 21; and it is not necessary for us to decide whether it would be valid or not, if it were necessary for (578) us to decide that question.

The fact that the Legislature of 1899 changed the name of "an act to promote the oyster industry of North Carolina" to that of "Shellfish Commissioners," did not abolish the plaintiff's office. *White v. Hill,* and *Abbott v. Beddingfield, supra; Wood v. Bellamy,* 120 N. C., 212. Nor does the fact that the act of 1899 changed the name of the plaintiff's office from that of "Chief Inspector" to that of "Chairman of the Shellfish Commission," oust the plaintiff from his office or deprive him of his salary. *Wood v. Bellamy,* and *Abbott v. Beddingfield, supra.*

The plaintiff being entitled to his office and to the salary attached thereto, what is his salary under the legislation as it now exists, and how is he to get it?

Under chapter 19, Laws 1899, it seems to us that it has been reduced to $400 per annum and five cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum. We can not say that this reduction was not made for the public benefit, and we have no power to change it, and no disposition to do so if we had. The reduction may be made. *Gales v. Bunting* and *Hoke v. Henderson, supra; White v. Murray, ante,* 153.

Then what is necessary to be done to enable the plaintiff to draw his salary? The act of 1897 did not give specific directions as to this. Laws 1899, ch. 19, sec. 9, provides that this shall be done upon the warrant of the Auditor, "which warrant shall be issued by the Auditor upon the certificate of the secretary of said board, and countersigned by the chair-

man of the Shellfish Commission." This was only a matter of detail, which seems to have been proper to supply a defect in the act of 1897, and was passed when it was thought that Hill and his force would be in office. And we can not, and do not construe this paragraph to mean that the incumbent should not receive any salary for his (579) services. This, in our opinion, would be to construe the act to mean what we think the Legislature could not do (*Cotten v. Ellis, supra*), and it would also be to construe it to mean what it does not say, and what we do not think the Legislature intended it to mean.

So, if this direction as to the manner of issuing the warrant can not be literally complied with—*in hic verbis*—it should be complied with "as near as may be." That is, the certificate should be issued by the clerk of the present board and countersigned by the plaintiff who is acting as chairman, in place of Hill, and the Auditor's warrant should issue upon this certificate.

This opinion might close here, and would do so, but for the arguments urged in opposition to the views we have expressed, some of which it seems to us should be noticed.

It is said that chapter 19 names certain persons as commissioners, and that the plaintiff is not one of those named in the act. This is true. But the act does not provide that the salary shall be paid to these parties, *eo nomine,* but to the commissioners performing the duties prescribed by the act. Suppose any or all of the commissioners named in chapter 19 had died or resigned, is it contended that still they should receive the salary, or that the work should stop and the commission fall through and fail on that account? They are out, and so far as we know, are not claiming any pay.

It was said this Court had no jurisdiction of this matter, that it only has appellate jurisdiction, that the assumption of such jurisdiction is unheard of; that the judgment of the Court will be *ultra vires,* unlawful, unconstitutional and void, and that the *Legislature* may declare it unconstitutional; and if it should do so, and the Treasurer should obey the judgment of this Court, he might be in danger. This (580) argument seems to proceed upon the idea that this proceeding was commenced in this Court, whereas the record shows that it is here on appeal from the Superior Court of Pasquotank County. And it would seem that the slightest examination would have shown that it is not a proceeding unheard of before.

In *Marbury v. Madison,* 1 Cranch., 49, which was mandamus against James Madison, Secretary of the United States, it was held that the action would lie.

In *Cotten v. Ellis,* 52 N. C., 545, which was a proceeding in mandamus by Cotten, claiming a *salary* as Adjutant-General of North Caro-

lina against John W. Ellis, Governor of North Carolina, it was held that the action would lie, and the writ was issued.

But a more recent case is that of *County Board of Education v. State Board of Education,* 106 N. C., 81, in which it was held that the action would lie, and the writ was granted. The opinion of the Court in that case was written by *Justice Clark,* and seems to be a direct authority for issuing the writ in this case.

The opinion in *Cotten v. Ellis, supra,* is not only authority for granting the writ, but it would be well to note what the Court says, near the close of the opinion, with regard to the execution of the writ, which is in these words: "We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question." The opinion *(Cotten v. Ellis)* also contains this language: "A statute which *reduces* a salary during the term of office, and one which *takes away the salary altogether,* stand on different footings, for in the latter
(581) case, the object would evidently be to starve the incumbent out of his office, and thereby do indirectly what could not be done directly, so as to make applicable the remarks made in the case of *Hoke v. Henderson,* in which there seems to be much force, that such indirect legislation is as obnoxious to the charge of being unconstitutional as an act directly depriving one of his office. A proper construction of the statute does not lead to the inference that it was the intention to abolish the salary, in the event that the applicant still continued entitled to the office and liable for the discharge of its duties. On the contrary, the clause which repeals so much of the ninth section as relates to the salary is a mere corollary or incident to the clause which repeals so much of that section as relates to the appointment of the Adjutant-General, and consequently the one can not, by any rule of construction, be made to extend in its operation further than the other." To hold otherwise, the Court says, "would be to place the Legislature in this attitude—we mean to abolish the office, if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary."

The facts in *Cotten v. Ellis* are so clearly the same as the facts in this case, is our excuse for quoting so much of the opinion.

Before the suggestion that the *Legislature may declare the opinion of this Court unconstitutional* may be adopted by any one, we ask them to read the opinion of *Chief Justice Marshall* in the case of *Marbury v. Madison, supra.* It is a full and complete answer to this suggestion. We would like to incorporate the whole of that opinion in the opinion of

the Court in this case; but as this is impossible, we will again have to ask to be pardoned for making some quotations from this very able opinion, emanating from the mind of probably the greatest (582) jurist this country has produced. It fully sustains the doctrine of *Hoke v. Henderson,* 15 N. C., 1, that an office is property—a vested right—of which he can not be deprived. It discusses the relation of the government to the citizen, the supremacy of the Constitution over ordinary legislative acts, the relation of the executive, legislative and judicial departments of the government, and shows that all three of these departments are equally bound by the Constitution, but within their own departments; that while it is the exclusive right of the legislative department to enact laws and the duty of the executive to enforce them, it is the exclusive right of the judiciary to construe them, and to say whether they are repugnant to the Constitution or not. The idea that the executive or the legislative department has any right to put a different construction on a statute or a different construction on the Constitution than the Court has, is utterly repudiated. On page 59 (1 Cranch.), it is said: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights." And on page 61, it is said: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the law of his country for a remedy."

On page 62: "The question whether a right has vested or not is in its nature judicial and must be tried by the judicial authority."

On page 64: "What is there in the exalted station of the officer, which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus* directing the performance of a duty, not depending on executive discretion, but upon particular acts of Congress and the general principles of law?"

On page 66: "The doctrine therefore now advanced is *by no* (583) *means a novel one.*"

On page 67: "If Congress remains at liberty to give this Court appellate jurisdiction, when the Constitution has declared their jurisdiction shall be original, and original jurisdiction when the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance."

On page 69: "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall

please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . . If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Court and oblige them to give it effect? Or in other words, though it be no law, does it constitute a rule as operative as if it were a law?

On page 70: "It is *emphatically the province and duty of the judiciary to say what the law is* (the italics are ours). . . . So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We can not quote all of this very able and exhaustive opinion, but we trust that we have quoted sufficiently from it to establish the (584) separate independent jurisdiction and power of courts to decide the law, and to show that neither the executive nor the legislative department has any such power.

Our opinion then is, that the plaintiff is entitled to the salary and compensation provided for in the act of 1899, chapter 19 (and the same that Hill would have been entitled to if he had remained in office), to be paid by the Treasurer of the State, out of the oyster fund appropriated by the act of 1897 and the act of 1899, admitted to be now in his hands: *Provided,* that the expenses of this commission do not exceed the sum of $6,000 per annum, and that the certificate and warrant shall be issued in the manner we have indicated.

This action is to recover the *salary of a public officer.* The facts are agreed, and from these facts it appears that there is now money in the hands of the Treasurer, more than sufficient to pay the plaintiff, which arose from the oyster fund, under Laws 1897 and 1899, that this fund is specially appropriated to the payment of the salaries of officers serving under the act of 1899; that the Auditor and Treasurer are *honest men, and faithful public officers,* and want to do their duty. They wanted the opinion of the Court as to what that was, and neither of them nor their counsel made any objection to both being defendants; but it is made, and it would seem that the party making it can see no difference between the *salary of a public officer* and a *claim* against the State; nor can he see the distinction between *Garner v. Worth* and *Cotten v. Ellis.*

The judgment of the court below will be modified in conformity with this opinion, and being so reformed, judgment will be entered in this Court.

Modified and affirmed.

DOUGLAS, J., concurring: I shall be glad indeed when all the(585) office-holding cases are finally decided, not only from their intrinsic difficulty, but more so from the vast amount of discussion to which they have given rise. Much of this discussion, viewed from my standpoint, has seemed irrelevant and indeed liable to mislead. Hence upon one or two occasions I have felt compelled to explain myself in a concurring opinion, as I did not wish to be misunderstood on important constitutional questions. My personal views are fully set out in *Wilson v. Jordan,* 124 N. C., 707, and *Green v. Owen,* 125 N. C., 212.

I have given this case most careful consideration, especially in view of the division of opinion, and I see no reason to overrule the unanimous opinion of this Court as expressed in *Wood v. Bellamy,* 120 N. C., 212. If I follow that opinion to its necessary and legitimate results, I am forced to concur with the Court in the case at bar. In fact, the case as now before us presents no substantial difficulties to my mind. Whatever complications may have existed were solved when we decided that the plaintiff was entitled to the office. The only question now before us is whether he shall receive the compensation which the Legislature attached to the performance of its duties. We are not creating any office, for the office was admittedly created by the act of 1897, and it does not appear to us that it was abolished by the act of 1899. We are not affixing any salary to the office further than that we find expressly provided in the act of 1899—the last expression of legislative will. We are not levying any public taxes, nor appropriating any public money. This was done to the fullest necessary extent by both acts. That of 1897 raised and appropriated to the specific purposes of this case an ample fund, much of which still remains in the treasury unexpended and not otherwise appropriated. The case comes before us on facts agreed, and it is expressly stated that "the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available (586) for the payment of such salary and traveling expenses as the plaintiff may be entitled to." No one else is now claiming it, and no one else is now performing the duties which would entitle him to receive it.

The only reason given why it should not be paid to the plaintiff is a construction of section 1, ch. 21, Laws 1899, which it seems to me would ascribe to the Legislature most unworthy motives. This section provides that "the Treasurer of the State of North Carolina shall not

pay any compensation to any person or persons claiming the same for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services under the provisions of the said act" (ch. 19, Laws 1899).

We are asked who were authorized to render such services under said act? Plainly the person or persons rightfully performing the official duties prescribed by that act. Can we say that the primary object of the Legislature was not the public welfare, but the private benefit of the individuals named in the act? Have we any right to say that the Legislature, in providing for the protection and supervision of one of the great industries of the State, intended to say to the Treasurer, "We think that the proper supervision of the shellfish industry is necessary for the public welfare, and for this purpose we have appropriated the public money, but if that public money can not go into the pockets of our personal friends whom we have named in the bill, we prefer that those important public duties shall remain unperformed and those great public interests entirely neglected"? The Legislature has not said so; it could not legally say so, and it shall not be made to say so, (587) even inferentially, by any construction of mine. It is my duty as well as my pleasure to place upon its acts a construction in harmony with the public interests which they are bound to protect, and the Constitution which they are sworn to obey. They may well have believed that the office held by the plaintiff had been legally abolished, and that they had the right to fill the offices they had presumably created. So believing, they may have intended simply to instruct the Treasurer not to pay any mere claimant under any other act, but if he could not pay their appointees, to hold the fund until it was legally determined to whom it should be paid. Such would have been their legal intent, and such I prefer to believe was their actual intention.

Of course I would deeply regret to see my native State visited by earthquakes or cyclones of a civil or material nature, and I am glad to say they have no germ in the decision we are rendering. This case is a small one, actually and potentially. It enunciates no new principle, and involves but little money. Concerning the two acts together, we find an office created by the Legislature with a salary attached thereto and a fund specifically appropriated for the payment thereof. All we now say is that the man legally and rightfully performing the duties of the office is entitled to the compensation thereunto affixed by law.

MONTGOMERY, J., dissenting: Because of the great public importance of the matters involved in the discussion and decision of this case, I have given to it a more thorough consideration than a judge of this Court usually gives, or has time to give to the investigation of cases

generally, and, after all, I find myself unable to agree to the conclusion reached by a majority of the Court that the plaintiff is entitled to writs of *mandamus* against the Auditor and Treasurer to enforce the collection of his claim. It has been decided in *White v. Hill,* 125 N. C., 194, that the plaintiff is entitled to his office. I therefore (588) agree in the present case with the Court that he is entitled to his salary, whatever that may be. I think he is entitled to the whole amount named in the act of 1897 ($75 per month), and his necessary traveling expenses. While the salary is no part of the office, but only an incident thereto, it is yet the consideration for which the services and duties of the office are performed, and the salary therefore must follow the office. I am of this opinion because I regard the decision in *White v. Hill, supra,* as determining that part of the act of 1899, which undertook to create a board of commissioners and to distribute amongst them the duties of the plaintiff as Chief Inspector, was unconstitutional, and therefore no such board being in existence, the plaintiff can not be their chairman and entitled to a salary of $400, allowed by the act of 1899, to such chairman. He is still, however, the chief officer, by whatever name to be called, of the oyster or shellfish industry, and is to discharge the duties of that position as best he may under the provisions of the act of 1899.

I further agree with the Court that the legislative department of our State Government is not the supreme—sovereign power in the State. I also agree with the Court that any public officer who is required by law to perform a specific duty, which concerns individual rights dependent upon the performance of that duty, may be compelled to perform that duty at the suit of a person who alleges that he is injured; and I agree with the Court that, when any act of the General Assembly is plainly contrary to the provisions of the Constitution such act is void, and it is the right and the duty of the Supreme Court to so declare it.

The only point of difference then between my views and the (589) opinion of the Court is this: The Court construes the act of 1899 in reference to the shellfish industry to mean that the funds now in the hands of the Treasurer, derived from that industry, are not only appropriated specifically by law to the payment of the expenses of carrying out that law, but that as the plaintiff has been declared by this Court to be entitled to his office acquired under the act of 1897, he is therefore performing services under the act of 1899, and is therefore entitled to law to have his writs of *mandamus* against the Auditor and Treasurer to have enforced the payment of his salary; that the plaintiff is entitled to this remedy, notwithstanding the act of 1899 specifies a method by which the money is to be drawn from the treasury, and it is apparent that that method can not be followed. The contention last

mentioned I can not agree to, however much force there may be in the former, under the decision in *Day's case,* 124 N. C., 362.

The method by which the oyster funds are to be drawn out of the Treasurer's hands is set out in section 9 of chapter 19, of the Laws of 1899. The Auditor's warrants are required to be issued upon the certificate of the secretary of the Board of Commissioners of the shellfish industry, and countersigned by the chairman of the board. That method can not be complied with, for under the decision in *White v. Hill, supra,* there is no chairman or secretary of such a board. Any other method of drawing this money out of the Treasurer's hands, in our opinion, would be one arbitrarily prescribed by the Treasurer, or one authorized by judicial construction purely; and while I think, as I have said, that the plaintiff is entitled to his salary, yet I can not get my consent as a member of this Court to join in an order to the Treasurer, for the reason that the method by which the same may be paid can not be carried out.

(590) It is true that the Legislature, in appointing the method by which this money might be paid out by the Treasurer, has been disappointed in that those officers, whose duty it was to certify to the Auditor the persons and the amounts to be paid, have been declared by the Supreme Court to have had and to have no existence; yet, I do not think that by judicial construction another method may be substituted.

If the General Assembly, when it enacted section 9, of chapter 19, Laws 1899, in place of section 13, of chapter 13, Laws 1897, had provided that warrants issued by the Auditor for the payment of claims against the oyster fund should be certified by a committee, the persons composing that committee being dead, and the Legislature not being aware of that fact, or by a committee who might die while charged with the duty of certifying the claims, the method would fail by reason of the non-existence of the certifying committee, but neither the courts nor the Treasurer could adopt another method for the payment of the claims than the one prescribed by the General Assembly. Another method would have to be adopted by the Legislature and the claimant would have to wait until that was done.

This is not a case where the officer is left to discharge his duties and at the same time be deprived of his entire salary, in so many words, by the legislative enactment. In such a case, the attempt to deprive the officer of his entire salary—to starve him out—and still require him to discharge the duties of the office, would be void under the decision in *Hoke v. Henderson.* But this is a case where the General Assembly considered that they had abolished the office, and it is only by judicial construction that the abolition of the office was not effected; and while under the judicial decision the old officer retains his position, and while

the oyster fund in the hands of the Treasurer is appropriated to (591) the payment of claims against that fund, yet the essential prerequisites to the drawing out of that fund can not be complied with, for the reasons that I have given above.

It has been said, not by counsel in the case, however, that if this Court is powerless to compel the payment of a salary due to a public officer, then the decisions of this Court that an office is property are of no avail, since the Legislature hereafter in removing legislative office-holders could simply declare that such displaced officers should not receive compensation for their services. That, in my opinion, is not a true proposition of law, and that any General Assembly of North Carolina should pursue such a course is unthinkable to me. If an officer should have his office taken from him by legislative enactment before his term expires, and the duties of his office are continued, the courts can declare such an act of the Legislature void. If an appropriation has been made by the General Assembly for the payment of a salary of such an officer, and no particular method has been prescribed by which it is to be paid, the Auditor can issue his warrant to the claimant, and the Treasurer must pay it. If a particular method has been prescribed, that method must be followed. If an office is continued and the officer is required to perform the duties thereof, and the General Assembly should fail or refuse to make an appropriation for the payment of his salary, that would present a case indeed where the courts could not compel the legislative branch of the Government to perform a plain duty. If such an abuse of power were possible, the courts could give no relief; the people themselves would have to correct it.

In *Hoke v. Henderson,* the Court said: "The Constitution of this State provides that the Governor, Judges, Attorney-General, Treasurer, and other officers shall be elected, and that certain of them shall have adequate salaries during their continuance in office. Suppose the Legislature (at that time the elective body) should re- (592) fuse to elect those officers, or to give them salaries, or after assigning them salaries in a statute, should refuse to lay taxes or to collect a revenue to pay them; all these would be plain breaches of constitutional duty. And yet a court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful for more faithful representatives. Yet no one will say that the Legislature can, by law, remove the Governor, or a judge, or any other head of a department, because they can unconstitutionally refuse to provide salaries for them, and the courts can not compel the raising of such salaries. Nor can it be said because there can not be such compulsion, that therefore the law is constitutional." That quotation is certainly an answer to such a suggestion, and it must be that unless our system of government is an ab-

solute failure, no body of men could ever get or hold power who would resort to such a device to defraud men of their property rights in the offices they hold. The Legislature of North Carolina has undertaken to abolish offices, and, as a result, salaries have been thought to be destroyed; but that body has never undertaken to continue the office and at the same time to deprive the officer of his compensation, and I believe never will.

This, it is to be hoped, is the last of the cases which involve the title to public office. The first one was *Wood v. Bellamy,* 120 N. C., 212. There, it was held by a unanimous Court that in North Carolina a public office is property belonging to that office holder by contract between the State and himself, as had been held in *Hoke v. Henderson,* 15 N. C., 1. That unanimity of opinion continued up to and during the September Term, 1897, of this Court, when the case of *Ward v. Elizabeth City,* 121 N. C., 1, was decided. The opinion in that case was written by *Justice Clark,* who, after stating the proposition that the Leg-
(593) islature could not turn an officer out by an act purporting to abolish the office, but which in effect continues the same office, said: "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,* though this State is the only one of the forty-five States of the Union which sustains that doctrine."

Since the decision last mentioned, *Justice Clark* has entered numerous dissenting opinions (which are part of the history of this Court), notably in the cases of *State Prison v. Day,* 124 N. C., 362; *Wilson v. Jordan, ibid.,* 683; *Gattis v. Griffin,* 125 N. C., 336, and *Abbott v. Beddingfield, ibid.,* 256, in which he has with marked ability attacked the doctrine so long and so firmly established in the decisions of this Court that an office is property, and that it exists by contract between the State and the office-holder.

It has been suggested that the legislative department of the Government may resent the opinion of the Court in this case and pronounce it extra-constitutional itself. I feel satisfied, however, that the General Assembly will follow the course which has characterized that body since the foundation of the Government, that is, respect the authority and decisions of the highest court in the State as the final determination upon any matter of law or legal inference that may be before it under its appellate jurisdiction. In 1787, the highest court in the State in *Bayard v. Singleton,* 1 N. C., 42, where an act of the General Assembly alleged to be unconstitutional was before it for the decision of that question, said: "But that it was clear that no act they (the Legislature) could pass could by any means repeal or alter the Constitution, because, if

they could do this, they would at the same instant of time destroy (594) their own existence as a Legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as any law whatever) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect." And since that time this Court has continued in proper cases to decide acts of the General Assembly to be unconstitutional.

In *Marbury v. Madison,* 5 U. S., 49 (1803), where an act of Congress, alleged to be unconstitutional, was before the Supreme Court of the United States, the Court took jurisdiction, and decided against the constitutionality of the act, and that decision has been followed in proper cases by that Court to this day. The opinion of the Court in that case is so opposed to the view of the sovereignty of the legislative branch of the government, that it may be well to quote from it at some length. It is there said, *Judge Marshall* delivering the opinion of the Court: "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then the legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to (595) give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were a law? This would be to overthrow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution,

disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

The Court has not undertaken to decide that the Treasurer of North Carolina can be made to pay out money in a case where no appropriation by the General Assembly has been made. There is not a member of the Court who would think of doing such a thing. The decision of the Court rests upon the foundation and proposition that the General Assembly has appropriated a particular fund for the payment of the plaintiff's claim. There can therefore be no clash between the two departments of government. Nobody would dispute the proposition that if this fund had been appropriated by the General Assembly to the payment of the plaintiff's claim, the Treasurer could be made by mandamus to pay it. The duty required of the Treasurer would involve no judicial discretion, and would be simply a ministerial duty. *County Board of Education v. State Board of Education,* 106 N. C., 81.

In the last mentioned case, *Marbury v. Madison, supra,* is cited (596) as authority. Upon examination of that case upon that point, the facts are that Marbury was appointed by the President of the United States (John Adams), a justice of the peace for the county of Washington in the District of Columbia. The commission had been signed by the President and the seal of the United States affixed thereto, but it had not been delivered when Mr. Jefferson entered upon his duties as President. Mr. Madison, the new Secretary of State, refused to deliver the commission to Marbury, whereupon Marbury moved in the Supreme Court of the United States for a rule to James Madison, Secretary of State, to show cause why the *mandamus* should not issue commanding him to deliver to Marbury his commission. The Court held that it was a plain case of a *mandamus* either to deliver the commission or a copy from the record. But the rule was discharged, not because *mandamus* was not the proper remedy, but because the Supreme Court was a Court of appellate jurisdiction, and did not have the jurisdiction to hear the motion as an original proceeding in that Court.

CLARK, J., dissenting: The General Assembly of 1899, by chapter 21, ratified 8 March, 1899, enacted: "Section 1. The Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services under the provisions of the said act, entitled 'to provide for the general supervision of the shellfish industry of the State of North Carolina,' and ratified March second, eighteen hundred and ninety-nine." Who are authorized to render such services *"under the*

provisions of the said act"? Plainly we must turn to the provisions of said act, which is chapter 19. We find it there provided: "Section 1. There shall be seven commissioners, hereinafter named in this act, to carry out the provisions of this act," and section 2 names the seven commissioners, and it is provided "that if any one of (597) those named shall die or resign, those remaining shall fill the vacancy." There can be no possibility of doubt who are authorized "under the provisions of the said act." They are named in the act, and the Treasurer is forbidden to pay any one else. The plaintiff is not one of them.

Can the Court order the Treasurer to pay him when the Legislature has ordered the Treasurer not to pay him?

The identical point has been expressly decided against the plaintiff by this Court in several cases on "all fours" with the one before us. In *Wilson v. Jenkins,* 72 N. C., 5, it was held, *Pearson, C. J.,* that "the General Assembly has absolute control over the finances of the State; the Public Treasurer and Auditor being mere ministerial officers, bound to obey the orders of the General Assembly Hence the courts have no power to pay a debt which the General Assembly has directed him not to pay, nor the Auditor to give a warrant which the General Assembly has directed him not to give unless the act of the General Assembly be void as violating the Constitution of the United States or of this State." The act there sustained forbade payment of interest on State bonds out of a fund though it had been collected by a special tax laid for that purpose.

In *Shaffer v. Jenkins,* 72 N. C., 275, the statute of 1869 had appointed a surveyor and commissioners to locate a certain road, appropriated $5,000 and directed the Governor to issue his warrants for the payment of contractors. The act of 1871 forbade the Treasurer to pay these or any similar warrants. It was held that "no court of this State has jurisdiction to take money out of the Treasury of the State to pay even an admitted debt of the State against an express and positive prohibition of the General Assembly." It is impossible to distinguish these cases from the one before us.

In *Boner v. Adams,* 65 N. C., 639, the Court says that a mandamus can not be brought against the Auditor and Treasurer at the same time (as is here attempted) because in no case could a *mandamus* lie against the Treasurer until a warrant had been issued by the Auditor. *Reade, J.,* then says as to the Auditor: *"The most* this Court could do would be to order the Auditor to examine the claim and to allow it, if *he* thought it correct, and in that event to issue his warrant for it, if *in his opinion* there is sufficient provision of law for its payment." The

Court then says: "Nor can we pass upon the merits of the claim." The same ruling was made *Taylor v. Adams,* 66 N. C., 339.

In *Bayne v. Jenkins,* 66 N. C., 356, we have a duplicate of the present case (if an office is a contract). There L. P. Bayne & Co. had a contract with the State, and, as in the present case, the Legislature directed that no payment should be made under it. The Court held that a *mandamus* could not issue for payment of plaintiff, and said: "The Auditor in his warrant upon the Treasurer, in any case, must recite the law under which it was issued, and as the Legislature has expressly forbid a warrant or the payment of money in this case, the Auditor could (598) not issue a warrant. . . . If the plaintiff have a claim as alleged, it seems that his remedy is an application to the Legislature or a suit originated in this Court" (which could only recommend payment to the Legislature. Constitution, Art. IV, sec. 9.) If the plaintiff's claim that his office is a contract be conceded, then these cases are precisely alike, differing only in the name of the plaintiff. It is passing strange if the Constitution permitted any Superior Court Judge to issue a *mandamus* to the public Treasurer to pay a claim against the State when it expressly forbids the Supreme Court in a case begun there, to do more than recommend payment to the Legislature. The original jurisdiction of claims against the State is given by the Constitution to the Supreme Court alone.

As is well said in the brief of Mr. K. P. Battle in the latter case, "If each Superior Court in the State could order the Treasurer to pay out moneys or command the Auditor to issue warrants, the fiscal concerns of the State could not be regulated or intelligently conducted. All claimants could *in effect sue a sovereign State* by resorting to *mandamus* against the officers in charge of her funds."

These cases have ever since been held as authority and have never been questioned in any way. In *Koonce v. Commissioners,* 106 N. C., at page 200, the Court quotes with approval the above language of *Boner v. Adams.* In *Burton v. Furman,* 115 N. C., at page 169, the Court again cites *Boner v. Adams,* saying: "It was held that *mandamus* would not lie against the Treasurer, because no warrant had been issued, and not against the Auditor, because it was something more than a ministerial duty sought to be required of him. . . .

The principles governing the issue of *mandamus* were *the* (599) *same then as now, and the decision is a controlling one, in which we fully concur."* This was in 1894. In *Garner v. Worth,* 122 N. C., 250, (1898), it was still the law, for the same judges that are now on the bench, restate the same proposition and cite the above cases. In *Chemical Co. v. Board of Agriculture and the Public Treasurer,* 111 N. C., 135, it was held that an action to recover back $1,000, wrong-

fully collected, though paid under protest, could not be maintained because both the defendants were State agents, and the action was in effect against the State. The remedy was by application to the Legislature. If the law so clearly stated and so uniformly repeated be not the law, where shall we look for it, and where shall we find stability in the decisions of the courts?

The repeal of an appropriation has always been sufficient to shut the doors of the treasury against any claimant, but there have been other occasions when the Legislature has, as in the present instance, expressly directed that a claim be not paid, notably, for instance, the resolution of 1870-71, page 471, forbidding payments of warrants, "already made or which may be made" on account of expenses incurred by order of the Governor in the "Holden-Kirk war." No treasurer and no Court has to this day deemed there was anywhere power to disobey that order of the Legislature, but the power does exist, and has existed all along, if the State can be ordered by the Court in the present case to pay a claim against it. And there is this difference against the plaintiff: he entered upon the discharge of his duties knowing the Legislature had directed he should not be paid, while in the matter of the Holden-Kirk claims the services had already been rendered, the salaries accrued, and the supplies furnished when the Legislature intervened and forbade payment. This power of the Legislature over the public purse is the most essential one in the system of a government of the people, by the people, and its abandonment under any pretext whatever (600) can never, with safety, be allowed.

In the recent case of *Garner v. Worth, Public Treasurer,* 122 N. C., 250 (February Term, 1898), it was held by a unanimous Court, composed of the same justices as now: "The Courts can not direct the State Treasurer to pay a claim against the State, however just and unquestioned, when there is no legislation to pay the same; and when there is such an appropriation, the coercive power is applied not to compel the payment of the State's liability, but to compel a public servant to discharge his duty by *obedience to a legislative mandate.*" Here, there is not only no legislative mandate, but a positive prohibition. In that opinion, attention is called to the fact that the Eleventh Amendment to the United States Constitution was passed to prohibit the Federal courts from coercing the States, whose sovereignty protects them from subjection to the jurisdiction of any court whatever.

What is the plaintiff's ground for this action? It is that by virtue of chapter 13, section 12, Laws 1897, he was appointed "Chief Inspector of the oyster industry" for four years, and that this Court has held in *White v. Hill,* 125 N. C., 194, that chapter 19, Laws 1899, creating Hill and six others "Commissioners of Shellfish Industry," continued

in their hands (among other duties) the duties he had been discharging, and therefore the act was unconstitutional in so far as it took away his property in his office. The Court did so hold, and put Hill and the other commissioners out and put the plaintiff back. The Court construing the other parts of the act of 1899, in connection with the act of 1897, gave the plaintiff the additional duties, bestowed by the act of 1899, upon the commissioners created in that act, and which were not conferred upon the plaintiff by the act of 1897. But his title
(601) to hold office rests upon the act of 1897, and *notwithstanding* the act of 1899—not *under* the act of 1899. The opinion of the majority of the Court in the present case says: "The plaintiff's office to which he was appointed in 1897 still exists, and he is entitled to hold *the same* and perform its duties. It would seem that he is entitled to receive the salary attached thereto." The Legislature has not, as has been asserted, prohibited the Treasurer "from paying a salary to any one not acting under chapter 19, Laws 1899. There would be no point or purpose in such a statute. On the contrary, chapter 21, Laws 1899, prohibits him from paying "for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services *under the provisions of the said act*" (ch. 19, Laws 1899), and the provisions of the act name the seven commissioners it authorizes to act, and authorizes them alone to fill vacancies in their own body and to employ all subordinates.

The Court heeld in *White v. Hill, supra,* that the act of 1899, in putting seven commissioners in office violated the contract made by the plaintiff with the State under the act of 1897. If so, with whom did the plaintiff make the contract? With the State. If the office is a contract, who has attempted to break it? The State. The Court having in *White v. Hill, supra,* put White back into office, is now asked to order the State Treasurer to open his vaults and pay the plaintiff, as it would order any private individual under similar circumstances. Has the Court that jurisdiction? The Constitution, Art. IV, sec. 9, says not. It says: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process *in the nature of execution shall issue thereon;* they shall be reported to the next session of the General Assembly for its action."

The Constitution, Art XIV, sec. 3, says: "No money shall be
(602) drawn from the treasury but in consequence of appropriations made by law." This is an exact repetition of the United States Constitution, article I, section 9, clause 7. Where is the appropriation to pay the plaintiff? There was an appropriation in the act of 1897 of $900 per annum to pay him for supervising the oyster industry. But

Laws 1899, chapter 19, placed the exclusive supervision in the hands of seven commissioners named therein, and appropriated $400 per annum to pay each of them, and repealed all laws in conflict therewith, and chapter 21 forbids the State Treasurer to pay any one else. It is true the Court has held that the act was unconstitutional in putting the seven commissioners in discharge of duties which the plaintiff had "contracted" with the State to perform. But that does not repeal the legislative prohibition upon the Treasurer against paying the plaintiff.

The Court has audited this claim, and holds it fixed not at the $900 allowed the Chief Inspector by the act of 1897, but at $400, which is the sum allowed each of the seven commissioners for discharging that and other duties under the act of 1899. Will it direct its mandamus to issue to the Treasurer to pay that sum to the plaintiff, which is "process in the nature of an execution," to enforce collection out of the State, notwithstanding the statute prohibiting payment to any one unless *"authorized under the provisions"* of chapter 19, Laws 1899, which provisions name those who alone are authorized? The Court places its opinion on the ground that "the Legislature having general powers of legislation," its statutes "must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff," *i. e.*, unless the State breaks its contract with the plaintiff by the Legislature refusing to pay him the salary to which he is entitled by virtue of the "contract" he made with the State in 1897, to hold the office of Chief Inspector of the oyster industry. Instead of sending its (603) recommendation to the Legislature, "for its action" as Constitution provides, the Court is asked by the plaintiff to send its *mandamus,* which is "in the nature of an execution" (*Fry v. Commissioners,* 82 N. C., 304; *Bear v. Commissioners,* 124 N. C., 204), to the public Treasurer to pay that salary because nonpayment "conflicts with the vested constitutional rights of the plaintiff," under his "contract" to hold that office and receive the salary. Though the Court has reduced this from $900 (the contract price), to $400, it is not the saving of a petty $500 which concerns the State, but the assertion by the Court of the power to order payment out of the State treasury of any sum, however small, when the proper department, which is alone vested with such authority, the Legislature, has not ordered such payment, but has forbidden payment. The courts have often held that if the Legislature attempted to do a judicial act, it is null and unconstitutional because beyond their powers. It follows that when the courts attempt to do a purely legislative act, such as ordering payment of a State liability, it is null and unconstitutional because beyond our powers.

An assertion of such power in the Court is so novel, so opposed to all previous adjudications, that it will challenge attention not only in this

State, but elsewhere. It is doubtless the first time, in this or in any country, that a Court has issued its order to a public Treasurer to pay a claim which the legislative department has forbidden him to pay. If this can be done, this Court can direct the public Treasurer to pay the "Special Tax" bonds issued under the broad seal of the State, and signed by the Governor and Treasurer, and which the law-making power, for reasons as satisfactory to itself as the act here in question, has (604) forbidden the Treasurer to pay, for if a contract can be enforced against a State, a constitutional amendment can no more impair the obligation of such contract than mere legislative enactment. *Louisiana v. Taylor,* 105 U. S., 445; *Clay Co. v. Society,* 104 U. S., 519. If the contract of the plaintiff in 1897 to hold office and receive a salary for four years is a "vested constitutional right" which the courts can enforce by directing the public Treasurer to pay, notwithstanding a legislative prohibition, certainly, the contract evidenced by bonds issued by authority of the General Assembly, and signed by the Governor and Treasurer with the public seal attached, which is unquestionably a contract, can be enforced by *mandamus* on the same ground that an act of the Legislature "must be observed and enforced unless it conflicts with the vested constitutional rights of the plaintiff" to receive his money, which the Court may think the State justly owes him. And the same would be true as to any other claim which the Court might deem a valid indebtedness of the State, but which the Legislature failed to appropriate money to pay. An office-holder has no greater "vested constitutional rights" in his salary than any other creditor of this State.

Judged by the provisions of both State and Federal Constitutions, and the unbroken decisions of all the courts, for not one has been cited that sustains the exercise of this authority, this Court has no power to direct the public Treasurer to pay the plaintiff, when expressly forbidden by the Legislature. Among the numerous decisions of the U. S. Supreme Court that the courts have no such power, are *Hagood v. Southern,* 117 U. S., 52, which holds that the officer is merely the nominal party when the object is to coerce money out of the State treasury, and the action being really against the State, no court has jurisdiction. In *Cunningham v. R. R.,* 109 U. S., 446, it is said that "No judgment can (605) be entered against a State through its officers or Treasurer," and in *Louisiana v. Jumel,* 107 U. S., 711, the same doctrine is repeated, the Court pointedly adding: "It needs no argument to show that the political power can not be ousted of its jurisdiction and the judiciary set in its place." To same effect, *Pennoyer v. McConnaughy,* 140 U. S., 1, and many others. In *Osborn v. Bank,* 9 Wheaton, 738, the same high Court says: "Judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the pur-

pose of giving effect to the will of the Legislature." The will of the Legislature has been plainly expressed that the plaintiff shall not be paid out of the State's treasury.

Under our Constitution, Art I, sec. 9, the three departments of government are "forever separate and distinct from each other." To the Legislature belongs exclusively the function of raising money for the public treasury and directing its disbursement. As said in the late case of *Garner v. Worth, supra,* the Court is powerless to issue a *mandamus* to the Treasurer to pay out a single cent, however just and unquestioned the claim, unless there is a legislative enactment directing him to pay it.

The legislative department may, if it sees fit, acquiesce in this novel assertion of power on the part of the Court. If so, we are witnessing a new development in our history, a profound modification of our organic law which places "the power of the purse," for the first time in the history of the world, in the possession of the judiciary. But the Legislature may not accept this view, for that department, as well as the executive, is equally a custodian of the Constitution with the judiciary, whose duty it is to adjudicate private rights and construe the laws made by the Legislature, as it is the duty of the executive to execute them. Though the Court has often exercised the power to declare void an act which is in conflict with a constitutional provision, it has never (606) gone so far as to order payment of money by the State, where the Legislature has made no appropriation to pay, or has forbidden payment. Neither the executive nor the legislative department is bound by the delimitation of powers which the judiciary may give to itself, for that would be to make this department sole judge of its own powers, however much it might see fit to narrow those of the other two. Like Aaron's rod, it would swallow them up.

The members of the executive and legislative departments take an oath to support the Constitution. Should the Legislature, as they have the highest warrant for doing, hold that the *mandamus* issued by this Court to the public Treasurer, contrary to legislative enactment, is beyond the constitutional power of the judiciary, the condition of the public Treasurer would not be an enviable one, for an order of this Court outside its constitutional jurisdiction is no greater protection to one who obeys it than a writ of ejectment, or to execute a capital sentence, issued by a magistrate would be to an officer who chooses to obey that.

No one who reads chapter 21, Laws 1899, can doubt that the Legislature meant to prohibit, and does prohibit, the Treasurer from paying the plaintiff, or any one else claiming his office, as the Court says the plaintiff does, under the act of 1897. The Court has held that public office is property, and that, by virtue of that property in his office, the plaintiff is entitled to continue to discharge the duties of his office notwithstand-

ing the act of 1899 gave those duties to others, and that as a consequence the plaintiff is entitled to his salary. If that be granted, the Court can certainly go no further. It can not take charge of the public treasury and adjudge that, because the State has violated its
(607) contract and the Court has restored the plaintiff, the State shall pay him.

It is true *Hoke v. Henderson,* 15 N. C., 1, held that a public office was private property—a decision unsupported by any decision of any other court, anywhere—but it limited the decision to saying that the office-holder's property was in his "emoluments," and expressly says (p. 27), that if the Legislature should refuse to give officers salaries or to pay them, "this would be a plain breach of constitutional duty, and yet the Court could give no remedy," and *Hoke v. Henderson* also expressly admitted that the Legislature could abolish any office created by the Legislature. The recent decision in *Day's case* (124 N. C., 362), which holds that an office-holder has property not merely in the emoluments but in the duties of his office, which he may claim as long as those duties are continued, makes it practically impossible to abolish any office having duties necessary to be continued (as is the case with most offices), and the later cases of *Wilson v. Jordan,* 124 N. C., 683, and *Abbott v. Beddingfield,* 125 N. C., 256, hold that as long as there is legislation on the same subject-matter—*in pari materia* as it is termed—the former office is not abolished, though the new act may expressly so declare (as in *Wilson v. Jordan*), and though the new office may have a different title and different duties, and added duties, as in *Abbott v. Beddingfield,* and *White v. Hill.* If to this indestructibility of a legislative office, for the term of the incumbent, however long, the Court has the power, now asserted for the first time in the history of jurisprudence, to coerce by its writ payment by the State of the old officer, legislative power over government, which is most largely exercised by the shaping of public agencies, is at an end. Whenever one Legislature shall create an office, for no matter how long a term, so long as similar duties are discharged, subsequent Legislatures are powerless to get rid of the incumbent, and the Court will see that the public pays him. The assertion of
(608) such vast power by the Court over the operations of the legislative department, challenges its denial by that department. Should the Treasurer, under legal advice, deem the action of the Court in excess of its just constitutional powers, will the Court put him in jail for disobedience? Should the Legislature, whose action in forbidding payment the Court treats as unconstitutional because impairing "the vested constitutional rights" of an officer to receive a salary, return the compliment by holding unconstitutional the action of the Court in assuming jurisdiction over the public treasury, what then will be our condition?

The people of North Carolina control their treasury through their representatives in the General Assembly. If the General Assembly levies taxes in excess of what should be levied, or less than is necessary, the Court can not correct this. If the General Assembly be too extravagant in its appropriations on the one hand, or on the other shall withhold appropriations to pay debts which the Court deems just and meritorious, the Court can not compel a different conduct on the part of the coördinate branch in the discharge of the functions entrusted to it. The people alone can supervise such action of their representatives when acting within the sphere of their duties, by the election of another General Assembly, or, as was said in *Hoke v. Henderson:* "It must be left to the action of the citizens at large to change unfaithful for more faithful representatives."

It is true that, if the Court can not coerce payment of an officer's salary, the decisions, peculiar to this State, that an office is property based upon a contract, are futile, since the Legislature hereafter, in removing the incumbents of a legislative office, need only to add a clause that the removed officer shall not be paid. But may it not be that such result demonstrates the possibility that the decisions of (609) this State are incorrect, and the uniform rulings of other courts are correct, based as they are upon the principle that the Legislature alone has the power to create officers, and to pay or to refuse to pay them, when not created by the Constitution? But at any rate, a claim for salary is of no higher dignity than any other indebtedness of the State, and the office-holder has the same remedy as all other creditors of the State—an appeal to the sense of right among the people which always will be surely expressed by them, sooner or later, through the Legislature—and he has no more.

No stronger proof of the inadmissibility of the plaintiff's application can be had than the three cases which, after the most diligent and thorough research, his counsel have presented to the Court in support of the claim that the Court has power to order the Treasurer, by *mandamus,* to pay a salary which the Legislature has forbidden him to pay.

Firstly: *Marbury v. Madison,* 1 Cranch., 137. In that case the *mandamus* was *refused.* That case was where the commission of a justice of the peace for the District of Columbia had been signed by the outgoing President, Mr. Adams, and the new Secretary of State, Mr. Madison, refused to deliver it. Marbury applied for a *mandamus. Marshall, C. J.,* wrote an elaborate opinion, expressing his views of government and of the functions of the judiciary, antagonistic to those known to be entertained by President Jefferson, the new executive, saying, in substance, that Marbury was entitled to have his commission, and that the opinions of the judiciary ought to control in such matters, but

concludes by *deciding* "the authority . . . to issue writs of *mandamus* to public officers appears not to be warranted by the Constitu-
(610) tion," and denied the writ, and Marbury never got his commission. The entire discussion in the opinion, however able and interesting, is therefore a discussion of abstract questions of law, and the case, for now near a century, has been cited to law students by their instructors as an able opinion which was entirely and altogether *obiter dicta,* the decision of the Court being that it was without jurisdiction of the subject-matter. Yet the relief there denied, a *mandamus* to the Secretary of State to deliver a commission signed and sealed, which the departing President had inadvertently failed to deliver, was by no means equal to the assertion of power here asked of the Court to issue a *mandamus* to the public Treasurer to pay the public money which the legislative power has levied and placed in his hands, and from which it has directed him not to pay this plaintiff.

But neither in the wide range of the discussion in *Marbury v. Madison,* nor in any other case which the most minute research has found, has there ever been a decision by any court that there was private property in public office, or that the office was a contract between the State and the officer, save only the cases in this State based upon *Hoke v. Henderson,* and the expansion of that doctrine by recent decisions of this Court, the logical result of which later cases (but not of *Hoke v. Henderson,* which denies the power), may be the power claimed for the courts by the present application to enforce such "contracts" by issuing our *mandamus* to open the public treasury. In several decisions the United States Supreme Court has explicitly and expressly denied that there was, or could be, from the nature of things, any property or contract as to a public office—notably in *Butler v. Pennsylvania,* 10 Howard, 51 U. S., 402; *Newton v. Commissioners,* 100 U. S., 548; *Crenshaw v. U. S.,* 134 U. S., 99; see quotations, 125 N. C., pp.
(611) 274-279. In the famous *Dartmouth College case,* 4 Wheat., 629, *Chief Justice Marshall,* while holding that the Legislature could not revoke a charter because that was a contract (before the provision since inserted in State Constitutions to the contrary), expressly says that Legislatures unquestionably have the right to change or abolish offices created by legislative enactment, because they are governmental agencies, and, unlike charters, are not held by virtue of any contract.

In a very recent case, *Keim v. U. S.,* decided 9 April, 1900, 177 U. S., 290, the United States Supreme Court held that except where protected by express constitutional or statutory provisions "the power of removal is incident to the power of appointment," and that where an officer is thus removed "the courts can not issue *mandamus* either to reinstate him or to compel payment of his salary." Thus that Court disavows

the power in the judiciary, in both particulars, while this Court is asked to assert it. The plaintiff, not being a constitutional officer, is not protected by any constitutional provision, and can not be protected by legislative provision when it is by legislative enactment that he has been removed.

In a still more recent case in the United States Supreme Court, in which the opinion was filed yesterday (May 21), in the contest over the governorship of Kentucky, *Taylor v. Beckham,* the question was presented whether an office was "property," and therefore protected by the Fourteenth Amendment. The case was of unusual importance, and was argued by able and eminent counsel. The Court, speaking through *Chief Justice Fuller,* after quoting numerous cases all holding that public offices are mere agencies or trusts, and not property as such, and that the salary and emoluments are not property, secured by contract, but compensation for services only when actually rendered, says: "In short the nature of the relation of a public officer to the (612) public is, generally speaking, *inconsistent with either a property or a contract right.*" If there were anything in the *obiter dicta* in *Marbury v. Madison* which might be justly construed as favoring, by implication, a different doctrine, there is no *obiter,* and no possible doubt as to the meaning of this latest enunciation of the highest Court in the land—an enunciation which the opinion itself shows is in conformity with the uniform decisions of that Court, and required by the very conception of the nature of an office which belongs to the public, not to the individual who is assigned to discharge its duties at the will of the appointing power and subject to removal at the will of the Legislature, except when the Constitution fixes the term.

Secondly, *Cotten v. Ellis,* 52 N. C., 545, was a case in which the Court expressed the opinion that because Cotten's office had been created by Act of Congress, the Legislature had no power to abolish the office (as it could do with offices created by legislative enactment), and that consequently the salary was like the salaries of those officers who were protected by express constitutional provision from legislative abolition, and could not be taken away. The Court issued an alternative *mandamus, i. e.,* a notice to show cause why a *mandamus* should not issue, but intimated very clearly that a peremptory *mandamus* (as here asked) could not issue, saying, "we do not enter upon the inquiry how it could be enforced." In a still more recent case (*Blount v. Simmons,* 119 N. C., 50), the Court, speaking through *Faircloth, C. J.,* while adjudging the State liable for certain obligations, was careful to add: "How the judgment will be satisfied is a question not now before us." But it was soon before the Court upon an application for a *mandamus* upon that very claim in *Garner v. Worth, Treasurer,* 122 N. C., 250,

in which it was held, as above stated, by a unanimous Court, composed of the same justices as now, that "the courts can not direct the (613) public Treasurer to pay any claim against the State, *however just and unquestioned,* when there is no appropriation to pay the same." Here there is not only no appropriation, but an act of the Legislature forbidding the Treasurer to pay the plaintiff. In *Burton v. Furman,* 115 N. C., 166, the Court refused a *mandamus* to the Auditor and Treasurer, such as is asked here, though there was an appropriation, because "there was no sufficient provision to pay the plaintiff," the amount, as in the present case, being disputed.

Thirdly, *County Board of Education v. State Board of Education,* 106 N. C., 81. The Court held that the State Board of Education, being an agency of the State, could only be sued because the Legislature had authorized and directed that it might "sue and be sued." It is also held that *mandamus* might issue "to compel public officers to discharge a mere ministerial duty, not involving an official duty"—that is, where the statute directs them to perform a certain duty. That would be the case here if the Legislature had directed the Treasurer to pay the plaintiff a certain salary, but it is not a ministerial duty, nor a duty at all, when the Legislature has told him, as in this instance, not to pay the plaintiff. If the case of *Ward v. Elizabeth City,* 121 N. C., 1, cited by *Mr. Justice Montgomery,* and which was decided by a unanimous Court, had been followed, all the line of cases from *Day's* to *"White v. Auditor,"* would have been decided in accordance with the dissenting opinion in these cases, as a glance at *Ward v. Elizabeth City* will sufficiently show.

The three cases cited for plaintiff certainly do not sustain his contention, and the utmost research has not brought forward any other, from any court whatever, that will justify this Court in directing payment of this, or any liability by the State treasury when there (614) is no appropriation by the Legislature, unrevoked, to pay it.

The plaintiff's contention rests upon two fallacies: First, that the agencies, created for mere governmental purposes, are "contracts," and if that is conceded, that the State can be forced by the courts to execute the contract and to pay the salary. Whether a sovereign State will perform its contract and pay out money under it, must ever be left solely to the sense of right and justice in the sovereign. This is inherent in sovereignty, and every one, who makes any contract of any kind with a State, does so with the knowledge that this right is safeguarded and reserved to each State by the Eleventh Amendment to the United States Constitution, and by express provision in the State Constitution.

Cited: Taylor v. Vann, 127 N. C., 251; *Corporation Commission v. R. R.,* 137 N. C., 21; *Battle v. Rocky Mount,* 156 N. C., 339.

Overruled: This case has been overruled, with the whole class of cases to which it belongs, from *Hoke v. Henderson,* 15 N. C., down, by *Mial v. Ellington,* 134 N. C., 131, which put an end to the doctrine of *property in office* in this State.

(615)

AUGUSTUS WRIGHT v. D. F. FORT.

(Decided 22 May, 1900.)

Deed of Trust—Death of Trustee—Substituted Trustee—The Code, Section 1276—Mortgage—Equitable Title of Assignee of Secured Note—Rents and Damages Pending Appeal.

1. A conveyance made by a debtor to a trustee in trust to secure the payment of certain named notes to the rightful owner thereof is a deed in trust, and nothing results to the trustor until the debts are paid.
2. Upon the death of the trustee, the clerk of the Superior Court may appoint another under The Code, section 1276, who may proceed to execute the trust according to the terms of the deed.
3. The assignee of a note secured by mortgage has an equitable interest in the land, which, as our courts are now conducted, may be enforced by an action for possession in the absence of an equitable defense in defendant, who with his bondsmen will be liable for rents and damages since date of appeal,

ACTION for the possession of two tracts of land, 684½ acres and 260 acres, heard before *Moore, J.,* at July Term, 1899, of WAKE, upon exception by defendant to report of referee. An injunction to restrain waste was also asked for, and an order of restraint had been granted.

The defendant had conveyed his life estate interest in the land to W. H. Pace, as trustee, by deed of trust, to secure notes to the amount of $6,900, payable to him, but belonging to plaintiff. Before completing the trust Mr. Pace died, and W. C. Douglass was appointed by the clerk to succeed him as trustee, by virtue of sec. 1276 of The Code. Mr. Douglass completed the trust by making a sale, the plaintiff being the purchaser, and receiving a deed.

The plaintiff, Augustus Wright, was also the assignee of a (616) mortgage on the 684½-acre tract, made by defendant to the trustees of Rex Hospital, of his life interest.

The defendant, D. F. Fort, had made considerable payments upon the Pace notes—he contended he had settled them in full; he also contended that the deed to Pace as trustee was not a deed of trust, but

a mortgage and that the substituted trustee, Douglass, could not sell the land; and he also alleged that the plaintiff had charged and received usurious rates of interest on his various dealings with defendant.

There was a reference ordered at a previous term to Hon. T. B. Womack, referee, who reported adversely to the contentions of defendant, and that the plaintiff was entitled to recover possession with $500 rental value for 1899.

The court confirmed the report and rendered judgment according thereto in favor of plaintiff. Defendant excepted and appealed.

J. N. Holding and Douglass & Simms for plaintiff.
N. Y. Gulley for defendant.

FURCHES, J. This is an action for the possession of land. The plaintiff claims that he is entitled to maintain the action upon two grounds: First, as the purchaser of the land in controversy at the sale of W. C. Douglass, Trustee; and secondly, as the purchaser and assignee of a note due the Rex Hospital by the defendant, and mortgage by defendant to secure said note. The fact that the plaintiff was the purchaser at the sale made by Douglass as trustee is not denied; nor is it denied that the defendant executed the note and mortgage to the Rex Hospital, and that the plaintiff is the owner thereof.

But the defendant resists the plaintiff's right to recover upon both of these grounds. He resists plaintiff's right to recover upon the
(617) title received from Douglass as trustee, for the reason that he professed to act as trustee, in the place and stead of W. H. Pace, who is dead, under an appointment made by clerk of the Superior Court of Wake County, pursuant to sec. 1276 of The Code, which appointment the defendant contends is void for the reason that said section does not apply.

The defendant does not deny that he executed the deed to Pace and that Pace is dead. But he denies that it is a *deed of trust,* for the reason that the *cestui que trust* is not named in the deed. Defendant contends that if it is a deed of trust, as there is no *cestui que trust* named, the estate conveyed resulted and returned to the defendant; that if this is not true, the most that can be made out of this deed is that it is a mortgage, and should have been foreclosed by the personal representative of Pace under the statute.

It seems to us to be too plain for argument that it is a deed of conveyance to Pace to secure debts of the defendant, and that nothing can *result* to the defendant until these debts are paid. And this he is entitled to by the express terms of the conveyance. It can not be a mortgage, as it is made to W. H. Pace, *Trustee,* and is to secure certain notes

therein specified, executed by the defendant on the same day the deed was executed. These notes are made payable to W. H. Pace, *Trustee,* and are specifically described as follows: "That whereas, D. F. Fort is justly indebted to said W. H. Pace, Trustee, in the sum of six thousand and nine hundred dollars, evidenced by six several bonds of even date herewith, as follows: One thousand dollars due 1 October, 1886; one thousand dollars due 1 November, 1886; one thousand dollars due 1 December, 1886; seventeen hundred dollars due 1 January, 1887; eleven hundred dollars due 1 October, 1887, and eleven hundred dollars due 1 December, 1887, each of said bonds bearing interest (618) from date at 8 per cent per annum." And it is further provided in said conveyance that said property is "conveyed to the said W. H. Pace, Trustee, his heirs and assigns, upon the following trusts, namely: If the said D. F. Fort shall fail or neglect to pay the said bonds or either of them at maturity, with all interest due and payable, or any part of either the principal or interest when due and payable, that the whole of said debt shall be considered due and payable, and upon the application of any party rightfully in possession of the said bonds or either of them, the said W. H. Pace, Trustee, is hereby authorized and fully empowered to expose the interest, claim, property and demands of said D. F. Fort in the lands, crop, personal property, stock of goods, and all other things of value herein conveyed, to public sale to the highest bidder for cash at the court-house door in said county of Wake, after making advertisement of the time and place of sale for thirty days in some newspaper published in the county of Wake, . . . convey the lands to the purchaser in fee simple, and after paying the expenses of making such sale, with 5 per cent commissions on amount of sales, apply the proceeds of said sales and collections to the discharge of whatever may remain unpaid on *said bonds,* and all interest thereon accrued and pay the surplus, if any, to the said D. F. Fort, his legal representatives or assigns."

So it clearly appears that this conveyance to W. H. Pace, Trustee, is a *deed in trust* to secure and pay the notes therein named, and that the *rightful holder of these notes had the right to demand a foreclosure of said trust and the payment of the same.*

It is not denied but what these notes were assigned and delivered to the plaintiff by W. H. Pace, Trustee, without recourse, and the plaintiff is now the *rightful* holder and owner of these (619) notes.

To our minds, this deed is not a mortgage; that there is no resulting trust to the defendant until the notes therein secured are paid; that it is a *deed of trust,* and, the trustee, Pace, being dead, the said Douglass was properly appointed trustee, and had the right to foreclose by sale.

This establishes the plaintiff's title under the sale by Douglass, as we do not think he has shown that these notes have been paid or otherwise discharged.

This is simply an action for possession of land. It is not for the recovery of the notes or any balance due on them. And the reference was not for the purpose of taking and stating an account and settlement between the parties; but, as the defendant had alleged that the indebtedness secured by the deed of trust had been paid or discharged, this reference was made for the purpose of ascertaining the truth of this plea, and for no other purpose. The account does not therefore furnish a basis for a judgment on the indebtedness of the defendant to the plaintiff, and no such judgment is asked or granted. And if the plaintiff shall sue the defendant on these notes, the defendant may set up any defense he may have, and the judgment in this action will be no estoppel against his doing so. This entitles the plaintiff to recover on the Douglass deed. And we see no reason why he might not recover on the Rex Hospital mortgage, as the admitted facts, as to that, makes him the equitable owner of the property embraced in that mortgage. It has been several times held by this Court that, as the courts are now constituted, a party may maintain an action for possession upon an equitable title where the defendant has no equitable defense to such action. *Condry v. Cheshire,* 88 N. C., 375; *Taylor v. Eatman,* 92 N. C., 601.

But mortgages and the holders of equitable estates do not usually bring actions for possession, as the possession by them, before the
(620) trust is closed, would usually subject them to a claim for rents. In this case it might not do so, as the plaintiff is entitled to possession under the Douglass deed.

The judgment of the court below must be affirmed. But if the defendant has continued in possession, he and his bondsmen will be liable for rents and damages (if any), since the date of the judgment appealed from, and not included in that judgment.

Affirmed.

THOMAS C. TIDDY v. G. C. GRAVES.

(Decided 22 May, 1900.)

Greensboro—Tax Sales, City Taxes, State and County—Curtesy—Constitution, Art. X, Section 6—Devise by Wife—Erroneous Admission of Point of Law.

1. Where a *feme covert* dies intestate her husband is entitled to his common law right of curtesy; where she devises her land under section 6, Art. X, of the Constitution, the estate of curtesy is destroyed.

2. Where a husband qualifies as executor of his wife's will he can not claim a life estate as against her devisee.

3. Such devisee is not the owner of a reversion, but became the owner in fee of the present and all other interests in said land.

4. The plaintiff, being such devisee, was only entitled to twelve months and not two years, in which to redeem said land sold for taxes.

5. Where the answer erroneously admitted that the husband was entitled to an estate by curtesy, and that the devisee was remainderman, such admission may be controverted.

ACTION for possession of city lot in Greensboro tried before *Brown, J.*, at August Term, 1899, of GUILFORD.

The plaintiff claimed as devisee under the will of his mother, (621) Annie G. Reed, wife of J. W. Reed. The defendant claimed under tax titles from sheriff of Guilford and tax collector of Greensboro. The facts were, by consent, found by his Honor, who rendered judgment in favor of plaintiff. Defendant excepted and appealed. The opinion states the case.

Osborne, Maxwell & Keerans for plaintiff.
L. M. Scott and A. M. Scales for defendant.

CLARK, J. The plaintiff alleges that he is the owner in fee of the premises by virtue of his mother's will, by which it is devised to him in fee simple. She died in 1890. On 6 May, 1895, the property was sold for nonpayment of taxes, both by the city under the provisions of its charter, and by the sheriff, under the general statute, and purchased by the defendant at both sales. Over a year thereafter, no one having come forward to redeem the premises, deeds therefor were made to the defendant both by the sheriff and by the city. There is no impeachment of the regularity of these proceedings. The plaintiff made no offer to redeem till 29 April, 1897.

The plaintiff contends, however, that his stepfather (Reed), who was in possession, was entitled to a life tenancy in the premises as tenant by the curtesy, and therefore that he (the plaintiff) had two years in which to redeem instead of one, and therefore was in time, and that the defendant is estopped by an admission in the answer to deny that the stepfather was tenant by the curtesy. To this, it is sufficient to say:

1. The two years given one who is remainderman after a life estate in which to redeem, applies only to sales for nonpayment of State and county taxes, and therefore, if the contention that the stepfather was tenant by the curtsey were valid, the defendant's title under (622) the deed from the city is unimpeachable.

2. It is clear that under the present Constitution there is no curtesy

after the death of the wife in property which she has devised. In *Walker v. Long,* 109 N. C., 510, *Merrimon, C. J.,* in a well-considered opinion, says: "But that Constitution (1868, 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. It provides that '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, liabilities 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.*' This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and *plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single instance of conveying it.* She must *convey* with the assent of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common law right or estate he might at one time have had as tenant by the curtesy initiate. The strong, exclusive language of the clause above recited is that the property *'shall be and remain* the sole and sepa-
(623) rate estate and property of such female,' . . . and the husband shall be, not tenant by the curtesy initiate, but tenant by the curtsey *after the death* of his wife, *in case she die intestate."* This is necessarily so, as the separate estate *remains* the wife's during coverture with unrestricted power to devise and bequeath it. With this explicit provision in the Constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had *remained unmarried.*

The plaintiff insists that curtesy in the husband of the whole of the wife's realty is the correlative of dower in the wife of one-third of the husband's realty, and if the Legislature can confer dower it can retain curtesy. That is true, when the *feme covert* dies intestate, as is pointed out in *Walker v. Long, supra,* but the Constitution having guaranteed that a married woman *shall be and remain* sole owner of her property with unrestricted power to devise it, the Legislature can not restrict it. Blackstone justly says that no one has the natural right to dispose of any property after death. The power to do so is conferred by law, and varies in different countries. In England it did not exist after the Conquest, till the Statute of Wills, 32 Henry VIII. Of course, as the Legislature confers the right to devise, in the absence of constitutional inhibition it can repeal or restrict the power of devise, and, till the Con-

stitution of 1868, which gave a married woman the unrestricted power to devise and bequeath her property, as if unmarried, the limitation of such power could be made by legislation allowing curtesy as well as dower. If the Constitution had gone further and provided that the property rights of a married man should remain as if he were single, and expressly conferred the unrestricted right to devise his realty, then, certainly, when he had devised it in fee there could be no (624) right of dower. The Legislature could only prescribe for dower in realty not devised, as it can now only confer curtesy in realty not devised.

The learned counsel for the plaintiff, however, relies strenuously upon the following admission in the answer: Paragraph 3 of the complaint alleges: "J. W. Reed, the husband of the said Annie G. Reed, at her death became entitled to an estate by the curtesy in the said land, and he is still surviving," and paragraph 3 of the answer says: "Paragraph 3 (of the complaint) is admitted." This is an admission of the allegation of fact therein contained, to wit, that Reed was still surviving, but the allegation therein that the husband of the testatrix "at her death became entitled to an estate by the curtesy in the said land," which the wife had devised to the plaintiff, was a matter of law, and the Court must decide upon the words of the Constitution which guarantee to the wife the unrestricted power to devise and bequeath her property, which is to *be and remains* hers as if she were unmarried. No admission in the answer, intentional or inadvertent, could change the law arising upon a given state of facts. Here, that state of facts is set out in the clause of the will (appended to the complaint) which devises the realty in controversy to the plaintiff in fee, as indeed he alleges in the complaint. Besides, Reed having qualified as executor to the will, can not claim a life estate in this land contrary to the will, and the plaintiff can not do it for him. *Allen v. Allen,* 121 N. C., 328.

His Honor below held correctly: "1. That under section 6, Art. X, of the Constitution, the estate by curtesy is destroyed where the *feme covert* dies testate, and devises the property, as in this case. 2. That the husband, J. W. Reed, having duly qualified as executor to said will, can not claim a life estate as against the plaintiff, a devisee of this lot. 3. That the plaintiff is not the owner of a reversion, but became the owner in fee of the present and all other interest in said lot by said will, and that the plaintiff was therefore only entitled to (625) twelve months, and not two years, within which to redeem."

But he erred in holding that, notwithstanding the above is the law, the defendant has admitted the contrary by his answer, and "can not controvert that admission." Suppose, instead of the admission, there had been a denial, and an issue had been submitted to the jury who had

found thereon that Reed was "entitled to an estate by the curtesy" notwithstanding the will, would not such finding have been held immaterial, and judgment entered *non obstante veredicto?* Certainly the admission in the answer (if, indeed, it were intended to admit anything beyond the allegation of fact in clause 3, that Reed still survived) could have no greater effect than the finding of a jury.

Upon the findings of fact, judgment should be entered for the defendant.

Reversed.

Cited: Tiddy v. Graves, 127 N. C., 505; *Watts Ex Parte,* 130 N. C., 242; *Hallyburton v. Slagle, ib.,* 482; *S. c.,* 132 N. C., 948; *S. v. Jones, ib.,* 1047; *Watts v. Griffin,* 137 N. C., 579; *Eames v. Armstrong,* 146 N. C., 6; *Richardson v. Richardson,* 150 N. C., 553; *In re. Lloyd,* 161 N. C., 560; *Jackson v. Beard,* 162 N. C., 109.

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(626)

J. WESLEY MOREFIELD, ADMINISTRATOR OF J. C. FODDRILL, v. W. E. HARRIS.

(Decided 22 May, 1900.)

Administrator Appointed in Another State—Ancillary Administrator Appointed Here—Bona Notabilia—Attachment Issued by Justice—Lien, When.

1. An administrator can not sue in this State by virtue of his appointment in another State. There must be an ancillary administrator appointed here.
2. A transcript of judgment obtained by the administrator and brought here is sufficient *notabilia* to warrant the appointment of such ancillary administration.
3. Attachment issued by justice creates a lien from its levy, and not merely from docketing of the judgment in Superior Court. Code, section 354.

ACTION, with attachment proceedings, heard on appeal from justice's court before *Allen J.,* at Spring Term, 1899, of STOKES.

T. M. Foddrill, administrator of J. C. Foddrill, in Georgia, obtained a judgment in Georgia against the defendant, W. E. Harris, resident there. A transcript of said judgment was forwarded to Wesley Morefield, with directions to take out auxiliary letters of administration in Stokes County, N. C., and issue summons and attachments against the defendant, which was done, and attachment levied on land there belonging to defendant.

The justice rendered judgment in favor of plaintiff for $193.98 and interest and returned the papers to clerk of Superior Court.

Defendant appealed to Superior Court, and his Honor affirmed the judgment and adjudged that the attachment was a lien from the docketing of the judgment, and not from its levy.

Defendant excepted and appealed from the judgment. The (627) grounds of exception are stated in the opinion.

W. W. King for plaintiff.
A. M. Stack for defendant.

CLARK, J. The administrator in Georgia who obtained a judgment against the defendant, also resident in that State, seeks to subject realty of the defendant lying in this State. The administrator appointed in Georgia can not sue in this State (*Butts v. Price,* 1 N. C., 201; *Anon.,* 2 N. C., 355; *Leake v. Gilchrist,* 13 N. C., 81; *Smith v. Munroe,* 23 N. C., 345; *Sanders v. Jones,* 43 N. C., 246; *Stamps v. Moore,* 47 N. C., 80; *Grant v. Reese,* 94 N. C., 720), but ancillary administration must be taken out here. 13 A. & E. (2 Ed.), 921. The intestate had no property in this State, but when a certified copy of the Georgia judgment is sent here, that is sufficient *bona notabilia* to authorize administration here under The Code, section 1374 (3), *Shields v. Insurance Co.,* 119 N. C., 380. The creditor, if he had lived, could have sued here upon the debt, and have procured service by attaching the property here of the debtor who is a nonresident of this State. The administrator is simply the personal representative of the intestate, and has the same right of action, and to attach property of a nonresident as the basis of jurisdiction which the intestate would have had if living. Any other view would be a denial of justice. In *Leake v. Gilchrist,* it is said that the assignee of the debt by the administrator appointed at the domicile of the deceased could maintain an action here, and this is reaffirmed in *Grace v. Hannah,* 51 N. C., 94; *Riddick v. Moore,* 65 N. C., 382. Of course the assignee could have no higher rights to sue than an ancillary administrator appointed in this State, and one of the (628) Court (*Hall, J.*), adds that administration should be taken out in this State to sue on the debt, if it had not been assigned. Under the present Code (sec. 177), an assignee for purposes of collection could not maintain the action. *Abram v. Cureton,* 74 N. C., 523. In *Smith v. Munroe,* 23 N. C., *Ruffin, C. J.,* points out that our statute (now with some amendment, Code, section 1374) was intended to prevent disputes as to what county should grant administration, where the deceased left goods in more than one county, and was not intended to exclude the necessary power to authorize administration where the intestate died out of

this State, and holds that a right to a distributive share in an estate, or debts however desperate, or even a claim of one who had assigned for benefit of creditors, was sufficient *bona notabilia* to authorize grant of administration here upon the estate of one who died nonresident. In *Shields v. Insurance Co.,* 119 N. C., 380, it was held than an ancillary administrator appointed in this State upon the estate of one dying domiciled in Alabama, upon proof that there was property in this State (there a policy of insurance) could maintain an action "no matter when or how such chattels were brought within this State," and that is conclusive of the present action. "Being under a valid appointment and having in his hands the policy sued on, the law did not allow the debtor to contest his right to collect on behalf of the administrator in Alabama." To same purport it has been generally held in other States, that if property is brought after the owner's death into a State of which he was not a resident, ancillary administration may be granted there though he did not own any property in such State at the time of his death. *In re Hughes,* 95 N. Y., 55; *Johnston v. Smith,* 25 Hun (N. Y.), 171; *Saunders v. Weston,* 74 Me., 85; *Stearns v. Wright,* 51 N. H., 600; *Pinney v. McGregory,* 102 Mass., 186; *McCord v.* (629) *Thompson,* 92 Ind., 565; *Green v. Rugely,* 23 Tex., 539, the latter case citing English authorities to the same effect. The lien relates back to the date of the levy, and not merely to the date of docketing the judgment in the Superior Court. Code, sec. 354.

Affirmed.

Cited: Person v. Leary, post, 506; *Page v. Ins. Co.,* 131 N. C., 116; *Coleman v. Howell, ib.,* 129; *Hall v. R. R.,* 146 N. C., 346; *Chapman v. McLawhorn,* 150 N. C., 167; *Martin v. Mark,* 158 N. C., 442; *Bank v. Pancake,* 172 N. C., 515.

MATILDA D. ARROWOOD AND J. J. DAVIS, ADMINISTRATORS OF ALBERT ARROWOOD, v. SOUTH CAROLINA AND GEORGIA EXTENSION RAILWAY COMPANY.

(Decided 22 May, 1900.)

Negligence—Contributory Negligence—Defective Lookout—Proximate Cause of Death—Map, Ex Parte, How Far Admissible—Experiments With Headlights.

1. Lying down on a railroad track is *per se* contributory negligence.
2. The failure to keep a proper lookout, according to the circumstances of the case, is negligence—more care required on a frequented track than on a

clear one—more diligence on a winding road than on a straight one. If the engineer and fireman are insufficient, more help must be employed for this indispensable duty.

3. A map made without order of court may be admitted merely to explain the witness's testimony and as a part thereof. The result of experiments made with headlights, at the spot, is competent to go to the jury for what it is worth.

ACTION for the alleged killing by negligence of plaintiffs' intestate, Gilbert Arrowood, tried before *Shaw, J.*, at January Special Term, 1900, of MCDOWELL, upon the usual issues—negligence, contributory negligence, and last chance; all three of which the jury found in the affirmative, and assessed the plaintiffs' damages at $1,500. Judgment for plaintiffs according to verdict. Appeal by defendant.

The exceptions taken by defendant are considered in the (630) opinion.

D. W. Robinson, E. J. Justice and J. T. Perkins for plaintiffs.
Locke Craig and P. J. Sinclair for defendant.

CLARK, J. The first exception for permitting the use of the map can not be sustained as it was admitted merely to explain the witness's testimony, and as a part thereof. *Riddle v. Germanton,* 117 N. C., 387, and cases cited; *Tankard v. R. R., ibid.,* 558.

The Court instructed the jury that if they found from the evidence "that this was a public passway, as heretofore defined, and that the engineer, by reason of the curve in the road and the obstruction of the smokestack, could not keep a proper lookout for persons on the track, and that the fireman could have done so, then it would have been the duty of the defendant to have had this fireman to have assisted this engineer in keeping this outlook." And also: "What might be ordinary care under certain circumstances might not be ordinary care under other circumstances; and if you should find from the evidence, under the rules to be hereinafter given you, that the public were in the habit of using the railroad track at that point of the accident as a passway, then a greater degree of care would be required of the defendant in running its trains at this point than the defendant would have exercised in running its trains along the track where the public had not been habitually permitted to use the track as a passway. All that the defendant is required to do is to use ordinary care under the circumstances of the case, and in determining whether the defendant was negli- (631) gent, as alleged in the complaint, you must first ascertain what duty, if any, it owed the plaintiff's intestate at the time of the alleged killing and if it owed a duty, whether or not it failed to perform that duty."

The above paragraphs of the charge are excepted to, but without cause. There was ample evidence to go to the jury tending to show that the track was used habitually as a passway, and in telling the jury that if they found such to be the fact the defendant should observe a greater degree of care than in running its trains where the track was not so used, the court was stating almost a truism. In moving trains through a crowded city, it must be at a lower speed, with much greater control over the engine and keener lookout kept in front, than in going along a straight track in an open and almost uninhabited country, and the court properly told the jury that the amount of care depended upon the circumstances of the case. So, on a straight track, the careful lookout of the engineer would ordinarily be sufficient, but on a winding mountain track, turning first to the right, then to the left, if the engineer could not see the track when the engine turned to the left, then it was his duty to have the fireman to look out forward on that side. The duty of keeping the lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If by any reason a proper lookout can not be kept without the aid of the fireman, he should also be used. If by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout can not be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In *Pickett v. R. R.*, 117 N. C., 634; *Lloyd v. R. R.*, 118 N. C., 1012, and a long line of similar cases, it is held that it is the duty of the *defendant* to
(632) keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give, will relieve the company, if that lookout is not a proper lookout.

The other exceptions do not require consideration. Similar exceptions have heretofore been before the Court, and held to be without merit. The evidence of three witnesses who went to the place where the intestate was struck, and on a dark night (such as that on which the intestate was killed), made observations of the light cast by one of defendant's engines with an oil headlight, such as all the engines of defendant used, was competent to go to the jury for what it was worth. It was not necessary on such matters of fact, depending on ordinary powers of observation requiring no special training, that the witnesses should be experts. It was also competent for the jury to consider the testimony of the engineer that he could have seen the intestate, and did not see him when it was his duty to have seen him. *Powell v. R. R.*, 125 N. C., 370.

The defendant's prayer was given in substance in the charge with the exception that the court told the jury that if the intestate was killed on a point of the road where the public were in the habit of using it

with the knowledge and implied consent of the defendant, and on a curve which kept the engineer from seeing the track, but the fireman could have done so in time to have stopped the train and prevented the injury without endangering the persons on the train, it was the duty of the fireman to have kept the outlook. In this modification there was no error as already stated. If the track was habitually used by the public to the knowledge of the company, of which there was evidence, it would not have decreased the latter's duty to look out if such use had not been so long continued and acquiesced in as to amount to implied consent. Requiring implied consent to the use of the track, as well as knowledge of its habitual use by the public as a precedent con- (633) dition to the defendant's using the lookout, was an error against the plaintiff. Consent, express or implied, would have lessened the liability of the deceased for contributory negligence, but the jury having found that issue against the plaintiff, the sole question is (the third issue), whether "Notwithstanding the negligence of the plaintiff's intestate, could the defendant by the exercise of ordinary care, have avoided the killing of the intestate?"

The railroad track is for the exclusive use of the company. It pays for its construction, and has from the State, by virtue of a grant under the State's right of eminent domain, power to condemn from private owners the right of way "for public uses," but that use is to be exclusive in itself, subject of course to public regulation and control in its use. Others have no right to use the track, and when they do so they are guilty of contributory negligence, unless they have permission, express or implied, from the company. The discussion whether the intestate was a *licensee* or a *trespasser* has no bearing upon this appeal by the defendant, for the jury found on the second issue that the intestate, whether he was licensee or trespasser, was wrongfully on the track, *i. e.*, that he was guilty of contributory negligence. If he was a licensee, nay, more, if he had had an express permit to walk on the track, he certainly had no permission to lie down on the track, and the jury found that issue against the plaintiff.

But, notwithstanding a human being is down helpless on the track, and is there in his own wrong, the railroad company acquires no right to run over and kill him for his foolhardiness if by ordinary care it can be avoided. Even a cow or a hog does not forfeit its life under such circumstances, if the company's servants can by ordinary care avoid killing. If, on this occasion, by reasonable, ordinary care, (634) in keeping a lookout on both sides of a winding mountain road, whose curves would sometimes obscure the track from the sight of the engineer on the right hand side of the engine, and did so obscure it at the point where the deceased was killed, and such defective lookout

caused the killing which might otherwise have been prevented, then, notwithstanding the negligence of the deceased, the defective lookout kept by the defendant was the proximate cause of the death. Such the jury found to be the fact in this case.

Affirmed.

Cited: *Burney v. Allen,* 127 N. C., 479; *Upton v. R. R.,* 128 N. C., 176; *Whitesides v. R. R., ibid.,* 231, 234; *Jeffries v. R. R.,* 129 N. C., 241; *McCall v. R. R., ibid.,* 300; *Bogan v. R. R., ibid.,* 157; *Cogdell v. R. R.,* 130 N. C., 325; *Lassiter v. R. R.,* 133 N. C., 248; *S. c.,* 137 N. C., 151; *Stewart v. R. R., ibid.,* 693; *Britt v. R. R.,* 148 N. C., 40; *Thompson v. R. R.,* 149 N. C., 157; *Strickland v. R. R.,* 150 N. C., 10; *Farris v. R. R.,* 151 N. C., 491; *Edge v. R. R.,* 153 N. C., 215, 217; *Exum v. R. R.,* 154 N. C., 417; *Guilford v. R. R., ibid.,* 608; *Boney v. R. R.,* 155 N. C., 113; *Holman v. R. R.,* 159 N. C., 46; *Smith v. R. R.,* 162 N. C., 33; *Shepherd v. R. R.,* 163 N. C., 521; *McNeill v. R. R.,* 167 N. C., 400; *Gray v. R. R., ibid.,* 436; *S. v. Rogers,* 168 N. C., 114; *Treadwell v. R. R.,* 169 N. C., 701; *Hill v. R. R.,* 169 N. C., 743; *Hopkins v. R. R.,* 170 N. C., 487, 489; *Horne v. R. R., ibid.,* 652; *Brown v. Power Co.,* 171 N. C., 558.

W. K. NEAL, ADMINISTRATOR D. B. N. OF C. M. COFFIN, v. CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 22 May, 1900.)

Negligence—Contributory Negligence—Demurrer—Nonsuit—Laws 1897, Chapter 109.

Where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and if true, establishes negligence on the part of the plaintiff, and of the defendant, concurrent to the last moment, a judgment as of nonsuit, sustaining the demurrer, is proper.

CLARK and DOUGLAS, JJ., dissent.

ACTION for damages for occasioning through negligence, as alleged, the death of plaintiff's intestate, tried before *Starbuck, J.,* at October Term, 1898, of MECKLENBURG.

The intestate was run over by defendant's train and killed while walking along on the railroad track in Charlotte. The defendant denied negligence, and pleaded contributory negligence. At the close of plain-

tiff's evidence, the defendant demurred to plaintiff's evidence and moved for judgment of nonsuit, under act of 1897, ch. 109. (635)

His Honor intimated that plaintiff was not entitled to recover, and plaintiff in deference to said intimation submitted to a nonsuit and appealed.

Jones & Tillett and Clarkson & Duls for plaintiff.
Burwell, Walker & Cansler for defendant.

FURCHES, J. This is an action to recover damages for the wrongful killing of Charles M. Coffin. The defendant does not deny the killing, but denies that it was caused by its default or negligence, and alleges that it was the result of the negligence of plaintiff's intestate.

The evidence of plaintiff showed that intestate was killed by the shifting engine on defendant's road, in the city of Charlotte; that this engine was running backward drawing a gondola car after it; that it was running at a high rate of speed in a westward direction, and intestate was walking on defendant's track, going in the same direction; that this train had come very near running over a team of mules at the street crossing, scaring the mules and making them unmanageable, and that the engineer and crew were watching the mules and laughing at the driver trying to manage them. The road was straight for 150 yards, and as the killing occurred in open daylight, the crew and engineer might have seen intestate, and intestate have seen the train for that distance. The intestate was walking on the defendant's track when he was knocked down by defendant's train, run over and killed. (636)

The plaintiff also offered in evidence an ordinance of the city forbidding trains to run at a greater speed than four miles an hour, while passing through the city, and requiring the bell to be rung. Plaintiff showed that this train was running at a high rate of speed, and greater than that allowed by the ordinance, and that no bell was being rung.

The plaintiff having offered evidence as to amount of damages, rested the case. Defendant offered no evidence, demurred to plaintiff's evidence, and moved to nonsuit plaintiff under chapter 109, Laws 1897.

After hearing argument of counsel and upon full consideration of the matter the court allowed defendant's motion, and assigned the following reasons therefor:

"First, That the evidence, if believed, showed the defendant guilty of negligence.

"Second, That the evidence being that offered by the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and if believed it showed, and the conclusion could not be reasonably avoided, that the plaintiff's intestate by his own negligence contributed to cause the injury.

"Third, That while it might be found that notwithstanding the negligence of plaintiff's intestate, the defendant might, by ordinary care, have avoided the injury, the evidence, which as to the plaintiff, must be believed, clearly showed that notwithstanding defendant's negligence, the plaintiff's intestate by the exercise of ordinary care, might himself, up to the last moment, have avoided the injury. Therefore the negligence of plaintiff's intestate, if not the proximate cause, at least concurred with defendant's negligence, up to the last moment, in together constituting the proximate cause of the injury The third issue therefore should be answered No, and the plaintiff is not entitled to re-
(637) cover in the action. In deference to this intimation, the plaintiff having excepted, submitted to a nonsuit, and judgment was entered accordingly."

The plaintiff assigned the following grounds of error:

"1. That the court added at the end of the third issue tendered, the clause, 'And if so, was defendant's failure to avoid the injury the proximate cause thereof?'

"2. The plaintiff assigns as error the ruling of his Honor sustaining the demurrer and dismissing the action.

"3. That the court in and by its said judgment dismissed the action."

The evidence was all introduced by the plaintiff—the defendant introduced none, and there is no exception as to the competency of any of the evidence.

The court finds from this evidence that the defendant was guilty of negligence; and while we think from the evidence, taken to be true, that it was guilty of negligence—as this negligence was shown by the evidence of the plaintiff—the court could not have found this issue against the defendant, if it had complained of and excepted to it, and brought it before us for review. It was the finding of an affirmative issue against the defendant upon the evidence of the plaintiff. *Spruill v. Insurance Co.*, 120 N. C., 141; *Bank v. School Commissioners*, 121 N. C., 109; *White v. R. R., ibid.*, 484. But this ruling is not before us for review. The defendant neither excepted nor appealed, and the plaintiff can not except to this finding because it is in his favor.

And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence, if the evidence be true and every word of it believed. This issue is then not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different con-
(638) struction upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence.

If plaintiff's intestate was walking upon defendant's road in open daylight, on a straight piece of road, where he could have seen defend-

ant's train for 150 yards, and was run over and injured, he was guilty of negligence. And although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate. It has been so held in *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236; *High v. R. R.*, 112 N. C., 385. These cases hold that it is not negligence in a railroad company where its train runs over a man, walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury. In *McAdoo v. R. R.*, 105 N. C., 140, this doctrine is expressly held; and it is further held in that case that, on account of plaintiff's negligence in standing on the road and allowing defendant's train to run over him, that this was concurring negligence, and prevented him from recovering damages. *McAdoo v. R. R.* has been cited and approved on this point in *Syme v. R. R.*, 113 N. C., 565, and in *Smith v. R. R.*, 114 N. C., 744, and many other cases.

We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road, on which it appeared that the persons killed or injured were also guilty of negligence; and it may not be easy to distinguish some of these from the one under consideration. But there is a distinction, and a distinct line of decisions, (639) as we have shown by the cases we have cited.

The dictinction does not seem to lie so much in the negligence of the parties, where both are guilty of negligence, as it does in the condition of the parties. And we think upon examination that it will be found that where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage or disability—as where the party injured is lying on the railroad track apparently drunk, or asleep, or on a bridge or trestle where he could not escape or could not do so without great danger. In such cases, if the engineer saw the party injured, or by proper diligence should have seen him, the company is liable. It is in such cases as these that the doctrine of proximate cause, or the "last clear chance," is called in to determine the liability.

The doctrine of proximate cause—the "last clear chance"—is firmly established in this State, and we have no idea of abandoning or in any way disturbing it. We think the cases where it applies are dis-

tinct, and distinguishable from this case whether we have succeeded in pointing out the distinction or not. Indeed, we do not understand the plaintiff to make this the principal ground upon which he rests his appeal and insists upon a new trial. Nor do we understand the plaintiff seriously to insist but what there is evidence tending to prove—if proving—that the plaintiff's intestate was guilty of negligence.

But it is contended that if the intestate was guilty of negligence, the defendant being also guilty of negligence, the intestate's negligence was what is termed contributory negligence, and that contributory (640) negligence is an *affirmative issue* and can not be found by the court. To sustain this position, a number of recent cases have been cited, among them *Spruill v. Insurance Co.* and *Bank v. School Commissioners, supra.* In these cases, and quite a number of others, it was held that the court could not find an affirmative issue. This holding was entirely correct in those cases and in every other case where it has been held, so far as we remember. We do not wish to overrule or disturb this doctrine, as held in those cases; but to our minds this case is clearly distinguishable from them, as we hope to be able to show.

In those cases, and in all others, as we think, where this has been held, there was some doubtful or disputed fact to be found, dependent upon the weight or the credit of the evidence. In such cases the court can not find the facts, nor even intimate an opinion, without violating the statute of 1796 (Code, sec. 413). And if the court has done so in this case, the plaintiff is entitled to a new trial.

But the function of the jury is to find the facts—this must mean disputed facts—and must be exercised where there is evidence proving or tending to prove the facts disputed. If there is not, it is the duty of the court to say so, and withdraw this dispute—this issue—from the jury. This was conceded by the plaintiff, it being a negative finding of the issue. But the plaintiff contends that to find the intestate guilty of negligence was an affirmative finding, and one the court could not find. This is logically and legally true if the court *had* to find any disputed fact, where there was any evidence showing or tending to show the negative of the issue, or if it was necessary that he should pass upon the weight or credit of the evidence. Where this is the case, the usual rule is to submit the issue to the jury, with the instruction that, if they believe the evidence, they will find the issue yes or no as the case (641) may be. This is usually a good rule, and in many cases saves an appeal to this Court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff by offering the evidence had vouched for its credit. He could

not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that if the plaintiff offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe. But both witnesses stand alike credited so far as the plaintiff or the party introducing them is concerned. If this evidence, or any part of it, had been introduced by the defendant, it would have been the duty of the court to submit it to the jury, because the plaintiff would not have been bound to give credit to the defendant's witnesses, and the defendant could not give them credit by demurring to their evidence.

But when the defendant demurred to the plaintiff's evidence, and but one construction can reasonably be drawn from it, that is, it could not reasonably mean different things, we can not see why it did not become a question of law, as much so as if the facts stated in the evidence had been agreed to as the facts in the case. And if this is so, it certainly became a question of law for the court.

This view of the case is sustained by *Williams v. Telephone Co.,* 116 N. C., 558; *Hinshaw v. R. R.,* 118 N. C., 1047; *Ice Co. v. R. R.,* 122 N. C., 881; *White v. R. R.,* 121 N. C., 484, and we do not think it will be found to conflict with any opinion of this Court. A number of cases may be found (some of which we have cited) in which it is said that the Court can not find an affirmative issue; and this is true in those cases, and in all cases where the court would have to *find* (642) *the facts* to establish an affirmative issue. But in this case, the court *finds no facts.* They are admitted by the demurrer of the defendant to the plaintiff's testimony. This being so, and the plaintiff's evidence clearly establishing the intestate's negligence, which was the *concurrent cause of the injury,* the plaintiff can not recover, without overruling the authorities we have cited, and many others not cited.

The doctrine of proximate cause and "the last clear chance" is not involved in this case. It falls under the doctrine announced in *McAdoo v. R. R., supra,* and that line of cases.

Taking the view of the case we do, the judgment of the court below must be

Affirmed.

FAIRCLOTH, C. J., concurring: When the plaintiff closed his evidence defendant moved that plaintiff be nonsuited for the reason that upon his own evidence he was not entitled to recover. His Honor was of opinion that the evidence, if believed, showed the defendant guilty of negligence, that the evidence being that of the plaintiff and without contradiction, must, as to the plaintiff, be believed, and if believed, it showed that plaintiff's intestate, by his own negligence, contributed to cause the injury.

The intestate was walking on the track of the defendant company when he was struck by the defendant's shifting engine and killed. At the time he was struck the intestate was walking along the track in full possession of his senses, and in a place where he had a full view of the approaching engine for a long distance. The track was perfectly
(643) straight from the place where the intestate was struck by the engine to the crossing of the Southern Railway Company, a distance of two blocks and two hundred and twenty-five feet, or a thousand feet in round numbers, and there was no obstruction whatever to his view. There was a path running alongside of the track where plaintiff was walking at the time the engine struck him.

Plaintiff's witness, Sophia Lee, testified that she saw the train and heard it coming, and that plaintiff's intestate was between her and the train, walking right along the track on a clear day.

Upon this evidence it appears to me that, assuming the defendant to have been negligent, the causation of the injury was the *concurrent* negligence of both parties, and it has often been held that in that event neither party can recover.

In *McAdoo v. R. R.*, 105 N. C., 140, a case quite like the present, the Court held that "the plaintiff could not recover if the engineer and fireman, without actual knowledge of or acquaintance with him, had acted, as they did, on the assumption that intestate would get out of the way." "There was no error in the instruction predicated upon the supposition that they failed to ring the bell. According to the plaintiff's own testimony, he stood upon the track with his back toward the engine and did not see it till after he was stricken by it. He was therefore, in any aspect of the case, negligent, and the jury would not have been warranted in any finding that the defendant could have prevented the injury by using ordinary care." The court further says that it could make no difference at what rate of speed the engine was running at the time. "All this might possibly have been more clearly presented, if there had been a third issue, and his Honor had said there was no testimony to support an affirmative finding on it." The principles stated and applied in *McAdoo's case* have since been repeatedly affirmed by this Court, and expressed in emphatic language.

(644) In *Meredith v. R. R.*, 108 N. C., 616; the Court said: "We concur with the judge below in the opinion that the plaintiff was not entitled to recover, because by the undisputed facts considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would get out of the way of the engine before it would reach him."

In *Norwood v. R. R.*, 111 N. C., 236, this Court decides:

"If the engineer could, by proper watchfulness, have seen intestate standing or walking on the track, he would not have been negligent in acting on the assumption that intestate would step off in time to avert injury, and where the intestate was seen, or could, by proper care, have been seen by the engineer, sitting upright on the end of a crosstie, the latter was justified in believing that he would get out of danger, and his failure to leave the track, whether he was a trespasser or licensee, is considered by the law as the proximate cause of his death, unless it is shown that his condition or situation was such that he could not leave the track, and that this was known, or could by the exercise of proper care have been known, to the engineer."

In *High v. R. R.*, 112 N. C., 385, this Court decides:

"Where an engineer sees on the track, in front of the engine in which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and, if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless.

"The failure of the engineer to keep a proper lookout subjects (645) the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted it. Whether he saw the plaintiff at a distance of 150 yards, or of 10 feet, he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this.

"If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen that the engine was moving towards her.

"The fact that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful.

"There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule, that the servant of a railroad company is warranted in expecting licensees or trespassers, apparently sound in mind and in body, and in possession of their senses, to leave the track till it is too late to prevent a collision."

In *Syme v. R. R.*, 113 N. C., 558, this Court decides:

"When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law imputes the injury to his own negligence. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of the want of ordinary care
(646) on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was negligent in getting upon the track in front of the engine without looking, and in exposing his person to injury, when he might have seen that the engine was approaching and have avoided the collision by stepping off the track.

"On the other hand the engineer was justified in assuming that the intestate had looked and had notice of his approach, and would clear the track in ample time to save himself from harm."

Other cases might be cited of the same purport.

The defendant's motion was in effect a demurrer to the plaintiff's evidence, admitting every word to be true and every fact that can be gathered from it. I am unable to see what is left for the jury to pass upon. I understand that when facts are agreed upon, or found by a special verdict, or admitted by demurrer, nothing remains to be done, except for the court to apply and fit the law to the facts. Here the proximate cause of the injury is plainly and manifestly the joint, *concurrent* negligence of both parties, and there is no place found in these facts for what is called the last clear chance. When the facts are clearly settled, from which only one inference can be drawn, the question is then one of law, for the court to decide, and in such case the court should take the case from the jury and direct a nonsuit or verdict as the case may be. 1 Shearman & Redfield Negligence 68, sec. 56; Cooley Torts, 670. That the causes of the injury are concurrent seems plain according to these facts. Possibly *some sort* of logic might conclude differently, but that is not the common sense view to my mind, and when logic and common sense can not be reconciled, logic must give way.

DOUGLAS, J., dissenting: It is with a feeling of deep regret and much hesitation that I am forced to enter my most earnest dissent from
(647) the opinion of the Court. I wish I could agree with the majority of the Court that its opinion does not conflict with our former rulings, but I am utterly unable to do so with those cases before me. That plain words may have a hidden legal meaning utterly at variance with the ordinary usage of the language, and which I did not intend them to have, and never dreamed they could have, when I used them, is beyond my comprehension. Feeling as I do, I would be untrue to myself were I to concur in an opinion which to my mind destroys the

principle of our recent decisions, is in direct violation of the statute, and flatly contravenes the letter and spirit of the Constitution.

The rule as now laid down, stripped of its incidents, is as follows: "That the court may withdraw an issue from the jury and direct an affirmative finding of contributory negligence against the plaintiff, whenever it thinks that the evidence of the plaintiff's own witnesses is sufficient to prove the fact in controversy." That is all there is in it, dilute it as we may. It is true the Court says provided there is no conflict in the testimony, but such a want of conflict does not of itself prove the issue. There may be only one witness, or fifty witnesses, swearing to the same thing, and unless they swear to enough to prove the fact in issue, neither the Court nor the jury can find it to be true.

This line of reasoning forces me to the conclusion which this Court has recently so repeatedly and emphatically announced, but which it now seems, at least partially, to repudiate, that the court can never direct an affirmative finding of fact. To do so, it would be necessary for the court to pass directly upon the *weight* of the evidence, and to find that it was of sufficient weight to overcome the negative presumption always rising from the burden of proof. In other words, it (648) would be saying, in the teeth of the statute, that a fact which the law required to be proved had been "sufficiently proven." And yet *Justice Furches,* speaking for a unanimous Court in *Bank v. School Commissioners,* 121 N. C., 109, says that this can not be done, using the following words: "But no matter how *strong* and *uncontradicted* 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."

In *White v. R. R.,* 121 N. C., 484, 489, the same justice again speaking for a unanimous Court, says: "The court can *never* find, nor direct an affirmative finding of the jury. The most the court can do is to instruct the jury, where there is no conflict of evidence, that if they believe the evidence they should find yes or no, as the case may be."

In *Wood v. Bartholomew,* 122 N. C., 177, 186, *Justice Furches,* again speaking for a unanimous Court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue and can not be found by the *court.* It must be determined by the jury."

Other opinions of the same learned justice contain expressions to the same effect. The italics are my own. These emphatic expressions were neither casual nor *obiter,* but were used in the decision of questions directly raised and in answer to the strenuous contentions of counsel urged in repeated and elaborate arguments.

This Court at the last term, after most careful consideration, speaking without dissent through *Justice Montgomery,* in *Crews v. Cantwell,*

125 N. C., 516, 519, after intimating that the burden was really on the defendant, uses the following language: "The instruction then of his Honor was erroneous, for as the *burden of proof was assumed* (649) by the plaintiff, the court could not withdraw the issue from the jury. *Bank v. School Commissioners,* 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.'"* It should be noted that in that case the Court based its judgment solely upon the fact that the plaintiff had *assumed the burden of proof,* and made no allusion whatever to the fact that the only evidence was that of the plaintiff.

Justice Clark has used similar language in speaking for the Court, and does not wish now either to modify or withdraw it.

Speaking for a unanimous Court, in *Sherrill v. Telegraph Co.,* 116 N. C., 655, he says, on page 657: "But when the plaintiff makes out a *prima facie* case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates chapter 452 of the acts of 1796 (Code, sec. 413), which forbids an expression of opinion by the judge upon the weight of the evidence."

I may be pardoned for citing some of the opinions of the Court written by myself. They are in plain words, plainly setting forth the views I was known to possess and intended to express. Whatever other faults they may have, my opinions are neither the intangible mists of summer nor the shifting winds of March.

In *Spruill v. Insurance Co.,* 120 N. C., 141, during my first term upon the bench, it is said, for a unanimous Court: "Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient in a just and reasonable view of it to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict *against the party upon whom the bur-* (650) *den of proof rests.* That the verdict should be directed *against* the party upon whom rests the burden of proof, is the *essence* of the rule. . . . If the verdict of a jury is, in the opinion of the court, against the weight of evidence, it can be set aside, and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the *sufficiency* of the evidence necessary to rebut a legal presumption without submission to the jury, would infringe upon the exclusive powers of the jury. . . . The rule laid down in some authorities that wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, can not receive our sanction. It is not the law in North Carolina, and never

can be under our present Constitution. 'The ancient mode of trial by jury,' guaranteed by the Constitution, is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommits the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious method of appeal, where findings of fact can be reviewed only from the meager notes of the judge, and the uncertain recollection of counsel. The mere fact that the judge can never, save by waiver or consent, *render* a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law. These principles are 'fundamental,' and 'a frequent recurrence' thereto is of constitutional obligation." This case appears to have been cited in more than twenty different cases, including the opinion of the Court from which I am respectfully dissenting.

In *Cox v. R. R.*, 123 N. C., 604, this Court, in reviewing (651) *Spruill's case,* says: "Had the question not been again presented by counsel, it would almost seem needless to repeat what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumtion necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. . . . Where there is evidence tending to prove negligence on the part of both parties, the case must *always* be submitted to the jury, and *it makes no difference if this evidence appears in the testimony of the plaintiff.* The court may say to the jury that there is no evidence tending to prove a fact, but it can *never* say that a fact is proved. . . . It is the *settled rule* of this Court that a verdict can *never* be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill v. Insurance Co.,* 120 N. C., 141, it did not have its origin in that case, but in *Wittkowsky v. Wasson,* 71 N. C., 451, where the doctrine was distinctly laid down in the following words, quoted from the opinion of *Wells, J.,* in the Court of Exchequer Chamber: 'There is in every case a preliminary question which is one of law, viz.: Whether there is any evidence on which the jury could properly find the question *for* the party on whom the *burden of proof lies.* If there is not, the judge ought to withdraw the question from the jury and direct a *nonsuit* if the *onus* is on the plaintiff, or direct a *verdict* for the plaintiff if

the *onus* is on the *defendant.*' In other words, the verdict must in either event be directed *against* the party on whom lies the *onus,* and by
(652) necessary implication can never be directed in his favor. . . .

The burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction *in favor* of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chap. 33 of the Laws of 1887. . . . It, therefore follows that on a motion for a nonsuit the court *can consider only the evidence relating to the negligence of the defendant,* and if there is more than a scintilla tending to prove such negligence, the motion must be denied and the case submitted to the jury." That case cites a large number of authorities which it is needless now to recite. Can there be any question as to its meaning? There was a single dissent.

In *Bolden v. R. R.,* 123 N. C., 614, this Court, with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense in which the burden, both of allegation and proof, rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the *weight* of that evidence is sufficient to overcome the presumption in his favor, arising from the burden of proof, is a question for the jury. The action of the plaintiff in going upon the bridge was argued as contributory negligence, but if it be viewed as an implied assumption of risk, the same rule will apply. Both doctrines are alike as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is in both cases upon the defendant, and issue can be found in its favor *only by a jury.*"
(653) In the subsequent case of *Cogdell v. R. R.,* 124 N. C., 302, it is said by a *unanimous* Court, that: "Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and *can not be considered on a motion for nonsuit.*" Citing *Bolden v. R. R., supra.* It is useless to further cite the large number of cases wherein this Court has said that the court could *never* direct an affirmative finding. If it did not mean "never" when it said it in the above cases, I suppose it did not mean it in the others. I meant it then and mean it now.

The rule now adopted by the Court is an adaptation of the Federal rule; and while it may find a home with us by adoption, it is not to the manner born, and is the legitimate offspring neither of our Constitu-

tion nor of our laws. The Federal courts, as well as those of some few of the States, still adhere to the English practice of allowing the court to express an opinion upon the *weight* of the evidence, that is, the court under this rule may in all cases say to the jury what it thinks ought to be their verdict. This practice, which may serve to explain some decisions in those tribunals where it still exists, has been repudiated by a large majority of the States, and was positively prohibited by statute in this State, as far back as 1796. This prohibition has been brought forward in successive compilations, and is still in force as section 413 of the Code, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." This distinct line of demarcation be- (654) tween the powers of the judge and the jury, established in the childhood of our State, and remaining in full force for more than a hundred years, has become a fundamental part of "the law of the land."

I am aware that there are some cases tending to sustain the rule now adopted by the Court, but they were decided before I came upon the bench, and are in direct conflict with our later as well as our earlier decisions. The earliest case cited by the Court is that of *Meredith v. R. R.*, 108 N. C., 616, decided in 1891, which cites upon this point only the cases of *McAdoo, Parker,* and *Daily.* In *McAdoo's case,* all the issues were submitted to the jury, and none found by the court. In *Daily's case,* decided in 1890, while the court below held that the plaintiff, who was an idiot, could not recover, on account of his contributory negligence, this Court held that there was no evidence tending to prove the negligence of the defendant. *Parker's case* was decided before the passage of the act of 1887, chap. 33, which expressly provides "that in all actions to recover damages by reason of the negligence of the defendant where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial." I am also aware that there have been two or three *dicta* to the same effect, but I do not feel bound by them. I am not responsible for all that may be said in an opinion from which I do not dissent, but only for such matters as are necessarily involved in the decision of the case.

Dicta are the overflows of judicial learning, and, like the freshets in our streams, are always dangerous and generally harmful. Occasionally they add fertility to the fair fields of jurisprudence. But more often they tend to cut gullies through well-established principles, or to create stagnant ponds of doubt, whose mist and malaria are equally dangerous. (655)

The tendency of judges to invade the province of the jury is shown throughout the entire history of the law, and the survival of the system in full vigor as the foundation stone of Anglo-American jurisprudence, is in itself the strongest proof of its inherent merit. Courts of equity, from the first, refused to recognize the system, and we have recently seen to what extent a trial by jury can be evaded by proceedings in injunction, and in the nature of contempt. Courts of Admiralty, following the principles of the civil law, have also discarded the jury; and it is a significant fact that they also have refused to recognize the doctrine of contributory negligence, always apportioning the damages in proportion to the *comparative* negligence of the parties.

In view of this tendency, this Court has felt it its duty more than once to assert the independence of the jury. In *Cable v. R. R.*, 122 N. C., 892, 900, the Court says: "This Court does not favor the growing practice of taking cases from the jury. The jury is a constitutional body, as much so as the court itself, and in the exercise of its peculiar powers of equal responsibility and independence."

In *S. v. Shule,* 32 N. C., 153, the Court says: "We think there was error in the mode of conducting the trial. . . . There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once; particularly, as in this case, it concerns the 'trial by jury' which the 'bill of rights' declares 'ought to remain sacred and inviolable.' This innovation is that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render, and then they are asked if any of them disagree to it? Thus making a verdict for them, unless they are bold enough to stand out against (656) a plain intimation of the opinion of the court."

The Court then proceeds to lay down the rule substantially as stated in *Spruill v. Insurance Co., supra.*

In *S. v. Allen,* 48 N. C., 257, 262, *Judge Pearson,* speaking for the Court, says: "It is our duty to see to it that the trial by jury shall remain 'sacred and inviolable,' and if upon the circuits there has grown up any practice encroaching upon the trial by jury as 'heretofore used,' although such practice may, to some extent, have been sanctioned by decisions of this Court, it is our duty to put a stop to it; and while we will not allow a jury to encroach upon the province of the judge, *i. e.,* to declare and explain the law and undertake, by an *abuse* of their power, to decide questions of law, on the other hand we are equally solicitous to see that the court shall not commit usurpation upon *'the true office and province of the jury.'* Repetition of error can never justify the violation of a positive enactment of a statute, much less the infringement of a fundamental principle upon which our social existence

is declared to rest. An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected both by the Constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or entire absence of evidence, it is his duty so to instruct the jury; but if there be any competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that any one will exclaim, 'certainly, no jury will find the fact upon such insufficient evidence.' Still the judge has no right to put his opinion, in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent (657) them from being misled by the arguments of counsel or their own want of apprehension. It is true, juries will sometimes find strange verdicts, acting under the influence of ignorance or of prejudice, but in general, juries are *honest,* and it is considered *safer for the lives and property of the people to submit to the inconvenience of particular cases of this kind than in anywise to allow the judge to encroach upon 'the true office and province of the jury.'* This partial evil is in a great measure obviated by allowing the judge to grant a new trial in all cases (except where a party is acquitted upon a criminal charge) whenever he thinks the jury have found against the weight of the evidence."

I have no apology to make for quoting so much of this opinion. It is a great opinion of a great judge, fully equal in importance to that of *Hoke v. Henderson,* 15 N. C., 1, about which we have recently heard so much. I have given to the latter opinion the deliberate assent of my judgment and my conscience, and have carried it to its fullest legitimate extent. In doing so I have nothing to retract, but I feel equally bound by the underlying principles of *S. v. Allen.* Are the constitutional rights of the office-holder any more sacred than the constitutional guarantees of the citizen? I think not. I understand the opinion of the Court to admit that there is sufficient evidence tending to prove the negligence of the defendant, and to base its judgment purely upon the contributory negligence of the plaintiff, which it presumes to have been shown beyond the possibility of reasonable doubt.

It should be borne in mind that much of the evidence upon which the Court apparently relies as showing contributory negligence, was brought out by the defendant on cross-examination. (658)

That driving a train at a greater rate of speed than that allowed by law is at least evidence of negligence, is well settled. In *R. R. v. Ives,* 144 U. S., the Court says, on page 418: "Indeed it has

been held in many cases that the running of railroad trains, within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city, is negligence *per se* (citing authorities). But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence."

The opinion of the Court disposes of the case at bar in the following words: "And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence, if the evidence be true and every word of it believed. This issue is then not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence." By this I presume the Court means that the negligence of the deceased was the ultimate proximate cause. This remarkable finding, coupled with the unqualified assertion that no reasonable man can put a different construction upon it, becomes still more remarkable in view of the fact that two members of this Court *have* put a different construction upon it. This exquisite but unconscious satire upon the rule itself, well illustrates its inherent fallacy. I do not mean to be flippant or to treat the opinion of the Court with any disrespect, but surely it is a legitimate argument to show that it necessarily involves a *reductio adsurdum*. If reasonable men *can not* take a different view of this matter, it follows that the two judges (659) who *have* taken a different view of it can not be considered as reasonable men. But suppose two other judges should in some other case have the misfortune to differ from a majority of the Court as to the effect of the evidence, they also would come under the ban. This would leave the remaining member of the Court far above his associates upon the lonely pedestal of solitary infallibility. Suppose he, too, should fall from his high estate, what would become of the Court? And yet this Court *must* say that no reasonable man can draw but one conclusion from the evidence, or the case *must* go to the jury. Why not let it go to the jury, as was said in *Allen's case* should be done in all cases of doubt? The Court is not only putting itself in the place of the jury, but is deciding the case by a majority verdict.

Another exceedingly able and interesting opinion is the dissenting opinion of *Justice Bynum* in *Wittkowsky v. Wasson,* 71 N. C., on p. 458. The present attitude of the Court renders that opinion almost prophetic.

The opinion of the Court in the case at bar says that the evidence introduced by the plaintiff must be taken as true, as far as he is concerned. This absolutely reverses the reason of the rule. A party is estopped

from impeaching the credibility of his witnesses, but not from denying the correctness of their statements. Moreover, much of the evidence was brought out by the defendant on cross-examination. On a motion for nonsuit, the *defendant* admits the truth of the plaintiff's evidence, which must be construed in the light *most favorable to the plaintiff*. So construing the evidence, can any one say that if the engine had been going at not more than four miles an hour, the maximum speed allowed by the ordinance, the engineer could not have stopped in time to prevent the killing? As the intestate was going in the same direction, if he were walking at the rate of three miles an hour, the train would have gained on him only one mile in an hour. The intestate is pre- (660) sumed to have known the law, and he had a right to assume that the defendant would obey the law. He had a right to presume that the defendant would give him the ordinary signals required by law, and would not run him down and crush the life out of him without giving him some slight warning. Surely a human life is still worth something —the pulling of a bell-cord, the opening of a whistle. We are constantly told that we should be shocked at the excessive verdicts of juries. That is often the case, but there are other things which also touch my judicial sensibility. A human form mangled beyond recognition, and an immortal spirit hurled into eternity without a moment's warning, are a greater shock to the instructed conscience of a Christian age than any verdict rendering merely pecuniary damages. This may be called mere sentimentality. Be it so. I can never hope to attain that high plane of judicial temperament where I shall be entirely free from human sympathy. In addition to the weight of reason and authority in favor of drawing the line at *affirmative* verdicts, another advantage is that it is a natural boundary, seen and known of all men. Where the dividing lines between great principles are marked by nothing more substantial than stakes, which can easily be put down, and as easily pulled up and moved, the principles themselves are in imminent danger.

I deeply feel the importance of this decision, and may overestimate its danger. I hope I do, but it seems to me to involve ultimate results far reaching and dangerous in their nature. With such strong convictions and sincere apprehensions, I can not afford to cast away the moorings of the past, and turn my opinions loose to float without chart or compass, the aimless driftwood of a shoreless sea. (661)

CLARK, J., dissenting: The jury system, whatever its defects, is the best which the wisdom of the ages has yet evolved for the ascertainment of the truth of disputed issues of fact. It is the bulwark of the liberty and the rights of the citizen. The line between the province of the court and of the jury was distinctly run and marked by our ancestors

in the act of 1796, now Code, sec. 413. *Bynum, J.*, in *Wittkowsky v. Wasson*, 71 N. C., 458, ably and prophetically pointed out the evils of the judiciary passing beyond that line and invading the province of the jury as the sole triers of the facts. It is to be deeply regretted that his views did not then prevail. It is a still further invasion of the province of the jury, and contrary to a long line of the decisions of this Court (as *Justice Douglas* has shown) to permit a judge to direct an affirmative finding, which is nothing less than the court passing upon the evidence and holding that a fact is sufficiently proved. It is the province of the jury to disbelieve uncontradicted evidence if they attach no faith to the witnesses. If there is no evidence in support of the party having the burden of proof upon an issue, the judge may direct a negative finding for its absence, or if the uncontradicted evidence is in support of the contention of the party having the burden of proof, the court may tell the jury that "if they believe the evidence" to find in favor of that side, but the judge can not even in such case direct an affirmative finding, for that is to pass upon the credibility of the witnesses and the weight of the evidence, which the jury alone is authorized to do.

Cited: Ice Co. v. R. R., post, 802; *Moore v. Cohen,* 128 N. C., 345; *Coley v. R. R., ibid.,* 543; *McCall v. R. R.,* 129 N. C., 301; *Lea v. R. R., ibid.,* 463, 464; *Johnson v. R. R.,* 130 N. C., 489; *Bessent v. R. R.,* 132 N. C., 937, 943; *Lassiter v. R. R.,* 133 N. C., 249; *Pharr v. R. R., ibid.,* 611, 614; *Morrow v. R. R.,* 134 N. C., 99; *Stewart v. R. R.,* 136 N. C., 389; *Ruffin v. R. R.,* 142 N. C., 127; *Hollingsworth v. Skelding, ibid.,* 252; *Beach v. R. R.,* 148 N. C., 159, 160; *Exum v. R. R.,* 154 N. C., 411, 413; *Cabe v. R. R.,* 155 N. C., 424; *Horton v. R. R.,* 157 N. C., 150; *Patterson v. Power Co.,* 160 N. C., 580; *Talley v. R. R.,* 163 N. C., 573; *Ward v. R. R.,* 167 N. C., 155; *Penninger v. R. R.,* 170 N. C., 474; *Davis v. R. R., ibid.,* 587; *Horne v. R. R., ibid.,* 660.

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IREDELL MEARES AND P. B. MANNING, RECEIVERS OF THE CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION, v. J. M. FAIRLEY, TRUSTEE, AND THE MONROE LAND AND IMPROVEMENT COMPANY ET AL.

(Decided 22 May, 1900.)

Corporation Borrowing Money From Building and Loan Association—Lossage by Lender—Contribution by Borrower—Judicial Decisions in Other States.

1. As a general rule, in the absence of an express provision in its charter, a corporation is not authorized to take stock in another corporation.

2. Where, however, in the course of business, a corporation becomes the holder of stock in another corporation, *e. g.*, a Building and Loan Association, which becomes insolvent, it may be held liable on the same, as an incorporator, in the association issuing the stock.

3. Where the defendant, the borrowing corporation, authorized its trustee, who held title to its lands, to borrow money, which he did, and his company received and used it, but in order to effect the loan for the money ($3,000) he had to subscribe for thirty shares of stock in the Building and Loan Association, and give a note secured by mortgage on the lands held in trust, he becomes an incorporator, and the debt becomes his as well as his company's, and he becomes liable for his part of the loss, which must be accounted for before he can be credited with payments made; and the mortgage is bound for whatever he is bound for.

4. The decisions of the highest court of a sister State are entitled to all due respect, but are not controlling as precedents.

DOUGLAS, J., dissents.

ACTION to foreclose land mortgage, tried before *McNeill, J.*, at August Term, 1899, of UNION. Jury trial waived; facts found by his Honor. Upon the facts found, judgment of foreclosure was rendered, and defendants excepted and appealed.

The facts are sufficiently stated in the opinion.

R. B. Redwine, E. S. Martin and Burwell, Walker & Cansler for plaintiffs.

Adams & Jerome for defendants.

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FURCHES, J. The plaintiffs are the receivers of the Carolina Interstate Building and Loan Association, and the defendants are the Land and Improvement Company—J. M. Fairley, J. W. Townsend, S. S. Brown, O. W. Carr, F. C. Beard, L. A. Burke, and A. P. Rhyne.

The facts are found by the judge by consent of plaintiffs and defendants and among other facts, he finds that the plaintiffs are the duly appointed receivers of the Carolina Interstate Building and Loan Association, which had become insolvent, and that the Monroe Land and Improvement Company is a corporation; that the defendant J. M. Fairley is the trustee of said corporation, holding the title to the land hereinafter mentioned, for the benefit of the defendant corporation; that the defendant corporations being in need of money, by resolution authorized its trustee, Fairley, to borrow for its benefit, $3,000; that under the authority conferred by this resolution, the said Fairley, as trustee and agent of the defendant corporation, on 11 April, 1892, made arrangements with the Building and Loan Association to borrow that amount. In order to enable him to get this money, he had to subscribe for thirty

shares of stock in the Building and Loan Association, and become a member of the same. In other words, he had to become one of the incorporators of the said association, which he did, and the association issued to him a certificate for thirty shares of stock of the par value of $100 per share, aggregating the sum of $3,000. And upon this certificate the Building and Loan Association loaned him $3,000.

To secure the payment of this money, the certificate of stock was assigned to the association and deposited with it as collateral se-
(664) curity.

The defendant, the Land and Improvement Company, J. W. Townsend, J. M. Fairley, S. S. Brown, O. W. Carr, F. C. Beard, and L. A. Burke on 5 May, 1895, made and executed their bond and obligation to the Building and Loan Association for the $3,000. And on the same day (5 May) the defendant corporation, the Land and Improvement Company, executed its mortgage upon the land heretofore mentioned as being held in trust by the defendant Fairley for the benefit of said Land and Improvement Company, as additional security for the payment of this loan. A large balance of the money so borrowed remains due and unpaid, and this action is brought to foreclose the mortgage.

These are substantially the facts in the case necessary to be considered in determining the rights of the parties.

The defendants admit that the Land and Improvement Company is liable for the balance of the $3,000 at 6 per cent interest, giving it credit for all it has paid thereon; and defendants admit that the mortgage is liable as security for what the Land and Improvement Company is liable for.

But the defendants contend that the Land and Improvement Company is not an incorporator in the Building and Loan Association, and, therefore, is not liable for the 30 per cent of lossage, which it has been found to be necessary to restore the capital and equalize the losses sustained by the Building and Loan Association. The defendants say that the Land and Improvement Company is not, as a matter of fact, one of the Building and Loan incorporators. But as there is no express provision in its charter authorizing it to take stock in another corporation, it could not in law do so, if it had attempted to do so. And while this seems to be the general rule, one of the authorities cited by the defend-
ants in support of this position, holds that where a corporation
(665) in the course of its business has become the holder of such stock, it may be held to be liable on the same, in case of insolvency of the company issuing the stock. *Bank v. Kennedy,* 167 U. S., 362. And it would seem that under the authority of this case, treating Fairley as the agent, the Land and Improvement Company could be held liable for

this loss of 30 per cent. And it is admitted that the mortgage is liable for whatever sum the Land and Improvement Company is liable.

But there is another principle involved in this action, which, to our minds, clearly makes the defendant corporation and the mortgage liable for the demand of the plaintiffs, including the 30 per cent.

The defendant corporation, by resolution, authorized and empowered its trustee, who held the legal title to its land, to borrow this money for its use and benefit. Under this power and authorization, he borrowed the money, and the defendant corporation received and used it. And we must suppose that it was properly borrowed and legitimately used. To enable the trustee and agent of the defendant to borrow this money, he had to subscribe for thirty shares of stock in the Building and Loan Association, and thereby become one of the corporators of said association, and he and the defendant company, and a number of other persons, executed a bond obligating and promising to pay the Building and Loan Association this debt. It therefore became the debt of the defendant Fairley as well as that of the defendant company. And as he is one of the corporators and liable for his part of the loss this must be accounted for before he can be credited with the payments that have been made. *Meares v. Duncan,* 123 N. C., 203.

This being a debt of the defendant Fairley (though as between the defendants he is a surety) makes no difference so far as the plaintiff is concerned; and the mortgage is bound for whatever he is (666) bound for. *Meares v. Butler,* 123 N. C., 206.

The matter of usury, as between the corporators of this Building and Loan Association, has been discussed and decided by this Court so many times that we can not afford to enter upon a discussion of the matter again. This must be considered as settled. If there are any errors in the computation of interest or the equalization of the losses, they should of course be corrected.

We think every principle involved in this case has been settled by the various opinions of this Court, in cases arising out of the settlement of the insolvent Building and Loan Association of Wilmington.

It is claimed that the Supreme Court of South Carolina, in the case of *Meares v. Finlayson,* 55 S. C., 105, has decided this question, or one similar to it, differently from what we have held in the cases of *Meares v. Duncan,* and *Meares v. Butler, supra,* and other cases referred to. But upon examining the case of *Meares v. Finlayson,* we find that it is principally put upon a South Carolina statute, and may be correct as a South Carolina decision. But the case of *Meares v. Finlayson* is not the case we have under consideration, and it is not our purpose to review that case. It can not have the authority of a precedent but only such weight as it is entitled to as the opinion of the highest court of a sister

State. We can not adopt it in this case, without overruling at least a half dozen of our own decisions, which we do not care to do, as they seem to us to be based upon justice, equity, and sound reasoning.

The judgment appealed from is

Affirmed.

Cited: *B. & L. Asso. v. Blalock,* 160 N. C., 493.

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CHARLES B. ROUSS v. W. H. KRAUSS.

(Decided 22 May, 1900.)

Dealings Between Merchants—Note With Surety as Collateral Security for Indebtedness—Continuing Guaranty for Future Purchases and Payments—Release.

1. Where a continuing guaranty stipulated that the firm of Krauss & Clyburn would remit to plaintiff 10 per cent per week of their open account of indebtedness to him, they having the privilege of ordering an equal amount of goods to the remittance sent, thus granting continuous credit running collaterally and equally with the remittance—the surety is not released because the payments of 10 per cent per week were not made and new goods were shipped in excess of the remittance.
2. The nonpayment was not the fault of the plaintiff, and the defendant can not plead a release by his own wrong.
3. The rule of applying payments to the oldest indebtedness has no application when the understanding of parties is to the contrary. The jury having applied the credits to the debt due by the firm at its dissolution, and which was covered by the contract of guaranty, thereby reduces the liability of the defendant as guarantor—the credits would have been more properly applied to the indebtedness incurred for goods furnished after the dissolution occasioned by the retirement of Clyburn.

ACTION upon a promissory note payable to plaintiff by F. A. Krauss and J. F. Clyburn, of the firm of Krauss & Clyburn, and their sureties, W. H. Krauss and H. N. Clyburn; also upon a guaranty executed by same parties, tried before *Allen, J.,* at January Term, 1900, of UNION.

There was verdict, also judgment, against all the defendants. W. H. Krauss one of the sureties, alone appealed, claiming that he had been released by the conduct of the plaintiff. His grounds are reviewed and determined in the opinion.

(668) *Redwine & Stack and Burwell, Walker & Cansler for plaintiffs.*
Adams & Jerome for defendant.

CLARK, J. This is an action upon a note signed by F. A. Krauss and J. F. Clyburn (who were partners as Krauss & Clyburn), W. H. Krauss and H. N. Clyburn, for $1,300, to be held as collateral security for the indebtedness of said Krauss & Clyburn. The said Krauss & Clyburn, with the above two sureties, signed a contemporaneous agreement that said Krauss & Clyburn would remit 10 per cent per week upon the above indebtedness, and that said Rouss would permit the ordering of an equal amount of goods with remittance sent, and there is a stipulation that said Rouss could in his discretion grant extension of time to the principal debtor without notice to the sureties. *Bank v. Couch,* 118 N. C., 436. There was in fact no extension of time granted, but the defendant W. H. Krauss contends that he was released because the payments of 10 per cent per week were not made, and new goods were shipped exceeding the amount of the remittances and therefore, the said surety was released. The nonpayment of the weekly 10 per cent, however, was not the default of the plaintiff, but of the defendants, and W. H. Krauss's obligation was that he should be responsible if such payment was not made. He can not plead a release by his own wrong. Indeed, the contract of guarantee expressly provides that if "the said weekly payments remain unpaid as much as four weeks, then the said Rouss is authorized to proceed with the collection of the note." The sale of more goods to the amount of remittance made was not a restriction upon the guarantee, but a privilege to the defendants. The guaranty is of a line of credit of $1,300, a continuing guarantee (14 A. & E., 1140), and at no time did it exceed that amount, and if it had the overplus would simply have been beyond the guaranty and unsecured by it, but that (669) would not have released the guarantor as to the $1,300.

The defendant, however, contends that he is released because, after the dissolution of the partnership, to a letter of F. A. Krauss, asking a release of J. F. Clyburn, the plaintiff replied: "There is no need of Mr. Clyburn being released from the guarantee given by the old concern as collateral. We, of course, would not look to him; if unfortunately anything should go wrong, the surety is the proper person. His name on the paper does not make it any stronger; in fact, we will not recognize it. We have already permitted you to assume the indebtedness, and that is sufficient. You may explain this to your partner, and it will cover the ground." If this had been an agreement to release, it was without consideration (*Bank v. Sumner,* 119 N. C., 591), but in fact, while it is not a blunt refusal, it is none the less a declination, though in rather diffuse and diplomatic style. Treating it, however, as ambiguous, capable of two explanations, the construction was a matter for the jury. There was clear and explicit evidence from the plaintiff and two of his head clerks, and not excepted to, that no release was ever made or in-

tended. The jury found upon the issue of fact thus submitted to them: 1. "Did the defendant F. A. Krauss, with the consent of the plaintiff, assume the payment of the indebtedness of the firm of Krauss & Clyburn, upon which this suit is brought, and plaintiff cease further to regard J. F. Clyburn as debtor?" "No."

The jury further found, in response to the second issue, "Did plaintiff accept remittances from Krauss & Clyburn of less than 10 per cent per week of the open account of their indebtedness, and did plaintiff extend credit to the said Krauss & Clyburn for goods sold and delivered (670) them in excess of the amount of their remittances to plaintiff on said debt?" "Yes." And thereupon the court directed an affirmative response to the fourth issue, "Is defendant W. H. Krauss liable to the plaintiff?" This was a matter of law and was correctly held, for, as above said, the default in making 10 per cent weekly payments lay upon the defendant, who guaranteed they should be made, and the credits allowed Krauss & Clyburn at no time exceeded the $1,300, which the sureties guaranteed. In truth, the plaintiff, rather than the defendants, has cause to complain because the jury in response to the third issue have credited the defendants with $841.25 paid by F. A. Krauss after the dissolution of the partnership, in face of the uncontradicted testimony that such payments were cash payments exacted of F. A. Krauss for the goods bought by him after the dissolution. The rule applying payments to the oldest indebtedness has no application where the understanding of parties is to the contrary. *Miller v. Womble,* 122 N. C., 135. But the jury applied them to the debt of the firm, the balance recovered by the plaintiff in this action being only $192.32, instead of $1,011.25, which was due by the firm at the date of the dissolution, and which was covered by the contract of guaranty—leaving a loss to the plaintiff of the amount due by F. A. Krauss, after the dissolution, though the evidence was that the above $841.25 was applied for goods as he bought them. The jury having found that such payments were to go upon the firm debt, there is only the question left whether the $192.32 was released by action of the plaintiff, and the jury have found with the plaintiff as to that.

No error.

(671)

D. P. HUTCHINSON AND WIFE, S. W. HUTCHINSON, EXECUTORS OF MRS. M. A. BREM, AND INDIVIDUALLY, *v.* ADELE W. HUTCHINSON ET AL.

(Decided 22 May, 1900.)

Petition for Sale for Better Investment—Devise of Contingent Interest in Remainder—Remaindermen Not in Being—Minor Children.

1. The court may sell the land of minors for better investment, when they are properly represented before the court. Code, section 1602.
2. The court will act, when all interests are found in classes, if one of each class is before the court.
3. But where the devise is to the mother (S. W. Hutchinson) for life and then to such children as may survive her, she and some of the children being alive, some dead, and some now alive, may predecease their mother, while others may yet be born, no one can say *now* who will take the remainder, and such taker, not being known, can not be represented, and no sale can be made binding such remainderman.

PETITION for sale of land for more productive investment, heard before *Allen, J.*, at March Term, 1900, of MECKLENBURG.

There was a demurrer filed, which was overruled, and petition allowed.

Defendants excepted and appealed. The *situation* is described in the opinion.

Jones & Tillett for appellants.
Burwell, Walker & Cansler for appellees.

FAIRCLOTH, C. J. David Parks died in 1873, having devised one-half of the residue of his estate to his wife for life and in remainder to his grandson, D. P. Hutchinson, and the other half of the residue to his said grandson, with power to sell the Brickhouse place and (672) the Silas Orr tract, when he thought best to do so. Prior to August Term, 1891, M. A. Brem became the owner of the interest and estate of the said D. P. Hutchinson in the said land, known as the "David Parks place." In 1891, the said M. A. Brem instituted this action against the defendants, who were the only persons *living* and interested in the subject of the action for the sale of said land, the proceeds to be reinvested for their mutual advantage. In 1891, seven and one-tenth acres of the land was sold and title decreed in this action, about which there is now no contention.

In 1893, the said M. A. Brem died, leaving a will, in which she directed as follows: "Item 1. I give, devise and bequeath my entire es-

tate (real and personal) to my daughter, Sarah W. Hutchinson, for and during the term of her natural life, and at her death to such child or children as she may have surviving her, and in case any child or children of my said daughter should die leaving child or children, then in that event such child or children shall take the share that their deceased parent would have taken."

D. P. Hutchinson and wife, Sarah, were made parties plaintiff, as executor and executrix of Mrs. M. A. Brem's will.

It seems that all the parties now interested desire the sale of the land to be made for better investment. The chief question is, can a court of equity decree a sale with the consent of all interested parties *now* living, of land devised as above stated? We are compelled by authority and just reasoning to answer in the negative.

The power of the court to sell the land of minors, etc., when they are properly represented before the court, has never been questioned since the act of 1827, ch. 33, now Code, sec. 1602. But the difficulty in cases like the present is that there is no one in existence upon whom the
(673) court can act, to protect such contingent interest as may arise in the future. The devise is not to Sarah W. for life, and then to her children, but to *such* children as may survive her. She and some of her children are living, some dead, and others may be born, and some now alive may predecease their mother. So no one can say *now* who will take the remainder, and, such taker not being now known, no one can represent him, and it follows that no sale can be made binding such remainderman.

There are cases in which all interests are found in *classes,* when the court will act if one of each class is before the court. This is allowed because it is the policy of the law and the disposition of the courts to unfetter alienation and give property free circulation.

The question was presented by a similar devise in *Watson v. Watson,* 56 N. C., 400, and the power of the court was denied. That decision has been followed in numerous instances, presenting strictly the same question. *Williams v. Hassell,* 74 N. C., 434; *Justice v. Guion,* 76 N. C., 442; *Ex Parte Miller,* 90 N. C., 625.

The sole ground of the demurrer was that the court upon the admitted facts, was without authority to decree a sale.

We think the judgment overruling the demurrer was erroneous.

Reversed.

Cited: Marsh v. Dellinger, 127 N. C., 362; *Bullock v. Oil Co.,* 165 N. C., 66.

(674)

J. E. DUCKWORTH, ADMINISTRATOR C. T. A. OF THOMAS P. JORDAN, v. HULDA ORR AND HANNAH ORR.

(Decided 22 May, 1900.)

Gift—Delivery, Actual, Constructive, Symbolical—By Agent, Incomplete, Revocable—Burden of Proof—Judge's Charge.

1. Delivery is essential to a gift of personal property, whether *inter vivos* or *causa mortis*. It is a passing over the property with intent to transfer the right and the possession of the same.
2. Actual delivery is the general rule to complete the gift—where impracticable, *constructive* delivery is sufficient in a certain class of cases. Symbolical delivery does not prevail in this State.
3. The failure of an agent to make the delivery previous to the principal's death, revokes the agency and the power to deliver the same after his death.
4. In a suit brought for the recovery of property as belonging to the testator against a defendant who claims the property as a gift from the testator, the burden of showing the gift and *delivery* of the property before the testator's death rested on the defendant.
5. Where there is a simple fact at issue between the parties, *i. e.*, whether the testator gave the money to the defendant, the Code, sec. 413, calls for no specific charge from the court in the absence of a special prayer for instructions.

ACTION for the conversion of personal property claimed to belong to the testator, tried before *Coble, J.*, at Fall Term, 1899, of TRANSYLVANIA.

The defendant, Hulda Orr, a sister of testator, at whose house he lived and died, claimed the property, a large sum in ready money, as a gift from her deceased brother, and that was the matter in issue, which the jury found in favor of plaintiff. Judgment accordingly. Appeal by defendant.

The incidents connected with the trial are considered in the (675) opinion.

Tucker & Murphy and W. W. Zachary for appellant.
George A. Shuford for appellee.

FAIRCLOTH, C. J. The main question is whether the plaintiff's testator gave and delivered to the defendant Hulda Orr during his life, the moneys in controversy.

It is shown and not denied that two years before his death Thomas P. Jordan removed to the house of his sister, the said Hulda, and re-

mained there until his death, and that he carried with him $2,000 in gold, and $200 or $300 in other moneys. It is admitted by the defendant that she had received and appropriated said moneys to her own use, but she claimed that her said brother had made an absolute gift to her of all his money.

The other defendant, Hannah, daughter of Hulda, testified that the said testator, before his death made a gift of all his money to her mother; that she had kept the money for her mother until after her uncle's death, when she removed it from the place where it was deposited. Her language was, "It was kept in the house by me for my mother, and none of it was given away until after Uncle Tom died, when it was moved. I moved it, and no one else had anything whatever in any manner to do with it nor handled it."

The issue submitted was: "Did Hulda Orr and Hannah Orr, or either of them, wrongfully and fraudulently convert to their own use, or to the use of either of them, the moneys of the testator, Thomas P. Jordan, as alleged in the complaint?" The jury answered, "Yes, Hulda Orr."

There was evidence offered by the plaintiff tending to prove that when the said Jordan moved to the house of the defendant Hulda, the
(676) said gold was put by him and the said Hannah Orr in a small room adjoining the room occupied by him and his wife, and that the gold remained there until after his death; that his other money was kept by him in a small box under his pillow until the day before his death, when he was supposed to be dying, when it was taken from under his pillow by Hannah Orr, and immediately after his death all his money was taken possession of by Hulda and Hannah, and used as their own. There was also other evidence. The verdict settles the matter unless there was error in the trial.

It does not appear, except as it is to be inferred from the verdict, whether the money was delivered to Hulda before or soon after the death of her brother. The burden of showing the gift and *delivery* of the property before the testator's death rested on the defendant. In the recent cases cited below, the whole question of the delivery of personal property, sufficient to pass title, was carefully and fully considered, and we deem it unnecessary to repeat the argument. It appears there that symbolical delivery does not prevail in this State, and that, in a certain class of cases, *constructive* delivery is sufficient when actual delivery is impracticable. Williams on Personal Property, 34. It is also held that delivery is essential to a gift of personal property, in *Noble v. Smith,* 2 Johns, 52, whether it be *inter vivos,* or *mortis causa.* This means passing over the property with intent to transfer the right and

the possession of the same. *Newman v. Bost,* 122 N. C., 524; *Wilson v. Featherstone,* 122 N. C., 747; *Medlock v. Powell,* 96 N. C., 499.

The exceptions to the rejection of evidence are without force, as they refer to questions that were immaterial or incompetent under The Code, sec. 590.

The tenth exception was to the charge. His Honor told the jury that the burden of showing a wrongful conversion was on (677) the plaintiff; also, that if they should find that Thomas P. Jordan had money in his possession belonging to him when he went to the defendant's house, and said money was afterwards in possession of, and claimed by the defendant as a gift, then the burden was upon the defendant to prove such gift by the greater weight of the evidence.

Eleventh exception. His Honor instructed the jury that if said Jordan delivered the money in question to his own agent, with direction to deliver the same to Hulda Orr, and said agent failed to do so before the principal's death, then the death of Jordan revoked the agency and power to deliver the same after his death.

We do not observe any error in the 10th and 11th instructions, and those exceptions were properly overruled.

The eighth exception was that his Honor failed to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," as required by section 413, of The Code. That section has been so often construed that it seems only necessary to apply its true meaning to individual cases, as they are presented. There was a simple fact at issue between the parties, *i. e.,* whether the testator gave this money to the defendant Hulda. The principal evidence was that of the daughter Hannah, and the admission and claim of the defendant Hulda. The case clearly falls within the reasonable rule laid down by *Ashe, J.,* in *Holly v. Holly,* 94 N. C., 96. The Code, sec. 413, does not require the judge to "charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirements of the statute." It would have been difficult in the present case for the jury to fail to understand the single (678) fact at issue and the bearing of the evidence thereon.

Affirmed.

Cited: Patterson v. Trust Co., 157 N. C., 14.

J. B. SPRINKLE v. KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY.

(Decided 22 May, 1900.)

Insurance—False Representations—Suppressed Information—Fraud —Issues.

1. Issues raised by the pleadings and not supported by evidence, are properly refused.
2. A badly diseased applicant whose condition is known to the agent is not a fit subject for insurance, and it was a fraud on the company for the agent to insure him.

ACTION upon an insurance policy on life of G. R. Sprinkle, in which the plaintiff was the beneficiary, tried before *McNeill, J.*, at Spring Term, 1900, of MADISON.

The defense was, that the policy was obtained by misrepresentation and concealment of material facts relative to the health of the insured. The jury so found, and there was judgment in favor of the defendant.

Plaintiff appealed. Former trial reported 124 N. C., 405.

J. M. Gudger, Jr., for plaintiff.
G. A. Shuford and W. W. Zachary for defendant.

MONTGOMERY, J. This action was brought to recover the amount mentioned in a policy of insurance issued by the defendant com-
(679) pany to George R. Sprinkle, the beneficiary named therein being the plaintiff, the father of the assured. The application for insurance was made on 18 September, 1896, and the policy was issued thereon upon 18 October following. The collection of the amount of the policy was resisted by the defendant on the ground that the assured made false and fraudulent statements, in matters material to the risk, as to the state and condition of his health, and that he fraudulently withheld from the company information concerning those matters which he ought to have communicated in his application.

The plaintiff tendered several issues, amongst which was one as to whether the agent of the company, by mistake or blunder, omitted or failed to incorporate in the application statements of the assured relative to his health prior to the date of the application, the agent not deeming the answers material; and another as to whether the agent of the company, after full knowledge of the facts, waived the fact that the assured had been afflicted with dangerous diseases.

His Honor refused to submit those two issues, and there was no error

in his so doing. They were not raised by the pleadings, nor was there a particle of evidence to that effect. The issues which were submitted were sufficient in all respects to have every phase of the plaintiff's cause of action properly presented.

This case was heard before this Court at February Term, 1899, and is reported in 124 N. C., 405. We thought then, and we think now, that there was less of merit in the claim of the plaintiff than in any case involving life insurance in our reports. The assured, by the overwhelming weight of the evidence, was shown to have been a badly diseased man from the year 1891, when he had hemorrhages from the lungs, until the day of his death on 24 February, 1897—four months after he had procured the policy. He had had a dangerous case of (680) measles; he had had rheumatism; he had pleurisy with effusion in 1895, which became chronic, finally resisting the absorption treatment, and showing signs of fatty degeneration, so that in January, 1897, the fluid passed out of the pleura through the mouth. Between July and November, 1896, about the time or a little before, he made application for insurance, the assured was treated and examined by Doctor Frank Roberts. He was found to be suffering from pulmonary consumption, and was told that he could not be cured. He had a cough, night sweats and emaciation, and cavities in his lungs.

As will be seen by a reference to the former appeal, *Sprinkle v. Indemnity Co.*, 124 N. C., 405, a new trial was ordered because there was evidence going to show a conspiracy between the agent and the examining physician and the assured to cheat and defraud the company. The chief difference between the case as it was then constituted and as it now stands, is an attempt on the part of the plaintiff to show, not actual fraud on the part of the agent of the company, but that he through a mistake and blunder entered answers of the assured to questions put to him in his application, which the assured never made, that is, that although the assured said he had been spitting blood and had rheumatism and other dangerous diseases, yet that the agent thought they were not dangerous diseases, nor material to the risk, and he therefore answered them "no," when he should have answered them "yes." There is nothing in the evidence on which this theory can be founded. The agent did say that he did not regard ordinary measles as a dangerous disease; but it nowhere appeared in evidence that measles attended with after complications was regarded by the agent as an immaterial matter, or that he thought pleurisy, spitting of blood and rheumatism were not serious diseases.

The special instructions asked by the plaintiff were based on the idea of this alleged mistake and blunder on the part of the (681) agent, and they were properly refused.

We have carefully looked over the other exceptions of the plaintiff to his Honor's charge, and we find no error of sufficient consequence to justify us in ordering a new trial. The judgment of the court below is

Affirmed.

DOUGLAS, J. dissents.

Cited: *Shields v. Freeman,* 158 N. C., 126.

McGLOUGHAN AND NORTHCOTT v. JAMES S. MITCHELL, SHERIFF OF HERTFORD COUNTY.

(Decided 29 May, 1900.)

Process From Justice's Court—How Directed.

1. Execution from justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. Code, sec. 841.
2. The sheriff must execute writs issued and directed to him from a Superior or justice's court under penalty of $100 for neglecting to make return. Code, sec. 2079.
3. A constable can not serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable.

AMERCEMENT of sheriff in penalty of $100 for failing to make return on a justice's execution, heard on appeal before *Bowman, J.,* at Spring Term, 1899, of HERTFORD.

The execution was addressed *"to J. E. Jones, Constable of Winton."*

The motion to amerce was dismissed by his Honor, and plaintiffs appealed.

(682) *George Cowper for plaintiffs.*
Winborne & Lawrence for defendant.

FAIRCLOTH, C. J. The plaintiffs recovered judgment against the Roanoke & Chowan Lumber Company before a justice of the peace who issued an execution directed to "J. E. Jones, constable of Winton," which was placed in the hands of the defendant who was sheriff of the county. The sheriff levied on some personal property of the judgment debtor, but nothing was collected, and the sheriff failed to return the execution in due time. On motion, a judgment *nisi* for failing to make return was made absolute by the justice of the peace. The defendant

appealed to the Superior Court, where the motion to amerce the sheriff was dismissed, and the plaintiffs appealed.

In this Court a motion to dismiss the appeal for irregularities was discussed, but we express no opinion on the motion, and we treat the case on its merits.

Where an execution is issued by a justice of the peace, it must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. Code, sec. 841.

The sheriff must execute writs issued and directed *to him* from a Superior or justice's court, under the penalty of $100 for neglecting to make return. Code, sec. 2079.

A constable can not serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. Murfree on Sheriffs, sec. 115.

An officer may utterly disregard any process or writ not directed *to him.* He is a stranger to it, and if he exercises power under such writ, it is an act of usurpation, and he will be liable in damages for any injury done, as if he were a private citizen. There are numerous reported cases in which sales are held void and pass no title for the want of authority in the officer selling, as a sale of land by (683) the sheriff after a return of the execution and without a new writ. No title passes, because the sale is without authority. *Tarkinton v. Alexander,* 19 N. C., 87.

The process not directed to him who acts under it, is as a blank. Whatever power is granted is given to *him* to whom it is directed; otherwise any *stranger* could act, which would be inconvenient. If the process confers no power or authority on the officer, it seems immaterial whether he makes a return or not.

It was argued that, as the sheriff levied and sold or attempted to do so, he was liable to amercement. That argument is that the assumption of authority confers the power, which we can not agree to. Whatever cause of complaint the debtor, whose property was seized, may have, we can see no cause of complaint for the plaintiffs.

If the defendant's sworn answer is substantially true, we may say that we see no evidence of bad conduct by the sheriff. It is a well-settled rule that penal statutes must be strictly construed. They will receive no equitable construction beyond their plain language. *Smithwick v. Williams,* 30 N. C., 268; *Coble v. Shoffner,* 75 N. C., 42.

Affirmed.

Cited: *Carson v. Woodrow,* 160 N. C., 147; *Skinner v. Thomas,* 171 N. C., 102.

(684)

J. F. COWELL v. PHŒNIX INSURANCE CO.

(Decided 29 May, 1900.)

Fire Insurance—Statute of Frauds—Building on Leased Land—Notice —Sale of Building Without the Land.

1. Real estate may be sold by parol and the title is good between the parties unless the statute of frauds is invoked as a defense—strangers to the transaction can not avail themselves of the statute.
2. A building on leased land may be insured, with notice to the company, notwithstanding a stipulation to the contrary in the policy.
3. By consent between the contracting parties, the landowner can sell a house by parol and convert it into personal property by such contract.

ACTION to recover the amount of a fire insurance policy, tried before *Starbuck, J.*, at Fall Term, 1899, of PAMLICO.

The defense was that the plaintiff was not the owner of the house insured, and burned, and had concealed that fact from the company. The jury rendered a verdict in favor of plaintiff, and judgment was rendered accordingly. Defendant appealed. The opinion states the facts in evidence.

W. W. Clark for plaintiff.
Simmons, Pou & Ward for defendant.

FAIRCLOTH, C. J. This is an action to recover the amount of a fire insurance policy. The defendant issued the policy to the plaintiff on a dwelling house, household furniture and other personal property. Policy issued 24 May, 1898, and the property was destroyed by fire 21 November, 1898. The facts are admitted. The defense is that the plaintiff was not the sole and unconditional owner of the house when it was in-
(685) sured nor when it was burnt; that the plaintiff concealed the fact that he was not the owner of the land on which the house was situated and failed to disclose the true ownership thereof, and that the policy was therefore void, according to the terms of the policy.

The defendant introduced in evidence the record of an action instituted in 1896, styled *Daniels v. Fowler et al.*, from which it appeared that S. H. Fowler had made an assignment of his property to one Baxter, who conveyed the same to C. H. Fowler, with an allegation that said assignment was fraudulent and void—that said suit continued until Spring Term, 1898, when the verdict and judgment declared said assignment to be void, and that the plaintiff Daniels and others were the owners of the property in controversy. The plaintiff here was a party to the action of *Daniels v. Fowler.*

The defendant offered other evidence showing that plaintiff and said C. H. Fowler were in business in a shop on said lot of land, that it was

moved about fifty feet on said lot and made to front another street and separated from the balance of the lot, and was converted by improvements and additions into a dwelling house by plaintiff, and occupied by him as a residence until the fire. This is the insured house now the subject of this action.

Plaintiff's evidence: J. F. Cowell testified that: "The burned building was formerly used as barroom; outside was of rough boards. I bought the house of C. H. Fowler in 1894. There was no deed. Paid him $100. (Defendant objected to the statement that he bought the house in 1894, on the ground that the sale would have to be in writing. Overruled, and defendant excepted.) I moved it to another part of the same lot. It cost me $1,000 to rebuild it. I had no notice of any fraud at the time I made the purchase. I leased the land a year from each January in 1894, when I moved the building. I leased it (686) with the understanding that it was to be renewed each January as long as C. H. Fowler and I remained partners in the store business. I first leased it in 1894, when I moved the building. I would say I rented it each 1 January. It was understood that the lease should be to 1 January, 1895, and should be renewed each successive January as long as C. H. Fowler and I remained partners in the store business. January by the previous agreement made in 1894. I gave my time to the business. I was to have one-half the profits and also possession of the lot fenced in about the dwelling as long as we remained in business. I understood I was holding it under lease made in 1894."

Cross-examined: "Were you holding at the time of the fire in 1898, under the parol lease made in 1894?" Answer, "I was holding under this lease with the understanding that it was to be renewed from year to year as long as our partnership lasted. The partnership was renewed each year after 1894 till we went out of business after the fire. We renewed the partnership about 1 January, each year, and it was understood that the lease was renewed each year as the partnership was renewed. Nothing was said about the rest of the business each January." The plaintiff further testified that he did not know whether this was the second or third annual policy he had taken out on the property in this company. It was admitted here that at the time the policy was issued, the defendant had notice that the plaintiff claimed that the building was on leased ground.

The plaintiff's application attached to the policy is: "On *his* two-story shingle-roof frame building and additions . . . on leased land." The clause in the policy relied on by the defendant, among other things, is: "The entire policy shall be void if the interest of the assured be other than unconditional and sole ownership; (687) or if the subject of the insurance be a building on ground not

owned by the insured in fee simple, *unless otherwise provided by agreement endorsed hereon or added hereto.*"

Real estate may be sold by parol and the title is good as between the parties unless the statute of frauds is invoked and relied on as a defense, but strangers to the transaction can not avail themselves of the statute. "Buildings which are sold without the land on which they stand, with the intention of all parties to sever them from the land, pass to purchaser, with a right to remove them as personal property within a reasonable time." *Shaw v. Carbrey,* 95 Mass., 462. The first exception therefore can not be sustained.

An insurance policy issued with full notice (as was the case in this instance) to the company that the building insured stands upon leased ground is not invalidated by a provision that it shall be void if the subject thereof is on ground not owned by the assured in fee simple. *Baldwin v. Insurance Co.,* 15 N. Y., Supp., 587; 39 N. Y., 725, and S. P. 60 Hun, 389.

The defendant's prayer was if the jury believed the evidence they should answer the first issue "No," and the second "Nothing." This prayer was refused, and his Honor instructed the jury that if they believed the facts as to the lease to be as stated by the plaintiff, Cowell, in his testimony, they should answer the first issue "Yes" and the second issue "$1,000." With our view of the law, we see no error in overruling these prayers and exceptions. There was no evidence in conflict with that of the plaintiff, and the judge made no mistake in allowing the jury to act on the plaintiff's evidence.

What cause of complaint has the defendant company? The
(688) defendant insured a dwelling house with notice that it stood on leased ground; and what is the difference to the defendant whether it stood on the ground of A or B? Knowledge in that particular could neither increase nor diminish the risk of the company. It was immaterial to the defendant whether the land belonged to Fowler or to Daniels. The defendant simply insured the house as "his," plaintiff's property, knowing that the plaintiff had no fee in the estate.

In the argument, the case was put on the legal proposition that the landowner could not sell the house by parol and convert it into personal property by such contract. We have shown this can be done by consent of the contracting parties, and we think the defendant has no interest in that question.

Our conclusion as to the law seems to lead to a just result. Finding no error in the trial, the judgment of the court below must be

Affirmed.

Cited: *Bowen v. Perkins,* 154 N. C., 453; *Plaster Co. v. Plaster Co.,* 156 N. C., 456.

(689)

BOARD OF EDUCATION OF VANCE COUNTY ET AL. v. TOWN OF HENDERSON ET AL. (Both sides appealed.)

(Decided 29 May, 1900.)

Free School Fund—Fines and Penalties—Constitution, Article IX, Section 5—Act 1899, Chapter 128—Violation of Town Ordinances Misdemeanors—The Code, Sections 3818, 3820.

1. A fine is the sentence pronounced by the court for a violation of the criminal law of the State.
2. A penalty is the amount prescribed for a violation of the statute law of the State or the ordinance of a town, and is recoverable in a civil action of debt.
3. The Constitution, Art. IX, sec. 5, appropriates all fines for violation of the criminal laws of the State for establishing and maintaining free public schools in the several counties—whether the fines are for violation of town ordinances, made misdemeanors by section 3820 of The Code, or other criminal statutes.
4. Where such fines are collected through the mayor of a town, by virtue of his authority as justice of the peace, they are to be accounted for to the Board of Education. It is otherwise as to penalties imposed for violation of town ordinances, which are to be sued for.
5. The Act of 1899, ch. 128, which attempts to divert from the school fund the fines collected by the defendant can not be supported.

ACTION to recover fines, forfeitures and penalties for violation of State laws and town ordinances, collected by the authorities of the town of Henderson, for the use of the free public schools of Vance County, tried before *Moore, J.*, at April Term, 1899, of VANCE, upon exceptions to report of referee, who reported $407.90 as the sum due the plaintiff.

Both parties filed exceptions, which were overruled—the report confirmed—and judgment rendered accordingly in favor (690) of plaintiff for $407.90, from which judgment both sides appealed.

The facts and exceptions appear in the opinions.

T. T. Hicks for plaintiff.

J. H. Bridgers and A. C. Zollicoffer for defendant.

FURCHES, J. The plaintiff board of education of Vance County alleges that defendant town of Henderson has collected, and now has in its treasury, a large amount of money collected from fines and penalties belonging to the public school fund of said county, which defendant refuses to account for and pay over to plaintiff.

The defendant answers and denies that it owes plaintiff anything—denies that it has collected any fines and penalties that belong to the plaintiff—pleads the statute of limitations, and also pleads an act of the Legislature (Laws 1899, ch. 28), in bar of plaintiff's right to maintain this action.

A reference was had, an account taken and reported, finding $407.90 in favor of plaintiff. This account and report are excepted to by both parties; and the amount reported may be changed, upon considering these exceptions, if it be found that plaintiff is entitled to recover anything. But whether the amount found by the referee be correct or not, the evidence taken by the referee shows that defendant had collected a large amount of fines and penalties, for which it had not (691) accounted to plaintiff, upon the ground (as defendant alleges) that it is not liable to plaintiff for any part thereof.

To our minds there is a clear distinction between a fine and a penalty. A "fine" is the sentence pronounced by the court for a violation of the criminal law of the State; while a "penalty" is the amount recovered—the penalty prescribed for a violation of the statute law of the State or the ordinance of a town. This penalty is recovered in a civil action of debt. *Commissioners v. Harris,* 52 N. C., 281; *State v. Earnhart,* 107 N. C., 789. A municipal corporation has the right, by means of its corporate legislation, commonly called town ordinances, to create offenses, and fix penalties for the violation of its ordinances, and may enforce these penalties by civil action; but it has no right to create criminal offenses. And this being so, it was found to be almost impossible to administer and enforce a proper police government in towns and cities by means of penalties alone. It therefore became necessary to make the violation of town ordinances a misdemeanor—a criminal offense—which was done by section 3820 of The Code, and to invest mayors with the criminal jurisdiction of justices of the peace, which was done by section 3818 of The Code. This being so, in order that the mayor may have jurisdiction, the town legislature (the board of aldermen) pass ordinances or by-laws for the government of towns and fix penalties for their violation, not to exceed a fine of $50 or imprisonment for a term not exceeding thirty days. And while the town or city government has no right to make criminal law, the Legislature has made the violation of such ordinance a criminal offense, and has given to mayors jurisdiction to try such offenses. *S. v. Higgs, post,* 1014.

While such violations of town ordinances are criminal offenses, they are made so by a general act of the Legislature, 3820 of The (692) Code; and while the mayors of cities and towns have jurisdiction under section 3818 of The Code, any justice of the peace also has jurisdiction of such offenses. *S. v. Wood,* 94 N. C., 855; *S. v. Higgs,*

supra. But whether the criminal offenses created by the violation of town ordinances (under section 3820 of The Code), are tried before the mayor, or before a justice of the peace, they are State prosecutions, in the name of the State, or for violations of the criminal law of the State, and at the expense of the State (*S. v. Higgs, supra*), and the city can not be charged with the costs of such prosecutions.

Article IX, sec. 5, of the Constitution, among other things, provides: "Also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State; . . . shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the State."

It must therefore follow that all the fines the defendant has collected upon prosecutions for violations of the *criminal laws* of the State, whether for violations of *its ordinances* made criminal by section 3820, of The Code, or by other criminal statutes, such fines belong to the common school fund of the county. It is thus appropriated by the Constitution, and it can not be diverted or withheld from this fund without violating the Constitution. This is not so with regard to "penalties" which the defendant may have sued for and collected out of offenders violating its ordinances. These are not penalties collected for the *violation of a law of the State,* but of a town ordinance. But wherever there was a fine imposed in a State prosecution for a misdemeanor under section 3820 of the Code, it belongs to the school fund, and, as we have said, must go to that fund.

But it is contended by defendant that if this is so, it is protected by the act of 1899, ch. 128. This is an act to amend sec- (693) tion 3806 of The Code, by making it read that "said fines and penalties shall be paid into the treasuries of said towns for municipal purposes"; and section 2, of said act, provides, "That no action shall be brought or maintained against any town for the recovery of any fines and penalties heretofore collected, and this act shall apply to existing actions."

The provisions of the first section of this act that "said fines and penalties shall be paid into the treasury of said town for municipal purposes," is so palpably in conflict with Article IX, sec. 5, of the Constitution, which says that all moneys so collected "shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the State," that we feel unwilling to discuss its unconstitutionality. We can not think it needs more than a comparison of the provisions of the statute with the provisions of the Constitution to show the repugnancy of the statute to the provisions of the Constitution.

The second section of the act of 1899: "That no action shall be brought or maintained against any town for the recovery of any *fine or penalty* heretofore collected, and this act shall apply to existing actions" —is equally unconstitutional, though it may not be so palpable as that of the first section.

It will be seen that the act of 1899 does not undertake to "abolish" the school board of education. It is probable that it could not have done so, as the common schools are creatures of the Constitution, and while its machinery—its agency—may be changed and regulated by legislation, it can not be abolished by legislation. It does not undertake to take from this board the general right to sue and be sued, but to prohibit it *from suing for this money.*

So we have this condition: The defendant has (we will say)
(694) $407.90 of *plaintiff's money.* This, we will say, is admitted, but defendant says it will not pay it to the plaintiff, and the argument of the defendant is that the Legislature says to the defendant, "hold on to plaintiff's money, you need it more than the poor common school children do, and we (the Legislature) will not let the plaintiff sue you." Can it be that the Legislature can in this indirect way destroy the plaintiff's constitutional right? The defendant having received money that belongs to the plaintiff, the law presumes that it received it for the plaintiff upon an implied contract, and is liable to be sued for it upon this implied contract, in what would have been an action of *indebitatus assumpsit* before The Code. *Robertson v. Dunn,* 87 N. C., 191; *Hauser v. McGinnis,* 108 N. C., 631; *Draughan v. Bunting,* 31 N. C., 10. To say that to prohibit the plaintiff from suing the defendant for what it owes the plaintiff is not to impair the obligation of a contract and not in violation of the Constitution, would be to close our minds to all reason, and to disregard all precedent.

It has been frequently held by this Court that a general act staying for a period of time a plaintiff's right to collect his debts, was a violation of both the State and Federal Constitution. *Jones v. Crittenden,* 4 N. C., 55; *Barnes v. Barnes,* 53 N. C., 366. If such general legislation as that is in violation of both State and Federal Constitutions, how can it be that an act which perpetually enjoins the plaintiff from suing the *defendant* for a debt—money of plaintiff it has collected—can be constitutional?

It was said that this Court has held that penalties recovered by parties suing for them might be given to the party suing, and *Sutton v. Phillips,* 116 N. C., 502, and many other cases before and since that decision, to the same effect, are cited. Those cases are to our minds distin-
(695) guishable from this. Besides, the fact that they were put upon the ground of public good—to protect the public from flagrant

violations of the law, such as public carriers, and that while these were inducements for making the decisions, we admit that even these reasons would not have justified the court in violating the Constitution.

The Constitution provides that the "clear proceeds of all penalties" shall go to the school fund. It was held that there were no "proceeds" until there was a suit and a recovery; and if it took all the penalty to enforce the collection, there were no "clear proceeds" left to go into the school fund. This may not be very satisfactory reasoning to some, as we know it was not in *Sutton v. Phillips, supra,* where both the *Chief Justice* and *Justice Avery* dissented. But it was held to be the law in that case as it had been in other cases before and since. But in this case there is no ground for such reasoning. Here the money has been collected from *fines* imposed for the violation of the criminal law of the State, upon prosecutions by the State, and at the cost of the State. This to our minds makes a clear distinction between this case and *Sutton v. Phillips, supra, Carter v. R. R., ante,* 437, and other cases where an individual was induced to incur the expense, and take the risk of paying costs by being allowed whatever he might recover in such actions. Here there was no one individual to sue for a penalty; no one taking upon himself the expense of prosecuting an action, and the risk of costs. This money was all collected at the cost and expense of the State.

But whether the distinction we have attempted to draw between this case and *Sutton v. Phillips* and that line of cases, is sustained or not, does not materially affect the case at bar. Those cases were actions for penalties where the "clear proceeds" are given to the school fund, and this is an action for *fines collected.* Mark the difference in (696) the language of the Constitution: with regard to penalties, it says, the "clear proceeds"; while it says "all fines collected in any county" shall belong to the common school fund, and there is no ground for deducting anything from it.

We do not think that the statute of limitations interferes with the plaintiff's right to recover.

We do not go into a discussion of the exceptions to the account further than to say that it does not appear to be unfavorable to the defendant. And as the judgment seems to have been based upon correct principles of law, the same is affirmed.

This opinion disposes of the substantial exceptions in the plaintiff's appeal.

Affirmed.

FAIRCLOTH, C. J., concurring in result: I fully concur in the conclusion in this case, but I can not assent to the argument which attempts to distinguish *Sutton v. Phillips,* 116 N. C., 502, from the present case.

With entire respect, it appears to me that the argument is unsound and illogical, and I think the principle now and here decided *necessarily* overrules the decision in *Sutton v. Phillips.*

The question depends on the meaning of Article IX, sec. 5, of the Constitution—"All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for
(697) establishing and maintaining free public schools in the several counties of this State."

Now it is held that the Legislature can not divert the fines from the school fund and give them to the defendant or any one else, as it attempted to do in the act of 1899, ch. 128, because the Constitution appropriates fines to the public schools, and yet it was held in *Sutton v. Phillips, supra,* that the Legislature, under a different statute, could divert the penalties mentioned in said Article IX from the school fund and give them to a common informer, a municipal corporation or any other at its pleasure! Is that a reasonable and legal construction of section 5, Art. IX? Look at the language itself and the context of the several parts—"also the clear proceeds of all penalties and forfeitures, and of all fines collected," etc. Is not the natural rendering of those words this? Also the *clear proceeds* of all penalties and the *clear proceeds* of all fines collected, etc. If this is not the way of it, what is the use of the word "of" immediately before "all fines," and what duty does "of" perform? We must hold that every word in the Constitution has a meaning and proper position. If this is the proper construction of the language, then the whole theory of *Sutton v. Phillips* falls to the ground, according to the decision in the case now before us.

But it is said that *penalties* are collected in "civil actions" and that *fines* are imposed and collected in "criminal actions," also that in the case of penalties there are no "proceeds" until there is a suit and a recovery. Certainly, and so there are no fines until there is a suit or some judgment of the court. I think the authors of the Constitution would be loath to consider this a serious argument, but rather an effort to reconcile *Sutton v. Phillips* and the present decision.

The Constitution does not attempt to prescribe the ways and methods nor the agencies for collecting penalties, fines, etc. The Legisla-
(698) ture unquestionably regulates the procedure, as in other matters, and may select proper agents, but the net moneys in every instance mentioned in Article IX, sec. 5, are appropriate to the school fund.

Prior to 1868, the entire subject was under legislative control, but the Constitution of 1868 established a school system and appropriated the fund for its support, and the question now is whether the Legislature can divert a portion of the fund and give it to common informers, municipal corporations or any other; that is, does the Constitution or the Legislature control? "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . . If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be no law, does it constitute a rule as operative as if it were a law?" These are the words of *Marshall, C. J.*, in *Marbury v. Madison*, 1 Cranch., 69.

It is urged that *Sutton v. Phillips* has been followed in several other cases. That is true, and that only shows a continuous list of errors. Repetition will never correct an error. I know of but one way to correct an error, and that is to cut it up by the roots, especially the tap-root, and let it go. A familiar instance of heroic treatment will be found in *Spruill v. Leary*, 35 N. C., 225, 408. There the Court fell into an error, and the Court unanimously at the first opportunity cor- (699) rected it, by cutting it out, root and branch. *Myers v. Craig*, 44 N. C., 169.

I expressed my views in *Sutton v. Phillips, supra*, p. 511, and nothing but the importance of common schools induces me to write again. The revenues provided in Article IX, sec. 5, are not inconsiderable, and the withdrawal from that source will reduce the school term, already below the constitutional requirement. I think every blow at common school education is a strike at the principle of civilized and *free* government.

DOUGLAS, J., concurring. After careful consideration I am forced to concur in the opinion as well as the judgment of the Court. If the argument in this case in any way interfered with the school fund as set apart by the Constitution, I could not give it my assent; but such does not seem to me to be its effect either in letter or in spirit. I fully concur in the view that the "clear proceeds of all penalties" belong to the school fund, because the Constitution says so; but the words "clear proceeds" must have some meaning. The Constitution might have said *all* penalties, but this it does not say, and apparently does not mean to say. The proceeds of a debt do not mean the debt itself, but only what is received

from the debt. The clear proceeds are only the amount coming into the hands of the creditor after the payment of expenses incurred in the collection of the debt. Therefore that section of the Constitution can refer only to such penalties or parts thereof as come to the State. This was expressly decided by a unanimous Court as far back as *Katzenstein v. R. R.*, 84 N. C., 688, and the principle thus established has since been uniformly followed. It has recently been discussed and reaffirmed, with full citation of authority, in *Carter v. R. R.*, decided at this term.

Where the State alone can sue for the penalty, it is entitled to all the penalty, provided it does sue; but it gets nothing if it does not sue.

(700) I see no reason why the school fund should not become entitled to the penalty given to a common informer if the suit therefor is first brought in the name of the State or of some officer for the benefit of the school fund. That such suits are rarely if ever brought (and I can not now recall a single instance), tends to show that giving penalties to the informer does not subtract a dollar from the school, but simply gives to some one, usually in fact the injured party, the right to a penalty which the State itself would never exact. The imposition of a penalty presumes its collection, and, as its primary object is the enforcement of a public duty, it is proper that it should be collected. If the proper officers of the State can not or will not collect it for their lawful fees, it is proper that the Legislature in its wisdom should allow such part, or all, as may be necessary to secure its collection. If the State itself will not collect it, why should not the right be given to the injured public to collect it, and thus compel the performance of a public duty which it was intended to enforce?

Under all the circumstances, I can not but feel that the public school is merely a sentimental factor in such a discussion, and that the actual effect of a different construction of the Constitution would be to give practical immunity to the wrongdoer without any corresponding benefit to the school.

Cited: Davison v. Land Co., post, 709; *Board of Education v. Henderson,* 127 N. C., 8; *Directors v. Asheville,* 128 N. C., 251; *Bearden v. Fullam,* 129 N. C., 479; *School Directors v. Asheville,* 137 N. C., 507; *S. v. Maultsby,* 139 N. C., 585.

(701) (701)

SHELLY BROWN v. TOWN OF LOUISBURG AND J. W. PONTON.

(Decided 29 May, 1900.)

Liability for Damages—Primary and Secondary—Release—Joint Tort Feasors.

1. A full release and discharge, for a valuable consideration, of the party primarily liable, operates for the benefit of the party secondarily liable, especially where the latter in the event of recovery against him could have recourse to the former for indemnification.
2. Joint tort feasors or codelinquents must actively participate in the act which causes the injury.
3. Where a property owner in Louisburg caused an excavation in the sidewalk in front of his building into which the plaintiff fell and was injured, the plaintiff could sue the party occasioning the injury and also the town for negligently permitting the sidewalk to remain in a dangerous condition.
4. In the event of recovery against the town, it could hold the property owner responsible, as they are not joint tort feasors, and a release, for valuable consideration, to the party primarily liable, operates to the discharge of the town.

ACTION for injury received through alleged negligence of the town in not keeping its sidewalk in safe condition, tried before *Moore, J.*, at April Term, 1899, of FRANKLIN. Ponton, one of the defendants, made the excavation which caused the accident, and obtained a full release from liability by paying $75 to the plaintiff. The town claimed that it also was entitled to the benefit of the release. His Honor held otherwise. The town excepted. The jury rendered a verdict for $400 less $75 against the town. Judgment accordingly; and the town appealed.

F. S. Spruill and W. H. Ruffin for plaintiff.

C. M. Cooke & Son, W. H. Yarborough, Jr., and W. M. Person for defendant.

MONTGOMERY, J. This action was brought against the defend-
ants to recover damages for personal injuries sustained by the (702)
plaintiff on account of the alleged negligence of the defendant.
The defendant Ponton in building a store within the limits of the town of Louisburg, made a deep excavation abutting upon the sidewalk and after the front wall of the building had been built up to the level of the sidewalk, there was still left a part of the excavation between the front wall and the center of the sidewalk (extending into the sidewalk about

two feet). The hole was about two feet in width at the top, but slanting and narrow at the bottom. The town authorities had knowledge of the excavation in the sidewalk.

On a dark night, the plaintiff, without fault of his own, fell into this excavation and was badly hurt. The hole was unguarded by rail or otherwise and no danger signal was displayed.

While the action was pending the plaintiff agreed in writing through his attorneys, for the consideration of $75 "to enter a nonsuit . . . and to release J. W. Ponton from any and all claims of the plaintiff against J. W. Ponton, by reason of the facts set forth in the complaint filed in the above cause, and from any and all claims of every description which the said Shelly Brown may have against the said J. W. Ponton." It was verbally agreed at the time of the execution of the agreement that the payment of the $75 was not made or accepted in full satisfaction of the injuries sustained, but simply to discharge Ponton.

The contention of the plaintiff's counsel is that the defendants are not joint tort feasors, but that they were "cotrespassers, codelinquents, cowrongdoers," and that their liability to the plaintiff is not only joint, but several; and that therefore the effect of the contract between the plaintiff and Ponton and the payment of the $75 was only a payment *pro tanto* which enures to the benefit of the other defendant, the
(703) town of Louisburg It seems to us immaterial, in considering the effect of the contract between the plaintiff and Ponton, whether the defendants were joint tort feasors or codelinquents in the sense in which that word is used by the plaintiff's counsel.

The defendants were not, however, joint tort feasors. To make persons joint tort feasors they must actively participate in the act which causes the injury. The town of Louisburg had no active part in the matter of building the house or in creating the nuisance. The authorities of the town knew, or ought to have known, of the excavation in the street; but Ponton did not act under the directions of the corporation, nor were his acts in any way for its benefit. The absence of objection on the part of the town authorities to the defendant Ponton's digging the excavation can not be considered a presumption that the town intended to authorize Ponton to leave the excavation unguarded. Ponton therefore was the active wrongdoer in digging a pit on the public street, and leaving it unguarded. The town's liability arose out of its negligently permitting its sidewalk at that dangerous place to remain unguarded.

The real question in the case is this: Upon which of the defendants is the ultimate liability resting as between themselves? The plaintiff can, of course, sue either one, but which one of the defendants is liable to the other for the damages which the plaintiff would be entitled to recover for the injury which he has sustained on account of their negli-

gence? We think that Ponton would be liable to the town, and that any recovery which might be made against the town could be ultimately recovered back from Ponton. *Robbins v. Chicago,* 71 U. S., 657.

And again, the plaintiff and the defendant had a legal right to make the contract which they entered into, and the consideration having been paid by Ponton he must be protected in his right under (704) that contract. He can not be protected in those rights if the town is, by law, permitted to recover out of him whatever damages the town might be compelled to pay the plaintiff. And the town, as we have seen, can bring such an action against Ponton and recover from him the amount which it, by process of law, had been made to pay on account of his negligence.

Such a result would be the complete destruction of Ponton's rights under his contract with the plaintiff. His Honor should have instructed the jury that upon the evidence the plaintiff could not recover.

New trial.

Cited: *Raleigh v. R. R.,* 129 N. C., 266; *Smith v. R. R.,* 151 N. C., 481; *Howard v. Plumbing Co.,* 154 N. C., 227; *Gregg v. Wilmington,* 155 N. C., 28; *Sircey v. Rees, ib.,* 300; *Guthrie v. Durham,* 168 N. C., 575; *Conway v. Ice Co.,* 169 N. C., 578.

DAVISON AND BAKER, TRUSTEES, v. WEST OXFORD LAND CO. ET AL.

(Decided 29 May, 1900.)

Specific Performance—Evidence, Fact Found by the Court, Section 590, of The Code—Written Obligation to Pay in a Sale of Land—Counterclaim on Contract, Express or Implied.

1. Specific performance of contract for sale of land will not be enforced unless there was a *written* obligation on the part of the defendant to pay for the same. *Hall v. Fisher, ante,* 205.
2. A preliminary finding of fact by the judge, of which there is evidence, is not subject to review.
3. Section 590 of The Code does not exclude where the door has been opened to the objecting party.
4. A counterclaim is available if arising upon contract, express or implied. The law will presume a contract to pay where a party *receives* money and *wrongfully* refuses to pay it over to the rightful owner.

ACTION for special performance of an alleged contract on part (705) of defendant to purchase land, known as "the Johnson land" near Oxford, tried before *Bryan, J.,* at April Term, 1899, of GRANVILLE.

The cause was heretofore tried and reported in 121 N. C., 146.

The issues were found adversely to the plaintiffs, who appealed from the judgment rendered against them.

The case is fully stated in the opinion.

W. A. Devin and A. J. Field for plaintiffs.

A. W. Graham, Hicks & Minor and J. W. Graham for defendants.

FURCHES, J. The plaintiffs claim that as trustees under an assignment of W. A. Davis and N. A. Gregory, for the benefit of creditors of the assignors, they are the owners of a small tract of land lying in and near the town of Oxford, known as the "Johnson land." The "West Oxford Land Co.," is a corporation, and is insolvent. F. W. Carpenter has been appointed its receiver. W. A. Davis, D. C. Hunt, N. A. Gregory and R. W. Lassiter were directors in said corporation.

The plaintiffs allege that they sold to defendant corporation the "Johnson land" at the price of $6,000; that this trade was negotiated with W. A. Davis and R. W. Lassiter representing the defendant corporation; and that said corporation paid $1,028 thereon, evidenced by two drafts as follows: "D. C. Hunt, Treasurer West Oxford Land Co., will pay to John Johnson the sum of ($528) five hundred and twenty-eight dollars on the Johnson land purchased by us. This 13 December, 1890."

(Signed) W. A. Davis, R. W. Lassiter, Executive Committee.

"$500. At ten days sight, pay to order of G. W. Davison and
(706) E. C. Baker, trustee, five hundred dollars in part payment Johnson land. Value received and charge same to account of

"W. A. DAVIS,
"R. W. LASSITER,
"Executive Committee."

"To D. C. HUNT, Treasurer West Oxford Land Co., Oxford, N. C."
"Accepted—Payable at Bank of Oxford.

"WEST OXFORD LAND CO.,
"D. C. HUNT, *Treasurer.*

"22 June, 1890."
"Paid 10 July, 1891—Bank of Oxford."

To which there is attached the following: "Oxford, N. C., 16 June, 1891. Received of West Oxford Land Co., a draft for $500 in part payment of Johnson land, leaving a balance due of fifty-five hundred dollars to be arranged as follows: Forty-five hundred to be settled for within thirty days after 18 August, 1891, and for the remainder one thousand dollars we agree to accept the note of the company, ninety

days after 18 August, 1891, for one thousand dollars, with not less than ten shares of stock as collateral security, and in the event that said security, at or after the distribution, shall equal more than the sum of one thousand dollars, then any excess to be paid over to the directors of said West Oxford Land Company.

"G. W. DAVISON,
"E. C. BAKER,
"Trustees."

These two drafts and the receipt attached to the last draft is what the plaintiffs allege contain the contract of sale and the obligation of the defendants to pay. Upon this alleged contract, and the other evidence in the case, these issues were submitted to the jury:

1. "Did defendant company contract with plaintiffs for the purchase of the Johnson land described in the complaint, at the (707) net price of $6,000?" Answer, "No."

4. "Is defendant company indebted to plaintiffs, if so, in what amount?" Answer. "None."

5. "Are the defendants R. W. Lassiter and D. C. Hunt, or either of them, indebted in their individual capacity to the plaintiffs?" Answer. "No."

6. "Are the plaintiffs indebted to defendant company, if so, in what amount?" Answer. "Yes, $1,028, and interest on the same."

Therefore, there are two propositions contained in this appeal: Did the plaintiffs sell the Johnson land to the defendant corporation, and did the defendant obligate itself to pay for the same and, secondly, are the plaintiffs liable to the defendant corporation for the amount of the two drafts—one to Johnson for $528, and the other to the plaintiffs for $500?

The jury have found by the first issue that the defendant corporation did not buy the "Johnson land." This is an end to plaintiffs' right to recover against the defendant company, and also as against Lassiter and Hunt, because they could not be bound if the plaintiffs did not sell the land.

Besides the allegation of the defendants that these drafts did not amount to a written contract to sell land, they deny that Lassiter and Davis had any authority from the defendant "corporation" to make and enter into such a contract, and that said corporation did not know that such a contract had been attempted for many months after, and that the same was never approved or ratified by the corporation.

The plaintiffs offer pages 9, 11, 13, and 15 of the minute book of the corporation, which they allege show the approval of this transaction and purchase by the defendant corporation. The defendants object to this evidence upon the ground that it is no part of the min- (708)

utes of any meeting of the corporation; that there was no meeting when they were made; that they were in the handwriting of W. A. Davis, who was the agent of the plaintiffs in trying to effect a sale of this land, and were not a part of its minutes. The objection was sustained and the plaintiffs excepted.

We think there was evidence from which the facts, stated in the defendant's objection, might have been found to be true; and, as the court sustained the objection, we must suppose that the court found these statements of defendants to be true. And whether they were in fact true or not, we have no right to review the court upon a finding of fact in the trial of a cause. If the allegations of the defendants were true, as we must take them to be from the ruling of the court, it is clear this evidence was incompetent, and should not have been received.

There is another exception to the evidence of the defendant Lassiter by the plaintiffs. This evidence does not seem to bear upon the issues now under consideration. But we do not think it can be sustained, if it does. This objection is with regard to a conversation between Lassiter and W. A. Davis, who was one of the original defendants, but dead at the time of the trial; and this evidence is objected to under section 590 of The Code. If Davis was represented in this case after his death, the record fails to show it; and there seems to be no one claiming through or under him except the plaintiffs. But more than this, the plaintiffs had before this introduced similar evidence of conversations with Davis and the defendant Lassiter, and in this way opened the door, if there had been anything in the plaintiffs' objection. This disposes of the plaintiffs' right to specifically enforce the contract of sale, as there was no contract to enforce.

(709) But it seems to us that there is another clear reason why the plaintiffs could not succeed, admitting that the drafts contained a contract for the sale of the Johnson land which might have been enforced. They contained no *written* obligation on the defendant corporation to pay, as was necessary in a sale of land. *Hall v. Fisher, ante,* 205, and authorities there cited.

As we have seen that the plaintiffs can not recover, it remains to be seen whether the defendant corporation can recover of the plaintiffs the amount paid by it on the two drafts, one to Johnson and the other to plaintiffs, amounting to $1,028 and interest.

The defendant corporation makes this by way of counterclaim. We are of the opinion that it can not.

When this case was before the Court at September Term, 1897 (121 N. C., 146), it was held that the money paid on the two drafts did not constitute a counterclaim growing out of the sale of land, as there had been no sale. And as it is held now, as it was then, that there was no

sale, the proposition then stated by the court is true now if it was then. And we see no error in this statement and no reason for reversing what was then said.

But while this is true, the defendants may set up and maintain a counterclaim that does not grow out of the contract sued on, if the counterclaim be a cause of action arising upon contract. And where one party has received money to which *another is entitled,* the law presumes a contract if it is necessary to do so to enable the party entitled to recover the same. *Board of Education v. Henderson, ante,* 700. This entitles the party having the right to the money to an action of debt, *indebitatus assumpsit,* which though an action at law was equitable in its nature. It has been styled "an equitable action on the law side of the docket." But it arises only where the money was received and held under such circumstances that the law will imply the (710) contract—where it would be inequitable and unconscionable for the party receiving the money to hold it, amounting to a moral fraud to do so, it will usually be so held. Where one person receives money belonging to another and wrongfully refuses to pay it over, the action will lie. But to make him liable, he must *receive* the money and *wrongfully* refuse to pay it over to the party to whom it belongs.

The plaintiffs never *received* the money on the $528 draft. The draft was made payable to John Johnson, and the money paid to him. Whether he could be held liable for it or not is not a question before us. But we fail to see how the plaintiffs can be held liable for the money paid on this draft to Johnson.

The $500 draft was drawn payable to the plaintiffs and collected by them. This distinguishes it from the $528 draft drawn payable to Johnson and collected by him. And the plaintiffs' liability depends upon the fact as to whether it is unconscionable for them to refuse to pay the defendant corporation this money or not. Whether it is *wrongful* for them not to do so; if it is, the law will presume the contract—presume that they agreed to do so, and will not allow them to disprove this presumption. The fact that the plaintiffs received this draft ($500) and received the money on it is not disputed. But how did they receive it, and for what purpose? Not wrongfully, nor as their money. They received it as the assignees of Davis & Gregory, for the benefit of the creditors of Davis & Gregory; and it must be presumed that it has long since been paid over to such creditors. This is the presumption, and no evidence has been offered to rebut it. While, on the contrary, it appears from the evidence (the correspondence between Davis and plaintiffs) that Davis was urging the sale of this land in order that (711) the long deferred third-class creditors might be paid."

Then, if the plaintiffs received this money as assignees—trustees—

for the benefit of the creditors named in the deed of assignment to them and have paid it over, as we must presume they have, can it be inequitable and unconscionable in them not to take their own money and give it to the defendant corporation, which has at least been guilty of culpable negligence in paying $500 on land that it had never bought? We do not think *Bahnsen v. Clemmons,* 79 N. C., 556, cited by the learned counsel of defendants, sustains the defendants' right to recover back this money. The argument in that case we think tends to sustain the views we have expressed.

There are some other exceptions taken by the plaintiffs, which have been examined and can not be sustained, or do not apply to the matters involved in this appeal.

We are therefore of the opinion that the plaintiffs can not recover, and that there is no error in the judgment as to the plaintiffs' right of action.

We are also of the opinion that the defendant is not entitled to recover on its counterclaim, and there is error in the judgment of the court as to that.

The judgment is, therefore, affirmed as to the plaintiffs' cause of action, and reversed so far as it gives the defendants judgment on the counterclaim. Let this be certified to the court below that proceedings may be there had in accordance with this opinion.

The costs of this Court will be divided between the parties.

Cited: *Commissioners v. Fry,* 127 N. C., 262; *Monds v. Lumber Co.,* 131 N. C., 25.

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(712)

FRANK SMITH v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 29 May, 1900.)

Damages—Evidence—Statement of Case on Appeal.

1. In enumerating to the jury the grounds for damages to the plaintiff, none should be stated unless supported by evidence.
2. Where there is uncertainty apparent on the face of the statement on appeal as to facts in evidence, a new trial upon the whole case will be awarded and not confined simply to the issue as to damages.

ACTION to recover damages for personal injury sustained in obeying orders by the plaintiff, an employee of the defendant company, tried before *Adams, J.,* at June Special Term, 1898, of SAMPSON.

The allegation of the plaintiff is that while he and a fellow workman were engaged in cutting a "brake-beam" by "blocking," which was the usual and safe way, they were suddenly commanded by the foreman to desist from that mode, and to cut and prepare said "brake-beam" by "chipping," which was an unnecessary and dangerous method. They obeyed at once, but immediately upon adopting the method required, a slug or chip severed by the cold chisel and hammer was hurled with great force into his right eye, rendering it useless and occasioning him great pain. There was a verdict for the plaintiff and judgment for $3,000.

Defendant excepted and appealed.

The grounds of exception are stated in the opinion.

Armistead Jones, Womack & Hayes, and E. W. and J. D. Kerr and F. R. Cooper for plaintiff.

Junius Davis and H. L. Stevens for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages against the defendant company for a personal (713) injury sustained by the plaintiff while in the performance of work for the defendant, which the plaintiff alleges was dangerous, and the character of which was unknown to him at the time he sustained the injury.

On the issue of damages his Honor instructed the jury that if the plaintiff was entitled to recover at all, he was entitled to recover such damages as would compensate him for the loss of his time, for the money paid out by him for medical attention, for the physical pain he had suffered, for the mental anguish he had endured, and for the deterioration in his labor as a carpenter.

We have carefully read, over and again, every line of the evidence, and there is not a word in reference to the time lost by the plaintiff, nor of any money paid out by him for any medical attendance, nor of any mental anguish endured by him. There was therefore error in that instruction, for which there must be a new trial.

We would restrict this new trial to the issue as to the damages the plaintiff is entitled to recover, but for the fact that we have grave doubts as to whether the case on appeal is the real case as it was tried. When this case was first called, a letter was read by the counsel of the defendant from his Honor, *Judge Adams,* who tried the case below, in which it was stated that a part of the testimony of the plaintiff, to wit, "Since my injury, I have heard Nelms say it (the work) was dangerous, and he said he had told the officers of the company that it was dangerous. Nelms went to my boarding house after I was hurt, and he said during

that visit that he told the company it was dangerous at the time they gave him the orders to change the work," ought not to have been embraced in the case on appeal. His Honor further wrote that his
(714) notes did not show such testimony, and that he had no recollection of the same. His language was, "I have no recollection of this evidence, and am confident the witness did not so testify, and did not intend to include it in the case on appeal." A *certiorari* was granted by this Court, and the cause is now here upon the statement of the case made up by *Judge Adams* in response to the *certiorari,* with the same testimony of Smith, the plaintiff, included. The certificate of *Judge Adams* is in the following words: "After the foregoing case was settled, as above shown, and upon affidavit having been filed with me, I was of the opinion that there had been a mistake made with reference to the testimony of Frank Smith. Since that time I have carefully gone over the notes of the testimony, and after considering the numerous affidavits on both sides as to what the witness swore to, and after hearing argument on both sides, I now certify the foregoing as a correct statement of the case on appeal." If this was the only matter which the defendant had a right to complain of, it might not be sufficient to warrant the Court in sending the matter back for a new trial. But as the case is to be tried again because of the error, as we have seen, in the instruction which was given to the jury on the question of damages, we are decidedly of the opinion that the new trial should not be restricted to the trial of the issue on damages. Of course we intend no reflection upon his Honor, *Judge Adams;* but the whole matter shows that his own recollection of the testimony was not like that of the various persons who made affidavits in reference to the matter, and that he acted because of the effect produced on his mind by the number of the affidavits and the positiveness of their statements and the argument of counsel of the defendant. He did not state that his recollection had been refreshed or that his notes contained the testimony. He was in doubt.

New trial.

Cited: Wilkie v. R. R., 128 N. C., 114; *Bryan v. R. R.,* 134 N. C., 539; *Worley v. Logging Co.,* 157 N. C., 498.

(715)

M. O. JAMES ET AL. v. E. S. WITHERS ET AL.

(Decided 29 May, 1900.)

Claims against Dead Man's Estate—Taxes—Post Mortem Analysis Ordered by the County—Sale of Land by Trustee, Pendente Lite—Purchaser—Heirs at Law.

1. Taxes assessed against a decedent in his lifetime is a valid debt against administrator.
2. A claim by the county to be reimbursed for a *post mortem* analysis of decedent's stomach, made under contract with a portion of the heirs, is no valid charge against the estate, real or personal.
3. A sale of land made by a trustee in deed of trust after the debt secured has been arranged between trustor and the heirs of decedent, and the note of the trustor surrendered to him by the heirs, and they restored to possession, especially when the sale has been made *pendente lite* in an action to enjoin such sale, is not valid and conveys no title.
4. Such purchaser can not look to the estate for reimbursement of the purchase money, and he is liable for rents and *mesne* profits, and the trustee is entitled to no commissions.
5. The plaintiffs, heirs at law of decedent C. W. James, have the right to pay off the indebtedness of the estate, and to have the deed of trust canceled, and thereby become the sole owner in fee of the land—the proper costs and charge of administration being also paid, by a day named, and thus obviate the sale by the administrator.

CLARK, J., dissenting.

ACTION to enjoin the sale of land by the trustee named in a deed of trust, on the ground that there was no necessity for the sale, as the debt secured had been adjusted, heard before *Shaw, J.*, at Fall Term, 1899, of STOKES.

From the decree directing a sale by the trustee, E. S. Withers, defendant, the plaintiffs appealed.

The case is one of some complexity, but is fully elucidated in the opinions rendered now and at February Term, 1894, reported (716) in 114 N. C., 474.

W. W. King and Glenn & Manly for plaintiffs.
No counsel contra.

MONTGOMERY, J. C. W. James, the plaintiff's ancestor, on 20 July, 1892, conveyed a tract of land and certain personal property to James L. Grogan at the price of $2,350, and the purchaser and his wife executed a deed of trust upon the property to secure the notes which were

given by Grogan for the purchase money. After the death of the grantor, Grogan conveyed his equity of redemption, his wife joining in the deed, in the tract of land to the heirs at law—without naming them —of the grantor, James. W. F. Campbell, the public administrator of Stokes County, qualified as administrator of C. W. James, and requested E. S. Withers, the trustee (defendant), to sell the land and pay the proceeds to him, to be constituted assets for the payment of the debts of the intestate. The sale of the land was advertised by the trustee, and then this action was commenced to enjoin the trustee from making a sale of the land, to have the deed of trust canceled, and for such other and further relief as they might be entitled to. The injunction was granted and an appeal taken by defendant from the order. This Court, on hearing the appeal, reversed the order of the court below on the ground that it was improvidently made, because no undertaking was required on the part of the plaintiffs. The plaintiffs were allowed to apply again for an injunction, to be granted upon the filing of an undertaking on their part.

(717) During the pendency of the appeal, however, the trustee had sold the land, the defendant J. Walter Neal having been the purchaser.

In the opinion of the Court on the first appeal it was suggested that when all proper parties should have been made and the pleadings filed, if it should appear necessary, then there should be a reference to ascertain whether there were any debts of the intestate, and the amount, if any, and the sum which might become due for charges of administration. When all this should have been done, if it should appear to be to the interest of all parties concerned, a decree would be proper, giving to the plaintiffs a day before which they would be allowed to pay the ascertained debts and charges of administration, and upon payment of the same, a decree might be made for the cancellation of the deed of trust, and for partition of property among the owners. It was further suggested that if there should be no debts of the estate, the plaintiffs being entitled to the proceeds of the sale as distributees, and being also the owners of the equity of redemption, there should be a judgment directing a cancellation of the deed of trust upon the payment of the charges of administration. In deference to these suggestions all the heirs at law of C. W. James were made parties plaintiff, and the administrator and J. W. Neal, and the board of commissioners of Stokes County were made parties defendant. At August Term, 1897, of the Superior Court, the sale by the trustee to Neal was set aside and a reference ordered. The referee was instructed to find the facts and his conclusions of law thereon, and report the same to the Superior Court.

The defendants appealed from that part of the judgment which decreed that the sale from the trustee to Neal should be set aside.

At September Term, 1897, of this Court the judgment of the court below was affirmed.

The referee made a report of the proceedings had before him as referee, to the Superior Court, and exceptions were filed on (718) both sides. He reported that the amount paid by Neal as the price of the land was $360; that the trustee retained $53 thereof for his charges and commissions in making the sale, and paid over to the administrator the balance, $307; that the administrator disbursed all but $9.55 of the amount, except the sum of $60, which he paid into the clerk's office for the plaintiffs—the heirs of Calvin and Alexander James—and the sum of $17.35 which he retained as commissions; that the disbursements made by the administrator were the sum of $12.30 for taxes assessed against C. W. James before his death; $30 attorney's fee; $168 to defendant board of commissioners, and the balance incidental cost of administration; and that most of the fund deposited in the clerk's office had been drawn out by the heirs at law of Calvin and Alexander James.

It appeared further from the referee's report that the amount of $168, which was paid by the administrator to the board of commissioners, was a part of a claim which said board demanded by virtue of a contract and agreement made on the 5th of September, 1892, by certain of the plaintiffs, M. O. James, R. A. Neal, William James, Pleasant James and Faucett Odell. The contract was made because of a belief, on the part of the plaintiffs named, that the death of C. W. James was caused by poison having been feloniously administered to him, and a desire on their part to have the stomach of the deceased examined by a chemist, the plaintiffs being unable to furnish the money for that purpose. The agreement was in these words: "We, the undersigned heirs at law of C. W. James, deceased, do hereby agree and consent that all expenses incurred by the county of Stokes in having the stomach of the said C. W. James analyzed, including the charge made by the chemist who analyzes the same, may be paid by the personal (719) representative and administrator of said James, deceased, out of our distributive share of his estate, and that a receipt of said administrator for said expenses may be and shall be a valid voucher for him in the administration of said estate."

Upon his finding of fact, the referee concluded as matter of law:

1. That the defendants were bound by the judgment rendered at Spring Term, 1897, setting aside the sale, that judgment having been affirmed by the Supreme Court.

2. That the tax assessed in 1892 against C. W. James was a valid claim upon the estate of C. W. James.

3. That the $60, which was paid into the clerk's office by the administrator for the heirs at law of Calvin and Alexander James should be refunded to the purchaser of the land, Neal, and unless refunded by the parties who received the same, Neal should be subrogated to their rights.

4. That the board of commissioners should return to the purchaser, Neal, the $168, paid to them by the administrator, the referee holding that the contract made by a part of the plaintiffs with the board of commissioners did not constitute a debt against the estate of C. W. James.

The referee further concluded as a matter of law that in case the costs of administration, the debt (taxes), $12.30, and the $60, paid into the clerk's office, should not be paid within a reasonable time, the administrator should have the right to enforce the sale of the land by the trustee—the net proceeds to be used by the administrator toward the payment of the costs of administration, including his commissions; the debt of $12.30, and the balance to be paid to the heirs at law (the plaintiffs) according to their respective rights; and in making this distribution of the surplus the administrator should pay to J. Walter Neal from the interest of the heirs at law of Calvin and Alexander James (720) the $60, which was paid into the clerk's office for them. The exceptions filed to the report were heard at Spring Term, 1899, of the Superior Court, and the referee's conclusions of law were modified. It was adjudged by the Court that the defendant Neal should be reimbursed to the extent of the whole of the purchase money, with interest from the day of sale; that the county commissioners should be paid the amount expended by them, to wit, $323.55, under the contract with certain of the plaintiffs; that the heirs at law, plaintiffs, pay to defendant Neal $232; that the trustee, Withers, pay to Neal the sum of $53; that the administrator, Campbell, pay to Neal $15 (overcharge in commission); that the clerk of the court pay to Neal $60, originally paid into his office by the administrator, less the amounts paid out by him to the heirs at law of Calvin and Alexander James; that the heirs of Calvin and Alexander James pay to Neal the amount drawn out of the clerk's office by them respectively; that the plaintiffs who signed the agreement with the county commissioners pay to the county commissioners the amounts expended under said contract, less $168, which had been paid to them by the administrator.

It was further ordered that the clerk of the court ascertain and report to the court at its next term the amount of rental value paid for the land since the day of sale, June 30, 1894, and by whom received, the amount of taxes paid since June 30, 1894, and by whom paid, and the

amount received from the clerk of the court by the plaintiffs or any of them with their names, and the value of any timber sold from the land, and by whom, and what improvements, if any, have been put upon the land.

Exceptions were made by the plaintiffs to the order and judgment of the court, and noted, and appeal entered. At the next (721) term of the Superior Court the report was made by the clerk, and confirmed, no exceptions having been made thereto.

It appeared from the report of the clerk that J. Walter Neal was chargeable with $169.17 received from rents, and it was ordered by the court that that amount be credited and deducted from the amount due Neal in the order made at the last term of the court. It was further ordered that the plaintiffs pay the amounts as directed in the order made at the last term, Spring Term, 1899, to the defendant Neal, and to the county commissioners of Stokes County, and the $10 allowed at the present term to the clerk of the court, on or before the first day of December, 1899, and upon their failure to do so, it was ordered that Withers, trustee, should sell the land described in the deed, and report to the next term of court.

It was further ordered that J. C. Flinn pay over to defendant Neal the $15 in his hands for cross-ties, and that Neal be chargeable with the same. The plaintiffs then perfected their appeal under their exceptions filed at Spring Term, 1899, of the Superior Court.

The report of E. B. Jones, referee, in this case sets out the facts very clearly, and the referee held, properly as we think, that the only debt which was proved against the estate of the decedent, James, was the one for the taxes assessed against the decedent during his lifetime. He properly held that the contract between certain of the plaintiffs and the county commissioners was not a debt against the decedent. As we shall hereafter see, the referee made an error in his conclusion of law that Neal should be reimbursed to the extent of the amount which he paid to the trustee for the purchase of the land.

We think there was error in the order and judgment made at Spring Term, 1899, of the Superior Court. Whether or not (722) there was error in the judgment entered in the cause at Spring Term, 1897, of the Superior Court, is not the subject of review. The sale of the land by the trustee to Neal was set aside peremptorily, and for reasons set out in the judgment. That judgment was affirmed by this Court at September Term, 1897 (121 N. C., 692). There has been no application to rehear the case on the part of the defendants. For reasons satisfactory to ourselves, we do not think it incumbent on us to open the past record of this case. The defendant Neal then bought nothing at the trustee's sale. Such a case is not usual, but sometimes

such investments are made. He has lost the money which he paid to the trustee, and we can not affirm any judgment of the court below which orders that money to be paid back to him by any person into whose hands it may have come.

There was also error in the judgment of the Superior Court at Spring Term, 1899, in which it was ordered that the plaintiffs should pay to the defendant board of commissioners any part of the amount which the board claimed by virtue of their contract with certain named ones of the plaintiffs. As the matter stood after the execution of the deed by Grogan and wife, which conveyed the equity of redemption in the land to the heirs at law of C. W. James (the heirs at law being the plaintiffs in this action), the plaintiffs had the right to pay off the indebtedness of the estate, and have the deed of trust canceled, and thereby become the sole owners in fee of the land.

The contract by certain ones of the plaintiffs with the defendant board of commissioners constituted no lien upon the land, and was no equitable assignment of the interest of these plaintiffs in it to the commissioners. It was a simple contract, and while good faith has
(723) not been kept by those of the plaintiffs who executed that contract with the commissioners, yet we can not subject the land by a judicial order under that contract to the payment of that obligation.

Entertaining the opinion that we do of this case, judgment should be entered below in favor of the plaintiffs against the defendant Neal for the amount which he has received, as set forth in the report made by the clerk, and that the plaintiffs be allowed a reasonable time in which to pay the debt of $12.30 for taxes, and the proper costs and charges of administration, and that, upon their failure to do so, a sale of the land may be ordered by the court in order that the same may be paid—the surplus to be paid to the plaintiffs. If the plaintiffs should pay within the day named by the court the debt of $12.30 taxes, and the proper costs and charges of administration, then the deed of trust should be ordered canceled of record, and the plaintiffs, if they so desire, have the land divided or sold for partition. The case is remanded for judgment according to this opinion.

Reversed.

CLARK, J., dissenting: On 5 September, 1892, the plaintiffs, M. C. James, R. A. Neal, William James, Pleasant James, and Faucett Odell, made a written contract with the county commissioners that if they would cause the stomach of C. W. James to be examined, all the expenses thereof should "be paid by the personal representatives and administrator of said James out of our distributive share of his estate, and that the receipt of said administrator for said expenses shall be a

valid voucher for him in the administration of said estate." At that time the only property belonging to the estate of the deceased was a bond for $2,250, secured by a trust deed on realty. The parties above named were then the distributees of C. W. James, and the aforesaid contract was upon good consideration, and amounted to an (724) equitable assignment *pro tanto* of their interest in the estate. It was not a mere order upon the administrator, but a binding contract that the receipt for the amount so paid should be a valid voucher in the settlement of the estate.

Subsequently, the said plaintiffs arranged with the obligor of the bond and mortgagor to surrender the bond, and take over the realty in its stead. By this arrangement, the only asset of the estate was now realty, and the plaintiffs became heirs at law instead of distributees; but this act of theirs can not in equity have the effect of destroying the rights of third parties. The commissioners have no lien on the realty, but they were *pro tanto* assignees of the personal estate; they did not assent to its being changed into realty, and, to the extent of their claim the fund remains stamped with the nature of personalty. The realty should be reconverted into personalty by a sale of enough of the plaintiffs' shares to pay the expenses, which on the faith of the agreement of the plaintiffs the commissioners expended at the instance and request of the plaintiffs. The county should not be "jockeyed" by the plaintiffs out of that money thus expended.

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(725)

JOHN C. McMILLAN v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 29 May, 1900.)

Damage by Fire From Locomotive—Motion to Nonsuit—Evidence of Plaintiff, How to be Considered—Fire Originating Off the Right of Way.

1. On motion to nonsuit, or prayer for instruction that there was no evidence against the defendant, or that upon the whole evidence the jury should find in favor of the defendant, whatever the evidence tends to prove must be taken by the Court as proved.
2. If the fire originated off the right of way of the defendant, then the company is not liable even if it was caused by sparks emitted from the engine of the defendant.

ACTION for damages for injury done to plaintiff's land by fire originating on defendant's right of way from sparks emitted from the engine, tried before *Robinson, J.*, at December Term, 1898, of DUPLIN.

At the close of plaintiff's evidence, the defendant moved to nonsuit him, on the ground that he had failed to make out a case entitling him to recover. Motion refused. Defendant excepted. There was a verdict for plaintiff, and judgment. Defendant appealed. The evidence is stated, substantially, in the opinion.

Allen & Dortch for plaintiff.
Junius Davis and H. L. Stevens for defendant.

FURCHES, J. This is an action against the defendant upon the allegation that defendant negligently set fire to defendant's lands, by reason of which plaintiff was damaged.

Upon the close of plaintiff's evidence defendant moved to non-
(726) suit plaintiff upon the ground that he had not made out a case entitling him to recover. Chapter 109, Laws 1897. As this action was tried before the passage of chapter 131, Laws 1899, the defendant is entitled to have the case reviewed upon its status at the time this motion was made. *Purnell v. R. R.*, 122 N. C., 832; *Wood v. Bartholomew*, 122 N. C., 177. We have, therefore, examined the plaintiff's evidence for the purpose of ascertaining whether defendant's motion should have been allowed. We find that Lewis Bryant testified that when he saw the fire in the morning it was on the right of way. He also testified that the right of way was grassy. Lewis Murphy testified that "we had not burnt off the right of way north of Bear Ford that year." T. C. Carter testified, "it (the fire) had burned to a pond north of the culvert. Beyond the pond the right of way was covered with brown grass. . . . I saw continuous signs of fire from above the culvert on and across plaintiff's land." While it is not negligence for a railroad to run its trains over its road well managed and well equipped, as it seems the defendant's train was, yet we know that no spark-arrester can be so constructed as to entirely prevent the emission of sparks, without destroying the efficiency of the engine; and while it was not negligent in the defendant to run such a train over its road, the fact that it had recently passed over the road, and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire. The negligence complained of is not that of a defective engine or improper conduct on the part of the defendant in running its train, but in allowing the right of way to become foul with dead broom grass and other combustible matter, which caused its train to start the fire that injured the plaintiff.

The evidence against the defendant is circumstantial it is true,
(727) but so it often is in determining matters of the greatest consequences, criminal and civil. So in this case we have the undis-

puted facts that the defendant had a railroad track and right of way; that its train had recently passed over this track, and that the fire was there that damaged the plaintiff. And in addition to this we have the evidence stated above, that the right of way was foul—that is, covered with dead broom grass, and that the fire when first seen (by some of the witnesses) was on the right of way; and we have the fact—known from common knowledge—that no spark arrester, no matter how well constructed, will entirely prevent the emission of sparks.

Whether this evidence is considered upon the defendant's motion to nonsuit the plaintiff, or upon defendant's prayer for an instruction from the court to the jury that there was no evidence, or that upon the whole evidence the jury should find the second issue for the defendant, the motion or prayer for instruction can not be sustained. It is said in *Purnell v. R. R., supra,* that in a motion to nonsuit the plaintiff upon the evidence, whatever the evidence tends to prove, must be taken by the court as proved. The same rule obtains in a prayer for instruction to the jury that there is no evidence. Upon this rule we are of the opinion that defendant's motion to nonsuit, and its prayer for instruction that there is no evidence, were properly refused.

That defendant's exception to the remark of the court in refusing its motion to nonsuit the plaintiff, "in the hearing of the jury," can not be sustained. This remark was not made to the jury but in the hearing of the jury, and as this fact (that it was not made to the jury) was called specially to our attention by plaintiff in the argument of the case, we would not have it understood that because we do not sustain defendant's exception we mean to say that remarks made by the judge in presence of the jury may not be the proper ground of exception. (728) It might have been better not to have made this remark, but such things often occur in the trial of a cause by mere inadvertence, and do no harm. But this remark seems to have been made upon defendant's motion to nonsuit the plaintiff upon the ground that there *was no evidence* against the defendant. So we see that defendant's motion called upon the court to decide this very question. The fact that the court refused the defendant's motion was in substance to say that in the opinion of the court there was evidence. And this brings the question to this: Was the remark of the judge correct as a matter of law? and we have already discussed this question, and agree with the judge that there was some evidence.

The defendant asked, and the court gave, the following instructions:

"1. The burden is upon the plaintiff to prove to you, by a preponderance of the evidence, that the fire which burned the plaintiff's land was set out by the engine of the defendant; and if the evidence of the plaintiff fails to satisfy the jury that such was the fact, then plaintiff

can not recover, and the jury will find all the issues in favor of defendant.

"2. If the jury shall believe that the fire that burned plaintiff's land was originated by tramps mentioned in defendant's evidence, then the defendant is not guilty of any negligence in regard to the fire, and plaintiff can not recover.

"3. If the fire originated off the right of way of the defendant, then the defendant is not liable, even if it was caused by sparks emitted from the engine of the defendant."

In addition to the above, his Honor gave the following charge:

"It is admitted by the plaintiff that the engine was equipped with a proper spark arrester, so that the only claim of negligence is (729) upon the ground that the defendant permitted rubbish or other material liable to become ignited to accumulate on its right of way. The burden rests, therefore, on the plaintiff to satisfy you by the greater weight of evidence that the defendant company permitted rubbish, grass or combustible matter to accumulate and remain on its right of way so near the track as to become ignited, and did become ignited, from sparks emitted from the engine and spread over the right of way to the lands of the plaintiff. If the plaintiff has failed to satisfy you of this, you will respond to the second issue, 'No,' and will not consider the issue as to damages. You must first be satisfied that the fire was occasioned by sparks emitted from the engine, and also that the sparks fell on the right of way and ignited rubbish or combustible matter that had accumulated on the right of way. If the sparks fell from the engine beyond the right of way, the defendant would not be liable, and you will respond 'No' to the second issue."

In our opinion, the prayers of the defendant given by the court and the charge of the court in addition thereto cover all the material facts developed by the evidence on the trial of this case and contain a fair and correct exposition of the law. The other exceptions of the defendant are only evidentiary or otherwise untenable.

That the defendant offered much evidence tending to show that the fire was not set out by its train, but was the work of two tramps who stayed in the neighborhood the night before the fire, must be admitted. But this seems to us to have been fairly submitted to the jury and they have found against that view of the evidence. We can not review their finding.

Affirmed.

Cited: Williams v. R. R., 140 N. C., 626; *Whitehurst v. R. R.*, 146 N. C., 592; *Deppe v. R. R.*, 152 N. C., 81; *Houston v. Traction Co.*, 155 N. C., 6; *Ashford v. Pittman*, 160 N. C., 47.

(730)

J. H. GLENN ET AL. v. W. B. WRAY, SHERIFF, ET AL.

(Decided 29 May, 1900.)

Bonds of Stoneville, Rockingham County, N. C.—Roanoke and Southern Railway Co., Laws 1887, ch. 87—Claybrook v. Commissioners, 117 N. C., 456—Constitutional Mode of Enactment, Article II, sec. 14—Res Non Judicata—Estoppel—Amendment.

1. The fact that an action to impeach the validity of the bonds in question on the ground of irregularity in the election was brought and failed, is no estoppel to a second action to impeach their validity on the ground that the act authorizing an election was not passed in the mode required by the Constitution.
2. Neither would the payment of interest preclude the inquiry as to the validity of the bonds.
3. It was competent for the Legislature by a provision in a railroad charter to authorize the town to hold an election upon the issue of bonds, without in terms amending the town charter for that purpose.
4. The Constitution, Art. II, sec. 14, renders invalid any act to raise money, or create a debt, or lay a tax by the State, or to authorize any county, city or town to do so, unless the bill shall have passed three several readings on three several days in each House, and unless the yeas and nays on the second and third readings shall have been entered on the Journals.
5. If an amendment in a material matter is made to the bill, the amended bill should be read over again three times in each House, with the yea and nay vote on the second and third readings entered on the Journals.
6. The Constitution requires in such cases a majority of the registered voters, and not simply a majority of those voting.

ACTION in the nature of a creditors' bill to enjoin the payment of town bonds of Stoneville in aid of Roanoke and Southern Railway, issued under the act of 1887, ch. 87, heard by consent before *Starbuck, J.*, at chambers, 4 August, 1899, in case pending in ROCKINGHAM, Fall Term, 1899. The application was placed upon the ground that (731) the act authorizing the election was not passed in the mode required by the Constitution. His Honor ruled otherwise, and refused the injunction. Plaintiffs excepted and appealed. The opinion reviews the facts.

Louis M. Swink for plaintiffs.
Watson, Buxton & Watson for defendants.

CLARK, J. The plaintiffs are not estopped by the decision in *Claybrook v. Commissioners,* 117 N. C., 456, which was an action to im-

peach the validity of the bonds now in question, but upon the ground of irregularity in the election, and that alone. The decision therein is conclusive that the bonds are not invalid on that ground. The present action is to attack their validity upon the entirely different ground that the act authorizing an election was not passed in the mode required by the Constitution. This was not within the scope of the litigation in *Claybrook v. Commissioners,* and has not been passed upon. Hence it is not *res judicata. Tyler v. Capehart,* 125 N. C., 64, which cites *Williams v. Clouse,* 91 N. C., 327; *Wagon Co. v. Byrd,* 119 N. C., 460. A case exactly in point is *Bank v. Commissioners,* 116 N. C., 339. In that case the indebtedness was first before this Court upon an allegation of invalidity because the bonds were not authorized by the town charter of Oxford. The Court sustained the objection, but found error because the bonds recited on their face that they were authorized by the act chartering a railroad company, in whose aid the bonds had been voted and issued. There had been no allegation in the pleadings as to the latter act, and its validity had not been passed upon. When the case went back, the defense was set up that the latter act was invalid to au-
(732) thorize the issue of bonds because not passed in the mode required by the Constitution, Article II, sec. 14, and on appeal that contention was sustained. *Bank v. Commissioners,* 119 N. C., 214. Of course the payment of interest by the commissioners would be no estoppel. *Commissioners v. Payne,* 123 N. C., 432, and cases cited at p. 489.

The charter of the town of Stoneville did not authorize the issue of the bonds in this case, but it was competent for the Legislature, by a provision in the charter of a railroad company, to authorize the town to hold an election to authorize such issue, without in terms amending the charter of the town. *Jones v. Commissioners,* 107 N. C., 265; *Wood v. Oxford,* 97 N. C., 227; *Bank v. Commissioners,* 116 N. C., 339, 363.

The Constitution, Article II, sec. 14, renders invalid any act to raise money or create a debt or lay a tax by the State, or to authorize any county, city or town to do so, unless the bill shall have passed three several readings on three several days in each House, and unless the yeas and nays on the second and third readings shall have been entered on the Journals. This is a constitutional requirement, and unless strictly complied with, the attempted act of the Legislature confers no authority, and is without any effect whatever. It is a restriction upon the exercise of legislative power, which the sovereign power has written in the face of the organic instrument which created the Legislature. The creature can not transcend the limits placed upon it by its creator. *Bank v. Commissioners,* 119 N. C., 214; *Commissioners v. Snuggs,* 121

N. C., 394; *Mayo v. Commissioners,* 122 N. C., 5; *Rodman v. Washington, ibid.,* 39; *Charlotte v. Sheppard, ibid.,* 602; *Commissioners v. Call,* 123 N. C., 308; *McGuire v. Williams, ibid.,* 349; *Commissioners v. Payne, ibid.,* 432; *Smathers v. Commissioners,* 125 N. C., 480.

It therefore only remains to consider whether the act authorizing the the election, upon the issue of those bonds, was passed in the manner required by the Constitution. It appears from the Journals (733) that the bill passed its three several readings in each House, on three several days, and that the yeas and nays were duly entered on the Journals on the second and third readings in each House. On the third reading in the Senate, the bill was amended by inserting the words "a majority of," and as thus amended, the bill passed its third reading, and being sent back to the House of Representatives, the amendment was concurred in, and the bill was duly enrolled and ratified.

If the amendment were in a material matter, it would be necessary that the amended bill should be read over again three times in each House, with the yea and nay vote on the second and third readings entered on the Journals. It is the bill in its final shape, not in another and different form, which requires these preliminaries to its validity. It would be a clear evasion of the constitutional guarantees and of the restriction upon legislative power, if, after a bill has passed one House and two readings in the other in the required manner, it should then be amended into something else; for, in that case, the bill as enacted into law will have had only one reading in one House in the constitutional mode and a concurrence in the other, without a yea and nay vote recorded on the Journals. In ordinary legislation, material amendments may be made even on the last reading in the second House, and when concurred in by the other House the bill is law. In such cases, the ratification is conclusive of the passage of the act. But it is otherwise as to legislation which the Legislature is restricted from passing except in a manner specifically pointed out and prescribed. In the latter case, any substantial material amendment requires the passage of the amended bill in the prescribed manner, *de novo. Norman v. Kentucky,* 18 L. R. A., 557. A statute may be ordinary legislation, not (734) coming within the restrictions of the Constitution, Article II, sec. 14, except as to one or more sections. *Riggsbee v. Town of Durham,* 94 N. C., 800. Here the chapter in question (ch. 87, Laws 1887), is not impeached except as to section 17, and that section reads: "It shall be lawful for any county, township, city or town, through or near which the said road may run, to subscribe for and hold stock in said company or in any section thereof, in case any section be built alone, whenever such subscription shall be authorized under the provisions of this act by a *majority of all the qualified voters* of such county, township, city or

town." The words in italics are those added by the amendment made on the third reading in the Senate, and afterwards concurred in by the House. The amendment was immaterial, for it only placed in express words in the section that which was its meaning, if the words in italics had not been inserted. We take it, that the original requirement "by all the qualified voters," meant simply "by the qualified voters" or "by the voters," and that has always been held to mean "by a majority of the qualified voters," *i. e.*, that a majority merely of those voting would not be sufficient in cases of this kind, but that the Constitution requires a majority of the registered voters. *Norment v. Charlotte,* 85 N. C., 387; *Duke v. Brown,* 96 N. C., 127; *Wood v. Oxford,* 97 N. C., 227; *Railroad v. Commissioners,* 109 N. C., 159.

We do not think that the bill before amendment meant to require a unanimous vote, but merely a majority of all the qualified voters, instead of a majority only of those voting.

The restraining order was therefore properly dissolved.

Affirmed.

Cited: *Cabe v. Vanhook,* 127 N. C., 426; *Commissioners v. DeRosset,* 129 N. C., 280; *McCall v. Zachary,* 131 N. C., 469; *Debnam v. Chitty, ibid.,* 678, 680; *Brown v. Stewart,* 134 N. C., 361, 362; *McCall v. Webb,* 135 N. C., 367; *Commissioners v. Stafford,* 138 N. C., 455; *Bank v. Lacy,* 151 N. C., 5; *Russell v. Troy,* 159 N. C., 368; *Pritchard v. Commissioners, ibid.,* 637.

(735)

J. S. BRADLEY, ADMINISTRATOR OF SARAH J. KANIPE, v. OHIO RIVER AND CHARLESTON RAILWAY CO. ET AL.

(Decided 29 May, 1900.)

Negligence—Public Highway Crossing—Evidence, Res Gestæ—Corroboratory — Issues — Prayers for Instruction — Charge — "Flying Switch" and "Kicking Cars"—Hack Driver and Passenger—Sifting Exceptions.

1. There is evidence of negligence on the part of the defendant in backing its cars on the crossing, at a depot, without giving timely signals and without keeping a reasonable lookout, and in "kicking" its cars back over the crossing without reasonable and proper means to stop the train in case of danger.

2. A crossing which the public have been habitually permitted to use is treated as a public highway crossing, and it is competent to prove the custom of the defendant and the public in using it.

3. It was competent to show as part of the *res gestæ* that the hack and the body of another lady injured at the same time were pushed back by the train, as tending to show that it was a detached train and only stopped by this obstruction.

4. A party may corroborate his witness by showing that he had theretofore made similar statements to his testimony on the stand, but he may not go further to show other statements made by the witness not testified to by him on the stand, as that would be mere hearsay.

5. The framing of issues is largely left to the sound discretion of the trial judge; when the issues submitted arise on the pleadings, and every phase of the contention of the parties can be presented thereunder, they are not subject to review.

6. Under our system of submitting issues, a general prayer that "the plaintiff can not recover" should never be granted. Upon the issues found, the court adjudges as a matter of law whether the plaintiff is entitled to judgment. A judge is not required to charge in the exact language of a proper prayer, so he give the substance in his charge.

7. The definition given by his Honor of negligence—"the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others"—is justified by precedent.

8. "Flying Switch" and "Kicking Cars" are terms in railroad nomenclature denoting nearly the same thing. In making "flying switch," the engine may be in front, and upon being disconnected the rear cars may be run upon another track while still rolling. In "kicking cars," the disconnected cars are given their impetus by a backward motion of the engine, which does not follow them. The same principle of law applies—it is gross negligence to kick a car across a highway unattended.

9. A passenger is not responsible for conduct of hack driver unless he assumes to direct and control him.

10. While counsel are the sole judges of what exceptions they shall think proper to bring up for review, it is suggested that fifty-four "fatal errors" in any one trial is rather an unnecessary number, and a sifting process is recommended.

FAIRCLOTH, C. J., dissents.

ACTION for damages for occasioning through negligence the death of intestate, Mrs. Sarah J. Kanipe, tried before *Allen, J.*, at August Term, 1899, of MCDOWELL, upon these issues:

1. Was the intestate negligently killed by the defendant railway company in failing to give timely signals before backing its car on crossing? Answer: "Yes."

2. Was intestate negligently killed by defendant railroad company by backing its car on crossing without keeping reasonable and proper lookout? Answer: "Yes."

3. Was intestate of plaintiff negligently killed by the defendant railway company kicking its train over the crossing described, without taking reasonable and proper means to stop its train in case of danger? Answer: "Yes."

4. Did the intestate, by her own negligence contribute to her death? Answer: "No."

5. What damage is plaintiff entitled to recover? Answer: "$6,000."

There was judgment in accordance with the verdict, and (737) defendant appealed.

The evidence, substantially, and the exceptions appear in the opinion.

E. J. Justice and S. J. Ervin for plaintiff.

P. J. Sinclair and Locke Craig for defendants.

CLARK, J. The plaintiff's intestate, Mrs. Kanipe, was a passenger on the defendant's road, who had just gotten off the train at Henrietta Station. She took passage on the hack of one Higgins to go to Henrietta Mills. It was necessary to cross the railroad track a few yards in rear of the train from which she had just alighted. The train backed, but was concealed from view by a line of box cars on a side track, and the backing train ran over the hack, killing Mrs. Kanipe. The jury found that the intestate was killed by the negligence of the defendant in backing its cars on the crossing, without giving timely signals and without keeping a reasonable lookout, and "kicking" its cars back over the crossing without reasonable and proper means to stop the train in case of danger; that the intestate was not guilty of contributory negligence, and assessed the amount of damages. Appeal by defendant.

Exceptions 1, 2, 3, 4, 5, 7, and 10 to evidence, and 2, 3, and 5 to the charge, present the question whether it is competent to prove the custom of the defendant as to where it stopped its train and discharged its passengers, and the custom of the defendant and the public in using the crossing where the plaintiff's intestate was killed. This was competent, both upon the question of negligence of the defendant in backing its train, as to the notice to be given, and whether the intestate was guilty of contributory negligence in attempting to cross. "A crossing (738) which the public have been habitually permitted to use" is treated as a public highway crossing. *Russell v. R. R.*, 118 N. C., 1098, and cases cited. The evidence, showing that it was the custom of the company never to back its trains over this crossing after passing it, was material in determining what degree of care was required when backing, contrary to custom, and in showing that the intestate had a right to rely upon the custom of the company not to back its train (*Blackwell v. R. R.*, 111 N. C., 151), unless notice was given.

Exceptions 8 and 9 were to evidence that the conductor in charge of this train knew of the custom of hackmen crossing at this crossing after his train had passed it, and that he had notified the witness, who was

foreman of the stables employing the hackman, that hacks could pass at that crossing after the train had once cleared it, and that the latter had so notified the hackman who drove Mrs. Kanipe. The evidence was competent and pertinent.

Exceptions 6, 13, and 14, to evidence, are clearly without merit, and need no discussion.

Exceptions 11 and 12 were to the admission of evidence tending to show that the hack and the body of Miss Kanipe (who was injured at the same time) were pushed back by the train. The evidence was offered and, the judge stated, was admitted only as a part of the *res gestæ* as evidence tending to show what stopped the train, that it was detached from the engine, "kicked back," and was only stopped by this obstruction. The defendant's contention was that the train could not have been stopped so soon if the engine had been, as plaintiff alleged, detached.

Exception 15 is to the rejection of proposed testimony by the witness Horne as to statements made by one Coxe who had testified for the defendant. So far as he corroborated Coxe by showing that he had theretofore made similar statements to his testimony on the (739) stand, the testimony was competent, and was admitted by the court; but when the defendant wished to go further to show other statements made by Coxe not testified to by him on the stand, it was mere hearsay, and did not come within any exception to the rule which rejects hearsay evidence, and was properly refused.

The exceptions to the issues can not be sustained. The framing of the issues is largely left to the sound discretion of the trial judge. When the issues submitted arise on the pleadings and every phase of the contention of the parties can be presented thereunder, they are not subject to review. *Pretzfelder v. Insurance Co.*, 123 N. C., 164; *Willis v. R. R.*, 122 N. C., 905; *Williams v. Gill, ibid.*, 967.

The defendant's prayers for instructions numbered 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, and 24, so far as they were correct, were given in substance in the charge. The judge was not required to use the exact language of the prayer. See cases cited in Clark's Code (3 Ed.), p. 539.

In lieu of the 20th prayer, the court properly charged: "If you find from the evidence that this was a crossing where the public had been habitually permitted to cross and with the sanction and knowledge of the defendant, then it became the duty of the defendant, before it backed its cars on the crossing, to give signals that it intended to do so, and to give them in time for persons approaching the crossing to avoid the danger, and if the defendant failed to give any signal when it backed its cars upon the crossing, or failed to give them in time to warn a person who

was in the exercise of ordinary care, and the killing followed as a direct result, then it was a negligent act, and you should answer the first issue "Yes."

Prayers for instructions numbers 2 and 4 were that there was no evi-
(740) dence to support the allegations therein contained, and the plaintiff can not recover thereon. Under our system of issues being submitted, a general prayer that "the plaintiff can not recover," should never be granted. *Witsell v. R. R.*, 120 N. C., 557, and other cases cited in Clark's Code (3 Ed.), p. 535. Upon the issues found, the court adjudges as a matter of law whether the plaintiff shall recover judgment. Besides, in this case, the court could not tell the jury that there was no evidence to support the allegation referred to.

Prayers 17 and 18 were that the court should tell the jury that two isolated facts, if facts, would not be negligence. Possibly it would not have been error to have given these prayers, though it is the weight of authority that whether a flagman ought to have been at the crossing was a question for the jury. *R. R. v. Ives,* 144 U. S., 408. But the court is not called upon to express an opinion upon each isolated fact whether it *per se* would be negligence or not, and a failure to do so is not reversible error, when, as here, the court has placed before the jury every phase of the circumstances which the defendant contended was true, as a whole, and instructed the jury properly in regard thereto. It is not whether any single disconnected fact, taken alone, would or would not be negligence, but whether any given state of facts, which there is evidence tending to prove, would justify a certain finding upon the issue named. These two prayers leave out the important surrounding circumstances. It is as if a party were to ask the court to say that $1 is $1, that 0 is 0, and another 0 is 0, and theretofore to argue that the defendant can not possibly be indebted to the plaintiff $100 though the circumstances, taken as a whole, may show that he is entitled to that response upon an issue "whether the defendant is indebted to him, and if so, how much."

The 19th prayer could not have been given, for it assumes as a
(741) fact that Mrs. Kanipe could have seen the train, when there was contradictory evidence.

As to the 23d prayer, whether the sounding of a whistle, when the train was 50 feet away, was timely, was a question of fact for the jury, and not a matter of law.

The exception to the "charge as given" would, if intended as an exception, be untenable as "broadside," but it is doubtless stated by the appellant merely as matter of inducement to the thirteen specific exceptions to the charge, which follow. The first of these is to the definition of negligence, as "the failure to do what a reasonable and prudent per-

son would ordinarily have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others." This definition is justified by precedent, *R. R. v. Jones,* 95 U. S., 439; A. & E. Enc. (1 Ed.), 390. It was used by the judge in *Norton v. R. R.,* 122 N. C., at p. 920, though it was not there excepted to. It may be that a more scientific definition could be framed by a skillful dialectician, but we can not see that the defendant was prejudiced by the use of the one furnished by the judge.

The matter presented in exceptions 2, 3, and 7, to the charge, taken in connection with the context, is unobjectionable.

The fourth exception is as to matter which is in the defendant's tenth prayer for instruction, and as to which he has also erroneously excepted, because not given.

As to the 5th and 6th exceptions to the charge, the law requires those in charge of a moving train to keep a lookout along the track even where there is no crossing, and, if they could have saved life by proper lookout at a crossing, failure to do so is certainly negligence. *Pharr v. R. R.,* 119 N. C., 756; *Deans v. R. R.,* 107 N. C., 686; 8 A. & E. Enc. (2 Ed.), 293, notes 2 and 3.

The 8th, 9th and 12th exceptions to the charge, can not be sustained. Patterson Acc. Ry. Law, sec. 167; 2 Wood on Rail- (742) ways, 1513; 8 A. & E. Enc. (2 Ed.), 397, 398, note 2.

The matter referred to in 11th exception is a correct statement of the law. 8 A. & E. Enc. (2 Ed.), 419, 420, and notes. "Making flying switch" and "kicking cars" are terms denoting very nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In "kicking cars" the disconnected cars are given their impetus by a backward motion of the engine which does not follow them. The same principle of law applies. In *Schindler v. R. R.,* 87 Mich., 410, it is said: "It is gross negligence to kick a car across a highway unattended." *Key v. R. R.,* 65 Pa., 269; *R. R. v. Smith,* 18 L. R. A., 63; *R. R. v. Baches,* 55 Ill., 379. Here the only person who, the defendant contends, was on the train, was an 18-year-old negro, and he was not on the end of the backing train, but says he was between two cars to put on brakes.

The 13th exception to the charge is to the language: "She (Mrs. Kanipe) was not responsible for the conduct of the driver unless she assumed to direct or control him." There was no error in this. *Little v. Hackett,* 116 U. S., 366; *R. R. v. Powell,* 89 Ga., 601; *R. R. v. Cooper,* 85 Va., 939; *Bottoms v. R. R.,* 114 N. C., 699; *Crampton v. Ivie,* 124 N. C., 591. In the last-named case, two judges dissented, but not upon this point, as to which the Court was unanimous.

There are fifty-four exceptions in this case, all of which have been

carefully considered. Only errors which are material and fatal can entitle a party to a new trial, and none which the appellant does not have reasonable ground to think such should be brought to this (743) Court. There could be no necessity to show fifty-four fatal errors in any trial. Counsel, not knowing what will be the views of the Court, are the sole judges of what exceptions they shall think proper to bring up for review, but it is not necessary to bring up every exception which through abundant caution is taken on the trial. If in making up a case on appeal counsel will sift out and drop those presenting the same points already made by another exception, and those exceptions which have already been held against the appellant in other cases, and harmless errors not justifying a new trial, the number left will still be enough to occupy the time allotted for argument, and will concentrate both the argument of counsel and the attention of the Court upon the vital points which should determine the appeal. *Pretzfelder v. Insurance Co., supra.* In saying this, we are laying down no rule for counsel, who must always decide for themselves what exceptions the interest of their clients shall require them to bring up for review, but we are suggesting that a little more care and discrimination in selecting exceptions to be passed on by this Court might in many cases lighten the labors of counsel as well as of ourselves, and be conducive to the ends of justice by concentrating attention upon the really vital points of the case.

Affirmed.

Cited: Vanderbilt v. Brown, 128 N. C., 499; *Lassiter v. R. R.,* 133 N. C., 248; *Foy v. Winston,* 135 N. C., 440; *Turrentine v. Wellington,* 136 N. C., 312; *Wilson v. R. R.,* 142 N. C., 336; *Vaden v. R. R.,* 150 N. C., 702; *Credle v. R. R.,* 151 N. C., 52; *Edge v. R. R.,* 153 N. C., 217; *Farris v. R. R., ibid.,* 487; *Roberts v. Baldwin,* 155 N. C., 282; *Johnson v. R. R.,* 163 N. C., 445; *Meroney v. R. R.,* 165 N. C., 613; *Ward v. R. R.,* 167 N. C., 163.

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(744)

JOHN L. VANDYKE v. T. C. FARRIS ET AL.

(Decided 29 May, 1900.)

Ejectment—Processioning Proceeding, Act 1893, Chapter 22—No Estoppel.

Processioning proceedings, previously had between the parties, under Act of 1893, ch. 22, and judgment of the clerk therein, no bar to an action of ejectment subsequently instituted to determine the title between the same parties.

VANDYKE *v.* FARRIS.

EJECTMENT, tried before *Starbuck, J.*, at Fall Term, 1898, of GASTON.

The defendants pleaded as an estoppel a processioning proceeding between the parties under act of 1893, ch. 22, and judgment of the clerk locating the lines between them and taxing plaintiff with the costs, 10 October, 1893, which were admitted to be all regular.

This action was commenced 1 February, 1896. His Honor sustained the plea, adjudged the processioning proceeding to be a bar to the present action, and so instructed the jury who rendered a verdict in favor of the defendants.

Plaintiff excepted and appealed.

Webb & Webb for plaintiff.
George F. Bason for defendants.

FAIRCLOTH, C. J. This is an action of ejectment. The defendant after denying the allegations of the complaint, entered a plea in bar of the action, and the case was tried on that plea alone. His Honor held that the evidence and judgment relied on in support of the plea were an estoppel against the plaintiff, and the plaintiff appealed. The plea was, that in 1893 the plaintiff instituted a processioning proceeding before the clerk against the defendant to locate the line between plaintiff and defendant, under the act of 1893, ch. 22, and that (745) judgment was entered against the plaintiff for costs, from which no appeal was taken.

At the trial of the present action, it was admitted by the plaintiff that said processioning proceeding and judgment therein were in all respects regular and in strict compliance with the act of 1893, ch. 22. It was admitted by both parties that the question presented is, whether, after said processioning proceeding, the plaintiff can bring an action in the Superior Court to recover the same land. We have to consider this question without any argument or authorities cited by counsel. Does the proceeding before the clerk, and his judgment therein, simply establish a line between the parties without determining the title to the land on either side of the line? The act of 1893, ch. 22, repeals chapter 48 of the Code. That chapter was an innovation on the common-law remedy in settling titles to land, and is therefore to be strictly construed. Several cases came to this Court thereunder, but practically nothing was accomplished in any case. The original act indicated that two processionings would be conclusive as to title. As amended, Code, sec. 1929, it declared that "any person whose land shall be processioned to him, according to the direction of this chapter, shall be deemed and adjudged to be the sole owner thereof; and upon any suit commenced for

such lands the party in possession may plead and give the proceedings under this chapter in evidence." And singularly no decision has been found on the question now presented. The inference is that under the Code, ch. 48, the processioning proceedings would establish title, and hence this Court required strict conformity in every particular.

In *Hoyle v. Wilson,* 29 N. C., 466, *Ruffin, C. J.,* said: "Indeed, the very important and conclusive effect given by the statute to these inquisitions, whereby two of them vest an absolute title, requires the
(746) court to exercise the utmost vigilance to prevent surprise and injury to the true owners of land, by tolerating any undue laxity in the proceedings."

In *Cansler v. Hoke,* 14 N. C., 268, *Hall, J.,* for the Court, said: "When I observed that the first act . . . declared that any person whose land was twice processioned according to that act, shall be deemed and adjudged the sole owner of such land, and that it was supposed that clause gave a title to land which might be twice processioned under the act of 1792, I could not but consider it as a proceeding fraught with danger to the rights of land proprietors, and felt myself altogether justified in throwing every legal impediment in the way of a title to be thus consummated."

The act of 1893 contains no language similar to that above quoted, Code, sec. 1929, on which the remarks of *Judges Ruffin* and *Hall* were predicated, and leave the inference that the Legislature desired no longer to continue the danger referred to by those judges.

In *Williams v. Hughes,* 124 N. C., 3, it was held that in processioning under the act of 1893, ch. 22, the title was not in *issue,* and in *Wilson v. Alleghany Co.,* 124 N. C., 7, that an auxiliary remedy by injunction could not be given in such processioning proceedings, because there was no substantive relief under said act.

Upon these considerations and our own reasoning, our opinion is that the act of 1893, ch. 22, provides that a line or lines may be established as therein provided if the parties desire to do so, but does not prohibit either party from asserting his rights as to the title to the same land. What benefit the act confers to the citizen, it is not our province to say.

We think therefore that his Honor was in error in holding that the defendant's plea was a bar to the plaintiff's action.

Error.

Cited: Midgett v. Midgett, 129 N. C., 21; *Smith v. Johnson,* 137 N. C., 46; *Whitaker v. Garren,* 167 N. C., 660, 663.

(747)

S. WITTKOWSKY v. H. BARUCH AND WIFE, D. H. BARUCH.

(Decided 29 May, 1900.)

Deed in Trust for Creditors—Composition of Trustee's Claims and Assignment of Trust Assets—Badges of Fraud—Demurrer.

Where there are badges or evidences strongly tending to sustain the charge of fraud contended for by defendants, yet where the fraud is not sufficiently apparent on the face of the complaint to justify the court in so pronouncing, a demurrer will be overruled, that the case may go to trial, where the facts can be developed and found by the court or the jury.

ACTION upon a money demand to vacate a conveyance to *feme* defendant on ground of fraud and for the appointment of a receiver, heard before *Coble, J.*, at June Term, 1899, of MECKLENBURG, upon demurrer. Demurrer sustained, and plaintiff appealed.

Jones & Tillett for plaintiff.

Burwell, Walker & Cansler and Osborne, Maxwell & Keerans for defendants.

FURCHES, J. The plaintiff alleges that the defendant H. Baruch was indebted to him in the sum of $20,000, and on 1 October, 1894, the said H. Baruch executed four notes to the plaintiff therefor, in the sum of $5,000 each; that the said H. Baruch became financially embarrassed, and on 1 July, 1895, made a general assignment to the plaintiff as trustee for the benefit of his creditors, the plaintiff being one of them; that by an agreement between the defendant H. Baruch, E. D. Latta and the plaintiff, on 21 September, 1895, the plaintiff assigned to said Latta all the property and effects of said Baruch conveyed to him by said deed of trust, dated 1 July. And it is stated that said Baruch (748) was desirous of paying his debts, and the assignment of the plaintiff to Latta was for the purpose of *compromising* and paying off said indebtedness; that upon said *compromise and payment the creditors were to surrender their evidences of debt against said Baruch to said Latta.*

But the plaintiff further alleges that there was another agreement between him and said Baruch that in consideration that he would make this assignment to Latta, and that he would surrender his notes to Latta, he should be paid $6,000 out of the assets and commissions amounting to $4,000, and that said Baruch was to give to the plaintiff his note for the balance of his debt.

The plaintiff then alleges that Latta paid him the $6,000, and the

$4,000 commissions, and that Baruch paid him $1,000, and he surrendered his four notes of $5,000 each to Latta, as he contracted to do, but that there is still due him $9,000; that he has prepared notes for that amount for Baruch to sign; that he refused to sign the same, and still refuses to do so; that Baruch, for the purpose of defrauding his creditors, has procured Latta to assign and transfer the effects, originally conveyed to him and by him to Latta, to D. H. Baruch, the wife of defendant H. Baruch, for a nominal consideration; that said D. H. Baruch has very little, or no means, and is insolvent; that, in addition to this, the said H. Baruch has bought valuable real estate in the city of Charlotte and procured the deed therefor to be made to his wife, the said D. H. Baruch.

Upon this complaint, the plaintiff demands judgment for the $9,000; that the assignment of Latta to the said D. H. Baruch be de-
(749) clared fraudulent and void, and that the said D. H. Baruch be declared a trustee of the real estate so bought by her husband, and conveyed to her, for the benefit of the husband's creditors.

To this complaint, the defendants demurred, and say: That it appears from the complaint that the plaintiff can not recover on the original notes of $5,000 each, for they have been surrendered to Latta under the agreement for which the plaintiff has received $11,000; that he can not recover on the new promise, for the reason that it appears from the complaint that these notes were surrendered upon a composition contract; that the new promise was a stipulation for an advantage over the other creditors of the defendant H. Baruch, and was therefore a fraud upon them, and void; that the plaintiff was not only guilty of a fraud in this respect, as he was not only creditor, but he was the trustee of the assigned assets for the equal benefit of all the creditors of H. Baruch; and this was another reason why he should have acted fairly with the other creditors, and this made said contract void. And further, that said complaint does not set forth a cause of action.

As to the allegations contained in this complaint, as to the defendant D. H. Baruch, we have had but little trouble. Taking them to be true, as we must, they are in plain violation of every principle of honesty and fair dealing, and are fraudulent as to the creditors of the husband. *Redmond v. Chandly,* 119 N. C., 575.

But the question as to whether the complaint states a cause of action against the defendant H. Baruch or not has given us much trouble. That there are elements or badges of fraud, apparent upon the complaint must be admitted. But it may be that they do not sufficiently appear upon the complaint to justify us in declaring the fraud as a matter of law.
(750) The plaintiff is a large creditor of H. Baruch, and is made assignee. Under the law, as it was at the time of this assignment,

all creditors stood on equal footing—no preference could be given. Laws 1895, ch. 466; *Farthing v. Carrington,* 116 N. C., 315. This being the law, the question suggests itself: Why was the assignment made by the plaintiff to Latta? They could not change the assignment or the law. It is stated that it was made by agreement between the plaintiff, the defendant Baruch, and Latta; and that the assets were to be used by Latta (we suppose) in compromising the debts of Baruch. How this could be done by either the plaintiff or Latta, we do not know. And if it could be done by Latta, we do not see why it might not have been done by the plaintiff. But it seems that the creditors of Baruch were to *surrender* the evidences of their debts upon receiving the compromise money; and under this contract the plaintiff surrendered his notes to Latta upon the receipt of the amount agreed upon. And Latta, it seems, has conveyed the effects (conveyed to him by the plaintiff) to D. H. Baruch, wife of H. Baruch, and the plaintiff says without substantial consideration and in fraud of Baruch's creditors.

It would seem that the plaintiff has no cause of action on the $5,000 notes, as he surrendered them to Latta under the agreement with Baruch to do so. Code, sec. 574. And if he has any cause of action, it must be upon the new promise to give the new notes, or, in other words, to pay the plaintiff the difference between what was paid out of the trust fund and the $20,000 due by the four notes of $5,000 each.

The defendants say that he can not recover on this promise, for the reason that the contract entered into, by the plaintiff Baruch and Latta, was not only a compromise of this indebtedness of Baruch, but that it was a composition of said indebtedness. The defendants say this appears from the facts, that the indebtedness was to be compromised and the *evidences of debt were to be surrendered to Latta* (751) and that Latta has since assigned the property and effects (assigned to him) to the wife of H. Baruch for a consideration so grossly inadequate as to be a fraud on the creditors of the insolvent husband; that this being a composition of the debts of the insolvent assignor, the new promise upon which the plaintiff must rely is a fraud on the other creditors, and can not be enforced in a court of law.

This proposition of law seems to be correctly stated by the defendants, and is well sustained by numerous authorities. *White v. Kuntz,* 107 N. Y. (62 Sickles), 518; *Galderburger v. Hoffman,* 69 N. Y. (24 Sickles), 322. That there are badges or evidences strongly tending to sustain the charge of fraud, contended for by defendants, must be admitted. And while there is no form necessary to constitute a composition, and no formal release of the claim is necessary (6 A. & E. Enc., 377, 378, 380), still it is necessary that there should have been a community or understanding as to the composition between the plaintiff

and the other creditors, or some of them, to make its violation a fraud upon them. This element of fraud, it seems to us, is not sufficiently apparent on the face of the complaint to justify us in saying that this new promise was in fraud of the rights of the other creditors.

We have, therefore, concluded that the case should go to a trial where the facts can be developed and found by the court or the jury. For this reason we think there was error in sustaining the demurrer.

Error.

Cited: *S. c.* 127 N. C., 313.

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(752)

MARY J. LITTLE, WIDOW AND EXECUTRIX, ET AL., CHILDREN AND DEVISEES OF B. F. LITTLE v. PETER M. BROWN.

(Decided 29 May, 1900.)

Will—Devise—Construction.

1. Where the testator, after giving his wife, for life, certain personal property, and a child's part of the balance of his estate, real and personal, wills the remainder, real and personal, to be divided among all his children equally, including any after-born children, the devise to the children is in fee simple.

2. An additional provision in case of the death of any of the children without issue living at his death, his share to go to the surviving children or their representatives, gives no estate to the representatives by way of a substitution, being words of limitation, meaning "their heirs." As executory devisees, the children may bind their heirs and convey and release absolutely their contingent interests—the children being the primary object of testator's bounty.

3. The children take a vested remainder in the child's part for life devised to their mother, subject only to the limitations "to the surviving children or their representatives."

CONTROVERSY WITHOUT ACTION, submitted to *McNeill, J.*, at October Term, 1899, of MECKLENBURG, the object being the construction of the will of B. F. Little, deceased, of Richmond County, N. C., to ascertain whether the devisees could make a good title for a part of the real estate to the defendant, purchaser. His Honor decided that they could, and rendered judgment in their favor for the purchase money. Defendant excepted and appealed.

The controverted clauses of the will are considered and construed in the opinion.

H. W. Harris for plaintiffs.
Burwell, Walker & Cansler for defendant.

CLARK, J. This is a controversy submitted without action. The plaintiffs, the widow, the executor and executrix of the testator and his heirs at law and devisees, vendors of land, seek to com- (753) pel the defendant vendee to comply with his agreement to purchase, by accepting their deed and paying the purchase money. The defendant resists their claim upon the ground that the deed does not convey an indefeasible estate in fee, and that he can not be compelled, unless the deed should vest in him such an estate. The determination of the controversy depends upon the construction of the following clauses in the will of B. F. Little: "I give and bequeath and devise unto my beloved wife, Mary Jane Little, for the term of her natural life, all my household and kitchen furniture, including all my books, and a child's part of the balance of my estate, real and personal. The remainder of my estate, real and personal, I wish to be divided among all my children equally, share and share alike, and my will is to include any child or children that may be born after this date." This last clause was a devise in fee simple to all his children. This he made defeasible by adding the following limitation to surviving children: "Should any one of my children die without issue living at his or her death, then the property and estate of the one so dying, to go to my surviving children or their representatives." This condition must be construed to be operative at the earliest period, which is the death of all the children. The words: "or their representatives" are words of limitation, meaning "their heirs," and give no estate to the representatives by way of substitution. Hence all his surviving children (and the children of those deceased, if any there had been), as executory devisees, may now bind their heirs and convey and release absolutely their contingent interests, *Corlyn v. French,* 4 Ves., 418; 2 Jarman on Wills, 625. (754)

The testator gives the wife an equal share with his children "a child's part," as he terms it, and directs that the tract of land and residence where he lives should be included in her share, and restricts her devise to her life. He describes the property given to his children as "the remainder of my estate real and personal." The limitation over to "surviving children or their representatives" on the contingency of any one of them dying without leaving issue, makes the fee simple estate of the children defeasible, but does not operate to tie up the estate. That construction would give the grandchildren an absolute estate in both the original and accrued shares going to them, while *his children,* the primary objects of his bounty, would be deprived of absolute ownership of the original shares.

Overman v. Sims, 96 N. C., 451, and *Overman v. Tate,* 114 N. C., 571, differ from this case. There the clause for construction was as follows: "To the sole and separate use of Mary Cornelia Tate, wife of said Thomas R. Tate, for her life, and at her death to such child or children and the representatives of such as she shall have living by the said T. R. Tate, and their heirs forever. Should the said Mary Tate die without a child or representative of such living at her death, then to the said Thomas R. Tate and his heirs forever." The words there used are plainly substitutional, and the issue of the child or grandchild is the object of the bounty, and are to take after a life estate. Here, the children are the objects of the testator's bounty. They are given a fee simple made defeasible upon death without issue, in which event their interest is to go to the other children of the testator, and the issue of such as may be dead, leaving issue.

But the defendant contends further that the testator's wife has a life estate in an undivided share of this real estate, equally with the children, and that the remainder, after her life estate in that share,
(755) is so limited that she and the children can not now make a good and indefeasible title. The clause of the will on which that contention is based is found in the fifth item as follows: "At my wife's death, it is my will and desire that all the property and estate, real and personal, that I have left to her for life, shall be equally divided among my children, and the issue of any deceased child or children." But this should be read with the concluding clause of the same item of the will, to wit: "It being my intention that all my children shall receive an equal share in valuation of all my estate, real and personal, left to my wife for life." In this last clause he shows by express terms that he considered he had already given to his children equally the remainder in fee after her life estate in one equal share, thus making their estate a vested remainder, without any other limitation over than that which follows in the next clause, "To surviving children or their representatives."

In the devise to his wife, her life estate and the vested remainder thereafter to his children had already been devised by the first and second clauses, and the fifth item was intended simply to provide for the time and manner of the division of that share. There is no devise or bequest whatever in the fifth item, and it was manifestly not the testator's intention to limit any estate by its provisions, but only to direct the division of the real estate devised to his wife, and especially the family residence.

The deed tendered conveyed a valid title in fee, and the judgment of court below must be

Affirmed.

(756)

JANE MILLS v. S. C. CALLAHAN.

(Decided 29 May, 1900.)

Amendment—Additional Parties—Evidence.

1. The power of the judge to make additional parties to an action is settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party.
2. When the additional parties have been made by leave of the court, evidence is competent to identify them and connect them with the chain of title.

EJECTMENT, tried before *McNeill, J.*, at Fall Term, 1899, of RUTHERFORD.

The plaintiff was Jane Mills, widow of L. A. Mills. At a previous term of the court his heirs were made parties, on motion of plaintiff, and defendant excepted. At the present term of the court the plaintiff offered evidence tending to show who the heirs were, and to identify them and connect them with the chain of title. The defendant objected, and upon being overruled, excepted. There was verdict for plaintiff, and judgment accordingly. Defendant appealed.

M. H. Justice for plaintiff.
D. W. Robinson and R. S. Eaves for defendant.

FAIRCLOTH, C. J. Action of ejectment by the widow of L. A. Mills. At Spring Term, 1899, the heirs of L. A. Mills were made parties plaintiff, and the defendant excepted. The matter was tried at Fall Term, 1899, when the plaintiffs recovered the land, tracing their title from a grant older than that under which the defendant claimed.

We had supposed that the power of the judge to make additional parties to an action was settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. Code, sec. 273; *Bullard v. Johnson,* 65 N. C., 436. (757)

The exceptions to evidence, tending to show who were the heirs of L. A. Mills, and to identify and locate the land in dispute, were based on the theory that error in making the heirs parties was committed. They were properly overruled, and we see in the record,

No error.

GEORGE H. SMATHERS v. R. D. GILMER, TRUSTEE AND ADMINISTRATOR C. T. A. OF JAMES R. LOVE.

(Decided May 29, 1900.)

Shortage of Acreage—False Representation—Warranty—Caveat Emptor.

1. The maxim of *caveat emptor* applies equally to sales of real and personal property, and will be adhered to when there is no fraud—and so, as to quantity.
2. When each party has equal means of information, and there is no proper warranty and no false representation calculated to deceive, a party purchases at his own risk, and is without remedy.

ACTION for damages for shortage in acreage in tract of land bought by plaintiff, heard by *Starbuck, J.*, upon facts alleged and agreed on, jury trial waived, at Spring Term, 1899, of HAYWOOD. Judgment in favor of defendant. Appeal by plaintiff.

The facts material to the decision are stated in the opinion.

T. H. Cobb for plaintiff.
Simmons, Pou & Ward for defendants.

(758) FAIRCLOTH, C. J. This is an action to recover damages against the defendant, trustee and administrator of James R. Love, for shortage in acreage in the land described in the complaint, lying in the wild lands of Haywood County, tried by the court by consent, on facts admitted in the pleadings and facts agreed on and set out in the judgment, said tract being a part of a large body of land in Haywood and adjoining counties owned by said James R. Love.

These are the facts material to a decision: In February, 1876, the executors of said Love contracted in writing to convey to R. V. Welch a boundary of land supposed to contain five hundred acres more or less, etc., as soon as the purchase money was paid. On 9 May, 1883, Welch transferred this bond for title to Richard Gray, and on the same day the surviving executors of Love executed and delivered a sufficient deed to said Richard Gray for the said tract of land, adjoining the lands of A, B, and C and bounded by *definite* courses and distances, "containing five hundred acres, more or less," with a covenant of authority to sell and to warrant the same. By a proper decree in some proceeding between the heirs at law of said Richard Gray, commissioners were appointed to sell said tract of land after due advertisement, etc., whose report of sale was confirmed by the court, the plaintiff being the purchaser at the price

of $510. In September, 1895, the said commissioners made their deed to the plaintiff for said land, with same definite description by courses and distances, "containing five hundred acres more or less," with warranty of title so far as they were required to do by the decree of the court. The deed to Richard Gray was registered on 29 April, 1884.

At the time the plaintiff purchased, he believed there were about five hundred acres in the tract. No representation was made at the sale as to the number of acres, and the defendant avers that the sale in 1883 to Gray was as a solid body of land, and not by the acre. (759) Soon after the plaintiff had purchased, he caused a survey of the tract to be made, and the surface measurement showed only 262 acres.

As a matter of law his Honor adjudged that the plaintiff could not recover damages for the deficiency in acreage.

The principles of law applicable to such cases are few and simple. The plaintiff had two opportunities for protection: (1) A simple calculation, according to the definite boundaries, courses and distances, appearing on the record from the day of the registration of Gray's deed for over ten years before he purchased. (2) To require proper covenants in his deed for his protection.

Failing to avail himself of those means, he purchased at his own risk and subject to the principle of *caveat emptor*. When each party has equal means of information that principle applies, and the injured party is without remedy. If, however, false representations are made, on which the other party may reasonably rely, they constitute a material inducement to the contract, and the injured party has acted with ordinary prudence, courts of justice will afford relief. Ordinarily, the maxim of *caveat emptor* applies equally to sales of real and personal property, and will be adhered to where there is no fraud. *Walsh v. Hall,* 66 N. C., 233. And so as to quantity, etc. *Etheridge v. Vernoy,* 70 N. C., 713, and cases cited.

"Ordinarily the quantity of acres contained in a deed constitute no part of the description, especially where there are specifications and localities given by which the land may be located, but in doubtful cases it may have weight as a circumstance in aid of the description, and, in some cases in the absence of other definite descriptions, may have a controlling effect." 1 Greenleaf on Ev., sec. 301; *Baxter v. Wilson,* 95 N. C., 137; *Cox v. Cox,* 91 N. C., 256.

"Quantity is in no way material except where the boundaries (760) are doubtful, and, there, it is a new circumstance." *Reddick v. Leggett,* 7 N. C., 539.

These cases sufficiently show the universal rule in this State. There is no doubt as to the boundaries, and it does not appear that the defend-

ant had any better information in regard to the number of acres than the plaintiff. It is not so alleged.

His Honor's legal conclusion was correct.

Affirmed.

Cited: *Stern v. Benbow,* 151 N. C., 462; *Leonard v. Power Co.,* 155 N. C., 15; *Bethell v. McKinney,* 164 N. C., 78; *Higdon v. Howell,* 167 N. C., 457; *Turner v. Vann,* 171 N. C., 129.

STATE EX REL. R. S. McCALL v. CHARLES A. WEBB.

(Decided 29 May, 1900.)

Quo Warranto In re Solicitor of Buncombe Criminal Court—Motions in the Cause—Emoluments and Fees—Reference—Judgment of Supreme Court to be Considered Final Below.

After final judgment in the Supreme Court, the Superior Court has no power to order a further reference, or to take any action in the case.

CLARK, J., concurs in the result.

MOTIONS IN THE CAUSE by the relator after affirmation of the judgment below in his favor, reported in 125 N. C., 243, heard before *McNeill, J.,* and refused, at August Term, 1899, of BUNCOMBE.

The relator submitted two motions in the cause:

(1) To be allowed to amend the complaint alleging the wrongful appropriation by the defendant of the emoluments and fees of the office of solicitor.

(2) For a reference to ascertain the amount thereof. The motion being disallowed, the relator excepted and appealed.

(761) *Frank Carter for plaintiff.*
T. H. Cobb for defendant.

FURCHES, J. This was originally an action in the nature of *quo warranto* by the State on relation of R. S. McCall against Chas. A. Webb to try the title to the office of solicitor. Upon the hearing in the court below it was decided that the plaintiff was entitled to the office, and a judgment to that effect was rendered declaring that the defendant was not entitled to the said office, but that McCall, the relator, was —ousting the defendant from the office and declaring that the relator

was entitled to said office, to perform its duties, and to receive the fees and emoluments thereof. From this judgment the defendant appealed to this Court where the judgment of the court below was affirmed (125 N. C., 243).

When the judgment of this Court was certified to the Superior Court of Buncombe County, the plaintiff moved for an order of reference to ascertain the amount of fees and emoluments the defendant had received while he was wrongfully in possession of said office. This motion was resisted by the defendant, and the plaintiff then moved to be allowed to amend his complaint so as to embrace the claim for the fees and emoluments of the office, while so wrongfully held by the defendant, and this motion was also resisted by the defendant, and the plaintiff then moved to be allowed to amend his complaint so as to embrace the claim for the fees and emoluments of the office, while so wrongfully held by the defendant, and this motion was also resisted by the defendant. Both of these motions were refused by the court below, and the plaintiff excepted and appealed.

It was held in *Dodson v. Simonton,* 100 N. C., 56, that a judg- (762) ment of the Superior Court, affirmed by this Court, could not afterwards be changed or modified by the Superior Court.

It was also held in *Calvert v. Peebles,* 82 N. C., 334, that when this Court affirms the judgment of the Superior Court, it can not afterwards be changed or modified in the court below, on motion of the parties.

It was held in *Brendle v. Herren,* 97 N. C., 257, that "After final judgment disposing of the rights of the parties, it is too late to introduce a new cause of action into the controversy. So, in an action to have the holder of the legal title declared a trustee, it is too late after judgment to ask for an account of rents and profits."

In *Pearson v. Carr,* 97 N. C., 194, it was held that "No order of reference can be made to ascertain any facts taking place after the final judgment. After final judgment in the Supreme Court, the Superior Court has no power to order a further reference or to take any action in the case."

These cases seem fully to sustain the action of the court below, and the judgment must be affirmed.

It was contended by the defendant, and argued at length before us, that, as the plaintiff had failed to ask for this relief in his complaint and have an order of reference before final judgment, he is estopped, and has no remedy to recover what seems to be due him by the judgment of the court. While we do not consider this question before us for adjudication, still, as it was argued and insisted upon by the defendant, we think it proper to say that we do not think the authorities

cited by the defendant sustain this contention. This is an action of *quo warranto* by the State, on the relation of McCall, to try the title to this office. The State is interested in this question, in having its public offices filled by its proper officers. But this is as far as the State's
(763) interest goes, and it would seem to be the only issue triable in this action. And we doubt whether it would have been proper for the court to have made the order of reference asked for, if it had been pleaded and asked for before final judgment, if resisted by the defendant. But it must be that the plaintiff has a remedy, not only against the defendant, but also against his sureties, as the Legislature has provided for requiring him to give security, which he has done. In our opinion this case is distinguishable from the cases cited by the defendant.

Affirmed.

Cited: McCall v. Gardner, post, 763; *Taylor v. Vann,* 127 N. C., 248; *McCall v. Zachary,* 131 N. C., 469; *McCall v. Webb,* 135 N. C., 359; *Tussey v. Owen,* 147 N. C., 337.

McCALL v. GARDNER, No. 2.

STATE EX REL. R. S. McCALL, APPELLANT, v. G. E. GARDNER, ET AL.

Frank Carter for plaintiff.
No counsel for defendants.

FURCHES, J. This appeal relates to the defendant Eaves only, and the facts as to him are substantially the same as those in *McCall v. Webb, ante,* 760. This case is therefore governed by the opinion in that case, and the judgment of the court below is

Affirmed.

CLARK, J., concurs in the decision upon the point presented by the appeal and for the reasons given, but is not to be understood as expressing any opinion upon the matters stated therein to be outside the present litigation. The plaintiff recovered (125 N. C., 243) upon the ground that this office was his private property, and that by the act of 1899, which put the defendant in office, the State had broken or attempted to break its contract. It would not seem that the State was "interested" in having this action brought to declare it had violated its contract. It is not a public question in that aspect, but a private
(764) action by the plaintiff to assert his property rights. It is otherwise where a *quo warranto* is brought merely to determine who

is properly elected or appointed or entitled under proper construction of a statute, which is not sought to be set aside by the action as a breach of contract by the State. If office is a public agency and not a "contract" then the State *is* "interested in having its public offices filled by its proper officers," but that interest must be and has been shown through the Legislature which alone can create or abolish offices, not established by the Constitution, and which alone can prescribe how they shall be filled. This can not be done by decree of court unless there is private property in office, and in that case the State has, as between the parties, no more interest than in any other action over any other private right arising upon contract.

WILLIAM A. DUNN, RECEIVER OF THE CLINTON LOAN ASSOCIATION, ET AL. v. MITTIE R. BEAMAN, ADMINISTRATRIX C. T. A. OF JOHN R. BEAMAN, SR., ET AL., HEIRS AND DEVISEES.

(Decided 29 May, 1900.)

Proceedings by Creditors—The Code, sec. 1448—Finding of Fact by Referee When Conclusive.

(*In re.* Claim of M. J. Hobbs, Appeal by Hobbs.)

A finding of fact, of which there is evidence, made and reported by the referee and approved by the judge, is conclusive on appeal.

CREDITORS' BILL, instituted under the Code, sec. 1448, by creditors of the estate of John R. Beaman, Sr., deceased, heard before *Timberlake, J.*, at April Term, 1899, of SAMPSON upon exception to report of referee. The exceptions were overruled and the report confirmed. M. J. Hobbs claimed to be a creditor of the estate, as assignee of (765) a judgment, to the amount of $516.88, rendered in favor of the Clinton Loan Association against the firm of John R. Beaman, J. A. Ferrell and T. M. Ferrell. The referee found upon evidence that the claim had been adjusted, and reported so, and the report was confirmed. M. J. Hobbs excepted and appealed.

Stevens & Beasley and Geo. E. Butler for M. J. Hobbs.
H. G. Connor & Son and R. O. Burton contra.

CLARK, J. This was a proceeding by a creditor under the Code, sec. 1448, to compel an account and settlement of the estate of John R. Beaman. The claim of M. J. Hobbs, the appellant, was No. 17, as numbered by the referee. The appellant, Hobbs, contended that he was

assignee of a judgment which had been rendered against a firm composed of John R. Beaman, J. A. Ferrell and T. M. Ferrell. The referee found that Hobbs paid no money to the plaintiff in the execution, but that said money was "really, though not directly, paid to plaintiff by the judgment debtors, J. A. and T. M. Ferrell." This finding of fact was approved by the judge. There being evidence tending to support the finding it is conclusive on appeal. Clark's Code, sec. 422 (3 Ed.), and cases cited. The conclusion of law follows that the claim of M. J. Hobbs was extinguished and properly disallowed. Whatever balance, if any, is due the Ferrells on a settlement of their partnership accounts against John R. Beaman could be proven against Beaman's estate in this action, if not barred by the statute of limitations. This is not the case of a surety paying the debt of a principal, and if it had been, the judgment was extinguished because it was not assigned to a trus-
(766) tee for the benefit of the surety. *Browning v. Porter,* 116 N. C., 62.

No error.

Cited: Fowle v. McLean, 168 N. C., 542.

WILLIAM A. DUNN, RECEIVER OF THE CLINTON LOAN ASSOCIATION, ET AL. v. MITTIE R. BEAMAN, ADMINISTRATRIX C. T. A. OF JOHN R. BEAMAN, SR., ET AL., HEIRS AND DEVISEES.

(Decided 29 May, 1900.)

Proceeding by Creditors—The Code, Section 1448—Statute of Limitations—Reference of a Claim Under The Code, Section 1426—Evidence, Section 590.

(*In re* Claim of Defendants. Appeal by Plaintiff.)
No. 2.

1. The proceedings authorized by section 1426 of The Code are between a creditor and the personal representative of the estate, and have no application to a creditors' bill under The Code, sec. 1448, instituted to take the administration into the hands of the court.

2. Holder of a claim against the decedent is incompetent under The Code, section 590, to prove nonpayment, or noninformation from him of its existence.

3. Upon a deficiency of assets one creditor may set up the statute of limitations to the claims of another creditor, and being pleaded, the burden is upon the claimant to show his claim is not barred.

4. *Semble.* A right of action as to a debt, once barred by lapse of time, can be restored by legislation, but otherwise when title to property has ripened by lapse of time prescribed.

5. In the absence of averment and proof of fraudulent concealment, the records of the court and public proceedings under them put all parties on notice by the recitals therein contained, and set the statute in operation.

6. Ten years after ward coming of age bars an action by him against his guardian for settlement.

FAIRCLOTH, C. J., dissents.

CREDITORS' BILL, instituted under the Code, sec. 1448, by credi- (767) tors of the estate of John R. Beaman, Sr., deceased, heard before *Timberlake, J.*, at April Term, 1899, of SAMPSON, upon exceptions to report of referee. The exceptions were overruled and judgment was rendered confirming the report.

The plaintiffs excepting to so much thereof as established the claim of defendants, took an appeal. The nature and circumstances connected with defendants' claims are discussed in the opinion.

R. O. Burton and H. G. Connor & Son for plaintiffs.

Allen & Dortch, J. D. Kerr, Marion Butler and F. R. Cooper for defendants.

CLARK, J. This proceeding was begun by a creditor of John R. Beaman, deceased, on 23 February, 1894, against the administratrix of said Beaman and his heirs at law to procure a settlement of his estate, and to subject his realty, under the provisions of the Code, sec. 1448. At February Term, 1895, a referee was appointed "to ascertain the indebtedness of the estate and the parties to whom it was due." Some time after this action was begun, the children of John R. Beaman, claiming that their father was indebted to them in the sum of $10,725, with interest thereon from 15 July, 1861, for proceeds of realty which, as the guardian of some of them, he had procured to be sold, agreed with their codefendant, and sister, the administratrix, to refer the claim under the Code, sec. 1426. The referees reported on 1 April, 1896, allowing the claim in full, although three of the children were of full age at the time of the sale in 1861, and parties to the proceeding under which the land was sold. The referee in this action properly disallowed the claim based upon such award under the Code, sec. 1426, and (768) ruled that after one creditor has instituted a creditors' bill he can not be cut off from contesting another creditor's claim and pleading the statute against it, by a collateral proceeding between the administratrix and such other creditors. The proceedings authorized by section 1426 are between a creditor and the personal representative in the ordinary course of administration, and have no application when an action

has been begun under the Code, sec. 1448, to take the administration into the hands of the court, which thereupon, appoints the referee to ascertain the indebtedness and a commissioner to sell the property, and takes in hand the settlement of the estate. Besides, the children and heirs at law of Beaman, as well as the administratrix who assented to the attempted reference, were parties defendant in this action, and bound by the reference herein to determine the indebtedness. However, that side is not appealing, and the rejection of the attempted award of 1 April, 1896, is not really before us upon any exception.

The referee allowed the claim of those five of the eight children who were wards of Beaman at the time of the sale, and that brings up the question of the statute of limitations, the decision of which in favor of the plaintiff renders it unnecessary to discuss his exceptions to the admission of evidence. It is proper, however, to say that the children seeking to prove their claims against the estate of John R. Beaman were incompetent under the Code, sec. 590, to prove nonpayment of the indebtedness to them by their father, or that he never informed them of this indebtedness, and it was error to admit their testimony.

The referee finds as facts that on 19 February, 1861, John R. Beaman qualified as guardian of his five minor children; that at February Term, 1861, as their guardian, and with the joinder as parties
(769) with him of his three adult children and their husbands, he filed a petition for sale for partition of 1350 acres of land which had been devised to his said children by one Carraway, the property was sold at the price of $10,800 to one Cobb, who paid the purchase money, netting $10,725 after deducting court costs, to the clerk and master, who executed a deed to the purchaser upon confirmation of the sale. The referee finds that the five-eighths belonging to the wards was paid over to John R. Beaman, guardian, but that there is no evidence that the shares of the three adults were paid to him. He finds that none of said wards have been paid their shares by their father, and that they had no knowledge of the facts upon which their claim is based, until within three years before their said claim was presented to him at the hearing, 17 March, 1897. As the referee finds that the assets of the estate are insufficient to pay all the indebtedness, any creditor has the right to set up the statute of limitations (which is here pleaded by the plaintiff) against any other, although it has not been pleaded by the administrator. *Wordsworth v. Davis,* 75 N. C., 159; *Oates v. Lilly,* 84 N. C., 643, *Lockhart v. Ballard,* 113 N. C., 292.

The statute of limitations being pleaded, the burden is upon the claimants to show that they are not barred. *House v. Arnold,* 122 N. C., 220, and numerous cases there cited. The youngest of the five wards, living 15 July, 1861, was necessarily of age some time prior to 15 July,

1882, and, in fact, the age of the youngest person which is found by the referee, is that of John R. Beaman, Jr., who became of age 2 March, 1879. The referee held that the limitation of an action by a ward against his guardian is ten years from his arrival at age, when no account is filed (*Kennedy v. Cromwell,* 108 N. C., 1), and as to him, the ten years bar was completed 2 March, 1889, prior to chapter 269, Laws 1889, which was ratified on 6 March, 1889. The pro- (770) visions of the Code, sec. 155 (9), allowing three years from discovery of a fraud applied only to "cases heretofore solely cognizable in courts of equity," and an action by a ward for recovery of an amount due him by his guardian could have been brought in a court of law, and hence the youngest of these wards was barred 2 March, 1889.

The referee holds, however, and was sustained by the judge below, that though "this claim was already barred when chapter 269, Laws 1889, was passed, it was revived thereby." That chapter struck out the words, "in cases heretofore solely cognizable in courts of equity," from section 155 (9), of the Code. The ruling, that though a debt is barred by the statute of limitations the Legislature may remove the bar by repealing the limitation after it has accrued, is within the reasoning of *Pearson, C. J., in Hinton v. Hinton,* 61 N. C., 410, and is sustained by *Justice Miller,* in *Campbell v. Holt,* 115 U. S., 620, decided in 1885, the Court in the latter case holding that this is true as to a debt, though not as to the title to property which has ripened, because *time does not pay the debt, but time may vest the right of property.* On the other hand, it has been held by the Supreme Court of this State (1884), in *Whitehurst v. Dey,* 90 N. C., 542, that the Legislature can not revive a right of action as to a debt when it has become barred by the lapse of time, though it is true the decision was not necessary to the disposition of that case. The point is an interesting and important one, but it is not necessary that we pass upon it, for there is no state of facts to which it is applicable.

There is no allegation of fraud as to John R. Beaman in the pleadings filed by his children as the foundation of their claim—nothing beyond the mere averment that they (the children) were not aware, till 1894, of the sale of the land and the receipt of the money by (771) their father. There is no averment of any fraudulent concealment or any concealment of the facts by him. The averment made is not sufficient to predicate a finding of fraud; nor is there any proof of fraud; nor is there any evidence tending to show fraud on his part. Counsel for the children disavow any intention to charge their father with fraud in fact—"any intentional or willful fraud"—but say that their ignorance of the facts is proof of constructive fraud by him. It shows their confidence in their father, from whom they expect to receive

a large estate, and who in fact made them large advancements, and their abandonment of all matters to him, but the inferential finding of fact (for it is not directly made) by the referee of "fraudulent concealment" by him is without any evidence or any allegation in the pleadings to support it, and the exception on that ground must be sustained. The children had legal notice of the facts. The will of Carraway, under which their title accrued, was probated and recorded in 1844, the land devised to them was sold for partition in 1861 at the courthouse door after due advertisement under a decree in equity, the proceedings in equity were duly recorded, to which three of the children who were adults, together with their husbands, were parties praying the sale, and the decree of confirmation was properly enrolled. The deed from the clerk and master to the purchaser was duly recorded in the register's office, and was notice to the children as well as to all the world, and they were put on notice by the recitals therein contained.

There was the widest and most entire publicity, and an entire absence of any proof tending to fix John R. Beaman's memory with the stain of any fraud upon his children. The sale was in 1861; the youngest ward became of age in 1879; they all lived in the county, it seems, except one who has since left the State, and it is not to be held that all through these years, there was constructively a "fraudulent con-
(772) cealment" of a transaction conducted with such publicity. The limitation is not "three years from the discovery by a party of rights hitherto unknown to him," but "from the discovery of *facts constituting fraud.*"

The children may have been negligent in inquiring as to their rights or in asserting them, or may have forgotten facts which they once knew, and which three of them are conclusively fixed with having known at the time of the sale (since they can not impeach the decree collaterally), but there is nothing to sustain a finding of fraud. This being so, the act of 1889 has no bearing and requires no discussion.

Error.

Cited: Bonner v. Stotesbury, 139 N. C., 8; *Sanderlin v. Cross,* 172 N. C., 243.

DICEY A. BROWN v. D. G. MORISEY.

(Decided 5 June, 1900.)

Dower — Nature — Statutory and Common Law Right — Statute of Limitations.

1. The widow claims her dower under the statute, not under her husband, often against him.
2. She has no estate in the land until assignment of her dower, and the statute of limitations can not be pleaded against her.
3. Her claim is in the nature of "a writ of right," is favored by the law, and can not be lost or forfeited, except for causes prescribed by the statute, or the common law.

FURCHES and CLARK, JJ., dissent.

PETITION to rehear case decided at February Term, 1899, reported in 124 N. C., 292.

Stevens & Beasley for plaintiff. (773)
Allen & Dortch for defendant.

FAIRCLOTH, C. J. This case was decided in favor of the defendant at February Term, 1899, and is reported in 124 N. C., 292. It was reheard at February Term, 1900. After reargument and further consideration, the Court is of the opinion that the plaintiff is entitled to have dower assigned to her out of the land described in the complaint, and the first opinion is overruled. The reasoning and ground of our present opinion will be found in the dissenting opinion, as reported in 124 N. C., at page 297, where the authorities are cited, and it seems that it is unnecessary to repeat them here.

In addition to those, we refer to *Pinner v. Pinner,* 44 N. C., 475, *Frost v. Etheridge,* 12 N. C., 30. These fully recognize the principle of this opinion, with some excellent reasoning by *Taylor, C. J.*

The plaintiff, being entitled to dower, is also entitled to damages from her demand for dower equal to one-third in value of the rents and profits of the land. *Spencer v. Weston,* 18 N. C., 216. These will be adjusted by the court below, if the parties do not agree to some arrangement among themselves.

This will be certified to the court below to the end that the court may proceed according to this opinion.

Error.

FURCHES, J., dissenting: I dissent to that part of the opinion of the Court which adopts the dissenting opinion when the case was here be-

fore, and I adopt the opinion of the Court then filed as my dissenting opinion to that part of the opinion filed at this term. *Brown v. Morisey,* 124 N. C., 292.

CLARK, J., dissenting: I concur in the dissenting opinion of *Mr. Justice Furches.* There is no scintilla of evidence that the defend-
(774) ant claims under the heirs at law of the husband, and what would be the plaintiff's right to dower as against them or their assignee is not before us. There is no evidence how defendant entered, whether under deed from the husband or without (see statement of facts, 124 N. C., 292), but probably under a deed possibly since lost, as the widow living in same county has not stirred till now. All that appears is that plaintiff's husband had a deed to the land in 1855; that he and his wife went to Wilmington in 1856; that in a few days she returned to the county (Duplin) where the land lies, and soon thereafter the defendant took possession, and has been in exclusive possession, cultivating and using it as his own, ever since—over forty years. Nothing else appearing, the defendant's title is good against the world. The fact that it is further shown that the husband went south and died intestate, prior to 1861, leaving no children, can not affect defendant's title. The statute, which began running against the husband in his lifetime, was not suspended at his death, even as to minor heirs, and of course not as to his widow. She can only recover dower by showing that her husband, if living, would be entitled to recover the land in which she claims dower. Otherwise she would be taking dower in defendant's land, not in her husband's. If dower had been allotted to plaintiff when disseized, she would be barred in seven or twenty years like any one else, and she is not entitled (even in that aspect) to longer time under our statute law because she neglected to have dower allotted.

Overruled: (And adopting, in effect, the dissenting opinions), *Brown v. Morisey,* 128 N. C., 138.

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(775)

STATE EX REL. M. L. MOTT v. E. A. GRIFFITH.

(Decided 5 June, 1900.)

Quo Warranto—Solicitor of the Superior Court of Forsyth County—Solicitor of Western District Criminal Court for Forsyth County.

The decision of this case is controlled by the case of *White v. Murray, ante,* 153, present term, the questions of law being the same.

Quo warranto, to try the title of defendant to be Solicitor of Criminal Court of Forsyth, heard upon agreed facts before *Shaw, J.,* at November Term, 1899, of FORSYTH.

His Honor, upon consideration of facts agreed and submitted to him rendered judgment in favor of defendant E. A. Griffith, and the relator, M. L. Mott, excepted and appealed.

Holton & Alexander for plaintiff.
Glenn & Manly for defendant.

FURCHES, J. From the facts agreed in this case it appears to us that the same questions of law are presented for our determination that were presented in *White v. Murray, ante,* 153, and this case is controlled by the opinion in that. The judgment of the court below that the plaintiff could not recover must be

Affirmed.

(776)

S. F. CONRAD, W. L. HILL AND THEONE L. HILL, P. H. HANES AND J. W. HANES, THOMAS PATTERSON, A. F. MESSICK, MINNIE E. MESSICK, AND J. A. EFIRD v. WEST END HOTEL AND LAND COMPANY AND W. B. TAYLOR.

(Decided 5 June, 1900.)

Dedication for Public Use—Sale by Recorded Map and Reference—"Grace Court"—Notice by Purchaser.

1. If the owner of land lays it off into squares, lots and streets with a view to form a town or city, or as a suburb thereto, certainly if he causes the same to be registered in the county where the land is situated, and sells any part of the lots or squares, and in the deed refers in the description thereof to the plat, such reference will constitute an irrevocable dedication to the public of the streets marked upon the plat.

2. The same principle would apply to those pieces of land which were marked on such a plat as squares, or courts, or parks, and that streets and public grounds designated on such a map should forever be open to the purchasers and the public.

3. It is immaterial whether the public authorities of the city or county had formally accepted the dedication of the park or square designated as "Grace Court" on the map. The sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should forever be open to the purchasers and their assigns.

DOUGLAS, J., dissents.

ACTION for injunction to enjoin the defendant land company, from dividing up and selling off an open square, known as "Grace Court," and from closing up or narrowing the streets leading to and surrounding it, tried before *Shaw, J.,* at November Term, 1899, of FORSYTH.

The defendant land company were the owners of a tract of land on the western and northern suburbs of city of Winston, which they (777) had laid off into lots, with streets and a public square, known as Grace Court, all designated on a map, which was recorded. The plaintiffs allege that they had bought and paid for building lots, and some of them had built on their lots, designated on said map, and that the defendant company was about to close up Grace Court, for the purpose of selling it off, had sold part to defendant Taylor, who bought with notice, and was offering more of it for sale, and was narrowing and closing up streets indicated on the map.

The defendant company denied selling by the map referred to, but by a certain lithographic map shown to plaintiff purchasers, when they bought, on which Grace Court and other squares were reserved for future disposition. Evidence tending to support the allegation of defendants was excluded, on the ground that the defendant company was precluded by the map, which they had placed on record. Defendants excepted.

There was a verdict in favor of plaintiffs, under instruction from the court, and the injunction order was granted. Defendants appealed.

Jones & Patterson and Glenn & Manly for plaintiffs.
Watson, Buxton & Watson for defendants.

MONTGOMERY, J. In 1890 the defendant, The West End Hotel and Land Company, was the owner and in possession of a tract of land situated and lying on the western and northern boundaries of the city of Winston. The defendant company, with the view of opening up the tract of land as suburbs of the city, laid off the same into lots to be sold for homes, public buildings, and squares, with streets and avenues. Immediately at the western end of Fourth Street of the city, there was an open space of land, pear-shaped, which the company called (778) "Grace Court." The company extended Fourth Street along the southern edge of Grace Court, and turned it toward the north along the western edge of Grace Court, and then by an avenue along the northern edge of the court to Fourth Street. On the western side of the street, lying on the western edge of Grace Court, was a piece of land on which the company was to build the Zinzendorf Hotel. A map with the outlines, which we have described, was made by a competent engineer in the employment of defendant company, and by its direction registered in the office of the register of deeds of Forsyth County, in book 35, p. 136.

Afterwards the plaintiffs each purchased from the defendant company one of the lots so laid off, lying along the southern edge of Fourth

Street as it ran along Grace Court. In the deeds which were executed by defendant company to the plaintiff purchasers, reference was made to the plat which had been filed in the register's office, which plat as we have seen contained the square called "Grace Court" and the streets surrounding and adjoining. Several of the lots have been built upon as homes. Since the execution of the deeds to the plaintiffs, the defendant company has sold and conveyed by deed a part of Grace Court to the defendant W. B. Taylor, and is endeavoring to sell other parts of the court.

The plaintiffs claim that the registration of the plat of the land of defendant company, and the reference made n its deed to the plaintiffs to that plat, is a dedication of Grace Court to their use, and to the use of the public as an open court, and can not be closed by the defendant, or any persons claiming under it, by the erection of buildings thereon or by any other means.

This action was brought for a perpetual injunction restraining the defendant hotel and land company from disposing of the court or any part thereof for private purposes, or from otherwise depriving the plaintiffs of their enjoyment of the court as a public open (779) ground, and from narrowing and closing up the streets surrounding the same; and that the defendant Taylor be forever restrained from erecting any building or placing other obstruction on any part of Grace Court, or from using the same for any private purpose.

The defendants set up as a defense the averment that, notwithstanding the registration of the plat by the defendant company heretofore described, the plaintiffs, in truth, bought their lots not by the plat registered, but under a certain lithographic map shown to the plaintiff purchasers at the time they bought, and in which Grace Court and other squares were reserved as the property of the defendant company and subject to its future disposition. The evidence of the defendants tending to show their contentions, was rejected by the court as incompetent, and the court instructed the jury that if they believed the evidence to answer the issues in favor of the plaintiffs.

We agree with his Honor that, as the defendant company in the execution of its deeds to the plaintiffs referred therein to the plat and map which they had caused to be registered, and not to the lithographed map, they were concluded thereby, and that no evidence to the contrary was admissible. If the owner of land lays it off into squares, lots and streets with a view to form a town or city, or as a suburb to a town or city, certainly if he causes the same to be registered in the county where the land is situated and sells any part of the lots or squares, and in the deed refers in the description thereof to the plat, such reference will constitute an irrevocable dedication to the public of the streets marked

upon the plat. *Meier v. Portland,* 16 Oregon, 500. We think the same principle would apply to those pieces of land which were marked on such a plat as squares, or courts, or parks, and that streets and (780) public grounds designated on such a map should forever be open to the purchasers and to the public. *Gorgan v. Hayward,* 4 Fed. 164; *Church v. Portland,* 6 L. R. A., 659; *Price v. Plainfield,* 40 N. J. Law, 608.

It is immaterial whether the public authorities of the city or county had formally accepted the dedication of the court. The plaintiffs had been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should forever be open to the purchasers and their assigns. Grace Court, as laid off on the plat, was not within the curtilage of the hotel, and therefore to be used in connection with it, but was outside of the lot reserved for the hotel, across a very wide street, and surrounded by lots laid off on the streets adjacent to it. The word "court," when used in connection with such a piece of land, is synonymous in law with the words "park" and "square."

The exception made by the defendant to the refusal of his Honor to submit an issue as to the rights of the plaintiff Hanes is not of any consequence, for if the streets and court are for the benefit of the other plaintiffs and the public, he necessarily must share therein as a consequence.

No error.

Cited: Collins v. Land Co., 128 N. C., 565, 566, 569; *Hanes v. Land Co.,* 129 N. C., 312; *Davis v. Morris,* 132 N. C., 436; *Hughes v. Clark,* 134 N. C., 460; *Milliken v. Denny,* 135 N. C., 22; *S. c.* 141 N. C., 227; *Staton v. R. R.,* 147 N. C., 440; *Bailliere v. Shingle Co.,* 150 N. C., 637; *Butler v. Tobacco Co.,* 152 N. C., 421; *Sexton v. Elizabeth City,* 169 N. C., 390, 393; *Wheeler v. Construction Co.,* 170 N. C., 428; *Guilford v. Porter,* 171 N. C., 359.

(781)

STATE EX REL. N. S. WILSON v. STEPHEN T. NEAL.

(Decided 5 June, 1900.)

Quo Warranto—Clerk Superior Court of Forsyth County—Clerk of the Western District Criminal Court for Forsyth County.

This case is controlled by the decision in *White v. Murray, ante,* 153.

Quo Warranto brought by the relator to try the title of the defendant as clerk of the Criminal Court of Forsyth County, tried before *Shaw, J.,* at November Term, 1899, of FORSYTH upon the following

FACTS AGREED.

It is agreed in the above-entitled cause, that at a general election held in November, 1898, N. S. Wilson, plaintiff relator, was elected clerk of the Superior Court of Forsyth County, and duly qualified and entered upon the duties of the said office. It is also agreed that the amount of fees from civil and probate business received by the clerk of the Superior Court of Forsyth County averages $1,500 per year and the fees received from criminal actions, $1,200 per year.

It is also agreed, that S. T. Neal, the defendant, under the provisions of acts of the General Assembly of 1899, ch. 371 and 594, was appointed clerk of the Criminal Court of Forsyth County in the Western District Criminal Court, and duly qualified as said clerk and entered upon the duties of said office, and now duly performs the duties of said clerk of the Criminal Court of Forsyth County as provided by said Act of Assembly, receiving the fees and emoluments thereof.

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WATSON, BUXTON & WATSON,
HOLTON & ALEXANDER,
Attorneys for Plaintiff Relator.
GLENN & MANLY,
Attorneys for S. T. Neal.

His Honor, upon consideration, rendered judgment in favor of defendant, S. T. Neal, and plaintiff relator, N. S. Wilson, appealed to the Supreme Court.

Holton & Alexander and Watson, Buxton & Watson for plaintiff.
Glenn & Manly for defendant.

FURCHES, J. From the facts agreed in this case it appears that the same questions of law are presented for our consideration and decision that were presented in the case of *White v. Murray, ante,* 153. The opinion in that case must govern us in deciding this case, and the judgment of the court below, holding that plaintiff could not recover, is

Affirmed.

(783)

M. C. AUSTIN v. E. M. STATEN ET AL.

(Decided 5 June, 1900.)

Common Grantor—Statute of Frauds, Section 1546 of The Code, Construed with Registration Act of 1885, Chapter 147—Effect of Prior Registration of Second Deed Upon the Prior Unregistered Deed.

1. The Statute of Frauds and the Registration Act were both intended to prevent fraud, and must be construed together with that view.
2. Registration is required for the purpose of notice—an unregistered deed does not *now* constitute color of title.
3. Where both parties claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first—he makes out a *prima facie* case, and the burden of proof is shifted upon the defendant to attack the *bona fides* of plaintiff's deed, and to defeat it, if he can, by establishing fraud.

ACTION for possession of land, tried before *McNeill, J.*, at August Term, 1899, of UNION. It was admitted that the title was out of the State. The plaintiff claimed under a deed to himself from H. W. Staten, Jesse F. Staten, and J. Bithel Staten, dated 31 March, 1896, registered the same day. Action commenced 23 May, 1896.

The defendant claimed under a deed to himself from the same parties, 31 December, 1887, registered 31 May, 1897. Both deeds covered the land—the defendant was in possession and had been from the date of his deed. His allegation was that the plaintiff was not a purchaser of the land.

In the course of his charge, his Honor instructed the jury that the burden is upon the plaintiff to show the *bona fides* of their transaction, that is, to show that he paid for the land, and in passing upon the question as to whether or not Austin paid, or was to pay for the land without any condition, you will consider all the circumstances sur-

(784) rounding the transaction.

Plaintiff excepted. Verdict for defendant, and judgment. Plaintiff appealed.

R. B. Redwine and Adams & Jerome for plaintiff.
Armfield & Williams and A. M. Stack for defendant.

FURCHES, J. This is an action for the possession of land commenced on 23 May, 1896. The defendants rely on the general denial of the plaintiff's right to possession, in which the plaintiff's title and the defendants' possession under color of title are involved. The following issues were submitted without objection:

"1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: 'No.'

"2. What is the annual rental value of the said land?

"3. What damage is the plaintiff entitled to recover?"

The plaintiff and defendants both claim title under the same parties, to wit, W. H. Staten, J. F. Staten, and J. B. Staten. The plaintiff claims under a deed dated 31 March, 1896, and registered on the same day. The defendants claimed under a deed dated 31 December, 1887, and registered 31 May, 1897. It was admitted that the defendant E. M. Staten had been in the continuous possession of the land ever since the date of his deed in 1887.

It was also in evidence that he was a neighbor of the defendant, E. M. Staten, knew of the deed to said defendant and of defendant's possession. The plaintiff's wife is a sister of the grantors and a half sister of the defendant.

The evidence tended to show (and was not contradicted) that (785) the defendant E. M. Staten was threatening to caveat and contest his father's will, and the other defendants conveyed him the land in controversy in consideration that he would not do so; that two of the grantors were minors under 21 years of age, when the deed to the defendant was executed, but had both reached the age of 21, more than three years before the date of the conveyance to the plaintiff, and before the commencement of this action.

It was in evidence that the grantors were men of small means, and in debt; that on the day they made the deed to the plaintiff, they went to the town of Monroe and consulted an attorney as to whether they could recover the land in controversy from the defendant, and, under his advice, they made the deed to the plaintiff, and he executed his note to them as the consideration therefor in the sum of $297.50, due one day after date, and dated 31 March, 1896; that no part of said note has been paid, but it was offered in evidence on the trial by the plaintiff, as evidence of consideration for the deed; and the grantors testified that the sale to the plaintiff was *bona fide*.

This is substantially the case at the close of the evidence, and the plaintiff asked the court for the following special instructions:

"1. That the evidence is insufficient to show fraud in the procurement and execution of the deed under which the plaintiff claims title to the land mentioned in the complaint. Refused, and plaintiff excepted.

"2. That there is no evidence to show fraud in the procurement and execution of the deed under which the plaintiff claims title to the land. Refused. Plaintiff excepted.

"3. If the jury believe the evidence they will find that the plaintiff is a purchaser of the land for value. Refused, and plaintiff (786) excepted.

"4. That if the jury believe the evidence introduced by the defendant himself, then the plaintiff paid a valuable consideration for the land. Refused, and plaintiff excepted."

And the court charged the jury in part as follows:

"The burden is upon the plaintiff to show that he is a purchaser for a valuable consideration; the defendant having shown a deed to the land older than the plaintiff's, he must show this by a preponderance of the testimony, that is, he must show you by a greater weight of the testimony that he paid for the land. (The plaintiff excepted to this part of the charge.)

"If you should find from the evidence that the note given for the purchase money of the land was executed under an agreement, or with an understanding with the grantors in said deed, upon the part of the plaintiff, that the note was not to be paid unless the plaintiff recovered the land in this suit, in such case the plaintiff would not be a purchaser for value, and should you find that there was such an agreement or understanding, you will answer the first issue: 'No.' (The plaintiff excepted.)

"In this case the defendant contends that the transaction by the plaintiff and his grantors, was one without a valuable consideration, and as to this the court has instructed you that the burden of proof is upon the plaintiff to show that he paid for the land, or gave a note without any understanding or agreement that it was not to be paid, in case plaintiff should not recover in this suit. (The plaintiff excepted.)

"The burden is upon the plaintiff to show the *bona fides* of the transaction; that is, to show that he paid for the land, and in passing upon the question as to whether or not Austin paid or was to pay for the land without any condition, you will consider all the circumstances (787) surrounding the transaction. (The plaintiff excepted.)

"The defendants contend that the facts that there has nothing been paid on the note, that no effort has been made to collect the note save that a request to the attorney to collect the note, that the grantors are poor men, while the grantee is worth considerable property, that the plaintiff Austin has not gone on the stand to testify concerning his transaction with his grantors, taken together with the circumstances at the making of the deed, which you will recall, and taken with the testimony of H. W. Staten that he was to receive one-third of the land in case of recovery by the plaintiff—though the witness afterwards changed that evidence—that these matters throw suspicion on the transaction and prove lack of consideration and fraud." (Plaintiff excepted.)

Under the instructions of the court the jury found "No" to the first issue, and upon the judgment being signed the plaintiff appealed.

The plaintiff contends there were errors committed by the court in

refusing to give the special instructions, and also in the instructions given to the jury, as pointed out in his exceptions. He further contends that whether this is so or not, still, he is entitled to recover under chapter 147, Laws of 1885, as his deed was registered before the deed of the defendant; while the defendant contends that his deed, though not registered, was color of title; that he had been in possession, holding under said deed, for more than seven years, and more than three years after all the grantors came of age; that his possession was open and notorious, known to the plaintiff when he took his deed, and that the plaintiff had actual knowledge of the fact that the defendant E. M. Staten had a deed for the land from his grantors, when he took his deed.

Besides the questions presented upon the exceptions to the prayers for instructions and the judge's charge, this case presents (788) a new and important question growing out of the Registration Act of 1885. That act provides: "That no deed or contract for the sale of land shall be valid to pass any property against the creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof." While section 1546 of The Code (27 Elizabeth) provides that where a party who has sold land, "with the actual intent in fact to defraud such person as hath purchased or shall purchase in fee simple . . . the same land . . . or to defraud such as shall purchase, . . . shall be deemed utterly void against such person and others claiming under him, who shall purchase for the full value thereof . . . the same land . . . without notice before and at the time of his purchase alleged to have been made with intent to defraud."

These statutes, construed separately, would seem to be in conflict with each other. But they were both passed to prevent fraud and must be construed together with a view to the end for which they were passed. And when so considered, it does not seem to us that they are in conflict with each other. The knowledge required by section 1546 of The Code, it would seem, must now be manifested under chapter 147, Laws of 1885, by registration. But this only applies to knowledge of the former conveyance, and carries with it no taint or knowledge of *actual intent to defraud,* which vitiates the deed when it exists, and is so found. The act of 1885, it seems to us, does no more than to put the second purchaser upon the same footing where a second purchaser stood before the act of 1885, who purchased without notice of the former deed. And the second purchaser must now, as before the act of 1885, still be a *bona fide* purchaser, and for full value. We do not mean to say that (789) he should have paid every dollar the land was worth, but he should have paid a reasonably fair price—such as would indicate fair dealing, and not be suggestive of fraud.

Considering these acts together, it seems to us that this is their necessary construction, and the only construction that will prevent a statute, passed to prevent fraud, from becoming a means of fraud. To give these acts any other construction—to give them the construction contended for by the plaintiff—would be to open the door to the very worst kind of fraud. If the construction contended for by the plaintiff be put upon it, A might sell his land today to B and receive every dollar of the purchase money, and tomorrow, by an arrangement with C, sell the same land to him, and if C is able to get his deed registered first (which he would likely do if he was engaged in a trick of this kind), B would be without remedy.

But if the plaintiff's deed is void for any of these reasons, the title to the land would be in the grantors but for their deed to the defendant E. M. Staten, which is good as between them.

The real matter involved in this case, as it seems to us, is this: Was the purchase of the plaintiff an absolute *bona fide* purchase for a full price and without any actual intent to defraud the defendant? The plaintiff though, having obtained his deed long after the defendant obtained his, got it registered first. And this, under the act of 1885, gives him the vantage ground, and the burden is upon the defendant to show the ground which he alleges vitiates the plaintiff's deed. As a general rule, one who alleges fraud or vitiating circumstances must prove them; and we do not think the relationship of the parties to this action changes this rule. *Reiger v. Davis,* 67 N. C., 185; *Redmond v. Chandley,* 119 N. C., 579; *Bank v. Gilmer,* 116 N. C., 684.

We can not adopt the argument of the defendant that an un-
(790) registered deed is color of title, now. To hold this, would be in effect to destroy chapter 147, Laws 1885, which we can not do.

We see no error in the court's refusing to give the plaintiff's prayers for instruction, but there was error in the charge as pointed out by the plaintiff's first, third and fourth exceptions thereto, in which he placed the burden of proof upon the plaintiff. For this reason and for the reason that it does not seem to us that the case was tried upon the real issues presented (as we have endeavored to point out), there must be a new trial.

New trial.

Cited: Lindsey v Beaman, 128 N. C., 192; *Collins v. Davis,* 132 N. C., 111; *Laton v. Crowell,* 136 N. C., 380; *Janney v. Robbins,* 141 N. C., 403, 404, 405, 408, 409; *Wood v. Lewey,* 153 N. C., 403; *Gore v. McPherson,* 161 N. C., 644; *Weston v. Lumber Co.,* 162 N. C., 182; *Moore v. Johnson, ibid.,* 270; *Burns v. Stewart, ibid.,* 367; *Buchanan v. Clark,* 164 N. C., 66; *King v. McRackan,* 168 N. C., 624; *Sills v. Ford,* 171 N. C., 741, 742.

N. G. McMANUS AND WIFE v. J. J. TARLETON.

(Decided 5 June, 1900.)

Statute of Frauds—To What Applicable—Fraudulent Executory Contract—Fraudulent Conveyances.

1. The statute of frauds, as between parties and privies, does not apply to executed but only to executory contracts.
2. Courts of law will not enforce fraudulent executory contracts, and courts of equity will set aside fraudulent conveyances in proper cases.

ACTION for the recovery of land, tried before *McNeill, J.*, at August Term, 1899, of UNION.

The *feme* plaintiff claimed the land as heir at law of G. W. Little, assignee of W. C. Tarleton; the defendant claimed it as heir at law of W. C. Tarleton. There was a verdict for plaintiffs. Judgment in accordance with the verdict, and appeal by defendant. The contentions of the parties are disclosed in the opinion. (791)

Adams & Jerome for plaintiffs.
R. B. Redwine and Armfield & Williams for defendant.

FURCHES, J. This is an action for the possession of land. The plaintiffs claim title as heirs at law (the wife) of G. W. Little, assignee of W. C. Tarleton. The defendant claims title as the heir at law of W. C. Tarleton. The pleadings admit that the *feme* plaintiff is the legal owner of the land in controversy. But the defendant alleges that the deed from W. C. Tarleton to G. W. Little was intended by the parties as a power of attorney, and not as a deed; but, by the inadvertence and the ignorance of the draftsman and of the parties, the same was drawn, in form, a deed in fee simple. The defendant therefore asks that the deed be reformed, and that plaintiffs be declared trustees of the land for his benefit. The plaintiffs reply to the defendant's answer, alleging that the deed was not intended as a power of attorney, and drawn as a deed through mistake and ignorance of the parties, and deny the same; and allege that it was a fee simple deed, and, in fact, that said deed was made to delay, hinder and defraud the creditors of the grantor, W. C. Tarleton.

Upon this state of the pleadings there was an issue submitted to the jury as to whether the deed was made to defraud the creditors of W. C. Tarleton; also another, as to whether it was intended as a power of attorney, and drawn in form a deed in fee simple by mistake; and also another, as to whether the plaintiff was the owner of the land in controversy.

(792) The jury found that the deed was not made to defraud creditors, and that it was not intended as a power of attorney, but as a deed of conveyance, and the court having reserved the issue as to the ownership of the land, found it in favor of the plaintiff.

Before the commencement of the trial in the court below, the defendant made a motion to dismiss the action, upon the ground that the plaintiffs had alleged in their replication that the deed to G. W. Little, under whom they claim, was made to defraud creditors. The court refused the motion, and the defendant excepted, and the defendant renewed this motion in this Court.

The court below properly refused this motion, and the motion made here can not be allowed. The jury found that the deed was not made to defraud creditors. But if they had found otherwise it would not have affected the plaintiff's right to recover the land. *York v. Merritt,* 80 N. C., 285. This deed was an executed contract, and the statute of frauds, as between parties and privies, does not apply to executed but only to executory contracts. *Choat v. Wright,* 13 N. C., 289; *Hall v. Fisher, ante,* 205. This issue was unnecessary and should not have been submitted, even if we were to admit that it was raised by the pleadings, which we do not.

Courts of law will not enforce fraudulent executory contracts, and courts of equity will set aside fraudulent conveyances in proper cases. But there is no equitable ground alleged here for setting aside this conveyance, and indeed, the defendant alleges that the plaintiff has the legal title, and asks that she may be declared trustee of the land for the defendant's benefit.

Upon the jury's finding that the deed was not made as a power of attorney, but a deed in fee simple, the defendant having admitted that the plaintiffs had the legal title to the land, it necessarily follows that they were entitled to judgment, unless there was error committed on the trial. We have examined the other exceptions of the defendant,
(793) and fail to find error in them. The judgment is

Affirmed.

Cited: Brinkley v. Brinkley, 128 N. C., 506, 514.

JAMES CANSLER v. G. N. PENLAND.

(Decided 5 June, 1900.)

Petition to Rehear—Farming Out Public Office—Code, sec. 2084.

The plaintiff, appointed tax collector for the county of Macon for the years 1891-1892, turned over to the defendant the entire lists, absolutely, to collect and account for, and reserving no control of the tax lists. This constituted a clear case of farming out a public office, prohibited by statute. Code, sec. 2084.

CLARK, J., dissents.

CASE reported in 125 N. C., 578. Petition to rehear refused.

Busbee & Busbee for petitioner.
Simmons, Pou & Ward, contra.

MONTGOMERY, J. This case was first before the Court at September Term, 1899, 125 N. C., 578. It is now reheard upon petition of the plaintiff. One reason assigned in the petition to rehear is that the decision was made to turn wholly upon the legality or illegality of the written contract between the plaintiff and defendant, which is set out in the answer of the defendant by way of counterclaim. The petitioner did not complain of that part of the decision, but on the other hand admitted that it was void under section 2084 of The Code. But it is further stated in the petition, that the petitioner was advised (794) that the court did not consider the fact that the action was not brought by the plaintiff upon that contract. It may be true that the court considered fully, in arriving at its decision, the illegal contract set up by the defendant in its answer as affecting the contract upon which the plaintiff brought his action; and we see no error in that manner of the treatment of the case.

If it should be conceded for the sake of the argument that the contract upon which he declared was a valid one, yet he, on the investigation before the referee as to the account between him and the defendant, himself introduced the contract which the defendant set up as a counterclaim, and insisted that the defendant owed him a balance under the provisions of that very contract. However, upon a careful reading of the decision in the reported case, it appears that the case was decided upon the contract upon which the plaintiff brought his action. It showed that the plaintiff had been appointed tax collector for the county of Macon for the years 1891-92, and that he placed in the defendant's hands, not a part of the tax duplicates, but the entire list; and that he

took a bond from the defendant with sureties in which it was recited that it was given to secure the collection of the taxes of Macon—State, county, poor, school and special taxes. It is true the plaintiff called the defendant his deputy, but there is nothing in the name in this case. As a fact, he turned over absolutely into the hands of defendant the entire tax lists of the county, which had been confided to him, specially to collect and to account for. He reserved no control of the tax lists. There could not be a clearer case of farming out a public office than the one before us. In this respect, the contract upon which the plaintiff sued was as clearly tainted with illegality as the one which the de-

(795) fendant set up in his answer.

The plaintiff's bond as tax collector was a security to the county for the collection and payment by the plaintiff of the taxes. The commissioners of the county were, and are required to keep these bonds in a safe and solvent condition, and renewed at stated times. And so far as we see from the record the county is not interested in this action.

Petition dismissed.

CLARK, J., dissenting: The plaintiff tax collector of Macon County, sued his deputy for money collected on the tax lists turned over to him and for the execution of which duty the defendant had given bond as "deputy tax collector," 7 September, 1891, and 24 September, 1892. There is and could be no objection to this transaction. The sheriff or tax collector may collect his entire tax list by deputy. It can make no difference whether the entire tax list is collected by one, or by several deputies. The referee found the amount due by defendant on plaintiff's cause of action after allowance of commissions, and there is no exception by either party to the amount reported by him.

The defendant pleaded as a counterclaim that the plaintiff on a day previous to that on which the deputy gave aforesaid bond, to wit, in August, 1891, agreed that the defendant should have the collection of the entire tax list, and set up as counterclaim constructive commissions on certain taxes collected by the plaintiff himself. This agreement in August, 1891, was illegal for the reasons given on the former hearing of this case, 125 N. C., 578, Code, sec. 2084; *Basket v. Moss,* 115 N. C., 448. But the effect of that illegality palpably would be to disallow the defendant's counterclaim for the "constructive" commissions claimed by him under such illegal contract, and could not affect the valid claim of plaintiff for public moneys collected for plaintiff by defendant as his deputy under a valid contract, and bond executed at a different

(796) time.

But the referee treated defendant's counterclaim as valid, and allowed his "constructive" fees, to which there is no exception by plaintiffs. It is true, being *contra bonos mores,* these fees might be disal-

lowed here, but that would increase the plaintiff's recovery, and could not possibly authorize the dismissal of his action.

The defendant, however, claimed that under a proper construction of the contract, which is the foundation of his counterclaim, and which has been held illegal, he could recover "constructive" costs for certain tax sales made by the sheriff. Aside from the adjudged illegality of that contract defeating the defendant's claim, the terms thereof (if legal), did not embrace "costs for tax sales," and the referee properly so held, and was affirmed by the judge. From the refusal to allow the constructive "costs on tax sales," and on that ground alone, the defendant appealed to this Court.

There was a clerical error of $60.34 made by the referee in addition, but that was corrected by the judge, and was already deducted before the appeal.

It should seem plain therefore that the defendant's exception should be disallowed both because the constructive "costs on tax sales" are not within the terms of the contract (if it were valid) and further because if within its terms, the contract (in August, 1891), upon which the counterclaim is based, is invalid.

There is no ground for dismissal of plaintiff's action to recover public moneys collected by defendant as his deputy. On the contrary, the court should *ex mero motu* reform the judgment by disallowing the counterclaim which the referee allowed defendant for "constructive commissions" upon a contract which the court has held illegal.

DOUGLAS, J., also dissents.

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(797)

HYGIENIC PLATE ICE MANUFACTURING CO. v. RALEIGH AND AUGUSTA AIR-LINE RAILROAD COMPANY.

(Decided 5 June, 1900.)

Damage by Fire—Origin of Fire—Sparks From Engines—Evidence.

Evidence of fires at various times and at other places, caused by sparks from other engines both before and after 29 August, the day of the fire, is incompetent, as not tending to prove the condition of engine No. 228 (the engine in question), nor to throw any light on the question directly before the jury, and was calculated to divert and mislead the minds of the jury to an unsafe verdict. The principle which governs in such cases is stated in *Grant v. R. R.*, 108 N. C., 462, 470.

ACTION to recover damages from fire communicated, as alleged, by sparks from a locomotive engine of defendant, and through negligence,

partially destroying the ice factory of plaintiff, tried before *Brown, J.*, at April Term, 1899, of WAKE.

Verdict and judgment for plaintiff. Defendant appealed.

(798) FAIRCLOTH, C. J., writes the opinion of the Court.
DOUGLAS, J., writes dissenting opinion.

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

MacRae & Day, J. D. Shaw, J. B. Batchelor, W. H. Neal, C. F. MacRae, and R. T. Gray for defendant.

FAIRCLOTH, C. J. This is an action for damages to plaintiff's property alleged to have been caused by defendant's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff, and an appeal by defendant. For the purposes of this opinion the facts are as follows: The plaintiff's ice factory was located on the defendant's right of way, two or three hundred yards west of Union Depot in the city of Raleigh. On 29 August, 1893, between 8 and 9 o'clock, about 8:30 the plaintiff's ice factory was discovered to be on fire and was partially consumed; that about twenty minutes before the fire the defendant's engine, No. 228, called the Atlanta Special, pulled out from Union Station going
(799) west and passed the plaintiff's factory, emitting sparks, and soon thereafter the factory was discovered to be burning. The plaintiff alleged and proved the passing of said engine and fire at the time above stated, and there is no allegation or proof in the record that any other engine of the defendant passed by said place recently before or soon after the time the fire occurred. Carefully reading the record shows clearly that the contention at the trial centered on the question whether the damage was caused by said engine, No. 228.

There was much evidence and many exceptions to the admission and exclusion of evidence, and to instructions given to the jury by the court.

During the trial, the plaintiff offered and was allowed, over the defendant's objection, to introduce the evidence of several witnesses to show that at several times, both before and after this fire and at other places on defendant's line, other engines of defendant had, by sparks emitted, set fire to and burned the property of other persons—one witness testifying that it was a common occurrence for these trains to set the fields on fire, but he did not know whether it was done by the defendant's trains, it being proved that at those points another railroad runs parallel with and in a few feet of the defendant's track. This testimony was heard by the jury without any evidence of the condition of

these engines, and without any explanation of the attending circumstances. Another witness said that in 1894 the remains of said factory building caught on fire directly after the defendant's freight train passed, and constantly before and since, and that the old field caught on fire in March, 1894, two or three times near the bridge.

This evidence of fires at various times and at other places, caused by sparks from other engines, both before and after 29 August, we must hold to be incompetent, as it does not tend to prove the condition of engine No. 228, nor to throw any light on the questions (800) directly before the jury. It was well calculated to divert the minds of the jury and lead them to an unsafe verdict.

The principle which governs in such cases was brought to the attention of the Court in February, 1891, in *Grant v. R. R.*, 108 N. C., 462, 470; the plaintiff was injured by derailment of defendant's train, and on the trial he offered to show that a similar accident occurred soon before and afterwards at other places, to a train run by the same engineer and conductor. The Court said: "The condition of the defendant's railroad track at places other than that at which the accident in question happened, could not prove or disprove the condition of the track at the latter place," and that such evidence would certainly tend to mislead the jury.

In October, 1891, the same question was before the Court in Pennsylvania, and is on "all fours" with the case before us. It was *Henderson v. R. R.*, 144 Pa. St., 461. After able and elaborate arguments the Court held: (1) "In an action for a loss by fire, caused by sparks from a locomotive engine of a railroad company, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant company, and also to prove negligence in the construction or management of the engine; such facts, however, may be established by circumstantial evidence. (2) When the fire is shown to have been caused, or, in the nature of the case, could only have been caused by sparks from an engine which is known and identified, the evidence should be confined to the condition, management and practical operation of that engine; and testimony tending to prove defects in other engines of the company is irrelevant and inadmissible. (3) If, however, the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove, in support of the allegation that the fire was caused by the defendant's negligence, that the defendant's (801) locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, causing numerous fires on that part of its road. (4) This class of testimony is exceptional in character at the best, and is admissible only because direct evidence is impracticable; the examination, therefore, will be confined to the negli-

gent operation of the engines at and about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to make such proofs practicable."

We have quoted freely from this case because it covers several practical points of this subject, and because it seems unnecessary to cite other cases of a similar bearing. The principle is not only supported by authority, but it appears to our minds to be correct, and a just rule to be applied in jury trials.

There are some decisions modifying this rule and perhaps seem inconsistent with it; but the reasoning in some of them is not satisfactory, and we do not cite or discuss them.

What we have said shows error and requires a new trial. At the next trial it is probable that many of the other exceptions will be eliminated, and we will not therefore discuss them at present.

Venire de novo.

DOUGLAS, J., dissenting: I can not concur in the judgment or opinion of the Court. The only ground for granting a new trial appears to be the admission of testimony as to the condition of other engines. Under the circumstances of this case I am inclined to think that the admission of such testimony was competent in any view, but whether this is so or not, it is clearly admissible in rebuttal of the defendant's evidence.

(802) The defendant had previously introduced Parish, foreman of its round-house, who testified on direct examination, that he did not remember anything about the particular time of the fire or the particular engine, but that he did not permit any engine to go out of the round-house without being in thorough repair. The object of his testimony clearly was to prove that this particular engine, of which he had no recollection, must have been in good repair at that time because *all* the engines were constantly kept in repair. The plaintiff simply answered this by showing that the other engines were not always kept in perfect repair, because they had set fire to property in such a way as could not have happened if they had been equipped with spark arresters such as described by the defendant's witnesses. Such evidence was strictly in rebuttal.

But it may be said that the plaintiff's counsel on the cross-examination of Nowell, a witness for the defendant, asked him about some engines that had been burned, and thus opened the door to the defendant. It seems a very little crack to open so wide a door. But admitting it to be so, the defendant did not shut the door, but opened it still wider. If it was left wide open by the defendant, why could not the plaintiff enter?

But another view suggests itself. In *Neal v. R. R., ante,* 634, this

Court has held in effect that all the testimony of the plaintiff's witnesses, whether given on direct or cross-examination, is the plaintiff's testimony. Why is it not so as to the defendant?

Cited: *Cheek v. Lumber Co.*, 134 N. C., 228; *Johnson v. R. R.*, 140 N. C., 583; *Williams v. R. R., ibid.*, 626; *Knott v. R. R.*, 142 N. C., 245; *Kerner v. R. R.*, 170 N. C., 96.

(803)

JOHN C. SHORT v. JOHN GILL, RECEIVER OF THE C. F. & Y. V. RAILWAY COMPANY AND ATLANTIC AND YADKIN RAILWAY COMPANY.

(Decided 5 June, 1900.)

Negligence—Contributory Negligence—Proximate Cause—Convicting Evidence—Jurisdiction of Special Terms.

1. Where there is conflicting evidence proper to be considered by the jury, a motion to nonsuit will not be entertained.
2. Where there are several allegations of negligence, to-wit, the coupling of an unsuitable caboose to the engine; the using an S coupling link; and the running at an excessive rate of speed—while there is an allegation of contributory negligence in that the plaintiff had failed to supply himself with a bell-cord for the trip, and there was conflicting evidence as to the main questions—it was properly submitted to the jury to determine what was the proximate cause.
3. The proximate cause of injury is an expression to denote whose negligence was nearer to the injury. The law seeks to find out who had the last chance to avoid the accident and holds that party responsible who had the last chance to avoid it.
4. Where there is a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion stay, quash or dismiss the suit. Where such is not the case, the objection must be brought forward by a plea to the jurisdiction—otherwise there is an implied waiver of the objection. *Branch v. Houston*, 44 N. C., 85.
5. His Honor's commission to hold this special term shows upon its face complete jurisdiction, with authority to go on until the business was disposed of. The fact that he took a recess to allow opportunity for holding a regular term, if thought to terminate his jurisdiction, should have been brought forward by plea to the jurisdiction.

ACTION for damages for personal injuries received through alleged negligence of defendant, tried before *Timberlake, J.*, at Special June Term, 1898, of GUILFORD.

The plaintiff testified that he was a yard conductor in the employ-

(804) ment of defendant at Greensboro in August, 1896, his duties being confined to shifting cars and making up trains. That about 3 o'clock, before day, he received orders from Mr. Smith, train dispatcher, his superior officer, to attach a caboose to an engine, both indicated, and proceed at once at a rate of twenty-four miles an hour to Madison, to carry some passengers, and to return, and that he would find everything needed in the caboose, and to hurry up. That he found the caboose was lower than the locomotive, and had to be coupled with an S link, and that there was no bell-cord, as he found out after starting. That he made the trip safely to Madison, but on his return the caboose was derailed twice—the last time he was thrown to the ground, had his skull fractured and received other injuries.

There was conflicting evidence on the part of the defense, in regard to instructions given to plaintiff, as to the suitableness of the coupling, the use of S link, and the rate of speed. The jury found the issues in favor of plaintiff, and assessed his damages at $6,500, for which sum judgment was rendered, and defendant appealed.

The exceptions to judge's charge are stated in the opinion.

Bynum & Bynum and Z. V. Taylor for plaintiff.
J. T. Morehead and G. M. Rose for defendant.

FAIRCLOTH, C. J. This action is for damages, alleged to be the result of defendant's negligence. A general statement of the case is this: That plaintiff was the conductor; that it was his duty to see that his train was properly equipped before pulling out of the yard; that he knew it was not so equipped, and was therefore guilty of contributory negligence, as he started out without a bell-cord, and the car ran a long distance on the cross-ties after it had jumped the track, because he (805) could not stop the train for want of the bell-cord, and that finally the plaintiff either fell off or jumped off, and was injured. The plaintiff claims that defendant was negligent to his injury, in that (1) it caused a comparatively light car to be attached to a powerful engine; (2) that the coupling iron was inferior to those in general use. The witnesses call it a goose neck or S link, by which we understand an iron bent thus, so as to connect the car with a base lower than that of the engine; (3) that the speed of the train ordered to be run was too fast for a train of this character.

Several witnesses were examined, and there were no exceptions to the evidence. There was some conflict in the evidence of the conductor and the engineer as to the rate of speed when the injury occurred, and as to the orders received by the latter from the company, and from the conductor himself.

The first exception was the refusal of his Honor to nonsuit the plaintiff under the act of 1897, ch. 109. There was no error here, as there was manifestly conflicting evidence proper to be considered by the jury.

The fourth exception was that the court had no authority to try the case at an adjourned day of the special term ordered by the Governor to "continue until business is disposed of" in civil cases only. A regular term of the Superior Court was held during the recess of the special term. No objection to the jurisdiction was made before the judge holding the special term, but was first made in this Court. This the defendant may do if this Court can see that the Superior Court was without jurisdiction. This motion raises an important question. Counsel cited no authority nor did he refer to the distinction which is decisive against his motion. There is perhaps no word more frequently used in judicial proceedings than jurisdiction, very often in a general and vague sense, without due regard to precision in its application. The question arose in *Branch v. Houston,* 44 N. C., 85, and the distinction (806) clearly marked, citing English authorities. "If there be a defective, *i. e.,* a total want of jurisdiction apparent upon the face of the proceedings, the court will, of its own motion, stay, quash or dismiss the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment."

If, however, "the subject-matter is within the jurisdiction and there be any peculiar circumstances excluding the plaintiff, or exempting the defendant, it must be brought forward by a plea to the jurisdiction. Otherwise there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction."

Applying this clear cut distinction, we see that his Honor, on the face of his commission, had complete jurisdiction, with authority equal to that of a judge holding a regular term, with few unimportant exceptions, and when he organized his court, there was nothing before him to excite a doubt of his authority to go on until the business was disposed of. Having then, jurisdiction, if anything or circumstances occurred which the parties thought terminated jurisdiction, they are presumed to waive such matters unless they bring them to the attention of the court by a plea to the jurisdiction. The fourth exception was therefore properly overruled.

The second and third exceptions are to parts of the charge, indicated by "a" and "b." After charging as to the caboose in a manner not excepted to, his Honor said: ("a") "But if you should not so find, you will proceed to the next allegation of negligence, to wit, the use of goose neck link or coupling. There is evidence on the part of plaintiff tending to show that it was dangerous and unsafe, and evidence on the part of defendant that it was not. You must consider it all together with the facts

and circumstances surrounding the accident, and ascertain the facts. The burden is here again on the plaintiff, and unless satisfied by (807) the greater weight of evidence that a prudent man in the exercise of ordinary care would not have, under the circumstances, used such a coupling, you will find that it was not negligence to use it. If you are so satisfied, you will say, Yes, provided you find plaintiff's injury was caused thereby—and not consider or trouble yourself with the other allegations of negligence. If not so satisfied you will consider the allegation of negligence in giving a maximum rate of speed of twenty-four miles per hour—by train dispatcher—and so running by engineer." He then told the jury that the burden was on the plaintiff, and directed them to consider all the facts and circumstances. He further said: ("b") "But before you can find the second issue Yes, you must find that the plaintiff's negligence was the proximate cause of the injury. That is to say that his negligence was nearer the injury than that of defendant. The law seeks to find out who had the last chance to avoid the accident, and holds that party responsible who had the last chance to avoid it. . . . You must find the defendant negligent either in coupling such a caboose to such an engine; in using an S coupling link, or in running at an excessive rate of speed," and he charged that the burden of the second issue was on the defendant, and that they must find that the defendant's negligence, if any, was the proximate cause, and not the plaintiff's negligence.

It appears from this review that there was conflicting evidence as to the main questions, and the proximate cause was submitted to the jury.

We think that the court was justified in this case in submitting the question of negligence and proximate cause to the jury, and we see no material error in any part of his charge. Taking the facts as the jury have found them, there is no error in the record.

Affirmed.

Cited: *Bryan v. R. R.*, 128 N. C., 395; *Love v. Huffines,* 151 N. C., 382.

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(808)

BROWN & CO. v. R. M. NIMOCKS ET AL.

(Decided 5 June, 1900.)

Appeal, Premature—Fragmentary—Motions Pending—Right of Creditors to Litigate and Prorate Inter Se.

1. The intent and policy of the statute allowing appeals (The Code, section 548) are to present for review the exceptions taken and questions of law

arising upon the *whole* case, and fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal.

2. A party can preserve his rights by having his exceptions noted in the record and bringing them forward on the final hearing.

3. Although the plaintiff's claim is admitted by the defendant debtor, yet other preferred creditors when brought in, will have the right to litigate *inter se* and to prorate in case of a deficiency of assets.

ACTION, with attachment proceedings, to vacate an assignment by R. M. Nimocks, on the ground of fraud and insufficiency of the schedule of preferred debts, tried before *Robinson, J.*, at May Term, 1899, of CUMBERLAND. Upon a former appeal, reported in 124 N. C., 417, the schedule was sustained, and the issue of fraud was abandoned. The plaintiff's debt was not controverted, and was preferred among the second class. They moved for judgment upon their debt, and that it be declared a lien upon the property. His Honor refused the motion, dissolved the attachments and directed the other preferred creditors to be made parties along with other creditors who had obtained judgment since the date of the assignment—and it was further adjudged that an issue be submitted to a jury to ascertain what damage, if any, the defendants have sustained by reason of the attachments.

The plaintiffs excepted, and appealed.

Robinson & Shaw for plaintiffs. (809)
H. L. Cook and N. A. Sinclair for defendants.

FAIRCLOTH, C. J. On 19 May, 1897, the defendant Nimocks made an assignment of his property to W. S. Cook in trust for his creditors in classes. On 27 May, 1897, the plaintiff sued out an attachment on some of said property, on the assumption that the assignment was void. On appeal, this Court (124 N. C., 417) held that the assignment was not void, and ordered a new trial. At May Term, 1899, the plaintiff tendered a judgment to be signed for the amount of his debt, which was not disputed, and that such judgment be declared a valid *lien* on the assigned estate, and that certain other claims in the second class were of equal dignity with that of the plaintiff. This tendered judgment was refused, and his Honor entered judgment as follows: That the assignment is valid, that the attachment be dissolved and set aside, and that an issue be submitted to the jury to ascertain the defendant's damages, if any, by reason of the attachment. To this judgment and the refusal of his Honor to sign the tendered judgment, the plaintiff excepted. The court also ordered that all the preferred creditors in the assignment and certain judgment creditors be made parties defendant, with leave to file pleadings, and that summons issue accordingly. A motion

by the defendant to amend his schedule, also to amend his answer, was continued. The plaintiff appealed from said refusal and judgment and orders, and in this Court the defendant moves to dismiss the appeal on the ground that it is premature.

The Code, section 548, allows an appeal from every judicial order, upon a matter of law or legal inference, which affects a substantial right; or determines the action; or discontinues the action, or grants, or refuses a new trial. Many decisions have been rendered on this section of the Code.

(810) The intent and policy of the statute, as we construe it, are that an appeal to this Court should present for review the exceptions taken and questions of law arising upon the *whole* case, and that appeals presenting the exception and legal questions in piecemeal will not be entertained, when no substantial right is put in jeopardy by such refusal. Any other rule would confuse litigation and vex litigants, as well as increase costs. It would be inconvenient for each preferred creditor, in a case like this, to prosecute his appeal when other rights of the same dignity have not been tried. The plaintiff can preserve his rights by having his exceptions noted in the record, and bringing them forward on the final hearing. It is true the plaintiff's claim is admitted to be correct by the *present* defendant, but when the other preferred creditors are in, they will have the right to litigate *inter se,* and to prorate in case of a deficiency of assets. The plaintiff has no more or better lien than the others of the same class. The order and judgment of his Honor were quite proper. No final judgment has been entered, and none could be in the present condition of the case. The numerous decided cases will be found in Clark's Code, under section 548—notably *Hines v. Hines,* 84 N. C., 122; *Clement v. Foster,* 99 N. C., 255 and *Welch v. Kinsland,* 93 N. C., 281.

Appeal dismissed.

Cited: Houston v. Lumber Co., 136 N. C., 328; *Riley v. Sears,* 151 N. C., 188; *Pritchard v. Spring Co., ib.,* 250; *Smith v. Miller,* 155 N. C., 246.

(811)

W. M. WHEELER v. R. L. GIBBON.

(Decided 5 June, 1900.)

Negligence—Concurrent Negligence—Last Clear Chance.

Where the evidence discloses, and the jury so find, negligence and concurrent negligence, the remaining question, as to the last clear chance, is peculiarly one for the jury to answer from the evidence, and their response is decisive of the case.

ACTION to recover damages for personal injuries sustained by the alleged negligence of defendant's driver in driving his horse and buggy against the plaintiff in Charlotte, tried before *Coble, J.*, at Spring Term, 1899, of MECKLENBURG. The plaintiff was crossing the street in a severe wind and rain storm, with his head under an umbrella, when the driver at a fast rate of speed collided with him, and knocked him over, hurting him severely. The defendant objected to the third issue (as to the last clear chance), and excepted because the court refused to strike it out. The jury found all the issues in the affirmative, and assessed plaintiff's damages at $500. Judgment accordingly. Appeal by defendant.

Jones & Tillett for plaintiff.
Burwell, Walker & Cansler for defendant.

CLARK, J. The plaintiff started to cross Tryon street in Charlotte, at a crossing. A violent storm of wind and rain suddenly sprang up. He looked down the street just before crossing, in the direction from which the storm was coming, and saw "no moving thing"; he placed his umbrella on that side to keep off the rain, and tried to cross. While his view was thus obstructed, and when he had almost reached the (812) opposite sidewalk, the hoof of the defendant's horse, which was being driven up the street, going in the same direction as the storm, shot forward under the umbrella as he held it down, striking him on the knee, and immediately after, the front wheel of the buggy, struck him.

The jury, in response to the first issue, found that the plaintiff was injured by the negligence of the defendant, and, in response to the second issue, that plaintiff was guilty of contributory negligence. This disposes of much of the argument that was submitted, and clearly justifies the submission of the third issue (*Baker v. R. R.*, 118 N. C., 1015, and cases cited), to which defendant excepted. "Could the defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff, notwithstanding the negligence of the plaintiff?" This was the crucial

issue of fact, and was peculiarly for the consideration of the jury, for we can not agree with the appellant that the court could instruct the jury that on such a state of facts, in law, the proximate cause of injury was due to the plaintiff. That is the very fact which the jury, not the court, must determine. The negligence may have been concurrent, or the last negligence may have been the plaintiff's, or notwithstanding the negligence of the plaintiff, the defendant could, with the exercise of ordinary care, have prevented his horse striking, and his conveyance running over, the plaintiff. The jury and the jury alone were competent to determine the fact, for there was evidence for their consideration. The plaintiff was crossing, with his head tucked behind his umbrella. This was negligence. The defendant was driving rapidly, "ten miles an hour, or at top of his speed," and with his oilcloth up in front of the buggy, and this was negligence. He was driving in the same direction with the storm, and was in a vehicle, and therefore could keep a
(813) better lookout. Then his horse and vehicle could do damage to a foot passenger—and did—while the foot passenger was not likely to run into him and do damage, and the defendant should have kept a lookout correspondingly careful to avoid injury.

This is not like *High v. R. R.*, 112 N. C., 385, where it was not negligence for the engineer to suppose that a woman, even though wearing a poke bonnet, would hear and see the train and get off the narrow railroad track; but, here, the defendant could not suppose that the plaintiff, crossing a street in a heavy storm, with his head behind his umbrella, would see or hear his buggy in time to get out of the way. He had no right to act on that presumption, as the engineer was justified in doing in *High's case*. The train had the superior right of way. The defendant had not.

The jury under proper instructions have found that if the defendant, himself driving negligently, had used ordinary care, he could have seen the plaintiff negligently crossing the street in a pelting storm with his head hid behind his umbrella, in time to avoid running over him. This was a pure question of fact, and the Court can not review it. Citation of cases, far and near, more or less analogous, would throw no light upon the solution of the question of fact, so plainly and so clearly set forth in the third issue for the jury to answer.

No error.

Cited: Alexander v. Statesville, 165 N. C., 537; *Norman v. R. R.,* 167 N. C., 546.

(814)

BATTERY PARK BANK, J. B. BOSTIC AND J. G. MERRIMON, TRUSTEES, v. JAMES H. LOUGHRAN.

(Decided 5 June, 1900.)

Bank Indebtedness—Past Due Notes Lodged as Collateral—Defenses—Finding of Referee—When Conclusive—Evidence.

1. Past due notes lodged with a bank to secure indebtedness, are taken subject to all proper defenses by the makers against the original payee.
2. The finding of facts by a referee, upon *some* evidence, concurred in by the judge, although apparently against the weight of evidence, is conclusive, and not subject to review.
3. Where there was *some* evidence before the referee tending to show that the collaterals were notes made by the defendant to plaintiff J. B. Bostic, who pledged them to the plaintiff bank, when past due—that they were made to Bostic in purchase of three lots from him by defendant, upon an agreement that upon payment of one-fifth of the purchase money Bostic would deliver to him a good bond for title to secure a fee simple deed, when defendant should comply with his part of the contract—that Bostic had failed to give the defendant a bond for title upon payment of the notes, and had sold the lots to other parties. The referee found the facts as contended for by defendant, and his finding was approved by the judge. *Held*, to be conclusive.

ACTION upon six promissory notes executed by defendant, payable to J. B. Bostic, who after maturity lodged them as collaterals to secure a debt he owed the plaintiff bank, tried before *Coble, J.*, upon exceptions to report of referee, filed by plaintiff, at November Term, 1899, of BUNCOMBE. By an amendment to his answer the defendant set up as a defense an entire failure of consideration, and there was a reference to ascertain the facts. There was *some* evidence tending to establish the defense, and the referee reported the facts as contended (815) for by defendant. The plaintiffs excepted to the report, but his Honor approved the finding of the referee, and rendered judgment in favor of defendant. Plaintiffs excepted and appealed.

This case was before the Court at February Term, 1898, reported in 122 N. C., 668.

T. H. Cobb for plaintiffs.
W. W. Jones for defendant.

MONTGOMERY, J. This action was commenced originally for the recovery of the amount due by the defendant on six promissory notes, three of them payable two years from date, and three of them three years from date, which he, with two others, had executed to the plaintiff Bostic, and which Bostic had assigned as collateral security to the

plaintiff bank for a debt which he owed it. Afterwards Bostic made an assignment of his property, including his equitable interest in these notes, to the other defendant, J. G. Merrimon, as trustee. The consideration upon which these notes were executed was not stated in the complaint. The defendants in their answer admitted the execution of the notes, averring that the consideration therefor was the purchase price of three lots of land situated in Asheville, sold at public auction by Bostic and bought by the defendant. Three defenses were set up by the defendant in his answer:

1. That while the sale of the lots was going on Bostic made to the defendant false and fraudulent representations in respect to the manner in which the sale was to be conducted, viz., that there would be no by-bidding, when in fact, Bostic had procured by-bidders, who fraudulently ran up and increased the price of the lots greatly in excess of their true value.

(816) 2. That after the notes were executed, Bostic sold the lots without the consent or authority of the defendant to various persons, and thus disabled himself from executing proper deeds to the lots to the defendant, and that the plaintiff bank had full knowledge of the defendant's equitable defense; and

3. That Bostic did not have a good title to the property at any time since the sale, and therefore, that he could not give a good title to the same.

The statute of limitations was also pleaded in defense. In the first trial there was a judgment for the defendant. Upon appeal to this Court by the plaintiff a new trial was ordered. Afterwards in the Superior Court the defendant amended his answer in which he introduced new matter as a defense, and which new matter raised another issue. That part of the amended answer to which we particularly refer is in these words: "That at the time of the sale of the lots mentioned in the original answer, as a further defense, the said Bostic announced or caused to be announced at the sale, that the balance of the purchase money for the lots should be secured by the promissory notes of the purchasers, and that, in consideration of the said purchases and execution of said notes, he, Bostic, would execute to the purchasers a good and sufficient bond for title in fee simple with warranty, upon the payment of the notes when they became due; that this defendant, with one Millster and one Cleary, purchased certain lots mentioned in the original answer, and executed and delivered to Bostic their said notes, but that Bostic failed and refused to execute to said purchasers a sufficient and legal bond for title to the lots."

The defense set up in the amended answer was not thought of in the original answer, nor on the first trial. It turned out to be, however,

the main and only defense which he had, for in the trial before (817) the referee, the cause having been referred to W. P. Brown with all the issues, to report the evidence, his findings of fact and conclusions of law, the defendant offered no evidence showing fraud in the sale, and he did not appeal from the findings of law by the referee that the debts were not barred by the statute of limitations. The referee in his second finding of fact reported that at and before the sale of the lots there was an agreement between the defendant and Bostic that the defendant should pay one-fifth of the purchase money in cash and execute to Bostic nine notes to be paid in the future, and that, in consideration of the payment of the money and the execution of the notes, Bostic would execute and deliver to the defendant "a good bond for a title to the three lots to secure to James H. Loughran a deed in fee simple for the lots above referred to, when the defendant Loughran should comply with his part of the contract by the payment of one-fifth of the purchase money, and the making and delivering of the said notes above mentioned for the payment of the remainder of said purchase money." The referee also found that Bostic did not comply with his part of the agreement by executing and delivering to the defendant the bond for title, and that on 26 October, 1892, Bostic sold the lots to the highest bidder, for cash, to J. A. Burross, L. A. Farinholt, and Natt Atkinson, that the money was paid, and that Bostic and his wife executed fee simple deeds for the lots to the purchasers with covenants of warranty.

Upon these findings of facts, the referee concluded as matters of law that Bostic, not having complied with his contract by making and delivering the bonds for title, was not entitled to take anything by reason of his action, and that the notes had no consideration to support them. Those parts of the report of the referee were sustained by his Honor in the court below.

The counsel of the plaintiffs, in his argument, and in his brief (818) filed, contended that the amended answer raised no issue; that upon its face it was a sham plea, and an absurd one; and that notwithstanding the finding of the referee, that Bostic had failed and refused to deliver the bonds for title, and that his Honor sustained that finding, the plaintiffs were entitled to a judgment because of the failure of the amended answer to raise the issue of the delivery of the bonds for title.

The contention of the plaintiff's counsel was that the natural and proper construction of the amended answer was that Bostic was to deliver the bonds for title when the *whole* of the purchase money should have been paid by the defendant, and that that was an absurdity, and contrary to the implied admissions on the question of delivery in the original answer. The argument might have some force if we should be bound by a strict grammatical construction, and should apply that to the first

part of the amended answer. But it loses its entire weight when the whole of the amended answer is taken into consideration, for the latter part of section 2 clears up the full meaning of the section. The amended answer then raises the issue as to the delivery of the bonds for title to the defendant, and the referee under his power passed upon that issue, and the court below sustained him, most probably on the ground that there was *some* evidence to support the finding. It seems to us that the great weight of the evidence was the other way, but with that we can have nothing to do.

This is not a case like that in which the vendor of land by parol is seeking to recover notes given by the purchaser for the price, tendering at the same time a good and sufficient deed, is met by the debtor with the plea of the statute of frauds. The plea would not avail the debtor. *Taylor v. Russell,* 119 N. C., 30. Nor is it like a case where the vendor did not have a good title to land at the time he made a contract to
(819) convey upon the payment in the future of the purchase money, but who afterwards acquired title before he demanded of the purchaser the purchase money, or before he is called upon to make title. In such a case the purchaser would be bound. *Bank v. Loughran,* 122 N. C., 668.

The notes were past due at the time when the other plaintiffs acquired their interest in them, and they took the notes subject to all proper defenses of the defendant against the original payee, Bostic. It is not necessary to discuss the other exceptions of the plaintiffs.

Affirmed.

Cited: Rogers v. Lumber Co., 154 N. C., 112; *Brown v. Hobbs, ibid.,* 546, 550; *Sykes v. Everett,* 167 N. C., 608.

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(820)

1. C. C. McCARTY ET AL. v. IMPERIAL INSURANCE CO.
2. C. C. McCARTY v. SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

Two Cases.

(Decided 5 June, 1900.)

Fire Insurance — Concurrent Insurance — Misrepresentations, Not Fraudulent, or Immaterial—Inadvertent and Unintentional Omissions—Notice of Incumbrance—Waiver.

1. Concurrent insurance is permissible. Notice of such insurance to the same agent who issues the policies in both companies, and of incumbrances stated in the policies or communicated to him at the time of insurance, is a waiver of all objections on those grounds.

2. A misrepresentation, unless fraudulent or material, will not prevent a recovery. Neither will an omission, inadvertent and unintentional, have that effect.

3. Misrepresentations, to be material, must contribute materially to the loss, or fraudulently evade the payment of the increased premium, otherwise they do not vitiate the policy, life or fire—the burden of proof being upon the company, and the jury to decide the fact.

4. The restoration of sections 8 and 9, Laws 1893, ch. 299, inadvertently omitted in the codified system of 1899, ch. 54, warmly recommended.

TWO ACTIONS upon two different policies issued to the plaintiff by the two defendant fire companies who insured the same property destroyed by fire, tried before *Starbuck, J.*, at March Term, 1899, of BUNCOMBE.

The two causes had been referred to H. B. Carter, Esq., referee, and the cases were heard upon exceptions, identical in both, filed by defendants. Both policies were issued by the same insurance agent, and contained a provision that they should be void, if the interest (821) of the insured be not truly stated therein. At the time of insurance there was a deed in trust to R. McBrayer, trustee, to secure a debt of plaintiff, for $960, incurred in purchase of the property, and which constituted a lien on it, as well as on another piece of property of still greater value. This incumbrance plaintiff failed to notify the agent of, and defendants knew nothing about it.

The referee found as a fact that the plaintiff was not himself aware that the incumbrance covered the burned property, and supposed it only covered the other more valuable piece. He also found that the plaintiff did not fraudulently or purposely conceal from the defendant the existence of said deed of trust.

The referee found as a conclusion of law in each case, that at the date of the destruction by fire of the property insured, the policy was a valid and subsisting contract, and had not been rendered void or suspended by anything done or omitted by the plaintiff.

His Honor, making no finding as to the plaintiff's intent overruled the conclusions of law of the referee, and rendered judgment dismissing both actions. The plaintiff excepted, and appealed in both cases.

Merrimon & Merrimon for plaintiff.
F. A. Sondley and T. H. Cobb for defendant.

CLARK, J. The plaintiff's house was insured in the defendant companies, and was destroyed by fire. Concurrent insurance was permitted, and policies in both these companies were issued to the plaintiff by the same agent. The companies had full notice of the incumbrance to the Building and Loan Association, and it is mentioned in the policies with

the provision "payable as their interests may appear." The de-
(822) fense is that there was another incumbrance in favor of McBrayer, trustee, which was not made known to the insurance agent, and there was a provision in the policies that they should be void "if the interest of the insured be not truly stated herein."

In *Insurance Co. v. Chase,* 72 U. S. (5 Wall.), 509, it is said: "Whether the disclosure of interest was material to the risk incurred and would have enhanced the premium, is always a question of fact for the jury." And our statute (Laws 1893, ch. 299), which was in force when this policy was taken out, and which therefore enters into and makes a part of the contract, provides:

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

"SEC. 9. All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."

There is no fraudulent misrepresentation found, and it is clear that failure to inform the company of the McBrayer trust deed was not material, and did not in anywise enhance the risk, for the trust deed embraced another tract of land which was alone sufficient to discharge it. Besides, the Building and Loan Association, named in the policy as the primary beneficiary of the insurance, had no knowledge of the McBrayer trust deed.

In *Albert v. Insurance Co.,* 122 N. C., 92, it is said (at page 95), construing the above-cited statute (1893, ch. 299): "This law applies to all policies of insurance, both of fire and of life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premium, they do not vitiate the policy.
(823) Ordinarily these are questions of fact for the jury, and not for the court." The burden of proving the fraudulent intent or the materiality of the misrepresentation, is upon the company who, after receiving the premium, must pay the loss, unless it shows good ground for its release from the discharge of the obligation it assumed. *Bank v. Fidelity Co., ante,* 320.

The evidence would seem to indicate an inadvertent and unintentional omission by the plaintiff in stating the incumbrances upon the property. The referee found that the insured, when he took out the insurance, did not know that the trust deed to McBrayer covered the lot on which the insured building stood, and that he did not fraudulently conceal its existence from the defendant's agent, but acted honestly and in good faith. The court, upon exceptions to the referee's report, overruled that finding

of fact, but expressly refrained from passing upon "the plaintiff's intent, deeming it immaterial," and neither does he find that the omission of reference to the McBrayer trust deed was material; in fact, his other findings in effect indicate that it was not. In the absence of any finding that there was a fraudulent or material omission in the application, it was error to give judgment in favor of the defendant.

The wise and just provisions contained in the above sections 8 and 9, ch. 299, Laws 1893, were repealed, together with all previous legislation upon insurance, in adopting a codified system, by chapter 54, Laws 1899. The omission to reënact said sections 8 and 9 was doubtless an inadvertence on the part of the Legislature. The protection given by those provisions against technical forfeitures of policies, taken out without fraudulent or material misstatement of facts in the application, will doubtless be restored when the matter is properly called to the attention of the General Assembly. The repeal does not affect this (824) insurance which was taken out while the law was in force.

The findings of fact being insufficient, the judgment is set aside.

New trial.

Cited: *Collingham v. Ins. Co.*, 168 N. C., 261.

J. W. BOONE ET AL. V. R. M. PEEBLES, ADMINISTRATRIX OF J. T. PEEBLES.

(Decided 7 June, 1900.)

Rents and Profits—Evidence—Family Bible Record—Statute of Limitations — Presumption of Payment and Abandonment — Divided Court.

1. Where the Court is evenly divided, the judgment below stands.
2. The statute of limitations to be available as a defense must be pleaded.
3. There is no statutory presumption of payment or abandonment under The Code.

CLARK, J., did not sit.

ACTION for rents and profits of land, brought by plaintiffs as devisees of their father, Solomon G. Boone, against administratrix of J. T. Peebles *ad. de bonis non, c. t. a.* of Solomon G. Boone, tried by consent, jury trial waived, before *Norwood, J.*, at Fall Term, 1898, of NORTHAMPTON. After objection, the plaintiffs were allowed to prove their ages by the entries recorded in the family Bible. Defendant excepted.

According to the family record, J. W. Boone was born 5 December, 1861; his sister, S. C. Boone, was born in 1865, and his other sister, Indiana Bristow, was born 2 September, 1854, and married Oc-
(825) tober, 1873. The testator, Solomon G. Boone, died in 1865. J. T. Peebles qualified as administrator *d. b. n.* with will annexed, on his estate, and died 12 September, 1879. Defendant administered 1 November, 1879.

Her defense was payment, also statutory presumption of payment. His Honor decided against the defendant, and ordered a reference to ascertain the amount due to each of the plaintiffs respectively. Defendant excepted and appealed.

R. B. Peebles for plaintiffs.
T. N. Hill, T. W. Mason and F. D. Winston for defendant.

FURCHES, J. This is an action for money received by defendant's intestate from the rent of lands belonging to plaintiffs and wrongfully appropriated to his own use. The defense relied on what seems to be the pleas of presumption and abandonment.

In the course of the trial, J. W. Boone, a party to the action, was allowed to testify as to his own age, and the ages of the other plaintiffs, which knowledge he said he got from the family Bible. That this Bible was in the possession of his sister, and that he had no other knowledge as to the dates of their births. This question and answer were objected to by defendant; objection overruled, evidence admitted, and defendant excepted.

Owing to the relationship of *Justice Clark* to one of the plaintiffs, he did not sit in this case, and the other members of the Court being equally divided upon the competency of this evidence, the opinion of the court below must prevail, and the evidence held to be competent. *Puryear v. Lynch,* 121 N. C., 255; *R. R. v. R. R.,* 113 N. C., 240.

(826) We do not think the defendant can sustain her defense upon the pleas of the statute of presumption and abandonment.

The Code went into effect in August, 1868, taking the place of the Revised Code, and the Code now contains no statute of presumptions; and it appears that no part of the rents claimed were received until after 1868, when the Code went into operation. The rights of infants and *femes covert* are saved under chapter 65, sections 5 and 9, Revised Code, and also by section 149 of the Code. This action having been commenced 20 September, 1893, chapter 113, Laws 1891, has no application. It seems that defendant's intestate was a tenant in common with the plaintiffs, of the land from which the rents were collected, and no demand had been made to start a presumption of ouster, which requires

twenty years. *Shannon v. Lamb,* at this term; *Jolly v. Bryan,* 86 N. C., 457. But as there is no such *statutory* defense that is the end of the case on this plea. It does not seem that defendant would have been protected by the statute of limitations if it had been pleaded; but as it was not pleaded, it is not necessary to consider the case in that aspect. And there being no *statutory presumption of payment or abandonment,* the judgment of the court must be affirmed, as we can see nothing in the objections made to parties. Some of them, it seems to us, were unnecessary (the administrators), but this will not prevent the rightful plaintiffs from recovering.

The judgment of the court appealed from is

Affirmed.

Cited: Ward v. Odell, post, 946; *Abernathy v. R. R.,* 159 N. C., 343.

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(827)

F. S. FAISON v. C. W. GRANDY & SONS.

(Decided 7 June, 1900.)

Usury—The Code, Section 3835.

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law.

ACTION for an account of dealings between the parties, pending in NORTHAMPTON, and heard, by consent, by *Brown, J.,* at chambers, 19 August, 1898, upon exceptions filed by plaintiff to report of referee, relating to the defense of usury set up against amount found due the defendant.

The defendant had succeeded to claims, as assignee, to the amount of $14,421.74, against the plaintiff, who insisted, and referee so found, that there was really due upon the claims (drafts and note), only the sum of $13,782.81—in the hands of an antecedent holder—the difference of $638.93 being made up of improper charges, acquiesced in by plaintiff, and held valid against the plaintiff by the referee, in favor of defendant. The finding was confirmed by his Honor; plaintiff excepted.

The finding and arguments established that the *"improper charges"* consisted of interest in excess of legal rates.

From the judgment rendered, plaintiff appealed.

R. B. Peebles and MacRae & Day for plaintiff.

T. N. Hill, R. O. Burton and Pruden & Pruden for defendants.

FAIRCLOTH, C. J. The transactions out of which this litigation comes originated in 1872, when the plaintiff borrowed money from Arp,
(828) and secured its payment, and said claim became the property of The Farmers Loan and Trust Company in 1873, with an agreement to advance money and supplies to the plaintiff. In 1881 the trust company transferred its claim to Ann D. Grandy and William Selden, and in 1885 and 1893, the latter named parties transferred their claims to the defendants Grandy & Sons, they paying the face value of the same. During these transactions numerous payments, advances and charges were made, and on 16 March, 1893, the plaintiff instituted this action against defendants for an account of his aforesaid dealings with Grandy & Sons. There was a reference, and the referee, by consent, was to pass on the issues raised by the plea of usury, and report his findings and rulings on the same, with his account.

In his report the referee finds that in March, 1876, the books of the trust company showed that the plaintiff was due $14,421.74, for advances, supplies, money and interest at 9 per cent, "but in fact the said Faison only owed the said company $13,782.81, the difference being made up of improper charges, and the amount advanced to pay said Arp's debt being charged at more than was advanced." The difference being on 2 March, 1876, $638.93. The final judgment appealed from in favor of defendants was $12,234.58, with interest from 1 August, 1897, and that the plaintiff is the owner in fee of the lands described in the pleadings, subject to the aforesaid lien of defendants. The referee finds that in March, 1876, there was a controversy between the plaintiff and the trust company as to the true amount due the company, he claiming that he was charged too much, and after a futile attempt to arbitrate, the plaintiff agreed to pay the said sum of $14,421.74 for the purpose of getting the defendants "to protect him in the payment of said amount found to be due."

(829) The referee also finds that the defendants, Grandy & Sons, knew of this controversy, and of the settlement and agreement finally reached, and that the defendants had no interest in the amount due by the plaintiff to the trust company. His Honor approved the findings of facts as reported by the referee. One of the plaintiff's exceptions is that several facts are found without any evidence to support them. This exception required a close examination of much of the evidence, and after making the examination, we are unable to sustain the exception, and say there was no evidence in support of the fact found.

The referee fails to find *in terms* whether the difference between the amount due and the amount claimed and received by the trust company was usury, but calls it "improper charges," and an amount paid Arp more than was advanced. From the issue of usury raised in the plead-

ings, the findings of the referee and the arguments by brief, we are driven to the conclusion that said difference of $638.93 was a usurious charge. The amount paid Arp and the trust company over the amounts in fact due are unexplained, except as a usurious charge, growing out of the necessitous situation of the plaintiff.

His Honor adjudged that under the facts found, the plaintiff is precluded from setting up the plea of usury as against said $10,000 note. In this conclusion he was in error. Prior to our statute in the Code, 3835, and repeated in the act of 1895, ch. 69, a usurious contract worked a forfeiture of both the interest and the debt, and it was stated in *Coor v. Spicer,* 65 N. C., 401, that under the operation of such a statute, innocent and meritorious holders were obliged to suffer, and so all the authorities agree. Our statutes at present declare that taking, receiving, reserving or charging an illegal rate of interest shall be deemed a forfeiture of the entire interest of the debt, and the act of 1895, ch. 69, expressly allows the party charged with usurious interest, to (830) plead the fact as a counterclaim. The forfeiture now is the interest only, whereas before 1876 the forfeiture was the interest and the debt, because the contract was void. The forfeiture of interest is the declaration of the law, and it accompanies the debt into whatsoever hands it may come. The injured party is not estopped or precluded from making his plea, by reason of any agreement made under the stress of bad weather, because the law-making power hath declared otherwise on the subject of charging interest. The forfeiture is the decree of the law. This question has been considered and decided heretofore in the following cases, where the reasons and authorities are collected: *Ward v. Sugg,* 113 N. C., 489; *Bank v. McNair,* 116 N. C., 550; *Smith v. B. and L. Association,* 119 N. C., 249.

The plaintiff is entitled to be credited with the difference in the matters between the plaintiff and the trust company, as shown in the referee's report, with interest thereon. In all other respects the judgment is affirmed. As the case is retained for further directions, no judgment will be entered in this Court.

Error.

Cited: Faison v. Grandy, 128 N. C., 438; *Tayloe v. Parker,* 137 N. C., 420; *Riley v. Sears,* 154 N. C., 517.

(831)

WALTER K. DEBNAM v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Decided 7 June, 1900.)

Domestication of Foreign Corporations—"Diversity of Citizenship"—Acts 1899, Chapter 62, Ratified February 10, 1899—Legislative Intent—Legal Effect.

1. The legislative intent of the act entitled "An act to provide a manner in which foreign corporations may become domestic corporations" (Laws 1899, ch. 62), was to require all such corporations to become domestic corporations either by reincorporation or adoption. Its legal effect was to charter and not to license.

2. One result from the process of domestication is, that the corporation is not entitled to remove the cause, when sued in the State courts, to a court of the United States, on the ground of diverse State citizenship.

ACTION for damages to the amount of $20,000 for personal injury resulting from alleged negligence of defendant company by reason of one of its employees while at work carelessly dropping an iron instrument upon plaintiff's head, in the public street of Durham, 24 May, 1899. Action was commenced 3 June, 1899, and was heard before *Brown, J.*, at October Term, 1899, of DURHAM, upon petition of defendant for removal to Circuit Court of United States for Eastern District of North Carolina, for that the plaintiff was a citizen and resident of North Carolina, and the defendant was a corporation under and by virtue of the laws of the State of New York, and that none of its incorporators or officers were citizens or residents of North Carolina, and that no citizen of this State ever had an interest in said corporation; that
(832) while during 1899, it was forced, for the protection of its property in this State, to file its charter under the direction of the act of 10 February, 1899, it submits that the filing of its charter as aforesaid, did not operate to make it a citizen of North Carolina.

His Honor adjudged that defendant had become a corporation of the State of North Carolina, and denied the petition for removal.

Defendant excepted, and appealed to the Supreme Court.

Boone, Bryant & Biggs for plaintiff.
Robert C. Strong for defendant.

DOUGLAS, J. This is an action brought to recover damages sustained by the plaintiff through the alleged negligence of the defendant. In apt time, and without filing an answer, the defendant filed its petition for

removal to the Circuit Court of the United States. The complaint alleges: "That the defendant is a corporation duly organized, and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said State." There is no other allusion, express or implied, in the complaint as to its having ever been incorporated in any other State.

The affidavit upon which the petition is based, is as follows:

O. A. Dozier, first being duly sworn by me, maketh oath that The Southern Bell Telephone and Telegraph Company is a corporation, under and by virtue of the laws of the State of New York, and that none of its incorporators, stockholders or directors are residents or resident of the State of North Carolina, or citizens or citizen of said State of North Carolina, nor are any citizen or citizens of the State of North Carolina interested in said company. Further, that none of said incorporators or their successors or stockholders or directors have ever been citizens or citizen or residents or resident of said State of North Carolina, nor have any citizen or citizens of North Carolina ever had an interest in said corporation. (833)

2. That having very valuable property in North Carolina at the present time, and at and before, and after the meeting of the General Assembly of North Carolina, during the year 1899, it was forced, for the protection of its said property, which it had built and constructed in said North Carolina under authority of its laws, to file its charter under the direction of "An act to provide a manner in which foreign corporations may become domestic corporations," ratified by said General Assembly 10 February, 1899. Further, that it submits that the filing of its said charter, as aforesaid, did not operate to make it a citizen of the said State of North Carolina.

O. A. DOZIER, *Manager.*

The act referred to is chapter 62, Public Laws of 1899, ratified 10 February, 1899. The essential features of said act are as follows:

SECTION 1 provides that every telegraph, telephone, express, insurance, steamboat and railroad company organized under the laws of any other State or government, desiring to carry on any business in this State, *shall become a domestic corporation* by filing in the office of the Secretary of State copies of its charter and by-laws duly authenticated.

SEC. 2. "That all parts of charter or by-laws in contravention of the laws of this State shall be null and void in this State."

SEC. 3. "That when any such corporation shall have complied with the provisions of this act above set out, *it shall thereupon immediately become a corporation of this State, and shall enjoy the rights and privileges and be subject to the liability of corporations of this State* the same as if such corporation had been originally created by (834)

the laws of this State. It may sue and be sued in all courts of this State, and shall be subject to the jurisdiction of the courts of this State as fully as if such corporation were originally created under the laws of the State of North Carolina."

SEC. 4. "That on and after the first day of June, eighteen hundred and ninety-nine, it shall be unlawful for any such corporation to do business or to attempt to do business in this State without having fully complied with the requirements of this act."

SEC. 5 provides the penalty for violating any provision of this act and the method of its collection.

SEC. 6. "No such foreign corporation is allowed to sue in the courts of this State unless domesticated."

SEC. 7. "No such foreign corporation mentioned in the preceding section of this act shall be allowed to enter into a contract in the State of North Carolina on or after the first day of June, eighteen hundred and ninety-nine, nor shall any such contract heretofore or hereafter made or attempted to be made and entered into by such corporation in the State of North Carolina be enforced by such corporation unless such corporation shall on or before 1 June, 1899, become a domestic corporation under and by virtue of the laws of North Carolina."

SEC. 8 prescribes the penalty for any foreign corporation doing business in this State without domestication.

The court below denied the defendant's motion to remove, on the grounds: (1) "That the petition is defective on its face; (2) that, considering the affidavit aforesaid, filed by defendant along with its petition, the defendant is a corporation of the State of North Carolina."

The defendant excepted and appealed, assigning among other errors, including that of citizenship, the following: That the "opinions, conclusions and adjudication of the court below were erroneous—
(835) (*a*) the same being repugnant to Article I, sec. 8, of the Constitution of the United States" as well as various statutes enumerated. "*(b)* Also repugnant to Article XIV, sec. 1, of the Constitution of the United States, in that the State of North Carolina in enforcing the said 'An act to provide a manner in which foreign corporations may become domestic corporations,' abridges the privileges and immunities of this defendant, a citizen of the United States, and deprives this defendant of its property, without due process of law, and deprives it of the equal protection of the laws. Wherein was drawn in question the validity of the said statutes and authority exercised thereunder, and the validity of a statute of said North Carolina, on the ground of repugnancy to the Constitution of the United States and also, the construction of above-named clauses, especially, and other clauses of said United States Constitution, and said United States statutes."

The question of diverse citizenship is the only one presented by the record but we will briefly notice the remaining contentions.

SEC. 8, Art. I, of the Constitution of the United States is a very comprehensive section, and as the particular repugnancy was not pointed out to us on the argument, we are at a loss to answer it further than to say we see no merit in the defendant's contention. We can not understand how a refusal to permit a domestic corporation to remove an action for personal injury "abridges the privileges and immunities of this defendant" as "a citizen of the United States." We are equally unable to admit that a trial in the courts of this State *ipso facto* "deprives this defendant of its property without due process of law, and deprives it of the equal protection of the laws."

We presume that these assignments of error are intended to be taken in connection with those that follow, and are supposed (836) legal inferences from the alleged right of removal. The questions argued were those arising from alleged diverse citizenship and the supposed existence of such a Federal question as would prevent our passing upon the legality of removal.

It is but just to say that they were ably argued both orally and by brief. The defendant contends that while the cause of action does not raise a Federal question in any view, that the petition for removal does raise a Federal question, to wit, the right of removal, which of itself ousts the jurisdiction of the State courts. In other words, that no matter what may be the nature of the action, a defendant can absolutely stop all further proceedings in the State courts by a mere petition for removal; and that the State courts can not pass even in the first instance upon their own jurisdiction, provided only that the petition is regular in form, no matter how apparent may be its essential want of validity.

We can not think that this is the law. No court has a right to abandon its own lawful jurisdiction when properly invoked, any more than it has to infringe upon the exclusive or paramount jurisdiction of another tribunal. The State court clearly has original jurisdiction of the action at bar, subject to be defeated by the defendant's right of removal if such right exists. Such existing right of removal may be waived by the defendant, or rather it is lost if not claimed in apt time and in strict accordance with the terms of the statute. The petition taken in connection with the complaint must show a *prima facie* right of removal; in which event it is the duty of the State court to grant the order of removal and stay all further proceedings. If the defendant does not show a *prima facie* right, it is the duty of the State court to retain the cause for such further proceedings as may be proper. It is not a question of discretion for either tribunal, but one of absolute right involving the vital fact of jurisdiction; and the (837)

relinquishment of jurisdiction by one or its assumption by the other, would not confer the right of removal if it did not already exist. It would seem that, for the purposes of the motion, disputed facts are properly determinable by the Federal courts; but the principle is fully recognized by the Supreme Court of the United States that "the State court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." Removal cases, 100 U. S., 457, 474; *Amory v. Amory,* 95 U. S., 186; *Tulee v. Vose,* 99 U. S., 539, 545; *Stone v. South Carolina,* 117 U. S., 430, 432; *Howard v. R. R.,* 122 N. C., 944, 953, 954; *Bradley v. R. R.,* 119 N. C., 744, and appendix, 918.

It has also been held that: "The Circuit Court of the United States has no jurisdiction, either original or by removal from a State court, of a suit as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." *Tennessee v. Bank,* 152 U. S., 454. In this case occurs the following significant words, on page 462: "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States."

If the State court wrongfully denies the petition, the defendant can remain and defend himself in the State court without losing his right of removal. He can appeal from such denial, and can eventually take his writ of error to the Supreme Court of the United States, where the question will be finally determined. Until such determination
(838) we can not be required to surrender what appears to us to be our rightful jurisdiction. What under such circumstances may be the rights and duties of the parties in the Federal courts, it is not for us to determine.

In the case at bar there are really no disputed facts, the only question being the construction of the said act of 10 February, 1899. We must therefore determine (1) whether said statute has the effect of making the defendant a domestic corporation as distinguished from a mere licensee and (2) what is its further effect under the United States statutes of removal. It is well settled that a corporation being a mere creature of the law, has no legal existence outside of the sovereignty that created it, except in so far as it may be recognized by the so-called law of comity. The rule of comity, for it is nothing more than a rule, is of such general acceptance as to carry with it the presumption of its existence; but this is a mere presumption which may be rebutted by any act of the legislative power which may amount to its express or implied repudiation. Foreign corporations may be entirely excluded by any

State, or may be admitted upon any terms and conditions that are not repugnant to the Constitution and laws of the United States.

The nature and status of a foreign corporation are so well stated in *Paul v. Virginia,* 75 U. S., 168 that our own views can best be expressed by an extended quotation. The Court says, on page 180: "But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or (839) implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given. Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank v. Earle,* 'It must dwell in the place of its creation, and can not migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried (840)

on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. *The principal business of every State would, in fact, be controlled by corporations created by other States.*"

This able opinion, coming without dissent from the Court of last resort, clearly lays down the underlying principles originating and governing the statute now under consideration. The dangers therein pointed out have become too fully realized to be longer ignored and are greatly aggravated by the open policy adopted by certain States of chartering corporations with almost unlimited powers for the sole purpose of transacting business in other States. So far has this gone that we have merchants in this State, who, having failed as a partnership subsequently incorporated under the laws of another State, immediately resumed their same old business at the same old stand, in the State of their lifelong residence with all the privileges and immunities of a foreign corporation.

It seems to be well settled that while a State can, in its discretion, absolutely prohibit a foreign corporation from transacting any business within its borders, it can not impose conditions that are repugnant to the Constitution and laws of the United States. Such would be any provision requiring a foreign corporation to surrender or agree to waive its right of removal to the Federal courts as a condition
(841) precedent to obtaining license. Nor can a State forbid a foreign corporation, *as such,* from removing its causes when otherwise entitled to do so. *Insurance Co. v. Morse,* 87 U. S., 445, 456; *R. R. v. Denton,* 146 U. S., 202, 207; *Barron v. Burnside,* 121 U. S., 186, 200, and cases therein cited.

Construing the act of 10 February, 1899, now under consideration, as a North Carolina statute, it is clear to us that the legislative intent was, not to grant a mere license under which foreign corporations might do business in this State, but to require all such corporations to become domestic corporations either by reincorporation or adoption. Whatever the process may be called, the intent of the act, as well as its legal effect, was to make all corporations complying with its conditions domestic corporations of the State of North Carolina. *Its effect was to charter and not to license.*

But it is argued that the act has attempted to create a domestic corporation, not out of natural persons, but out of a foreign corporation that has no natural or legal existence in this State. This is only par-

tially correct. Whatever may be the wording of the act, its effect, as well as legal intent, is to create a domestic corporation out of the stockholders of the foreign corporation. Perhaps it would be better to say that it enables the stockholders of a foreign corporation to become a domestic corporation with the same capital stock and identical powers, privileges and obligations.

Again it is said that the act requires a foreign corporation to file its foreign charter and by-laws; but this is done, not as recognizing the legal validity of such charter, but to definitely ascertain the powers to be conferred, which can never exceed those permitted by the Constitution and laws of this State. In fact, as a foreign corporation, having no legal existence in this State, can never be anything more than a licensee, express or implied, it would seem that it could become a domestic corporation only by some form of creation. Because in build- (842) ing a house, a man may use some timbers hewn by some one else, he is none the less the builder of the house; and the defendant is none the less a North Carolina corporation because our laws permit it to use its New York charter and by-laws simply for the purpose of indicating the extent of its powers acquired by virtue of our incorporation.

It may be said that this is an artificial construction, but so is the entire existence of a corporation. In *R. R. v. Wheeler,* 1 Black (66 U. S.), 286, 297, *Chief Justice Taney,* speaking for the Court, says: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers."

In *R. R. v. R. R.,* 136 U. S., 356, 373, the Court said: "Identity of name, powers and purposes, does not create an identity of origin or existence, any more than other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity."

Of course all such chartered rights are held at the will of the Legislature, and under section 1, Art. VIII, of the Constitution (843)

"may be altered from time to time or repealed." A mere license is admittedly revocable at any time, not reaching the dignity of a charter.

Having thus decided that the act in question does not license or pretend to license, but in legal intention and effect *creates a domestic corporation,* we come to the final question, whether a corporation so domesticated can remove an action into the Federal courts solely by virtue of its prior incorporation by some other State. In the case at bar the defendant voluntarily took advantage of the act, and became a domestic corporation, certainly as far as that act could make it so. It held itself out to the people of North Carolina as a domestic corporation in order to obtain their business, and at the same time evade the penalties attaching to the transaction of any business by a foreign corporation after all comity had been withdrawn by legislative authority. The plaintiff has sued the defendant as a domestic corporation of this State, and in that capacity only; and states a cause of action that presents no element whatsoever of a Federal question. He simply seeks to recover damages for personal injuries inflicted upon him by the defendant's servant who dropped an iron bar upon his head while he was walking the public streets of an incorporated city. Admitting that the defendant exists in a dual capacity as a corporation under the laws of New York as well as of North Carolina, the plaintiff elected to sue it in the latter capacity. In fact, we do not see how he could well have sued it in any other capacity. Forbidden by law to do any business as a foreign corporation, and holding itself out as a domestic corporation, was not the plaintiff forced to presume that he was injured by the defendant in the transaction of its business as a domestic corporation? Is it not a legal presumption that the defendant was acting in that capacity in which alone it
(844) could lawfully transact any business? It seems that if the defendant had, as *plaintiff,* been seeking to enforce a lawful cause of action, it might have brought suit in the Federal courts *by electing to sue as a New York corporation.* We do not see how it could have sued in the Federal courts as a domestic corporation, nor could it have brought suit in the State courts as a foreign corporation, because as a purely foreign corporation it has now no legal existence in the State of North Carolina.

Recognizing the fact that this is a question whose ultimate determination rests with the Supreme Court of the United States, we have carefully examined its reports, and have endeavored to reconcile our decision with its opinions. We think they are entirely consistent. The facts in the case at bar seem identical with those in *R. R. v. Alabama,* 107 U. S., 581. The head-note of that case, written by *Mr. Justice Gray,* who also wrote the opinion, is as follows: "The Memphis and Charleston Railroad Company is made, by the statutes of Alabama, an Alabama corpora-

tion; and, although *previously* incorporated in Tennessee also, can not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama." The opinion says, on page 585: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must as to all its doings within the State of Alabama, be considered a citizen of Alabama which can not sue or be sued by another citizen of Alabama in the courts of the United States." Citing *R. R. v. Wheeler,* 1 Black., 286; *R. R. v. Whitton,* 13 Wall., 270, 283.

If this be the law then we are compelled to hold in the case at bar that the defendant, being a corporation of the State of North Carolina, has no existence in this State as a legal entity or person, except (845) under and by force of its incorporation by this State; and although also incorporated in the State of New York, must, as to all its doings within the State of North Carolina, be considered a citizen of North Carolina, which can not, when sued by another citizen of North Carolina, remove the cause into the courts of the United States. It is rare that a precedent so exactly fits that the case under consideration can be decided by the adoption of a single sentence from the opinion of the cited case with a mere change of names. Has that case been overruled or modified? Not so far as we can see, certainly not in express terms nor by necessary implication in any case that has been cited to us or that we have been able to find. On the contrary, it has been expressly cited with approval in numerous cases, including *R. R. v. James,* 161 U. S., 545, 559, and *R. R. v. Trust Co.,* 174 U. S., 552, 581, so strongly relied on by the defendant. The last case, which is the last utterance of the Supreme Court upon the subject, was written by *Mr. Justice Gray,* who also wrote the opinion in *R. R. v. Alabama,* 107 U. S., 581. This learned judge surely would not have expressly cited his own opinion with approval if he had intended to overrule it by implication. On page 562, he says: "This Court has often recognized that a corporation of one State may be made a corporation of another State by the Legislature of that State, in regard to property and acts within its territorial jurisdiction." Citing *R. R. v. Wheeler,* 1 Black, 286, 297; *R. R. v. Harris,* 12 Wall., 65, 82; *R. R. v. Whitton,* 13 Wall., 270, 283; *R. R. v. Vance,* 96 U. S., 450, 457; *R. R. v. Alabama, supra; Clark v. Barnard,* 108 U. S., 436, 451, 452; *Stone v. Trust Co.,* 116 U. S., 307, 334; *Graham v. R. R.,* 181 U. S., 161, 169; *Martin v. R. R.,* 151 U. S., 673, 677.

And again on the same page: "But this Court has repeatedly (846) said that in order to make a corporation, already in existence under the laws of one State, a corporation of another State, 'the language used must imply creation or adoption in such form as to confer the power

usually exercised over corporations by the State, or by the Legislature, and such allegiance as a State corporation owes to its creator.' The mere grant of privileges or powers to it as an existing corporation, without more, does not do this."

This clear and concise statement of the law would meet our unqualified approval even if it had come from a different source. Applying this rule in its strictest form, we are clearly of opinion that the act now under consideration does not pretend to be a "mere grant of privileges or powers," but is in legal intent and effect "a creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the Legislature, and such allegiance as a State corporation owes to its creator." The act says in express terms, "That every telephone . . . company incorporated, created and organized under and by virtue of the laws of any State or government other than that of North Carolina, desiring to own property or to carry on business *or to exercise any corporate franchise whatsoever in this State, shall become a domestic corporation of the State of North Carolina* by filing, etc. . . . That when any such corporation shall have complied with the provision of this act above set out, it shall thereupon immediately *become a corporation of this State, and shall enjoy the rights and privileges and be subject to the liability of corporations of this State the same as if such corporation had been originally created by the laws of this State.*"

The distinction between the case at bar, following the opinion in *R. R v. Alabama,* and the case of *R. R. v. Trust Co.,* seems to be that in
(847) the last case the complainant, being a corporation of the State of Indiana by original creation, even if also a corporation of Kentucky by adoption, *elected* to sue in its former character. If it had elected to sue as a Kentucky corporation, or some one had elected to sue it in such capacity, the suit could not have been brought in the Federal courts within the State of Kentucky. This seems to appear from the opinion of the Court on page 563, where the following language is used: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this Court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits.

As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

The case of *R. R. v. Alabama,* is so completely "on all-fours" with

the case at bar, and has been so often and so recently approved, that further citations seem unnecessary; but the same principle is clearly enunciated in *Martin v. R. R.*, 151 U. S., 673. There the Court says, on page 677, that: "A railroad corporation, created by the laws of one State, may carry on business in another, either by virtue of being created a corporation by the laws of the latter State, also as (citing cases): or by virtue of a license, permission or authority, granted by the (848) laws of the latter State, to act in that State under its charter from the former State (citing cases). In the first alternative, it *can not* remove into the Circuit Court of the United States a suit brought against it in a court of the latter State by a citizen of that State, because it is a citizen of the same State with him." Citing *R. R. v. Alabama*. "In the second alternative, it *can* remove such a suit, because it is a citizen of a different State from the plaintiff."

The leading text writers take the same view of the question. Thompson in his elaborate work on corporations, says, in volume 6, sec. 7472: "We have several times had occasion to examine into the constitution of this species of corporation, with the conclusion that it is a *domestic corporation in each of the States* by whose legislation, in concurrence with that of other States, it has been created. This being so, when it is sued in a court of any one of such States by a citizen thereof, it is *not entitled to remove the cause to a court of the United States* on the ground of diverse State citizenship." To the same effect are Clark Corporations, secs. 36, 37 and 38; Morwitz Priv. Corp., secs. 999, 1001; Desty Fed. Pro., p. 321; Black's Dillon Rem. of Causes, sec. 101.

There are many other cases sustaining the position we have taken, but those above cited are so carefully considered and ably written, with such full citation of authority, that further elaboration by us seems useless.

We are of the opinion that as the defendant has become a domestic corporation of the State of North Carolina, and in contemplation of law a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation upon a cause of action which discloses no Federal question whatever, the case can not be removed into the Circuit Court of the United States. Therefore the judgment (849) of the court below is

Affirmed.

FURCHES, J., dissenting: It is with hesitation that I dissent from the well-considered opinion of the Court, especially so, when personally I have no objection to the conclusion arrived at. And it may appear strange that I dissent for the reason that I have an entirely different

conception of the case from that of the Court. If I agreed with the Court as to who the defendant is, I would agree with the Court in its conclusion.

I do not propose to enter into a discussion of the case, but simply to state my position and some of the reasons for my not agreeing with the Court; and it is to be regretted that a case of so much importance as this should be presented in such a way as to leave any doubt as to the very question upon which I think the appeal depends.

Is the New York corporation or the North Carolina corporation the defendant? The summons does not say which is the defendant. The complaint does not say in direct terms whether it is the New York corporation or the North Carolina corporation. But it seems to me that by direct implication it does say that it is the New York corporation. It says: "That the defendant is a corporation duly organized, and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said State."

It is plainly stated that the defendant is a corporation, and that it (the defendant) has *become* a domestic corporation under the laws of North Carolina. So the thing sued existed before it *became* domesticated. It is not the thing created by domestication that is sued, but the thing that existed before and has *become* domesticated. But if there was any oubt as to this, it seems to me to be mae plain and
(850) certain by the affidavit of O. A. Dozier, which was received and considered by the Court in passing upon the motion to remove. He says "That at the time said suit was begun, and at the present time, the defendant was, and still is, a corporation chartered by and existing under and by virtue of the laws of the State of New York."

And the Court in passing upon the motion to remove, says: "That considering the affidavit aforesaid (Dozier's) filed by the defendant, along with its petition, the defendant is a corporation of the State of North Carolina." These facts stated in the affidavit were not denied—were considered by the Court; and must be taken as true. These facts being true it seems to me settles the question, and shows that it was the New York corporation which was sued. In other words, there was a latent ambiguity (two John Smiths), and the affidavit showed it was the New York John which was sued. But as it has become domesticated under the act of 1899, the judge held as a matter of law that the New York corporation was not entitled to have the case removed because it had become a domestic corporation. In this I think he was in error.

It is stated in the opinion of the Court that it must have been the North Carolina corporation which was sued, as it is admitted that the defendant was doing business in North Carolina at the time of the injury; and that the New York corporation had no right to do business

in North Carolina after the act of 1899 went into effect. I submit that this must be an error. It is true that this act did take from the defendant and all other foreign corporations their comity—their right to engage in business in this State, unless they complied with that act by becoming domesticated. But when they did this, their right of comity was restored, and the conclusion of the Court is incorrect.

I agree that a foreign corporation may become a North Caro- (851) lina corporation by complying with the act of 1899. Indeed, there must be a foreign corporation before this act can operate. It is then made a North Carolina corporation, not by creation, but by adoption. But this new corporation has a new and distinct entity from the New York corporation. It does not bring the New York corporation into North Carolina; it can not do this, because a corporation can have no legal existence or authority outside of the State that gives it corporate life, except by the law of comity.

My opinion is that had the plaintiff sued the North Carolina corporation, it would not have been entitled to removal, based on diverse citizenship. But as the plaintiff chose to sue the New York company, the defendant was entitled, as I think, to an order of removal.

FAIRCLOTH, C. J., also dissents.

Cited: *Layden v. Knights of Pythias,* 128 N. C., 550, *Comrs. v. S. S. Co., ibid.,* 559; *Allison v. R. R.,* 129 N. C., 337; *Mowery v. R. R., ibid.,* 354; *Harden v. R. R., ibid.,* 359; *Thompson v. R. R.,* 130 N. C., 145, 146; *Beach v. R. R.,* 131 N. C., 400; *Power Co. v. Whitney Co.,* 150 N. C. 32.

(852)

STATE EX REL. A. R. HERRING ET AL. v. W. J. PUGH ET AL.

(Decided 7 June, 1900.)

Proceedings for Contempt—Venue—Waiver—Jurisdiction—Appeal.

1. During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders, not affected by the judgment appealed from.

2. Where a party is served with a rule granted by the judge resident in the district to attend and answer in a county outside of the district before another judge, and he does attend and answer, without standing upon his rights, he will be deemed to have waived the question of *venue.*

3. A disclaimer of all purpose to commit any contempt of court, accompanied with a refusal to obey the lawful order issued in the cause, is no answer to the rule, and will not screen the offender from the judgment for contempt sanctioned by statute.

RULE FOR CONTEMPT against the relators for disobeying an order in the case pending in SAMPSON, during an appeal to Supreme Court, made by *Allen, J.*, of the Sixth Judicial District, returnable before *Bryan, J.*, at New Bern and heard 25 July, 1899, who made the rule absolute, and sentenced the relators to fine and imprisonment. Defendants appealed.

The case is fully stated in the opinion.

Allen & Dortch, J. D. Kerr, and E. W. Kerr for plaintiff.
Stevens & Beasley, Marion Butler, and Geo. E. Butler for defendants.

MONTGOMERY, J. This was a proceeding in contempt, heard before *Bryan, J.*, at New Bern, on 25 July, 1899.

The respondents, A. R. Herring, R. A. Ingram, and W. J. Fair-
(853) cloth, were elected in 1897 members of the board of education of Sampson County for a term of three years. W. J. Pugh, W. A. Pugh, W. A. Bissell and L. L. Mathis were appointed by the General Assembly of 1899 members of the county board of school directors, to enter upon the duties of their office immediately upon their qualification. The new board (the board of school directors) were in charge of affairs after their qualification on 20 April, 1899, when the respondents in this proceeding brought an action for themselves in the name of the State against Pugh, Bissell, and Mathis, for the recovery of their office. The case was heard before *Judge Timberlake,* at May Term, 1899, of the Superior Court, a jury trial having been waived, and the court being authorized to find the facts and all the issues involved therein. It was adjudged by the court that the relators in that action, the respondents here, Herring, Ingram and Faircloth, recover of the defendants the office of county board of school directors, together with all the books and papers in the custody of the defendants or within their power belonging to the office. The defendants appealed from this judgment. Afterwards, and while the appeal was pending in the Supreme Court, and while the defendants were still in possession of the office and exercising the duties thereof, the relators in that action, the respondents here, got possession of the room in which the sessions of the board were held, and also of the books and papers of the office, and of the key of the room, against the consent of the defendants, and without legal process. The defendants, then, by a motion in the original cause, based upon affidavits, procured an order from the *Honorable O. H. Allen,* resident judge of the Sixth Judicial District, in which the relators, Herring, Ingram, and Faircloth, were restrained from exercising any function or power, or from performing any duty as members of the board
(854) of school directors, or of the board of education of Sampson County. The relators were also ordered to appear before *Judge*

Bryan, presiding judge of the Sixth Judicial District at New Bern, on 25 July, 1899, to show cause, if any they had, why the order should not be continued until the final determination of the action. Afterwards, another order upon affidavits was procured from *Judge Allen* in which it was recited that, while the plaintiff relators were not actively exercising the functions of the office, they still had the key, and books and papers in their possession, and were obstructing the proper administration of the public school affairs of the county, and the relators were ordered to forthwith deliver the room, key, books and papers, and reports to the defendants. And the relators were further ordered to appear before *Judge Bryan,* at the same time and place, there to show cause, if any they had, why the order should not be continued until the final hearing of the case, as mentioned in the first order. The relators filed a paper in the cause, in which they declined to obey the order to deliver the papers and books and key to the new board. That fact having been made known to *Judge Allen,* a motion was made by the defendants' counsel for a rule upon the relators for contempt in declining to obey the order of *Judge Allen* commanding them to deliver the books and papers to the defendants. It was ordered that the relators appear before a judge of the Superior Court, and show cause, if any they have, why they should not be held guilty of contempt, and punished therefor, for a willful disobedience of *Judge Allen's* order, in which they were commanded to deliver the books and papers to the new board, and the order was made returnable before *Judge Bryan* at the same time and place mentioned in the former orders—at New Bern on 25 July, 1899. The relators appeared and answered the rule, declining and refusing to obey the order of *Judge Allen* to deliver the books and papers and key. (855) Whereupon *Judge Bryan,* in a judgment in which the facts were found, inflicted upon the relators the extreme penalty of the law—a fine in the sum of $250 each, and imprisonment in the common jail of Sampson County until they complied with the order of *Judge Allen,* that is, until they should deliver the books, papers, etc., to the defendants, or be otherwise discharged according to law.

It appeared in the proceedings that the relators had received a circular letter from C. H. Mebane, Superintendent of Public Instruction, addressed to the county superintendent of schools, in which the following language was used: "I have frequent inquiries as to effect of the recent decision of *Judge Timberlake* in the case of the Sampson County School Board, and also inquiries as to the effect this will have as to the county boards throughout the state, if said decision is sustained by the Supreme Court. I write this letter to say in reply to the first inquiry that the decision of the *Sampson County case* does not affect any county board

of education except the county board of education in Sampson County. I recognize the old county board of education of Sampson County because the Superior Court of said county has so ordered, and I obey this order until it is passed upon or otherwise ordered by the Supreme Court." And that the relators had also seen a letter, written after *Judge Timberlake's* judgment, from the Attorney-General directed to Street Brewer, Superintendent of Public Schools, which letter was in the following words: "In reply to your letter of recent date, I will say that it is your duty to recognize the *de facto* school officers. An officer *de facto* is one who is in actual possession of the office in the exercise of its functions and discharge of its duties. From the facts stated by you, I am (856) of the opinion that the old school board are the rightful officers until the Supreme Court shall decide otherwise, and should be recognized by you. 8 A. & E. Enc., 786."

From the judgment of *Judge Bryan* the relators appealed to the Supreme Court and assigned the following errors:

1. For that the court had no jurisdiction to entertain a motion in the cause after final judgment.

2. For that the court had no jurisdiction to issue any restraining order after final judgment, and the perfecting of the appeal to the Supreme Court, and any order made therein is absolutely void.

3. For that the court had no power to issue a restraining order to compel the plaintiffs, without notice before a hearing, to deliver the room, books and papers to defendants, and such order was void because it was contrary to Article I, section 17, of the Constitution of North Carolina, and of Article XIV, of the Constitution of the United States, in that it deprived the plaintiffs of their private property without due process of law.

4. For that it appears from the facts found that the first and second restraining order, upon which the motion for contempt is based, has not been served upon the plaintiffs, and it was error in the court to grant the rule to show cause for contempt.

5. For that the matters involved in their motion were *res judicata.*

6. For that his Honor, *Henry R. Bryan,* has no jurisdiction to hear and determine this proceeding for contempt against the plaintiffs in the county of Craven, the same being outside of the Sixth Judicial District and outside of the county of Sampson, where the said contempt, it is alleged, was committed, the same not being in violation of any order (857) issued by his Honor, *Henry R. Bryan.*

7. For that the plaintiffs purged themselves by answer of any intent whatever to commit any contempt of court, and it was error in the court to so find and hold.

8. For that his Honor failed to find the facts at the time of the trial

and before judgment, and spread the same upon the minutes of the court; in fact, no facts were found until after respondents served their case with assignments of error, which were attempted to be answered by the finding of facts.

9. For that the acts complained of are not such as tended to defeat, impair or prejudice the rights or remedies of the defendants in any action pending in the Supreme Court.

The first two assignments of error may be considered together. The counsel of the respondents—relators in the original action—cited numerous authorities going to show that the effect of an appeal from a final judgment is to remove the cause into another jurisdiction—that of the appellate court—and to make the affirmation of it therein a final and complete disposition of the controversy involved in the action. That is certainly the general rule. *Manufacturing Co. v. Buxton,* 105 N. C., 76; *Isler v. Brown,* 69 N. C., 125; *Ellison v. Raleigh,* 89 N. C., 125; *Green v. Griffin,* 95 N. C., 52. But there are powers of the court in which the judgment was originally rendered in the nature of auxiliary agencies that can be exercised in furtherance of the object of the suit. In *Hinson v. Adrian,* 91 N. C., 372, there was a final judgment for the distribution of an amount of money in the hands of the clerk from which judgment there was an appeal to this Court. No order or direction concerning the safe-keeping or investment of the money pending the appeal had been made, and under the view that the judgment below had been vacated by the appeal, and the whole case transferred to another jurisdiction, one of the persons interested in the distribution of money made a motion in the Supreme Court for an order for the (858) intermediate disposition of the fund. This Court said in substance, that that view was a misconception of the legal effect of the appeal; that the fund was not withdrawn from the protection of the Superior Court, but that it remained there until the final decision of the appeal had been rendered, and that meanwhile the court below might make a proper order concerning the safety or investment of the fund. In that case, the Court said further: "It is only the subject-matter involved in the judgment that is thus placed beyond interference, and not those incidental matters appertaining to jurisdiction, and often necessary in securing full fruits of the judgment that may be rendered in the appellate court." And besides, section 558 of the Code is *itself* in language too plain to admit of a doubt that the court in which the judgment was rendered still retains jurisdiction to hear motions and grant orders, except such as concern the subject-matter of the suit. The statute reads: "Whenever an appeal is perfected, as provided by this Code, it stays all further proceedings in the court below upon the judgment appealed from or upon the matter embraced therein; but the court below may proceed

upon any other matter included in the action, and not affected by the judgment appealed from."

The subject-matter of the suit out of which grew the proceedings now before us was the office of school director of Sampson County. The books and papers, which were the means of performing properly the duties of the office, were taken from the new board after the members of that board had perfected their appeal bond, and while they were still holding and executing the duties of their office. Clearly then the judge had the right by a motion in the cause to order a restitution of the books and papers. Such an order did not touch the subject-matter of the action—which was the office itself. The proceeding was in the (859) nature of a mandatory injunction and such injunctions are recognized under the law in such cases. Pomeroy's Eq. Jur., section 1359.

The third assignment of error can not be sustained. The books and papers were not the property of the appellants; they were the property of the county of Sampson, to be used by the school board of education for the public good, and the new board, during the pendency of their appeal, were entitled to them until the case should have been determined in the Supreme Court, at least.

There is no force in the fourth assignment of error, for the respondents appeared at New Bern on 25 July, 1899, the day mentioned for the hearing of the contempt rule, and answered in form declining and refusing to surrender the books and papers.

The fifth assignment is answered in the consideration of the first and second.

As to the sixth assignment of error: The question is not presented as to whether a judge could by an order compel the attendance of a person outside of the judicial district in which he lives and outside of the county where the action was tried, to answer a rule for contempt. The order of *Judge Allen* requiring the respondents to appear at New Bern, outside of the judicial district in which the respondents lived, was served on the respondents, and they appeared, as we have said, at the time and place mentioned in the order; and they not only appeared but they answered the rule, and declined, in the presence of the judge, to obey the order to deliver the books and papers. They did not stand on their rights to have the contempt order heard in Sampson County where the original judgment was had. It was not a question of jurisdiction; it was a question of *venue,* and the respondents consented to have (860) the matter heard outside of their district and county. There was no positive consent entered in writing, but there was no objection ever entered until the case on appeal was prepared for this Court.

In *Godwin v. Monds,* 101 N. C., 354, it is held that a judgment could

not be set aside by a judge outside the county in which it was rendered, unless it was done by *common consent,* and that that consent should appear in writing, or the judge should set out the consent in the order which he makes in the cause, or such consent should appear by fair implication from what appeared in the record. See, also, *Ledbetter v. Pinner,* 120 N. C., 457; *Fertilizer Co. v. Taylor,* 112 N. C., 145. In *Godwin v. Monds, supra,* the Court said: "That it did not appear that the plaintiffs, or their counsel, were present at the hearing of the motion, and did not object, thereby implying such consent."

But in the case before us, as we have said, the respondents were present with their counsel, and answered the rule and made no objection. They, therefore, consented to the *venue,* by fair implication.

The seventh assignment of error can not be sustained. It is true that the respondents in their answer denied all purpose to commit any contempt of the court, but they refused to obey the order of *Judge Allen* commanding them to deliver the books and papers to the new board. The contempt is the refusal to obey the order of the court. They had it in their power to do so. *Pain v. Pain,* 80 N. C., 322; *Boyett v. Vaughan,* 89 N. C., 27.

The eighth assignment of error is without merit, and is based upon the misapprehension of the facts. *Judge Bryan,* in his judgment, recited the facts which constituted the contempt, and they were also set out in the last order of *Judge Allen.*

The ninth assignment of error can not be sustained. The (861) conduct of the respondents was in willful disobedience of a lawful order of *Judge Allen,* who had jurisdiction of the question.

Because of the serious nature of the matters involved in this proceeding, matters in which were involved not only the property, but also the personal liberty of three citizens of the State, we have given the case a most careful consideration, and our conclusion is that *Judge Allen* had jurisdiction of the matters mentioned in his orders; that the books and papers and key should have been returned to the new board under the last order of *Judge Allen,* as the remedy sought by the new board was a proper one; that the appearance at New Bern, outside of the district and county in which the original judgment was had, and in which the repondents resided, and their answer to the rule at that place and time, their counsel being present and aiding them, and no objection having been entered against the hearing of the contempt rule at New Bern, constituted a consent to have the contempt rule heard at the time and place when and where it was heard; and that, therefore, the judgment of *Judge Bryan* must be affirmed.

Of course, as the main action for the recovery of the offices by the plaintiffs (who are the respondents here) has been decided at the last

term of the court in favor of the plaintiffs (the respondents), that part of the judgment of *Judge Bryan* as to the imprisonment of the respondents is vacated. They are now entitled to keep the books, papers, and key, and any other belongings to the board of school directors of Sampson County, under the decision of this Court above referred to.

This case is in its effect upon the respondents one of great and peculiar hardship. There appears to have been no purpose on their part to do anything except to claim and to avail themselves of their legal (862) rights as they were advised by their counsel. They were confirmed in their course, also, by the letters of the State officers from which we have quoted. By the decision of this Court, too, they have been declared entitled to the offices which were the subject-matter of the main action and to the possession of the books and papers pertaining thereto. We can afford them no relief, however, but must sustain the order and judgment of his Honor, *Judge Bryan,* because of the reasons given in this opinion. Yet it may be that relief might be sought successfully through another source—executive clemency—for under the provisions of the Constitution of the State, Article III, section 6, such power is given to the governor. A contempt of court is an offense against the State and not against the judge personally. The Constitution of the United States, Article II, section 2, invests the President of the United States with the same power as to offenses against the United States, with the same exception—in cases of impeachment. *Ex Parte Muller,* 7 Blatch., 23. The same power has been exercised by the Governors of other States. *State v. Sanvinet,* 24 La. Ann., 119; *Ex Parte Hickey,* 4 Smed. and M. (Miss.), 751.

Modified and affirmed.

FAIRCLOTH, C. J., dissenting: My objection to the opinion is that the orders were made without authority, that is, that the judge had no jurisdiction. We know that the Superior Court judges hold the courts in the several judicial districts successively, called rotation. Code, section 911. We know that the Fall Term, 1899, of the courts in the Sixth Judicial District began July 1 and continued until December 31. Laws 1885, ch. 180, sec. 8. We also know that the resident judge of the Second District was the presiding judge of the Sixth District during the Fall Term, 1899. The first order in this contempt proceeding, upon (863) motion in the original action, was made 8 July, 1899, the second on 12 July, and the third on 19 July. These orders were made not by the presiding judge of the district, but by the resident judge, who was then the presiding judge of another district. The order to show cause, etc., thus made was returnable before the presiding judge, then at New Bern in the Second District, who made the final order adjudging

the plaintiffs in contempt in failing to obey the order made in the Sixth District by another judge.

Jurisdiction is a term frequently used, and sometimes without an accurate understanding of its precise application. Jurisdiction of the court is essential, and without it any judgment is a nullity. As to the scope of the term "jurisdiction" there was for a time some controversy, but the "rule now supported by high and abundant authority and excellent reason, is that the court must not only have jurisdiction over the person and the matter, but authority to render the *particular* judgment." 7 A. & E. Enc. (2 Ed.), 36.

The only acts constituting contempt in North Carolina are specified by statute; all other acts recognized at common law as such are repealed and annulled. Code, section 648.

The action in which this motion was made is *quo warranto* for the office of the board of education of Sampson County, and it had been adjudged by the Superior Court that the plaintiffs were entitled to the office, from which judgment the defendants appealed to this Court, where the judgment was affirmed. Pending said appeal, the plaintiffs peaceably entered the office and took possession of the key and the school books. They were ordered to deliver the books and key to the defendants. They declined to do so, on the ground that they were entitled to keep them, and on the ground that the order was made by a judge who was without authority to do so.

This refusal is alleged to be a violation, and contempt of court, (864) as defined in the Code, section 648, subsection 4. The language of that section is "willful disobedience of any process or order *lawfully* issued by any court." It will be noted that the order must be "lawfully issued," and that involves the question whether the order was issued by a court having jurisdiction and authority to render this particular judgment.

It is argued that pending an appeal the court may make incidental orders not affecting the matter in the appeal, such as making new parties, requiring better security for the costs, and protecting any property in *custodia legis*, and the like. I concede all that. But what court or judge can make even these incidental orders? Are they not to be made at term time by the judge then presiding in that district? Can any other judge make such orders at will out of term time? That is not my understanding of the practice heretofore. Suppose A sues B, both living in Currituck County, and one notifies the other to appear before the presiding judge, who is then in Cherokee County, to show cause, etc. It occurs to me that the inconvenience of such practice is a sufficient reason for requiring such orders to be made returnable within the district and county where the parties live, and where the action is pending.

Before rotation was allowed each judge acted only in his district, except by special commission. During that period the Governor issued a commission to the judge of the Sixth District to hold court in the Third District. A kindred question came to this Court, and the Court said: "A Superior Court judge has no authority to vacate injunctions or to set aside attachments regularly granted, except for causes pending in his own district," which I understand means when he is on duty in his own district. . . . "Judges who exchange districts by the consent of
(865) the Governor for a whole riding or a series of courts, take the place of each other for all purposes during that series of courts. When the Governor requires a judge to hold a term of a court for some county outside of his proper district, the authority of the judge is special; the jurisdiction of the proper judge of the district is superseded by that of the substituted judge in that county during the specified term, but not elsewhere, nor for a longer time; the substituted judge has, in respect to all cases pending in the specified county during the specified term, all the powers of the proper judge of the district." *Bear v. Cohen,* 65 N. C., 511, 519. "A district court judge is not authorized to dissolve injunctions or to punish parties for a contempt in disobeying an injunction, except in his own district, unless he has been duly assigned to hold the court in the county where the original process is returnable." *Morris v. Whitehead,* 65 N. C., 637. "The resident judge of a district has no other powers within such district in vacation than any other judge of the Superior Court—that each judge of the Superior Court has general jurisdiction only in the judicial district to which he is assigned by the statute, except in cases of exchange," etc. *State v. Ray,* 97 N. C., 510, 514. The statutes authorize any judge to issue a restraining order for twenty days, but that order must be returnable before the resident or presiding judge, as the case may be. There is a scarcity of authorities on the main question, probably from the fact that such a question is seldom presented.

Reasoning by analogy from the above authorities, it seems to me that when the term of a presiding judge, fixed by statute, begins, he is the only judge who can adjudge important and grave questions in that district during the term.

If it be true, then, upon the facts before us, the order to deliver up the key and books, and the order to show cause, etc., were made by a
(866) judge without authority or jurisdiction, of course all subsequent proceedings are void, including the final judgment for contempt.

I can not for a moment consider the possibility that the Executive will or may exercise his pardoning prerogative, if he has the power to do so.

I have written briefly, to avoid the just inference from my silence on this important question.

DOUGLAS, J., also dissents.

Cited: Moore v. Moore, 131 N. C., 372; *Worth v. Trust Co.,* 152 N. C., 246; *In re Brown,* 168 N. C., 424.

M. L. MOTT, SOLICITOR NINTH JUDICIAL DISTRICT, v. BOARD OF COMMISSIONERS OF FORSYTH COUNTY.

(Decided 7 June, 1900.)

Mandamus—Constitutional Jurisdiction of the Superior Courts—Grand Jury—Solicitor.

1. The constitutional jurisdiction of the Superior Courts, generally, may be stated as intermediate between the Supreme Court and the courts of justices of the peace.
2. While the General Assembly may allot and distribute that portion of the power and jurisdiction which does not pertain to the Supreme Court among other courts prescribed in the Constitution or which may be established by law, in such manner as it may deem best, *so far as the same may be done without conflict with the other provisions* of the Constitution, yet the Legislature may not deprive the Superior Courts of any constitutional provisions essential to their existence.
3. Grand juries are essential constitutional constituents appertaining to the system of Superior Courts, and may not be discontinued by the county commissioners under legislative enactment of 1899, chapter 371.
4. *Mandamus* is the appropriate remedy to enforce the performance of the duty of drawing a grand jury for the Superior Court, and the solicitor of the district is the proper officer to apply for it.
5. The Constitution is superior to ordinary legislation, and when they conflict, the latter must yield to the former and the court will so adjudge.

CLARK and MONTGOMERY, JJ., dissent.

APPLICATION FOR MANDAMUS by the solicitor of the Ninth Judi- (867) cial District to require the board of commissioners of FORSYTH to draw a grand jury for the Superior Court, heard before *Starbuck, J.,* at chambers in Winston, 11 January, 1900.

Application refused, and plaintiff appealed.

Holton & Alexander for plaintiff.
Glenn & Manly for defendant.

FURCHES, J. It is admitted that the relator Mott was elected solicitor of the Superior Courts of the Ninth Judicial District in November, 1898, for a term of four years; was regularly inducted into that office; that said term of office has not expired, and that the county of Forsyth is one of the counties composing the Ninth Judicial District.

It is also alleged and admitted, that the defendants are the county commissioners of Forsyth County, and that they have not drawn a grand jury for the Superior Court of that county since February, 1899, and while they say that the plaintiff never demanded the drawing of a grand jury for the Superior Court, they do not say that they would have drawn one if such demand had been made; and in fact, they substantially say that they would not have done so, as they justify their action in not drawing said jury under chapter 371, Laws 1899, and that this act justified them in not drawing a grand jury, if the same is constitutional. And as it was not expected that they, acting in this respect, as ministerial officers, should pass upon its constitutionality, they were therefore not to blame for obeying the act of 1899, until it should be passed upon by the courts and declared unconstitutional. While it is contended that Mott, who is a resident and citizen of Wilkes County, is not the proper relator, the main and important question is the constitutionality
(868) of the act of 1899. This is not only an important, but a serious question, and should receive a careful consideration, and after it has received this, if it should plainly appear to be unconstitutional, it will be our duty to so declare. That is, if we shall find that the provisions of the act of 1899, in effect abolishing the grand jury of the Superior Court in Forsyth County, is plainly in conflict with the Constitution, it will be our duty to say so.

Where an act of the legislature is in conflict with the terms of the Constitution, they can not both stand, one must give way to the other; and as the Constitution is superior to the legislative act, the latter must give way to the former. "It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it." *Marbury v. Madison,* 1 Cranch., 49. But we do not think it necessary at this late day for us to undertake to establish the proposition that the Constitution is superior to ordinary legislative acts, and that when they conflict the latter must yield to the former.

Taking this to be conceded, we will proceed to the consideration of the constitutionality of the act of 1899, so far as it deprives the Superior Court of Forsyth County of any grand jury, and if upon this examination it shall be found to conflict with the Constitution the act must give way and not the Constitution.

The amended Constitution, Article IV, section 12, authorizes the Legislature to establish courts inferior to the Supreme Court, "so far as

the same may be done without conflict with the other provisions of this Constitution." So it must be held that the act of 1899 is constitutional so far as it does "not conflict with" some of "the other provisions of the Constitution." But if it conflicts with any of the *other provisions of the Constitution* it is to that extent unconstitutional.

In considering this question it must be understood that it is (869) not the constitutionality or unconstitutionality of the Criminal Court of Forsyth that is being considered, but only those provisions in the act of 1899 establishing the Criminal Court of Forsyth, and other counties that deprive the Superior Court of its grand jury. Is that part of said act which deprives the Superior Court of Forsyth of its grand jury in conflict with any of the other provisions of the Constitution? This is the question.

The Constitution, Article IV, section 2, establishes a Supreme Court, Superior Courts and courts of justices of the peace. Article IV, section 8, defines the jurisdiction of the Supreme Court, and Article IV, section 27, defines the jurisdiction of courts of justices of the peace. But the jurisdiction of the Superior Court is nowhere defined in the Constitution. Section 10 provides for the division of the State into judicial districts, for each of which a judge shall be chosen, "and there shall be a Superior Court held in each county at least twice in each year." Section 11, provides that "every judge of the Superior Court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years." Section 18, prohibits the reduction of the salaries of judges during their terms of office, and section 22, provides that, "The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring jury."

Thus it is seen that the Constitution establishes Superior Courts; that it has provided for dividing the State into judicial districts; that it has provided that each of these districts shall have a judge, and that these judges shall rotate, and shall not hold the courts of the same district oftener than once in every four years; that they shall preside and hold a Superior Court in each county as often at least as (870) twice a year, and that the Superior Courts shall at *all times* be open for the transaction of *all business* not requiring a jury.

These are constitutional requirements, and yet the Constitution has nowhere in express terms given the Superior Courts any jurisdiction. While the jurisdiction of all the other courts are prescribed and defined, not a word is said as to the jurisdiction of the Superior Courts. And yet we know that they have a jurisdiction, well known and understood

by every lawyer, recognized and acted upon at every term of the Superior Court and of this Court. Indeed we can not conceive the idea that the Constitution would establish such courts as Superior Courts, next in dignity to the Supreme Court, and leave them without jurisdiction. Their constitutional jurisdiction, then, is to be found to include everything below the Supreme Court and above the courts of justices of the peace. These courts are established by the Constitution, and have their constitutional jurisdiction defined, of which they can not be deprived by the Legislature. This we think will be conceded. But as there is no express grant of jurisdiction to the Superior Courts in the Constitution, it remains to be seen what their jurisdiction is. We know they have a jurisdiction—that is known of all men—and as we have said, is constantly acted upon by this Court. How did they get this jurisdiction? If we can determine this, then we are in a position to ascertain and determine what it is, as the same reason that gives these courts their jurisdiction will determine what that jurisdiction is. This jurisdiction is to be found in the fact that these courts—Superior Courts—are not creatures of the Constitution but adoptions of the Constitution. The Constitution found them here, established institutions, with their jurisdiction well known and established, and the Con-
(871) stitution, not wishing to make any change as to the jurisdiction of these courts, simply adopted them as they were. In this adoption it made provision for the holding of these courts by providing judges to hold them, by requiring the judges to reside in the district for which they were elected, by requiring them to rotate and to hold at least two terms a year in each county in the State, and that these courts—Superior Courts—should at all times be open for the transaction of *all business* that did not require the intervention of a jury.

Yet not a word is said as to what their jurisdiction should be. They were to do business, because these courts were to be open to the transaction of *all business* that did not require a jury. But it can not be inferred from this that they were not to have a jury, but the inference is otherwise—that they were to do business at term time where the court had a jury—as we know this was the fact, as the terms of these courts were provided with judges. We say these courts—these Superior Courts—were here before the Constitution, and became constitutional courts by adoption, and without any change or modification as to jurisdiction—a part of which was a grand jury. This was not the case with the other courts established by the Constitution. There were changes made in the jurisdiction of each of the other courts from what they were at the time of adopting the Constitution. This made it necessary to define their jurisdiction, and in doing this the jurisdiction of the Superior Courts was substantially defined. The whole law of the State was to be

administered. The Superior Courts were courts of general jurisdiction, and when the jurisdiction of the other courts, which were special, was taken out, the remainder was left as the jurisdiction of the Superior Courts.

While the question now before the Court has not before been (872) directly presented, it has been discussed to some extent in several recent opinions of this Court.

In *Rhyne v. Lipscombe,* 122 N. C., 650, this Court said: "The Constitution, Article IV, sec. 2, establishes the Supreme Court, Superior Courts and courts of justices of the peace, and authorizes the Legislature to create other courts inferior to the Supreme Court. Section 12 of the same article provides that the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it, but that it shall allot and distribute that portion of the power and jurisdiction which does not pertain to the Supreme Court, among the other courts prescribed in the Constitution, or which may be established by law, in such manner as it may deem best, . . . *so far as the same may be done without conflict with the other provisions* of this Constitution." But under our State Constitution the Superior Courts and courts of justices of the peace are created by the Constitution itself, and the General Assembly can not abolish them.

The term "Superior Court" had a well-defined signification at the time of the adoption of the Constitution, and the language of that instrument must be taken as referring thereto. "While the General Assembly is given the power to allot and distribute the jurisdiction of the courts below the Supreme Court, this is with the important limitation that it must be done 'without conflict with other provisions of this Constitution.' This renders it essential to consider what is the inherent nature of the Superior Courts created by those 'other provisions' of the Constitution itself which treats them with so much consideration, prescribing the election and terms of whose offices, besides the other provisions above recited. The General Assembly may allot and distribute the jurisdiction below the Supreme Court, but it can not in doing so, create new courts with substantially the same powers as the Superior Courts, and make the offices elective, otherwise than by (873) the people, subject to be abolished by legislative enactment, and hence without independent tenure of office, as prescribed by the Constitution and freed from the provision as to rotation, the residence of the judges and the requirements as to two terms annually in each county, and being always open. All this can not be done by simply creating new Superior Courts, or criminal courts, or otherwise. . . . Applying these reasonable rules of construction to the Superior Courts estab-

lished by the Constitution, and fenced about, as its importance demanded, by so many provisions in the Constitution, what was the Superior Court, as the term was well understood, at the time of adoption of the Constitution? It means the highest court in the State next to the Supreme Court, and superior to all others, from which alone appeals lay directly to the Supreme Court, and possessed of general jurisdiction, criminal and civil and both in law and equity. . . . The constitutional guarantees, and the inherent nature and general jurisdiction of the Superior Courts, recognized by the historical and legal meaning of the term at the adoption of the Constitution, can not be held revoked and discarded by the incidental authority to the Legislature to create criminal courts in cities, and other inferior courts (which the Constitution did not deem of sufficient importance even to name), and to allot the jurisdiction among them. Even this provision is guarded, as already stated, by the requirement that the allotment shall not conflict with the other provisions of the Constitution."

We must be pardoned for quoting so extensively from this case of *Rhyne v. Lipscombe,* as it is so recent an expression of this Court written by *Justice Clark* and concurred in by the entire Court.

(874) These extensive quotations seem to fully sustain the contention of the plaintiff. But this opinion was delivered in a case of a direct appeal from the Criminal Court to this Court, and not involving the question now before the Court as to the jurisdiction of the Superior Court, and can not be claimed as an adjudication. But as it seems to us it is valuable for the strength of its argument upon the question now presented for our consideration and determination, and should go a long way in its determination. But there are expressions in that opinion such as "exclusive jurisdiction except as to the right of appeal," which defendants claim tend to weaken the argument of the case. But upon a careful review of the case it seems to us that these expressions were inadvertences. They were not necessary to the decision of the case—certainly that part which speaks of the exclusive jurisdiction, was not—and they are the only expressions in the opinion that seem to be in conflict with the contention of the plaintiff, and they are in conflict with the argument of the opinion. So we think we are justified in saying that they must have been inadvertences, as they are at entire variance with the whole argument of the opinion. The argument of the opinion in *Rhyne v. Lipscombe* is that the Superior Courts had a known and established jurisdiction at the adoption of the Constitution. That the Constitution adopted these Superior Courts, and made them constitutional courts, with their known and established jusisdiction, thereby adopting the jurisdiction they had at the adoption of the Constitution, and making such jurisdiction the constitutional jurisdiction of the court.

If this be true, and we think it is (and it is certainly the argument of *Rhyne v. Lipscombe),* then the contention of defendants and the construction they put upon *Rhyne v. Lipscombe* can not be correct. It is said in *Rhyne v. Lipscombe* that "the Legislature can not take the constitutional jurisdiction from the Superior Courts." This (875) can not be true if the Legislature can give the inferior courts original and exclusive jurisdiction of all criminal offenses and take from the Superior Courts their jurisdiction. The Superior Courts are essentially courts of original jurisdiction, with very little appellate jurisdiction, and in almost all cases where it had appellate jurisdiction (from justice's courts) the trial is *de novo,* as if originally commenced in the Superior Court. And if its jurisdiction under the Constitution is original the Legislature has no power to take this jurisdiction from it.

Chief Justice Marshall, in speaking of the Constitution of the United States, and the acts of Congress, uses this language: "If Congress remains at liberty to give this Court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction when the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance." *Marbury v. Madison,* 1 Cranch., 49, on page 67. Besides this being from the greatest judge and the highest court of this country, it is so clearly correct that we do not hesitate to adopt and follow it.

It seems to us to be a necessary result that as this act takes from the Superior Court its constitutional right to a grand jury, the effect of which is to deprive that court of its *original jurisdiction,* the act so depriving the Superior Court of this jurisdiction is in conflict with that part of the Constitution that gave the Superior Court a *grand jury and original jurisdiction as a constitutional court.*

But we said the contention of the defendants could not be true, and was in conflict with the reasoning of the opinion in *Rhyne v. Lipscombe,* that if it were true its logical result would lead to the utter destruction of the Superior Courts. It must be admitted—in fact it is admitted—that if the Legislature can deprive the Superior Courts (876) of all their *original criminal jurisdiction,* that the Legislature may also deprive the Superior Courts of all their *original civil jurisdiction.*

Suppose the Legislature establishes another inferior court for the county of Forsyth and the other counties composing the criminal circuit, and gives them *original exclusive jurisdiction of all civil actions,* in which act it provides that it shall be unlawful for the clerk of the Superior Court to issue any summons returnable to the Superior Court; and if the act taking the grand jury from the Superior Court, thereby cutting off the means by which it obtained *original jurisdiction* is con-

stitutional, it would be constitutional to take away the civil jurisdiction of the Superior Court in the way we have suggested; we would then have the carcass of the Superior Court, without life. This can not be done.

Almost this very question was presented in *Rhyne v. Lipscombe.* The Legislature of 1897 undertook to give *Judge Ewart* both civil and criminal jurisdiction, equal to that of the Superior Courts and this Court said it could not be done. But if what the Legislature of 1899 did in taking from the Superior Courts their grand juries and giving *Judge Stevens exclusive original jurisdiction* can be done, then the Court was in error in holding that it could not be given to *Judge Ewart,* because it can make no difference, so far as the constitutional question is concerned, whether this *exclusive original jurisdiction* is given to one or two judges.

S. v. Ray, 122 N. C., 1097, and *Tate v. Commissioners,* 122 N. C., 661, are cited by defendants. But they simply follow *Rhyne v. Lipscombe,* and are put upon that case, and we do not deem it necessary to give them a separate consideration.

In *Wilson v. Jordan,* 124 N. C., 683, the same argument was (877) advanced as to grand juries, putting that argument upon *Rhyne v. Lipscombe.* This opinion was concurred in by all the Court except *Justice Clark,* who filed a lengthy dissenting opinion, based entirely upon other grounds, apparently agreeing to this argument in that case, as he does not allude to it, unless it is in saying, if there are other errors they can be corrected by the Legislature.

The only remaining question is the objection made to Mott's being the proper relator. But as it is admitted that he is the solicitor of Forsyth Superior Court and entitled to the fees and emoluments, we think he has such an interest as entitles him to bring and maintain this action. *Houghtalling v. Taylor,* 122 N. C., 141; *Hines v. Vann,* 118 N. C., 3.

There was error in the judgment appealed from, and the writ of mandamus should have been issued as prayed for.

Error.

MONTGOMERY, J., dissenting, thinks that under section 12, of Art. IV, of the State Constitution, the General Assembly has the power to create criminal courts, and to give them all, or such part as it pleases, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction, all subject to the right of appeal to the Superior Courts. *Rhyne v. Lipscombe,* 122 N. C., 650; *Tate v. Commissioners, ibid.,* 661; *Pate v. R. R., ibid.,* 879; *S. v. Ray, ibid.,* 1098; *S. v. Hinson,* 123 N. C., 755.

CLARK, J., dissenting: Prior to the Constitution of 1868 all the courts, including the Supreme Court, were created by the Legislature, which allotted to each court such jurisdiction as it thought proper. The Supreme Court was remodeled by the Legislature at least three different times. *Battle's History of the Supreme Court,* 103 N. C., 475-479. The Constitution of 1868, Art. IV, sec. 4, provided: "The (878) judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and special courts." And section 15: "The Superior Courts shall have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction is not given to some other courts; and of all criminal actions in which the punishment may exceed a fine of $50 or imprisonment for one month." And section 19 authorized the General Assembly to establish special courts for the trial of misdemeanors in towns and cities. It was soon held in consequence that these special courts had no jurisdiction in civil cases (*Wilmington v. Davis,* 63 N. C., 582; *Edenton v. Wool,* 65 N. C., 379), and no criminal jurisdiction except over misdemeanors. *S. v. Pender,* 66 N. C., 313; *Washington v. Hammond,* 76 N. C., 33.

This "straight-jacket" system not being satisfactory to the people of the State, they amended the Constitution in 1875 by striking out this section 15, which fixed the Superior Court with original jurisdiction. By that repeal, of itself, the jurisdiction of the Superior Court was restored to legislative control, as was the case before 1868. But to put the matter beyond controversy, the same convention amended the above section 4 (now become sec. 2) of Article IV, by striking out the words "Special Courts" and inserting in the lieu thereof the words "such other courts inferior to the Supreme Court as may be established by law." Section 12, as to the number of Superior Court districts, was rewritten and made section 10, reducing the number of Superior Court judges from twelve to nine, and adding the words: "But the General Assembly *may reduce* or increase the number of districts." And then a new section 12 was inserted which is as follows: "The General Assembly shall have no power to deprive the judicial department (879) of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly *shall allot and distribute* that portion of this power and jurisdiction which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or *which may be established by law,* in such manner as it may deem best, provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of

this Constitution." By striking out and repealing the provision of the Constitution of 1868, which had given the Superior Courts original civil and criminal jurisdiction, by inserting the new provision authorizing the Legislature to establish other courts inferior to the Supreme Court, to reduce at will the number of Superior Court districts, and to "allot and distribute" the jurisdiction below the Supreme Court among the other courts (whether named in the Constitution or established by law) *in such manner* as the Legislature "may deem best," it is clear that the organic law put the remodeling of the jurisdiction of all the courts below the Supreme Court into the hands of the General Assembly, reverting (except as to the Supreme Court) back to the system which, prior to 1868, placed all the courts, even the jurisdiction and constitution of the Supreme Court itself, in the power of the Legislature. Should, therefore, the Legislature see fit to deprive the Superior Courts of all original jurisdiction, making it purely an intermediate appellate court, like courts of that kind in New York and other States, it is clearly within legislative discretion by the express words of the amendments made to the Constitution in 1875. This is still clearer by reference to
(880) the legislative power over the jurisdiction of the courts up to 1868, and the evident intent and purpose to restore that power by the repeal of the provisions in the Constitution of 1868, which gave the Superior Courts original jurisdiction. This Court can not reënact and replace provisions stricken out of the Constitution by the convention of 1875, whose action in so doing has been ratified by the people at the ballot box.

The very utmost that was reserved to the Superior Courts, after the amendments of 1875, is that they retain the headship of the judicial system below the Supreme Court, and that from them alone appeals lie to this Court, and that appeals lie to the Superior Courts from justices of the peace. Section 27, Art. IV. Whatever jurisdiction the Superior Courts have beyond this, is a matter of legislative enactment, and not of constitutional right, as this Court (as now constituted) has over and again decided.

In *Rhyne v. Lipscombe,* 122 N. C., at p. 655, this Court said: "Subject to these constitutional restrictions" (just recited as being the right of appeal from justices to the Superior Courts, and that all appeals to this Court must come from the Superior Courts), "the General Assembly may allot the jurisdiction below the Supreme Court. It may create criminal courts, or circuit courts, city courts, or other courts, and give them *all,* or such part as it thinks proper, *of the original criminal or original civil jurisdiction* above that given by the Constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction with the justices of the peace, for their jurisdiction is not

exclusive." This decision is expressly in point, was concurred in by all the judges, and adjudged that the Legislature had power to give to the criminal courts all the original civil and criminal jurisdiction heretofore used by the Superior Courts—but denied that the Legislature could make them the equal of the Superior Courts by taking (881) away the headship of the Superior Court through its appellate supervision of them.

In *Tate v. Commissioners,* 122 N. C., at p. 663, this Court again said: "It is competent for the General Assembly to give to said circuit court, or any other court it may erect, original jurisdiction, *either exclusive or concurrent,* with the Superior Court, *civil as well as criminal,* of all matters which may originate in said counties, subject to the right of appeal therefrom to the Superior Courts." And this is emphasized and reiterated on the next page.

In *Pate v R. R.,* 122 N. C., at p. 879, it is said that Article IV, sec. 12, "conferred on the Legislature power to give to courts created by it *original jurisdiction, exclusive or concurrent* with the Superior Courts," subject only to appellate supervision over such subordinate court by the Superior Courts since appeals lay to this Court only from the Superior Courts.

In *S. v. Bennie Ray,* 122 N. C., at p. 1098, it is said that the act creating the Criminal Circuit Court of Buncombe, etc. (the court whose jurisdiction is here called in question), "confers upon said court *exclusive original* jurisdiction of *all crimes,* misdemeanors and offenses committed within the counties composing said districts." And adds that the Court has held that provision of the statute valid in *Rhyne v. Lipscombe, supra,* and reaffirms that decision.

S. v. Rumbough, 122 N. C., 1104, and *S. v. Postell,* 122 N. C., 1105, were decided "upon the ruling in *S. v. Bennie Ray," supra.*

In *Malloy v. Fayetteville,* 122 N. C., at page 482, the above cases of *Rhyne v. Lipscombe, Tate v. Commissioners,* and *S. v. Ray,* were all cited on that point "that the power of the General Assembly to allot and distribute the jurisdiction below this Court was un- (882) limited" save as in those cases stated (as above recited).

The same three cases were cited as authority by *Faircloth, C. J.,* in *S. v. Hinson,* 123 N. C., 755, the Court holding that the defendant was not entitled to a trial *de novo* by a jury in the Superior Court, but only to an *appeal* upon matters of law, as the Legislature had so prescribed, and that it had the right so to prescribe under Constitution, Art. IV, sec. 12. *S. v. Hinson* is cited as authority for that proposition in *S. v. Davidson,* 124 N. C., at p. 844, and in *S. v. Bost,* 125 N. C., at p. 709.

Rhyne v. Lipscombe is cited as authority by *Furches, J.,* in *Wilson v.*

Jordan, 124 N. C., at p. 690, and in *McCall v. Webb,* 125 N. C., at p. 247, and by *Douglas, J.,* 125 N. C., 729.

Several of the above cases have been also cited as authority in opinions at this term.

After the above repeated and reiterated construction of the amended Constitution as giving the General Assembly power to confer upon courts created by it "all the original jurisdiction, civil as well as criminal," which was formerly in the Superior Courts, subject only to the appellate jurisdiction of the Superior Court, it should seem that the matter was settled. The judges who concurred in all the above decisions are the same who now sit on the Court.

In the above cases, the jurisdiction was construed at the instance of parties in civil actions, and of both the State and defendants in criminal actions, directly raising the question of jurisdiction. In the present case it is somewhat indirectly raised. The plaintiff who is seeking by mandamus to compel the county commissioners to draw a grand jury is not a citizen of the county, and his only interest is in the fees which as solicitor of the Superior Court he might receive if the original
(883) jurisdiction of criminal cases, in whole or in part, should be taken from the criminal court to which the General Assembly has seen fit to "allot and apportion" it, as empowered by the express language of the Constitution and so construed by the above numerous decisions of this Court. The statute creating the Criminal Court, reserves, as the decisions hold necessary, the right of appeal in matters of law to the Superior Court, *Faircloth, C. J.,* in *S. v. Hinson, supra.*

All the decisions of all courts that exercise the power at all of declaring an act of the Legislature unconstitutional hold that it can only be done when it is plainly and clearly so, and if there is any reasonable doubt, the presumption in favor of constitutional action by the coördinate branch of the government will prevail. *Sutton v. Phillips,* 116 N. C., 502. After the above repeated decisions sustaining the jurisdiction of criminal courts when conferred by the Legislatures of 1895 and 1897, this Court is in no condition to hold that the same jurisdiction thus held valid is plainly and clearly unconstitutional when conferred by the Legislature of 1899. There is no clause of the Constitution which conflicts with the act abolishing the grand jury in the Superior Court of Forsyth County.

There is no constitutional provision requiring a grand jury at any term of the Superior Court, and since the amendments of 1875, no constitutional bestowal upon the Superior Courts of the original criminal jurisdiction, which would require a grand jury. In Wake, and many other counties, certain terms of the Superior Court have no grand jury, but are purely for civil business. If, therefore, the peremptory man-

damus should issue as prayed for, it should properly issue, if at all, to the General Assembly, for the county commissioners of Forsyth are not empowered to legislate as to what terms of the Superior Court must be for criminal business, requiring a grand jury, and what (884) terms may be for civil business, not necessitating a grand jury.

It may be true, and doubtless is, that the growth of population and business does not yet require a Superior Court system having only appellate jurisdiction. The Legislature, the best and only judge of that matter, has so thought, and in only a few counties at present is the Superior Court made appellate, and in them only as to criminal business. It may also be true that a frank increase of the number of Superior Court districts with judges elected for fixed terms by the people, is preferable to the creation of criminal courts, with nonrotating judges and liable to be abolished and recreated at the will of Legislatures, changing with the vicissitudes of parties. But under the Constitution that question is to be settled by the General Assembly, as from time to time "it may deem fit," and not by the decrees of this Court.

Cited: *S. v. Brown,* 127 N. C., 563; *Jones v. Riggs,* 154 N. C., 282.

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(885)

A. F. HOUCK AND WIFE ET AL. V. S. L. PATTERSON, EXECUTOR OF JAMES C. HORTON.

(Decided 7 June, 1900.)

Will—Construction.

1. In construing wills, there is no better rule than to find out the intention of the testator.

2. Testator devised: "I give to my three children and their children, namely, Amelia Ann Cowles, Margaret Rebecca Houck and James Dickson Horton, all my lands after the death of myself and wife, to be equally divided into three lots of equal value as near as may be. My children above named to have the entire control and use of the lands allotted to each of them, and in case either one of them should die and all of their children, then, and in that case, their lot or lots of land given under this will shall revert back to the survivors of my children or their children." The son died during the life of his father: *Held,* that the daughters are seized in fee of one-half interest each in the lands devised. This case distinguished from *Moore v. Leach,* 50 N. C., 88.

PARTITION PROCEEDINGS, involving the construction of the devise contained in the will of James C. Horton, heard before *McNeill, J.,* at Spring Term, 1899, of CALDWELL.

A copy of the devise is contained in the opinion. One of the devisees, James Dickson Horton, died without issue in lifetime of his father. His Honor decided that Amelia Ann Cowles and her children were tenants in common in fee in one-half of the land, and that Margaret Rebecca Houck and her children were tenants in common in fee in the other half.

The executor excepted and appealed.

Both sides appealed.

No counsel for plaintiff.
Edmund Jones for defendant.

(886) FAIRCLOTH, C. J. This is a friendly action for partition, brought here for construction of J. C. Horton's will, which is as follows: "I give to my three children and their children, namely, Amelia Ann Cowles, Margaret Rebecca Houck and James Dickson Horton, all my lands after the death of myself and wife, to be equally divided into three lots of equal value, as near as may be. My children above named to have the entire control and use of the lands allotted to each one of them, and in case either one of them should die, and all of their children, then, and in that case, their lot or lots of land given under this will shall revert back to the survivors of my children or their children."

Each daughter has children living. James Dickson Horton disappeared in 1899, and has not been heard from since. The clerk adjudged that he died without issue. On appeal, his Honor adjudged that Margaret Houck and her children are tenants in common, and owners in fee, of an undivided one-half interest in the lands described in the complaint, and that Amelia Cowles and her children are tenants in common in fee of the other undivided one-half. Appeal by both parties.

The question then is, do Amelia Cowles and her children hold as tenants in common, or does Amelia have an estate in fee, and so with Margaret Houck? We have no better rule in construing wills then to find the intention of the testator.

In *Moore v. Leach,* 50 N. C., 88, the devise was "to his daughter and her children," she having children at the date of the will; the court held, nothing appearing in the will to manifest a contrary intention, that the daughter and her children took a joint estate in fee.

In the present case we think that by looking at all the parts of the will a different intention is manifest. The direction is that the (887) land be divided into *"three* lots of equal value." "My *children* above named to have control," etc., of the lands allotted "to *each one* of them," and in the event of death, the land to revert back to "the survivors of *my children* and their children."

We think the testator's intention was to give his lands to his three children, and if either of the three should predecease him leaving children, then those last named children should take the same that their parent would have taken if he or she had survived the testator.

Our conclusion is that Amelia Cowles and Margaret Houck are seized in fee of one-half interest each in the lands described in the complaint. This disposes of the executor's appeal also. This will be certified so that the parties may proceed according to this opinion.

Reversed.

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(888)

GERMAN LOOKING GLASS PLATE COMPANY ET AL v. THE ASHEVILLE FURNITURE AND LUMBER COMPANY, FIRST NATIONAL BANK OF SPRINGFIELD, OHIO, THE MAD RIVER NATIONAL BANK, OHIO, ET AL.

(Decided 7 June, 1900.)

Creditors' Bill—Injunction—Receiver—Attachment—Foreign Judgment —Irregularity.

1. The Ohio banks, creditors of the Asheville Furniture and Lumber Company, recovered judgments upon their claims in the Court of Common Pleas of Clark County, Ohio, and afterwards brought suit in the Superior Court of Buncombe County, N. C., upon their judgments, together with attachments levied upon the property of their debtor, and recovered judgments in the Superior Court upon their Ohio judgments, and also in the attachments: *Held*, that the North Carolina judgments were valid, and unaffected by any alleged irregularity in the Ohio judgments which were used in evidence, and that the attachment liens related back to the levy.
2. The fact that the plaintiffs were also creditors of the Asheville Furniture and Lumber Company did not entitle them to an order for injunction and receiver against the Ohio banks, who by their diligence had established their claims and seized the property of their debtor.

CREDITORS' BILL pending in BUNCOMBE, heard before *Starbuck, J.*, at chambers, 29 June 1899, upon an application to continue until final hearing an injunction order previously granted and for the appointment of a receiver of the property of the defendant Asheville Furniture and Lumber Company. The Ohio banks, defendants, who were also creditors of the Furniture and Lumber Company, had reduced their claims to judgments in the Court of Common Pleas of Clark County, Ohio, and afterwards sued upon them in Buncombe Superior Court, and

attached the property of their debtor, and recovered judgments
(889) in both the suits and attachments, using the Ohio judgments as evidence.

The application for injunctive relief set up in the creditors' bill, was that the Ohio judgments were irregularly obtained. His Honor ordered the injunction and appointed a receiver. The Ohio banks, defendants, excepted, and appealed.

Branches of this Furniture and Lumber Company case, have been heretofore before the Supreme Court, and are reported in 116 N. C., 827; 120 N. C., 475; 122 N. C., 752.

T. H. Cobb and W. W. Jones for plaintiff.
Charles A. Moore and F. A. Sondley for defendants.

FURCHES, J. After examining a record of over three hundred pages of printed matter we hope we sufficiently understand the facts of this case to decide the questions of law presented by the appeal.

It seems that plaintiffs and the defendants, The First National Bank of Springfield, Ohio, and The Mad River National Bank, were creditors of The Asheville Furniture and Lumber Company. The plaintiff and the defendants, The First National Bank of Springfield and the Mad River National Bank, all brought suits in the Superior Court of Buncombe County upon their respective claims.

The Ohio banks commenced their action on 24 November, 1891, on which day they sued out attachments, which were levied on property of The Asheville Furniture and Lumber Company, and at December term of said court The First National Bank of Springfield, Ohio, recovered judgment against The Asheville Furniture and Lumber Company for $20,726.40 and the Mad River National Bank recovered judgment against The Asheville Furniture and Lumber Company for
(890) $7,053.60. And, afterwards, these two actions, by consent of all parties, were consolidated, and at August Term, 1895, of said court these parties, in this consolidated action, recovered judgment upon their attachment proceedings, condemning the property so attached and against the Battery Park Bank, The Western Carolina Bank, and The National Bank of Asheville, into whose hands the attached property had gone, and who had intervened in the attachment proceedings, for the sum of $11,000, as the value of the property attached, and $2,488 as damages for the detention, etc., of said attached property. That at March Term, 1892, of said court, The East Tennessee National Bank recovered a judgment against The Asheville Furniture and Lumber Company for $5,104.12, upon which it seems an attachment was levied on the property of The Asheville Furniture and Lumber Company in

Swain County. That on 15 August, 1895, the German Glass Plate Company and the Atlanta Paper Company commenced this action as a creditors' bill. In this action plaintiffs asked for an injunction against the Ohio banks enjoining them from receiving the money recovered on their attachments, and against The Battery Park Bank, The Western Carolina Bank and The National Bank of Asheville from paying said money to the Ohio banks. And on 15 September, 1898, the injunction was granted, and a receiver appointed, from which order the Ohio banks appealed.

The Ohio banks held notes against The Asheville Furniture and Lumber Company, a North Carolina corporation, a part of whose directors lived in Ohio, where it seems to have had an office and place of business, and where some of the endorsers on said notes resided; and it seems that these Ohio banks had sued on these notes in the State of Ohio, and had recovered judgments there against The Ashe- (891) ville Furniture and Lumber Company, as well as against the endorsers. That they had sent transcripts of these judgments here, which were used as evidence in the action of the Ohio banks in their actions and attachments in Buncombe Superior Court, in which they recovered their judgments against The Asheville Furniture and Lumber Company and the intervening defendants therein.

There is no suggestion but what the notes given to the Ohio banks were genuine, and that The Asheville Furniture and Lumber Company owed these banks the debts for which said notes were given. But it is contended by The German Looking Glass Plate Company, and the other plaintiffs in this action that there was an irregularity in the proceedings in Ohio by which the Ohio banks procured said judgments in the Ohio court; and the greater part of the arguments in this Court were directed to a discussion of that question. It may be that there was such irregularity as that contended for, but we do not say that there was, as it does not become necessary for us to pass upon that question, as we do not think it material to the determination of the case on appeal.

The rights of the Ohio banks do not depend upon the regularity by which the Ohio judgments were obtained, but upon the judgments which these banks recovered against The Asheville Furniture and Lumber Company in the Superior Court of Buncombe County, and the judgment of said banks (in the consolidated action) recovered against the interveners, in the attachment proceedings. These are regular, are still in force and unsatisfied. The Ohio banks would have had a right of action against The Asheville Furniture and Lumber Company, on their debts, and upon their notes; and the Ohio judgments were only used as evidence of indebtedness in the actions of the Ohio banks against The Asheville Furniture and Lumber Company in the action in the Su-

(892) perior Court of Buncombe. And the fact that evidence may have been offered on the trial of that action that would have been excluded (if such was the case) can not make said judgments irregular and void. Indeed, we do not understand that this is contended by the plaintiffs in this action. It was said that some of the parties interested in the Ohio debts—judgments—were stockholders and directors in the corporation, The Asheville Furniture and Lumber Company, but if this were true it did not prevent them from dealing with the Asheville company, nor did it prevent the Ohio banks, in which they were interested, from dealing with The Asheville Furniture and Lumber Company. *Langston v. Improvement Co.,* 120 N. C., 132.

Then the judgments of the Ohio banks being regular North Carolina judgments still in force and unsatisfied, and the attachments sued out by these banks being regular (based upon an allegation of fraud), and levied on the property from which the judgment against the interveners was rendered, the question depends upon the rights the Ohio banks acquired by reason of said attachments—the attachment liens.

The fact that The Asheville Furniture and Lumber Company owed the plaintiffs, gave them no lien on its property; and although the plaintiffs have commenced what they claim to be a creditors' bill, and appeal to the equitable jurisdiction of the court, can not avail them anything as against the Ohio banks, if these banks have acquired a legal right—a priority to this fund, over the other creditors of The Asheville Furniture and Lumber Company. So if the attachments gave the Ohio banks the legal right to this fund—a special lien—a judicial appropriation—they are still entitled to have it. Equity always recognizes the legal rights of parties, and never displaces them. This is the question—the crucial point in this case—and it seems to be settled against the

(893) plaintiffs, the German Looking Glass Plate Company, and the other plaintiffs in this action. By the levy of the attachments, the Ohio banks acquired a lien on the property from which this fund was derived, which lien commenced at the date of their levy on 24 November, 1891. *McMillen v. Parsons,* 52 N. C., 163; 3 A. & E. Enc. (2 Ed.), 220.

There was error in the judgment appealed from in granting the injunction, and it is reversed. But if it be deemed necessary to have a receiver as to other property and effects not embraced in the judgment of the Ohio banks upon the attachments, that part of the order appealed from may be allowed to stand. The defendant, the Ohio bank, will recover the costs of this appeal, including the cost of printing the whole record.

Reversed.

(894)

A. J. CRAMPTON v: IVIE BROS.

(Decided 14 June, 1900.)

Petition to Rehear—Negligence of Drivers—Primary, Contributory—Proximate, Remote.

1. If plaintiff was injured through negligence of defendant proximately concurring with that of plaintiff's driver, he can recover.
2. If defendant's negligence was remote and did not proximately or directly concur in producing plaintiff's injury, he can not recover.
3. If the negligence of plaintiff's driver was the sole proximate cause of his injury, he can not recover, but must look to his driver or his driver's master. This would be the primary negligence of his driver.
4. If the proximate cause of the injury was the negligence of plaintiff himself, he can not recover, as this would be his own negligence.

MONTGOMERY and FURCHES, JJ., dissent from that part of the opinion in which a new trial is granted.

PETITION TO REHEAR this case reported in 124 N. C., 591.
Petition allowed.

Burwell, Walker & Cansler, and Scott & Reid for petitioners.
Jones & Tillett, contra.

DOUGLAS, J. This is a petition to rehear the case reported in 124 N. C., 591. It was then decided by a bare majority of the Court, and now we find it impossible to come to a unanimous decision, and difficult to come to any decision at all, under the circumstances, and in view of the fact that there is grave doubt in our minds whether (895) the essential principle of proximate cause was properly explained to the jury, we think that substantial justice will be best subserved by granting a new trial.

We may regard it as settled law that the negligence of the driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being, the possession of the owner to the extent of making the driver the temporary servant of the passenger. The contrary doctrine that the negligence of the driver was imputable to the passenger seems to have had its origin in the English case of *Thorogood v. Bryan*, decided in 1849, and reported in 8 C. B., 115. For a time this celebrated case bade fair to receive general acquiescence, but was frequently doubted, and finally directly overruled in the recent English case of The

Bernina, 12 Prob. Div., 58. In the meantime, the doctrine had met but scant favor in this country, and was distinctly repudiated by the Supreme Court of the United States in *Little v. Hackett,* 116 U. S., 366, decided in 1886, in which it was held that the passenger could not be held accountable for such negligence. The same conclusion had been announced by the Supreme Court of New Jersey in *R. R. v. Steinbrenner,* 47 N. J. Law, 161 (54 Am. Rep., 126), where the principle is elaborately discussed. So far we have no trouble; but there is an essential difference between the contributory negligence of the driver and his primary negligence. Contributory negligence presupposes the negligence of the defendant causing the injury to which the negligence of some one else has contributed. Strictly speaking, contributory negligence
(896) applies only to the plaintiff or some one whose negligence is legally attributable to the plaintiff. If the plaintiff was injured through the negligence of the defendant proximately concurring with that of the plaintiff's driver, then he can recover, as the negligence of his driver is not imputable to him unless, as stated above, he had assumed such complete control over the vehicle as to control its management. On the other hand, if the defendant's negligence was remote and did not proximately, either immediately or by a direct line of causation, produce or concur in producing the plaintiff's injury he can not recover, not because he is responsible for the negligence of his driver but because the defendant has not been guilty of any actionable negligence. Again, if the negligence of his driver was the sole proximate cause of his injury, he can not recover from the defendant, but must look to the driver or the driver's master. This would be the primary negligence of the driver. Again, if the proximate cause of the injury was the negligence of the plaintiff in negligently jumping out of the buggy or negligently sitting therein so as to fall out from some otherwise inadequate cause, he can not recover, as this would be his own negligence.

We have endeavored briefly to lay down the principles that should govern a new trial, but the testimony may so materially alter the application of these principles or bring new ones in requisition, that it is impossible to anticipate the course of the trial.

For reasons stated above a new trial must be ordered.

New trial.

MONTGOMERY, J., dissents from that part of the opinion of the Court in which a new trial is granted. My views are fully set forth in the opinion of the Court as reported in 124 N. C., 591.

FURCHES, J., also dissents.

Cited: Duval v. R. R., 134 N. C., 333; *Bagwell v. R. R.,* 167 N. C., 616; *Hunt v. R. R.,* 170 N. C., 444; *McMillan v. R. R.,* 172 N. C., 855.

(897)

GEORGE N. HUTTON ET AL. v. THOMAS M. WEBB, SHERIFF, AND BOARD OF COMMISSIONERS OF BURKE COUNTY.

(Decided 14 June, 1900.)

PETITION TO REHEAR.

Floatable Streams—Assessments, Act 1897, Chapter 388—Riparian Owners.

1. The opinion filed in this cause reported in 124 N. C., 749, is adhered to.
2. The act of 1897, chapter 388, does not affect the principle that the right of floatage in the public is superior to any right of riparian proprietors, but attempts to deprive both the public and the riparian owners of their free right of floatage without compensation to either.
3. While the right of the State, directly or through proper agencies, is admitted, to improve the stream whenever it sees fit to do so, and to charge a just equivalent for the benefit enjoyed as the result of such improvement, by the imposition of tolls or property tax, the opinion not only recognizes the right of floatage, but protects that right against the encroachment of the State.

CLARK and MONTGOMERY, JJ., dissenting.

Petition to rehear dismissed.

A. C. Avery and J. M. Mull for petitioners.
E. B. Cline and Shepherd & Busbee, contra.

DOUGLAS, J. This is a petition to rehear the case as reported in 124 N. C., 749. The difficulties of the case apparently arise from the fact that the concurring opinion, which under the otherwise even division of opinion had the peculiar effect of controlling the judgment of the Court, did not fully concur in its opinion. The case as pre- (898) sented to us, did not involve the abstract right of the State to improve its floatable and navigable streams, and to charge such tolls as would fairly represent their increased value as public highways to those who had received the benefit of such improvement, but simply the right of the State to deprive the plaintiff of the use of his natural easement without some corresponding benefit in the nature of compensation. The dominating principle apparently controlling the judgment of the Court is thus expressed in the concurring opinion on page 759: "The term 'floatable stream' implies an easement in some one to use the stream for purposes of transportation. Whether this easement belongs to the general public or is appurtenant to the riparian lands, it is difficult to say. If it exists at all, it must belong to the riparian owner, as a *natural* easement. Whether it vests in him solely or in common with

others, it is needless now to discuss. If it is worth anything to anybody, it is a valuable appurtenance to his land, of which he can not be deprived without adequate compensation. Whether this compensation must be in money, or may be in the increased conveniences afforded him by reasonable improvements upon the stream, need not now be considered, as no compensation whatever appears to have been given to him, and no substantial improvements have been made which would increase the facility of transportation. I speak of the riparian owners as a class, each of whom has the easement, where it exists, as far as the floatability extends. If he owns the easement, then the State can not charge him with the simple use of it.

"I concede the right of the State to establish a highway on water or land. . . . I also admit that where the State has made or caused to be made valuable improvements of a local nature, it may charge a reasonable compensation for the use of the increased (899) facilities and benefits afforded by such improvement. But this is in the nature of a toll and not a tax, and presupposes some corresponding benefit to him who pays the toll. Where there is an utter failure of consideration, why should the toll be paid? But it is said to be in the nature of a special tax levied upon the property to be benefited. But on what property is it levied? Not on the logs, for they have not been benefited, nor even assisted in their journey. Moreover, a tax must possess some element of uniformity, and, if levied locally for a special purpose, its disbursement must be confined to its creative objects." This we understand to be the general tenor of the Court, which says, on page 751: "It is true that the Legislature may by proper enactment provide for the improvement of such waterway for the *benefit of navigation.* But the Legislature can not impose duties upon the commerce upon such waters for the purpose of 'building public bridges and of cleaning out fords, public and private, across' such water-courses." The plain meaning of this is that such duties, whose imposition upon commerce can be justified only by their reciprocal benefits, can not lawfully be diverted to a purpose, public or private, utterly foreign to their original object; nor can we give our approval to any law which permits such unjust diversion. As the purpose of a special tax or toll is the only justification for its imposition, it can not lawfully be imposed where such diversion is permitted. We presume that a city can impose general taxes for the improvement of its streets, even if the bulk of it is spent in some one locality. It seems equally true that it can levy special assessments in different localities for the purpose of making special improvements within those localities. This is permitted upon the principle that where money is spent for the benefit of those who paid it, they are not injured, as the nature of the improvement is supposed to be

worth its cost. But can a city levy special taxes in one par- (900)
ticular section to be spent in an entirely different section? Or
can it impose a special assessment upon one piece of property for the
exclusive benefit of another? Surely not. And yet this has been done
in the case at bar. A heavy assessment has been levied on these logs
without any corresponding benefit to them or their owner. No improve-
ment has been made in the floatability of the stream of which they have
had any advantage. At best, the money which they paid would be de-
voted to the future improvement of the stream, even if none were used
in building bridges or cleaning out private fords. Their owner may not
have any more logs to float down, and, if he did, he would probably be
called on to pay toll for the floatage. This right of floatage he already
possessed, as we have held this to be a floatable stream. It did not come
to him by grant from the State, nor was it created by the decision of
this Court. All that this Court did or could do, was to declare its
existence as a *natural* easement, the right inherent in the general pub-
lic to use a natural highway. It was said that this right belonged to the
riparian owner, but it was not said that he was its exclusive owner. If
it exists it certainly belongs to him in some capacity, and to some ex-
tent. If it is a local highway, he is entitled to its use by virtue of his
riparian ownership, and if it is a public highway in its broadest sense,
he is equally entitled thereto as one of the general public. This right
can not be taken from him without just compensation in some form or
other, and this is the essence of our decision.

There seems to be an idea that an easement can exist in the general
public without belonging to the individual. The general public
in such a sense is a pure abstraction. As an artificial entity, it (901)
can not use the highway, as it can neither ride nor walk, having
neither feet nor hands. The easement is available only to the individual,
and, if he has the right to use it, then he has the easement.

Again, it is suggested that the State owns the highway separate and
apart from the individual, to whom it may forbid its use without any
form of compensation. This is probably a survival of the old idea that
the highways belonged to the King, in whom in fact was vested the ulti-
mate fee to all land. While, for purposes of government we must still
regard the State as an artificial entity apart from the individual citizen,
and while certain kinds of property must be reserved by the State to be
used in a certain manner and for certain specific purposes free from all
private interference, yet after all the State is but the trustee for its peo-
ple, and, within the necessary limitations of the trust, the privileges of
the citizen are inherent and of common right. Thus the right of the indi-
vidual to use the highway does not come from the permission of the
Sate, but rests upon the primary object for which the highway was

established—the use of the public. The power of the State to regulate the highway is an entirely different matter, but rests upon the same general principle—the ultimate welfare of the people. Suitable highways are absolutely necessary to all people, and the more free, intelligent and progressive a people become, the greater will be their demand for highways suitable to their development, and commensurate with their advancement. Such highways it is the duty of the State to establish, and with this duty go the corresponding powers necessary to its performance. Such powers, however, although ample and largely within the discretion of the legislative body, can not ignore the vested right of the citizen. Such rights on the other hand are not permitted to lie "in cold obstruction across the pathway" of the State, but
(902) are subordinate to the paramount right of eminent domain. By condemnation with compensation, any right of property can be taken for a public purpose.

We do not deny the right of the State to improve floatable streams, including the one in question, and to regulate their use, even if it interferes with the natural easement hitherto enjoyed by the public.

When, however, one is deprived of his vested easement, which is the result *pro tanto* if he is made to pay for its use, he must be given some compensation in money or in kind. This compensation must be actual and present, and not merely speculative and prospective. Where the easement is in the nature of a toll, the benefit must be contemporaneous and reasonably coextensive with the payment. When we say that the State can do this, we mean it can do so directly or by means of such agencies as it may deem best suited to accomplish its public purposes. We do not deny the power of the State to entrust such work to a private individual or corporation, nor the right of such private party to charge such reasonable tolls as would return a fair profit; but there may be some doubt whether public agencies would be entitled to any profit beyond the interest on the investment and the cost of maintenance, operation and repair. On this point we express no opinion, as it is not before us in our view of the case.

All that is now before us is the judgment of the court below continuing until the trial of the action the injunction restraining the sheriff and tax collector "from proceeding in any way under the assessment against the plaintiffs mentioned in the pleadings, and also from interfering with the floatage of logs by the plaintiffs down said Catawba and Johns rivers by the assessment or imposition of toll, or the levying or collecting of any tax or toll on the property of the plaintiffs, or
(903) by the sale of any property of the plaintiffs under any assessment or otherwise."

The learned counsel for the defendant is mistaken in supposing that

we overlooked the case of *Commissioners v. Lumber Co.*, 116 N. C., 731, to which we presume he refers. That case was cited in the dissenting opinion, and referred to in the concurring opinion, but is not involved in the decision of this case. The act under consideration does not affect "the principle that the right of floatage in the public is superior to any right of riparian proprietors," but attempts to deprive both the public and the riparian owners of their free right of floatage without compensation to either. Nor do we deny "the power of the Legislature to provide for levying tolls or assessments for *keeping in order* public highways used for floatage."

"Keeping in order" implies that the highway has previously been put in order; that is, that substantial improvements have already been made, from which the user has derived a substantial benefit. In such cases, the toll is regarded as the equivalent of the benefit already received.

Our opinion not only recognizes the right of floatage as existing in the public, but protects that right against the encroachment of the State. At the same time, we admit the right of the State, directly or through proper agencies, to improve the stream whenever it sees fit to do so, and to charge a just equivalent for the benefit enjoyed as the result of such improvement.

Upon the facts of the case as presented to us, and the legal principles above set forth, we think the judgment should be affirmed. The petition to rehear is therefore dismissed.

Petition dismissed.

CLARK, J., dissenting: We are saved any discussion whether (904) this is a floatable stream or not, for it was held in *Commissioners v. Lumber Co.*, 116 N. C., 731, that the Catawba River, at that part of it which is embraced in the statute now before us, is a floatable stream. This act (1897, chap. 388) recites that decision and provides for the regulation of the use of the stream for floatage purposes.

In *S. v. Glenn*, 52 N. C., 321, it was held that floatable streams are *"public highways by water,"* like navigable streams, the only difference being that in floatable streams the bed of the stream is capable of grant to the riparian owners for such uses as will not conflict with the paramount public right to the use of the stream for floatage. The riparian owner, as such, can have no rights not common to all others, except over the bed of the stream, to the center, within his boundaries. He can have no possible rights, as riparian owner, above or below his line, for there the riparian rights of the other owners come in. Consequently, as riparian owner, he has no right whatever above or below his line to the use of the stream for floatage, any more than a landowner over whose land a toll road or canal or other highway runs. The riparian

owner has rights of floatage but not as a riparian owner, and only as any other citizen has the right to the use of a public highway, and on the same terms as is granted to all others, whether that be free or on payment of toll. By the accident of location, a riparian owner may have greater need to use the stream for floatage or for navigation (when it is navigable) and greater ease of access. But any one else, who can get his logs to the stream either by the use of public roads crossing the stream or by permission of some riparian owner to cross his land, when he places his logs in the stream, has the same right to use the stream. The stream being a *public highway (S. v. Glenn),* he owes no duties or tolls to any riparian owner, and no riparian owner has any superior rights to his, any more than landowners adjacent to any other
(905) public highway have superior rights to the use of the highway.

All public highways are alike in this, that their regulation and the terms on which they may be used, rest with the people at large who express, and can express, their will only through their representatives in the Legislature, unless when some question is presented direct to them at the ballot box by what is now termed a referendum. Whether this or any highway shall be free, or whether tolls shall be paid, and, if so, what tolls, is a matter for the Legislature, not for the courts to decide. The riparian owner loses no property rights. He has none beyond his upper and lower lines, and to the thread of the stream, and within those limits he has the bed of the stream for such use as he can make of it, but subject to the superior right of the sovereign to the use and regulation of the stream for all its citizens alike.

The law-making power is confided by the Constitution to the General Assembly, and no act of theirs can be held invalid unless it plainly and palpably violates some provision of the State or Federal Constitution. No provision of either can be pointed out that restricts the power of the General Assembly to regulate the use of public highways or to exact tolls for the use of them. There is no requirement of either instrument that work must be done by the sovereign on public highways by water before tolls can be exacted, and that thereafter tolls can be exacted only to the precise amount of public funds so expended. Whether or not this would be a desirable restriction upon the power of the law-making body entrusted with general legislation, the people have not seen fit to place it in the Constitution, and no one else can place such restriction there.

The Supreme Court of the United States has uniformly held that the power of a State Legislature to regulate the use of floatable
(906) streams and prescribe tolls upon logs, is unlimited by the United States Constitution, save when such stream lies in two States, and even then the lower State can place tolls upon logs between any

two points in it, and also as well upon logs coming from a State higher up, unless Congress has legislated on the latter subject. In a very recent decision in the United States, *Lindsay v. Mullen,* filed 15 January, 1900, 20 Supreme Court Reporter, 325, it is said, speaking of the Manistee River: "The State can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State—that is, the commerce wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce, and render it safe, the States may provide for the removal of obstructions from their rivers and harbors and deepen their channels, and in other ways. . . . And to meet the cost of such improvements, the State may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. Regulation of tolls and charges in such cases are mere matters of administration under the entire control of the State."

What the improvements shall be, and what the rate of toll, whether the tolls shall be greater or less than the cost of the improvement, and whether the agency shall be directly by the State through special commissioners, or (as here) by the agency of the boards of commissioners of the riparian counties, or whether the agency shall be by means of chartered "navigation companies" or contractors (for all these methods have been tried), and whether the State shall raise a fund by tolls to be applied, when raised, to making the improvements, or shall first advance the necessary funds out of money raised by general taxation, and further, if the tolls prove insufficient, whether the deficiency shall (907) be made good out of the public treasury, or whether, if the tolls shall be more than sufficient, the surplus receipts (like the receipts of the Federal Government from port dues and the like) shall go into the general treasury, or whether such surplus shall go as directed by this act to building bridges over the stream to take the place of the fords deepened for floatage—all these matters rest with the representatives of a self-governing people, who from time to time, will change the tolls and regulations as experience may dictate. There is no hint in the Constitution (State or Federal) that the General Assembly is restricted from legislating as to the regulations and tolls upon public highways by water; still less is there any indication that the wisdom of the courts is so far superior to the will of the people expressed through the law-making body that the judiciary shall *virtute officii* supervise and correct legislation, whether wise or unwise (in its estimation), when such legislation is enacted within the limits not forbidden to the General Assembly by the Constitution.

MONTGOMERY, J., dissents: He doubts the power of the General Assembly to enact that part of chapter 388, Laws 1897, which has given rise to this litigation, but its unconstitutionality does not clearly appear to his mind, and therefore he does not concur in the opinion of the Court.

(908)

NANCY PRICHARD, WIDOW OF Z. T. SMITH, ET AL., HIS CHILDREN AND HEIRS AT LAW, BY THEIR NEXT FRIEND, NANCY PRICHARD, v. BOARD OF COMMISSIONERS OF MORGANTON, BOARD OF COMMISSIONERS OF BURKE COUNTY, R. T. CLAYWELL, AND ROBERT ROSS.

(Decided 14 June, 1900.)

Smallpox—Demurrer—Ultra Vires—Misjoinder of Causes of Action—Counties and Towns.

1. Neither town nor county board of commissioners can burn a residence house to prevent the spread of contagious and infectious diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected.
2. Counties, in a strictly legal sense, are rather instrumentalities of government than municipal corporations, like cities or towns, with corporate powers to execute their purposes, and are not liable for damages in the absence of statutory provisions giving a right of action against them.
3. There is a distinction between the liability of a county and that of a town for failure to discharge corporate duties. Towns and cities are, as a general rule, liable in damage for negligence of their officers and agents in the performance of prescribed duties, occasioning damage by their failure.
4. The county is not liable to the demand of plaintiff in respect to burning her residence, for the reason that there is no statute which makes it so. Neither is the town of Morganton liable, for the reasons, that the act complained of was for the interest of the State at large, and because the town commissioners unreasonably exceeded the powers conferred on them by the charter or by any special statute in aid thereof.
5. While the complaint was demurrable in respect to the burning of the residence of plaintiff, there were other causes of action all growing out of the same matter, and, therefore, not demurrable on that account, and the demurrers should have been overruled as to them.

ACTION for tort of defendants and their agents in burning residence of plaintiff, her corn crib, and outhouses, destroying her crop and
(909) garden, household furniture and utensils, books and clothing, and forcibly taking her and family to a pesthouse on the unfounded pretense that there was smallpox in the family or that they had

been exposed to it. The defendants filed separate demurrers. *Bowman, J.*, at Fall Term, 1899, of BURKE, allowed the plaintiff to amend the complaint with additional parties and allegations of individual liability, and overruled the demurrers. Defendants appealed.

J. T. Perkins for plaintiffs.
S. J. Ervin and Avery & Ervin for defendants.

MONTGOMERY, J. The plaintiff Nancy Prichard, a tenant in dower, brought this action against the commissioners of the town of Morganton, the board of commissioners of Burke County, and R. T. Claywell and Robert Ross as their agents and servants, to recover of them damages for burning the house in which she lived, and certain personal property therein, as a nuisance because of alleged smallpox taint and infection; for injury and damage to growing crops on the same, and for unlawfully and wrongfully depriving her of her liberty by seizing and carrying her to a pesthouse for smallpox patients and keeping her there for weeks in restraint of her freedom and contrary to her will. The persons entitled to the remainder interest in the real estate are the other plaintiffs in this action.

The commissioners of Morganton, for one cause of demurrer to the complaint, say that the complaint fails to allege that the tortious acts complained of were within the scope of the powers conferred on said corporation by its charter, and that it appears on the face of the complaint that the acts complained of are not within the scope of the powers of the corporation, and, for another ground of demurrer, say that if the acts complained of had been done under the express (910) direction of the town commissioners, the conduct of the commissioners would have been *ultra vires*.

The board of commissioners of the county demurred to the complaint, and amongst the grounds assigned, these two seem to be the chief: (1) "That the acts alleged to have been done by these defendants and constituting the plaintiff's cause of action against these defendants are not within the scope of the corporate powers and duties conferred upon or delegated to these defendants by law." (2) "That said acts are not alleged to have been done or performed under or in pursuance of any order, resolution, or direction of these defendants, and these defendants are in no way liable."

The defendant Claywell demurred because the complaint alleged that he was merely acting as the agent of the other defendants, and that there was imputed to him as an individual no unlawful or wrongful act.

We have examined the charter of the town of Morganton (Private Laws 1885, ch. 120), and find no authority given to the town commis-

sioners to burn or destroy any house or residence. In section 37 the town commissioners are authorized to take such measures as they may deem effectual to prevent the entrance into the town or the spread therein of any contagious or infectious disease; and under those powers they are permitted to cause to be destroyed or disinfected such furniture or other articles which shall be believed to be tainted or infected with any contagious or infectious diseases, or of which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury."

That statute certainly does not even purport to give to the town commissioners the right to burn a house in which a family, infected
(911) or thought to be infected with a contagious disease, resides. The right of the commissioners to destroy the property, indeed, is not admitted by the plaintiffs, but it is intimated that they acted under the authority of the act of 1893, ch. 214, sec. 22; but upon examination of that section it appears that reference is there made to the powers and duties of the superintendents of health of the several counties. No powers or rights are there given to the town commissioners or to the board of commissioners of the county. It is there provided that, in cases where the county superintendent of health declares that a nuisance exists on premises, it shall be removed or abated at the expense of the town, city or county in which the offender lives, in case of his inability to remove it, with the proviso that the expense chargeable to the town, city, or county, shall not exceed $100.

In reference to the powers conferred by law upon boards of county commissioners, we find that by subsection 22 of section 707 of the Code they can establish public hospitals for their several counties in cases of necessity, and make rules, regulations, and by-laws for preventing the spread of contagious and infectious diseases and for taking care of those afflicted thereby—the same not being inconsistent with the laws of the State. By no reasonable construction of that subsection of the Code can it be held that the boards of county commissioners can burn a residence-house to prevent the spread of contagious and infectious diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected.

It is not alleged in the complaint that the acts complained of were ordered by the county superintendent of health; nor does the cause of action as stated in the complaint proceed upon the idea that property was destroyed by the defendants under a method allowed by law, and
(912) that the plaintiff is entitled to compensation for its loss. The action is one purely in *tort*.

It is well settled in this State that counties, that is, the boards of

county commissioners in their corporate capacity are not ordinarily liable to actions of a civil nature for the manner in which they exercise or fail to exercise their corporate powers. They may be sued only in such cases and for such causes as may be provided for and allowed by the statute. Counties are not, in a strictly legal sense, municipal corporations like cities and towns; they are rather instrumentalities of government, and are given corporate powers to execute their purposes, and they are not liable for damages in the absence of statutory provisions giving a right of action against them. *White v. Commissioners,* 90 N. C., 439; *Manuel v. Commissioners,* 98 N. C., 9.

There is, however, a distinction between the liability of a county for failure to discharge corporate duties and that of a town or city for such a failure. Towns and cities are, as a general rule, liable in damages for the negligence of their officers and agents when specific duties are imposed by their charters and special statutes, when the damages are caused by their failure to discharge such duties and to exercise the powers conferred to that end, or when the town authorities are acting within the scope of their authority in the management of their property for their own interest, or in the exercise of powers voluntarily assumed for their own advantage, and that, notwithstanding the work they are engaged in will enure to the benefit of the municipality. But it is said in *Moffitt v. Asheville,* 103 N. C., 237: "Where a city or town is exercising the judicial, discretionary or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute expressly (913) or by necessary implication subjects the corporation to pecuniary responsibility for such negligence."

But the plaintiff does not complain of a negligent act of either of the defendants. The alleged cause of action is a positive act in *tort,* the burning of a residence-house as a sanitary measure. The board of commissioners of the county, as representing officially the county, are not liable to the demand of the plaintiff, for the reason that there is no statute in existence which makes them so, either expressly or by necessary implication. The town commissioners, as representing the town community, are not liable, for the reason, first, that the act complained of was for the interest of the State at large, and because they unreasonably exceeded the powers conferred on them by the charter of Morganton or by any special statute in aid thereof.

The case is before us on demurrer, and of course the facts concerning the burning are to be taken as true for the purposes of the demurrer. If, however, it be a fact that the house in which the plaintiff lived was

burnt as alleged in the complaint, it was a most high-handed and unreasonable act on the part of those who did it, and was done without the semblance of authority.

But she is not without redress. Her remedy will doubtless suggest itself to her counsel. The propositions of law which we have laid down seem to be admitted in the plaintiff's brief, and a recovery is sought upon the effect of the defendant's demurrer to the complaint. In the sixth allegation of the complaint it is alleged that the board of town commissioners caused the house to be burned under some statute or provision of law, which they claimed authorized them to assess and burn and (914) pay for the damage an amount not exceeding $100. Only the facts are admitted by the demurrer.

Parties to an action can not by complaint and demurrer enact a law. There is no such statute as the one referred to in the complaint, and the defendant's demurrer can not have the effect to admit that there is such a statute and law in force.

If the complaint be treated as containing only one cause of action the demurrers ought to have been sustained, for the demurrers were directed against the whole complaint; though there was only one allegation that was demurrable—the one which charged that the residence-house of the plaintiff was burned. *Cowand v. Myers,* 99 N. C., 198. If the complaint be treated as embracing more than one cause of action, as we will treat it—all growing out of the same matter and therefore not demurrable on that account—we think that the demurrers were good against that cause of action which set forth the burning of the plaintiff's house and damages therefor. The other causes of action were not demurrable, and the demurrers should have been overruled as to them.

There was error in the particular we have pointed out.

Modified and affirmed.

FURCHES, J., dissenting: The plaintiff Nancy Prichard alleges that she is the widow of Z. T. Smith, deceased, and that the other plaintiffs are the children and heirs at law of said Smith; that as such widow she was entitled to dower upon the lands of her said husband, which was laid off and assigned to her in a house and lot in the town of Morganton, in which she and her family were living; that there were other buildings on said lot, and a growing crop of corn and a garden with vegetables growing therein; that besides these, she owned and had in (915) said house clothing, bed clothing, table-ware and other domestic articles and furniture; that on or about the last of May, 1899, the defendants Robert Ross and R. T. Claywell, under the pretense that the

plaintiff had smallpox or had been exposed to the disease of smallpox, and claiming that they were authorized to do so by an order of the board of commissioners of Morganton, sustained and approved by the board of commissioners of Burke County, came to her house, arrested her, and carried her to a pesthouse, set fire to and destroyed her house, and the other outhouses on the lot, and also burned and destroyed her *clothing, bed clothing, tableware and household furniture;* when in fact she did not have smallpox, nor does she believe that she had been exposed to that contagious disease. To recover damages for this treatment—the loss of houses and the loss and destruction of her personal property—she brings this action against the defendants, Robert Ross, R. T. Claywell, the board of commissioners of Morganton, and the board of commissioners of Burke County.

To this complaint the defendants demurred, thereby admitting the facts stated in the complaint to be true. And taking these facts to be true, as we must do, it would seem that the plaintiff is entitled to damages from somebody.

One ground of the demurrer is the misjoinder of causes of action—too many causes joined together in one action. But it appears that they all grew out of one wrongful act or are connected with the same, and that the complaint is not demurrable on that account. *Benton v. Collins,* 118 N. C., 196; *Solomon v. Bates, ibid.,* 311.

It is claimed in the demurrer that Ross and Claywell are not liable because they were only the agents and servants of the other defendants. Admitting that this defense can be raised by the demurrer in this case (which we do not admit), it could not protect them, unless their employers had the right to commit this trespass upon the plain- (916) tiffs, and to destroy their property. And while this is so—must be so—the other defendants claim that they had no right to order this trespass and destruction of property, and demand protection on that account. So it is manifest that both of these contentions can not be true, nor can both these defenses be good. This is sufficient to justify the court in overruling the demurrer.

But are the other defendants liable? The complaint alleges that this trespass and destruction of plaintiff's property was done by order of the board of commissioners of Morganton, sanctioned by the commissioners of Burke County. But it is contended that they had no right to make such order, that it was *ultra vires,* and they are not bound by it.

But it is provided in chapter 120, sec. 37, Private Laws 1885 (charter of the town of Morganton): "That the board of commissioners may take such means as they may deem effectual to prevent the entrance into the town or the spreading therein of any contagious or infectious diseases, . . . may cause any person in the town believed to be infected

with such contagious disease or whose stay may endanger the public health, to be removed to some place within or without the town limits, may cause to be disinfected or destroyed such furniture or other articles which shall be believed to be tainted or infected with any contagious or infectious disease, or of which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury."

It would be very hard to believe that the draftsman of this act did not think he was giving the commissioners of Morganton plenary power to deal with contagious diseases; and it seems that they so under-
(917) stood it when they made this order, as it appears from the complaint that they have had the plaintiff's damages assessed at $100, and have offered to pay plaintiff that amount. But it is contended that the commissioners were limited to that amount. This can not be so—that the act authorized the commissioners to destroy property and limited the plaintiff's damages to $100, or any other amount less than the value of the property destroyed. If this contention of defendants were true, it would allow the defendants to assess their own damage. This can not be so. It is further contended that this act does not extend to the destruction of houses. I do not agree to this contention. If that were true, what becomes of damages for her *clothing, the bed clothing, tableware, and other articles of household furniture destroyed?* Has the plaintiff *no remedy for this trespass and destruction of property?* I can not so hold.

As there was no statute called to our attention that authorized the county commissioners to destroy property in Morganton, it is probable that they are not liable. The demurrer should have been sustained as to them, but was properly overruled as to the others.

This was written as a tentative opinion; and, although the opinion of the Court has been modified since it was written, it is filed as a dissenting opinion.

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

Cited: Bell v. Commissioners, 127 N. C., 91; *McIlhenny v. Wilmington, ibid.,* 149; *Moody v. State Prison,* 128 N. C., 16; *Peterson v. Wilmington,* 130 N. C., 77; *Jones v. Commissioners, ibid.,* 452; *Hull v. Roxboro,* 142 N. C., 460; *Graded School v. McDowell,* 157 N. C., 319.

(918)

G. W. WILLIAMS, THE NATIONAL BANK OF ASHEVILLE, D. C. WADDELL, AND J. G. MERRIMON, TRUSTEE, v. WEST ASHEVILLE AND SULPHUR SPRINGS RAILWAY COMPANY.

(Decided 9 June, 1900.)

Mortgage by Corporation—Intervening Prior Creditors—The Code, Sections 685, 1255.

1. Prior creditors must assert their rights within sixty days after registration of mortgage or other conveyance, Code, section 685.
2. Where a judgment is obtained for *tort*, after the sale under foreclosure, and the property turned over to the purchaser, such creditor can not be allowed to intervene in the action of foreclosure; his claim is not germane to the action, and he has no right to share in the proceeds of sale, but must proceed against the debtor and assert his rights by execution against the property, notwithstanding the foreclosure sale.
3. *Aliter*, where the court, *after* judgment, took possession of the property and prevented the enforcement of his execution, the judgment creditor should share in the proceeds of sale under order of the court.

ACTION to foreclose a deed of trust made to secure an issue of bonds, tried before *Coble, J.*, at August Term, 1899, of BUNCOMBE, upon the petition of Falls of Neuse Manufacturing Company, a creditor of defendant, as intervener to share in the proceeds of sale of trust property. The plaintiff objected. The action was commenced 22 November, 1894. Decree of foreclosure. Receiver and commissioner of sale appointed, and sale made to D. C. Waddell for $10,000, reported and confirmed at August Term, 1895, at which term the petitioners were allowed to be made parties to assert claim for damages against defendant.

The Falls of Neuse Manufacturing Company, at August Term, 1899, obtained judgment against the defendant for $2,833 dam- (919) ages, occasioned by ponding back water on its lands, and as an intervening judgment creditor petitioned to be allowed to share in the funds arising from the foreclosure proceedings instituted by plaintiffs. Petition allowed, over objection from plaintiff, and the commissioner, J. G. Merrimon, was directed to pay off the intervener's judgment out of the assets in his hands arising from the sale. Plaintiffs excepted, and appealed.

Merrimon & Merrimon and Davidson & Jones for plaintiffs.
Chas. A. Moore for interveners.

CLARK, J. This was an action by certain bondholders secured by a deed in trust upon the defendant's property, alleging insolvency, asking

a decree of foreclosure, and a receiver *pendente lite*. The action was begun in 1894, a receiver appointed soon thereafter, and a decree of foreclosure at March Term, 1895, sale thereunder 6 July, for the sum of $10,000, and report confirmed at August Term, 1895. At the same term, the Falls of Neuse Manufacturing Company was allowed to intervene, and the plaintiff bondholders excepted, which exception is one of the matters which now come up for review.

The ground of intervention by said Falls of Neuse Manufacturing Company, set out in its petition to intervene, is that it is the owner of a valuable tract of land and waterpower which have been injured by water ponded back upon said tract by a dam built by one Carrier, on his own land, which dam the defendant railway company subsequently bought and took possession of, and thereafter continued to pond the water back and overflow the land of said petitioner.

(920) It was error to allow the Falls of Neuse Manufacturing Company to intervene, and the exception of the plaintiff thereto must be sustained.

The claim of the petitioners, if valid, is an indebtedness of the defendant which has no right to share in the fund raised by the sale under the mortgage, nor is its assertion a germane matter of this action whose sole purpose is to foreclose said mortgage and disburse the proceeds among the bondholders. The petitioners rely upon the Code, secs. 685 and 1255. Section 685 has no application except when the prior creditors assert their rights by action within sixty days after the registration of a mortgage or other conveyance. Section 1255 does not apply because, as said in *Coal Co. v. Electric Co.*, 118 N. C., 232, it "neither creates nor provides for the creation of a lien." This case is governed by *R. R. v. Burnett*, 123 N. C., 210. There Burnett brought an action against a corporation for personal injuries, recovered judgment and sued out execution. In the meantime, a mortgage had been foreclosed against the corporation, the property had been sold and a new company was in possession as purchaser. This Court said: "The fact that the plaintiff claims under a sale made under a decree of foreclosure by order of court does not affect the rights of the defendant Burnett. The decree was based on the mortgage and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage under power of sale contained in the mortgage." And says further, "The principle underlying this decision and upon which it is decided is, that under section 1255 of the Code the mortgage conveyed nothing as against this claim, and as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale."

The intervener here was not a party to the foreclosure proceeding and

did not seek to be made a party till after the sale had been made under it. The purchaser stands in the shoes of the original debtor, (921) bought only such interest as he could mortgage as against the Falls of Neuse Manufacturing Company, and subject to any judgment it might obtain, and the Falls of Neuse Manufacturing Company has no right to share in the proceeds of such sale. It must proceed against its debtor and assert its rights by execution against the property, notwithstanding the foreclosure sale, just as was held in *R. R. v. Burnett, supra.*

The same doctrine was reiterated in *Belvin v. Paper Co.,* 123 N. C., 138, but, there, the Court after judgment took possession of the property, and having thus prevented enforcement of the execution, it was held that the judgment creditor should share in the proceeds of sale made under orders of the court. But here, as in *R. R. v. Burnett,* the judgment for *tort* was obtained after the sale under foreclosure, and after the property was turned over to the purchaser, and there was no obstruction of the petitioner's execution by any action of the court. As to it, the mortgage and any rights obtained under it, either by bondholders or purchasers, are nonexistent. *Hancock v. Wooten,* 107 N. C., 9, which holds that in a creditors' bill the creditors uniting in the action to set aside a fraudulent assignment acquire a preference by way of an equitable lien, has no application in this case. *Goldberg v. Cohen,* 119 N. C., 68.

There being error in admitting the petitioner to intervene over the plaintiff's exception, it is unnecessary to discuss the other exceptions subsequently raised, for whatever views might be expressed would be *obiter dicta.*

Error.

Cited: *Clement v. King,* 152 N. C., 461, 467.

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(922)

T. B. LENOIR, EXECUTOR OF W. W. LENOIR, ET AL., CREDITORS, v. LINVILLE IMPROVEMENT COMPANY.

(Decided 9 June, 1900.)

Receivership—Effect on Salaries of Company Officers—Referee's Finding of Facts, When Reviewable.

1. Where a fact is found without evidence tending to prove it, the finding is reviewable; but where, upon the whole evidence, the referee and court find that there was none tending to prove an allegation, the finding is not reviewable.

2. The appointment of a receiver for a company, who is directed to take control of *all* the property of the company, and to assume *entire* management of its affairs, has the effect of suspending all the officers of the company; and they can not interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership.

3. If the receivership had been only partial, extending only to particular property and leaving the corporation still in general or even partial management of its affairs, the case would be different.

CREDITORS' BILL pending in MITCHELL. A receiver had been appointed to assume entire control and management of the property and affairs of the defendant company. His duties having ended, he was discharged.

Petition in the cause filed by Thomas F. Parker and Harlan P. Kelsey, claiming balance of their salaries, as president and secretary of the company, accruing while the company was in the hands of the receiver, heard before *Allen, J.*, at chambers, 5 August, 1899, upon exceptions by petitioners to the report of referee, who disallowed the claims. The petitioners Parker and Kelsey excepted, and appealed from the order of the court confirming the report.

(923) *Davidson & Jones and Busbee & Busbee for appellant.*
E. J. Justice and D. W. Robinson for appellee.

DOUGLAS, J. This is an appeal by the petitioners, Parker and Kelsey, claiming respectively as president and secretary of the company, the balance of their salaries, coming due while the company was in the hands of the receiver. The following is the report of the referee:

REPORT OF BURWELL, REFEREE.

This cause having been referred to me, I proceeded, on 29 June, 1898, at Linville, N. C., to hear evidence upon the matters submitted to me for determination.

There were present at such hearing Messrs. Davidson and Jones, attorneys for Thomas F. Parker and Harlan P. Kelsey, petitioners, and E. J. Justice, attorney for the defendant.

I send herewith the testimony of the several witnesses who were examined before me, it having been taken down by a stenographer.

When the case was called for hearing before me, counsel suggested that the following issues had been agreed upon as covering the matters in dispute:

1. Is the Linville Improvement Company indebted to the plaintiff Thomas F. Parker upon his claim filed in this case? If so, in what amount?

2. Is the Linville Improvement Company indebted to the plaintiff Harlan P. Kelsey upon his claim filed in this case? If so, in what amount?

From the testimony introduced before me by the petitioners (924) and defendant, I find the following facts:

1. On 21 August, 1893, an order was made appointing a receiver of the defendant corporation, and this order prescribed the duties of such receiver as follows: "To take into his hands all the property and effects of the Linville Improvement Company, both real and personal, together with all choses in action, debts, claims and demands of every kind; to collect all debts due the company; to keep in proper repair the houses and other property; to pay all taxes lawfully assessed against the said company, and to defend and prosecute all suits at law or in equity touching or concerning the said company, and for this purpose to employ counsel at compensation to be fixed and allowed by the court; to sell and dispose of, for cash, all the property of a personal nature, and especially such as is liable to deterioration, at either public or private sale, and at such times and places as he may elect to sell and dispose of the houses, lands and tenements of said company, in such quantities and at such times and places and upon such terms as he may deem best, and, upon confirmation of the said sale or sales by the court, to execute deeds conveying such to the purchaser or purchasers."

2. That, pursuant to this order, J. F. Spainhour was duly qualified as receiver, and immediately thereafter took charge of the property and effects of defendant corporation according to the terms of the order appointing him receiver.

3. That, at the time of said appointment of a receiver, the petitioner, Thomas F. Parker, was president, and Harlan P. Kelsey was secretary of defendant corporation.

4. The charter of the defendant corporation provided that there should be a president and a secretary and a treasurer, who should be elected annually and should hold their offices respectively for one year, or until their successors should be chosen. The charter provided that the treasurer should be elected by the board of directors, and should hold his office for one year, or until his successor should be elected or inducted into office, unless he should be removed by the board (925) of directors, and that he should give bond with good and sufficient surety for the safe-keeping of all moneys that might come into his hands, and for the faithful discharge of all the duties of his office.

5. The by-laws of the corporation provided that the salaries or other compensation of all officers should be fixed by the directors, and might be changed or discontinued at the end of any month.

6. Thomas F. Parker was duly elected president on 20 July, 1893, and

immediately thereafter, at a meeting of the directors, he was elected treasurer, and as such treasurer he gave bond in the sum of $20,000.

7. At that time (20 July, 1893), Harlan P. Kelsey was duly elected secretary of defendant corporation, and was duly inducted into that office.

8. At a meeting of the directors on 20 July, 1893, the compensation of these offices, to wit, president and secretary, was fixed as follows: President, $100 per month; secretary, $25 per month. The secretary and treasurer were both, *ex officio,* members of the board of directors that so fixed their compensation.

9. It was always the custom of the defendant company to pay the actual expenses of the directors of the company in attending meetings whenever they made any charge for so doing.

10. That the receiver paid to each of the petitioners the amount due them on account of salary up to 1 September, 1893, the date of his qualification as receiver, and his taking charge of the property and effects of the company.

11. That, after the appointment of the receiver and his entering upon the duties of his office, the petitioner, Harlan P. Kelsey, was not (926) called upon or required to perform any service whatever for the company, and did not in fact perform any service on its account, except attendance at meetings of the stockholders.

12. That the petitioner, Thomas F. Parker, after the appointment of receiver and his qualification, continued to act as president of the corporation as to all matters that seemed to require his attention, and interested himself in the affairs of the company and in the efforts made by himself and others to extricate the corporation from its financial difficulties. He was recognized as the president of the company at the meeting of the corporation held in 1894, and he aided and assisted the receiver in his care of the affairs of the company. No evidence was introduced before me as to the value of such services as he rendered in this behalf.

13. Thomas F. Parker attended a meeting of the corporation, and at such meeting was recognized as the president of the company, and he expended of his own means in attending such meeting the sum of seventeen and 95-100 dollars.

14. There was no contract or agreement as to compensation between the corporation and petitioners, or either of them, except such contract or agreement as is contained in the action of the stockholders and directors above set forth electing them to be officers of the company, and fixing their salaries, and inducting them into their offices.

From these facts, so found by me, I conclude that the petitioners are not entitled to prove, in this action, the claims against the corporation

set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation except for such salaries, they can not recover anything, as creditors in this action.

I disallow Mr. Parker's claim ($17.95) for expenses, because it is a claim originating entirely after this bill was filed. I therefore answer both issues "No." In arriving at my conclusions of fact (927) stated above, I have considered all the evidence relied upon by the claimants, notwithstanding the objections of defendant, and have sustained all objections made by the claimants and excluded all evidence objected to by them.

We do not feel at liberty to review the referee's finding of fact as presented to us in the first and second exceptions. Where a fact is found without any evidence tending to prove it, the finding is reviewable by us; but where, without the exclusion of any evidence whatever, the referee and court find that there was no evidence tending to prove an allegation, how can we review the finding without passing upon the weight of the evidence? If we were to say that the court was in error in saying that there was no evidence, and that there was evidence tending to support the allegation, we could not say that the evidence was sufficient to *prove* the allegation, as that would be passing upon its weight. Therefore, the third exception of the petitioners is all that is properly before us; and it is as follows:

"3. For that the referee erred in his conclusions of law as follows: That the petitioners are not entitled to prove in this action the claims against the corporation set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation for such salaries, they can not recover anything as creditors in this action." The court below confirmed the report of the referee in all respects.

We frankly admit that this case has given us much trouble, and to it we have given careful consideration. The authorities on the exact point are not numerous, but they are conflicting, and from courts of the highest respectability.

In *Spater v. Manufacturing Co.*, 47 N. J., Eq., 18, in able (928) opinion by the chancellor, it was held that claims for damages arising from breaches of contract for services, occasioned by the insolvency of the defendant corporation, were entitled to be paid *pro rata* out of the funds in the hands of the receiver. After calling attention to the fact that, upon the dissolution of a corporation, all its surplus assets, existing after the payment of debts, are returned to its stockholders, the Court says: "It could hardly have been the intention of the law-makers

to distribute the surplus of assets, or, in other words, return capital to the stockholders of the company (that is, to those who deliberately ventured for gain and pledged their capital for the security of those who were induced to deal with them), and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. . . . I see no reason under this law for distinguishing between cases where the breach of contract precedes the adjudication of insolvency, and cases where the breach follows in consequence of that adjudication. The insolvency, suspension of business and receivership do not extinguish the corporation's life. The Chancellor 'may' declare the charter to be forfeited and void, and 'may' direct a division of the surplus assets among the stockholders; but cases may arise, and do arise, where he should not, and does not, exercise that power, because the assets are sufficient to pay creditors and justify the discharge of the receiver so that the company may resume its business, consequently the rule that when a master dies the contract with his servant is terminated is not potent in this consideration." This is the New Jersey rule, and there is much to commend it. But we think that (929) the average ends of justice would be better and more generally subserved by following the New York rule, as laid down in *People v. Insurance Co.*, 91 N. Y., 174, where the Court says, on page 178: "There was no breach of the contract between Mix and the Insurance Company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service, the company had done nothing to prevent performance, and we must assume was both ready and willing to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears, it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong and to make it liable for a breach, required action on the part of Mix. As a condition precedent, he was bound to show both ability and readiness to perform on his part. He could do neither. Performance by him had become illegal. It would have been a criminal contempt and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and un-

lawful acts. So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of (930) the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent, who contracted with it, did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation."

Again, in distinguishing a different class of cases, the Court says, on page 180: "In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding up orders were made, and the liquidators appointed. When the court interfered, it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not break what was already broken." The Court further distinguishes a certain class of cases where property rights survive the death of the parties. We have quoted at length from this opinion because it expresses so clearly our own view of the law. It is cited and followed by the Circuit Court of the United States in *Malcomson v. Wappoo Mills,* 88 Fed., 680. This rule applies in the case at bar. The petitioners were elected to their respective offices for the purpose of having the ordinary duties of those offices properly performed. Salaries were assigned to them for the proper performance of those duties, and were paid for the full time that they were performed. The company never refused to perform its part of the contract, nor were the claimants in a condition to perform their part after the appointment of a receiver. It is true they do not appear to have been enjoined from doing so, but that was the practical effect of the order appointing the receiver. He was directed to take control of *all* the property (931) of the company, and to assume *entire* management of its affairs. This left nothing for the petitioners to do, as any interference with the duties of the receiver would have been a contempt of court. It makes no difference whether their relations with the company were severed or not. It is probable that if the receiver had been discharged and the company permitted to resume the management of its own affairs during the continuance of their terms, or perhaps even if before the election of their successors, they would at once have resumed their offices with all their duties, powers and emoluments. But it is certain that during the con-

tinuance of the receivership they neither did nor could perform such duties, and that their inability to do so did not arise from any adverse action on the part of the company. As they did not perform those duties, they did not earn the salary attached to their performance, and they can not recover from the defendant for a breach of contract where the defendant has been guilty of no breach. If the receivership had been only partial, extending only to particular property, and leaving the defendant corporation still in the general and even partial management of its affairs, the case would be different.

If the petitioners rendered any service to the receiver, we do not see why they should not be paid, but they can not recover in the shape of salaries for offices that were practically in abeyance.

When this case was here before (*Lenoir v. Improvement Co.*, 117 N. C., 471), all that this Court decided was that the petitioners had a right to be heard upon the facts as well as the law. They have now been heard, and upon the facts as found by the referee they can not recover, in our view of the law. The judgment below is

Affirmed.

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(932)

HINKLE, CRAIG & CO. v. SOUTHERN RAILWAY COMPANY.

(Decided 9 June, 1900.)

Common Carrier—Transportation of Cattle—Negligence—Liability—Notice of Claim for Damages in Writing.

1. Where cattle are received by a common carrier for transportation and are not seasonably and safely delivered, that is, not delivered at all, or delivered in a damaged condition, and after unreasonable delay, the plaintiff's case is made out.

2. The burden is then upon the defendant, and if it wishes to escape any part of its common law liability by showing a special contract, it must affirmatively prove such contract, and bring the injury clearly within the terms of its exception.

3. The failure of the plaintiff to give formal written notice of his loss or intention to demand compensation, is no bar to his recovery, if otherwise entitled. The object of such a stipulation is not to relieve from just liability—such a purpose would be clearly unlawful—but to enable the defendant, by proper investigation to protect himself against unjust claims.

APPEAL from *Allen, J.*, at Fall Term, 1899, of CALDWELL.

This is an action to recover damages for injuries to a carload of cattle resulting from delay in transportation. The complaint, among other allegations, contains the following:

"3. That on or about 4 November, 1896, the plaintiffs shipped from Lenoir, N. C., to Hickory, N. C., over the railroad of the Chester and Lenoir Railroad Company, thirty head of cattle; that said cattle were shipped from Lenoir, N. C., on Wednesday, 4 November, 1896, at 2 o'clock a. m., and reached Hickory at about 4 a. m., of the same morning, and were at once turned over to and received by the defendant for further transportation; that defendant company, instead of transporting said cattle promptly and expeditiously, refused to carry (933) them on a through freight train which passed Hickory at 8 o'clock a. m., of the same morning, bound for points in the direction of Norfolk, on the defendant's road, although requested and urged to do so by plaintiffs; but instead, allowed them to remain in the cars of the Chester and Lenoir Railroad Company from 4 o'clock a. m., till 3 o'clock p. m., at which time they were placed in defendant's cars by plaintiff at his own expense, and remained in said car of defendant from 3 o'clock p. m., until 10 o'clock p. m., of the same day, before they were removed from Hickory; that said defendant then carried them on a local freight train, which traveled much more slowly than a through train, instead of transporting them on a through train, as it should have done. That said cattle did not reach Norfolk over defendant's railroad until Saturday, 7 November, 1896, having been on the road nearly or quite three nights and four days, although the distance is less than four hundred miles, as plaintiffs are informed and believe.

4. That plaintiffs allege that defendant company had ample notice of the date upon which the said cattle would be delivered to it for transportation, so as to have had cars ready for their prompt shipment.

The plaintiff further alleged, in substance, that on account of the unreasonable delay in shipment the cattle were injured and lost greatly in weight, and consequently depreciated in price; that he was forced to incur the additional expense of feeding them en route, and keeping them over Sunday at Norfolk; and that he thereby lost what is known as the Saturday market when cattle bring a higher price than at any other time.

These allegations are denied by the defendant on information and belief, who sets up the further defense: "That no notice in (934) writing was given to defendant of any claim for damages to plaintiff's stock, as set forth in said contract, and for the failure to serve such notice, as defendant is advised and believes, plaintiffs are not entitled to recover in this action."

The following are the material facts of the statement of the case on appeal:

"The plaintiffs offered evidence tending to support the allegations of their complaint, among other evidence, that the cattle were shipped from Hickory, N. C., on Wednesday, and were not received in Norfolk until the following Saturday. He admitted the execution of the contract for the shipment of his cattle, which was exhibited to him, and closed his case."

The defendant offered in evidence said contract, which contained, among others, the following stipulations:

"Now, in consideration of said railroad agreeing to transport the above-described live stock at the reduced rate of ____ dollars to Norfolk, and a free passage to the owner or his agent on the train with the stock, the said owner and shipper does hereby assume and release the said railroad from all injury, loss and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring himself or themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, and from all other damages incidental to railroad transportation which shall not have been caused by the fraud or gross negligence of said railroad company.

"And it is further agreed that as a condition precedent to the right of the owner and shipper to recover any damages for any loss or injury to said live stock, he will give notice in writing of his claim therefor to the agent of the railroad company, actually delivering said . . .
(935) to him, whether at the point of destination or at any intermediate point where the same may be actually delivered before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, and before said stock is intermingled with other stock.

"And this agreement further witnesseth, that said owner and shipper has this day delivered to said company the live stock described about to be transported on the conditions, stipulations and understandings above expressed, which have been explained to and are fully understood by the owner and shipper."

This contract was duly executed by the plaintiffs and by the railroad agent at the point of shipment. The plaintiff admitted that he had not given the notice in writing stipulated for in the above contract.

He testified, however, in rebuttal, that his agent, upon the receipt of the cattle in Norfolk, signed a receipt for the same under protest, owing to their bad condition.

Upon this evidence the defendant moved the court to dismiss the complaint.

Motion refused, and defendant excepted.

Defendant further requested the court to charge the jury that if the jury believed the evidence the plaintiffs are not entitled to recover, and to answer the issue "No."

This motion was refused, and defendant excepted.

The court charged the jury that if they believed the evidence the plaintiffs are entitled to recover such damages to the carload of stock as had been shown by the evidence.

And to this charge of the court the defendant excepted.

The issue submitted was as follows:

Were the plaintiffs endamaged by the negligence of defendant; and if so, in what amount?

The jury answered this issue "Yes, in the sum of $225." The defendant moved for a new trial on the ground of misdirection (936) by the court, and to the refusal of the court to instruct the jury as requested by the defendant, and because the court submitted the case to the jury upon the evidence.

Motion refused, and defendant excepted.

There was a judgment according to the verdict, and from this judgment defendant appealed.

1. The defendant assigns as error the refusal of the court to dismiss the action at the close of the evidence.

2. Because the court refused to charge the jury that if they believed the evidence the plaintiffs are not entitled to recover, and to answer the issue "No."

3. To the charge of the court that if the jury believed the evidence plaintiffs are entitled to recover such damage to their carload of stock as they had shown by his evidence.

4. Because the court refused to grant a new trial.

Edmund Jones and W. C. Newland for plaintiffs.

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

DOUGLAS, J. (after stating the facts).: This case was submitted to us on printed briefs for the plaintiffs, but was argued in behalf of the defendant both orally and by brief. It is perhaps proper to say that almost the entire brief of the defendant was devoted to proving a proposition that we have no disposition to deny, that is, that a common carrier can, by special contract, reasonably limit its common law liability. But we can not admit the assumed corollary that thereby it ceases to be a common carrier or *ipso facto* reverses the legal burden of proof. It is well established that where the negligence of the defendant is the primary cause of action, it must be alleged and proved by the plaintiff; but

here, it is merely incidental to the cause of action; in fact it arises as a matter of defense. We must not lose sight of the real cause of
(937) action, which is the injury resulting from the failure of the defendant to seasonably transport and safely deliver live stock received by it as a common carrier. The plaintiff's case is fully made out when he has shown that the cattle were received by the carrier, and not seasonably and safely delivered, that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay. The burden is then upon the defendant, and, if it wishes to escape any part of its common law liability by showing a special contract, it must affirmatively prove such contract, and bring the injury clearly within the terms of its exemption. These principles have been so recently and so fully discussed by this Court in *Mitchell v. R. R.*, 124 N. C., 236, that any further elaboration seems needless, at least for the present. The essential principle is tersely and strongly stated by *Chief Justice Faircloth,* in *Manufacturing Co. v. R. R.*, 121 N. C., 514, where, speaking for a unanimous Court, he says: "Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the *burden is upon it to rebut the presumption.*"

The rule is well stated in Greenleaf on Evidence (14 Ed.), sec. 219, in the following language: "And if the acceptance was special, *the burden of proof* is still *on the carrier to show,* not only that the cause of loss was within the terms of the exception, but *also that there was on his part no negligence or want of due care.*"

That this rule, which at first was seriously questioned, is receiving almost general acceptance, would appear from the recent work of Elliott on Railroads, where the authors say in section 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the *prevailing rule,* where the owner or his
(938) agent does not go with the stock, is, that when the animals are shown to have been delivered to the carrier in good condition and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." This rule, which is the natural result of the *prima facie* liability of the common carrier, is further strengthened by the universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. 5 A. & E. (2 Ed.), 41; Best Evidence, sec. 274; 1 Greenleaf Ev., sec. 79; Starkie Ev., sec. 589; Rice Evidence, sec. 77; *R. R. v. U. S.*, 139 U. S., 560, 567; *S. v. McDuffie,* 107 N. C., 885, 888; *Govan v. Cushing,* 111 N. C., 458, 461; *Mitchell v. R. R., supra.* Some of the earlier cases appear to take the

view that a common carrier ceases to be such when it makes a special contract, and becomes a private carrier for hire. Whatever foundation may have existed for such an idea in the earlier days of the law, when common carriers were private individuals and carried their shipments in wagons or boats on the ordinary public highway, without receiving or asking any special privileges, has long since disappeared. A railroad company is at least a *quasi* public corporation, exercising one of the highest prerogatives of the sovereign, that of eminent domain. It is purely a creature of the law, and has no existence outside of its public capacity. It is a common carrier by virtue of its charter, and not by any supposed usage or contract with the shipper. Its character as such is fixed by its contract with the State, and can not be waived either by the corporation or the shipper. It may limit its liability to a certain extent by special contract, but can not change its character. All such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable. Any doubt or ambiguity therein is to be resolved in favor of the ship- (939) per, and it has further been held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable. *Compania La Flecha v. Brauer,* 168 U. S., 104, 118; 4 Elliott Railroads, sec. 1424; *Cox v. R. R.,* 9 A. & E. R. R. Cases (N. S.), 591, 600; *Texas R. R. v. Reeves,* 8 A. & E. R. R. Cases (N. S.), 429; 5 A. & E. Enc. (2 Ed.), 326. Stipulations in a bill of lading are similar in their nature to conditions in a policy of insurance. It is well settled by the highest authority that if a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and against the construction which would limit the liability of the insurer. *Insurance Co. v. Coos Co.,* 151 U. S., 452; *London Asso. v. Compania de Moagens do Bareiro,* 167 U. S., 149.

In the case at bar it does not appear necessary for the plaintiff to resort to the burden of proof, as the unreasonable detention is in itself evidence of negligence. It appears from the evidence that the cattle were four days and three nights, that is eighty-four hours, in reaching their destination, a distance of 400 miles. At the present day, the transportation of live stock over a great trunk line of railway at an average rate of less than five miles per hour can not be considered reasonable diligence in the total absence of explanation.

The only remaining question is whether the failure of the plaintiff to give formal written notice of his loss or intention to demand compensation is an absolute bar to his recovery, if otherwise entitled. We think not. The object of such a stipulation is not to relieve the carrier from its just liability, for such a purpose would be clearly unlawful, but sim-

ply to give it such notice as will enable it by proper investiga-
(940) tion to protect itself against unjust claims. It is not denied that the plaintiff signed the receipt for the cattle *under protest.* These words written upon the receipt would be ample notice to the defendant that the plaintiff intended to enforce his rights. The meaning of those words is too well known in the business world to be capable of misconstruction. In the present instance they clearly meant that the plaintiff objected to receiving the cattle in their damaged condition, but did so under compulsion of circumstances to prevent still further loss, but at the same time retaining all his rights of action against the defendant. If the defendant's agent had desired any more specific notice or information, he might have asked for it after having been put upon notice, but this he did not see fit to do. Even if the protest had been merely verbal and not in writing, the stipulation might well have been deemed to have been waived under the circumstances. It appears from the uncontradicted testimony that the plaintiff suffered the injury and gave actual notice to the defendant of his claim for damages. We do not see why he can not recover. Any other construction would convert what, properly construed, is a reasonable stipulation for the proper protection of the carrier into an instrument of fraud and a shield of wrong. This is so clearly explained by *Justice Furches,* speaking for the Court, in *Wood v. R. R.,* 118 N. C., 1056, 1063, as to require no further comment. Judgment of the court below is

Affirmed.

Cited: Gardner v. R. R., 127 N. C., 297; *Mfg. Co. v. R. R.,* 128 N. C., 283, 284; *Bank v. Fidelity Co., ibid.,* 373; *Williams v. R. R.,* 130 N. C., 124; *Hosiery Co. v. R. R.,* 131 N. C., 240; *Parker v. R. R.,* 133 N. C., 339, 346; *Davis v. R. R.,* 145 N. C., 208; *Jones v. R. R.,* 148 N. C., 589; *Kime v. R. R.,* 153 N. C., 400; *s. c.,* 156 N. C., 453; *s. c.,* 160 N. C., 461; *McConnell v. R. R.,* 163 N. C., 508; *Phillips v. R. R.,* 172 N. C., 87, 89.

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(941)

W. F. DYER v. D. R. ELLINGTON, W. S. WILLIAMS AND J. M. HOPPER.

(Decided 9 June, 1900.)

Suit for Penalty, The Code, Section 3816—Legislative Remission, Pendente Lite, Acts 1899, Chapter 349—Right of Informer.

1. An informer has, in a certain sense, an inchoate right when he brings his suit, but he has no *vested* right to the penalty until judgment.

2. Until his right becomes vested, it can be destroyed by the Legislature.

APPEAL from *Shaw, J.*, at August Term, 1899, of ROCKINGHAM. The action was begun before a justice of the peace in Leaksville Township, for the purpose of recovering a penalty of $100 against the defendants named in the caption, for failure, as commissioners of the town of Leaksville, to publish, as required by section 3816 of The Code, a statement of taxes levied and collected in said town, together with a statement of the amounts expended by them, and for what purpose, during the year 1897, and by due appeal was brought to the Superior Court, where a trial by jury was waived, and, by consent, his Honor found the facts.

Upon the facts found, the defendants moved for judgment and (943) the motion was disallowed.

The defendants appeal, and make the following assignments of error:

1. The plaintiff had no standing in court upon the facts, his action being against the defendants individually, and if entitled to sue at all, his action should have been against the town of Leaksville or the board of commissioners of the town of Leaksville.

2. The defendants were protected, and the plaintiff deprived of his right of action by reason of the act of the General Assembly, being entitled "An act for the relief of the commissioners of the town of Leaksville, in Rockingham County, North Carolina," Laws 1899, ch. 349.

J. D. Pannill for plaintiff.

Scott & Reid and Glenn & Manly for defendants.

DOUGLAS, J. The act referred to in the case on appeal is as follows: "An act for the relief of the commissioners of the town of Leaksville, Rockingham County: Whereas, the commissioners of the town of Leaksville, in Rockingham County, North Carolina, by an oversight, failed to make an exhibit of the taxes collected and expenditures as required by The Code, sec. 3816, and whereas certain parties have sued said commissioners for such failure, therefore the General Assembly of North Carolina do enact: Section 1. That the (944) commissioners of the town of Leaksville, in Rockingham County, N. C., be and the same are hereby released from any and all penalties that may attach to them for failure to make such exhibit. Section 2. That this act shall be in force from and after its ratification."

This act was ratified on 28 February, 1899. It does not repeal section 3816 of The Code, either generally or locally, nor pretend to repeal it even as far as the town of Leaksville is concerned. It is simply what it professes to be upon its face—an act of amnesty or pardon to the commissioners of the town of Leaksville for their failure to make an exhibit of taxes and expenditures for the particular year for which they had been sued. It is true the act is very loosely drawn, specifying

neither the names of the persons nor the year of their default, and yet it seems plain to us to whom and to what the act was intended to apply. If there had been pending suits against different boards or for different defaults, the ambiguity might have been fatal; but there is no suggestion of any such ambiguity, whatever difference of opinion there might be as to the application of The Code. Whatever doubts we may have as to the propriety of the act or its probable effect, had it related to a criminal prosecution, we are not called on to express. The Code, sec. 3764, provides that "the repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute." This provision has been held good in *Epps v. Smith,* 121 N. C., 157, but does not apply to the case at bar, as here we have no repeal, but an absolute and express remission of the penalty. An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one
(945) created by the act. He has in a certain sense an inchoate right when he brings his suit, that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty; but he has no *vested* right to the penalty until judgment. Until it becomes vested, we think it can be destroyed by the Legislature. *Wilmington v. Cronly,* 122 N. C., 388. As the laws of one Legislature do not bind another, except in so far as they may be absolute contracts, we must take section 3764 of The Code as merely a rule of construction having no application where the intention of the Legislature clearly and explicitly appears to the contrary. A statute providing a penalty creates no contract between the State and the common informer, even if he acts under the permission given him to sue. It is true he may thus lose the costs and expenses of his action, but if he engages in a speculation from which he expects large profits from a small investment, he can not complain much at the loss of his stake. If the penalty had been reduced to judgment, or had been given to the injured party in the nature of liquidated damages, the case would be essentially different. But we are not now deciding what is not before us. Sufficient unto the day is the evil thereof. As this case comes before us on findings of fact by the judge, and as it appears to us that the cause of action was destroyed by the act of the Legislature before it became vested, the judgment of the court below must be

Reversed.

Cited: Dunham v. Andrews, 128 N. C., 210; *Grocery Co. v. R. R.,* 136 N. C., 400; *Turner v. McKee,* 137 N. C., 255, 268; *Bray v. Williams, ibid.,* 391; *Williams v. R. R.,* 153 N. C., 364; *R. R. v. Oates,* 164 N. C., 170.

(946)

EBBIRT WARD, BY HIS NEXT FRIEND, S. P. WARD, v. ODELL MANUFACTURING COMPANY.

(Decided 9 June, 1900.)

Evenly Divided Court.

When in consequence of one of the justices not participating in the hearing of the appeal in this case, the Court was evenly divided in their opinion, the judgment appealed from stands, not as a precedent, but as the judgment of the Superior Court. *Boone v. Peebles, ante,* 824.

FURCHES, J., did not sit.

ACTION for damages for alleged negligence resulting in occasioning the loss of an eye of the plaintiff, a child under 12 years of age, in employment of defendant company, tried before *Shaw, J.,* at February Term, 1899, of IREDELL. The jury found the issues in favor of plaintiff and assessed his damages at $1,000. Judgment accordingly. Appeal by defendant.

Justice Furches, having been counsel in the cause, did not sit on the hearing of the appeal. The Court being equally divided in opinion, the judgment for that reason stands, but not as a precedent.

The case was heretofore before the Court, and new trial granted. Reported in 123 N. C., 248.

Armfield & Turner and H. P. Grier for plaintiff.
B. F. Long and W. J. Montgomery for defendant.

CLARK, J. *Mr. Justice Furches* having been of counsel does not sit, and the Court being equally divided, the judgment below is affirmed. *Boone v. Peebles, ante,* 824, and cases there cited.

The only error found by the two members of the Court who favor a new trial, is the following instruction: "If the jury should find from the evidence that, at the time of the injury complained of (947) the plaintiff was only 11 years of age, and that, on account of his tender years, his immaturity and inexperience, he did not fully realize and know the danger he incurred in passing said work-bench where wires were being cut, he was guilty of no contributory negligence in so doing." If this instruction had read, "did not fully realize and know the danger, *if any,* he incurred," it is conceded there would have been no error. But the jury could not possibly have been misled into thinking that the judge meant to decide the issue of fact that there was danger, when he had repeatedly told them that this was a question of fact for the jury. The whole charge must be construed together, and not a de-

tached sentence. *S. v. Boone,* 82 N. C., 637. This is not the case where the judge has given two contradictory instructions as to the law; in which case the jury may well be confused as to which to take. But, here the whole charge taken together is perfectly intelligible and consistent. Juries are presumed to be intelligent and honest, and are as much an integral part of our court system as the judges, and in their department probably make as few mistakes in finding the facts as the judges do in finding the law or in applying it.

Besides, the fact that the plaintiff was injured and lost his eye at or near that bench is conclusive that there was danger, *res ipsa loquitur,* and the jury in no aspect were prejudiced by the inadvertent omission of the words "if any."

The judge very properly adverted to the immaturity and inexperience of a child 11 years of age employed in a large manufactory filled with dangerous machinery, and told the jury correctly that if that was the cause of his approaching the danger he was not guilty of contributory negligence. The humanity of the age has in very many of the
(948) States placed on the statute books laws forbidding the employment of children under 14 years of age in factories. So far as these statutes are based upon the inhumanity of shutting up these little prisoners eleven and one-half to twelve hours a day (the ordinary factory hours in this State according to the State's official publications) in the stifling atmosphere of such buildings, or depriving them of opportunity for education, or using the competition of their cheap wages to reduce those of maturer age, these are arguments on matters of public policy which must be addressed solely to the legislative department. But there is an aspect in which the matter is for the courts, that is, whether it is negligence *per se* for a great factory to take children of such immature development of mind and body and expose them for twelve hours per day to the dangers incident to a great building filled with machinery constantly whirring at a high speed. The children without opportunity of education, without rest, their strength overtaxed, their perceptions blunted by fatigue, their intelligence dwarfed by their treadmill existence, are over-liable to accidents. Can it be said that such little creatures, exposed to such dangers against their wills, are guilty of *contributory negligence,* the defense here set up? Does the law, justly interpreted, visit such liability upon little children? From the defendant's brief it would seem that this child had been put to work in the factory at eight or nine years of age, as it states he had been working there over two years when injured. Whether they are thus imprisoned at work too early by the necessities of their parents or not, it is not the consent of the children. It is not law, as the appellant's counsel insists, that the factory company is not liable because the father hired the child to the

company. It is the child's eye which was put out, not the father's. The father could not sell his child, nor give the company the right to expose him to danger. The factory superintendent put these (949) children to work, knowing their immaturity of mind and body, and when one of them, thus placed by him, in places requiring constant watchfulness, is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence.

The judge certainly committed no error in leaving it to the jury to find that there was no contributory negligence, if the child incurred the danger, which put out his eye, by reason of his ignorance arising from his immaturity of years and inexperience.

Affirmed.

MONTGOMERY, J. The Court is equally divided in opinion, *Justice Furches* not sitting on the hearing, and the judgment below for that reason stands. I desire, however, to express my views on the merits of the case.

The plaintiff, a minor, brought through his next friend, this action to recover of the defendant damages for a personal injury which he sustained through the alleged negligent keeping and use of a work-bench and tools by the defendant in its cotton mills where the plaintiff was employed. The room in which the plaintiff was hurt was a very large one, contained nearly two hundred looms, and was divided by an imaginary line into two equal sections. Wood was the loom-fixer, or boss of one section, and Suther of the other. The plaintiff worked under the supervision of Wood, his work being, in his own language, "to carry quills from the weaver room up stairs to the quiller room to be refilled"; and the work-bench at which he was hurt was in the corner of the room, and in the section under the control of Suther. Upon this work-bench (about three feet wide by six feet long) tools of various kinds were kept for use in the factory—for mending anything that (950) broke—and especially for fixing and mending pattern chains and picker sticks. The plaintiff testified that he was, on the day of his injury, sent out of his section by Wood to Suther's section to do the work of the quiller boy in Suther's section, who was sick or absent, and that while engaged in the work assigned him he had to go up an alley to the work-bench, and then turn and go down another alley to get quills.

He further testified that "Dan Ryan was cutting the wire for pattern chains with a hammer and cold chisel, and I was passing by the work-bench with a turn of quills and looked up to see what time it was, and just as I looked up a piece or scale of wire struck me in the eye." He further said that he had frequently before that time, seen Dan Ryan engaged in the same work at the bench. Dan Ryan's testimony was, in

substance, that he had been employed by the defendant for seven or eight years, and his duty was that of "rolling beams," and when he put on a warp for Ward he built pattern chains; that while he was cutting wire for this latter purpose with a chisel and hammer he saw plaintiff rubbing his eye, and at the same time declaring that something had gotten into it. This witness further said: "I put wire in vise and struck it with chisel, and it flew off. Wood ordered me to build chains, and I had to take it to the bench to build it. Usually they have wires cut, but none were there this time. The men whose business it was to cut wires had nippers. My regular business was rolling beams. Wood did not tell me to build this, but he told me whenever he was busy to build pattern chains and put them on. The men furnished me no nippers, but when I needed them I went to Wood to get them if he was in there. They kept chisel and hammer there. Wood was not in there at this time." There was other evidence to the effect that the cold chisel, vise and hammer were kept on the bench, and used for cutting wire. Wood testified for the defendant that he did not send the plaintiff to Suther's section, and that he
(951) had never ordered or allowed Dan Ryan to use the bench and tools for any purpose. Suther testified that Ryan never used the bench in work hours, and at no time for the company; that the plaintiff was not in his section during work hours on the day on which he was hurt. This witness further testified that during the dinner hour "Ryan and plaintiff were standing at the work-bench. I heard Ryan say to Ward he had better go away, 'this might fly off and hurt you,' and plaintiff stood there, and I heard the vise snap, and the boy threw his hand up to his face and got down, and I went up to him and asked him what was the matter, and he said 'Dan Ryan has put out my eye.' I took him by the hand and led him through my section to the door, and met his boss, and said, 'Mr. Wood, here is your boy with his eye hurt,' and he said, 'how?' and I told him he and Ryan were fooling with a top; and I came back up stairs and saw the same tools always there and a top laying on the bench. He was trying to get the head of the screw off. He had a screw in the vise, and it turned up and flew out. Nobody in the mill but one woman in Wood's section. The plaintiff had no business on this section."

The jury, whatever may be the justice of the verdict, found those controverted matters for the plaintiff. The instruction which his Honor gave to the jury in respect to the relation between Wood and the plaintiff, that is, as to whether Wood and the plaintiff were fellow-servants, or Wood sustained the relation of vice-principal, and the instruction in reference to the nature and character of the tools and the use made of them by the defendant, furnished the defendant's chief grounds of complaint against the verdict and judgment. As to the first instruction, his

Honor told the jury that if they believed the evidence the plaintiff and Wood and Suther were not fellow-servants, but that Wood and Suther were vice-principals, and that the plaintiff by his em- (952) ployment did not assume the perils arising from their negligence.

On this point it may be well to recite the evidence. The plaintiff testified that "Wood and Suther were the bosses of the room where I was at work. Wood had control of the upper end of the mill to the right as you go in the door, and Suther the other half. Wood was my boss." He further said, "If I had refused to go in Mr. Suther's department I would have been discharged." Another witness, J. D. Johnson, a loom-fixer, who had worked in the room where the boy was injured, testified that when he worked for the defendant they (Wood and Suther) "were my bosses. I think they had a right to employ hands. Mr. Wood employed me once when I returned from Charlotte. Don't know that they had a right to discharge hands."

W. R. Odell testified that "Mr. Wood and Mr. Suther in their respective sections were loom-fixers. In each section were about twenty-five hands. They had no authority to employ or discharge hands from their sections. The superintendent had authority." On cross-examination the witness said "Wood and Suther directed the hands in their sections. If hands disobeyed they reported to superintendent and recommended their discharge, which were usually followed."

Wood, a witness for the defendant, testified that "he had authority over the hands to keep them at work. No authority to discharge and employ hands; referred them to superintendent." On cross-examination, witness said: "I was section boss. Hands had to obey. If a hand disobeyed my orders I reported it to superintendent, and he usually acted on my recommendations; I kept such hands as I could control."

Suther testified that "the bench was for both sections. Hands under my control, and if they did not suit me I reported them to superintendent, and my recommendations as to their discharge would (953) be followed."

Upon a full consideration of the whole of the evidence we are satisfied that his Honor's instruction that Wood and Suther were vice-principals was correct. After all that has been written and spoken on the subject, it is still a difficult question to decide who is a fellow-servant. In *Dobbin v. R. R.*, 81 N. C., 446, *Judge Ashe*, for the Court, said: "And so far as we have been able to find, no definition of the relation as a test applicable to all cases has as yet been adopted by the courts; and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, colaborer and employee, in the various enterprises and employments, with their numerous and divers branches and departments: the cases frequently verging so closely on the

line of demarcation between fellow-servants or colaborers and what are called 'middlemen,' that it is difficult to decide on which side of the line they fall. Each case in the future, as heretofore, will have to be determined by its own particular facts."

It is further said in that opinion that "to constitute one the 'middleman,' he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty and in case of dereliction report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination and to whom they owe the duty of obedience." In *Patton v. R. R.*, 96 N. C., 455, *Judge Merrimon,* for the Court, after stating that there seemed to be no well-settled rule classifying the agents and servants of a common employer into such as have authority to stand for and represent
(954) the employer in respect to the persons and things with which they are charged and such as have no authority, said: "Thus an employer might confer upon a particular laborer, charged to do a particular sort of service but who simply by the nature of his employment would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or nonfeasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent, act for and in the place of his employer, in the business designated, and within the compass of the power conferred."

In the late cases of *Mason v. R. R.*, 111 N. C., 482; *Logan v. R. R.*, 116 N. C., 940; *Shadd v. R. R.*, 116 N. C., 968, and *Turner v. Lumber Co.*, 119 N. C., 387, the rule seems to have been simplified. In the last-mentioned case the Court said: "The test of the question whether one in charge of other servants is to be regarded as a fellow-servant or a 'middleman' is involved in the inquiry, whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged." That principle is the one announced in the other cases just above referred to. But it is argued by the defendant's counsel that Wood had no power to employ or discharge the hands under his control. It is true that the secretary of the company, Mr. Odell,

made that general statement, but he, on cross-examination, and also Wood and Suther, said that the hands were under the (955) direction and control of Wood and Suther, and that whenever they reported a hand to the superintendent, and recommended his discharge, that such discharge followed. There was no evidence that the hands under the control of Suther and Wood ever came in contact with or received even the least order from the superintendent, or that he ever put his foot in this room. On this point it was said in *Turner v. Lumber Co.*, "Though the authority to employ or discharge the laborers subject to him may be evidence to show that the fear of his loss of employment, in case of disobedience of the orders of the company, is well founded, it is not essential that it should always appear that such authority is expressly given. *Mason v. R. R., supra.* To concede that, is to afford opportunity to evade just responsibility by making the rule (when it never will nor can be carried into effect) that the power to discharge shall be lodged in another than the immediate superior, though the latter's recommendations of dismissal from service are always acted upon favorably. *Mason v. R. R., supra.* . . . When a servant never comes in direct contact with, or receives orders or instructions from one higher in position or power than the foreman, he is justified in looking upon the foreman as the very embodiment of the authority of a corporation. *Mason v. R. R., supra;* Bailey's Master's Liability, p. 341; McKinney, F. S., sec. 14.

"There is, therefore, no inflexible rule, growing out of the name or term, that a foreman exercising authority over those who work in a manufacturing establishment is or is not a vice-principal, but the question whether he is a fellow-servant or *alter ego* of the company depends upon the proof in each case of the relations subsisting between the two. Wood, Master and Servant, sec. 450." (956)

The most important part of the defendant's establishment was the keeping of these looms in operation. If they ceased to be worked there could be no product of manufactured goods. Wood and Suther, the loom-fixers and bosses, who had control and direction of the looms and hands, and of the bench and tools, were the only persons who could be expected or looked to to keep these looms in motion, and they, as we have seen, had power to employ and discharge hands and to direct and control them in their duties.

Wood and Suther then were vice-principals, and the jury found that the plaintiff was injured by the negligent handling of the bench and tools. The judgment of the court below would be affirmed therefore if there was no error in the second instruction given by his Honor in reference to the nature and character of the tools and the use made of them by the defendant. But there was error in that instruction, and of

so serious a nature that the case must go back for a new trial. We might have refrained from deciding the question whether Wood and Suther were vice-principals or fellow-servants of the plaintiff, but it is the chief question in the case, and the one chiefly argued by the counsel on both sides, and the one they most desire to be decided. Now as to the second instruction of the court: His Honor in his charge had repeatedly, under proper instructions, left to the jury for their determination upon the facts, whether or not it was dangerous for the plaintiff to go to or be near the work-bench at the time the injury is said to have occurred; that is, whether the manner in which the tools were being used at the time of the injury made it dangerous for passers-by, and whether the defendant had knowledge of such danger or reasonably ought to have had such knowledge. It was a lengthy charge, and that phase of the evidence and the law applicable thereto was dwelt upon over and over. But in the latter part of the charge his Honor twice assumed that
(957) there was danger in the manner in which the tools were used on the bench at the time of the accident. As I have said before, he had frequently left to the jury to find whether there was danger in the manner of the use of the tools, but we can not tell what effect the latter part of the charge on that head had with the jury. They might have understood that that matter was left with them, but they might also have thought that when the judge in the latter part of his charge assumed that there was danger in the use of the tools that that was the conclusion at which he had arrived. And they might have been influenced from that view. The instructions complained of were in these words: "If the jury should find from the evidence that at the time of the injury complained of the plaintiff was only eleven years of age, and that on account of his tender years, his immaturity and inexperience, he did not fully realize and know the danger he incurred in passing near said work-bench where wires were being cut, he was guilty of no contributory negligence in so doing, and you should answer the second issue 'No.'" "If the jury should find from the evidence that the plaintiff had sufficient capacity to know and did know said danger, but went in close proximity to same at command or direction of the defendant, he was guilty of no negligence in so doing."

When we look over the whole charge I find it explicit and covering well the points in the case, and the error we have pointed out must have been an inadvertence. But we can not say that it had no effect upon the minds of the jury. There was no other error in the case.

I think there should be a new trial.

Cited: Fitzgerald v. Furniture Co., 131 N. C., 642; *Lamb v. Littman*, 132 N. C., 981; *Davis v. R. R.*, 136 N. C., 118; *Rolin v. Tobacco Co.*, 141 N. C., 305; *Pettit v. R. R.*, 156 N. C., 127, 136.

(958)

FLORENCE TUCKER v. J. H. SATTERTHWAITE.

(Decided 9 June, 1900.)

Survey—Location of Disputed Line.

Decision in this cause reported in 123 N. C., 511, reaffirmed.

PETITION TO REHEAR dismissed.

Jarvis & Blow and A. C. Avery for petitioner.
W. B. Rodman and Ernest Haywood contra.

MONTGOMERY, J. This case was before us at September Term, 1898 (123 N. C., 511), and it received a most careful consideration on the part of the Court, and at the conclusion, while the judgment of the court below was affirmed, there was a division of the Court, two members dissenting. After another argument, with full briefs on both sides, upon the rehearing we have reconsidered the proposition of law before us at that time, with the earnest purpose to rectify any mistake or error under which we may have then labored, if such error should be pointed out to us, and our convictions and opinions are not changed. It will be seen from a reading of the opinion of the Court heretofore delivered, and from the dissenting opinion already referred to, that the sole question in the case depends upon the location of the northern boundary line of the Smith grant. The admissions of counsel on both sides, their arguments and their briefs are an acknowledgment that that was the sole point in the case. It was agreed on all hands that the starting point of the Smith grant was represented by the letter A on the map. The stations B, C, D, E, F, were all admitted and acknowledged stations. The trouble begins from the call from F station. That call is in these words (from F), "west 290 poles into John Jordan's line." 290 poles (959) west from F station does not reach John Jordan's line, but 299 poles will reach John Jordan's line, and to that line the call must go. *Bradford v. Hill,* 2 N. C., 30; *Cherry v. Slade,* 7 N. C., 82; *Mortgage Co. v. Long,* 113 N. C., 123. The defendant contends, however, that the northern boundary line of the Smith grant was through mistake inserted in the grant as running west 290 poles, and that it ought to be changed so as to run north 74 west 420 poles, and that there was evidence to that effect which his Honor should have submitted to the jury. The only evidence in the case on that point was that of a surveyor, Taylor, that he had seen at the end of the line, contended for by the defendant, two old trees marked as pointers. That evidence was not sufficient to go to the jury on the point. If a line of marked trees, marked at the

time of the original survey of the Smith grant, had been found along the line contended for by the defendant, although not called for in the grant, that would have been sufficient evidence to go to the jury to have the mistake in the course of the grant corrected and explained; or, if there had been evidence that the trees marked at the end of the line contended for by the defendant showed signs of having been marked, contemporaneously with the original survey, and had been recognized as a corner or point of the Smith grant, such evidence would have been competent for the same purpose. *Graybeal v. Powers,* 76 N. C., 66; *Reed v. Schenck,* 14 N. C., 65; *Cherry v. Slade, supra; Baxter v. Wilson,* 95 N. C., 137; *Davidson v. Schuler,* 119 N. C., 582. If there had been a natural object, known or admitted, at the end of the line from station F on the map to the Jordan line, then no parol evidence could have changed that line.

The defendant's counsel again insist that the line which he contends for, from station F to the Jordan line, can be proved to be the true line by a reversal of the Smith grant from the acknowledged starting (960) point A northward. Such a reversal can not be made in this case for the reasons, first, that from station A no surveyor could hit the next point northward, for no such point has been identified or admitted, and the call from the next to the last station, in the natural order of the survey, "is *to the beginning*" without any intimation of course or distance; and second, because, as we have seen, there is no evidence in the case fit to be submitted to the jury tending to show any uncertainty or mistake in the line from F west 290 poles to the Jordan line.

It is not essential to the decision of this case, but the writer of this opinion thinks that a prior or previous line, like the one in this case from F west 290 poles to the Jordan line, could be under proper evidence, altered and controlled by a line running in reversal from A northward, if it had been shown by competent proof that the call from F west 290 poles to the Jordan line was an uncertain line, and was made through mistake, and that the reverse line would show the true line from F to the Jordan line with greater certainty than the one as it now stands in the grant. *Harry v. Graham,* 18 N. C., 76; *Norwood v. Crawford,* 114 N. C., 513; *Graybeal v. Powers, supra.*

Petition dismissed.

CLARK and DOUGLAS, JJ., dissent.

(961)

W. J. RUSSELL, ADMR. OF J. M. RUSSELL, v. WINDSOR STEAMBOAT COMPANY.

(Decided 9 June, 1900.)

Negligence—Death of Infant—Substantial Damages—The Code, Sections 1498, 1499, 1500.

1. The statutory action provided by The Code, section 1498, against a party occasioning the death of another by wrongful act, neglect or default, may be maintained by the administrator of an infant a few months old.
2. There is no distinction in the law, nor reason for distinction, between the death of a child and of an adult.
3. The measure of damages is the same, the difficulty is in the application.

FAIRCLOTH, C. J., dissents.

ACTION for occasioning the death of the intestate, an infant of five months old, through alleged negligence of the defendant in overloading its boat and causing it to sink, and drowning its infant passenger, tried before *Coble, J.*, at special January Term, 1900, of WASHINGTON. The jury found that the intestate was killed by the negligence of defendant, and assessed the plaintiff's damages at $1,000. Judgment accordingly, and defendant appealed.

The case on appeal is stated in the opinion.

H. S. Ward for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

DOUGLAS, J. This is an action brought by the plaintiff as administrator of J. M. Russell, deceased, to recover damages for the death of his intestate, alleged to have been caused by the negligence of (962) the defendant. The said intestate was a child five months old at the time of his death, and was the son of the plaintiff. All the issues were found in favor of the plaintiff, his damages being assessed at $1,000. There are no exceptions other than those to the issue of damages. The following is the case on appeal:

"The court submitted the issues set out in the record. There was evidence introduced by the plaintiff tending to show that the death of the intestate was caused by the negligence of the captain of the steamer Mayflower, running upon the defendant's line, in that he overloaded and improperly loaded the said steamboat, on account of which she turned over, as alleged in the complaint.

"Upon the fourth issue as to damages, the following was the entire evidence:

"W. J. Russell testified:

"That he was the father of the intestate. That on 30 June, 1899, he took passage on the steamer Mayflower, at Plymouth, about 4 o'clock, with his wife and their two children. That one of the children, the intestate, was drowned. That the said child was a boy five months old, and had never been sick.

"R. M. Russell testified:

"That she was the mother of the child. That she was holding him in her arms when the boat turned over, and remembers nothing after that time. That the child was a boy, five months old, and had never been sick.

"The defendant introduced no testimony.

"The court submitted the issues set out in the record to the jury, which they answered as therein stated.

"The court charged the jury upon the question of negligence, to which no exceptions were taken.

"Upon the question of damages, the court charged as follows:

" 'If the jury come to answer the fourth issue as to damages,
(963) then they are instructed that the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. The burden is on the plaintiff to prove by a greater weight of evidence that he has sustained damage; and if the jury fail to find, under the court's instructions, that the plaintiff has sustained any damages, then the jury will answer the fourth issue, 'None.' But if the plaintiff has proved by greater weight of evidence that he has sustained damages, and in what amount, then the jury will give such sum as their answer to the fourth issue.

"(To this charge the defendant excepted, and this is his first exception.)

"At the request of the plaintiff's counsel, the court charged: 'If the jury come to answer the fourth issue, they shall say whether there was any life expectancy, and should estimate as best they can from their judgment and sound sense what that expectancy is, considering the age and condition of health of the deceased, then find what, in their judgment from all the circumstances, would have been the gross income; and from that gross income deduct what, in their judgment, would have been the expenditures of the intestate, for the entire period of expectancy, and the present value of the difference between that gross income and the expenditures will be the measure of damages which you should give.'

"(To this charge the defendant excepted, and this is his second exception.)

"The defendant in apt time asked the court to charge:

"'(1) That upon all the evidence introduced, the plaintiff is not entitled to recover substantial damages against the defendant, and the jury will, even if they answer issues two and three 'Yes,' (964) answer the fourth issue 'Nothing.'

"This charge the court refused, and defendant excepted, and this is his third exception.)

"'(2) That upon all the evidence introduced in this cause, the plaintiff is entitled to recover only nominal damages; and if the jury answer issues two and three 'Yes,' they shall answer the fourth issue 'Five cents and the cost.'

"(This charge the court refused, and this is his fourth exception.)

"The jury answered the issues as shown in the record, and the court gave the judgment as therein set forth."

Judgment was rendered for the plaintiff in accordance with the verdict.

This case as presented to us, raises the sole question whether more than nominal damages are recoverable for the negligent killing of an infant, incapable of earning anything, without direct evidence of pecuniary damage other than sex, age and condition of health of the deceased. In the very nature of things a child five months old has no present earning capacity, and has not reached a sufficient state of development to furnish any indication of his probable earning capacity in the future, other than the fact of being a healthy boy. This is all we know of him, or ever can know.

The real question before us is involved in the defendant's second prayer, that, upon the admitted facts, the plaintiff is entitled to recover only nominal damages. If there is no error in its refusal, there is no error in the case. If the plaintiff can recover substantial damages, then his prayers are undoubtedly correct. We have examined a great many authorities, but find that the large majority are based upon local statutes or predicated upon the parent's right to sue for loss of services. In the case at bar, the father does not sue in his own right, but bases his cause of action exclusively upon his right to recover as administrator the net value of the child's life, not what his services (965) might have been worth to some one else during his minority, but what his entire life would have been worth to himself, had he lived. In other words, the plaintiff brought his action as he would have done had his intestate been of adult age. In the first place, we must bear in mind that our statute is not like Lord Campbell's Act, which was in fact as it was entitled "An act for *compensating the families* of persons killed by accidents." Our statute does not regard the family relation, but gives the cause of action to the personal representative of the

deceased, without distinction as to age. It is as follows: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable for an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony." Code, sec. 1498. Suppose that the child had survived, but as a cripple, condemned to a life of dependence and perhaps of pain, could he not have recovered in a suit by his next friend? If so, can not his personal representative recover under our statute, We think he can. The position of the defendant is well illustrated by the following extract from the brief of its learned counsel: "The general rule for the measure of damages in the case of the negligent killing of an infant is laid down in *Hurst v. R. R.*, 84 Mich., 539, and is followed in about every State in which this question has been passed upon. 'In a (966) suit by an administrator of the estate of a deceased infant (23 months old) whose *parents are entitled* to the damages recoverable under How. Stat., 8314 (similar to the North Carolina statute), for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded and established by the evidence.' The following authorities more than sustain this ruling, the courts in some of the States taking cognizance of the fact that the expense of educating and maintaining the child, deducted from possible earnings until majority, would leave nothing, and hence only nominal damages, *if that*, could be recovered." Its error lies in the assumption that the plaintiff's cause of action is based upon the loss of services, which would legally cease at the majority of the deceased. The plaintiff, as father, would probably have been entitled to his common law remedy, but, in pursuing it, he would have encountered the very difficulties so clearly pointed out by the defendant and illustrated by the cases it cites. Such cases, whatever may be their decision, can not militate against our opinion in the case at bar, but may tend to sustain it, as many of them have allowed substantial damages. Admitting for the argument that the services of an infant may be worth nothing after deducting the cost of his rearing, maintenance and education, it does not follow that his services would be worth nothing to himself in his years of manhood. Education, while requiring a cash outlay more or less heavy that may not be immediately productive, is none the less a safe investment from which most handsome profits may

be reasonably expected. On the other hand, if the services of an infant have any net substantial value, a *fortiori,* they would be of greater value after the completion of his education and his attainment to the strength and ability of manhood.

In cases like the present, the plaintiff is entitled under section 1499 of The Code to recover "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." (967)

Section 1500 provides that, "The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." That is, it goes to the next of kin as ascertained by section 1478.

We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same, but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still, the jury must do the best they can, taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence.

Where life is lost by reason of the actionable negligence of another, the measure of damages is the present value of the net pecuniary worth of the life of the deceased, to be ascertained by deducting the probable cost of his own living from the probable gross income derived from his own exertions, based upon his life expectancy. This expectancy is fixed by section 1352, of The Code, but must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. The youngest age given therein is ten years, at which the expectancy is fixed at 43.7. This is probably a misprint for 48.7, as the expectancy at eleven years of age is fixed at 48.1, and it is hardly probable that the expectancy at eleven years would be greater than that of any succeeding age, and yet five years greater than than at ten years of age. Moreover, it appears that the expectancy at ten years is given by the standard life insurance tables at 48.36 years, being (968) greater than that of any subsequent age.

We do not mean to say that the *average* infant of five months has a greater expectancy of life than one of ten years, if as great, as we believe that medical statistics show a greater proportion of deaths under two years of age than at any subsequent period of life. This, not being fixed by statute, is a matter of evidence, like other circumstances of "health, constitution and habits."

We are not aware of any English case in which damages have been allowed for the death of a child of such tender years as to be incapable of earning wages, but in this country it is well settled by the weight of

precedent that in such cases substantial damages may be recovered even upon a suit for loss of services. 8 A. & E. Enc. of Law (2 Ed.), 919; Tiffany's Death by Wrongful Act, secs. 164, 165; Thomas on Negligence, 466; 5 Rapalge & Mack Dig. Ry. Law, sec. 403; 19 A. & E. R. cases, 195, 212, and notes. In that case a judgment of $2,265 for the death of a child five years old was sustained. The following cases are cited as a few of the many examples of judgments sustained:

In *R. R. v. Becker,* 84 Ill., 483, $2,000 were given for the death of a son six or seven years old; in *R. R. v. Dunden,* 37 Kan., 1, $3,000 given boy of 11 years and 8 months; in *Strutzel v. R. R.* (Minn.), 50 N. W., 690, $2,300 given for boy 6 years old; in *Ross v. R. R.,* 44 Fed., 44, $2,500 given for boy 5 years old; in *Ewen v. R. R.,* 38 Wis., 613, $2,000 given for boy 8 years old; in *Hope v. R. R.,* 61 Wis., 359, $1,000 given for boy 16 *months* old; in *Schrier v. R. R.,* 65 Wis., 457, $2,000 given for boy 18 *months* old; in *Ihl v. R. R.,* 47 N. Y., 317, 320, the Court, in sustaining a judgment for $1,800 for the death of a boy 3 years
(969) old, says: "The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages. . . . It can not be said, as matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. . . . It has been held by this Court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial."

In *Birkett v. Ice Co.,* 110 N. Y., 504, 508, the Court says: "In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. They have no rule but their own good sense for their guidance, and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority."

There is another view of the question that forces itself upon our minds which perhaps we are not called on to consider, but unless forced to do so by the overwhelming weight of authority or the inexorable logic of legal conclusion, we would be reluctant to admit that a human life, however lowly or feeble, had no value in the contemplaton of a common carrier. Even a new-born colt or calf has an actual value entirely dependent upon its future usefulness or salability. It is a matter of common knowledge that during the days of slavery a healthy negro child, even at the breast, was considered as worth at least $100. Let us consider the contrast. A

helpless negro baby, lying upon the floor along which he could not crawl, and born to a state of hopeless bondage, was worth to the owner at least $100 as a chattel; and yet another baby, with generations of inherent qualities behind him and the magnificent possibilities of (970) American citizenship before him, is not worth to himself, or to the country whose destinies he might one day have shaped, even the penny necessary to carry the cost. This view is entirely too incongruous to strike our fancy.

Upon the greater and better weight of authority, as well as our own convictions of natural justice and of public policy, we are constrained to hold that the plaintiff can recover substantial damages in the case at bar. In the absence of error in the trial, the judgment of the court below is

Affirmed.

Cited: Speight v. R. R., 116 N. C., 86; *Killian v. R. R.,* 128 N. C., 263; *Davis v. R. R.,* 136 N. C., 116; *Carter v. R. R.,* 139 N. C., 501; *Chambers v. R. R.,* 172 N. C., 562; *Gurley v. Power Co., ib.,* 695, 696.

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(971)

JOSEPH STRAUSS v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Decided 9 June, 1900.)

Contract of Life Insurance—Alteration of Terms by the Company—Measure of Damages—How Computed—Proxy to Represent Stockholder—How Construed.

1. A mutual life insurance company, by whatever name called, after entering into a contract of insurance with one of its members and receiving large sums thereunder, can not, without that member's consent, so alter the contract as to practically destroy its value.

2. Where such member refuses to comply with the altered terms and to pay the increased assessment imposed thereby upon his stock, and the company ceased and refused to recognize him as a member on account of his having refused to pay such excessive and invalid assessment, the company becomes liable to him in damages to be measured by the amount of premiums and dues paid by him, with interest thereon from date of each payment.

3. It is quite common for members of an association to send their proxies by request to the secretary or president in order to permit a meeting to be held; but it is not to be supposed, that by any such formal act, they intend to waive their vested rights, or to release the association from its contractual obligations.

STRAUSS *v.* LIFE ASSOCIATION.

ACTION for wrongful cancellation of a policy of life insurance, tried before *Hoke, J.*, at February Term, 1899, of CRAVEN, a jury trial being waived, and his Honor passed upon the facts as well as the law. Upon the facts found, judgment was rendered in favor of plaintiff, Joseph Strauss, for $1,990.39, and interest on $1,379.46 from 12 February, 1899, and costs.

There were two other cases against the same defendant, in *con-*
(972) *simili casu,* dependent upon substantially the same facts.

No. 2. E. S. Street against same defendant. His judgment was for $392.26 with interest on $265.63 from 12 February, 1899, and costs.

No. 3. E. G. Hill against the same defendant.

His judgment was for $554.02 with interest on $387.55 from 12 February, 1899, and costs.

The defendant appealed in all three cases. The essential facts, applicable to all three of the cases, appear in the opinion.

No. 1.

W. W. Clark for plaintiff.

Shepherd & Busbee, J. W. Hinsdale, and Sewell Tyng for defendant.

DOUGLAS, J. This is an action brought to recover damages for the alleged wrongful cancellation of a policy of insurance. The record comprises over 500 pages, with a large number of insertions, amounting in the aggregate to perhaps 600 pages of printed matter. The case was fully and ably argued at length, and we have been favored with well-prepared and exhaustive briefs. And yet we see but one simple point essential to the determination of the case: Can a mutual association, by whatever name it may be called, or whatever may be its purposes, enter into a contract with one of its members, and after receiving large sums upon said contract alter its essential terms without the consent of the member, so as practically to destroy its value? We think not. The plaintiff became a member of the plaintiff association in 1883, and received a policy in the form of a certificate of membership, wherein it was expressly agreed that assessments should "be made upon the *entire membership* in force at the date of the last death for such a sum as the executive committee may deem sufficient to cover said claims, the
(973) same to be apportioned among the members according to the *age of each member,* as per table endorsed," on said certificate.

It appears from the findings of fact that the plaintiff paid all demands made upon him up to the year 1898, and call number 96. This last call he refused to pay on the ground that it was exorbitant and con-

trary to the express terms of his policy. It seems that by successive resolutions, none of which were amendments to its constitution, the association has placed in a separate class all members who entered prior to 1890, and requires them to pay on the basis of the age attained by each at the date of each assessment; while other members continue to be assessed only as of their age of entry. That the result of such discrimination is injurious to the plaintiff clearly appears from the 16th, 18th, 21st and 22d findings of fact as follows: "Sixteenth . . . That since the last resolution of 1898, the plaintiff and all who joined said company prior to 1890, and who held policies similar to plaintiff's, were assessed at their full attained age at rates applicable to such age, whereas persons who became members since 1890, and who held policies under what is styled the ten-year class and the five-year class, are only assessed at their age of entry, and *plaintiff is thereby assessed at a higher amount than if the entire membership were assessed at rates of their attained ages.*"

"18th. That call number 96, made on plaintiff in 1898, and pursuant to the resolutions of said year, is larger in amount than it would have been, had all the members of the association been assessed at their full attained ages."

"21st. That the present value of plaintiff's policy, assuming that the rates were properly established and the members lawfully classified, was at the time he ceased to be a member of said company *only a nominal sum,* as by said classification and rating the amount of (974) policy discounted to such time would not exceed the present value of premiums which would be due and payable for the period of plaintiff's expectancy."

"22d. That if the entire membership of the company had been rated and assessed at their attained ages and no distinction made among the classes, then the present value of plaintiff's policy would be more than the present value of the premiums, and the *policy have a substantial present value,* but there are no data given from which said damage can be estimated or even approximated."

Upon his findings of fact, the court below concluded as matter of law that the assessment made in pursuance of the resolutions of 1898 were "in violation of defendant's constitution, and excessive and invalid," that the defendant, having ceased and refused to recognize the plaintiff as a member on account of his having refused to pay such excessive and invalid assessments, had broken its contract, and had become liable to the plaintiff in damages to be measured by "the amount of premiums and dues paid by plaintiff prior to call 96 with interest thereon from date of each payment." Judgment was rendered accordingly. In it we see no error.

All that we decide in the present case is that the defendant has violated its contract with the plaintiff in a material matter, whereby the plaintiff, having suffered substantial injury, is entitled to substantial damages. We do not decide that a mutual insurance company, or any other kind of insurance company, can not issue policies of divers kinds and classes if so authorized by its charter; nor do we decide that a member of a purely mutual association is not bound by all reasonable by-laws and changes lawfully made therein. We are not considering the enforcement of a contract inequitable on its face, but the violation of a lawful contract by attaching thereto, without the consent of the plaintiff, conditions which utterly destroy its value. It is evident that if
(975) the resolution of 1898 is binding upon the plaintiff, he would in any event be eventually forced out of the company by the constantly increasing premiums. There is one fact that does not clearly appear from the record and upon which counsel themselves seem to differ, which, while not essential to the determination of this case, seems worthy of notice:

On the hearing it was contended that the defendant association had the right to subsequently rearrange its members into classes so as to make each class bear the burden of insuring its own members. If by that the association claims the right to place all its members who entered before 1890 into a distinct class entirely separate from the other members, and make them raise exclusively among themselves enough to pay all the death claims that may occur among their own number, we can not admit the right unless such was the understanding when the original contract was made.

What would be the result? Suppose certain men start a mutual association and support it through all its infant struggles into a vigorous and enlarged growth. In course of time the new members would naturally outnumber the old ones. Suppose they should say to the old members: "You are getting old and therefore your insurance is more costly than ours; we will place you in a class by yourselves and make you insure each other without any help from us; it is true you have borne the heat and burden of the day, and we are resting in the shade of the tree you have planted, but that makes no difference to us; insure yourselves or leave." Of course as one by one died off, the burden would be greater upon the survivors, as a death claim of $1,000 bears more heavily upon twenty men than it would upon a hundred. Finally two would be left. When one died, the other would have to pay his entire policy, and then pay his own policy at his own death. Would this be insurance,
(976) and could it be said that any claim which would lead to such a result is sound in principle? It may be that the association has provided for such cases, but it is apparent that if any class of men is set

apart and no new blood permitted to enter, it will eventually die out. If a man voluntarily goes into such a contract with his eyes open, we are not inclined to help him, but his valid existing contract can not be changed into such a contract without his consent. Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.

It is admitted that the measure of damages followed by the court below is the established rule in this State. *Braswell v. Insurance Co.*, 75 N. C., 8; *Lovick v. Life Association*, 110 N. C., 93; *Burrus v. Insurance Co.*, 124 N. C., 9. But it is contended that this rule was established purely in contemplation of old line companies, and was not intended to apply to mutual associations. Whatever may have been the inception of the rule, we see no better one to adopt, and, as at present advised, must follow our own precedents. The judgment of the court below is

Affirmed.

Cited: Street v. Life Asso., post., 976; *Bragaw v. Supreme Lodge*, 128 N. C., 357; *Strauss v. Life Association, ibid.*, 465, 466; *Simmons v. Life Association, ibid.*, 469; *Gwaltney v. Insurance Soc.*, 132 N. C., 930; *Makely v. Legion of Honor*, 133 N. C., 370; *Scott v. Life Association*, 137 N. C., 521, 527; *Green v. Ins. Co.*, 139 N. C., 310, 313; *Brockenbrough v. Ins. Co.*, 145 N. C., 355, 364, 365; *Williams v. Heptasophs*, 172 N. C., 789, 790.

No. 2.

E. S. Street against same defendant. Same counsel appearing.

DOUGLAS, J. This case was argued with that of *Strauss v. Mutual Reserve Fund Life Association*, and as it involves the same principles and facts almost identical, it is governed by the decision in that case. The judgment is

Affirmed.

No. 3. (977)

E. G. Hill against same defendant. Same counsel appearing.

DOUGLAS, J. This case was argued with those of Strauss and Hill against same defendant. As it involves the same principles of law and, with one exception, facts practically identical, it is governed by that decision. It appears that the plaintiff was present by proxy when the objectionable resolution was passed, but that fact does not affect our

opinion. It is quite common for members of an association to send their proxies by request to the secretary or president in order to permit a meeting to be held; but we can not suppose that, by any such formal act, they intend to waive their vested rights, or to release the association from its contractual obligation. The judgment is

Affirmed.

Cited: S. c., 128 N. C., 463.

STATE v. JOHN HETTRICK.

(Decided 20 February, 1900.)

Warrant Under Town Ordinance of Elizabeth City—Creating a Disturbance—Indefinite Charge.

A warrant charging the creation of a disturbance, without specifying how it was done, within the corporate limits, is fatally defective.

WARRANT under town ordinance for creating a disturbance within the corporate limits of Elizabeth City, tried, on appeal from the mayor's court, before *Starbuck, J.,* at Fall Term, 1899, of PASQUOTANK.

The defendant, on conviction, moved in arrest of judgment. (978) Motion denied. Judgment. Appeal by defendant to the Supreme Court.

The town ordinance and the warrant are stated in the opinion.

Attorney-General Zeb V. Walser for the State.
E. F. Aydlett and P. H. Williams for defendant.

FAIRCLOTH, C. J. The defendant was convicted and sentenced for violating the following ordinance of the town of Elizabeth City: "All persons guilty of riotous and disorderly conduct, loud and boisterous cursing and swearing, or the use of vulgar or obscene language, indecent exposure of person, or creating a disturbance within the corporate limits of the town; of trespassing or of delivering or of sending insulting, vulgar or profane notes or cards, shall be arrested," etc.

The charge made against the defendant was for unlawfully and willfully violating said ordinance "by creating a disturbance within the corporation limits of the town of Elizabeth City, contrary to the said ordinance," etc.

It will be observed that the ordinance specifies numerous offenses, but the warrant alleges nothing except "creating a disturbance" within the town limits. How and in what way or manner the disturbance was created is not alleged, and therein the warrant is fatally defective. A disturbance may be created in many ways, but the accused, as of right, must be informed of what act of his the State complains, before entering his plea. Otherwise he is ill prepared to come and defend himself. The charge of committing a *"disturbance* of divers citizens" by noise in the public street does not set forth any criminal offense. If it is an offense, it is a nuisance, and should be charged as such. *Com. v. Smith,* 6 Cushing (Mass.), 80.

Judgment arrested.

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(979)

STATE v. J. C. GALLOP.

(Decided 20 February, 1900.)

Indictment—Act 1897, Chapter 291, Section 7—Gunning and Fishing in Currituck Sound—Constitutionality of the Act.

1. The ownership of game is in the people of the State, and the right to hunt and kill game may be granted, withheld, or restricted by the Legislature.
2. Game does not become private property until reduced to possession.
3. Adjacent landowners have no right to obstruct duck shooting in Currituck Sound.
4. Landowners can prevent others from hunting on their land, in virtue of their right to keep trespassers off, by statutory enactment.
5. The Legislature may prohibit even landowners from hunting and fishing on their own land at certain seasons, and may exclude nonresidents from the privilege altogether.
6. The Legislature was within its power when it forbade anyone to interfere with any citizen gunning or fishing in Currituck Sound.

INDICTMENT under Laws 1897, ch. 291, for obstructing gunning and fishing in Currituck Sound.

Appeal from *Starbuck, J.,* Fall Term, 1899, of CURRITUCK. The defendant, who appealed from a justice of the peace, was tried for violation of section 7, ch. 291, Laws 1897, entitled: "An act to regulate gunning and fishing in Currituck County." Said section 7 provides: "It shall be unlawful for any person hired or employed, to lay around, sail around or stop anywhere near any citizen who may be gunning or fish-

ing in Currituck Sound or tributaries for the purpose of keeping
(980) them from shooting, or damage his shooting or fishing; any person so offending shall be guilty of a misdemeanor," the penalty being fixed within the jurisdiction of a justice.

The evidence was as follows: One Jesse Owens for the State, testified: "I live in Currituck County; 'Buzzard's Lead' leads into the sound, and Horse Pond Ditch joins into this 'lead.' Brother and I, in 1897, were duck hunting in this lead, and had our decoys tied out in the sound; we were in our boat, and had a blind in front of us; we were eighteen feet from the shore in two and one-half feet water—our blind was all around the boat. Defendant Gallop ran his boat between us and the marsh; he asked us if we knew we were trespassing, ordered us to take up our decoys, and we refused. He was in a sail boat, and we asked him to leave; he did not; and I told him if he did not I would put the law on him; he stood there an hour and a half; he took his mast and settled it in the marsh, and left his sail fluttering so that no ducks would come; it stood there until dinner time, and destroyed our gunning. Gallop said that he would not leave; that he was employed to do it." On cross-examination, this witness further said: "This was in Currituck Sound, at the mouth of Buzzard's Lead. The lead goes from the main body of the sound up into the marshes. Gallop is employed by the Currituck Shooting Club to look after the marsh. This marsh was the club's property. It was about 2 November, 1897. He stayed aboard his boat one and one-half hours, with his bow against the marsh—the boat itself afloat, and not on the club's property. The marsh was the club's shooting property. When we left, the defendant, Gallop, got his sail and left. He said to us at the time of this occurrence that he was employed to watch the marshes, and to lay around people to keep them off the marsh."

(981) No other evidence was introduced, and defendant asked the court to charge that if the jury believed the evidence they should find a verdict of not guilty. Refused, and defendant excepted.

The court charged the jury that: "To find the defendant guilty the jury must be fully satisfied that the following were the facts: That Jesse Owens was a citizen of the State engaged, upon the occasion testified about, in duck shooting; that defendant, for the purpose of destroying the shooting of Owens, came up in his boat, stopped and stayed near the said Owens, and set up his mast and sail in the marsh near by; that the defendant did thereby destroy the shooting of said Owens, and that defendant was employed for that purpose; that if the jury were not fully satisfied that these were the facts, they should find the defendant not guilty." The defendant excepted to the charge. Verdict of guilty. Judgment, and appeal by defendant.

Pruden & Pruden and Shepherd & Shepherd for appellant.

E. F. Aydlett and P. H. Williams with the Attorney-General for the State.

CLARK, J., after stating the case: The evidence is that the decoys, where the ducks were invited and expected to alight, were "tied out in the sound." But even had they been in the "lead," that, according to the evidence, would have been one of the "tributaries of the sound" within the language of the act. The sole question then, is as to the constitutionality of the act under which the defendant, employed by the adjacent landowners for the purpose of interfering with duck hunting by others on the sound or one of its tributaries on the water front opposite their land, is indicted for preventing duck hunting there by the prosecutor.

The evidence states that the boat of the defendant was "not on the club's property," so the prosecutor who was still farther out was not a trespasser and liable as such, but had he been himself liable to indictment for trespassing, that would have been no defense to (982) the defendant for acts avowedly done for the purpose of interfering with the prosecutor's hunting upon "the sound or one of its tributaries," and not merely to procure his removal from premises on which he was trespassing. The defendant left his sail fluttering, so no ducks would come, and said he was employed to do it.

The shooting club, which employed the defendant for the purpose of breaking up or discouraging duck hunting on the sound and its tributaries on their water front, it was stated on the argument, bought the land for the purpose of enjoying such hunting themselves, and doubtless deem it a hardship that they can not keep off others.

The ownership of game is in the people of the State, and the Legislature may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict it, as in its opinion will best subserve the public welfare. *Magner v. The People,* 97 Ill., 320, 334; *State v. Rodman,* 58 Minn., 393. No one has property in animals and fowls, denominated "game," until they are reduced to possession. 2 Kent Com. (8 Ed.), 416 *et seq.,* Cooley on Torts, 435; *S. v. House,* 65 N. C., 315. The shooting club owned the adjacent shore, but they could have no property rights in the wild ducks which came, like the wind, whence they would and went where they listed. The landowners had no right to prevent their settling in the sound to the lure of the prosecutor's decoys, and the statute made it a misdemeanor to prevent them.

At common law, title to game was in the King (with us now in the sovereign people), and no one could hunt game even on his own land without a franchise from the sovereign. 2 Bl. Com., 411; 4 Bl. Com.,

174. Wild game within a State belongs to its people in their col-
(983) lective sovereign capacity. It is not the subject of private ownership except when some express statute confers it. *Ex Parte Maier,* 103 Cal., cited with approval in *Geer v. Connecticut,* 161 U. S., 519, 529. With us, landholders can keep others from hunting on their land, not by virtue of their ownership of the game, but from their right to keep trespassers off the land, or by express statutory enactment. The Legislature has constantly asserted the State's sovereignty by prohibiting the owners of land, equally with others, from hunting or fishing at certain seasons, or by certain methods, or for a certain numbers of years, and as to some animals or fowls at any time. *Phelps v. Racey,* 60 N. Y., 10; *S. v. Norton,* 45 Vt., 258; or forbidding any one having game, dead or alive, in possession. *Haggerty v. Storage Co.,* 40 L. R. A., 151. Maine, in his "Village Communities," 142, says this ownership of game by the sovereign has been the common law from the earliest time. The same is true as to fish, and the right of the State to regulate or prohibit fishing is well settled (*Burnham v. Webster,* 5 Mass., 266; *Nickerson v. Brackett,* 10 Mass., 212; *Gentile v. State,* 29 Ind., 409), even to a marine league out to sea, since the jurisdiction of the State extends that far. *Manchester v. Massachusetts,* 139 U. S., 240.

So well recognized is it that the ownership of game and fish is in the State and not in individuals, that the decisions are uniform that a State may confer exclusive right of fishing and hunting upon its citizens, and expressly exclude nonresidents, without infringing that provision of the Constitution of the United States (Art IV, sec. 2) which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" (*McCready v. Virginia,* 94 U. S., 391; *State v. Medbury,* 3 R. I., 138; *Paul v. Hazleton,* 37 N. J.,
106), and may impose higher penalties on nonresidents who vio-
(984) late the game laws than on residents. *Allen v. Wykoff,* 48 N. J. L., 90; 8 A. & E. (1 Ed.), 1032.

Indeed, so completely is the ownership of public water in the State (subject to the paramount control of the United States as to navigation) that the State can absolutely forbid the use of its waters for fishing or planting oysters by nonresidents *(McCready v. Virginia, supra),* and of course for hunting purposes. And the State may forbid the transportation of dead game beyond its borders, or killing or having it in possession for that purpose. *Geer v. Connecticut, supra.*

So the shooting club, the owners of the adjacent land, had no right of hunting upon their own land contrary to regulations prescribed by law, and the law gave them no rights over the hunting on the sound and its tributaries superior to that of the prosecutor. The Legislature was

within its power when it forbade any one to interfere with "any citizen gunning or fishing in Currituck Sound or its tributaries to keep them from shooting," etc.

Nor is it a valid objection that the act here forbidden is not made a crime elsewhere in the State, since it bears alike on all persons in the defined locality. *Broadfoot v. Fayetteville,* 121 N. C., 418, citing numerous local acts, forbidding sale of liquor, sale of seed cotton, stock running at large, etc. *S. v. Jones, ibid.,* 616; *S. v. Groves, ibid.,* 632; *Guy v. Commissioners,* 122 N. C., 471; *Bennett v. Commissioners.* 125 N. C., 468.

No error.

Cited: Brooks v. Tripp, 135 N. C., 161; *Daniels v. Homer,* 139 N. C., 222; *S. v. Sutton, ibid.,* 576, 579; *S. v. Blake,* 157 N. C., 609; *S. v. Sermons,* 169 N. C., 287; *Newell v. Green,* 169 N. C., 463; *Bell v. Smith,* 171 N. C., 118.

(985)

STATE v. M. E. CONDER, HENRY CONDER AND ANDY STARNES.

(Decided 13 March, 1900.)

Forcible Trespass—Two Counts, Personalty and Realty—Possession.

Forcible trespass is an offense against the possession—its tendency is towards a breach of the peace—even a lawful right of possession must be enforced in a lawful manner, and not with circumstances of violence and intimidation, in the presence of the party in actual possession.

INDICTMENT for forcible trespass in removing the horses of prosecutor, J. W. Houston, from the stable, in his possession, and taking possession of the stable, with force and arms and a strong hand, he being personally present and forbidding, tried before *Coble, J.,* at Spring Term, 1899, of UNION.

The defendants pleaded not guilty. The evidence was conflicting in its character. The charge of his Honor was directed to the different phases of the case, as the jury should find the facts. Exceptions were taken by defendants. There was a verdict of guilty. From the judgment rendered defendants appealed. The opinion presents a full view of the case.

Alexander Stronach with the Attorney-General for the State.
Armfield & Williams for defendants.

DOUGLAS, J. This is a conviction for forcible trespass. There was conflicting evidence, but the following facts sufficiently appear from the evidence for the State, which was apparently accepted by the jury.
(986) The prosecuting witness, John W. Houston, had rented from one Bivens, the premises in question, a livery stable, for the year ending 8 December, 1898, and was in undisputed possession. He again rented for the year 1899. On 4 January, 1899, Bivens came to him and said that E. J. Heath owned one-third interest in the stable, and wanted the premises. Houston claimed to have rented, and declined to surrender. Heath telephoned that his stock was on the road, and the defendant Conder came to the stable on 4 January, 1899, with Heath's stock. Defendant Mark Conder said he had come to stay a few days. Witness took his horses, put them up and fed them, after which the defendant Henry Conder bought feed for the stock; but the witness had the stock attended to until Monday afterwards when Henry Conder claimed possession of the stable. The witness told Henry Conder that he (witness) had not given him possession, and on Tuesday the witness put Conder's stock on the outside and locked the door. Witness's brother had had the key. Witness went to breakfast and was gone about twenty-five minutes, and when he returned the stable had been broken open, and Conder's horses put back. Witness called his hands in, and defendants would not let them come in. Witness's brother ran off a boy. Witness told the defendants he had the stables rented, and was going to hold them, and he demanded possession. Don't think the witness said anything that day to defendants about getting out. Witness demanded possession again on Wednesday, but did not put them out because he thought that he would have a fight with them. On Wednesday morning the stables were locked. Starnes was locked up in the stables. Witness again demanded the stables, and they refused, and said they would not open until the thing was settled.

The defendants subsequently put out of the stables all the prosecutor's stock and other property. The defendant introduced evidence tend-
(987) ing to show that the prosecutor turned over to them the possession of the premises, and subsequently acknowledged their possession by words and acts. This testimony raised an issue of fact for the jury. The prosecutor was admittedly in possession when the defendants first put their stock in the stable, and the jury were justified in assuming that he remained in possession if they saw fit to believe his testimony. If he admitted the defendants simply as a matter of favor because they had nowhere else to go, and upon their assurance that they came to stay only a few days, he did not surrender possession, and was justified in putting out the defendant's stock peaceably and without violence, upon their claim of possession, which amounted to a denial of his own pos-

session. This Court has repeatedly held that forcible trespass is an offense against the possession. *S. v. Fender,* 125 N. C., 649. The gravamen of the offense is that it tends to a breach of the peace, and hence there must be some actual violence or such an exhibition of force as would be calculated to intimidate a man of ordinary firmness. The law recognizes the fact that some men of more than ordinary firmness are prompt to meet force with force, which would lead to a breach of the peace with perhaps the most serious if not fatal consequences. Hence it says that even if a man has a lawful right of possession, he must enforce it in a lawful manner. The prosecutor testified that the defendants broke the lock and took possession of the stables while he was at breakfast, a temporary absence of very short duration, and afterwards retained possession and ordered off his hands in spite of his repeated demands for possession. They subsequently put out all his stock and other property, and retained sole possession of the premises. It is true the prosecutor was not present when the defendants broke into the stable, but he was only temporarily absent, and we think that the breaking of the lock in connection with their subsequent conduct justified a verdict of guilty. The defendants seek to justify their conduct also on (988) the ground that they were originally admitted into peaceable possession; but if, as claimed by the prosecutor, they were admitted as a matter of favor under the false assurance that they would remain only a few days, and then sought to retain the *qualified* possession thus obtained through artifice to the exclusion of the prosecutor, they would thus make themselves trespassers *ab initio.* The nature of the offense of forcible trespass and the application of its essential principles have been recently so repeatedly considered by this Court that it is unnecessary to further discuss this matter. *S. v. Woodward,* 119 N. C., 836; *S. v. Childs, ibid.,* 858; *S. v. Webster,* 121 N. C., 586; *S. v. Newbury,* 122 N. C., 1077; *S. v. Robbins,* 123 N. C., 730; *S. v. Lawson, ibid.,* 740; *S. v. Fender, supra.* There were various exceptions to his Honor's charge, and refusal to charge, but we see no error in either, as we think that defendants' contentions were fairly presented to the jury. The judgment is

Affirmed.

(989)

STATE v. HOGE IRVIN.

(Decided 20 March, 1900.)

Town Charter of Kinston (Private Laws 1889, Chapter 180)—Power of Taxation—Subjects of Taxation—Valid and Invalid Ordinance—Misdemeanor—Code, Section 3820—Town Records—Evidence.

1. Section 62 of the charter of Kinston, which grants to the town power to levy and collect taxes on all persons and subjects of taxation which it is in the power of the General Assembly to tax for State and county purposes under the Constitution of the State—is a valid exercise of the legislative power, not repugnant to any constitutional provision, in accord with previous legislation (The Code, section 3800), and sustained by judicial decisions.

2. An ordinance of the town, No. 11, section 3, passed 11 September, 1899, in these words: "Each tobacco buyer shall pay an annual tax of $10 in advance," is a valid ordinance.

3. An ordinance of the town, No. 11, adopted 11 September, 1899, in these words: "That violation of any ordinance to which no specific fine or penalty is affixed is a misdemeanor, and shall subject the offender to a fine of not more than $50, or imprisonment for thirty days," is void, because of the uncertainty in the amount of the fine or penalty—nor does the charter authorize the board to make the violation of an ordinance a misdemeanor; it does that itself in section 19 of the charter.

4. The violation of a valid town ordinance is a misdemeanor, under the general law. Code, sec. 3820.

5. The records of the proceedings of the board of aldermen, kept by the town clerk, is competent evidence of town ordinances.

CRIMINAL ACTION for violating town ordinance of Kinston, heard on appeal from the mayor's court, before *Bryan, J.*, at November Term, 1899, of LENOIR.

(990) The defendant was charged with violating the town ordinance: "Each tobacco buyer shall pay an annual tax of $10 in advance."

His Honor held that the ordinance was valid, and its violation a misdemeanor under the statute, and the jury having found the defendant guilty, he was fined $1, and appealed.

T. C. Wooten for appellant.

N. J. Rouse and Shepherd & Shepherd, with the Attorney-General, for the State.

MONTGOMERY, J. This was a criminal action, tried in the Superior Court of Lenoir, on appeal from judgment of mayor's court of Kinston. The defendant was charged with the violation of an ordinance passed by

the board of aldermen of Kinston, in which ordinance there was laid a privilege tax of $10 upon the defendant as a buyer of tobacco in the town. In the ordinance there was no specific fine or penalty imposed for its violation, but before the passage of the ordinance levying the tax another ordinance had been passed by the board, which is in the following words: "That the violation of any ordinance to which no specific fine or penalty is fixed is a misdemeanor, and shall subject the offender to a fine of not more than $50, or imprisonment for thirty days." The defendant was convicted, and appealed to this Court.

The defendant insists that he ought not to have been convicted, and that the judgment should be reversed because, first, that it did not appear from the evidence that the ordinance was passed in the manner required by the charter of the town; second, that the town authorities did not have the power in law to pass an ordinance to place a fine or penalty upon a citizen for the failure to pay a tax or carry on a business without paying the tax in advance; and third, that the board of aldermen (991) did not have, through its charter, the authority to impose a tax upon any person for the privilege of carrying on a trade or business in the town.

Under the first contention of the defendant, he objected on the trial below to the record of the meeting of the board of aldermen which contained the two ordinances. N. B. Moore, the town clerk and treasurer, produced a book which he said was the record of those proceedings; that the entries were not transcribed from rough sheets upon the record at the very time of the passage of the ordinance, but were afterwards entered upon the true record by some one in his presence and under his direction; that the mayor and all of the aldermen were present at the meeting when the ordinances were adopted, though the record does not show who were present. The witness further said that it was not his custom to enter the names of the aldermen at meetings of the board when all were present, but only to enter the names of those present when any might be absent. His Honor received the evidence, and we think properly. If believed by the jury, it was a sufficient record in law to support the levy and collection of the taxes laid. Besides, they were printed and circulated in the town, and signed by the mayor and the clerk.

The defendant's counsel in his brief does not refer to his second contention, and we suppose did not rely on it. Anyway, we see no reason why the boards of aldermen of towns and cities should not be allowed to collect these privilege taxes in advance. In fact it must be that in many instances if they were not paid in advance, the taxes would be lost.

Under the third contention the defendant's brief opens up a wide range of discussion. In the first place, it is argued that the ordinances were invalid because they are not expressly authorized by the charter, be-

cause an authority to tax can not arise by implication, and that
(992) the charter enumerates the subjects of taxation, but in that enumeration there is no reference made to dealers in tobacco. And in support of that position we are referred to *Comrs. v. Means,* 29 N. C., 406. The authority fits the proposition advanced by the defendant's counsel, but it does not fit the facts in this case. There, the General Assembly had confined the commissioners to two subjects of taxation, real estate and the poll, but in the case before us, section 62, of the charter of Kinston, expressly confers on its board of aldermen "the power to levy and collect taxes on all persons and subjects of taxation which it is in the power of the General Assembly to tax for State and county purposes, under the Constitution of the State." And besides this, additional power is given to the board under section 3800 of the Code. In section 1, in the charter, it is declared that the general laws of the State, in relation to towns and cities, not inconsistent with the act incorporating the town of Kinston (Laws 1899, ch. 180), shall be applicable to the government of that town.

We have held in *Guano Co. v. Tarboro, ante,* 68, that there is no inconsistency between the powers granted in section 3800 of the Code and the specific powers of taxation named in the charter of any town or city.

But the defendant contends that section 62 of the charter, quoted above, is repugnant to that part of section 7, Art. VII, of the Constitution, which is in these words: "Nor shall any tax be levied or collected by any officer of the town except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." The argument is that the ordinance passed, under the authority of section 62, of the charter, does not show for what purpose the tax on the defendant's business was levied, and that it was necessary for that purpose to have been set out in the ordinance, and that it was for the necessary expenses of the town, before the defendant could be called upon to pay it.
(993) Such is not our view of the matter. The presumption must be that the aldermen obeyed the law and the Constitution in the passage of the ordinance. If such be not the case, then the defendant must show that fact. But again, he argues that the tax imposed by the ordinance is contrary to section 9, of Art. VII, of the Constitution (the uniformity of taxation). This is the same question that was raised in *Rosenbaum v. New Bern,* 118 N. C., 83, and it was there decided against the plaintiff's contention. And then again, the defendant argues that section 62 of the charter is repugnant to section 4 of Article VIII of the Constitution because it does not restrict the limit of the privilege tax or assessment by the board, and that the same is left to their discretion to decide how small or how onerous the tax may be. And it is insisted that if this Court should hold section 62, of the charter, to be constitutional,

then there is nothing to prevent the governing authorities of towns and cities from practicing gross abuses in the assessment of taxes.

This question has been heard before in this Court. In *Asheville v. Means, supra,* the Court said: "It would have been very *imprudent legislation* to have permitted the commissioners to tax any and everything in the town they might think fit, and that *without limitation* in the *amount* of the tax." But the Court did not go so far as to say that such legislation would have been unconstitutional. In *S. v. Worth,* 116 N. C., 1007, the Court said, in speaking of the rule of uniformity of taxation: "When the power delegated to a city or town is abused in this respect, the Legislature may restrict their discretionary authority by fixing a maximum or minimum limit for the tax on any or all of the subjects specifically taxed. But they have not done so, and we see no evidence of abuse of power, if we had authority to correct or remedy (994) such a wrong."

It is required by section 4 of Article VIII of the Constitution that the Legislature, in providing for the organization of towns and cities, shall restrict their power of taxation, assessment, etc. But the Legislature has not seen fit, or thought it necessary rather, to take such a course, and it is not for us to even intimate that they should do so, for the tax in this case is reasonable on its face, and there has been no abuse of power by the board of aldermen.

In the brief our attention is called to the case of *S. v. Bean,* 91 N. C., 559, in which there is a discussion of the difference between the power to impose a fee for license under the police power to carry on a trade or employment, and a tax for revenue. The adjudication in that case was made that the license fee must be reasonable, and not for the purpose of raising revenue, and was founded on an act of 1877, ch. 138, which had special reference to the town of Salisbury. Since the enactment of section 3800 of the Code, taxes laid upon trades and professions under the name of privilege taxes have been laid expressly for revenue, and such taxes are authorized by that section of the Code.

We have discussed at length the numerous questions raised in the defendant's brief in this case because of their great public importance, and with the hope that these questions, some of which have been heretofore passed upon by this Court, will be considered as settled.

We come now to discuss the indictment proper—the criminal phase of the case. If we were compelled to decide this part of the case on the validity of the ordinance which imposed upon the defendant a fine for the violation of the ordinance which assessed the tax, we should have to order a new trial. That ordinance is void in so far as the fine is concerned, and that is the part of it vital to the discussion, because a fine was imposed by the mayor, and also by his Honor below. (995)

The declarations in the ordinance that its violation should be a misdemeanor may be treated as surplusage, for the reason that the charter did not authorize the board to make a violation of one of its ordinances a misdemeanor, and yet the ordinance, construed as simple fine or penalty upon the defendant for a violation of the ordinance, is void because of the uncertainty in the amount of the fine or penalty. The language is as stated in the case on appeal "a fine of *not more* than fifty dollars." That was the exact language used in the ordinance of the town of Durham as appears in *S. v. Crenshaw,* 94 N. C., 877. To the same effect are *S. v. Cainan,* 94 N. C., 883, and *S. v. Rice,* 97 N. C., 421. In the *plaintiff's brief* the ordinance fixing the fine is quoted as follows: "The violation of any ordinance to which no specific fine or penalty is affixed shall subject the offender to a fine of fifty dollars or imprisonment for thirty days." In that quotation the fine appears to be fixed and certain, but it appears otherwise, as we have seen in the case on appeal, and of course we must follow the record.

But the warrant is for the misdemeanor created by section 19, of the charter, for a violation of the ordinance which imposed the tax, or it may have been for the same misdemeanor under section 3820 of the Code. The warrant is in these words: "To any constable or other lawful officer of the town of Kinston, greeting: I. B. Perry having made and subscribed before me the foregoing affidavit, you are hereby commanded forthwith to arrest the said Hoge Irvin, and safely him keep, so that you have him before me without delay at my office in Kinston, to answer the above charge, and be dealt with as the law directs.
(996) Given under my hand and seal, this third day of November, 1899.
Geo. B. Webb (Seal), Mayor of Kinston."

The affidavit referred to in the warrant and upon which the warrant was issued is in the following words: "State of N. C., Lenoir County—Town of Kinston. Before George B. Webb, Mayor:

"State and town of Kinston against Hoge Irvin: I. B. Berry being duly sworn complains and says that at and in said county, and in the town of Kinston, on or about the third day of November, 1899, Hoge Irvin did unlawfully and willfully violate an ordinance of the town of Kinston, to wit, ordinance No. 11, by buying tobacco within the corporate limits of the town of Kinston without paying tax, and was on said day engaged in and pursuing the occupation of tobacco buyer without paying the said tax, to wit, ten dollars, contrary to said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said town and State."

The defendant requested the court to instruct the jury "that the tax levied is illegal, and that the town had no authority to levy and assess the tax under the charter, and under the evidence, that the warrant does

not state a crime." The instructions were refused, and the jury instructed that if they believed the evidence the defendant was guilty. We see no fault in the warrant, and we see no error in the instruction of the court. The ordinance which the defendant violated was a valid one. The ordinance which imposed the fine was invalid because it was not certain as to the amount of the fine; but even in a case where there had been no fine imposed for a violation of a valid town ordinance, the offender could be convicted of a misdemeanor for a violation of such ordinance under section 3820 of the Code. *S. v. Crenshaw, supra.* Section 19 of the charter also makes the violation of a valid ordinance indictable as a misdemeanor. (997)

The ordinance imposing the fine being invalid for the reasons stated, the matter stands as if there had been no ordinance passed imposing a penalty.

No error.

Cited: Lacy v. Packing Co., 134 N. C., 572; *Plymouth v. Cooper*, 135 N. C., 8; *S. v. Danenberg*, 151 N. C., 720; *Guano Co. v. New Bern*, 158 N. C., 355; *Dalton v. Brown*, 159 N. C., 179.

STATE v. AGNES UTLEY.

(Decided 20 March, 1900.)

Indictment, Attempt to Poison — Nonessential Averment — Guilty Knowledge—Weight of Evidence—Motion in Arrest.

1. A motion in arrest of judgment will not be allowed, because the bill did not charge that the defendant had knowledge of the deadly character of the substance alleged to be poisonous.
2. The weight of the evidence and credibility of the witnesses for the jury to consider, and not the court.

INDICTMENT for attempting to poison the prosecutor by placing phosphorus and a deadly poison, the name of which is to the jurors unknown, in a coffee pot with coffee therein made for the prosecutor to drink, feloniously and maliciously intending him to injure, kill and murder, tried before *Hoke, J.*, at January Term, 1900, of WAKE.

After conviction, the prisoner moved in arrest of judgment, because the indictment did not charge that she had knowledge of the deadly character of the substance alleged to be poisonous.

Motion disallowed, defendant excepted.

At the conclusion of the evidence, the defendant asked his
(998) Honor to instruct the jury to render a verdict of not guilty, on the ground that evidence was insufficient to sustain the charge in the bill of indictment.

The prayer was disallowed, defendant excepted. Judgment of imprisonment. Defendant appealed.

Attorney-General for State.
M. A. Bledsoe for defendant.

FAIRCLOTH, C. J. The defendant is indicted for attempting to poison another by placing phosphorus and a poisonous substance in a coffee pot. After the conviction the defendant moved for an arrest of judgment, because the bill did not charge that the defendant had knowledge of the deadly character of the substance alleged to be poisonous. This averment was held not to be essential in *S. v. Slagle,* 83 N. C., 630.

The defendant also asked his Honor to instruct the jury to render a verdict of not guilty on the ground that there was not sufficient evidence to submit to the jury, which prayer was overruled. We have carefully read the evidence, and think that there was evidence to go to the jury. The weight of the evidence and the credibility of the witnesses were for the jury to consider, and not the court.

Affirmed.

Cited: *S. v. Carlson,* 171 N. C., 824.

(999)

STATE v. W. E. HAY.

(Decided 20 March, 1900.)

Compulsory Vaccination—Violation of Town Ordinance of Burlington—Act of 1893, Chapter 214, Section 23—Salus Populi Suprema Lex—The Code, Section 3820.

1. The public safety is the highest law—it is the foundation principle and urgent cause of all civil government.
2. The act of 1893, chapter 214, is a carefully drawn statute for the preservation of the public health, and its section 23 empowering the authorities of county and town to make regulations and provisions for the vaccination of the inhabitants, and to enforce them by penalties, is a valid exercise of governmental police power for the public welfare, health and safety.

3. The highest medical authorities, confirmed by long experience of mankind, attest the efficacy of vaccination as a preventative or alleviative of a most dreadful disease, smallpox.

4. The general law embraces all, leaving it optional to no one's private judgment whether to render compliance or not. If there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, that would be matter of defense, the burden of which would be on the defendant, and a fact to be found by the jury.

CRIMINAL PROSECUTION under section 3820 of the Code for violation of an ordinance of Burlington, tried on appeal from the mayor's court, before *Brown, J.*, at November Term, 1899, of ALAMANCE. The ordinance related to vaccination, and is as follows:

NORTH CAROLINA, ALAMANCE COUNTY.

"That all citizens of Burlington not successfully vaccinated within the last three years shall be vaccinated between this date (13 March, 1899), and Friday night, 17 March, instant, 9 o'clock p. m., and all persons refusing to be vaccinated shall be fined $10 for every day they refuse, after being called upon by the doctors appointed, or im- (1000) prisoned thirty days."

The defendant refused to be vaccinated for the reason that he had been advised and believed that it would be dangerous for him by reason of his physical condition.

In order to test the validity of the ordinance and for that purpose to allow the State to appeal, the case was decided *pro forma* by special verdict in favor of defendant, and from the judgment rendered the Solicitor appealed.

Attorney-General for the State.
Defendant not represented.

CLARK, J. Chapter 214, Laws 1893, is a well-considered and carefully drawn statute for the preservation of the public health. Section 23 thereof, which is specifically in regard to vaccination, contains among other provisions this clause: "The authorities of any city or town, or the board of county commissioners of any county, may make such regulations and provisions for the vaccination of its inhabitants under the direction of the local or county board of health or a committee chosen for the purpose, and impose such penalties as they deem necessary to protect the public health." There is no provision of the Constitution which forbids the Legislature so to enact, and it is indeed an exercise of that governmental police power to legislate for the public welfare which is inherent in the General Assembly, except when restrained by some express constitutional provision.

Salus populi suprema lex, "the public welfare is the highest law," is the foundation principle of all civil government. It is the urgent cause why any government is established, for, as Burke says: "All government is a necessary evil." It is, however, a much lesser evil than the
(1001) intolerable state of things which would exist if there were no government to bridle the absolute right of every man to do "that which seems right in his own eyes," like the Israelites in the days of Micah. The above maxim, quoted from Lord Bacon, is placed appropriately first by Broom in his treatise on Legal Maxims, with this just observation: "There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall under certain circumstances, be placed in jeopardy or even sacrificed for the public good." This observation, which is almost a literal translation from Grotius, he fortifies by quotations from Montesquieu, Lord Hale, and many judicial opinions from both sides of the Atlantic. But it needs none, for it is every day common sense that if a people can draft or conscript its citizens to defend its borders from invasion, it can protect itself from the deadly pestilence that walketh by noonday, by such measures as medical science has found most efficacious for that purpose. We know as an historical fact that prior to the discovery, 101 years ago, of vaccination by Edward Jenner, smallpox often destroyed a third or more of the population of a country which it attacked, and so futile was every precaution and the most careful seclusion that the greatest sovereigns fell victims to this loathsome disease which Macaulay has styled "the most terrible of all ministers of death." If this was so in days of imperfect communication, the present rapid means of intercourse between most distant points would so spread the disease as to quickly paralyze commerce, and all public business, if government could not at once stamp it out by compelling all alike, for the public good as much as for their own, to submit to vaccination. Statistics taken by governmental authority show that while 400 out of every 1,000 unvaccinated persons, exposed to the contagion, are attacked by it, less
(1002) than two in 1,000 take the disease when protected by vaccination within a reasonable period. There are those, notwithstanding these well-ascertained facts, who deny the efficacy of vaccination, as there are always some who will deny any other result of human experience, however well established, but the Legislature, acting in their best judgment for the public welfare upon the information before them, has deemed vaccination necessary for public protection, and their decision, being within the scope of their functions, must stand until repealed by the same power.

The power of the Legislature to authorize county and municipal au-

thorities to require compulsory vaccination has been exercised by nearly every State, and has been recently sustained by the highest courts of two of our sister States. *Morris v. Columbus,* 102 Ga., 792; *Blue v. Beach,* 155 Ind. (February, 1900), 121, and there are no decisions to the contrary. In reply to the argument that such exercise of power by the Legislature may in some cases infringe upon individual rights, *Cobb, J.,* in the Georgia case just cited, well says: "No law which infringes upon the natural rights of man can be long enforced. Under our system of government, the remedy of the people, in that class of cases where the courts are not authorized to interfere, is at the ballot box. Any law which violates reason, and is contrary to the popular conception of right and justice, will not remain in operation for any length of time, but courts have no authority to declare it void merely because it does not measure up to their ideas of abstract justice. The motive which doubtless actuated the Legislature in the passage of the act now under consideration was that vaccination was for the public good. In this the General Assembly is sustained by the opinion of a great majority of the men of medical science, both in this country and in Eu- (1003) rope." But even if we were of opinion with the small number of medical men who contend that vaccination is dangerous to health, and not a preventive of the disease, the Court is not a paternal despotism, gifted with infallible wisdom, whose function is to correct the errors and mistakes of the Legislature. *Brodnax v. Groom,* 64 N. C., at p. 250. Our people are self-governing, and themselves correct the mistakes of their representatives. The function of the courts is to construe and apply the laws, and they can hold a statute nugatory only when plainly and clearly violative of some provision of the organic law which has restrained the legislative power. *Sutton v. Phillips,* 116 N. C., 502; *White v. Murray, ante,* 153.

Nor does section 23 of the act require that the board of aldermen shall pass such ordinance in conjunction with the board of health (as defendant contends). It merely provides that the execution of the ordinance, *i. e.,* the vaccination, shall be under the direction of the local board of health or a committee appointed by the aldermen.

While the Legislature has power to authorize municipal bodies to provide compulsory vaccination, and the defendant did not comply with the ordinance enacted by the town of Burlington, in pursuance of such authority, though afforded opportunity to do so, it is true that there may be some conditions of a person's health when it would be unsafe to submit to vaccination, and which, therefore, would be a sufficient excuse for noncompliance, but it does not vitiate the ordinance that such exception is not provided for and specified therein. It is not a defense that a person *bona fide* believes that it will be dangerous for him to be vaccinated

or believes that he is already sufficiently protected by former vac-
(1004) cination; nor would the opinion of his personal physician on
either point be conclusive (though it would naturally have weight with the jury), for there may be evidence or circumstances tending to the contrary. Indeed, as to a former vaccination being sufficient protection, the opinion of the official physician supervising the vaccination should be presumptively correct. That which would relieve from a compliance with the ordinance is a matter of defense, the burden of which is upon the defendant, and is a fact to be found by the jury. The special verdict is ambiguous and defective in this particular, and is set aside. Let there be a

New trial.

DOUGLAS, J., concurring: While I concur in the judgment of the Court, I fear that there are some expressions in the opinion that may be misconstrued.

What I understand the Court to mean is, that while it is in the province of the Legislature to provide for the public health by all reasonable means, and incidentally to confer that power upon municipal corporations, yet whenever the exercise of that power is in derogation of natural right, it must be exercised in a reasonable manner. Compulsory vaccination is not an unreasonable requirement, as experience has shown that it is in times of epidemic necessary for the protection of the community and equally so of the individual. It is ordinarily less harsh than quarantine or isolation, and in the great majority of cases has no injurious effect beyond some slight temporary illness. But there may be cases where vaccination, owing to certain exceptional conditions of health, may be dangerous or even fatal. We can not suppose that the Legislature intended to enforce the rule under such circumstances, and yet there must be some tribunal competent to determine when such con-
ditions exist. By its very nature this power must ultimately rest
(1005) in the courts, where all other rights of the citizen are determined
and administered. Where legislative authority is given, the board of aldermen can determine within reasonable limits the existence of the general conditions justifying compulsory vaccination, and may make and enforce all reasonable regulations necessary to carry it into effect; but in case of resistance it can enforce it only by an appeal to the criminal jurisdiction of the courts. There the defendant has a right to be heard. It may be that his refusal to comply with a general ordinance might cast upon him the burden of proving whatever facts he might rely upon to exempt him from its operation; but this question is not now before us. I do not think that the election of any one as superintendent of health or his employment as vaccinating surgeon would add anything

to the weight of his testimony. It might give him the power to demand the vaccination of the individual, and to prosecute in case of refusal, but it would not carry with it any presumption of professional infallibility. He must take his chances before the jury like any other witness. I readily concede that these positions are generally filled by competent men, but we know that they are rarely held by physicians of large practice, because they do not pay enough to justify their acceptance. This is especially so where smallpox is prevalent. No well-established physician could afford to run the risk of contagion which would inevitably cause the loss of his practice. So strong is this feeling that it is sometimes necessary to send to other cities, and even other States, to obtain men willing to undertake the duty. I do not say this in any disparagement to them, but simply in justice to the resident physicians, who are entitled to all the credit due their character and professional standing.

I think this construction of the law is clearly in accord with the legislative intent, but if it were otherwise, I could not come to any other conclusion. The Constitution of this State expressly de- (1006) clares: "That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness." Article I, sec. 1. It does not profess to *confer* these rights, but recognizes them as pre-existing and inherent in the individual by "Right Divine." Therefore any unlawful interference with them is in violation of the express letter of the Constitution.

When man entered the social compact he gave up a portion of his natural liberty in exchange for the protection of society, but only so far as was demanded by the general welfare. Even then there must be some limit. Suppose the Legislature should pass an act that all persons afflicted with certain diseases should be killed in order to prevent contagion, would any court permit its enforcement? Therefore, can we suppose that the Legislature either would or could enforce vaccination if under the peculiar conditions of health of the patient it might reasonably be expected to endanger his life? This discussion, however, is not essential to the determination of the case at bar, as I feel safe in basing my opinion upon a reasonable interpretation of the legislative will without the necessity of resorting to constitutional limitations.

FURCHES, J. I concur in this concurring opinion.

Cited: *Hutchins v. Durham,* 137 N. C., 971; *Durham v. Cotton Mills,* 141 N. C., 645; *Morgan v. Stewart,* 144 N. C., 428.

(1007)

STATE v. CHAUNCEY DAVIS.

(Decided 27 March, 1900.)

Arson—Grand Jury—Continued Over Under Act 1899, Chapter 471, Sections 19 and 20—Motion to Quash—Freeholder—Motion in Arrest —Motion for New Trial.

1. The act of 1899, chapter 471, establishing the Eastern District Criminal Court, and in sections 19 and 20 authorizing the carrying over of a grand jury for one term, is not unconstitutional, although an innovation upon our judicial system.
2. A motion to quash a bill of indictment, found at July Term, 1899, by a grand jury organized at May Term preceding, but retained by the court until July Term following, will not be entertained.
3. A motion in arrest of judgment, on the ground that one of the special venire was not a freeholder, is not the proper remedy, as a judgment can only be arrested for matter appearing or for the omission of matter which ought to appear in the record.
4. A motion for a new trial for such cause is matter of discretion with the trial judge, and its refusal is not reviewable.

INDICTMENT for arson and conviction in the Eastern District Criminal Court of EDGECOMBE, heard on appeal before *Bowman, J.*, at the Superior Court at October Term, 1899, upon motions to quash indictment, and in arrest of judgment, which motions were refused, and the judgment of the criminal court affirmed.

Prisoner appealed. The grounds of the motions are stated in the opinion.

Attorney-General and Gilliam & Gilliam for the State.
Paul Jones and J. R. Gaskill for defendant.

(1008) MONTGOMERY, J. This case came up on appeal from the Superior Court of Edgecombe. The indictment, regular in form and sufficient in substance, and found in the Eastern District Criminal Court, charges the defendant with arson. At the proper time the defendant moved the court to quash the bill of indictment for the reason that sections 19 and 20 of chapter 471 of the Laws of 1899, establishing the Eastern Criminal Court, are unconstitutional. The latter part of section 19, referred to, is in these words: "In the event the grand jury at any term have not been discharged by the court, but retained for service at a subsequent term or terms, then there shall be drawn by the county commissioners, or sheriff and commissioners as aforesaid, only eighteen jurors for service as petit jurors at any such subsequent term;

provided said grand jury shall not be retained for more than one term subsequent to the term at which they were originally drawn." In section 20 of the act it is provided that the judge may arrange his sittings from time to time, and may, during recess of the court, discharge the jury, to be reassembled whenever notified either by personal service or by letter through the mails. The facts concerning the finding of the bill of indictment by the grand jury are, that at May term a grand jury was duly drawn and sworn, and went upon the discharge of their duties; that the judge presiding in accordance with the statutes heretofore referred to, retained and continued over the grand jury to a subsequent special term of the court in July, 1899; that at the subsequent term no new grand jury was drawn and sworn, but the grand jury brought over from the May Term, 1899, appeared, entered upon the discharge of their duties, and found the bill of indictment in this case.

This legislation is an innovation upon our judicial system, but (1009) we have found no inhibition by the Constitution against it. The General Assembly had the power to enact the law, and there was no error in the ruling of his Honor in the Superior Court in affirming the trial judge in the criminal court in refusing to quash the indictment. After the jury had returned their verdict against the defendant, his counsel moved in arrest of judgment for that J. W. Porter, one of the special venire, who had been selected and served as a juror, was not a freeholder. Upon the affidavits filed in connection with the motion, his Honor found the following facts: "That the juror was passed by the State when the defendant had exhausted his peremptory challenges; that upon being sworn by the defendant said juror was asked the following questions: 'Have you formed and expressed the opinion that the defendant is guilty?' To which question the juror answered, 'I have not.' 'Are you a freeholder in Edgecombe County?' 'I am.' And thereupon the juror was tendered to the defendant and accepted; that the mother of the said juror was at the time of her death in 189—, the owner in fee simple of a tract of land in Edgecombe County; that prior to her death she intermarried with one John Walston, by whom she had one or more children who survived her; that the mother of said Porter died without a last will and testament, leaving the said juror her heir at law; that the said John Walston is tenant by the curtesy of the said land, and has been in the possession of the same since the death of his said wife." The motion in arrest of judgment was overruled and the ruling was affirmed by his Honor in the Superior Court. It was not the proper proceeding by the defendant—the motion in arrest of judgment. It is most familiar learning that such a motion can only be made, or rather a judgment can only be arrested, for some matter appearing, or for the omission of matter which ought to appear in the record.

It was not necessary that the powers given to the court in refer-
(1010) ence to its control over the grand jury should be set out in the bill of indictment. The proper motion, if it could have been available, would have been for a new trial. But that motion could not have availed the defendant anything even if the juror were not a freeholder, under the facts found by his Honor, which matter it is unnecessary for us to consider. After verdict the motion for a new trial on the ground that a juror was not a freeholder would be too late. That point has been passed upon by this Court. *S. v. Davis,* 80 N. C., 412. In that case the Court, in declaring that a challenge *propter defectum* should be made before the juror is sworn, said "There is one point in this connection upon which there are few authorities, but those we have found are in harmony with the principle above stated. . . . It is where the ground of objection to the juror existed at the time of his being sworn, but not discovered, as in our case, until after verdict. In *S. v. Crawford,* 3 N. C., 485, a new trial was moved because one of the jurors was not a freeholder, and this was not known to the defendant until after the trial. But *Taylor, J.,* refused the motion." The refusal in such a case was a matter of discretion with the trial judge, and is not reviewable here.

No error.

Cited: *S. v. Jenkins,* 164 N. C., 529.

(1011)

STATE v. L. W. CARTER.

(Decided 27 March, 1900.)

Embezzlement—Plea in Abatement—Proper Venue—Presumption as to Venue Charged, Code, Section 1194.

1. A plea in abatement for wrong venue should give a better writ, by naming the proper county.
2. The presumption is in favor of the county charged, under The Code, section 1194, but may be rebutted by plea and evidence.
3. In misdemeanors, if the State joins issue, and the plea is found in favor of defendant, he is recognized for trial to the proper county; if found in favor of the State, judgment is rendered as upon a verdict of guilty.
4. In felonies, if the issue is found in favor of the State, the defendant is allowed to enter his plea of not guilty.

STATE *v.* CARTER.

INDICTMENT for embezzlement, tried before *Bryan, J.*, on appeal from criminal court of ROBESON, upon plea in abatement for wrong venue. The plea was overruled, and the defendant required to answer over, and he appealed to Supreme Court.

McLean & McLean and Proctor & McIntyre with the Attorney-General for the State.

W. F. French and J. B. Schulken for defendant.

FURCHES, J. The defendant stands indicted in the county of Robeson for embezzlement. To this indictment he files a plea in abatement in which he alleges that if he is guilty of the crime of which he stands charged, it is in the county of New Hanover and Columbus, and not in Robeson. We pass by what seems to be a defect in the plea in abatement, for want of certainty, as it shows that the venue should be in New Hanover or Columbus, and not in Robeson. But we treat the place as sufficient, and proceed to consider the case as if it was in proper form.

At common law, crimes that were entirely local in their char- (1012) acter were only indictable in the county where the offense was committed; others were indictable in more than one county if the offense continued to exist in more than one county. For instance, two or more counties might have jurisdiction in cases of larceny where the property was stolen in one county and carried into other counties for the reason that the crime continued to exist as long as the felonious intent and the asportation continued to exist.

But it was the duty of the State to show that the offense was committed in the county where the indictment was found, or that it had existed in that county, or the defendant would be acquitted. And as many of the boundary lines between counties were not well defined, many guilty defendants escaped punishment upon what seemed to be a technical defense. To prevent this, the Legislature, Code, section 1194, provided that the offense should be deemed to have occurred in the county where the indictment was found, unless the defendant should object to the jurisdiction of the Court by plea in abatement, in which he should set forth the county having the jurisdiction. And if the plea was admitted, the case was transferred to that county for trial, or if it was not admitted but found to be true, the case was transferred. But if the plea was not sustained—found not to be true—the defendant was held for trial. If the plea was admitted or found to be true, it rebutted the presumption created by the statute, and the matter stood as at common law, and as it stood before the statute.

The plea in this case was not admitted to be true, and was found by

the court (in fact, it seems to have been admitted or found by
(1013) agreement) "that the conversion and appropriation by the defendant to his own use of the proceeds of the sale of said mules and horses and collection of notes, if collected and appropriated by him at all, were made in the counties of Columbus and New Hanover."

But the court also found from the defendant's plea and affidavit, in which he set forth the evidence of the State taken before the committing magistrate, that the contract by which the defendant got possession of the mules, horses and notes as the agent of the prosecutor, took place in Robeson County; that said mules, horses and notes were delivered to the defendant in Robeson County; that defendant was to return said mules, horses and notes to the prosecutor or to account and pay over the proceeds thereof to the prosecutor in Robeson County; and that demand had been made upon him for said mules, horses and notes, or the proceeds thereof, and that defendant had failed and refused to return the same or to account with the prosecutor therefor.

We are of the opinion that the court was authorized to make this finding from the evidence, and we have no power to review its findings if we were disposed to do so, which we are not. And upon these findings the court overruled the defendant's plea in abatement, and refused to remove the case for trial.

It must be admitted from these findings that New Hanover or Columbus County, and probably both of them, had jurisdiction of this offense (if it was an offense). And this being so, it only remains to be seen whether Robeson County also has jurisdiction. And it seems that, as the contract was made in Robeson by which the defendant came into possession of this property, that it was delivered to him, and he received the same in Robeson County, and that he was to return it to the prose-
cutor from whom he got possession, or to account for and pay
(1014) over the proceeds to the prosecutor in Robeson County, that Robeson County also had jurisdiction of the offense. 7 Enc. Pl. and Pr., 412, 413; McLean Crim. Law, sec. 650, 651.

The plea was properly overruled, and the motion to remove was properly refused.

No error.

Cited: *S. v. Lewis,* 142 N. C., 636; *S. v. Long,* 143 N. C., 674; *S. v. Johnson,* 169 N. C., 311.

STATE v. SHERWOOD HIGGS.

(Decided 27 March, 1900.)

Raleigh—Store Signs, When Removable by City Authorities, When Not.

1. Where a store sign amounts to an obstruction which tends to hinder, delay, incommode or in some way endanger the use of the sidewalk by pedestrians in passing and repassing, its removal can be enforced by the city authorities by virtue of their granted powers, and their police powers.
2. An abutting owner to a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public. His placing an ornamental electric sign, securely attached to his building, 14 feet above the pavement and extending four to four and a half feet across the sidewalk, is not an obstruction—calling it so does not make it so, and he can not be required to remove it.

INDICTMENT in the mayor's court of Raleigh, for failure to take down his sign above the sidewalk in front of his store on Fayetteville street, contrary to the form of a city ordinance, in such case made and provided, tried on appeal before *Hoke, J.*, at January Term, 1900, of WAKE. His Honor charged the jury, if they believed the evidence, they should find the defendant guilty.

Verdict guilty. Defendant was fined $50, and appealed. (1015) The city ordinance, evidence of the State (defendant introduced none), and contentions *pro* and *con* fully appear in the opinion of *Furches, J.*, and in the dissenting opinion of *Clark, J.*

Attorney-General and Watson & Gatling for the State.
R. O. Burton for defendant.

FURCHES, J. This is a prosecution commenced before the mayor of the city of Raleigh for an alleged violation of an ordinance of the city. The ordinance under which the defendant is indicted is as follows:

"SECTION 1. That no sign shall be suspended or projected over the sidewalks in the city of Raleigh.

"SEC. 2. That all signs that are now projected or that are suspended over the sidewalks of the city of Raleigh shall be removed, together with the rods and poles used for suspending or swinging said signs, by 15 August, 1899.

"SEC. 3. Any person or firm violating the provisions of this ordinance or failing to comply with the provisions of the same, shall, upon conviction before the Mayor, be fined fifty dollars, or imprisoned thirty days."

The Legislature of 1899, Private Laws, ch. 153, enacted a new charter for the city of Raleigh, and our attention is called to the following provi-

sions therein for the purpose of showing the power of the city, which, the State contends, authorized the charge of the court and the verdict of the jury in finding the defendant guilty.

Sections of the charter:

"SEC. 33. That it shall be the duty of the aldermen to attend all the meetings of the board unless unavoidably prevented from doing so, and when convened, a majority of the board shall have power to make
(1016) and to provide for the execution of such ordinances, by-laws, rules and regulations, and such fines, penalties and forfeitures for their violation as may be authorized by this act, consistent with the laws of the land and necessary for the proper government of the city: *Provided,* that no penalty prescribed by the board of aldermen for the violation of any of the provisions of this act, or of any ordinance, by-law, rule or regulation made in pursuance thereof shall exceed fifty dollars fine or thirty days imprisonment."

"SEC. 80. That all penalties imposed under the provisions of this act or of any ordinance, by-law or regulation of the city, unless herein otherwise provided, shall be recoverable in the name of the city of Raleigh before the mayor; and all such penalties incurred by any minor shall be recovered from the parent, guardian or master, as the case may be, of such minor."

"SEC. 34. That among the powers conferred on the board of aldermen are these: . . . Ascertain the location, increase, reduce and establish the width and grade, regulate the repairs and keep clear the streets, sidewalks and alleys of the city; extend, lay out, open, establish the width and grade, keep clean and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square, and Pullen Park, have charge of, improve, adorn and maintain the same, and protect the shade trees of the city."

"SEC. 38. That they may require and compel the abatement of all nuisances within the city, or within one mile of the city limits, at the expense of the person causing the same, or the owner or tenant of the ground whereon the same shall be. . . .

Subsection 6 of section 79 provides:

(1017) "(6) Any person . . . ; or who shall excavate, construct, build, use, keep or maintain any cellar, basement, area, passage, entrance or way under any sidewalk, or build, construct, keep, use or maintain any veranda, piazza, platform, building or stairway or other projection or construction upon or over any sidewalk in the city whereby the free and safe passage of persons may be hindered, delayed, obstructed, or in any way endangered, . . . without having first taken out a license therefor; . . . shall be guilty of a misdemeanor, and upon satisfactory

proof before the mayor, shall be adjudged to pay for every such offense a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days."

The sections in the charter are not produced *seriatim,* but as they are presented in the brief and argument of counsel who represented the State.

Upon the trial the State introduced the charter and the ordinances of the city, and the following evidence:

The State then introduced Chief of Police Mullins, who testified that a written notice from the mayor to take down his sign was served on defendant before the beginning of this proceeding, which notice was put in evidence. That the sign was not taken down, and is still up. On cross-examination the witness stated that the sign was an electric sign, which spelled out Higgs's name by the passage of a current of electricity; that it was an ornament to the street, and did not interfere with passage or vision; it was at its lower end about fourteen feet above the sidewalk, projected four or four and a half feet from building, was twelve to fourteen feet long, about eighteen inches wide, made of plank, and apparently a very heavy one; was fastened at the top to a bar of railroad iron and at the bottom to a round bar of iron. The sign itself hung vertically, and he thought it was as practically secure as the (1018) house itself. Did not think there was any danger of falling or being blown down. Had never examined closely the fastenings to the bar of railroad iron. Witness identified the photograph of the sign, which was put in evidence, and which was taken before the lower swinging signs on the street were taken down. The sign which Higgs had swinging to the lower rod, as shown in the photograph, was taken down by him before this proceeding was started. The lower rod was also cut off at the end.

Witness said it was still common for porticoes or balconies, awnings and signs on awnings, and signs on the outer railing of balconies, and signs projecting a few inches over the sidewalks, to exist. There are many of them in the city. There are balconies in front of many buildings on Fayetteville street, projecting over sidewalk three to four feet. One over Yarborough House, Henry Building (with J. M. Broughton & Co.'s sign on outer railing, also Foller, the tailor's), one over A. B. Stronach's, with his sign on outer railing. Many awnings in the city which cover the entire sidewalk—some of wood, some of cloth, some signs on cloth, as Berwanger's stretching clear across sidewalk, and some on wood, as W. B. Mann's, at edge or side of awning, and extending over street. Some other signs were allowed to sit on sidewalks, as Watts, the barber. A great many signs on the doorfacing, which project a few inches over the sidewalk, as R. B. Raney's, Raleigh Savings Bank, Boy-

lan, Pearce & Co., W. E. Jones, a member of the board of aldermen, Cross & Linehan; Jones & Powell have steps leading from Fayetteville street down into their cellar. On each side of cellar is an iron railing and till recently they had suspended on the railing an ice and coal sign.

W. H. King & Co.'s drug store projects above some distance over
(1019) sidewalk and a sign is painted on it, as shown from the photograph. Y. M. C. A. building has steps in street.

W. Z. Blake, street commissioner was introduced by the State, and testified that he measured that morning the distance from the front wall of Higgs's store to center of street. It was 49½ feet.

The State then introduced the charter of the city of Raleigh, as contained in chapter 153 of the Private Acts of 1899, and thereupon rested its case.

The defendant's counsel contended that the ordinance was void; that on the evidence he was the owner to the center of the street, subject to the easement of the public, and had the right to make the customary and proper use of his property; that he was discriminated against, and that the ordinance was unreasonable and arbitrary and oppressive; that the board of aldermen had no power to adopt it, especially in its form and to the extent they claimed, and that it was an attempt to create a criminal offense, which they had no power to do.

His Honor charged the jury that if they believed the evidence, they should find the defendant guilty. Verdict guilty. Defendant excepted and appealed from the judgment pronounced.

There was exception taken on the argument to the jurisdiction of the mayor of the city to try the case, if the defendant was guilty of a criminal offense, for the reason that he was given exclusive jurisdiction. It was also contended that the ordinance was void for uncertainty, for the reason that it gave the mayor the discretion to fine the defendant upon conviction fifty dollars, or to imprison him for thirty days. We do not think either of these objections can be sustained. Article IV., sec. 14, of the Constitution, expressly provides for the establishment of such courts for the trial of misdemeanors in cities and towns; and the charter of the city of Raleigh, section 79, subsec. 6, expressly constitutes the
(1020) mayor a court for the trial of misdemeanors committed within the city, when the punishment does not exceed a fine of fifty dollars or imprisonment for thirty days. It would, therefore, seem that the mayor had jurisdiction, unless the ordinance is void, for the reason that it gives the mayor exclusive jurisdiction, and takes from justices of the peace their constitutional rights. But without discussing that question, we are of the opinion that it is not presented in this case, as it must be conceded that the mayor has a coördinate jurisdiction, if not the exclusive jurisdiction; and that is all that is necessary to be established to give

him jurisdiction of this offense, if it be an offense. Section 3818 of the Code gives to mayors the jurisdiction of justices of the peace; therefore he had jurisdiction outside of the charter.

Neither do we think the ordinance is void for uncertainty in its penalty or punishment. The ordinance of the city limits the punishment to $50 fine or thirty days imprisonment; and section 3820 of the Code makes the violation of a city ordinance a misdemeanor, and limits the punishment to a fine not to *exceed* fifty dollars, or imprisonment not to *exceed* thirty days. This is the exact language of the Constitution, and therefore can not be unconstitutional, as applied to misdemeanors. It seems to us that it must follow that the ordinance is not void for uncertainty, and, if not void for uncertainty, its violation was a misdemeanor unless it was void for other reasons than for uncertainty in its punishment. But if it was void for any reason, it was not unlawful to refuse to obey it, and its violation was no criminal offense.

But the ordinance may not be void (and we do not say that it is) when properly construed, and the defendant still not be guilty. And it seems to us that it has not been properly construed in the trial of this case.

Whether the Legislature could in express terms authorize the (1021) city to require the defendant to take down this sign, by the passage of an ordinance, or be guilty of a criminal offense, we very much doubt. But it is not necessary that we should pass upon that question, as we do not consider that it has attempted to give the city authorities that power. And we therefore consider the question from that view of the case, as it must be admitted that they had no such right unless it is given them in the charter of the city.

A municipal corporation is a creature of the Legislature, and only has such powers as are expressly given it, or such as are incident to the powers expressly given and necessary to the execution of the express powers. It seems to be conceded that they had no *express* power to pass an ordinance requiring the defendant to take down this sign. And we do not mean to say by this that the city authorities undertook to pass a personal ordinance requiring the defendant to take down his sign, but to say they had no express authority to pass a general ordinance requiring all such signs as his (if there are others) to be taken down, the violation of which would be *per se* a misdemeanor.

But the State contends that the city had express authority to open and grade streets, and clear and keep clear the streets and sidewalks of all obstructions; that the city is the owner of the streets and sidewalks, *cujus est solum ejus est usque ad cœlum,* and that the city authorities have the absolute right to remove any permanent fixture upon or over the streets or sidewalks; that they have the same rights of property over the side-

walks of the city that a private citizen has over his land; and, having this right, they have the right by the exercise of their arbitrary power to require the defendant to take down his sign.

The fallacies of these contentions are that the mayor and aldermen of the city of Raleigh do not own the streets and sidewalks; that
(1022) while the fee may be in the city it is held in trust for the use and benefit of the public. And the mayor and aldermen are but the agents of the city to look after the condition of the streets and sidewalks for the use and benefit of the public, and they have no power arbitrarily to do anything which interferes with the right of the citizen that the public has not, and can not have any interest in.

But the defendant, besides his general interest which he has in common with the public generally, is an abutting owner to this street and sidewalk, and, in this way has a special property—an easement in his frontage upon the street. *White v. R. R.,* 113 N. C., 612; *Moose v. Carson,* 104 N. C., 431; *Yates v. Milwaukee,* 10 Wall. (77 U. S.), 497.

This seemed to be conceded as a general proposition. But the State undertook to distinguish this case and take it out of the general rule, by alleging that the city of Raleigh was the owner in fee of the street, and, for this purpose has inserted in its brief the acts and ordinances locating the city of Raleigh. And while they might have been introduced on the trial (Dillon on Mun. Corp., sec. 83), they were not introduced, and we must be governed by the record. But lest it might be inferred that had they been introduced in evidence, that our judgment would have been for the State, we think it best to consider the case as if they had been introduced.

Had they been introduced, we are unable to see that this would have affected the status of the parties, or would have in any way affected the conclusion at which we have arrived.

We have assumed that the city was the owner in fee and sold to the defendant, or those under whom he claims, the lot he now occupies, abutting on Fayetteville Street, and, by this sale and purchase, the defendant acquired the right of an abutting landowner—an easement—
(1023) which is more than that of the general public; but subject to the lawful government of the city, so far as it is *necessary* for the use and benefit of the public. The case of *Moose v. Carson, supra,* cited by the State to sustain its contention, we think sustains the position taken by the Court.

Then, was it necessary for the public benefit—for the public convenience, the public safety—that this sign should be removed? If it was, then the city authorities under their granted powers would have the right to remove it. This power would then be one of the powers incident to their express powers granted to them over streets and sidewalks of the

city for the *benefit of the public;* while, on the other hand, the defendant had the right of an abutting owner—an easement—the right to use his frontage for the benefit of his property, as he pleased, in such a way as not to interfere with the rights of the general public, in safety, using the sidewalk for the purpose of traveling the same on foot, and for passing and repassing. And if his sign in no way impeded or tended to impede such travel, or in no way endangered the safety of such pedestrians in passing over the sidewalks, as they were wont to do, then the city had no right to require him to take it down; and it was no offense in the defendant to refuse to do so; and he would not be guilty of any criminal offense. It is only the violation of a legal ordinance that is a criminal offense. It is only to valid and lawful ordinances that section 2820 of the Code applies.

While we have been so far discussing this case upon general law and general principles, we do not believe that a fair and reasonable interpretation of the charter goes further, or was intended to go further, or to authorize the city fathers to do more than we have said they could do.

It provides in paragraph 6 of section 79 (after enumerating other things): "or other projection or construction upon or over any sidewalk in the city whereby the free and safe passage of per- (1024) sons may be hindered, delayed, obstructed, or in any way endangered." Therefore, to our minds, it is manifest that this paragraph of the charter is qualified and restricted, and that the obstruction (if we may call it such) must be such as will hinder, delay, obstruct or in some way endanger the use of the sidewalk (or at least tend to do so) to the use of pedestrians in passing and repassing upon it.

According to the evidence in the case, no one of these conditions is present. The sign is fourteen feet above the sidewalk, and of course can not be an obstruction to pedestrians, and it is shown to be perfectly secure, and in no danger of falling.

But the State contends that the charter (section 79, paragraph 6) authorizes the aldermen to condemn this sign and to require its removal, and that they have done so, and that defendant was properly convicted. We do not think so. We are of the opinion, as we have said, that a fair and reasonable interpretation of the statute does not sustain the State's contention. But if there are doubts as to its construction (and we do not think there are), they must be resolved against the power and against the State, as its right depends upon this power. 2 Dillon Mun. Corp., sec. 91; *Slaughter v. O'Berry, ante,* 181.

The governing bodies of cities and towns are vested with what is known as police powers, and they may do many things under and in exercise of this power. But still, they must act within the scope of their delegated powers, or their acts are *ultra vires* and void. They can not

do what they are not authorized to do by their charter or by the general law of the land. If a thing within itself is not a nuisance, they can not make it so by saying it is. If a sign hanging four feet from the wall of defendant's store building, firmly attached to the same, and fourteen feet above the sidewalk, is not an obstruction to footmen on the side-
(1025) walk, the city authorities can not make it so by saying it is. And if this sign is securely attached and fastened to the building by iron bars and fastenings so that there is no danger of its falling, the city authorities can not make it dangerous by saying it is. *S. v. Webber,* 107 N. C., 962; *S. v. Taft,* 118 N. C., 1190; Dillon, *supra,* sec. 87. The State must show the power or the ordinance is void. Cooley Const. Lim. (4 Ed.), 236. This question of overhanging signs has been elaborately and ably discussed in *Goldstraw v. Duckworth,* 5 Q. B. Div., 275, and very much the same views are taken in that case, as to such signs, as are taken in this opinion.

But it is said by the State, among many arguments it makes for the support of the judgment below, that to hold that the city had not the power to have this sign taken down, would destroy all city government. We do not think so. But if the law is so written, it must be so held, though it should have that effect. But it must be kept in mind that the power of the city government is not all that is to be considered in deciding this case. The rights of individual citizens are also to be considered, and they are of equal importance, and probably more in need of the protection of the courts than the mayor and board of aldermen of the city of Raleigh.

The Court holds that, upon the evidence in this case, the court below should have instructed the jury that, if they believed all the evidence, the defendant was not guilty. But if there had been evidence tending to show that the sign was an "obstruction" to footmen on the sidewalk, or tending to show that it was dangerous to the traveling public, it would have been the duty of the court to submit the question to the jury under proper instructions. *Howard v. Robins,* 1 N. Y., 63; *People v. Carpenter,* 1 Mich., 287. And to this it is replied that this would be de-
(1026) structive of all city government, to leave such questions to the jury. We do not think so, but as we have said, if it is the law, it must be so held, let the results be as they may. But, as between a jury, under the restraints of an oath, and the instructions of a judge, we think the citizens' rights would be more likely to be protected than they would be by the uncontrolled authority of the city government. The boundary between the rights of the citizen and the powers of the mayor and aldermen is not very plainly marked, and is easily invaded unless great care is taken. But this line is there, though delicately marked, and it must be found and observed. *Slaughter v. O'Berry, ante,* 181

While this is true as to many things, there are other rights and duties that the city authorities plainly have. It is plain that they have such powers as are expressly granted, unless they are void as being unconstitutional, or in violation of individual rights as established by the general law of the land. They also have such other powers as are incident to and necessary for them to have and exercise in order to carry out and enforce such express powers as are lawfully granted them. It is their duty to keep the streets and sidewalks in good condition, and to remove such obstructions from the sidewalks as are on them and are manifestly calculated to "hinder, delay, or endanger" the ordinary use of said sidewalks. Such obstructions clearly fall within their power, and it is their duty to exercise it in a proper manner. But such things as do not appear to hinder, delay or endanger the public and do not in any way obstruct the sidewalks, they do not have absolute control over. And to give them this right, they must allege and show that such signs or other such things are obstructions, or tend to obstruct, or that they are dangerous to the traveling public.

For these reasons we do not say that the ordinance is absolutely void, because if the State can show that the sign is dangerous to the public, the city authorities had the right and it was their duty (1027) to have it taken down. And in such event the defendant would be guilty of a violation of the criminal law of the State. But the State must allege and show this before he is liable. There is error for which there must be a

New trial.

CLARK, J., dissenting: No provision of the Constitution can be found that forbids or even makes doubtful the right of the people of this State, speaking through their representatives in the General Assembly, to authorize the aldermen or commissioners of any town or city to forbid the swinging of signs across the sidewalks. Certainly none has been cited. The charter provides in section 34: "That among the powers conferred on the board of aldermen are these, . . . ascertain the location, increase, reduce and establish the width and grade, regulate the repairs and keep clear the streets, sidewalks and alleys of the city; extend, lay out, open, establish the width and grade, keep clean and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square, and Pullen Park, have charge of, improve, adorn and maintain the same, and protect the shade trees of the city." The title to the streets of a city is in the city for the use of the public. The defendant, an abutting owner upon a street, has no more rights therein than any one else. He has the right of ingress and egress to and from his store, but so has the public unless he closes it. He has no right to obstruct the

view of the street by a sign unless permitted by the city authorities. He has no more right to hang a sign in the street than the city has to suspend anything above his premises. He owns to the line of his lot, but no farther. His easement in the street is simply that it
(1028) shall not be closed up or perverted to other uses. *Moose v. Carson,* 104 N. C., 431; *White v. R. R.,* 113 N. C., 610. Whatever has been done in the way of hanging signs across the sidewalks in the past, has been by the tacit assent of the city authorities, revocable at will whenever they deem such mode of swinging signs injurious to the appearance of the city. It would be strange if it were otherwise, seeing that in England, whence we derive our common law, for hundreds of years signs have not been allowed to project over the sidewalks, but are placed flat against the wall of each place of business. There is probably no town in the United Kingdom, however small, in which signs are allowed to hang across the sidewalk, and the same is true of the countries of western Europe generally. The same ordinance has been adopted by many cities in this country, and in a few years will doubtless become the general, if not the universal rule. After most diligent research by counsel and the Court, no decision has been found from any court in any country, till now, which denies the power of the town council to pass an ordinance like that now called in question. The powers of a city government are not restricted to suppressing what is dangerous, but extend to adorning and beautifying the city (when they possess the funds), and to removing from the public streets that which mars their appearance, and equally that which is unpleasant to the eye as that which is disagreeable to the nose. This particular sign may be ornamental, and so may others, but if the board of aldermen think the custom of hanging signs over the sidewalk injurious to the appearance of the streets, they could pass this ordinance impartially ordering the removal of all signs hung across the sidewalk. Now that there is a spirit springing up in favor of beautifying our cities and towns, it is to be regretted that the cold shadow of a judicial inhibition should fall upon the movement in this State to chill it.

(1029) Were a single act, like the hanging out of the defendant's sign, seized upon for its removal as dangerous, or because otherwise a nuisance, then an issue of fact would be raised for a jury. But when it is an ordinance, impartially ordering the removal of all swinging signs above the street or sidewalk, and the defendant's sign admittedly comes within the words of the ordinance, then it is not an issue of fact for the jury, but a question of the power to pass the ordinance. The people of Raleigh, acting through their duly elected board of aldermen, should certainly be able to decide whether they wish these signs removed or not, and if the aldermen do not correctly express public opinion the

next board of aldermen will permit the swinging signs to go back. Local self-government demands that much. The people of any town can decide such questions for themselves better than the courts. It is hardly to be conceived that any part of the functions of the Supreme Court of a State is to act as a supervisory board of public works to pass upon, restrict or veto the action of the board of aldermen of any town upon such matters as the present.

Chief Justice Pearson, in *Brodnax v. Groom,* 64 N. C., at p. 250, expressed much common sense and a sound knowledge of the true functions of the court when he said: "This Court is not capable of controlling the exercise of power on the part of the General Assembly or of the county authorities, and it can not assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities, and *erecting a despotism of five men* (italics in original), which is opposed to the fundamental principles of our government and the usages of all times past." What the learned *Chief Justice* said as to "county authorities," has, of course, the same application to city authorities. In that case the Court held itself incompetent to control (1030) the action of the county authorities in building a bridge or in supervising its location or cost or passing upon the necessity for it, because building bridges is a function of the county commissioners, and not of the courts. Here, the regulations of the streets, and the removing of what therein impedes their use or impairs their appearance is for the town authorities to decide, and they ought to decide it, subject to correction only by the people of the town at the ballot box, who are the best judges of what is proper and meet as to such matters for their own municipality. The defendant has no property rights in the streets more than any one else who uses them. His land ends where the deeds call for, *i. e.,* at the inner edge of the sidewalk next to his store. Whatever privileges he is allowed on the sidewalk or in the air above it, more than belongs to all alike, is a mere tacit license from the town, revocable at its will.

Moose v. Carson, 104 N. C., 431, holds that where a town conveys land bounded by a street, it can not afterwards convey away the street itself. *White v. R. R.,* 113 N. C., 610, holds that the abutting proprietor has an equitable easement in the street to the extent that it shall not be perverted to other uses. *Goldstraw v. Duckworth,* 5 Q. B. Div., 275, is a very short opinion construing that the language of a local statute to prevent nuisances upon the pavements of streets was not intended to prohibit projections, like balconies and the like, above the pavements. But neither these decisions, which are the reliance of the defendant, nor any others yet found from any court, sustain the contention that the town authorities do not possess the power to pass the plain unequivocal ordinance (which is here called in question) that "all signs suspended over the

sidewalks of the city of Raleigh shall be removed by 15 August,
(1031) 1899." No court till now has ever questioned such power, though it has been exercised for centuries in the home of the common law.

On the contrary, in *Tate v. Greensboro,* 114 N. C., 392, it is held: "The courts will not interfere with the exercise of discretion reposed in the municipal authorities of a city as to when, and to what extent, its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion." In that case it was held that the discretionary power over the streets authorized the town council to remove shade trees, against the protest of the owner of the abutting lot. That case cites with approval the following from the United States Supreme Court in *Barnes v. District of Columbia,* 91 U. S., 540: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades and the opening of new and the closing of old streets are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done." The right to open new and close old streets is certainly greater than the power of removing signs that obstruct the view and impede the circulation of air and light. The right of "superintendence of the streets" thus fully recognized by both courts, extends, like the defendant's ownership of his own lot *usque ad cœlum.* The city authorities are not chained down to surface improvements, but can rise to the level of the occasion.

The ordinance is in the discretion of the city authorities. It is reasonable and impartial. It applies alike to all, and there is no reason why the defendant should be exempted from it. "Equal rights to all, special privileges to none."

Cited: Board of Education v. Henderson, ante, 691; *S. v. Hill, post,* 1142; *S. v. Caldwell,* 127 N. C., 521; *Hester v. Traction Co.,* 138 N. C., 293; *S. v. Godwin,* 145 N. C., 464.

Overruled: Small v. Edenton, 146 N. C., 530; *Rosenthal v. Goldsboro,* 149 N. C., 134; *S. v. Staples,* 157 N. C., 638.

(1032)

STATE v. J. B. GREEN.

(Decided 27 March, 1900.)

East Durham—License Tax to Sell Fresh Meat—Cities and Towns—Act 1899, Chapter 11, Section 51.

1. Cities and towns referred to in statutory enactments imply incorporated communities with defined limits, unless otherwise indicated. Constitution, Art. VIII, sec. 4.
2. East Durham is a suburb of the city of Durham, outside of the city limits and unincorporated. It is not embraced in the provisions of the act of 1899, ch. 11, sec. 51, which imposes an annual license tax upon the business of buying and selling fresh meat in cities and towns, graded according to population.
3. When there is any ambiguity, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden the intention of the Legislature to impose that burden must be explicitly and distinctly shown.

INDICTMENT for selling fresh meat in East Durham without having paid license for the privilege required by Laws 1899, ch. 11, sec. 51, for such sales in cities and towns, tried before *Moore, J.*, at January Term, 1900, of DURHAM.

There was a special verdict to the effect that the defendant had made such sales in East Durham without license; but that East Durham was outside of the city of Durham, unincorporated and without town government and defined limits.

The court having instructed the jury that the defendant was guilty, they so found, and judgment was rendered against him for a penny and the costs, and he appealed.

Attorney-General for the State.
Boone, Bryant & Biggs for the defendant.

CLARK, J. Section 51, ch. 11, Laws 1899, imposes an annual (1033) license tax upon the business of "buying and selling fresh meat from offices, stores, stalls or vehicles," as follows: "In cities or towns of 12,000 inhabitants or over, $7.50; in cities and towns from 8,000 to 12,000 inhabitants, $5; in cities or towns under 8,000 inhabitants, $3." The defendant is indicted for carrying on such business in the town of East Durham without having paid the license tax above required.

The special verdict finds that the defendant carried on such business, without having paid any license tax, at a small stand near the Durham

Cotton Mills, situate about one mile outside the corporate limits of Durham, in a locality known as East Durham, which is a postoffice and a railroad station, but which is not within the limits of any incorporated town; that within a radius of one mile from such stand the number of inhabitants is between 2,000 and 4,000.

The sole question raised is whether the section imposing this license tax applies to towns not incorporated. Colloquially speaking, towns may be any aggregation of houses, any number of any size. This very indefiniteness indicates that in authorizing this tax the Legislature did not intend to leave open a question, which could only be settled in each case for itself, whether a given aggregation of houses was a "town"—whether 20 houses, or 50 houses, or 100 houses, or 200 people, or 500, or 1,000 people would make a town, and in what radius they must be compressed. Such loose expressions are common in ordinary conversation but are not admissible in a statute imposing a tax and making a misdemeanor. "When there is any ambiguity, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden the intention of the Legislature to impose that burden must be explicitly and distinctly shown." Dwarris on Statutes, 742, 749; Cooley on Tax, 267.

(1034) It is reasonable to suppose that in this case the law-making power intended a "town" which had been declared by law to be one by an act of incorporation. That makes a definite, well-defined line, which no one can mistake, and which can never leave it in doubt whether or not a person is liable to a license tax prescribed for carrying on any designated business "in a town."

In New England and some other States a "town" means always a township. In England the term "city" does not depend upon the number of its inhabitants, but upon its being the seat of a Bishop; for instance, Chester, with a few thousand inhabitants, has been for centuries a city, while the neighboring Liverpool, with many times the population, was only the "town of Liverpool" till comparatively recently, when it became a "city" by being given a Bishop. Statutes passed in England or New England containing the word "town" would therefore have to be construed with reference to this different legal meaning of the word. So in this State, the word "town" or "city" in a statute must depend upon its legal meaning of being so declared by a statute incorporating it as a town, or city without reference to the number of its inhabitants or the density of population. The Constitution, Art. VIII, sec. 4, authorizes the General Assembly to "provide for the organization of cities, towns and incorporated villages" and from this it would seem that only those that are thus "organized" should, in purview of law, come under that head, unless an act should specially provide for the inclusion of

"unincorporated towns," in which case doubtless the act would prescribe what number of inhabitants, and in what specified space, should constitute such a town, so as to create a standard which is now utterly lacking, unless we draw the line at "incorporated towns and cities." Section 3787, ch. 62, of the Code, which provides that "every incorporated town" shall elect officers, etc., means merely that "upon its incorporation" every town shall elect its officers. It is not in- (1035) tended to declare that unincorporated places are "towns," for if it were, the number of inhabitants would be prescribed which would make a town without incorporation. Indeed, in all the succeeding sections of that chapter wherever the word "town" is used it is plain beyond peradventure that an "incorporated" town is meant. Of these are now 218 in this State. It must have the same meaning in this act unless there had been words showing a different intent.

Upon the special verdict the defendant should have been adjudged "not guilty."

Reversed.

Cited: *S. v. Carter,* 129 N. C., 562; *Lacy v. Packing Co.,* 134 N. C., 572; *Dalton v. Brown,* 159 N. C., 180.

(1036)

STATE v. DREW BATTLE.

(Decided 3 April, 1900.)

Burning Stable—The Code, Chapter 985, Subsection 6, and Laws 1885, Chapter 66—Evidence—Motive—Malice Towards Agent of Owner—Retaining Grand Jury—Unnecessary Descriptive Words "Unlawfully, Maliciously and Feloniously"—Surplusage.

1. Declaration of the defendant that he was mad with the agent of the owner of the property, incompetent evidence of ill-will towards the owner, and on objection should have been excluded.

2. While the State is not bound to furnish evidence of motive for the commission of crime by the accused, yet if it undertakes to do so, it should be done by proper testimony.

3. Retaining a grand jury over for service at a subsequent term, authorized by act of 1899, ch. 471, sec. 19, establishing the Eastern District Criminal Court, although an innovation of questionable utility in the administration of justice, is not inhibited by the Constitution.

4. The descriptive words, "wantonly and maliciously," are used in the act of 1885, ch. 66, characterizing the offense—the additional words, "unlawfully, willfully and feloniously," used in the indictment, are simply surplus—*utile per inutile non vitiator.*

CLARK, J., dissents.

INDICTMENT for stable burning under the Code, sec. 985 (6), heard on appeal from the criminal court, before *Bowman, J.,* at Fall Term, 1899, of EDGECOMBE.

Upon the trial in the criminal court the solicitor offered to prove by the witness Thomas Tanner, as furnishing a motive for the criminal act, that the defendant told him last year that he was mad with Bullock (superintendent of the owner).

The evidence was objected to, but allowed. Defendant excepted.

After conviction and judgment the defendant appealed to the
(1037) Superior Court. His Honor, *Judge Bowman,* sustained the ruling and affirmed the judgment, and defendant appealed to the Supreme Court.

The defendant also excepted to the bill of indictment because found by a grand jury brought over for service from the preceding term.

The defendant also claimed that there was a variance between the offense charged and the proof made, owing to the phraseology of the indictment, which has resulted in his being sentenced excessively under the wrong act.

Attorney-General and Gilliam & Gilliam for the State.
G. M. T. Fountain for defendant.

MONTGOMERY, J. The defendant was indicted under subsection 6 of section 985 of the Code, but it appears from the statement of the case on appeal made up by his Honor who presided that the trial was conducted in respect to the evidence offered by the State as if the indictment had been found under subsection 2 of that section. The stable was burnt on 13 May, 1899, and belonged to Frederick Philips, and was situated on his plantation in Edgecombe County.

Evidence was introduced going to prove that about a week before the fire the defendant, a cropper on the plantation, had had a difficulty with William Philips, his father-in-law and laborer on the farm, and had become mad with Bullock, the superintendent of the farm, because he interfered in the trouble between the defendant and William Philips
(1038) that the defendant asked Bullock to discharge one of the sons of William Philips, saying he would not live on the farm with such rascals, and that Battle told one Mangum that he, the defendant, had told Bullock that he must get rid of William Philips's boys, and Bullock

"would give him no satisfaction," and that he was mad about that. That evidence was not objected to by the defendant; but when the solicitor offered to prove by Thomas Tanner that the defendant "told him last year that he was mad with Bullock," the defendant objected to the evidence, and upon its being received entered an exception. The ruling was sustained by the Superior Court, which we think was an error. The objection was well taken. In no conceivable aspect could the anger or vicious temper of the defendant toward Bullock furnish any motive for the defendant to burn the property of Judge Philips. It is idle to argue that because one may have a dislike for the manager of a farm that feeling could be allowed as evidence against one charged with burning the property of the owner of the farm as tending to show a motive for the burning; and the principle is not altered because the accused might be a cropper on the farm. So far as the evidence objected to is concerned it had no connection with Bullock as manager of the farm. Indeed, it was not attempted to show by the witness Tanner that the defendant gave him the reason for his dislike of Bullock. The State was not bound to furnish a motive in the breast of the defendant for the commission of the crime with which he was charged; but as long as it was thought necessary because (except as to an alleged confession made by the defendant to Rowe, the detective), the evidence was entirely circumstantial, to prove a motive it devolved upon the State to show the motive by proper testimony. The jury understood that that part of the testimony which was received over the objection of the plaintiff was considered material and incompetent by the court, and that it was introduced (1039) for the purpose of showing a motive for the act; and it must have influenced the jury in their verdict of "guilty" against the defendant. As it was incompetent it ought not to have been received, and as a new trial is to be had for that error it will be proper for us to discuss the whole evidence bearing on the question of the ill-will of the defendant to Bullock, including that which was received without objection. The principle of evidence which the trial court adopted in receiving testimony of a person's ill-will toward one who is an agent simply for another as proof going to show a motive for burning the property of the principal, and the affirmation of that doctrine by the Superior Court on appeal, is a matter of so vital importance to the people of the State that we feel it our duty to consider it. It seems to us that it can not be a true principle of evidence, and that if it is so acted on, great injustice is certain to be done to those who may be indicted for crime, and especially to people who are in service and who are subject to the discipline and control of bosses, superintendents, overseers or managers. Common observation teaches us all that hot-tempered and hasty words towards managers are not of infrequent occurrence whenever men who labor are

undertaken to be controlled, and that oftener than otherwise those frictions are harmless and not founded on malice even against the superintendents. Therefore it would be a harsh and cruel rule to infer, on the part of those employed, malice against the owners and a motive for the injury or destruction of their property in such cases. We are of the opinion that the whole of the evidence bearing upon the question of the ill-will of the defendant against Bullock was incompetent. As we have seen, there were no *threats* made by the defendant to do any in-
(1040) jury to the person or to the property of the owner of the farm—or to the manager either, as to that. Neither was there any evidence that the defendant contrived to have Judge Philips informed of the difficulty on the farm, and of the defendant's request that the manager should dismiss a laborer from the premises. If the defendant had taken such a course, and the owner of the plantation had declined to order Bullock to dismiss the laborer, then evidence of such facts might have been competent and sufficient to warrant the jury in drawing the inference that the defendant's ill-will had extended to the owner of the property; that it might be inferred that such a course on the part of the defendant amounted to a threat to do some damage to the owner or his property, and furnish a motive for the crime. But it may be argued that the defendant, because of his ill-will toward the manager, determined that the manager should lose his place, and to produce that result, burnt the barn, the object being to terrify the owner of the property, and compel him to dismiss the manager for fear of further injury to or destruction of his property if he kept him in his service. The answer to that argument is that malice or ill-will is evidence upon which a jury might infer a motive to commit a crime against a person or the property of the object of ill-will or malice; but the commission of the crime for the purpose of compelling the injured person to punish the enemy of the criminal, can not be a matter of inference of the motive to commit the crime. It is too remote. Such a conclusion must be based upon evidence, not of motive, but of the fact as to the object on the part of the criminal committing the crime. And in the case before us, as we have said, so far as the record shows, the owner of the property did not know of the defendant's trouble with William Philips, or of the request made of the manager to discharge Philips's sons, or that he had even heard that the defendant wished him to discharge Bullock from his employment. This case is nothing like the cases of *S. v.*
(1041) *Rhodes,* 111 N. C., p. 647, and *S. v. Thompson,* 97 N. C., 496. In both those cases, the indictments being under subsection 6 of section 985 of the Code, there was not only ill-feeling but there were open threats made by the defendant. In the first-mentioned case it appeared that the wife of the defendant was living on the land of the prosecutrix—

Mrs. King—and the defendant complained that her son was keeping defendant's wife away from him. It appeared in the evidence in that case that the defendant, before the outhouse was burnt, had made threats against Mrs. King and her son, who was her agent and manager, and lived on the land. There were several witnesses who testified that they had heard the defendant, while talking about his wife and complaining because King let her live on his land, say that "he could do King a private injury and the law wouldn't hurt him." The son and mother lived on the premises, the son being her manager, and threats to injure the person and property were made against both by the defendant.

In *S. v. Thompson, supra,* threats which were made against the sons and grandsons of the owner of the house which was burned, were admitted as evidence against the defendant, and this Court affirmed the ruling of his Honor in receiving the evidence on the ground of general ill-will toward the family, and as furnishing a motive. The language of the Court was: "The proof of threats directed against the son and grandson from their near relationship to the owner of the burned house was also relevant though perhaps feeble in showing general ill-will to the family, and a motive for the act." We are not saying that the ill-will of the defendant in this case toward the owner of the plantation could not have been shown on the trial, if it existed. It could have been, for there was evidence against the defendant tending to show (1042) that he burned the barn; but we mean to say that ill-will on the part of one accused of the crime of burning property toward an agent of the owner of property is not sufficient evidence to go to the jury from which an inference might be drawn of a motive to commit the crime.

We will not conclude this opinion without considering two other important questions which will be certain to arise again on the next trial. One of them is, whether or not the latter part of section 19, chapter 471, of the Laws of 1899, establishing the Eastern District Criminal Court is constitutional. The clause reads as follows: "In the event the grand jury at any term have not been discharged by the court, but retained for service at a subsequent term or terms, then there shall be drawn by the county commissioners, or sheriff and commissioners, as aforesaid, only eighteen jurors for service as *petit* jurors at any such subsequent term; *Provided,* said grand jury shall not be retained for more than one term subsequent to the term at which they were originally drawn." This case was tried at a special term of the criminal court held in July, 1899, the same at which the bill of indictment was found, and there was no grand jury drawn and sworn at that term of the court. But at May Term, 1899, a regular term of the court, a grand jury was drawn and sworn. After the grand jury had concluded its work at the May term, they were notified by the judge that they would be continued until the

next term under the statute referred to. The grand jury was present at the special term of the court, and the bill of indictment in the case duly returned "a true bill" by them. The retention of the grand jury from one term to another is an innovation upon our custom, but we know of no restriction placed upon the General Assembly which would prevent it
from enacting such legislation. It is likely that such a system
(1043) will result injuriously in its operation. It is almost impossible
that interested parties will not bring influences to bear upon members of the grand jury who are held over from one term to another which they would not be subjected to if they were drawn, and served and discharged as under the old system—the system of the Superior Courts. But with that this Court has nothing to do. The Legislature had the power to enact the statute. The other matter remaining for consideration is the request for a special instruction asked by the defendant which is as follows: "The defendant Drew Battle can not be convicted in this case under section 985, subsection 6, of the Code, for the charge of the State here is the burning of a stable in the night time, containing mules, and this charge is provided for in subsection 2 of said section. That if this is not the State's charge then there is a fatal variance between the charge and the evidence, and the defendant Drew Battle can not be convicted." The instruction was declined, and the ruling affirmed by the Superior Court, and we see no error in that ruling. It is true that in subsection 2 of section 985 of the Code the *willful* burning of a stable containing a horse or a mule, in the night time, subjects the convicted person to imprisonment in the penitentiary for a term of not less than five nor more than ten years; and it is true that on the trial the solicitor introduced evidence tending to show that the stable was burned in the night time, and that it contained five mules. It is not stated in the record that this testimony was objected to. The defendant, however, was not indicted under subsection 2, but under subsection 6, of the section referred to above. Subsection 6 has been amended (Laws 1885, chap. 66) by striking out the words "unlawfully and maliciously" in the first, second and third lines thereof, and substituting therefor in both places the words *"wantonly and maliciously,"* and by further striking out the
words "with intent thereby to injure or defraud any person or
(1044) persons, body politic or corporations." The bill of indictment
contains the words "unlawfully, willfully, and feloniously," in addition to the words "wantonly and willfully." But the bill is not affected by the use of the words "unlawfully, maliciously and feloniously"; they are simply surplusage. The indictment under subsection 6 is for the *wanton* and *willful* burning, and subjects the convicted person to a longer term of imprisonment, in the discretion of the trial judge, than for a sim-

ple, *willful* burning under subsection 2. The difference between the meaning of the words "wanton" and "willful" is to be found in *S. v. Brigman,* 94 N. C., 888, and in *S. v. Morgan,* 98 N. C., 641.

New trial.

CLARK, J., dissenting: The defendant was indicted and tried under subsection 6, sec. 985, of the Code. The judge refused to hold that the trial was under subsection 2 of that section, and passed a sentence which was authorized by subsection 6, but which would not have been legal under subsection 2. The said subsection 6 has been amended, Laws 1885, ch. 66, by striking out in line one the words "unlawfully and maliciously" and inserting "wantonly and willfully," and striking out in lines ten and eleven the words "with intent to injure or defraud any person, or persons, body politic or corporation." So no proof of malice towards the owner of the property is necessary to constitute the offense. The evidence of ill-will, expressed by the defendant towards the manager or overseer shortly before the fire, was admitted without exception, and is not before us. The corroboratory evidence that the defendant also expressed ill-will towards the overseer last year, which might well have been only four months earlier, in December of the previous year, was admitted over defendant's exception, and is the sole ground (1045) relied upon for a new trial. That could not be prejudicial after the admission without objection of the evidence as to the several more recent expressions of malice towards the overseer. But if the latter evidence had been excepted to, and had been brought before us, no precedent is cited which holds that malice towards the person in charge of the property would not be admissible upon the question of motive, and there are sound reasons why, in many cases, it would throw material light upon the transaction. Suppose the owner was that intangible thing, a corporation; if malice as a motive is competent, as it always is, it could be shown that the accused was angry with the person managing the property, or such cases would be an exception to the universal rule that motive can be shown. And that case differs in no material aspect from this, in which the overseer represents a nonresident owner. But if the owner were resident and present every day, can it be held as a proposition of law that evidence that an employee entertained ill-will towards an overseer, and wished to discredit him and cause his removal, is not evidence of motive? It is not an adequate motive, but is the motive for any crime ever adequate for its perpetration? If it is, it is not motive, but justification. It can not be said either as a proposition of law or as a matter of human experience that a desire to injure one person becomes irrelevant when the act will in fact injure another person still more. The desire to discredit the overseer and cause his removal is none the

less a motive because the burning will injure the owner. Motive was not offered as an ingredient of the crime, but as circumstantial evidence, tending with other proof to show commission of the crime by the defendant. The abduction of a child may be from ill-will to the parent or guardian, though the greater injury is to the child itself against whom there is no motive shown.

(1046) On this question of motive the long-established and well-observed rule is laid down by Roscoe's Criminal Evidence, and cited by *Ashe, J.*, in *S. v. Green,* 92 N. C., 779, on an indictment for burning a gin house. "Where it has been shown that a crime has been committed, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, *although remote,* are admissible in evidence." The jury should be cautious with respect to the importance they attach to this species of evidence, still it is to be weighed by them, and the court should not refuse whatever aid the evidence of motive may be to them. "It is always a just argument on behalf of one accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends, in some degree, to render the act so far probable as to weaken the presumptions of innocence, and corroborate evidence of guilt." 3 Rice Ev., sec. 281. "Threats" are of course evidence to show ill-will, but not the only evidence of it. Ill-will can be shown to exist in many an instance where no threat has been made to injure the object of it. A dog may bite though he does not bark.

In *S. v. Green, supra,* as evidence tending to show motive, the State proved the declarations of defendant before the fire that he had no money, but expected soon to have some, and that shortly after the fire he did have money. The Court says: "Facts tending to show a motive, although remote, are admissible in evidence." That evidence no more proved that the defendant did the burning than ill-will towards the overseer in this case. It was simply evidence there tending to show as a motive that he was to be paid, and in this case the motive that he would injure the overseer and perhaps cause his removal. It is slight evidence, and taken by itself, no evidence, but it fits into its place, taken in connection with the evidence pointing to defendant's guilt, by impairing the

(1047) defense based on the want of all apparent motive. In the celebrated "Molly Maguire" trials in Pennsylvania, a most material element, as explaining the motive of the defendants, was their ill-will towards the section bosses who had far less independent control of them than the overseer here of an owner not residing upon his farm. In the Wat Tyler insurrection in England (and in many another) the motive was no hostility to the King or the government, but to the tyranny of petty officials, and to secure their removal.

In *S. v. Rhodes,* 111 N. C., 647, for burning a barn, the State was permitted to show that the defendant had made threats previous to the burning that he would do some injury to the son of the prosecutor. Threats are merely evidence of ill-will towards the son which could be "shown by declarations or acts just as well or better," says Roscoe's Criminal Evidence, 96, 740, cited in *S. v. Rash,* 34 N. C., 389. The point is to show ill-will as a motive. In *S. v. Gailor,* 71 N. C., 88, indictment for arson, the ill-will, as a motive, was shown by defendant's declarations, there being no threats. In *S. v. Thompson,* 97 N. C., 496, proof of ill-will against the son and grandson of the owner was admitted as evidence of motive. It is true the ill-will towards them was proved by threats, but the ill-will as a motive would have been just as competent if proven by defendant's admissions or declarations, without threats.

Malice towards the son of the owner in *S. v. Rhodes, supra,* and against the son and grandson in *S. v. Thompson, supra,* was more remote than the ill-will here shown against the overseer and the direct motive to secure his dismissal. In Stephens' Digest of Evidence, 36, it is said that any fact that supplies a motive for the act is competent, and instances expressions of ill-will used many years before, (1048) against the deceased, by one charged with his murder; and in Wharton's Criminal Evidence (9 Ed.), sec. 784, it is said that it is relevant to show as motive that the defendant was inflamed with animosity to a cause with which the injured person was identified.

The law as to ill-will as a motive for the perpetration of crime as stated in the authorities, is that while it should be weighed with caution by the jury it is to be left to them to rebut the presumption which would arise from the absence of motive; that this ill-will may be shown by acts, declarations, admissions or threats, and that it need not be directly against the owner of the property destroyed (in arson cases), but may be animosity towards his son, his grandson or others connected with him or even animosity against a cause with which he is identified. There are well established cases (in Ireland certainly) where the sole motive was animosity towards the political party to which the owner of the property belonged.

It is an innovation to reject the evidence of motive offered in this case, and the principle laid down, if followed, will limit, not increase, the facilities afforded the jury to arrive at the truth of a charge investigated by them.

Cited: S. v. Hight, 150 N. C., 819; *S. v. Barrett,* 151 N. C., 667.

(1049)

STATE v. N. HARRISON.

(Decided 3 April, 1900.)

Failure to List for Taxation, Act 1899, Chapter 15, Sections 15 and 28—Misdemeanor—Justice's Jurisdiction.

Sections 15 and 28 of the Revenue Act of 1899, ch. 15, making the failure to list polls and property for taxation a misdemeanor, are to be construed together, and being punishable by fine of not more than $50, or imprisonment not more than thirty days, fix the jurisdiction in the court of a justice of the peace.

INDICTMENT for failure to list poll and property for taxation, tried before *Timberlake, J.*, at February Term, 1900, of IREDELL.

The defendant moved to quash the bill for want of jurisdiction. Motion allowed. State appealed.

Attorney-General for the State.
L. C. Caldwell and W. D. Turner for defendant.

MONTGOMERY, J. The defendant, a resident of Statesville, was indicted in the Superior Court of Iredell County for willfully and unlawfully failing to list for taxation all of his personal property in Statesville Township, as he was required to do by section 15, chapter 15, of the Laws of 1899. In that section, not only are the pains of perjury denounced against those who may be guilty of making false returns of their taxes, but it is also therein declared that "any person, corporation or firm, who fails to list the poll taxes and property taxes required of them by law, shall be guilty of a misdemeanor." On the trial the defendant moved to quash the bill of indictment upon the ground that the
(1050) court did not have jurisdiction of the offense. The motion was allowed, and the solicitor appealed on behalf of the State. If there was nothing else in the act of 1899 (ch. 15), concerning the criminal act on the part of one who refuses to properly list his taxes, besides what is contained in section 15 of the act, the Superior Court would have had jurisdiction. But in section 28 of the same act it is declared that "all persons who are liable for poll tax and shall willfully fail to give themselves in, and all persons who own property and willfully fail to list it within the time allowed before the list-taker or board of commissioners, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than $50, or imprisoned not more than thirty days." The two sections of the act are not inconsistent, and they must be construed

together. They both make the failure to list taxes a misdemeanor, and the last section fixes the jurisdiction in the court of a justice of the peace —the punishment prescribed being a fine of not more than $50, or imprisonment not more than thirty days.

Affirmed.

(1051)

STATE v. WILL EDWARDS.

(Decided 3 April, 1900.)

Murder in the First Degree—Deliberation and Premeditation—Conspiracy to Kill—Aiding and Abetting to Kill—Confessions to an Officer —Policeman—Motion for New Trial for Newly Discovered Evidence Judge's Charge—State v. Boyle, 104 N. C., 800, Overruled.

1. Where there is no duress and the prisoner has been cautioned by his statement to an officer, whether amounting to a confession or not, is competent evidence.
2. Where there is evidence of deliberation and premeditation, it is for the jury to say whether the killing is murder in the first degree or not.
3. The killing of a policeman who is endeavoring to enforce a town ordinance against the use of loud, profane language upon the streets by the arrest, without warrant, of parties guilty of it in his presence who refuse to desist and curse him, can not be placed on the ground of self-defense.
4. It matters not that it is questionable which of two persons fired the fatal shot, if the jury are satisfied beyond a reasonable doubt, from the evidence, that there was a conspiracy to kill the deceased, and that they were aiding and abetting each other.
5. A motion for a new trial for newly discovered evidence is not entertained in criminal actions on appeal.

INDICTMENT for murder, tried before *Robinson, J.*, at November Term, 1899, of ROWAN.

The prisoner was indicted along with Tom Carr for the murder of William Kerns, a policeman of the town of Concord. The cause was removed from Cabarrus County to Rowan County for trial on affidavit of prisoners. They were both convicted of murder in the first degree. Carr was awarded a new trial by the trial judge.

Sentence of death was passed upon Edwards, and he appealed (1052) to the Supreme Court.

The homicide occurred at night on the street in Concord. There was evidence of previous ill-will on the part of the prisoners towards the deceased, and of a concerted purpose to assail him that night. They ap-

proached him using loud and profane language, and when he checked them, they cursed him, and on his attempting to arrest them, one of them shot and killed him.

The exceptions taken on the trial are noted and considered in the opinion.

Attorney-General for State.
P. B. Means for defendant.

CLARK, J. The only exception to evidence, the exception to the prisoner's confession, is without merit. There was no evidence of duress, in fact, the evidence was that there was none, and that the prisoner was cautioned, and confessions made to an officer without duress are competent. *S. v. Whitfield,* 109 N. C., 876, and cases cited. Besides, it was in no sense a confession, but a denial. The prisoner, besides those of his prayers which were given, asked the court to charge:

"1. In no aspect of the testimony and under no reasonable inference that can be fairly drawn from it, are the prisoners guilty of murder in the first degree.

"2. There is no deliberation or premeditation in this case, and at most the jury can only convict of murder in the second degree.

"3. If the jury believe that the deceased was appointed policeman for a special purpose to perform duty at the depot only, then he had no right to arrest the prisoner for boisterous conduct and loud cursing (1053) upon the streets away from the depot, without a warrant, and his act in stopping the prisoners and ordering them to go back with him would be in law an assault, and the prisoners had the right to defend themselves against said assault."

These prayers were properly refused. There was ample evidence of premeditation to be submitted to a jury. As to the last prayer, the mayor of the town testified that the deceased had been a policeman two and a half or three months, and his duties were at the depot part of the time. There was no contradictory evidence, the mayor merely saying that the duties of the deceased as policeman did not taken up all of his time. Nor was there any evidence of an assault by the deceased. The prisoner and his companions were violating the town ordinance by loud use of profane language upon the streets; the deceased, who had on his policeman's uniform and cap and billy, spoke to them about it; the prisoner cursed him, whereupon deceased ordered him to come and go up town with him, as he could do without a warrant (*S. v. Freeman,* 86 N. C., 683), whereupon he was shot at several times by one or more of the crowd and killed. The only question arising upon the testimony is as to who in that party did the fatal shooting.

The prisoner further asked the court to charge that "there is no evidence that the homicide was committed within the corporate limits of the town of Concord." This the judge refused, and when reading over the evidence he reached the testimony of Dr. Archey, he said: "Here is the evidence that the homicide was committed within the corporate limits of Concord, and there is other evidence of it, to which I will call your attention." This is no expression of opinion "whether a fact is fully or sufficiently proved," which is forbidden by the act of 1796, now Code, sec. 413, but was merely calling the attention of the jury to evidence the existence of which was denied by the prisoner's (1054) prayers for instruction.

The court, in addition to many charges not excepted to, instructed the jury that "it made no difference whether Kerns (deceased) was acting in his official capacity as policeman, or whether the homicide was committed within or without the corporate limits of the town of Concord, if the jury are satisfied beyond a reasonable doubt that the prisoners killed the deceased upon a previously formed design to kill him, and under the circumstances deposed to by the witnesses upon the stand; the jury may find the prisoners guilty of murder in the first degree, even though the jury are satisfied that the deceased was a private citizen." There was strong evidence of a preconceived and avowed purpose on the part of the prisoners to kill the deceased, and if they did so, upon the uncontradicted circumstances, as above stated, the charge just recited was not erroneous.

His Honor, after giving several prayers for instructions, asked by the defense, was asked to charge: "If the jury are in doubt as to which of the prisoners shot the deceased, and have a reasonable doubt as to whether Edwards shot the deceased, or whether Carr shot him, then the verdict should be not guilty, as to both." This the court refused to give till he had added: "Unless the jury shall be satisfied beyond a reasonable doubt that there was a conspiracy on the part of the prisoners to kill the deceased, or that they were aiding or abetting each other." The evidence justified the addition, which was properly made. *S. v. Anderson,* 92 N. C., 732.

The other exception, "the failure of the judge to state in a plain and concise manner the evidence given in the case and declare and explain the law arising therefrom," would not be justified even by *S. v. Boyle,* 104 N. C., 800, which besides has been several times in effect overruled. *S. v. Beard,* 124 N. C., 811. The case seems to have been left to the jury in every phase presented by the evidence. The motion (1055) in this Court for a new trial for newly discovered evidence was properly withdrawn. Such motions are not entertained in appeals in criminal actions, as has been often held. *S. v. Starnes,* 94 N. C., 973; *S. v. Gooch, ibid.,* 987; *S. v. Starnes,* 97 N. C., 423; *S. v. Rowe,* 98 N. C., 629.

The murder appears to have been brutal and premeditated. The prisoner's cause has been presented with zeal and ability by his counsel in this Court, as doubtless it was in the court below, but we find no error of which the prisoner can complain.

No error.

Cited: *S. v. Kinsauls, post,* 1096; *S. v. Register,* 133 N. C., 754; *Simmons v. Davenport,* 140 N. C., 411; *S. v. Lilliston,* 141 N. C., 865; *S. v. Turner,* 143 N. C., 647; *S. v. Jones,* 145 N. C., 471; *S. v. Houston,* 155 N. C., 433; *S. v. Leak,* 156 N. C., 646; *S. v. Ice Co.,* 166 N. C., 404; *S. v. Lowry,* 170 N. C., 734.

STATE v. FIN HUGGINS, REDMOND PITTMAN AND JAMES JOHNSON.

(Decided 10 April, 1900.)

Murder—Lost Papers—Insufficient Evidence—New Trial.

1. Where material evidence taken on the trial and directed to be sent up as a part of the case has become lost and can not be found, a new trial will be ordered.
2. The exception that the evidence is insufficient to warrant a conviction, should be taken before verdict.

INDICTMENT for murder of John Thomas, tried before *Bryan, J.,* at September Special Term, 1899, of LENOIR.

The prisoners were convicted of murder in the second degree, and appealed from the judgment pronounced. Huggins afterwards withdrew his appeal. The other two, Pittman and Johnson, took the exception that the evidence would not warrant their conviction. His Honor refused to so hold, but in settling the case for the Supreme Court
(1056) directed the evidence to be certified and embraced in the transcript, which was not done in consequence of its having become lost and unable to be found.

Attorney-General and Brown Shepherd for the State.
T. C. Wooten for defendants.

CLARK, J. The prisoners, Johnson and Pittman, appeal from a conviction of murder in the second degree. The only question presented is as to whether there was any evidence as to them to go to the jury.

The judge ordered the evidence to be sent up as a part of the case on appeal, but by the almost criminal carelessness of some one, it has been lost, and the county of Lenoir will be put to the expense of another trial, which must be granted. *Ritter v. Grimm,* 114 N. C., 373; *Clemmons v. Archbell,* 107 N. C., 653; *S. v. Parks, ibid.,* 821; *Owens v. Paxton,* 106 N. C., 480. When court papers are thus lost the matter should, in every instance, be rigidly investigated, and the responsibility fixed.

The case on appeal does not clearly show that the exception that there was not sufficient evidence to go to the jury was taken before verdict. If it was not, the exception could not be considered, and the failure to send up the evidence would be immaterial, so far as the appeal is concerned. This has been well settled. *S. v. Harris,* 120 N. C., 577, and numerous cases there cited; *S. v. Wilson,* 121 N. C., 650. But the Attorney-General, from the nature of this case, and following the precedent set by his predecessor in *S. v. Wilcox,* 118 N. C., 1131, consents that the exception may be treated as having been made before verdict.

New trial.

Cited: S. v. Kinsauls, post, 1096; *S. v. Hawkins,* 155 N. C., 473; *S. v. Williams,* 129 N. C., 582; *S. v. Jarvis, ibid.,* 699; *Turner v. Gas Co.,* 171 N. C., 751.

(1057)

STATE v. PAGE SMITH.

(Decided 10 April, 1900.)

Retailing Spirituous Liquors Without License—Violation of Dispensary Act of Madison.

1. A party who violates the general law against retailing spirituous liquors without license (The Code, sec. 1076), and also the Dispensary Act of the Town of Madison (Laws 1899, ch. 268), is indictable under either act.
2. The special act establishing the dispensary did not repeal the general law, as to which it had no other effect than to prohibit the county commissioners from issuing license to retail spirituous liquors in said town, and to make such license, if issued, invalid, and no protection to any one selling under it.
3. A sentence to work the public roads is valid.

INDICTMENT for retailing spirituous liquors without license, tried before *Shaw, J.,* at October Term, 1899, of ROCKINGHAM. The defendant was bound over to court for violating the dispensary act of the town of

Madison, but he was indicted under the general act for retailing without license, and was convicted. He excepted because he was indicted under the general law. He was sentenced to eight months' imprisonment, to be worked on the public roads. From which judgment he appealed to Supreme Court.

Attorney-General for the State.
C. O. McMichael for defendant.

CLARK, J. The sale of spirituous liquor by the small measure without a license, in the town of Madison, is a misdemeanor, punishable at the discretion of the court, as it is everywhere else in this State. (1058) The Code, sec. 1076. By chapter 268, Laws 1899, a dispensary was established in that town, and retailing by individuals prohibited under a penalty of "not less than $50, or not less than three months work on the county roads, or both." The defendant was bound over to court for violating the dispensary act in selling spirituous liquor, but the grand jury indicted him under the general act for retailing without a license, as rested with them. The defendant appeals because he was indicted under the general act, and this is his only exception. It is true that upon conviction under such indictment the minimum punishment may be less than if he had been indicted under the dispensary act, but we do not see how the defendant can complain of that, and as his Honor fixed the punishment at eight months upon the county roads, the punishment is valid under either statute. *S. v. Snow,* 117 N. C., 778. Probably the defendant thought that if indicted under the act creating the dispensary in Madison he could test its validity, but the power of the Legislature to pass such acts has been sustained in *Guy v. Commissioners,* 122 N. C., 471 (Cumberland County dispensary); *Bennett v. Commissioners,* 125 N. C., 468 (Bryson City); *Garsed v. Commissioners* (Greensboro,) *ante,* 159, and is sufficiently settled.

The special act establishing a dispensary in the town of Madison did not repeal the general statute as to which it had no other effect than to prohibit the county commissioners from issuing license to retail spirituous liquors in said town, and to make such license if issued invalid and no protection to any one selling under it. *Hillsboro v. Smith,* 110 N. C., 417. It is expressly held as to "local option" that the defendant can be indicted for violating such statute, and the Code, sec. 1076, by separate counts in the same bill, or in separate bills, for the acts are supplementary, not conflicting. *S. v. Smiley,* 101 N. C., 709, which involves the same principle as is presented by this case. Indeed, it is held (1059) that the same act of selling liquor may be a violation of the United States statute, of the Code, sec. 1076, and of a town ordi-

nance, when the town is authorized to require a town license (*S. v. Stevens,* 114 N. C., 873), and of course it may be a violation of the dispensary act when that has been adopted for a town in lieu of the town "high license" system as in *S. v. Stevens,* which decision has been approved. *S. v. Reid,* 115 N. C., 741; *S. v. Robinson,* 116 N. C., 1046; *S. v. Downs, ibid.,* 1064. The sentence to work upon the public roads is valid. Laws 1899, ch. 581, secs. 8-9; *S. v. Weathers,* 98 N. C., 685; *S. v. Haynie,* 118 N. C., 1270; *S. v. Hicks,* 101 N. C., 747; *S. v. Hamby, post,* 1066.

No error.

Cited: *S. v. Young,* 138 N. C., 574; *S. v. Lytle, ibid.,* 740; *S. v. Farrington,* 141 N. C., 845; *S. v. Hooker,* 145 N. C., 584.

STATE v. EUGENE DAVIS.

(Decided 10 April, 1900.)

Disturbing Religious Congregation—Congregation Dispersed—Demurrer Ore Tenus.

An indictment for disturbing a religious congregation will not lie, and a demurrer *ore tenus* should have been sustained, when the State's evidence showed that the services (held at night) had been concluded for ten minutes, the lights were out, and the congregation dispersed.

INDICTMENT for disturbing a religious congregation at Mount Pleasant Church in SURRY, tried before *Shaw, J.,* at October Term, 1899, of the Superior Court of said county.

After the State had examined all its witnesses and rested its case, the defendant demurred thereto *ore tenus.* His Honor overruled the demurrer, and charged the jury, if they believed the evidence, (1060) to pronounce a verdict of guilty, which they did. Defendant excepted and appealed from the judgment pronounced.

The evidence, as agreed upon, is stated in the opinion.

Attorney-General for the State.
Virgil E. Holcomb and James B. McGuffin for defendant.

MONTGOMERY, J. The defendants were indicted for disturbing religious worship.

The defendants demurred to the evidence which was as follows: "That religious services which were held at night, had adjourned and

been adjourned ten minutes, and the congregation had left the house, some were in the church yard, some in the road thirty or forty yards away, and some had left or were in the act of leaving, and some had gone home. One witness testified that he was on the door-steps of the church at the time the alleged disturbance began; the defendants were in the road, and were under the influence of liquor, but were not drunk; that the defendants cursed loudly and abused each other, one of them drew or threatened to draw his knife, another one threatened to shoot. This continued for several minutes, and the crowd was considerably excited, and ran in different directions, especially the ladies. The defendants were finally quieted down, and persuaded by friends to leave. There were no lights in the church when the disturbance took place." The demurrer was overruled, and the defendants excepted and appealed.

There was error in the ruling of his Honor overruling the demurrer. The congregation had assembled, had worshipped and had dispersed, except those who loitered, probably to discuss other matters than the religion of the Nazarene. In *S. v. Ramsey,* 78 N. C., 448, the (1061) congregation had begun to assemble, and a number, from ten to thirty, were in the church, and their minister in his place in the pulpit when the disturbance occurred. There the defendant's counsel requested the court to charge the jury that to constitute the offense of disturbing divine worship the congregation must, when disturbed, be actually engaged in acts of religious worship. The instruction was refused, and his Honor told the jury that if the congregation were assembled for the purpose of worship, and were prevented therefrom by the disturbance, the offense would be sufficiently proved as charged. That instruction was approved by this Court, and in the opinion it was said: "It can make little difference whether the liberty of public worship is denied by conduct which breaks up and disperses a body met for religious purposes and just about to enter upon its duties; or the congregation is interrupted only during its devotions, and not wholly prevented from performing them."

In *S. v. Bryson,* 82 N. C., 576, this Court said: "The evidence did not establish the fact of the people being assembled for worship at the time of the loud talking of the defendant, but showed merely that they were in process of coming together. It showed that the congregation was not gathered together in the house where the worship was to be engaged in, but some were in the house, and some outside. In our opinion the people, or some considerable number, must be collected at or about the time when the worship is about to be commenced, and in the place where it is to be had, in order to make a disturbance which will make them indictable. It may then be said the congregation is assembled for worship and the protection of the law then extends to them."

But in the case before us there had been no disturbance while the congregation was assembling, or during the entire time of the worship. The people had met and had enjoyed free and full church (1062) services without interruption. The services had been concluded ten minutes before the disorderly conduct of the defendants had occurred; the lights in the church had been extinguished, and the congregation had dispersed; some had gone home, some were in the road thirty and forty yards away, and some were in the act of leaving. The principle which is at the bottom of our legislation, and the adjudications of this Court on the subject we have been discussing, are plainly the right of each religious denomination to assemble and worship God according to the dictates of their consciences, and to be protected by law in the enjoyment of that right. This congregation had enjoyed that right to its fullest extent, and while the conduct of the defendants was grossly reprehensible, yet the arm of the law can not be invoked against them for disturbing religious worship. We have no doubt, however, that if a person should indulge in loud and continued swearing and cursing in the presence of a religious congregation in the act of dispersing after religious services are over, or before it is begun, the parties would be indictable at common law as for a public nuisance. *S. v. Kirby,* 5 N. C., 254; *S. v. Eller,* 12 N. C., 267. If it be that the parties in this case drew their knives on each other within striking distance, and threatened to use them, of course they would be indictable for the assault.

Error.

(1063)

STATE v. J. C. BARNES.

(Decided 10 April, 1900.)

Revenue Law 1899, Chapter 11, Section 58, Tax on Lumber Dealers—License, Section 71—Misdemeanor.

The term "lumber dealer," in the Revenue Act of 1899, ch. 11, sec. 58, implies an habitual course of dealing in lumber, and does not apply to one engaged in general merchandise, who as occasion requires takes lumber or shingles in payment of a debt, or in exchange for goods he keeps for sale.

INDICTMENT for engaging in the business of a lumber dealer without having paid the license tax required by the Revenue Act of 1899, ch. 11, secs. 58 and 71, tried before *Robinson, J.,* at Spring Term, 1900, of ALEXANDER.

Upon the special verdict rendered in the case, his Honor adjudged the defendant guilty, and the jury so found. Judgment that defendant pay a penny and the costs. Defendant appealed.

The special verdict appears in the opinion.

Attorney-General for the State.
A. C. McIntosh for defendant.

DOUGLAS, J. The following is the special verdict:

That the defendant is a merchant in the town of Taylorsville, whose business and occupation by which he makes his living is to buy and sell goods, wares and general merchandise such as are usually kept in a small town in a general store for sale or barter. He sells his goods for cash or exchanges them for such produce as is usually offered by customers to persons engaged in such business.

(1064) That while engaged in such business as a merchant, the defendant occasionally obtained from a customer in the regular course of his business, a load of shingles which he took in satisfaction of a debt already contracted, or paid for out of the goods and merchandise from his store. That he sold the shingles thus obtained, as he sold other articles of produce obtained in his business, for cash or exchanged them for other merchandise for his store.

That the defendant did not hold himself out to the public as one whose business it was to buy and sell either lumber or shingles, and did not buy any articles that could be considered under the name of lumber except the shingles mentioned, if they can be considered lumber.

That said transaction was in connection with his business as a merchant, to obtain satisfaction of a debt which otherwise he might lose, or to effect a sale of his goods and to obtain a profit on his goods given in exchange for the shingles.

That the defendant has not paid the license tax imposed by law upon lumber dealers, but has complied with the law in regard to the tax on merchants.

Upon the findings of the jury the court below was of opinion that the defendant was guilty. In this we think there was error. Section 58, ch. 11, Laws 1899, known as the Revenue Act, imposes a license tax of ten dollars on "lumber dealers." The word "dealer" implies a habitual course of dealing, and a lumber dealer means one who habitually deals in lumber. Our revenue acts appear to have used the words "dealer" and "trader" as synonymous, using sometimes one word and sometimes the other, and they have been so held by this Court in *S. v. Yearby,* 82 N. C., 561.

In *S. v. Chadbourn,* 80 N. C., 479, a "trader" is defined as "one en-

gaged in trade or in the business of buying and selling." And on page 482, this Court says: "Still they must be *traders* who buy or sell, and not others who follow a different occupation. The of- (1065) fense is consummated only when the act of buying or selling is done by one whose business it is to buy and sell, and in the exercise of his calling." See, also A. & E. Enc., 846, and notes.

We do not mean to say that a man can not be a dealer unless he deals exclusively in one article or class of articles. He may deal in two or more different lines of trade, and it would make no difference if his course of dealing was principally in one line provided he *habitually* dealt in the other. The mere fact that a man, whose business was that of a merchant in a country town, may sometimes, as occasion requires, take lumber or shingles, or anything else in payment of a debt or in exchange for the goods that he keeps for sale, does not make him a dealer in such articles within the meaning of the statute. To hold that it did, would be a strained construction of the law, and would frequently work great hardship and injustice. Many a country merchant is in a large degree dependent upon the barter of his neighborhood, and his business might be seriously crippled, if not destroyed, if he were subject to cumulative license taxes upon every class of articles that he might occasionally be compelled to buy.

The judgment of the court below is reversed upon the special verdict, and a verdict of acquittal will be entered.

Reversed.

(1066)

STATE v. CHARLES HAMBY.

(Decided 10 April, 1900.)

Carrying Concealed Weapon — Presumption — Rebuttal — Cumulative Sentence—Excessive Punishment.

1. The fact that defendant had a pistol about his person, off of his own premises, was *prima facie* evidence of concealment, which shifted the burden upon the defendant to rebut or disprove.
2. A cumulative sentence, as where a defendant is convicted of several offenses at the same term, and receives a separate sentence of imprisonment for each—one to begin after the conclusion of the other—is valid.
3. A sentence to work the public roads of another county is valid when authorized by statute.

INDICTMENT for carrying a pistol about the person off of defendant's own premises, tried before *Shaw, J.*, at Fall Term, 1899, of WILKES.

The defendant was convicted. The evidence showed circumstances of great aggravation, including a murderous assault. The defendant had been convicted in another case, No. 259, at the same term of the court, and sentenced to imprisonment. The judgment in the present case was that defendant be confined in the common jail of Wilkes County for the term of two years and assigned to work on the public roads of Forsyth County, the term of this sentence to begin at the expiration of the sentence in No. 259.

From this judgment the defendant appealed to the Supreme Court. The exceptions are stated in the opinion.

The Attorney-General for the State.
No counsel for defendant.

CLARK, J. The defendant was convicted in Wilkes Superior Court of carrying a concealed weapon, and sentenced to be "confined in
(1067) the common jail of Wilkes County for the term of two years and assigned to work on the public roads of Forsyth County, the term of this sentence to begin at the expiration of the sentence in No. 259" (which was another conviction of the defendant at the same term).

The first exception is that the court instructed the jury that "if they were satisfied beyond a reasonable doubt that the defendant had the pistol about his person, and was off his own lands, such possession was *prima facie* evidence of its concealment, and it would then be incumbent upon the defendant to rebut the presumption of criminal intent, and to do this he could rely upon the evidence of the State." This follows the language of the statute, the Code, sec. 1005; *S. v. McManus,* 89 N. C., 555; *S. v. Brown,* 125 N. C., 704. In many other instances, murder among them, upon proof of a certain state of facts, a legal presumption arises by which the burden is shifted upon the defendant to rebut or disprove.

The second exception, that the punishment is cruel and unusual, is without merit. In view of the circumstances detailed in the evidence and set out by the judge as ground for the sentence (as was admissible, *S. v. Wilson,* 121 N. C., 650), the sentence did not err on the side of severity. *S. v. Apple,* 121 N. C., 584; *S. v. Haynie,* 118 N. C., 1265; *S. v. Miller,* 94 N. C., 904; *S. v. Pettie,* 80 N. C., 367.

The third and last exception is that the sentence is made to begin on the expiration of another sentence imposed on the defendant. This practice, called "cumulative sentences" is not unusual on the circuit and is not contrary to any principle of law. It is in conformity with the settled criminal practice in England and most of the States. Where a person is convicted of several offenses at the same time he may be sen-

tenced to several terms of imprisonment or penal servitude, one after the conclusion of the other. 1 Bishop New Crim. Law, sec. 953; 4 A. & E. (1 Ed.), 953; 1 Russell Crimes (5 Ed.), 82; (1068) 1 Bishop Cr. Proc., secs. 1326, 1327, and the numerous cases cited by each. If this were not so, a person could not be punished for an offense committed while undergoing punishment unless the trial were postponed till its expiration. Our statute does not expressly require sentences to begin *in presenti,* and it ought not to be so construed where no present effect can be given to such sentence by reason of another subsisting judgment of imprisonment. "To hold that where there are two convictions and judgments of imprisonment at the same term, both must commence immediately, and be executed concurrently, would clearly be to nullify one of them. To postpone judgment in one case till the termination of the sentence in the other would, if allowable, be attended with obvious inconvenience and expense, without any corresponding benefit to the convict." *Williams v. State,* 18 Ohio St., 46. "A sentence to a term of imprisonment, to commence from and after the expiration of a former sentence is legal; and if the former sentence is shortened by a pardon, or by a reversal on writ of error, it expires, the succeeding sentence immediately then takes effect, as if the former had expired by lapse of time." *Kite v. Commonwealth,* 52 Mass. (11 Met.), 581. Indeed, this is the universally recognized practice, founded upon reasons above given, except in a very few States, where the peculiar wording of the statute forbids this course.

It should be noted that there is a difference between "cumulative sentences," such as are pronounced upon a person under conviction at the same time of several offenses, and "cumulative punishment," which is an increased punishment inflicted for a second or third conviction under "Habitual Criminals" Acts. 8 A. & E. (2 Ed.), 480, note.

The sentence, the conviction being in Wilkes Superior Court (1069) to work the public roads of Forsyth, is authorized by section 9, ch. 581, Laws 1899, upon certain prerequisites, which are presumed to have been complied with, in favor of the regularity of judicial proceedings, *"omnia presumuntur rite acta." S. v. Hicks,* 101 N. C., 747. Besides there is no exception on that ground. The case differs from *S. v. Austin,* 121 N. C., 620, in that the act there forbids the working of the convicts on public roads outside the county, and here the act authorizes it. The legality of working prisoners on the public roads has been often held. *S. v. Weathers,* 98 N. C., 685; *S. v. Haynie,* 118 N. C., 1270; *S. v. Hicks, supra.*

The defendant appealed in three cases, all from the same term of court, but gave no appeal bond, and obtained leave to appeal without bond in this case only. The other two appeals have consequently been dismissed,

for "each tub must stand on its own bottom." If appeal bonds had been given the bond in any one case would have been liable only for the costs in that case, and when leave is given to appeal without bond it is not *pro forma,* but must be for good reasons, assigned upon affidavit and certificate (both often given too lightly) applicable to that case alone.

No error.

Cited: *S. v. Davis, ante,* 1059; *S. v. Young,* 138 N. C., 574; *In re Hinson,* 156 N. C., 252; *S. v. Woodlief,* 172 N. C., 889.

(1070)

STATE v. ZEB HUSKINS.

(Decided 17 April, 1900.)

Burning Stacks of Oats, Straw and Fodder—The Code, Section 985 (5)—Motion in Arrest of Judgment.

A motion in arrest of judgment, because the indictment did not conform to the statute under which it was brought, by averring that the stacks burned were "out of doors," Code, sec. 985 (5), was properly overruled.

INDICTMENT for burning eight stacks of oats, three stacks of straw and three stacks of fodder, tried before *Allen, J.,* at Fall Term, 1899, of MITCHELL. After conviction the defendant moved in arrest of judgment because the indictment did not allege that the stacks were *"out of doors"*—pursuant to the statute upon which the indictment was founded, Code, sec. 985 (5). His Honor overruled the motion and rendered judgment, from which the defendant appealed.

The statute is quoted in the opinion.

S. J. Ervin for defendant.

The Attorney-General for the State.

FURCHES, J. This is an indictment for burning eight stacks of oats, three stacks of straw and three stacks of fodder, the property of one Chapman. The defendant was indicted under section 985 (5) of the Code, and upon conviction moved in arrest of judgment.

The grounds upon which this motion was made are not stated in the record, but, upon the argument in this Court, it was put upon the ground that the indictment failed to state that the property destroyed

(1071) was "out of doors." The statute provides that when "any person, who shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, *oats,* buckwheat, rice, tobacco, hay, *straw,*

fodder, shucks, or other provender, *in stacks,* hills, rick or pen, or secured in any other way, out of doors, shall be guilty of a misdemeanor," etc.

It seems to us that by the exercise of common sense, applied to experience and observation, we are taught that such things as oats, straw and fodder are not stacked in doors. They are often stored away in barns and other houses, but not stacked in them—stacking of such crops as these is generally for the want of room to store them in doors. But if it be contended that the eight stacks of oats, three stacks of straw and the three stacks of fodder were stacked "in doors" it would not have been proper to charge them as being "out of doors," and the defendant's motion to quash would have been groundless. We introduce this argument to show, as we think, the fallacy of the defendant's motion, and not because we have any idea that they were stacked "in doors."

But the statute makes it a misdemeanor to burn the stacks of another person, whether in doors or "out of doors," as we think, or to burn any of these crops secured in any other way "out of doors." It seems to us that the Legislature, knowing something of the way farmers take care of such crops as oats, straw and fodder, took it for granted, if they were stacked, the stacks would be out of doors. But as they might be secured in other ways than by stacking, the Legislature provided that if this is done "by other means out of doors" (than by stacking) that burning them thus secured shall be a misdemeanor.

But the burning of such stacks is made a misdemeanor, a complete offense, whether in doors, or "out of doors." They are specifically named.

It is something like murder in the first degree under the (1072) statute of 1893: That where the killing is committed in any of the specified ways, as by poisoning, etc., it is not necessary to prove deliberation or premeditation. This is only necessary to be shown where the killing has been done in some other way than those specially named. So here, the burning of the stacks of oats, straw and fodder is a complete offense without showing anything more. But if the oats, straw and fodder are secured in some other way than in stacks "out of doors," then it is the same offense to burn them that it would have been had they been stacked.

The defendant cited and relied on *S. v. Avery* 109 N. C., 798. And while that is an indictment under the same statute for burning cotton in bales in a railroad car, and some of the arguments used in discussing that case are the same as those used by defendant's counsel in arguing this case, still, we do not think the opinion in that case controls the argument in this. We think it was not necessary to state that the oat stacks, the straw stacks and the fodder stacks were "out of doors." And as this was the only question involved in the appeal, the judgment must be

Affirmed.

(1073)

STATE v. SOUTHERN RAILWAY COMPANY.—2 Cases.

(Decided 17 April, 1900.)

Passenger Rates—Discriminating Rates—Free Passes—Appeal by State Restricted by General Statute, Code, Section 1237—Modified by Act Establishing the Eastern District Criminal Court, Laws, 1899, Chapter 471, Section 6—Aliter, by Act Establishing the Western District Criminal Court, Laws 1899, Chapter 371, Amended by Chapter 594.

1. The general law, Code, sec. 1237, restricts the right of appeal by the State to four classes: (1) Upon a special verdict; (2) upon demurrer; (3) upon a motion to quash; (4) upon arrest of judgment.

2. While the right of appeal by the State under the general law is modified by the act of 1899, ch. 471, as applicable to the Eastern District Criminal Court; the act of 1899, chs. 371 and 594, establishing the Western District Criminal Court, contains no such provision as applicable thereto.

INDICTMENT for discriminating in passenger rates and granting free pass to T. N. Hallyburton, heard on appeal from criminal court for BURKE, before *Shaw, J.*, at chambers, 13 March, 1900.

On the trial in the criminal court the defendant requested his Honor to charge the jury: That the transportation of Hallyburton from Morganton to Washington and return was interstate commerce, and was not the subject of indictment in the State courts. The court refused to give such instruction, and defendant excepted, and upon conviction and judgment appealed to the Superior Court. His Honor, *Shaw, J.*, was of the opinion that the defendant was entitled to have the instruction
(1074) prayed for given substantially, and remanded the case to the criminal court for a new trial.

The solicitor for the State excepted, and appealed to the Supreme Court.

A. C. Avery and I. T. Avery with the Attorney-General for the State.

G. F. Bason and F. H. Busbee for defendant.

DOUGLAS, J. This is a criminal action, tried upon the following bill of indictment:

The jurors for the State upon their oaths present: That on 1 January, A. D., 1899, 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 provision of chapter 320, Public Laws of 1891; and that the Southern Railway Company required and received of persons traveling over its said line of railway the regular first-class passenger fare of 3 1-4 cents per mile for each passenger.

And the jurors aforesaid, on their oaths 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 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 (1075) 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 the 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 1 January, 1899, 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 said Southern Railway Company demanded and received a regular passenger fare of three and one-quarter cents (3¼) 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 present, that the 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 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 Western North
(1076) 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.

Among other testimony T. N. Hallyburton testified as follows:

"I went on a free pass from here through Salisbury to Washington City about 15 March over the Southern Railroad. I paid no fare. Sam Huffman was on the train with me and other people. I had a free pass. I got it during the session of the Legislature. I have used another pass from the Southern Railway Company, from Raleigh to Morganton, prior to that time. I was doorkeeper of the State Senate. I rode on free pass during the session of the Legislature. The pass was signed by Col. A. B. Andrews, First Vice President of the Southern Railway Co."

Here the defendant admitted that the Southern Railway Company was operating a railroad from Morganton to Salisbury. The witness further stated:

"I paid my fare when I went to Raleigh at the middle of the session and paid full fare. The rate at that time was 3¼ cents per mile first-class fare, and 2¾ cents per mile second-class."

It was admitted by the defendant that the Southern Railway Company was a common carrier of passengers from Morganton to Salisbury, and that the road between Morganton to Salisbury was a part of its line.

On cross-examination the witness stated:

"I got a trip ticket from Raleigh to Morganton free, and then I got a return trip ticket from Morganton to Washington and return."

(1077) It was admitted by the defendant that the regular first-class fare charged by the Southern Railway Company along its whole line and all roads it operated was three and one-fourth (3¼) cents regular first-class fare, and two and three-fourths (2¾) cents second-class fare per mile at the time these passes were issued.

There was other testimony tending to show the rates of fare usually charged, the name and length of the railroad, and by whom it was operated. The defendant was found guilty, and appealed to the Superior Court, where the following judgment was rendered:

This was a criminal action, tried at March Term, 1900, of the Western Criminal District Court for Burke County, before *Stevens, J.*, and a jury for discrimination in the carrying of passengers as charged in the bill of indictment.

The jury returned a verdict of guilty and from the judgment pronounced thereon the defendant appealed to the Superior Court, which appeal was heard by *Shaw, J.*, at chambers at Lenoir, N. C.

The defendant requested the court to charge the jury that there was a variance between the allegation and proof as to the transportation of the witness Hallyburton, the bill having charged that he was carried from Morganton to Salisbury, while the proof showed that he was carried from Raleigh to Morganton. This prayer was refused by the court, and the defendant excepted.

In the opinion of the court the variance alleged was immaterial, and there was no error in the court's refusing to give said prayer.

The defendant further requested the court to charge the jury that the transportation of said witness from Morganton to Washington and return was interstate commerce, and was not the subject of indictment in the State courts, etc.

The court refused to give said prayer, and the defendant ex- (1078) cepted.

This Court is of the opinion that the defendant was entitled to have had this prayer given substantially, and for failure to give the same defendant is entitled to a new trial.

There were other exceptions taken by the defendant upon the trial, but as the questions involved therein may not arise upon the next trial, they are not passed upon by the court.

For the error pointed out above the defendant is entitled to a new trial, and for this purpose the case is remanded to the Western Criminal District Court of Burke County. THOMAS J. SHAW,

Judge Riding the Tenth Judicial District.

From this judgment the State appealed to this Court.

After a careful consideration we can find no authority for such an appeal. The State can appeal only in those cases allowed by statute which are limited by section 1237 of the Code to the following:

1. Upon a special verdict.
2. Upon demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.

The case at bar comes within none of these classes, and the act establishing the Western District Criminal Court (chapter 371, Laws 1899, amended by chapter 594), contains only the following provision: "Sec. 5. That appeals shall be from the Superior Court to the Supreme Court as now provided by law for offenses originally tried in the Superior Courts and appealed to the Supreme Court." As the State would have had no appeal in the case at bar under previously existing acts, it was

given none under the act of 1899. The act establishing the Eastern District Criminal Court(section 6, ch. 471, Laws 1899), specially provides for an appeal by the State in cases like that at bar, but no such (1079) provision can be found as to the Western Criminal Court. Hence we must dismiss the appeal.

This action on our part is not an affirmation in any degree, express or implied, of the judgment of the court below. As we can not entertain the appeal, the principles therein decided are not before us, and, therefore, we are powerless to correct any error in the judgment, if error there be, no matter how serious or patent it may appear to us.

Appeal dismissed.

APPEAL BY THE STATE IN ANOTHER CASE BETWEEN SAME PARTIES.

DOUGLAS, J. This is a criminal action for violation of chapter 320 of the Public Laws 1891, by transporting free of charge upon the trains of the defendant one Samuel Huffman from the town of Morganton to the town of Salisbury, both being within the State of North Carolina. The indictment, testimony and procedure are so nearly identical with those in the preceding case against the same defendant for the free transportation of one Hallyburton that a separate discussion does not seem necessary. For the reasons stated in that case, the appeal in the case now before us is dismissed.

Appeal dismissed.

Cited: *S. v. Savery, post,* 1088.

(1080)

STATE v. DOCKERY McLAUGHLIN.

(Decided 1 May, 1900.)

General Rule, Opinions Not Evidence—Exceptions: Experts, Identity, Necessity.

1. The general rule is, facts and not opinions are to be listened to by the jury. There are some exceptions: (1) The opinion of experts; (2) opinions on the question of identity; (3) opinions received from necessity.
2. The committing justice may state what the prosecutrix testified to before him; the jury who heard her evidence before them are to determine whether her two statements were substantially the same.

INDICTMENT for the rape of Harriet McMillan. The prisoner was convicted at July Special Term, 1899, of the Eastern District Criminal

Court of ROBESON, *Battle, J.*, presiding, and appealed to the Superior Court, assigning as error admission of improper evidence. The prosecutrix had been examined and cross-examined. One of the committing justices, D. L. Stewart, was examined on the part of the prisoner to show discrepancies in the evidence of prosecutrix in the justice's court, and on the present trial. On his cross-examination, the State proposed to ask the witness if her testimony in this court was substantially the same as it was on the hearing before him in justice's court. Objection by the prisoner. Question admitted. Answer: "Yes, she testified to about the same on both trials." Prisoner excepts. The prisoner was convicted, and judgment of death was passed on him. He appealed to the Superior Court, *Timberlake, J.*, presiding, who adjudged at chambers on 28 December, 1899, that there was error in the ruling of said criminal court, and that the defendant is entitled to a new trial. The solicitor, C. M. McLean, excepted, and appealed to the Supreme Court.

McLean & McLean with Attorney-General for the State. (1081)
J. D. Shaw, Jr., and G. B. Patterson for defendant.

FAIRCLOTH, C. J. The defendant was convicted of the crime of rape, in the criminal court. On appeal to the Superior Court his Honor held that there was error in the trial, and the State appealed to this Court.

During the trial the prosecutrix, Harriet McMillan, was examined and cross-examined. The defendant examined the committing justice of the peace as to the evidence of the prosecutrix before him, who recited her evidence fully to the jury for the purpose of showing discrepancies in her two statements. The State on cross-examination proposed to ask the witness, "if the testimony of Harriet McMillan, the prosecutrix, in this court was substantially the same as it was on the hearing before him in the justice's court." The objection of the defendant was overruled, and the question admitted, and the defendant excepted. The witness said: "She testified to about the same on both trials."

The admission of this question and answer was error. The general rule of law is that the jury (or the judge, as the case may be) are the triers of matters of dispute, and form their conclusions from the facts before them, and not upon the opinions of others on the subject. So that facts and not opinions are to be listened to by the jury.

To this general rule there are some exceptions: 1. The opinion of experts; 2. Opinions on the question of identity; 3. Opinions received from necessity, *i. e.*, when from the nature of the subject under investigation, no better evidence can be obtained. Illustration: (1082) Whether A was sick on a certain day, the opinion of a person who saw him on that day that A appeared sick, is admissible. *McKee v. Nelson*, 4 Cowan, 355.

The ordinary witness is not embraced within these exceptions, and he therefore falls under the general rule. That is the case in this instance.

Whether the two statements by the prosecutrix were substantially the same, is a fact to be determined by the jury, and not the witness. That would in effect make the witness the jury as to that fact. It was competent for the witness to state what the prosecutrix said on the former trial, and the jury would then determine whether the two statements were the same or not.

The converse of the principle is stated thus: "To impeach the credibility of a witness by proving that he swore differently as to a particular fact on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed to; it is sufficient if he is able to prove the repugnancy as to the particular fact, with regard to which it is alleged to exist." *Edwards v. Sullivan,* 30 N. C., 302.

There must, therefore, be a new trial in the criminal court, and it is so ordered.

The judgment of the Superior Court was correct, and it is

Affirmed.

Cited: *S. v. McDowell,* 129 N. C., 524; *S. v. Shuford,* 152 N. C., 810.

(1083)

STATE AND CITY OF WINSTON v. A. SAVERY.

(Decided 1 May, 1900.)

Vaccination Ordinance—Plea and Verdict of Not Guilty—Appeal by the State.

1. In a criminal prosecution, where there is a plea and general verdict of not guilty, the State has no right of appeal; such verdict ends the case.
2. The Code, sec. 1237, *restricts* the right of appeal on the part of the State to four instances, and *allows no other*: Where judgment has been given for the defendant: (1) Upon a special verdict; (2) upon a demurrer; (3) upon a motion to quash; (4) upon arrest of judgment.

CLARK and MONTGOMERY, JJ., dissent.

CRIMINAL ACTION for violation of special city ordinance of Winston in refusing to be vaccinated, heard on appeal from the mayor's court, by *Robinson, J.,* and a jury upon the plea of not guilty at Fall Term, 1899,

of FORSYTH. Upon the trial the prosecutor testified the warrant had not been sworn to. Thereupon the defendant claimed a verdict of not guilty, which was allowed, and the State appealed.

Glenn & Manly with the Attorney-General for State.
Jones & Patterson for defendant.

DOUGLAS, J. This is a criminal action brought here on the appeal of the State from a judgment discharging the defendant after a general verdict of not guilty. The material facts are as follows: The cause came on to be heard before the Superior Court on a war- (1084) rant issued by the mayor of the city of Winston against the defendant. There was no defect appearing on the face of the warrant, though no affidavit was attached.

The defendant pleaded not guilty, and the jury was empaneled.

The State introduced a witness, who swore that the warrant was issued without any affidavit, he being the witness referred to in the warrant as having made the affidavit.

Upon it appearing that no affidavit was made, defendant contended he was entitled to a verdict of not guilty.

The State first contended that the warrant being regular, that the absence of an affidavit made no difference, and that the most the court could do, in case it refused to hear the cause, was to withdraw a juror and dismiss the warrant. The court, in the exercise of its discretion, refused to withdraw a juror or dismiss the action, and directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged.

Upon this state of facts the State and the city of Winston moved the court to strike out the verdict of not guilty, as the defendant had never been in jeopardy, and to reinstate the case for trial, or at most to treat the entry of not guilty as a dismissal of the action, to the end that the State might proceed as it thought best.

The court denies the motion, and the State and the city of Winston appeal.

No motion was made to quash—on the contrary the defendant pleaded to the indictment. The State insisted that the most the court could do was to withdraw a juror. It does not appear that the State made any such motion; but on the contrary it does appear that the State insisted that the case should be heard on its merits. No one asked that the indictment be quashed, and no one moved that a juror be (1085) withdrawn. The court below announced that "in the exercise of its discretion, it *refused* to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done,

and the defendant discharged." We are thus brought face to face with a *general verdict* of *not guilty,* which we are asked to set aside on the appeal of the State. Look at it as we may, there it stands, and we can proceed no further unless we set it aside. We may *reverse* as many supposed judgments as we please quashing the indictment, but that of itself will not do away with the *verdict.* We can not *reverse* the verdict, and hence if we entertain the appeal we are forced to establish for the first time in this State the dangerous precedent of granting the State a *new trial* in a criminal action. We may borrow the words of an eminent lawyer, and say that in our opinion such action would be "not simply error, but a misarrangement of the whole idea of jurisprudence."

Where is there any element of quashing? His Honor did not quash and did not intend to quash the indictment. We do not understand the State as maintaining that that would have been the proper action. At best it seems to us to say that his Honor should have permitted the case to proceed; but that if he was determined to end it erroneously, he should have committed the error of quashing the bill, because then we could have reversed him on appeal. It is true his Honor may have committed error, but would that justify us in exercising a *quasi*-equitable jurisdiction in criminal matters?

But it is urged that unless we adopt some such construction the defendant may go unwhipt of justice. How does that concern us at present? What right have we to find him guilty, or to assume his guilt, for the purpose of invoking a strained construction upon a pure
(1086) question of law? We are well answered in *S. v. Spier,* 12 N. C., 491, 493, where this Court says: "In this case, the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be, when it is brought before this Court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment, in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose conviction if not procured on one trial, might be secured on a second or third, whether they were guilty or not." The opinion of the Court delivered by *Judge Hall* and the concurring opinion of *Chief Justice Taylor,* are both exceedingly interesting and instructive. It should be noted that this case does *not* decide that the doctrine "once in jeopardy" applies *only* to capital felonies, although that may be inferred from its reasoning if the phrase is taken in its strictest sense. But there is certainly not the slightest intimation that a general verdict of not guilty can ever be set aside, and that is the question now before us. That opinion quotes *Lord Coke* as saying that "the life of a man shall not be twice put in jeopardy upon the same charge, for a capital

offense"; but it also quotes *Lord Coke* as laying down the rule in still broader terms, and so as to render the discharge of the jury in *treason, felony* or *larceny,* illegal, even with the consent of the prisoner. (3 Inst., 110.) We do not understand the distinction between felony and larceny, but so great a judge must have had something in his mind.

The doctrine of "once in jeopardy" goes far beyond that of former acquittal, and applies where the jury have never rendered any verdict. Thus it is held that where a jury has once been empaneled in a capital case, they can not be discharged before verdict except for (1087) causes beyond human control. A conscientious inability to agree after every reasonable effort, is now deemed a cause beyond control even in capital cases; but it should clearly appear that there is no reasonable possibility of agreement.

Let us briefly review the history of appeals by the State as shown in our reports. *S. v. M'Lelland,* 1 N. C., 632, in the Superior Court, and *S. v. Haddock,* 3 N. C., 162, decided by the old Court of Conference, recognize the right of the State to appeal from the county court to the Superior Court on a verdict of acquittal, the Court, however, in the latter case doubting the principle. In fact, the opinion distinctly says that if it were *res integer,* their opinion would be to the contrary. These cases were overruled by *S. v. Jones,* 5 N. C., 257, and we can find no subsequent case in our reports where the State has ever claimed the right of appeal from a general verdict of acquittal. In the last named case the head-note says: "The State is not entitled to an appeal in a criminal prosecution," while the case is briefly disposed of by a *per curiam* opinion as follows: "The State in a criminal prosecution is *not* entitled to an appeal under any of the provisions of the act of Assembly regulating appeals; this appeal must, therefore, be dismissed." In *S. v. Taylor,* 8 N. C., 462, this Court says: "It would be to no purpose for this Court to decide whether the paper-writings offered in evidence were properly rejected by the circuit judge or not; for upon the supposition that they were not, we could not grant a new trial after the acquittal of the defendant." This case, so clearly enunciating the principle and so repeatedly affirmed, has apparently never been questioned. In *S. v. Martin,* 10 N. C., 381, the entire case is as follows: "The defendant was indicted below for an assault and battery, and being acquitted was discharged; whereupon the State appealed. On the reading of the record in this Court, Mr. Attorney-General *gave up the cause* (1088) on the authority of *S. v. Taylor,* 8 N. C., 462." This example appears to have been faithfully followed for forty-eight years, as the State does not appear even to have attempted an appeal until 1869 in *Myers v. Credle,* 63 N. C., 506. *Taylor's case* was promptly and emphatically reaffirmed; whereupon the State again subsided. In 1872 the

State again tried it, but with no better result. *S. v. Phillips,* 66 N. C., 646; *S. v. Freeman, ibid.,* 647; *S. v. West,* 71 N. C., 263; *S. v. Armstrong* 72 N. C., 193; *S. v. Lane,* 78 N. C., 547; *S. v. Swepson,* 82 N. C., 541; *S. v. Moore,* 84 N. C., 724; *S. v. Tyler,* 85 N. C., 569, 572; *S. v. Powell,* 86 N. C., 640; *S. v. R. R.,* 89 N. C., 584; *S. v. Ostwalt,* 118 N. C., 1208; *S. v. Ballard,* 122 N. C., 1024; *S. v. Hinson,* 123 N. C., 755; *S. v. Davidson,* 124 N. C., 839; *S. v. R. R., ante,* 1073. In this case the Court says:

"The case at bar comes within none of these classes (those mentioned in section 1237 of the Code). . . . Hence we must dismiss the appeal. This action on our part is not an affirmation in any degree, express or implied, of the judgment of the court below. As we can not entertain the appeal, the principles therein decided are not before us, and therefore we are powerless to correct any error in the judgment, if error there be, no matter how serious or patent it may appear to us."

In the celebrated case of *S. v. Swepson,* 79 N. C., 632, this Court, while stating in unequivocal terms that the verdict was obtained by fraud, declined to entertain the appeal of the State.

It is equally interesting to note the origin and growth of the right of the State to appeal under any circumstances. This right even (1089) in its most limited form is purely the offspring of judicial construction. Apparently the first allusion to it in our reports since we have had a Supreme Court, is in *Myers v. Credle,* 63 N. C., 506, where this Court, dismissing the appeal of the State on a verdict of not guilty (citing *Taylor's case, supra*), briefly says: "While the humanity of our laws gives the right of appeal to the accused in all cases, the class of cases in which the State has that right is very small." What they are is not stated. In *S. v. Lane, supra,* this Court in dismissing the appeal, says: "Until lately no case could be found in the English reports where a writ of error was allowed on behalf of the Crown in a criminal prosecution, and it has not yet been decided that such a writ may lawfully issue, as, in the cases in which it did issue, the question was not made. No reference is found to it in the older books on criminal law. . . . It will be seen that in many of the States it is held that the State has no appeal in a criminal case under *any* circumstances. In all, or nearly all, it seems to be held that where the right of appeal exists, it is given by statute; and that, if it exists at all independently of a statute, it is confined to two cases only—one where the inferior court has given judgment for the defendant upon a special verdict, and the other where it has given a like judgment upon a demurrer to an indictment or upon a motion to quash, which is considered as substantially similar. In this State it has been recognized as existing in *those two cases,* but I am not aware that it has been in any others."

In *S. v. Moore,* 84 N. C., 724, this Court says: "The State has no right to appeal in a case like this. Its right of appeal in a criminal action is not derived from the common law or any statute of this State, but has obtained under the sanction of the courts by a long practice, and has been recognized in but four cases, to wit, where judgment has been given for the defendant upon a special verdict; (1090) upon a demurrer; a motion to quash; and arrest of judgment."

By this time it became apparent that the courts, acting upon the *quo minus* and *ac etiam* principle, had enlarged their jurisdiction of State appeals to the verge of public safety, and hence section 1237 of the Code was passed, not as an enabling but as a *restrictive* statute. This section provides that "an appeal to the Supreme Court may be taken by the State in the following cases, *and no other:* Where judgment has been given for the defendant (1) upon a special verdict, (2) upon a demurrer, (3) upon a motion to quash, (4) upon arrest of judgment." The statute is emphatic and unequivocal, and yet we are now asked to add another case, that is, where in our opinion, a general verdict of not guilty is *equivalent* to quashing. If we can do this in one case, why can we not do so in all cases where the erroneous instructions upon the trial appear to us *equivalent* to any one of the above cases? Can we not thus reach every erroneous instruction upon a question of law? In the recent cases of *S. v. R. R., ante.,* 1073 the facts were practically undisputed; there was a verdict of guilty in the criminal court, and the judgment of the Superior Court was *equivalent* to sustaining a plea to the jurisdiction. Were we wrong in refusing to entertain the State's appeal? If this Court was right then, it seems to us we must dismiss the present appeal.

In conclusion, we can do no better than quote the concluding words of *Justice Ashe* in delivering the opinion of a unanimous Court in *S. v. McGimsey,* 80 N. C., 377, 383, as follows: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors and we are unwilling to move a step further in the direction of discretion. . . . In coming to this conclusion, we are aware that (1091) its effect may possibly be to turn loose a bad man upon society, but it is better in the administration of the law that there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which, in times of civil commotion that may occur in the history of every country, would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges to crush the liberties of the citizen."

Under our view of the law the appeal must be

Dismissed.

MONTGOMERY, J., dissenting: The term "appeal" as it is understood to mean the removal of a cause for final judgment from an inferior to a superior court to be tried *de novo* upon its merits, is of civil law origin, and was unknown to the common law. A writ of error upon matter of law was the remedy in criminal as well as in civil at the common law, but the writ was not allowable to the prosecution in criminal cases. In modern practice appeals can not be had by the State in criminal cases except as provided by statute. The decisions in our Court upon this subject are interesting. In *S. v. Jones,* 5 N. C., 257, it was held that in a criminal prosecution the State was not entitled to an appeal under any of the provisions of the act of Assembly regulating appeals. In *S. v. Caudle,* 63 N. C., 506, it is said "the class of cases in which the State has that right (appeal) is very small." In *S. v. Lane,* 78 N. C., 547, it was held that the State could appeal upon a special verdict, upon a demurrer, and upon a motion to quash. In *S. v. Moore,* 84 N. C., 724, it was said: "Its (the State) right of appeal in a criminal action is not derived from the common law or any statute of this State, but has obtained under the sanction of the courts by a long practice, and (1092) has been recognized in but four cases, to wit: Where judgment has been given for defendant upon a special verdict; upon a demurrer; a motion to quash, and arrest of judgment." After the decision in the last-mentioned case, section 1237 of the Code was enacted, and embraces the four cases mentioned in that decision in which the State can appeal.

In the case before us the defendant was tried in the court of the mayor of Winston, was convicted and fined, and appealed to the Superior Court. In that court the defendant was tried on the warrant which was issued by the mayor, and upon which there was no apparent defect, though, in fact, no affidavit of a complaint was attached. A witness, the person upon whose alleged affidavit the warrant was issued, testified that it was issued without affidavit. The subsequent proceedings, material for the purposes of this appeal, were, in the language of the case on appeal, as follows:

It appearing that no affidavit was made, the defendant contended he was entitled to a verdict of not guilty.

The State contended that the warrant being regular on its face, the absence of an affidavit made no difference, and that the case should be heard on its merits, and that the most the court could do, in case it refused to hear the case, was to withdraw a juror and dismiss the warrant.

The court announced that, in the exercise of its discretion, it refused to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged.

The case before us is here on the appeal of the State, and if the appeal can be sustained it must be on the ground that the course of his Honor in instructing the jury to return a verdict of not guilty was in legal effect the quashing of the bill of indictment (the justice's warrant). I am of the opinion that the action of his Honor was equivalent to a quashing of the indictment from which the State had the right to appeal. I know it is said in *S. v. Powell,* 86 N. C., 640, that: "When a party charged with an offense before a tri- (1093) bunal of competent jurisdiction has been tried and acquitted the result is final and conclusive, and no appeal is allowed the State to correct any error committed by the court." But I feel satisfied that in this case the verdict of the jury returned by direction of his Honor was not such an acquittal as is contemplated in *S. v. Powell, supra.* An acquittal, to be final and conclusive, as is contemplated in the last-mentioned case, must be had upon a trial upon the *merits* of the case. The ruling of his Honor in this case was in legal effect exactly as if he had quashed the bill of indictment for defect in substance. The State was anxious to have the case proceeded with on its merits, and insisted on such a trial, but his Honor upon discovering that the warrant was issued without an affidavit stopped the trial, and because of that defect, the issuing of the warrant without affidavit, directed the jury to return a verdict of acquittal. It is true that the third subdivision of section 1237 of the Code is in the words "upon a motion to quash," and it is also true that in the regular course of procedure the motion to quash should be made before the defendant pleads to the indictment; but in point of legal effect his Honor, without a motion on the part of the defendant made before or after pleading, after the defendant had pleaded and the jury had been empaneled, quashed the indictment because the warrant was not issued on affidavit. He did not enter a formal judgment that the indictment (warrant) be quashed, but what he did was in legal effect just as if he had done so. The defendant was not tried for the offense with which he was charged, the warrant itself being sufficient in substance and regular in form, but he was discharged by an order to the jury to acquit him of the charge because the warrant was not issued on (1094) affidavit. The doctrine of "once in jeopardy" applied only to trials where the indictment is for a capital felony. Wharton's Crim. Law, p. 577; *S. v. Spier,* 12 N. C., 491.

CLARK, J. I concur in the dissenting opinion.

Cited: *S. v. Branner,* 149 N. C., 564.

(1095)

STATE v. ARCHIE KINSAULS.

(Decided 8 May, 1900.)

Exceptions to Jurors—Peremptory Challenges—Possession of Deadly Weapon—"Broadside Exception" to Judge's Charge Inadmissible, Code, Section 550—When Tolerated.

1. The finding by the judge that a juror tendered is indifferent, is not reviewable; other exceptions will not be reviewed, if the prisoner has not exhausted his peremptory challenges.
2. Evidence which showed possession by the prisoner of weapons, is competent to show preparation.
3. As a general rule a broadside exception to the judge's charge is inadmissible. *In favorem vitæ*, in a capital case, the Attorney-General will readily assent to the insertion of proper exceptions, *nunc pro tunc.*
4. The strict rule laid down in *S. v. Boyle*, 104 N. C., 800, as to arraying the evidence and presenting the contentions of the parties, has been overruled. *S. v. Edwards*, at this term. Recapitulating the evidence, unless requested, is ordinarily not required.
5. When objectionable remarks are made by counsel, all that the court can do is to stop him, and to caution the jury not to consider them.
6. The verdict, "guilty of the felony of murder in the first degree," is a substantial compliance with the statute—the addition next day by order of the court, on reading the minutes, of the words "in manner and form as charged in the bill of indictment," was a mere formality.
7. An exhortation from the pulpit to the jury who by consent attended divine service on Sunday, for them to do their duty between the State and the prisoner, followed by a prayer for a fair trial, although wanting in propriety, was not prejudicial to the prisoner.

INDICTMENT for murder of John C. Herring, tried before *Bryan, J.*, at October Term, 1899, of SAMPSON. The prisoner was con-
(1096) victed of murder in the first degree, and from the death sentence appealed to Supreme Court. There was a "broadside" exception to the judge's charge, which by consent of the Attorney-General, was allowed to be substituted, *nunc pro tunc,* by specific exceptions, which were considered by the Court, and appear in the opinion.

John D. Kerr for defendant.
The Attorney-General for the State.

CLARK, J. The exceptions to jurors were properly abandoned in this Court. The finding of fact by the judge that a juror is indifferent is not reviewable. *S. v. Potts,* 100 N. C., 457; *S. v. Fuller,* 114 N. C., 891.

Besides, other exceptions to jurors if made could not be reviewed, since the prisoner did not exhaust his peremptory challenges. *S. v. Hensley,* 94 N. C., 1021; *S. v. McDowell,* 123 N. C., 764; Walser's Digest, 281.

The only exception to evidence was that which showed weapons in possession of the prisoner but which was competent to show preparation. The sole exception to the charge was the "broadside" exception "to the charge as given," which the unbroken decisions of this Court, in accordance with the provision of the statute governing appeals (Code, sec. 550), hold inadmissible. *S. v. Moore,* 120 N. C., 570; Walser's Digest, 149, 249. But in a capital case, the Attorney-General will readily assent to the insertion of proper exceptions *nunc pro tunc. S. v. Huggins, ante,* 1055; *S. v. Wilcox,* 118 N. C., 1131. The prisoner's counsel insists that the charge is defective because it did not array the evidence and present the contentions of the parties. The strict rule laid down in *S. v. Boyle,* 104 N. C., 800, has since been overruled, and we find the charge a reasonable compliance with the statute. If the (1097) prisoner's counsel had desired fuller instructions he should have asked for them. *S. v. Edwards, ante,* 1051. The prisoner further objects that the judge did not recapitulate the evidence. The regularity of the proceedings below are presumed, and the appellant must show error. The charge does not purport to be in full, and merely states "the judge charged among other things." All that is required is that the judge send up the parts of the charge excepted to. It does not affirmatively appear that the judge did not recapitulate the evidence. The prisoner had ten days after court to make out his exceptions to the charge, and if in them he had excepted that the judge had not recapitulated the evidence, his Honor would have been put on notice to state how the fact was. Besides, ordinarily, it is not error not to recapitulate the evidence unless it is requested. *Boon v. Murphy,* 108 N. C., 187, and cases there cited; Clark's Code (3 Ed.), sec. 412 (3); *S. v. Ussery,* 118 N. C., 1177.

When the remarks of counsel were objected to, the judge promptly stopped him and cautioned the jury not to consider them, which was all the court could do. *S. v. Rivers,* 90 N. C., 738. Besides, no exception was taken.

The verdict "guilty of the felony of murder in the first degree" is a substantial compliance with the statute, and the meaning of the jury could not be misunderstood. The addition, next day by order of the court, of the words "in manner and form as charged in the bill of indictment," was a mere formality which in no wise prejudiced the prisoner.

A month after the trial, the prisoner's counsel moved for a new trial because of misconduct of the jury. The court was then *functus officio. S. v. Sanders,* 111 N. C., 700; *S. v. Bennett,* 93 N. C., 503; *S. v. Warren,*

92 N. C., 825. If the motion had been made during the term,
(1098) the judge should have found the facts, and the verdict should have been set aside as a right only when there was misconduct affecting the verdict of the jury, and not when there was merely opportunity. *S. v. Tilghman,* 33 N. C., 513. Here the alleged misconduct was the remarks of a preacher at a church which the jury were allowed to attend with the consent of the prisoner. If the remarks had been prejudicial, the sermon was a matter of public notoriety, and the prisoner's counsel should have been able to have presented the matter to the court before adjournment, and, as he did not do so, it is a matter (if there were anything to complain of) to be presented to the Executive. The matter complained of is, as stated in *ex parte* affidavits for the defense, that the minister said, "There are men here who have in their hands the life of a poor man now on trial. You ought to be careful, and if he is guilty, say so; and if he is not guilty, say so. Do your duty before God and your country"; and in his prayer he said: "Now Lord, we are going to offer a special petition to Thee that this jury may give him a fair and impartial trial, and, if guilty, say so; and if not guilty, say so," and made a special appeal to God in behalf of said prisoner, praying for a "fair trial to him." It would have been of course propriety for the man of God to have made no reference to a matter which the laws of his country had entrusted to the unbiased decision of a jury, but it is impossible to find in the above anything which was prejudicial to the prisoner. In view of the occurrence, it would be well, however, for trial judges hereafter to avoid giving similar opportunity for complaint.

The counsel for the prisoner, with commendable zeal, has presented every possible objection which might vitiate the trial below, but so far as the record appears the minister's appeal has been answered, and the prisoner has had the fair trial which the laws of his country guaranteed him.

No error.

Cited: Simmons v. Davenport, 140 N. C., 411; *S. v. Bohannon,* 142 N. C., 697; *S. v. Gregory,* 153 N. C., 648; *S. v. Malonee,* 154 N. C., 204; *S. v. Heavener,* 168 N. C., 164; *S. v. Johnson,* 169 N. C., 311.

(1099)

STATE v. THOMAS JONES.

(Decided 15 May, 1900.)

Murder in First Degree—Mental Capacity to Premeditate and Deliberate—Evidence Amounting to More than a Scintilla, Conjecture, or Suspicion to be Submitted to the Jury, for them to Weigh and Consider.

1. In a case of murder, where there is evidence connecting the prisoner with the crime, and the defense is put upon the ground of mental incapacity, which relieved the accused from criminal guilt, or if not entirely, to render him incapable of deliberation and premeditation, and thus relieve him from the charge of murder in the first degree, and the evidence on this point is conflicting, the whole goes to the jury for them to weigh and consider.
2. The evidence submitted by the State must be such as reasonably tends to prove the fact, and must amount to more than a mere scintilla, conjecture, or suspicion, to authorize a finding by the jury.

INDICTMENT for murder of Ella Jones, tried before *Hoke, J.*, at March Term, 1900, of WAKE.

There was evidence that the prisoner went to the house of Ella Jones at night, killed her and one of her children with an ax, set fire to the house and burned up the bodies and three others of her children. The defense was made of mental incapacity on the part of the accused to be guilty of crime, especially of the crime of murder in the first degree. The State contended the prisoner had mental capacity to deliberate and premeditate. There was evidence both ways, and the whole was submitted to the jury for them to weigh and consider. They found the prisoner guilty of murder in the first degree. Sentence of death, and appeal to Supreme Court by the prisoner.

The details of the case, including the special instructions asked (1100) and refused, appear in the opinion.

B. C. Beckwith for defendant.
The Attorney-General for the State.

FURCHES, J. The prisoner is indicted for the murder of Ella Jones, and pleaded "not guilty." While the killing was not formally admitted, it was not denied. The jury found the prisoner guilty of murder in the first degree. There are no exceptions to evidence, nor to the conduct of the trial, nor to the charge of the court, except as appears upon the court's refusing to give the following special prayers for instruction:

1. That in no aspect of the testimony, and under no reasonable inference that can be drawn from it, is the prisoner guilty of murder in the first degree.

2. That at most the jurors can convict of murder in the second degree.

3. There is no evidence of deliberation and premeditation.

As these are the only exceptions contained in the record, we must take it that the charge of the court, in all other respects, was correct. And as the court could not weigh the evidence and say what parts should be believed and what should not be believed, if there was any evidence that showed or tended to show deliberation and premeditation, if believed, it ought to have been submitted to the jury. When we say "any evidence," we mean any such evidence as reasonably tends to prove the fact and authorize a finding of the jury. It is sometimes difficult for the court to determine whether there is such evidence as should be submitted to the jury; and, without undertaking to lay down a rule for the government of courts, we think we may safely say that it should be more than
(1101) a scintilla—more than a conjecture, more than to create a suspicion. But we do not think this case lies on the border line.

There is evidence that the prisoner had been too intimate with the deceased; that he had gotten a child upon her; that they had trouble about this; that he said to Johnson, a justice of the peace, the night before the homicide, that "Ella laid her last child" to him, which was then about one month old, and that they had trouble about it; that he wanted to bring her to his house the next night and have it fixed up; that he was willing to pay her $2 per month; that the next night (the night he proposed to bring the deceased to Johnson's) he went to the house of the deceased, and went in, sat down and talked to the deceased—but how long, does not appear; but it must have been for some considerable time, as the child witness (Laura) testified that his coming in awoke her, but she went to sleep again and was awakened by the scream of her mother, when she saw the prisoner strike her mother with an ax four times; that he then struck her oldest sister with an ax, and the blood flew on her and her younger sister; and that he then struck a match and set the bed on fire, and left.

To corroborate this testimony, tracks were found that had been made by the shoes the prisoner wore. Blood was found on the two children, who escaped from the burning house, fresh, undried. Soon after the house was found to be on fire from the alarm given by these two children, and they had related the terrible tragedy and had stated that the prisoner was the author of the crime, some of the persons present went to the prisoner's house for the purpose of arresting him. Upon reaching the house they knocked at the door, and had trouble in arousing the pris-

oner. But after so long a time he let them in, when they found a pair of overalls with fresh blood on them, and when this was shown the prisoner he tried to explain it by saying that it was "chicken (1102) blood," that he had killed chickens for Mr. Turner that evening. He also had blood on his hands. After they arrested him and started to the scene of the tragedy, he showed them a paper, so badly written as to be almost unintelligible, purporting to be an account of moneys he had given the deceased, and said that he had kept it so that if anything happened he could show that he had treated Ella right. He was identified on the night of the tragedy as the author of the crime, by the child Laura, and again recognized and pointed out by her on the trial.

The defense was not put upon the ground that the prisoner did not commit the crime, but upon the ground of mental incapacity, which relieved him from criminal guilt; and, if not to entirely relieve him, that it rendered him incapable of exercising "deliberation and premeditation." The prayers for instruction were intended to present this question, and the prisoner produced evidence tending to establish this contention. But the State produced the evidence of a number of witnesses tending to show that he did have sufficient capacity to commit the crime—to meditate and deliberate. In addition to the evidence already stated, the State produced a number of witnesses whose testimony was to the effect that the prisoner had mind sufficient to read, and that he was a local negro preacher. Some of the witnesses testified that his mind was as good as ordinary negroes, and some of them testified that he had good "sense"—as good as they had.

Then admitting that the prisoner produced some witnesses who testified to the want of sufficient capacity to enable the prisoner to reflect, to meditate and deliberate, still when the State had produced evidence showing that he had deliberated and meditated about fixing up the trouble with Ella, by what he said to the witness Johnson; that he had tried to explain away the evidence of blood on his hands and clothing, and produced what purported to be an account with Ella, which he had kept to show that he had treated Ella right—reënforced (1103) by the evidence of a number of witnesses who testified that his mind was good—made it an issue of fact for the jury which the judge could not try, and the prisoner's exceptions were properly refused.

The jury, with all the evidence before them, under proper instructions from the court (as we must take them to have been proper as they are not given or excepted to) have said that the prisoner is guilty of murder in the first degree. And in saying this, they have said the prisoner did have sufficient mind and capacity to premeditate and to deliberate.

The facts of this tragedy are shocking, when we think of the prisoner's going to the house, in the night time, of a woman with whom he

had been having illicit intercourse, and upon whom he had gotten a child, taking an ax and killing her and one of her children, setting the house on fire and burning up her and five children, one of them his own offspring—shocking to the utmost degree. If he had capacity to commit this shocking crime, it would seem that he should suffer the extreme penalty of the law. The jury have said he had such capacity, and we have no right to review or reverse their verdict.

There is no error.

(1104)

STATE v. E. G. NEWCOMB.

(Decided 22 May, 1900.)

Indictment, Retailing Without License—Greensboro Dispensary, Laws 1890, Chapter 254—Garsed v. Greensboro, Ante—Motion in Arrest of Judgment.

Where the act creating the Greensboro Dispensary Board, ratified 24 February, 1899, required the board to establish a dispensary in said city for the sale of spirituous, vinous and malt liquors, on 1 July 1899, or *as soon thereafter as possible*, and provided, *there shall be no prosecution under this act for the sale of liquor until said dispensary shall be open*—and the defendant was convicted of violating said act by unlawfully retailing spirituous liquor on 7 November, 1899, the judgment will not be arrested because the indictment did not aver that the sale took place *after* the dispensary was opened; if it took place *before*, that is matter of defense.

DOUGLAS, J., dissents.

INDICTMENT for unlawfully retailing spirituous liquor in Greensboro, N. C., tried before *Brown, J.*, at December Term, 1899, of GUILFORD.

The indictment is as follows:

NORTH CAROLINA—GUILFORD COUNTY.

Superior Court, December Term, 1899.

The jurors for the State upon their oath present: That E. G. Newcomb, late of the county of Guilford, on 7 November, 1899, at and in the county aforesaid, and in the city of Greensboro, unlawfully and willfully did sell and retail to James D. Taylor, spirituous liquor, the said E. G. Newcomb, not then and there being manager for or agent or servant of the dispensary board for the city of Greensboro, empowered to sell as provided by Laws 1899, chapter 254, of the Public Laws, con-
(1105) trary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

BROOKS, *Solicitor.*

The defendant was convicted, and from the judgment rendered appealed to the Supreme Court, where he moved in arrest of judgment on the ground that the indictment does not aver that the dispensary was in operation upon 7 November, 1899, when the offense charged was committed. The motion was overruled.

Bynum & Bynum and J. N. Staples for defendant.
Brown Shepherd with the Attorney-General for the State.

CLARK, J. This is an indictment for selling liquor in Greensboro contrary to the provisions of the act creating a "dispensary" in that town. Laws 1899, ch. 254. The defendant frankly and properly abandoned here the exceptions upon which the appeal has come up, conceding that they had been settled by the decision in *Garsed v. Greensboro, ante,* 159, which sustained the constitutionality of the act.

The sole point now raised is a motion in arrest of judgment, made for the first time in this Court (probably an afterthought), on the ground that the indictment does not aver that the dispensary was in operation upon 7 November, 1899, when the offense charged was committed.

The act was ratified on 24 February, 1899. Section 1 thereof makes the sale of spirituous liquor, otherwise than is therein provided, a misdemeanor; and section 3 provides that the dispensary board shall establish the dispensary "on 1 July, 1899, or as soon thereafter as possible," and that "there shall be no prosecution under the (1106) provisions of this act for the sale of liquor until said dispensary is open." The clear presumption is, nothing else appearing, that the law went into force on 1 July, 1899, and if it did not, the fact which would withdraw the defendant from liability is a matter of defense which he might have set up, if the evidence and his admission had not been the other way. The rule of pleading in criminal actions has been long settled by uniform decisions, that where the matter which would withdraw a case from the operation of a statute creating a criminal offense (here section 1) is in another section of the statute (here section 3), or indeed, when in the same section if it is in a proviso, then such matter is not required to be negatived by the indictment, but must be set up on the trial as a matter of defense. *S. v. Downs,* 116 N. C., 1064, citing *S. v. George,* 93 N. C., 567; *S. v. Lanier,* 88 N. C., 658; *S. v. Heaton,* 81 N. C., 542; *S. v. Tomlinson,* 77 N. C., 528; *S. v. Norman,* 13 N. C., 222.

In the last named case, *Henderson, C. J.,* draws a clear distinction between a proviso which withdraws a case from the operation of a statute, which is a matter of defense and need not be negatived in the indictment, and a condition upon the existence of which the statute de-

pends, which must be averred. It has since been approved, among other instances, in *S. v. Davis,* 109 N. C., 780, and *S. v. Melton,* 120 N. C., 591.

The indictment charges that the defendant "on 7 November, 1899, at and in the county of Guilford, and in the city of Greensboro, unlawfully and willfully did sell and retail to James B. Taylor spirituous liquor, the said E. G. Newcomb not then and there being manager for, or agent or servant of, the dispensary board for the city of
(1107) Greensboro, empowered to sell as provided by the act of 1899, ch. 254, Public Laws, contrary to the statute in such case made and provided."

The motion in arrest admits the truth of these allegations, and indeed, it is determined by the verdict; and as the defendant seeks by this motion to withdraw himself from liability to the statute, contrary to whose provisions it is both admitted and found that he made the sale, it was incumbent upon him to prove such fact in his defense. *S. v. Ballard,* 6 N. C., 186.

This is not like *S. v. Chambers,* 93 N. C., 600, chiefly relied on by the defendant. That was not a case where the act was to go into effect on a day named, subject to be suspended if something were not done, which is this case, but the act was not to go into effect at all until upon a vote of the people it was affirmed and made a law. Of course, in the latter case, it must be both averred and proved that the vote, which was essential to the validity of the act, was in favor of making it a valid statute. Here the act is positive, and goes into effect on the date therein specified, with a provision withdrawing the selling of liquor from prosecution thereunder "until said dispensary is open"—thus making the defeasance a matter of defense, for unless the defeasance is shown the statute is in force from 1 July. It is no more necessary to aver in the indictment that the sale was after the opening of the dispensary than it would be to aver that any other act, made criminal by statute, took place after the statute was passed. *S. v. Fleming,* 107 N. C., 905. If the occurrence was before the time at which such act became criminal, that is a matter of defense arising upon the evidence. *S. v. Ballard, supra.* If it were necessary to put in an indictment, now a negative averment that this sale was not before the dispensary opened, the same averment would be necessary in every indictment under the statute for all
(1108) the years to come as long as it is in force. *S. v. Fleming, supra.*

The other cases cited by the defendant are all cases in which the exception is named in the same clause which created the offense, and it is not negatived in the indictment, and therefore upon its face the offense described in the act is not charged. Indeed, this was also the case in *S. v. Weaver, supra,* where it is said, "The indictment does not suffi-

ciently charge an offense under the statute," which "provides that in a contingency specified in it, depending upon a popular vote to be taken as therein directed, it shall be unlawful to sell spirituous liquors," etc.; hence in the face of the indictment, it not appearing that the contingency *dehors* upon which the statute was to have validity had occurred, proof of sale did not prove its illegality. Here, the statute being valid, any fact *dehors* which would withdraw the defendant from its operation, is a matter of defense.

The sale is alleged on 7 November, 1899, and the motion in arrest of judgment admits the fact—which, besides, was not controverted on the trial. There can be, in fact, no injustice done by the defendant, for there is an express admission in the record by him that the dispensary was opened in the city of Greensboro under said act on 1 July, 1899, and has been in operation ever since.

If the judgment could, under the settled rules of criminal procedure, be arrested, it would therefore be a vain thing, and of no benefit to the defendant. Though this consideration should not avail to defeat the defendant of any legal right, if such he had, to have the judgment arrested, still, it shows the wisdom of the rule that such matters are defenses to be set up and proved by the defendant who seeks to withdraw himself from the operation of a statute creating a (1109) criminal offense.

Affirmed.

DOUGLAS, J., dissenting: I can not concur in the judgment of the Court. Whatever may be my personal views as to the benefits of the dispensary system, I can not ignore the right of one charged with crime to be tried according to the law of the land. To my mind an indictment must directly charge a criminal offense. The jury can not find the defendant guilty of more than is charged in the indictment, and if the facts therein stated are not of themselves sufficient to show the guilt of the defendant if they are found to be true, then no judgment can be pronounced upon the verdict. If every allegation in the bill is consistent with the innocence of the defendant, a verdict that he is "guilty in the manner and form as charged in the bill of indictment" has no legal effect. Guilty of what? Of what the indictment charges, but not of what the law condemns. The penalty is prescribed for violating the law, and where there is no violation of the law no penalty can be imposed.

In the case at bar every word in the indictment may be true, and yet the defendant may not be guilty of any criminal act, because it is not charged that the dispensary had been opened, an essential requisite to any conviction under the act. The essential parts of section 3 of the

act are as follows: "The said dispensary board on 1 July, 1899, or *as soon thereafter as possible,* shall establish one dispensary in said city, to be located on one of the principal streets, for the sale of spirituous, vinous and malt liquors, *and there shall be no prosecution under this act for the sale of liquor until said dispensary shall be open.*" The latter part is not an exception or even a proviso, but is a part of the very sentence itself which establishes the dispensary. There is not
(1110) even a semicolon between them, only a comma. It does not profess to "withdraw" any individual or class "from the operation of the statute," but withdraws the statute itself from operation as to any criminal effect until the condition is complied with. It is in the nature of a *condition precedent* which must be strictly complied with before the statute can have any penal effect whatsoever. So far from there being a "clear presumption" that the law went into force on 1 July, 1899 (by which I suppose is meant the criminal operation of the law), this presumption is rebutted by the statute itself, which specifically provides (1) for its failure to do so, and (2) that it shall not do so until after the happening of a certain event. This event might never have happened. Indeed, the author of the bill evidently anticipated some trouble, as he provided in one place that the city of Greensboro should appropriate $2,000 or as much thereof as might be necessary to establish the dispensary; and then immediately provided that the dispensary board might establish said dispensary without receiving said appropriation. His foresight was justified by subsequent events, as the city has been enjoined from appropriating the money. *Garsed v. Greensboro,* at this term. All these anticipations, precautions and provisos, arising on the face of the act, tend strongly to show that there is no legal presumption that the dispensary was opened on 1 July, 1899. The very reasoning of the opinion, with the authorities cited therein, prevents me from concurring in its conclusion.

The opinion of the Court says: "In the last-named case (*S. v. Norman,* 13 N. C., 222), *Henderson, C. J.,* draws a clear distinction between a proviso which withdraws a case from the operation of a statute,
(1111) which is a matter of defense, and need not be negatived in the indictment, and *a condition upon the existence of which the statute depends, which must be averred.*" To my mind the case at bar comes clearly within the second class, as its existence as a criminal statute absolutely depends upon the establishment of the dispensary.

Again it is said this case is not like *S. v. Chambers.* I think it is. In that case the act making it a misdemeanor to sell liquor in the town of Morganton was not to go into effect until after ratification by a vote of the people. In the case at bar, an act making it a misdemeanor to sell liquor in the city of Greensboro is not to go into effect until after the

opening of the dispensary. In *Chambers' case,* this Court said it could not take judicial notice that an election had been held, and of the result thereof. Neither can we take judicial notice that a dispensary has been established in Greensboro. In *Chambers' case,* this Court held that the indictment was fatally defective because it did not allege "that the contingency happened upon which it became unlawful and indictable to sell spirituous liquors within the area of the territory specified." Why is not the indictment in the case at bar fatally defective inasmuch as it failed to allege that the contingency had happened—the opening of the dispensary—upon which alone the statute in question could have any criminal operation? I fail to see. Whoever the prisoner may be, or whatever he may have done, he is presumed to be innocent until lawfully convicted, and is entitled to a fair and impartial trial according to "the law of the land."

I am in favor of a prompt and faithful enforcement of the law, without useless delay or needless technicality, but I am not in favor of breaking down, by judicial construction, all the barriers which the wisdom of the common law has erected around the liberty of the citizen.

Cited: *State v. Goulden,* 134 N. C., 746.

(1112)

STATE v. WILL HIGGINS.

(Decided 22 May, 1900.)

Larceny—Growing Crops—Property, How Charged—Tenant—Landlord.

For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor (Code, sec. 1754); as between the tenant and third parties, the tenant is entitled to possession of the crop, and the ownership of the crop is well charged as his in the indictment.

INDICTMENT for larceny of growing corn the property of George Thomas, heard on appeal from the Western District Criminal Court for BUNCOMBE, before *Coble, J.,* on 17 November, 1899.

The proof was that George Thomas was the renter of J. M. Bassett, and had charge of the crop, although he did not live on the land. The defendant claimed that there was a fatal variance between the allegation and the proof, and moved to be discharged, which his Honor refused to

do, and upon conviction rendered judgment against the defendant, who appealed to the Superior Court, where the judgment was affirmed and he appealed to the Supreme Court.

Carter & Curtis for defendant.
The Attorney-General for the State.

FAIRCLOTH, C. J. The defendant is indicted for stealing several ears of corn in August, standing, growing and ungathered in the field, being cultivated for food and market. The indictment alleges that the corn was the "property of George Thomas." The proof shows that
(1113) the prosecutor, Thomas, was a tenant, and rented the land from Bassett who was to have one-third of the corn; that Thomas did not live on the land, but had charge of the field. At the close of the evidence the defendant moved to be discharged on the ground of a variance in the bill, and in the proof in that the ownership was alleged to be in Thomas, whereas it should have been in Bassett, the landlord. This is the only question presented.

Where lands are leased or rented for agricultural purposes, the sole possession of the crop is deemed to be vested in the lessor. Code, sec. 1754. That section is only for a lessor's protection. Against any third person, the tenant is entitled to the possession of the land and the crop, and for an injury thereto whilst it is being cultivated he may maintain an action in his own name for the injury. He is the "real party in interest." Code, sec. 177. The Code, secs. 1754 *et seq.*, are intended to adjust the rights of landlord and tenant. *Bridgers v. Dill,* 97 N. C., 222, 227.

With this construction we think the ownership of the crop was well charged in the indictment.

Affirmed.

(1114)

STATE v. O. L. KEITH.

(Decided 29 May, 1900.)

Embezzlement—Lessor and Lessee—Possession of Crops—Breach of Trust—Remedy of Lessee.

1. As a criminal offense, embezzlement is exclusively of statutory origin, and only embraces those relations enumerated in the statute. The Code, sec. 1014.

2. The relation of lessor and lessee is not embraced in the statute. Possession of the crops is deemed vested in lessor. Code, sec. 1754. When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy—section 1755—for the breach of trust, should the lessor refuse to account.

INDICTMENT for embezzlement, tried before *Coble, J.*, at Fall Term, 1899, of CHEROKEE.

The prosecutor raised a tobacco crop on defendant's land, who sold it and refused to account for proceeds of sale.

The defendant demurred to the evidence and asked the court to instruct the jury that there is no evidence on which to convict. His Honor declined to give the instruction, and the jury convicted the defendant, who appealed from the judgment.

The Attorney-General for the State.
Defendant not represented.

FAIRCLOTH, C. J. The defendant stands indicted under the Code, sec. 1014, for embezzlement. That section declares that "if any officer, agent, 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 (1115) fraudulently convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money," etc., . . . "belonging to any person or corporation . . . which shall have come into his possession or under his car, he shall be guilty of felony." The evidence is that Young, the prosecuting witness, cultivated the defendant's land, and was to pay one-half of the crop; that defendant took possession of the crop and sold it. The tobacco belonged to Keith and Young, and the proceeds of sale belonged to Keith and Young, and Keith has never paid Young his share of the proceeds. Is this embezzlement?

As a crime, embezzlement is unknown to the common law. A fraudulent appropriation to one's own use, of the money or goods of another, was only a breach of trust, remediable by civil process only.

As a criminal offense, embezzlement is exclusively of statutory origin, and is a felony or misdemeanor as such statutes may declare. Our Legislature has declared in several instances that misappropriation of the money or goods of another, with intent to embezzle the same shall be an indictable offense, and has declared it to be a felony in some cases and a misdemeanor in others. They are found in our Code. Lessor and lessee are not partners. Code, sec. 1744. Possession of crops deemed vested in lessor. Code, sec. 1754. When the lessee is deprived of the actual possession of his crop he is left to his civil remedy. Code, sec. 1755.

Upon the facts in this case the defendant can not be treated as an "officer, agent, clerk, employee or servant" of his tenant. They are joint owners of the crop, with possession deemed to be vested in the defendant landlord. The defendant has sold the crop and has the proceeds in his possession. His failure and refusal to pay the tenant his share (1116) is a breach of trust as at common law. No statute has made it a crime, either as a felony or a misdemeanor. The indictment charges that the defendant was entrusted with money and a check by the witness (proceeds of the sale) and willfully, unlawfully, fraudulently and feloniously appropriated the same to his own use with intent to embezzle and convert to his own use the said money and check. This, as we have said, is only a breach of trust at common law, and we have no statute declaring it to be a crime. The bill of indictment therefore charges no criminal offense. *S. v. Barton,* 125 N. C., 702.

With this conclusion, we need not consider any other exception.

Error.

STATE v. THOMAS SMITH.

(Decided 29 May, 1900.)

Homicide—Premeditation—Scintilla of Evidence.

1. Where there is evidence, more than a *scintilla* on the part of the State, going to show premeditation and deliberation on the part of the prisoner, indicted for murder, it is for the jury to pass upon the guilt of the prisoner, and the degree, if guilty.

2. The credibility of the witnesses and the weight of the evidence are for the jury, and not for the appellate court, although it may differ from the jury as to the weight of the evidence, where it is conflicting.

INDICTMENT for murder, tried before *Hoke, J.,* at January Term, 1900, of WAYNE. The prisoner was indicted for murder of Charles Lewis Cawthorne in Johnston County. Former trial reported (1117) in 125 N. C., 615. A new trial having been granted, his Honor for reasons satisfactory to himself moved the trial to Wayne County, where the prisoner was again convicted of murder in the first degree. The killing was admitted—the testimony of the prisoner tended to show justification, certainly not more than manslaughter, while that of the State tended to show premeditation and deliberation on the part of the prisoner. There was no exception to the evidence or charge of his Honor, except as to his refusal to give the special instruction referred to in the opinion. Prisoner excepted. Verdict of guilty of murder in the first degree. Sentence of death. Appeal by the prisoner.

The Attorney-General for the State.
Argo & Snow for defendant.

MONTGOMERY, J. The prisoner was convicted of the murder in the first degree of Charles Lewis Cawthorne at August Term, 1899, of Johnston Superior Court. He appealed from the judgment, and this Court at September Term, 1899, ordered a new trial (*S. v. Smith,* 125 N. C., 615). At November Term, 1899, of the Superior Court, the cause was removed to the county of Wayne for trial, and at the March Term, 1900, of that court the prisoner was tried and convicted again of murder in the first degree. There was no objection made by the prisoner to any of the evidence offered by the State, and no exception was made to the charge of the court.

The only exception that appears in the case on appeal is one made to the refusal of his Honor to instruct the jury as follows: "In no aspect of the case can the jury find the prisoner guilty of murder in the first degree, for the evidence at most amounts to no more than a scintilla." The duty of a judge on the review of the evidence in a criminal cause, with a view to discover whether there is any evidence against the prisoner fit to be submitted to the jury, is very (1118) different from the duty of a juror who is to pass upon the weight of the evidence. There is more than a scintilla of evidence against the prisoner in this case. That evidence, it is true, was furnished in the main by the testimony of Thomas Winfrey, one of the three persons who were engaged in the fight with the prisoner, and who was badly wounded at the time Cawthorne was killed by the prisoner. But we can not pass upon its credibility. That witness testified that the conduct of himself and his companion was without fault; that the knife which the prisoner used was not an ordinary knife, but one something like a butcher's knife, and about eight inches long; and that the prisoner left his premises and made a sudden and unexpected assault with the knife upon Cawthorne and himself in the public road. Another of the State's witnesses, John O. Ellington, testified that the prisoner stated to him that he heard these men coming and picked up a knife he had prepared to kill hogs with next morning, and started out; that his wife asked him where he was going, and he answered that he was going to see if he could not stop that fuss or those boys; that his wife asked him not to go, and that if he had listened to her he would not have been in this trouble. The witness further testified that the prisoner told him he went out to the crib and stopped by the side of it; that they were shooting off Roman candles in front of the house; that they stopped; that he walked out, put his hand on one and asked if it was Mr. Pendergrass, that the one replied "No," and that he pushed his head back and went to cutting.

The whole evidence in the case is calculated to enlist the sympathies of any person who might read it from an unprejudiced standpoint. The sheriff of the county of Johnston (Ellington) testified that the
(1119) prisoner's general character was "that he was honest, industrious, and truthful, but was violent at times." W. R. Creech testified: "I live about half a mile from where Tom Smith was raised. I have known him for twenty-five years. His character is good." A. W. Peedin testified: "He has been living within three and a quarter miles from me for eighteen or nineteen years. His character is good, except he had a little trouble with Moore and a sanctified preacher. This is all I know against him, except this last offense. He is a hard-working man, and pays his debts." J. C. Collier testified: "I know Tom Smith. I have known him for ten years. I have been seeing him about three times a day for about ten years. I regarded him as a good negro."

Smith had been the superintendent of his Sunday School in the town of Selma for about sixteen years. On the night after Christmas of 1898, he was engaged in distributing gifts to the children from the Christmas tree at the Sunday School celebration. He had been at work all the morning before. At 11 o'clock, the festivities being over, he and his wife left for their home, walking, a short distance in the country. The father and mother of the prisoner, an aged couple, 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, concealing their faces. They each had a woman's skirt. They had been drinking and had liquor with them. The three masked persons were Charles Lewis Cawthorne, Graham Garner and Thomas Winfrey. During the day they had been discharging fireworks in Selma, and upon being prohibited by the town authorities from continuing this sport, they left the town. One of them (Winfrey) had in his pockets two loaded pistols.

After the prisoner had reached his home he heard the parties coming in his direction shooting off their fireworks and firing their pis-
(1120) tols. Roman candles were discharged into the trees of the yard of the prisoner and near his house, and the maskers threatened to shoot his dog. In front of the prisoner's gate and in the public road, a difficulty occurred between the prisoner and the revelers, Cawthorne was killed and Winfrey dangerously wounded by the prisoner, the weapon used being a large and dangerous knife.

The testimony of the prisoner tended to show justification, certainly not more than manslaughter; while that of Winfrey and Garner and Ellington tended to show premeditation and deliberation on the part of the prisoner.

Upon a consideration of all the evidence, it seems to us that the greater weight was in favor of the prisoner. But the jury decided otherwise, and the law has confided that finding to them.

There was evidence, more than a scintilla, on the part of the State going to show premeditation and deliberation on the part of the prisoner, and that is the only question before us. The credibility of the witnesses and the weight of the evidence were for the jury.

Affirmed.

Cited: S. v. Bishop, 131 N. C., 767.

(1121)

STATE v. ALSTON CHESTNUTT.

(Decided 5 June, 1900.)

Power of the Court, During Term, Over Its Own Records and Proceedings.

1. A court has power, during the term, to correct, modify, or recall, an unexecuted judgment in either criminal or civil cases.
2. The rule is equally applicable to orders and entries made during the term.
3. Court proceedings are *in fieri* until the close of the term, which the judge may modify or vacate, and his action is not reviewable unless in case of gross abuse of power, resulting in oppression.

MOTION to set aside a verdict rendered at September Term, 1899, of DUPLIN, which motion was made at September Term and continued over to December Term, 1899, when it was heard by *Bryan, J.,* and disallowed. Defendant had been convicted of an assault, and upon his motion his Honor had entered an order setting aside the verdict and granting a new trial. Afterwards during the term, on motion of the Solicitor, the order was stricken out. Defendant renewed his motion for a new trial, which motion was continued over to December Term following, when it was disallowed, and judgment rendered against defendant, who excepted and appealed.

James O. Carr for defendant.
The Attorney-General for the State.

FAIRCLOTH, C. J. At September Term, 1899, of DUPLIN, the defendant was convicted of an assault, and the verdict was set aside and a new trial ordered. Afterwards, during the same term, the order, setting aside the verdict was stricken out, and the verdict left as found by the jury, to which the defendant excepted, and a motion was again made to set aside the verdict. The motion was continued (1122)

to the following December term, when the court refused to set aside the verdict, and the defendant appealed.

A court has power during the term to correct, modify or recall an unexecuted judgment in either criminal or civil cases. *S. v. Warren,* 92 N. C., 825. The proceedings of a court are *in fieri* until the close of the term, and the judge may modify or vacate any order made during the term, and his action is not reviewable unless it appears that he has grossly abused his power, resulting in oppression. This is not only the rule, but it is reasonable, and often corrects mistakes made without full information. We think it is common practice, after verdict and judgment in criminal cases, to change the judgment as may seem just to the court. *Allison v. Whittier,* 101 N. C., 490; *Gwinn v. Parker,* 119 N. C., 19. These authorities refer to the power and control of the court over its own judgments. We can think of no reason or principle why the rule is not equally applicable to orders and entries made during the term of the court. The first order did not have the effect of discharging the defendant. The second order only corrected what his Honor thought was bad discretion, caused no doubt by misinformation, and left the verdict as the jury had rendered it.

The other exceptions were to matters of discretion.

No error.

(1123)

STATE v. R. J. MORRISON.

(Decided 9 June, 1900.)

Indictment—Selling Pianos and Organs Without License—Revenue Act 1899, Chapter 11, Section 27—Ten-Dollar License.

1. The legislative intent was that the $10 license authorizes only the person having it in possession to sell under it. Such has always been the policy of the law, except when duplicates or copies of the license are authorized.
2. If the licensee employs more than one salesman, he must take out and furnish each salesman with an additional license.

INDICTMENT for engaging in the business of selling pianos and organs in Lincoln County without license, tried before *Allen, J.,* at Spring Term, 1900, of LINCOLN. The defendant had no license himself, but was acting as one of the salesmen of E. M. Andrews & Co. (Incorporated), who had taken out a license, paying $10 therefor. The jury found a special verdict, upon which his Honor pronounced the defendant not guilty, and defendant was discharged. The Solicitor appealed. The special verdict appears substantially in the opinion.

D. W. Robinson and Brown Shepherd for the Attorney-General for State.

Jones & Tillett for defendant.

CLARK, J. Section 27, ch. 11, Laws 1899, requires that every person or corporation engaged "in the business of selling pianos or organs by sample, list or otherwise in this State, shall before selling or offering to sell any such instrument, pay to the sheriff or tax collector a tax of ten dollars on each brand and obtain a license which shall operate one year from its date and all licenses provided for in this section shall be countersigned by the register of deeds, and shall not be valid (1124) unless so countersigned."

The defendant is indicted for engaging in the business of selling pianos and organs in Lincoln County without license. It is found by the special verdict that E. M. Andrews & Co., a corporation having its principal place of business in Mecklenburg, upon payment of $10, obtained license from the sheriff of that county under the above section; that it had several agents and employees traveling and selling organs by sample under that one license; that the defendant sold organs in Lincoln as one of the agents of aforesaid corporation; that no license had been issued to him. It is not found, nor indeed is it contended, that the defendant had in possession the license issued to said corporation. If he had that was a matter of defense to be shown in evidence, and found as a fact. *S. v. Smith,* 117 N. C., 809; *Cook v. Guirkin,* 119 N. C., 13, and cases cited. The sole question arising upon the special verdict is whether such license protects only the person or agent who has it in possession or an unlimited number of agents.

Among the rules for the construction of an act, if of doubtful meaning, is that the intent must govern if it can be ascertained, and a reasonable construction must be placed upon the statute, taking it in connection with the other provisions with which it is associated and the previous law.

1. The requirement that the license must be signed by the sheriff and countersigned by the register of deeds, and the fact that when thus authenticated the licensee shall be able to sell anywhere in the 97 counties of the State would indicate that the license shall protect only the agent, who at the time has it in possession. If this were not so, why require signing and countersigning, and why the absence of provisions for certifying duplicates or copies? Shall the sheriffs of each (1125) of the other counties be held off by the simple statement of any one selling pianos and organs that he is agent for a corporation which has paid $10 to some sheriff in perhaps a distant county and gotten his license? If the license is good without producing it, then every sheriff

must take the word of any salesman who says that his principal has gotten his license in some other county, or run the risk of an action for false imprisonment or illegal arrest. Is that a reasonable construction of the law?

2. Construed by the context, section 26, the section just before this, requires a license for selling sewing machines (in which there is possibly less profit because more competition) to be issued by the State Treasurer. For that the sum of three hundred and fifty dollars is required, and there is accordingly a provision that the licensee "shall have power to employ an unlimited number of agents to sell" under his license, and that the Treasurer shall issue duplicate copies of the license upon payment of 50 cents each. The absence of these two provisions in section 27, and the exaction of only $10 instead of $350, is convincing proof that the legislative intent was that the latter license should authorize no agent to sell other than the one having it in possession. There is nothing to indicate that the Legislature meant to discriminate against useful sewing machines and in favor of ornamental pianos, by taxing the business of selling the former $350, and the latter only $10. This would not be a reasonable construction of the statute.

3. The former law, 1895, ch. 116, sec. 25, required a tax of $250 for license to sell pianos and organs. The reduction to $10 was made by the act of 1897, ch. 168, sec. 26, and though the Public Treasurer was to issue the license there was a significant absence of authority to licensee to employ an unlimited number of agents and for issue to him of certified copies of the license which then, as now, appears in the section (1126) (25) just before it, and which exacts a license tax of $350 for the kindred and hardly more profitable business of selling sewing machines. These two sections as to license for selling machines and for selling pianos and organs are reënacted in 1899 with the difference only that in the latter section the license is to be issued by the sheriff instead of the State Treasurer.

For these reasons we must think that the legislative intent was that the $10 license authorizes only the person having it in possession to sell under it. Such has always been the policy of the law, except when the statute authorized the issuance of certified duplicates, or copies, of the license. *Lewis v. Dugar,* 91 N. C., 16; *S. v. Smith,* 93 N. C., 516; *S. v. Rhyne,* 119 N. C., 905. The statutes were possibly more explicit in those cases, but they serve to show the settled policy of the law in these matters. Upon the special verdict, the court should have adjudged the defendant guilty.

Reversed.

(1127)

STATE v. DRAYTON MEDLIN.

(Decided 14 June, 1900.)

Indictment—Murder—Assailant With Deadly Weapon and Deadly Intent—How Remitted to Right of Self-Defense.

While the assailant remains in the conflict, to whatever extremity he may be reduced, he can not be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith, and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it.

INDICTMENT for the murder of William Brown, tried before *McNeill, J.*, at Fall Term, 1899, of GASTON.

The deceased was floor manager in a cotton factory at Gaston, N. C.; the prisoner and his little daughter were employees there. On the evening before the homicide the prisoner and deceased had a quarrel over the number of days the girl had been employed, and opprobrious epithets were interchanged. The next day the prisoner armed himself with a pistol and went to the factory—they exchanged shots at sight, the prisoner shooting first and repeating the fire, and killing Brown.

There was no exception to the evidence or the judge's charge as given. The only exception was to the refusal of his Honor to give a special instruction prayed for by the prisoner. There was a verdict of guilty of murder in the first degree, followed by judgment of death. The prisoner appealed. The special instruction appears in the opin- (1128) ion, and so does a full detail of the circumstances of the case.

Osborne, Maxwell & Keerans for defendant.

Jones & Tillett and Brown Shepherd with the Attorney-General for the State.

DOUGLAS, J. This is an appeal on a conviction of murder in the first degree. There is but one exception, which is to the refusal of the court to give the following instruction: "If the jury find from the evidence that the prisoner willfully, deliberately and with premeditation, shot at the deceased with the intent to take his life, and the deceased shot at the prisoner in the tower in self-defense, and the prisoner after having made the first assault, as above set forth, turned and fled from the deceased

down the steps out of the tower, closing the door after him to prevent the deceased from shooting him, and further retreating from the tower some fifteen or twenty steps with the intent of wholly withdrawing from the conflict in good faith, and with no design to continue it, and the deceased knew that all danger from the prisoner had passed, and the deceased went to the window and shot at the prisoner, still holding his pistol drawn on the prisoner, and the prisoner turned and shot the deceased, killing him, such killing would be in self-defense, and excusable under the law, and the verdict should be not guilty, provided at the time of firing the fatal shot he reasonably apprehended his own life was in imminent peril, and that further retreat would be fatal to him."

We have given this case most careful consideration, as we try to do in all cases, and as we always do in those involving the life of (1129) a fellow-being. Whatever doubts we have are resolved in favor of the prisoner whose life is in our hands unless, upon mature reflection, it clearly appears that those doubts are purely the result of human sympathy, unsupported either by reason or precedent. In such cases we can not permit personal feelings to interfere with the proper execution of the law whose ultimate object in punishing the guilty is the protection of the innocent. In cases of murder, in our sympathy for the accused we can not entirely forget the victim or the living who may become the victims of unpunished crime. We do not think that the prisoner was entitled to the instruction asked under all the circumstances of his case. It is drawn with great skill and care, and appears to be correct as an abstract proposition of law; but it assumes, in favor of the prisoner, facts and evidence that do not appear to us. In the first place, it assumes, or might well have been understood by the jury as assuming, that the deceased was killed by the last shot fired by the prisoner. This entirely excludes the possible effect of the previous shots, which the jury might have believed from the evidence caused the death of the deceased. Therefore, even if the remainder of the prayer had been proper as to the last shot being fired in self-defense, it was not proper to say that, therefore, "the verdict should be not guilty," without some further qualification. It seems to us that even if the last shot had been admittedly fired in self-defense and had inflicted a mortal wound, the prisoner would still have been guilty if any of his previous shots had mortally wounded the deceased. Those shots were, by the very terms of the prayer, admittedly fired without excuse or palliation, and if either of them had produced a mortal wound the prisoner would have been guilty of a crime that would have ripened into murder upon the death of the deceased if they had ultimately contributed to his death. This rule would be different if it were (1130) shown that the last shot was the exclusive cause of death, or

by itself the proximate and immediate cause. *S. v. Scates,* 50 N. C., 420; *S. v. Hambright,* 111 N. C., 707. But of this we find no evidence and certainly none that would justify the court in assuming it as a fact. It is well settled in this State that the killing with a deadly weapon implies malice, and that where it is admitted or proved beyond a reasonable doubt the prisoner is presumed to be guilty of murder at least in the second degree, and the burden then rests upon him of proving such facts as he relies on in mitigation or excuse. *S. v. Byrd,* 121 N. C., 684; *S. v. Booker,* 123 N. C., 713.

Aside from this, we do not think that the evidence justified the prayer. We see no evidence tending to show that "the deceased knew that all danger from the prisoner had passed," nor can we find, either in the citations furnished to us by the learned counsel for the prisoner, or in our own investigations, a single precedent holding that the prisoner, under circumstances similar to those of the case at bar, had so far "withdrawn from the conflict" as to relegate him to his right of self-defense. The counsel cited us to *S. v. Hill,* 20 N. C., 491; *S. v. Ingold,* 49 N. C., 216; *S. v. Brittain,* 89 N. C., 481, 500; *S. v. Hensley,* 94 N. C., 1021, 1036; *S. v. Wilcox,* 118 N. C., 1131; 1 Hale P. C., 479, 480; Wharton Law of Homicide, 213; Kerr on Homicide, 201, 202; 1 Bishop Cr. Law, secs. 870, 871; Horrigan & Thompson Self-Defense, 213, and notes; *Stoffer v. State,* 15 Ohio St., 47. None of these authorities appear to sustain his position. Some of them relate to *chance medley* where the party attacked had never lost his right of self-defense; but in *all* cases where the prisoner pleaded *se defendendo* he was required to show that he had "retreated to the wall." Hale says (omitting the citations): "But now suppose that A by malice makes a sud-
den assault upon B who strikes again, and pursuing hard upon (1131)
A, A retreats to the wall, and in saving his own life kills B,
some have held this to be murder, and not *se defendendo* because A gave the first assault. . . . It seems to me that if A did retreat to the wall upon a real intent to save his life, and then merely in his own defense killed B, that it is *se defendendo.* . . . But if on the other side A, knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intending the killing of B, then it is murder or manslaughter as the circumstances of the case require. . . . Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant." East and Hawkins both think it would be murder, but Sir Michael Foster appears to agree with Sir Matthew Hale. Wharton says on page 213: "In cases of personal conflict in order to prove this defense, it must appear that the

party killing had retreated, either as far as he could, by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault would permit him." Bishop says, in section 869: "But he (referring to Lord Hale) goes on to explain, and so do the other old writers, that the assailant's life can be taken only when no other means of escape are open. Such likewise is our own modern law." Kerr says in section 179: "In those cases where the assailant by his own conduct had, before the homicide was committed, given notice of his desire to withdraw from the combat, and had really and in good faith endeavored to decline any further struggle, and the homicide was necessary to save himself from great bodily harm, it might be excusable." And again at the head of
(1132) section 180: "The killing must appear to be the last resort for safety." The same author in section 181, says: "The weight of authority now is that when a person, being *without fault* in a place where he has a right to be, is violently assaulted, he may without retreating repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." Clearly this section does not apply where the assailant is the slayer, as in the case at bar. Clark on Criminal Law, page 155, says: "Self-defense is no excuse for a homicide if the accused brought on the difficulty and was himself the aggressor. If, however, after bringing on the difficulty a person in good faith withdraws, and shows his adversary that he does not desire to continue the conflict, and his adversary pursues him, he has the same right to defend himself as if he had not originally provoked the difficulty, but the withdrawal must be in good faith. If he withdraws, and gives his adversary reasonable ground for believing that he has withdrawn, it is sufficient. . . . It follows, from what has already been said, that where the original aggressor ceases the attack and shows that he has abandoned it, and the person assailed renews the difficulty, he becomes in turn the aggressor and can not plead self-defense if he kills the original aggressor to save his life." The matter is very clearly treated in McClain on Criminal Law, in sections 308, 309, 310. In the last section the author says: "As appears from the preceding section, one who voluntarily enters into a combat or is the original aggressor, can not excuse a subsequent homicide committed in consequence thereof on the ground of self-defense, it being his duty to withdraw; but there must be allowed room for repentance and abandonment of the evil and unlawful purpose, and if the defendant, though originally in the wrong, does thus abandon his purpose, he may afterwards exercise the right of self-defense. The withdrawal, however, must be in good faith; . . . and the fact of change of purpose must be known to the other party (citing *S. v.*
(1133) *Edwards*, 112 N. C., 901). Perhaps this duty to withdraw does not exist where the danger has become such that a reasonably

prudent man would consider that withdrawal would imperil his life. But a distinction must be introduced between the duty to *withdraw* here referred to and the duty to *retreat* discussed in the next section, for in the cases now under consideration the party who seeks to avail himself of the right of self-defense has been originally in the wrong, and it is doubtful whether he ought to be excused for killing in self-defense before a definite withdrawal, no matter how dangerous such withdrawal might be."

Perhaps the best expression of the rule we have found applicable to the case at bar is in *Stoffer v. State,* 15 Ohio St. Rep. 47, justly considered a leading case, in which the subject is learnedly and reflectively considered. The Court says, on page 53: "While he (the assailant) remains in the conflict, to whatever extremity he may be reduced, he can not be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so *palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary,* he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it."

Can the case at bar in any aspect be brought within this rule? Let us take the prisoner's own testimony, which is contradicted by other witnesses, but which we will assume to be true for the purposes of the argument. He testifies that he had a dispute with the de- (1134) ceased about the time and pay of his daughter. Next morning he put his pistol in his pocket and again went to see the deceased. They had another dispute, in which both he and the deceased cursed each other and bandied opprobrious epithets. He then went home, and soon after returned to the office of the deceased. The following are his own words as they appear in the record:

"I went on to the mill with my little girl behind me. When I got to the tower door Mr. Sherrill was standing in the door with his back against the south door facing, with his face towards me. He says to me 'Mr. Medlin if I was you I wouldn't have any fuss with Brown.' I said 'Oh hell, I didn't come here to have any fuss.' I walked into the door and turned to the right and stepped on a platform about one step high, and then I stepped two or three steps up the steps. When I got up two or three steps I could see Mr. Brown getting up out of a chair. I could not see the chair. He was raising up when I first saw him, looking right at me. I stepped one step after I saw him and Brown was getting up with both hands in his pockets, and when he got up I saw that he was drawing

his pistol out of his right pants pocket. I saw the white metal piece on the butt of the pistol between his fingers. When I saw that I stepped one step down and reached for my pistol, and says to Brown, 'Don't.' Then I jerked my pistol out as quick as I could get it out. When I jerked it out of my pocket I nearly let it fall out of my hand, and I grabbed it with both hands. I throwed it up with both hands in front of my body. By that time Brown was coming over with his pistol, and throwing it right down in my face. I shot then. I saw that he was going to shoot, and I shot, and then Brown shot. I kept going backwards down the steps. I saw that Brown was making an effort to shoot again, and I shot again as quick as I could. When I shot the second time
(1135) I was near the bottom of the steps—I think on the platform. I wheeled. As I turned round to run out the door somebody shot at me. I don't know who it was. I ran out the door and jerked the door shut behind me. When I got on the outside I thought of my daughter, and turned round to find her. She jerked the door open behind me, and jumped out of the door, and hallooed 'Lord have mercy, what is the matter, pa?' While I was standing there I heard somebody coming down the steps—running. I looked inside the door, and Mr. Brown by that time had got to the last step, stepping on to the platform and turned to come in the door. Just as he came in front of the door I told him to stop, and he didn't stop, but was raising his pistol to shoot again, and I shot at him. When I shot he jumped back and slammed the door to. My little girl was down about the corner of the tower then. I said to her 'get out of the way,' and started for home. She followed me. I was going in a sort of a run. When I got 20 or 25 steps from the tower I heard somebody say 'Yonder he goes, shoot him.' I turned my head, and just as I turned my head somebody shot at me again. As I turned round I saw George Ballard leaning out of the window up stairs. While I was looking I dropped my eyes, and saw Mr. Brown standing in the window down stairs with his pistol in both hands. The smoke was boiling out of the window as if he had just shot. I threw my pistol back and shot at Brown, and ran on. I looked back again but did not see Brown any more. As I shot the last shot I saw him throw his hand on his left breast and stagger back. That's the last I saw of Brown."

It thus appears from the prisoner's own testimony that he took no chances, but anticipated every action of the deceased. He went
(1136) around to the office of the deceased, Brown, with whom he had recently quarreled. He drew his pistol because Brown looked as if he intended to draw his pistol. He fired because Brown looked as if he were going to fire. As he was going down the steps backwards he shot again because Brown looked as if he were making an effort to shoot. After getting out of the factory he turned around and shot again because

Brown would not stop when he told him to stop. After getting 20 or 25 steps from the factory (but how far from the place where he fired the last shot, is not stated) he turned again because he heard some one say: "Yonder he goes, shoot him." After he turned his head around somebody shot at him, and then he again shot at Brown. We rarely find a more perfect specimen of Parthian tactics. Two things here are worthy of note: he turned around *before* the shot was fired, and he does not say that it was fired by Brown. He says Brown was "standing in the window with his pistol in both hands," and that "the smoke was boiling out of the window as if he had just shot." It is common knowledge that if Brown had shot in such a position the smoke from his pistol would have been carried out of the window with the discharge. The prisoner certainly had not "succeeded in wholly withdrawing himself from the contest," if indeed he had made any effort to do so, as he was constantly turning and shooting as he retreated. We are at a loss for any evidence whatever that he had done anything to "remove any just apprehension from his adversary." The last word he addressed to him but a few seconds before was a peremptory order to stop, followed by a pistol shot. He is not certain that Brown himself fired but one shot at him, while he admits he fired four shots at Brown. None of the shots hit him or came anywhere near him, as far as we can see. If he was in any danger when the last shot was fired at him, he would have been in less danger if he had kept on running in- (1137) stead of stopping and turning around to await and return the shot. He had not retreated to the wall, or a ditch, or anything that could stop him, and if he had continued running he would soon have been out of any effective range of the ordinary pistol. In any event a man in the open would be safer running than stopping and exchanging shots with a man in a building, who by stepping aside could have fired out of the window with perfect aim and but little exposure of his own person. We must remember that the prayer itself is based upon the assumption that the prisoner had been the aggressor, and therefore the duty rested upon him not simply of *retreating* but of *wholly withdrawing* from the contest as far as possible before he could resume his right of self-defense, of which he had voluntarily divested himself by his original assault.

Of all the cases cited by the defendant that of Ingold goes farthest in his direction, but even that falls far short of sustaining his contention. In that case this Court says: "There is manifest error in the first proposition of law laid down by his Honor. 'If the prisoner willingly entered into the fight, and during its progress, *however sorely he might be pressed,* stabbed the deceased as described by the witnesses, his offense, at least would be manslaughter. By *sorely pressed* we understand being

put to the wall, or placed in a situation where he must be killed or suffer great bodily harm, or take the life of his adversary. Supposing there was evidence to raise this point, the offense according to all the authorities, was excusable homicide, which Foster calls self-defense culpable, but through the benignity of the law, *excusable* (citing Foster's C. L., 273-4; 1 East Cr. L., 279; 4 Bl. Com., 184; 1 Hale, 482). Indeed, as the deceased made the first assault with a deadly weapon, *i. e.,* 'a stone about the size of a goose egg'—thrown with violence, at a short distance, and following it up by pushing the prisoner against the jamb of
(1138) the fence, gave him two blows, and then caught him with his hand about the mouth, having him against the fence, bent over on the side, before the prisoner struck him at all, if the necessity for killing existed, which his Honor assumed, it would seem to have been rather a case of justifiable homicide." This short statement shows the utter dissimilarity of that case from the one at bar. In that case occurs the following sentence, illustrating amongst others not only the profound legal knowledge of the great *Chief Justice,* but also his intimate acquaintance with the mainsprings of human action. He says, on page 222: "It is true, while they were *holding him* in the piazza, he flourished his knife, and swore 'one of us has to die before sunset'; but every one who has witnessed scenes of this kind, knows that such 'rearing and charging and popping of fists' are far from evincing a deliberate purpose, particularly when the opponent is a much stouter and more able-bodied man. The barking of a dog shows that he thinks it safer to bark than to bite."

This illustration was very apt where used, but scarcely applies to the case at bar. The popping of a pistol, especially when aimed with a deadly intent, means far more than the popping of fists; and the barking of a Colt's revolver has a compass beyond the gamut of a barking dog. We regret to say that we see no evidence beyond a scintilla that the prisoner had in good faith wholly withdrawn from the contest before he fired his last shot, and certainly none that "the deceased knew that all danger from the prisoner had passed." The record says that there was "evidence tending to show that the prisoner armed himself with a pistol and returned to the tower for the purpose of shooting the deceased, drew his pistol as he went up the steps leading to the second story of
(1139) the tower where he had left Brown, took aim at him with his pistol, fired once at him while deceased was sitting in his chair; that Brown returned the fire; prisoner fired again and inflicted a mortal wound upon him. After firing the second shot the prisoner turned and fled down the steps, Brown pursued him to the ground floor of the tower. Prisoner got out of the tower and Brown, the deceased, went to the window on the lower floor, fell and died from the wound inflicted as

above stated." The record further says that, "The prisoner introduced evidence tending to show that the shooting, occurring in the upper story of the tower, was done in self-defense. Upon this evidence his Honor charged the jury as requested by the prisoner." As the prisoner appears to have had a fair trial, so much so that he has complained of nothing except the single exception already considered, to which he was not entitled, we are constrained to affirm the judgment of the court below.

Affirmed.

Cited: *S. v. Hunt,* 128 N. C., 587; *S. v. Dunlap,* 149 N. C., 551; *S. v. Cox,* 153 N. C., 643; *S. v. Greer,* 162 N. C., 653.

(1140)

STATE v. FRED HILL.

(Decided 14 June, 1900.)

City of Wilmington Ordinance—City Scavenger.

1. A city ordinance which takes from the citizen a natural and a necessary right without apparent necessity, and substitutes nothing adequate to take its place, is neither reasonable in its provisions nor just in its results.
2. If the owner can not clean his own premises, no matter how filthy they may become, and the public scavenger can not be made to clean them oftener than once a month without an order from the Superintendent of Health, the effect of the ordinance is not to keep the city clean, but rather to keep it dirty for the time being.

WARRANT heard on appeal from court of Mayor of Wilmington, before *Bryan, J.,* at Fall Term, 1899, of NEW HANOVER. The defendant was charged with doing scavenger work without license in violation of an ordinance regulating the sanitary department of the city of Wilmington. The defendant was convicted and fined $5 and costs, and appealed.

Admitted facts are stated in the opinion.

L. V. Grady for defendant.
The Attorney-General for the State.

DOUGLAS, J. This is a criminal action originally begun in the mayor's court of the city of Wilmington wherein the defendant is charged with doing "scavenger work for pay at the surface closet of W. S. Royster,

without having license to do such scavenger work and not being employed by the licensed scavenger of the city" of Wilmington. The closet is thereafter referred to as belonging to Niestle. The following are the admitted facts:

That in January, 1899, the defendant made a contract with William Niestle to do his scavenger work for the term of one year by cleaning the closet at his store once a week and that at his residence once every two weeks; that he was to receive 15 cents each time for cleaning the store closet and 25 cents for the residence closet; that he continued to do this work without license after the passage of the ordinance, and that when the contract was made no license was required, and any one was at liberty to contract for such work. The city ordinance was introduced providing: that the city shall be divided into eight sanitary districts; that "persons proposing to do scavenger work of one or more districts shall submit bids for doing the work for a term of one year";
(1141) that "the board of health may refuse any and all bids for scavenger work, and shall have power to decide who are competent bidders"; that in case of disagreement between the owner or occupant and the scavenger as to the work having been properly done, the question shall be referred to superintendent of health; that "all closets must be cleaned at least *once a month,* and more frequently *if ordered by the superintendent of health";* that "the charges for cleaning closets shall be governed by the *previous going rates,* and shall not exceed 25 cents per closet in the first, second, seventh and eighth, and in third, fourth, fifth and sixth districts east of Tenth street, and shall not exceed 50 cents in the third, fourth and sixth districts west of Tenth street."

W. R. Slocumb testified for the State as follows: "I am the regular licensed scavenger for the city of Wilmington, and the defendant was not working under me at the time he was charged with doing scavenger work without license. I am the only licensed scavenger in the city of Wilmington. I do not receive any pay from the city of Wilmington for my work. I collect of the parties for whom I do scavenger work. *I have it done and pay a certain per cent of the proceeds* of such work for same. *I do not know what per cent I pay*—do not know whether I pay 10 per cent, 25 per cent or 50 per cent. There are no public sewers in the city of Wilmington."

It does not appear what were the charges of the city scavenger, but we presume they were the full amounts allowed, as our attention has not been called to any instance where a municipal contractor, holding an exclusive privilege, has charged less than the maximum allowed by his contract. We do not say that there are no such cases, but their whereabouts are unknown to us. The real point in the case is not very clearly presented by the prayer for instruction, but it clearly appears

from the case itself. The prisoner is not charged with carrying on the business of a public scavenger, but simply with doing the work for one man; and it is admitted in the argument that the effect (1142) of the ordinance would be to prevent the owner himself from removing the refuse from his own premises. This is clearly an interference with a natural right, and while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions. *S. v. Higgs, ante,* 1014; 1 Dillon Mun. Corp. (4 Ed.), sec. 319; 2 Wood on Nuisances (3 Ed.), sec. 745; *Mayor v. Redecke,* 49 Md., 217. Is the ordinance under consideration reasonable in its provisions or just in its results? We are compelled to think that it is not. It takes away from the citizen a natural and a necessary right without apparent necessity, and substitutes nothing adequate to take its place. The owner can not clean up his own premises, no matter how filthy they may become, and the public scavenger can not be made to clean them oftener than once a month without an order from the superintendent of health. This case does not question the right of the city to clean all closets, or to have them cleaned or kept clean; but it involves the right of the owner himself to clean up. If the ordinance has that effect, and the State claims that it has such an effect, then it is void at least *pro tanto.* In this particular the effect of the ordinance is not to keep the city clean, but rather to keep it dirty for the time being. It is a matter of common knowledge that refuse matter quickly decays during the summer months, and it can scarcely be contended that merely a monthly cleaning is sufficient to keep a closet in a healthy condition in a warm climate.

Are the rates allowed to the public scavenger reasonable? If the ordinance were otherwise valid, we would hesitate to interfere with it on this ground alone, and we do not decide it as a matter of law, but to us it seems questionable. What is meant by the words in (1143) section 7, of the ordinance—"shall be governed by the previous going rates"—is unknown to us, and we have not been favored with any explanation either in the record or the argument. We assume that the scavenger would be entitled to charge 25 or 50 cents, as the case might be, for each time a closet was cleaned. The result to Niestle would be that to have his work done by the city scavenger would cost him at least $19.50, and possibly $39, according to his location. It is now costing him $14 by private contract. The result of the ordinance would be that any one who lived in the humblest cabin in the farthest corner of the city would be compelled to pay at least $3 a year for the privilege of having a closet, and much more if he wished to keep it in a decent condition. No matter how humble he may be, or how willing to do the

most menial labor, he would be compelled to employ the city contractor to clean his own premises, and of course to pay him at the contract rates.

As bearing somewhat on the rate of compensation, we are informed that the city of Raleigh charges a license tax of $1 per year for each surface closet, and keeps its clean without further expense to the owner. We do not know the relative expense of performing such duties in Raleigh and in Wilmington, nor is it within our province to inquire, but such gross disparity might well be questioned on the ground of fairness or necessity.

In the case at bar the defendant could not have obtained a license, even if he had applied for one, as the city was all under contract. Had it not been, he would not have been licensed as a scavenger unless he had bid for an entire district. Even then he had no assurance of obtaining it, no matter how low he bid, as the board of health retained the right to refuse any and all bids, and to "decide who are competent (1144) bidders." The public scavenger was not required to do any special duty or to perform his duty in a special manner. He was not required to use carts or implements of any special kind, or to use any special precautions either for cleanliness or disinfection. As far as we can see from the record, the defendant was fully as well equipped for such work as the city scavenger himself, who indeed, does not appear to have performed any personal duties other than perhaps making certain reports, or possibly superintending those who were working for him on shares.

We will briefly examine the authorities that have been cited in support of the contention of the State, none of which are strictly applicable in our view of the case:

In *S. v. Hord,* 122 N. C., 1092, the Court says, on page 1094: "Of that the commissioners, the local Legislature, are the sole judges *unless their ordinance is unreasonable.*"

Hill v. Charlotte, 72 N. C., 55, simply holds that a municipal corporation is not liable to an action for damages in the exercise of discretionary powers.

In *Vandine's case,* 23 Mass., 187, while the Court recognized the power of the city to require public scavengers to take out a license, it held that the ordinance must be reasonable. It says on page 191: "To arrive at a correct conclusion whether the by-laws be *reasonable* or not regard must be had to its object and *necessity.*" And again on page 192: "We are all satisfied that the law is *reasonable,* and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

In *Commissioners v. Stodder,* 56 Mass., 563, the Court says, on page

571: "We can not doubt that a by-law, *reasonably* regulating the use of the public streets of the city . . . would be valid and (1145) legal." It then concludes on page 576 as follows: "A by-law, to that effect, is an *unnecessary* restraint upon the business of those carrying passengers for hire, and not binding upon inhabitants of other towns. For this reason the by-law must be held *invalid* as respects the defendant."

Boehm v. Mayor, 61 Md., 259, which at first glance seems to fit our case, has really no direct bearing. There, the action was brought by a public scavenger to recover from the mayor and city council of Baltimore damages alleged to have resulted from their wrongful act in suspending and revoking his license. The Court held that the city had the power to pass *reasonable* by-laws requiring a license from a public scavenger, and requiring all refuse matter to be carried off in carts of a certain character; that such by-laws were *reasonable,* and that the plaintiff could not recover damages for the revocation of his license. The Court in its opinion distinguishes this case from *Mayor v. Redecke,* 49 Md., 217, in which certain ordinances of the city of Baltimore were held *unreasonable and invalid.*

In *Louisville v. Wible,* 84 Ky., 290, the Court held that the city could not, upon its mere caprice or to gain a pecuniary advantage, violate a contract, which it had made upon a valuable consideration with an individual, whereby it granted to him the exclusive right for five years to the use of its streets for the purpose of removing the bodies of all dead animals from its streets, alleys, etc. The second headnote of that case is as follows: "The exclusive privilege of hauling the bodies of dead animals out of a city along its streets, having been granted by the city to an individual, others can not be allowed to buy up such dead animals and haul them out along the streets, although the *original owners have the privilege of thus removing them.*" That case does not appear to be an authority against the right of the owner to remove refuse from his own premises.

The *Slaughter House Case,* 83 U. S., 36, discusses at great (1146) length and with great ability the question of monopoly under the Fourteenth Amendment to the Constitution of the United States, but they do not appear to us to directly affect the principle now under consideration, that is, the necessity and reasonableness of the ordinance.

We are not disposed to question the law as laid down in 1 Dillon Mun. Corporations, sec. 144, as to the duty and power of a municipal corporation to preserve the public health and safety, but by lawful means, and in subordination to the principles enunciated by the same author in sections 319, 320, 321, 322, 325. These sections expressly lay down the rule that all ordinances "must be reasonable and lawful; must not be

oppressive; must be impartial, fair and general; and must not contravene common right." But one citation remains to be examined, that of *Brodnax v. Groom,* 64 N. C., 244. The subject-matter of that decision was an act of the Legislature providing: "That the commissioners of the county of Rockingham be and they are hereby authorized to levy and collect a special tax for the purpose of *building and repairing bridges* in said county." The Court says, on page 249: "Repairing and building bridges is a part of the necessary expenses of a county, as much so as keeping the roads in order or making new roads; so the case before us is within the *power* of the county commissioners. How can this Court undertake to control its *exercise?* Can we say, such a bridge does not need repairs, or, that in building a new bridge near the site of an old bridge, it should be erected as heretofore *upon posts,* so as to be cheap, but warranted to last for some years, or, that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have *stone pillars,* at a heavier outlay at the start, but such as will insure permanency, and be cheaper in the long run?" This language, half
(1147) humorous and half sarcastic, was surely never intended to apply to the constitutional rights of the citizen which are *not* held at the pleasure of a board of aldermen, or even of the Legislature.

We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not under *reasonable* regulations require any one to take out license before acting as a public scavenger, or even do the work through its own officers. Such cases are not before us.

We are constrained to say that the ordinance, construed as it appears to us, is not shown to be reasonable, necessary or just; and therefore, being in derogation of common right, must be held invalid in its application to the case at bar.

Error.

CLARK, J., dissenting: One of the most urgent causes for the institution of municipal government is the conservation of public health, and no duty more important is confided to municipal bodies. The nature of the ordinances they shall adopt for that purpose is a matter for their discretion, subject to change by the election of a new board, and not reviewable by the courts unless the ordinance is unreasonable. When people assemble in towns, matters of sanitation which are left to each one's own judgment in the country, become a matter of public concern. It is a matter of common observation that in this matter of cleaning

out water-closets, cesspools and sinks, if it is left to each householder, some will be guilty of neglect to the great discomfort of their neighbors, and often to the detriment of the public health; hence it has always been recognized that the regulation of that matter rested with the municipal authorities. The Code, sec. 3802, confers on (1148) towns and cities the power "to pass laws for abolishing or preventing nuisances, and preserving the health of the citizens," and the methods they shall adopt are left (except in cases of abuse) to the "local Legislature," the municipal body. *S. v. Hord,* 122 N. C., 1092; *Hill v. Charlotte,* 72 N. C., 55. The latter case says that "nothing can be clearer than that it is left entirely to those authorities to determine what ordinances are proper for those purposes."

In this matter of the best method of having the scavenger work of the city performed, it may be that, if it were for this Court to decide, I should agree with the majority that the best method is to have it done directly by the city through its officers and employees. Such is certainly the manifest tendency of the age as to all matters of municipal interest, including the furnishing of light, water, sewerage, street cars and the like. It is, however, not a matter committed to us, but to the people of each town and city to determine through its local board. When any town, as in the present instance, prefers that the scavenger business, whose proper regulation is of the highest local importance, should be performed by licensed scavengers, giving bond for the faithful performance of their duties, and under supervision of the city health officers, there has been no reason shown why it can not be done. There are ample authorities to that effect.

In *Vandine, ex parte,* 23 Mass. (6 Pick.), 187, as far back as 1828, it was held that a by-law of the city of Boston forbidding any one to remove night-soil, etc., unless duly licensed by the city was valid, though the Court there say that in their own judgment it would be better if the city would have the work done directly by its own employees than through contractors. This was cited and approved in *Commissioners v. Stodder,* 56 Mass. (2 Cush.), 563.

In *Boehm v. Baltimore,* 61 Md., 259, it was held that an (1149) ordinance that "no person shall remove the contents of any privy, well or sink within the limits of the city without having first obtained a *license* so to do," was a valid ordinance under the power "to preserve the health of the city, and to prevent and remove nuisances"—thus coming within the very letter of our Code, sec. 3802, and the ordinances of the city of Wilmington.

In another late case, *Louisville v. Wible,* 84 Ky., 290, it is held that the city have such or similar work done by contractors, and that it is no objection to the validity of the contract if there is only one contractor.

The above doctrines are laid down as well-settled law. 1 Dillon Mun. Corp., sec. 144, n. *ibid., sec.* 569, and notes.

It was held in *Slaughter House Cases,* 83 U. S., 36 (which is a thorough discussion of the proposition), that contracts of this general nature are not invalid when exclusive, because they are made in consideration of public services, but in this instance, however, there is no exclusive contract. The ordinance requires advertisements for bids, one contractor at least for each of the eight districts, bonds to be given for discharge of duty, supervision by the health officer, and power reserved to the city to cancel and revoke any contract at will, each contract to be renewed annually. The city's interest is fully safeguarded. It is purely incidental that one man has taken all the contracts, and his doing so in no wise invalidates the ordinance.

The power being clearly in the municipal body to regulate the scavenger work of the city, whether the method shall be directly by the city or by contract under the license system, is for them to decide. This Court can not review their discretion. This is stated in ever memorable words by *Pearson, C. J.,* in *Brodnax, v. Groom,* 64 N. C., at page 250.

(1150)

CASES DISPOSED OF BY PER CURIAM ORDER

LEWIS *v.* BATEMAN, from Washington. *Affirmed.* H. S. Ward for plaintiff; A. O. Gaylord for defendant.

TEMPLE *v.* INSURANCE COMPANY, from Pasquotank. *Affirmed.* G. W. Ward and E. F. Aydlett for plaintiff; R. C. Lawrence for defendant.

REDDITT *v.* MANUFACTURING CO., from Pamlico. *Affirmed.* W. W. Clark for plaintiff; Osborne, Maxwell & Keerans, and D. L. Ward, for defendant.

PURYEAR *v.* LUMBER CO., from Craven. *Affirmed.* D. L. Ward, L. J. Moore and Simmons, Pou & Ward for plaintiff; Iredell Meares, F. H. Busbee and W. L. Watson for defendant.

POPE *v.* WHITEHEAD, from Nash. *Affirmed.* T. T. Thorne for plaintiff; F. S. Spruill for defendant.

JOHNSON *v.* ROGERS, from Vance. *Affirmed.* T. T. Hicks for plaintiff; T. M. Pittman for defendant.

BUFFALOE *v.* BUFFALOE, from Wake. *Affirmed.* Douglass & Simms for plaintiff; Busbee and Argo & Snow for defendant.

GOODWIN *v.* JOHNSON, from Harnett. Motion of appellee to dismiss defendants' appeal for failure to print, allowed. Simmons, Pou & Ward for plaintiff; no counsel for defendant.

WHITTED *v.* PARKS, from Wayne. *Affirmed.* Aycock & Daniels for plaintiff; Allen & Dortch for defendant.

STATE *v.* BARBEE, from Durham. *Affirmed* upon the authority of *State v. Chadbourn,* 80 N. C., 479, and *State v. Yearby,* 82 N. C., 561. Attorney-General for State; Boone, Bryant & Biggs for defendant.

PARHAM *v.* R. R., from Granville. *Affirmed.* A. W. Graham and J. W. Graham for plaintiff; Winston & Fuller, J. B. Batch- (1151) elor and W. H. Day for defendant.

CHAPPELL *v.* MORRIS, from Durham. *Affirmed.* Manning & Foushee for plaintiff; Boone, Bryant & Biggs for defendant.

TATE *v.* FORSHEE, from Alamance. *Affirmed.* C. E. McLean, E. S. Parker and Womack & Hayes for plaintiff; no counsel for defendant.

KERR *v.* WADLEY, from Sampson. *Affirmed.* J. D. Kerr and F. R. Cooper for plaintiff; Stevens & Beasley and L. V. Grady for defendant.

CASES DISPOSED OF PER CURIAM.

GRAHAM *v.* WALKER, from Pender. *Dismissed* for failure to print. Motion to reinstate denied. J. D. Kerr for plaintiff; F. R. Cooper and Stevens & Beasley for defendant.

RHODES *v.* MOYE, from Lenoir. *Affirmed.* Battle & Mordecai for plaintiff; Y. T. Ormond for defendant.

WORTH *v.* LANCASHIRE, from Cumberland. *Affirmed.* J. W. Hinsdale and Shepherd & Busbee and R. C. Lawrence for plaintiff; H. L. Cook for defendant.

MCCASKILL *v.* LANCASHIRE, from Cumberland. *Affirmed.* J. W. Hinsdale, Shepherd & Busbee and R. C. Lawrence for plaintiff; H. L. Cook for defendant.

KOCH *v.* PORTER, from Columbus. Motion to docket and dismiss defendant's appeal under Rule 17, allowed. J. B. Schulken for plaintiff; no counsel for defendant.

CHURCH *v.* MCDUFFIE, from Cumberland. Motion to docket and dismiss defendant's appeal under Rule 17, allowed. N. A. Sinclair for plaintiff; no counsel *contra.*

(1152) ROUSE *v.* TELEGRAPH CO., from Iredell. Motion to dismiss for failure to print, allowed. L. C. Caldwell for plaintiff; Armfield & Turner for defendant.

BOWDEN *v.* R. R., from Iredell. *Affirmed.* B. F. Long and W. G. Lewis for plaintiff; G. F. Bason and A. B. Andrews, Jr., for defendant.

STATE *v.* HAMBY, from Wilkes. *Dismissed* for want of appeal bond. Attorney-General for State; no counsel for defendant.

STATE *v.* MCGLAMMERY, from Wilkes. *Affirmed* on authority of *State v. Ray,* 89 N. C., 589. Attorney-General for State; R. N. Hackett for defendant.

STATE *v.* FOSTER, from Watauga. *Affirmed.* Attorney-General for State; no counsel for defendant.

WILSON *v.* FOSTER, from Burke. *Affirmed.* S. J. Ervin for plaintiff; A. C. Avery for defendant.

WYCOFF *v.* R. R., from Catawba. *Affirmed* upon authority of *Norwood v. R. R.,* 111 N. C., 236. W. C. Feimster and M. H. Yount for plaintiff; G. F. Bason for defendant. *Cited: Upton v. R. R.,* 128 N. C., 176; *Stewart v. R. R., ibid.,* 519, 520; *Bessent v. R. R.,* 132 N. C., 941; *Beach v. R. R.,* 148 N. C., 160; *Talley v. R. R.,* 163 N. C., 577; *Abernathy v. R. R.,* 164 N. C., 95; *Ward v. R. R.,* 167 N. C., 151; *Davis v. R. R.,* 170 N. C., 587.

CASES DISPOSED OF PER CURIAM.

KRAMER *v.* *R. R.*, from McDowell. *Affirmed.* Morris & Morgan and E. J. Justice for plaintiff; G. F. Bason for defendant. *Cited: S. c.*, 127 N. C., 328.

STATE *v.* WILLIAMS, from Gaston. *Affirmed.* Attorney-General and Brown Shepherd for State; Osborne, Maxwell & Keerans for defendant.

GARREN *v.* SCOTT, from Henderson. *Affirmed.* W. A. Smith and A. E. Posey for plaintiff; no counsel for defendant.

BAXTER *v.* PORTER, from Lincoln. *Affirmed.* Jones & Tillett for plaintiff; D. W. Robinson for defendant.

HERMES *v.* CANNON, from Gaston. *Affirmed.* R. L. Durham for plaintiff; Burwell, Walker & Cansler for defendant.

LEAK *v.* R. R., from Mecklenburg. *Affirmed.* Jones & Tillett for plaintiff; Burwell, Walker & Cansler for defendant. (1153)

HINSON *v.* MFG. Co., from Mecklenburg. *Affirmed.* W. M. Smith and Osborne, Maxwell & Keerans for plaintiff; Jones & Tillett for defendant.

CALDWELL *v.* TELEPHONE Co., from Mecklenburg. *Affirmed.* Jones & Tillett for plaintiff; Osborne, Maxwell & Keerans for defendant.

SMITH *v.* R. R., from Mecklenburg. *Motion* to docket and dismiss defendant's appeal under Rule 17, allowed. Burwell, Walker and Cansler for plaintiff; no counsel for defendant.

LOG Co. *v.* COFFIN, from Swain. *Affirmed.* Merrimon & Merrimon for plaintiff; F. C. Fisher for defendant. *Cited: S. c.*, 130 N. C., 432.

STEWART *v.* EVITT, from Macon. *Affirmed.* J. F. Ray for plaintiff; G. S. Ferguson, S. P. Ravenel, Jr., for defendant.

COWAN *v.* LUMBER Co., from Macon. *Dismissed* under authority of *McNeill, v. R. R.*, 117 N. C., 642. Simmons, Pou & Ward for plaintiff; R. L. Cooper for defendant.

ANALYTICAL INDEX

ACT may be constitutional in part and unconstitutional in part. *Garsed v. Greensboro*, 159.

ACTS OF GENERAL ASSEMBLY:

Domesticating Foreign Corporations, Acts 1899, ch. 62, 831.
Authorizing Compulsory Vaccination, 1893, ch. 214, 999.
Establishing Eastern District Criminal Court, 1899, ch. 471, 1073.
Establishing Western District Criminal Court, 1899, ch. 371, 594. *Ibid.*
Processioning Proceeding, 1893, ch. 22, 409.
Fellow Servant, 1897, ch. 56 (Private Laws), 458.
Railroad Construction and Damage, 1895, ch. 224, 509.

ADMINISTRATOR appointed elsewhere can not sue in this State; there must be an ancillary administrator appointed here. *Morefield v. Harris*, 626.

Transcript of judgment obtained by him and brought here sufficient *notabilia* to warrant appointment of such ancillary administration. *Ibid.*

Attachment from justice's court creates a lien from its levy. *Ibid.*

ALDERMEN, election of, as "Street Boss" by the city board of Winston against public policy and void. *Snipes v. Winston*, 374.

APPEAL:

Premature from order of the judge directing partition proceedings to be placed on civil issue docket for trial of issue of fact. *Goode v. Rogers*, 62.

Also premature from an interlocutory order in reference to alleged credits. *Gammon v. Johnson*, 64.

Also premature from ruling allowing the verification of answer to be amended and refusing to remand partition proceedings to clerk. *Best v. Dunn*, 560.

Amended verification of pleadings in the interest of substantial justice approved. *Ibid.*

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APPEAL BY STATE:

General law, Code, sec. 1237—Special Act, 1899, ch. 471. *State v. Railway*, 1073.

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General verdict of not guilty ends the case. *S. v. Savery*, 1083.

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CLAIM AND DELIVERY will not lie for crops produced on wife's land under a crop lien by her husband without her consent. *Rawlings v. Neal*, 271.

All fraud apart on her side, his unathorized lien can not be enforced. *Ibid.*

The seizure of her crop under such lien being wrongful, she is entitled to judgment for its return, or its value undiminished, and for costs. *Ibid.*

Should she charge her separate personal estate by virtue of section 1826 of The Code, the creditor can not seize the property, but must reduce his debt to judgment, which can be enforced subject to her right of exemption. *Ibid.*

Affidavit indispensable under The Code, secs. 322 and 890. *Griffith v. Richmond*, 377.

2. Note secured to be proved—registered mortgage proves itself and estops the mortgagor to deny his responsibility for forthcoming of property when required to be applied to debt. *Ibid.*

3. In order to avoid security of action, when the debt is denied, the issues and judgment should cover the whole case, and the value of the property at the time of seizure should be ascertained, as the sureties are liable for such value. *Ibid.*

4. A charge if wanted should be asked for. *Ibid.*

Clerk's bonds are cumulative security for performance of official duties. *Darden v. Blount*, 247.

COLLATERAL RELATIONS, the heirs of deceased, represent their ancestors. *Draper v. Bradley*, 72.

COLLATERAL SECURITIES—past due notes lodged as securities to bank indebtedness subject to all proper defenses by the maker against original payees. *Bank v. Loughran*, 814.

CONCURRENT INSURANCE in different companies permissible; when the policies issued by the same agent acting for all, each has notice. *McCarty v. Insurance Cos.*, 820.

Inadvertent omissions and immaterial misrepresentations will not prevent recovery. *Ibid.*

CONDUCTORS OF RAILROAD must protect passengers from wrongful treatment, but may not resist arrest by a known officer. *Owens v. R. R.*, 139.

2. The mere pointing out to an officer a party indicated in a telegram as suspected of a capital offense does not render his company liable for false arrest. *Ibid.*

COMMON CARRIER liable for safe and seasonable transportation of cattle. *Hinkle v. R. R.*, 932.

May permit consignee and purchasing agent to inspect the articles before delivery. *Sloan v. R. R.*, 487.

COMMON CARRIER—*Continued.*

Where the complaint contained two causes of action, a general demurrer admits both, although intended to apply to one only. An answer should be filed by law to the other. *Ibid.*

The sum demanded in good faith determines the jurisdiction. *Ibid.*

COMMON GRANTOR, when both parties claim under, neither need go up back of the common source, and the elder deed will prevail, containing apt words of conveyance and description to admit of location. *Clark v. Moore*, 1.

2. Even lightwood stakes called for are not sufficiently durable to serve as monuments indicating corners—their designation may be aided by corners given and by natural objects called for, and the quantity of land specifically described, as one acre. *Ibid.*

3. Plaintiff not estopped by matter *in pais*, because one of his *mesne* grantors did not object when defendant was surveying the land. *Ibid.*

4. The deed first registered makes out a *prima facie* title. Unregistered deed is not now color of title. *Austin v. Staten*, 783.

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CONTEMPT PROCEEDING. Disclaimer of all purpose to commit any contempt of court, accompanied by a refusal to obey the lawful order in the cause, no answer to the rule. *Herring v. Pugh*, 852.

Waiver of *venue* to such rule. *Ibid.*

CONTRACT, specific performance of, for sale of land will not be enforced unless there was a written obligation on part of defendant to pay for same. *Davison v. Land Co.*, 704.

CONTRACT—No duration of employment being specified, general rule is, that it may be determined at the will of either. *Richardson v. R. R.*, 100.

2. Malice, disconnected with the infringement of a legal right, is not actionable. *Ibid.*

3. Punitive damages never given for breach of contract except in cases of promises to marry. *Ibid.*

In restraint of trade, as a general rule, such contract is void, as contrary to public policy. *King v. Fountain*, 196, 295.

2. Rule modified, when public interest will not suffer detriment. *Ibid.*

3. Restriction in operating the livery business, confined to single county town, for three years, applicable to one person only, is not unreasonable. *Ibid.*

The statute of frauds does not apply to executed, but only to an executory contract. *Hall v. Fisher*, 205.

2. An executory unwritten contract requires a consideration to support it, or it will be *nudum pactum*. *Ibid.*

3. A contract to do something must be something the party can do; and which is not in violation of law or public policy—otherwise it is not enforceable. *Ibid.*

CORPORATION judgment creditor in action of tort may pursue his remedy against the property of the company, by execution, and not by motion

CORPORATION—*Continued.*

to intervene in a foreclosure proceeding of mortgage pending in court, unless the court has taken charge of the property and prevented the enforcement of the execution. *Williams v. R. R.*, 918.

As a general rule, not authorized to take stock in another corporation—when, however, in the course of business it does become holder of such stock, it holds it subject to the liability of an incorporation therein. *Meares v. Imp. Co.*, 662.

COSTS—Court will not decide the merits of a controversy which no longer exists, merely to determine who shall pay the costs. *Commissioners v. Gill*, 86.

2. The judgment appealed from will be presumed to be correct until reversed on its merits. *Ibid.*

COUNTERCLAIM—The defendant admitting the contract price of work done by plaintiff, but setting up counterclaim for defective character of work done, takes the burden of proof upon himself. *Dyeing Co. v. Hosiery Co.*, 292.

Counterclaim is available, if arising upon contract express or implied. The law will presume a contract to pay when money is received and wrongfully detained from rightful owner. *Ibid.*

DAMAGES—In enumerating plaintiff's grounds for damages none should be stated unless supported by proof. *Smith v. R. R.*, 712.

DECISIONS of the highest court of a sister State entitled to all respect, but are not controlling as precedents. *Meares v. Improvement Co.*, 662.

DEDICATION for public use. A landowner laying off his land in lots and squares and streets and public park and selling by a map recorded, constitutes a dedication to the public of the streets and public squares indicated thereon. *Conrad v. Land Co.*, 776.

DEED conveying one-half of a tract of land, without further description, conveys a one-half undivided interest. *Morehead v. Hall*, 213.

In trust of property to be managed for maintenance of parents and children is valid—the property passed absolutely, and is vested in trustee for the purpose of the trust. Third parties claiming adversely to the trust can not, after death of grantor, set up an alleged violation of a covenant therein, as ground for defeating it. *Robinson v. Ingram*, 327.

Mortgage made by trustees is invalid, and sale under execution passes no title. *Ibid.*

Made by a mother for support of imbecile daughter will be enforced by the court—it is a lien on the land and not a mere personal charge. *Wall v. Wall*, 405.

From husband to wife valid. *McLamb v. McPhail*, 218.

DEED IN TRUST TO SECURE TRUSTEES:

Surety not secured is party in interest, and disqualified to take probate and acknowledgment of the deed. *Blanton v. Bostic*, 418.

If the disqualification appears upon the face of the record, the registration is a nullity as to the subsequent purchasers and incumbrances; if it does not so appear, the claimant under the defective probate, if without notice, gets a good title. *Ibid.*

DEED OF ASSIGNMENT—Feigned debt:

A preferred debt secured to the mother in law of debtor, an inmate of his home, and no evidence of the indebtedness, will be regarded as a feigned debt, and will be eliminated. *Jordan v. Newsome*, 553.

The deed of assignment being made part of the complaint the debts included and not assailed will be regarded as *bona fide*. *Ibid.*

Homestead reserved, but irregularly allotted, will be reallotted under direction of the court. *Ibid.*

Homestead reserved, the wife of assignor need not be a party to the assignment. *Ibid.*

DEMURRER TO EVIDENCE—The plaintiff's evidence will be considered as true and taken in the most favorable light for it. *Printing Co. v. Raleigh*, 516.

2. In reviewing judgment of nonsuit the court will assume any fact found necessary to be proved, when the evidence tends to prove it. *Ibid.*

3. When there is no conflict of facts, and only one inference can be reasonably clear, it becomes a question of law. *Ibid.*

4. When the facts are not clear nor the evidence plain, the question of negligence goes to the jury as a mixed question of law and fact, under proper instructions from the court. *Ibid.*

Demurrer to evidence, which if true, establishes a concurrent negligence to the last moment, makes judgment of nonsuit proper. *Neal v. R. R.*, 634.

DISPENSARY SYSTEM explained and sustained, 159—1057.

DISTURBING RELIGIOUS CONGREGATION, Indictment for, will not be sustained, when the lights are extinguished and the congregation dispersed. *S. v. Davis*, 1059.

DOMESTICATION OF FOREIGN CORPORATION—Legal effect is to charter and not to license. Diversity of State citizenship obviated (Act 1899, ch. 62). *Debnam v. Telephone Co.*, 831.

Enables plaintiffs to get service upon foreign corporations, but their property is not removed to this State nor the *situs* of debts created elsewhere. *Strauss v. Insurance Co.*, 223.

Without jurisdiction of the person or subject-matter of the suit, judgment is treated as a nullity. *Ibid.*

DOWER is claimed under the statute, not under the husband, often against him. *Brown v. Morisey*, 772.

2. The widow has no estate in the land until assignment, and the statute of limitations can not be pleaded against her. *Ibid.*

3. Her claim is in the nature of a "writ of right," is favored by the law, and can not be forfeited except for causes prescribed by statute or the common law. *Ibid.*

EJECTMENT—Equitable title will support for possession. *Shannon v. Lamb*. 38.

Evidence tending to prove the fact found by the referee, concurred in by the judge, is as binding on the court above as the findings of the jury. *Bank v. Loughran*. 814.

EJECTMENT—*Continued.*

2. Plaintiff claiming under a grant covering the land, and defendant admitting possession, make a *prima facie* case for plaintiff. *Lewis v. Overby*, 247.

3. The case may be rebutted by showing title out of the State before the grant issued, as by proving twenty-one years adverse possession under color of title. *Ibid.*

Not barred by judgment in processioning proceedings under act of 1892, ch. 22. *Vandyke v. Farris*, 744.

ELIZABETH CITY FERRY:

Right to operate public ferry is a public franchise, granted by legislative authority to be exercised under supervision of county commissioners, and is revocable. Tolls are regulated by them. *Robinson v. Lamb*, 492.

EMBEZZLEMENT, a statutory offense, embracing the enumerated relations. Code, secs. 1014, 1114. *S. v. Keith*, 1114.

EMPLOYMENT, duration of, not specified may usually be terminated at will of either party. *Richardson v. R. R.*, 100.

ESTOPPEL *in pais*—Plaintiff not estopped by matter *in pais* because one of his *mesne* grantors did not object to defendant surveying the land. *Clark v. Moore*, 1.

Relied upon as a defense must be pleaded specially. When general issue is pleaded, plaintiff may introduce record of former suit as evidence, without special plea. *Stancill v. James*, 190.

EVIDENCE, conflicting, goes to the jury.

There being evidence of negligence and of contributory negligence the jury are to determine the *proximate cause* of the injury, that is, whose negligence was nearest to the injury, and which party had the last clear chance to avoid it. *Short v. Gill*, 803.

Weight and credibility of witnesses are for the jury. *S. v. Smith*, 116; *S. v. Utley*, 997.

FACTS found by referee on evidence, concurred in by the judge, not subject to review. *Bank v. Loughran*, 814.

Found by referee, upon evidence, and approved by the judge, conclusive. *Dunn v. Beaman*, 764.

Of record, not affected by recitals in judgment. *Ellis v. Massenburg*, 129.

Found by the judge upon evidence, preliminary, not subject of review. *Davison v. Land Co.*, 704.

FARMING OUT PUBLIC OFFICE, prohibited. Code, sec. 2084. *Cansler v. Penland*, 793.

FINES AND PENALTIES:

Fines are imposed and collected in "criminal actions." Penalties are collected in "civil actions." Both belong to the County School Fund when collected at expense of the State. Including also fines for infraction of town ordinance, made misdemeanor by section 3820 of The Code. *Board of Education v. Henderson*, 689.

Act 1899, ch. 128, diverting fines and penalties from the School Fund can not be sustained. Article IX, sec. 5, of the Constitution. *Ibid.*

FIRES from locomotives—where the offending engine is known—its condition and defects are the proper subjects of inquiry, not those of other engines. *Ice Co. v. R. R.*, 797.

Fire originated by locomotive off of right of way, the railroad company not liable to third person for damages—otherwise, when the fire is originated on the right of way. *McMillan v. R. R.*, 725.

FIRE INSURANCE, concurrent, permissible, if by same agent of both companies, notice of incumbrance waiver of objection. *McCarty v. Insurance Cos.*, 820.

"FILED," term used in section 164 of The Code, signifies that the claim is to be exhibited to personal representatives for inspection. Creditor need not part with the possession. *Hinton v. Pritchard*, 8.

FLOATABLE STREAMS—Assessments, Act 1897, ch. 388.
Petition to repeal case in 124 N. C., 749, disallowed. *Hutton v. Webb*, 897.

FLYING SWITCH AND KICKING CARS—Railroad terms, 735.

FRAUDS, Statute of, and Registration Act 1885, ch. 147, are to be construed together to prevent fraud. Unregistered deed not now color of title. *Austin v. Staten*, 783.

Testimony offered to prove promise incompetent under the statute, to be excluded on objection. *Jordan v. Furnace Co.*, 143.

Compensation in equity will be allowed for improvements made by parol purchaser of land. Action for damages for nonperformance of contract will not be sustained. *Ibid.*

Applicable to executory contracts. *McManus v. Tarleton*, 790.

FRAUDULENT *Conveyance.*—A voluntary conveyance made to secure some creditors and to defraud others is void. *Mitchell v. Eure*, 77.

Where the father is preferred by an insolvent son, the burden of proof is shifted to prove *bona fide* of deed. *Ibid.*

FRAUDULENT *executory contracts* will not be enforced at law, and fraudulent conveyance will be set aside in equity. *Ibid.*

FREE PASSES—Error against the State, however potent, not remedied on appeal by the State, unless the restricted right of appeal extends thereto. *S. v. R. R.*, 1073.

GAME LAWS—Gaming and fishing in North Carolina. *S. v. Gallop*, 979.

GIFTS, *inter vivos causa mortis*—Delivery. Revocation. *Duckworth v. Orr*, 674.

GRANT—Plaintiff claiming under a grant, but his title fails to connect, his deed is mere color of title which must be accompanied by possession for required time to ripen. *Cedar Works v. Kilby*, 33.

GREENSBORO DISPENSARY may operate upon its own means and use its own credit. It is an agency of the State, not of the town. *Garsed v. Greensboro*, 159.

Act, violation of. *S. v. Newcomb*, 1104.

GROWING TIMBER, sale of, measuring 10 inches and above, pine and poplar on certain tract, for mill logs, confines the cutting to trees of the kind and size, but does not restrict the use. *Herring v. Hardison*, 75.

GROWING CROPS—As between lessor and lessee, possession vested in lessor, Code, sec. 1754. As between lessee and third parties, lessee entitled. *S. v. Higgins*, 1112; *S. v. Keith*, 1114.

GUARANTY, continuing. *Rouss v. Krauss*, 667.

Is a promise to answer for the performance of some duty in case of the failure of some person liable in the first instance for its performance. *Andrews v. Pope*, 472.

An endorser, without recourse, who stipulates to pay if maker does not, is a guarantor. *Ibid.*

GUARDIAN—His annual account competent evidence against him, and presumptive evidence against his sureties. *Loftin v. Cobb*, 58.

His bond liable for all moneys collected or which ought to have been collected due his ward. *Ibid.*

Administrator of former guardian becoming guardian, his guardian bond is liable for any balance due from solvent estate of former guardian. *Ibid.*

Wards having remedy against different persons may elect when to sue, leaving it to them to adjust their equities. *Ibid.*

Guardian *ad litem*. A plaintiff, though nominal, is disqualified to represent infant defendants. *Ellis v. Massenburg*, 129.

Appointment *nunc pro tunc*, disapproved. *Ibid.*

Strict compliance with the law when dealing with rights of infants and married women impressed upon the profession. *Ibid.*

HACK DRIVERS—Passengers. Negligence. Proximate cause. Remote cause. (Petition to rehear case reported in 124 N. C., 591.) Petition allowed. *Crampton v. Ivie Bros.*, 894.

HOMICIDE—Degree to be determined by the jury. In a conflict of evidence, their views of its weight and credibility controls although different from that of the appellate court. *S. v. Smith*, 1116.

Assailant with deadly weapon and deadly intent may not take life to save his own. He must withdraw from the conflict and manifest that he has abandoned his intent before he can take life in self-defense. *S. v. Medlin*, 1127.

HOMESTEAD being reserved, wife not necessary party to deed of assignment by husband. *Jordan v. Newsome*, 552.

Irregularly allotted may be reallotted by the court. *Ibid.*

HUSBAND AND WIFE, are among the confidential relations presumptive of fraud in business dealings, unless rebutted. *Howard v. Early*, 170.

Oral agreement to secure the wife valid; fraud on part of husband will not vitiate her title unless participated in by her. *Ibid.*

Husband's signature as witness to written assignment of wife is equivalent to his "written assent," Constitution, Art. X, sec. 6. *Jennings v. Hinton*, 48.

INFANTS:

Consent decree may be entered when the facts are developed and found by the court, who adjudges the course as best for the infant; otherwise, not. *Ferrell v. Broadway*, 258.

Legitimacy established by verdict and judgment is *res judicata*. *Ibid.*

Statutory action prescribed by The Code, sec. 1428, against party occasioning the death of another, may be maintained by administrator of infant. *Russell v. Steamboat Co.*, 691.

INSURANCE companies may not alter terms of contract without consent of insured. If they refuse to recognize the insured as a member because of his failure to pay invalid increased assessments, he has his right of action for damages, to be measured by amount of premiums and dues paid by him, with interest from date of each payment. *Strauss v. Life Association*, 971.

The fact that the plaintiff sent on a proxy to enable the company to have a quorum implies no waiver of his rights. *Ibid.*

INSURANCE—LIFE POLICY.

The application for delivery of policy and payment of first premium in good health—there is no contract of insurance until delivery of policy. *Ray v. Insurance Co.*, 166.

Where the action sounds in damages for breach of contract, and there was no contract, a claim for money had and received can not be recovered in this action. *Ibid.*

Demand made, certificate shown, death proved, make a *prima facie* case for plaintiff. *Doggett v. Golden Cross*, 477.

A refusal to pay the policy or denial of liability on other grounds waives notice and proof of loss. *Ibid.*

Usual mode of transmission of premiums by check accepted by the company may be adopted. Former course of dealing between the parties will be recognized to prevent forfeitures, which are not favored. *Hollowell v. Insurance Co.*, 398.

U. S. mails recognized mode of transmission as approved public agency. *Ibid.*

Policy improperly cancelled to be compensated in damages, return of premiums paid with interest. *Ibid.*

INSURANCE ON PROPERTY:

Equitable interest insurable. *Clapp v. Guano Co.*, 388.

Knowledge of agent in fire insurance knowledge of principal. *Ibid.*

Failure of notice of loss by fire will not avail if waived. *Ibid.*

INSURANCE OF DISEASED APPLICANT, known to the agent as such, a fraud on his company. *Sprinkle v. Indemnity Co.*, 678.

Of building on leased land admissible if notice is given to company, the policy to the contrary. *Cowell v. Insurance Co.*, 684.

ISSUES submitted should arise on the pleadings, and not merely presented by the evidence. *Howard v. Early*, 170.

Framing of, largely left to trial judge. *Bradley v. R. R.*, 735.

Should be responded to separately. *Ibid.*

ISSUES—*Continued.*

A general prayer that plaintiff can not recover should not be given. *Ibid.*

When neither raised by the pleadings nor supported by evidence properly refused. *Sprinkle v. Indemnity Co.*, 678.

JUDGE'S CHARGE need not be in the very words of counsel if it correctly states the law applicable. *Cox v. R. R.*, 103; *Bradley v. R. R.*, 735.

JUDGMENT against an executor fairly obtained without collusion or fraud conclusive against heir or devisee. *Hinton v. Pritchard*, 8.

Appealed from, presumed correct until reversed upon its merits. *Commissioners v. Gill*, 86.

To be effectually docketed must be properly indexed. The Code, sec. 433. *Darden v. Blount*, 247.

Upon an administrator bond for the penalty. *Ibid.*

Non obstante veredicto granted when the cause of action is confessed and the defense is insufficient. *Hauser v. Harding*, 295.

Not applicable to the facts found is reviewable. *Ladd v. Teague*, 544.

Where the record proper differs from the statement of the case the former controls. *Ibid.*

Where the order recites it was made by consent the court is bound by this statement. *Ibid.*

Judgment and attachment here, formed on judgment obtained in Ohio used here as evidence are valid, and relate back to the levy, and not subject to injunction at the instance of other creditors on allegations of irregularity in the Ohio judgment. *Glass Plate Co. v. Furniture Co.*, 888.

JURISDICTION of a State may not be extended over persons and property beyond its limits. *Hinton v. Insurance Co.*, 18.

Service by publication, when permissible. *Ibid.*

Invalid process, ineffectual service, void judgment—no estoppel, all recitals to the contrary notwithstanding. *Ibid.*

Conferred by sum demanded in good faith. *Sloan v. R. R.*, 487.

Being obtained over the person or subject-matter, will support the judgment, otherwise the judgment is a nullity. *Strauss v. Insurance Co.*, 223.

In attachment and garnishment not acquired by the mere suability of a debt, where neither creditor, debtor, nor garnishee are domiciled in the State. *Ibid.*

Acquired by personal service on foreign corporations by statutes of "domestication." *Ibid.*

Jurisdiction and authority of special terms evidenced by judge's commission. *Short v. Gill*, 803.

JUROR, on special venire, not a freeholder—remedy. *S. v. Davis*, 1007.

JURY, GRAND, retaining over for special service at subsequent term authorized by act of 1899, ch. 471, an innovation of questionable utility, though not unconstitutional. *S. v. Davis*, 1007; *S. v. Battle*, 1036.

JUSTICE'S COURT:

Process, how issued—to whom directed—how enforced. *McGloughan v. Mitchell*, 681.

JUSTICES OF THE PEACE:

Number and manner of election. *Mitchell v. Alley*, 84.

KICKING CARS AND FLYING SWITCH:

Railroad terms. *Bradley v. R. R.*, 735.

KINSTON—Town ordinances and subjects of taxation. *S. v. Irwin*, 989.

The town commissioners can not make a violation of town ordinances a misdemeanor—their charter does that in section 19, and so does The Code, sec. 3820. *Ibid.*

The town records kept by the clerk competent evidence of town ordinances. *Ibid.*

KILLING STOCK:

Engineer must use his common sense in sounding alarm when frightened animal is on the track running into danger—if necessary the whistle should cease and the train be stopped. *Brinkley v. R. R.*, 88.

LARCENY of growing crops—ownership—how charged. *S. v. Higgins*, 1112.

"LAST CLEAR CHANCE."—*Wheeler v. Gibbon*, 811.

LEGITIMACY of a party to a suit established by verdict and judgment is *res adjudicata* as to all the world. *Ferrell v. Broadway*, 258.

LOST PAPERS containing material evidence directed to be sent up, and which can not be found, remedied by a new trial. *S. v. Huggins*, 1055.

"LUMBER DEALER."—Term explained, as used in Revenue Act of 1899, ch. 11, sec. 58. *S. v. Barnes*, 1063.

MADISON DISPENSARY ACT modifies, but does not repeal the general law against retailing spirituous liquors without license—the violator of either indictable. *S. v. Smith*, 1057.

MALPRACTICE on part of physician calls for damages compensatory and even punitive. *Gray v. Little*, 385.

MALICE, disconnected from infringement of legal right not actionable. *Richardson v. R. R.*, 100.

Declaration of ill-will towards an agent incompetent as evidence of ill-will towards principal. *S. v. Battle*, 1036.

MANDAMUS on money demand returnable to term for performance of official duty may be returnable before judge at chambers. *Ducker v. Venable*, 447.

The man legally and rightfully performing the duties of an office is entitled to the compensation affixed by law, and to an order of mandamus to enforce it. *White v. Auditor*, 570.

MARRIAGE of daughter displaces parental right. *Wilkinson v. Dellinger*, 462.

License wrongfully issued—remedy on register's bond. *Ibid.*

MARRIED WOMAN—Her separate real estate not liable to be charged under section 1820, of The Code. *Bazemore v. Mountain*, 313.

Her personal estate may be so charged when sufficiently described. *Ibid.*

Consent of husband not necessary when her indebtedness is incurred for necessary personal expenses, for support of her family, or to pay antenuptial debts. *Brinkley v. Ballance*, 393.

Consent of husband how manifested. *Ibid.*

MEASURE OF DAMAGES—Where the property, such as machinery, has been accepted by the buyer, the rule of damage is the difference between the value of the property received and what it would have cost the defendant to purchase such machinery described in the contract and warranty. *Manufacturing Co. v. Gray*, 108.

MINORS, land of, may be sold by the court for better investment, when properly represented. *Hutchinson v. Hutchinson*, 671.

MORTGAGE or judgment incumbrancers should usually be made parties in foreclosure, their liens being transferred from the *corpus* to the *fund*. *Gammon v. Johnson*, 64.

By husband and wife of wife's land to secure his debt is discharged by extension of time, even after her death, by operation of law. *Fleming v. Barden*, 450.

MORTGAGOR, or vendee under contract of purchase, failing to pay, the remedy is by action for possession of the land, for sale and foreclosure, for judgment for rent, or for all three remedies. *Credle v. Ayers*, 11.

Possession retained after suit becomes wrongful and they become liable for *mesne* profits. *Ibid.*

Measure of damages is actual rental value, not what was actually gathered from the land. *Ibid.*

Evidence incompetent as to actual rental value of adjoining land. *Ibid.*

May disaffirm the sale when mortgagee buys; if sale is appproved the mortgagee is responsible for what the land brought—if not approved it is a nullity. *Austin v. Stewart*, 525.

MOTION FOR NEW TRIAL for newly discovered evidence in a criminal case not entertained in Supreme Court. *S. v. Edwards*, 1051.

Rulings as to conduct of the cause—exception to jurors; peremptory challenges; judge's charge; remarks of counsel; preaching to jurors; entry of verdict. (*S. v. Boyle*, 104 N. C., 800, overruled.) *S. v. Kinsauls*, 1095.

Mental capacity of prisoner, if controverted, to be submitted to the jury upon proper evidence. *S. v. Jones*, 1099.

MUNICIPAL TAXATION, property tax and privilege tax are distinct—exemption from one does not relieve from the other. The Code, sec. 3900. *Guano Co. v. Tarboro*, 68.

MURDER—The jury indicate the degree, where there is evidence of deliberation and premeditation in the killing. *S. v. Edwards*, 1051.

The killing of a policeman when he is endeavoring to do his duty can not be placed on ground of self-defense. *Ibid.*

Where it is questionable which of two parties fired the fatal shot, it matters not if the jury are satisfied there was a conspiracy to kill, and that they were aiding and abetting each other. *Ibid.*

NEGLIGENCE and contributory negligence being shown, the remaining question for the jury is, as to the last clear chance, and their response decides the case. *Wheeler v. Gibbon*, 811.

If the negligence of his own driver was the proximate cause of the injury, his driver is also responsible. The passenger is responsible for his own negligence. *Crampton v. Ivie Bros.*, 894.

Negligence of hack driver not to be imputed to a passenger unless the latter assumed control. If passenger is injured by concurrent negligence of his driver and the driver of another hack he can recover against the latter, unless his negligence was remote. *Ibid.*

Negligence, legal, is the absence of that degree of care which the law requires a man to exercise under the peculiar circumstances in which he may be placed for the time being. *Brinkley v. R. R.*, 88.

Approved definition of negligence. *Bradley v. R. R.*, 735.

Of fellow servant occasioning injury to plaintiff not to be imputed to company previous to Fellow Servant Act of 1897, ch. 56 (Private Laws). *Brown v. R. R.*, 458.

Contributory negligence, "the last clear chance," approved issues. *Cox v. R. R.*, 103.

Both parties being guilty of negligence the question of proximate cause comes up. *Dunn v. R. R.*, 343.

Derailment of train, resulting in the death of fireman, *prima facie* evidence of. *Marcom v. R. R.*, 200.

Failure to keep a proper lookout is evidence. *Brinkley v. R. R.*, 629.

Running mixed local freight trains with passenger car attached with regular schedule, without conductor, *prima facie* evidence of. *Ibid.*

NEGLIGENCE, CONTRIBUTORY:

Lying down on railroad track *per se* is such negligence. *Arrowood v. R. R.*, 629.

NEW TRIAL will be awarded on the whole case where the evidence of fact on the face of the statement on appeal is uncertain. *Smith v. R. R.*, 712.

NONSUIT, on motion to, the evidence of plaintiff will be accepted as true and construed most favorably for him; if there is more than a scintilla of proof, it goes to the jury. *Brinkley v. R. R.*, 88.

After motion to, it is discretionary with the defendant, under act of 1897, ch. 109, amended by act of 1899, whether he will introduce evidence or not—previously it was discretionary with the court to allow it or not. *Means v. R. R.*, 424.

On motion to, whatever the evidence tends to prove must be taken by the court as proved. *McMillan v. R. R.*, 725.

OFFICE PUBLIC, not to be farmed out. Code, sec. 2084. *Cansler v. Penland*, 793.

PARTIES additional may be made by order of the judge. *Mills v. Callahan*, 756.

PARTIAL PAYMENT by executor repeals the statute of limitations and admits the claim. *Hinton v. Pritchard*, 8.

PARTITION PROCEEDINGS—Defenses to payment of owelty present issues of fact for the jury, not questions of fact for the court. *Goode v. Rogers*, 62.

Children as heirs expectant, have no estate in the land, but may contract in writing to convey their expectancy. *Vick v. Vick*, 123.

Differences, if not otherwise adjusted, will be settled in partition proceedings. *Ibid.*

Title not in issue unless *sole seizin* is pleaded—otherwise parties are taken as tenants in common, their interest to be ascertained by the court. *Graves v. Barrett*, 267.

Deed to the heirs of John A. Barrett, he being alive, good under our statute, Code, sec. 1329. *Ibid.*

PASSENGER not responsible for conduct of hack driver unless he assumed to control him. *Bradley v. R. R.*, 735.

PAYMENTS not to be applied to oldest indebtedness when the understanding of parties is to the contrary. *Rouss v. Krauss*, 667.

PENALTIES, not given to the State may be sued for by individuals. *Carter v. R. R.*, 437.

Belong to the State for school purposes when given by law. Constitution, Article IX, sec. 5. *Ibid.*

Against railroad for refusing to receive and forward freight—each day's refusal a separate offense. *Ibid.*

PENALTY.—Informer has no vested right until after the judgment. *Dyer v. Ellington*, 941.

PIANOS AND ORGANS—Under Revenue Act, 1899, ch. 11, sec. 27, a ten-dollar license required of each salesman. *S. v. Morrison*, 1123.

PLEADINGS should present the issues, not the evidence. *Howard v. Early*, 170.

May present inconsistent defenses, if pleaded separately. *McLamb v. McPhail*, 218.

Plaintiff in ejectment or trespass need not set out his title, sufficient to allege ownership. *Stancill v. James*, 190.

Estoppel is a defense to be pleaded specially. *Ibid.*

Possession recoverable under equitable title since The Code. *Shannon v. Lamb*, 38.

To attack the judgment must be done by direct proceeding alleging fraud, imposition, and the like. *Banking Co. v. Morehead*, 279.

Superior Court has no right to modify judgment of Superior Court; in submission thereto an issue may be submitted whether cosignors are sureties among themselves, or coprincipal. *Ibid.*

POISONING, attempt at. Indictment need not aver a knowledge by accused of the deadly character of the substance alleged to be poisonous. *S. v. Utley*, 997.

PRACTICE:

Compulsory order of reference premature until pleas in bar are determined. *Bank v. Fidelity Co.*, 320.

Defect in complaint when cured by answer. *Ibid.*

PRACTICE—*Continued.*

Surety companies are analogous to insurance companies; where breaches of the contract by plaintiff are relied upon, they must be specified in the answer and proved. *Ibid.*

PROCESSIONING proceedings no bar to ejectment. *Vandyke v. Farris*, 744.

The court decides what are the boundaries, the jury where they are. *Echerd v. Johnson*, 409.

In running a line from agreed corner, if a natural object, as a tree, is called for, and the spot can be located, go to it; if not, course and distance control. *Ibid.*

PROXIMATE cause of injury denotes whose negligence was nearer to the injury—the law holds that party responsible, who had the last chance to avoid the injury. *Short v. Gill*, 803.

There being several allegations of negligence, it is for the jury to determine what was the proximate cause. *Ibid.*

Proximate cause of injury. *Crampton v. Ivie Bros.*, 894.

PUBLIC ROADS:

Sentence to work, is valid when authorized by statute. *State v. Smith*, 1057; *State v. Hamby*, 1066.

Worked by taxation, specified rate not to be exceeded. *Hornthall v. Commissioners*, 26.

Worked by convicts—sentence valid. *S. v. Smith*, 1057; *S. v. Hamby*, 1066.

QUO WARRANTO:

Title to office superintendent of roads of Warren. *Dontin v. Beardsley*, 119.

Superintendent of schools for Granville. *Baker v. Hobgood*, 149.

Clerk of Western Criminal District Court. *White v. Murray*, 153.

Justice of the Peace. *Mitchell v. Alley*, 84.

Solicitor of Buncombe Criminal Court. *McCall v. Webb*, 760.

Solicitor Criminal Court of Forsyth County. *Mott v. Griffith*, 775.

Clerk Criminal Court of Forsyth County. *Wilson v. Neal*, 781.

RAILROADS CROSSING highway and streets—The right and power exist, but they must maintain safe and convenient crossings. *Raper v. R. R.*, 563.

A space between rails wide enough to catch a man's foot evidence of negligence. *Ibid.*

Competent to show that at crossing similarly constructed, people get their feet caught. *Ibid.*

Not competent to show that at another crossing a different construction was used. *Ibid.*

RECEIVERS—Appointment is matter of record and should be shown by the record; failure to produce a copy is failure of proof. *Person v. Leary*, 504.

Foreign, like foreign administrators, shall apply for appointment here before bringing suit. *Ibid.*

RECEIVERS—*Continued.*

Rate of compensation—not in excess of five per cent on receipts and disbursements. The Code, sec. 379 (4). *Bank v. Bank*, 531.

Too many receivers and excessive allowances to be avoided. *Ibid.*

RECORD—Essential facts apparent upon the face of the record will not be affected by recitals in the judgment. *Ellis v. Massenburg*, 129.

REFEREE AND RECEIVER:

Receiver, when appointed, supersedes the officers of a corporation; their salaries suspended. *Lenoir v. Imp. Co.*, 923.

Facts found by reference without evidence are reviewable; when court and referee concur that there is no evidence to support an allegation—their opinion is not reviewable. *Ibid.*

REFERENCE—Case under, controlled by the judge, who may find facts from the evidence for himself. *Credle v. Ayers*, 11.

Facts found by the referee from the evidence, concurred in by the judge, have the force of a verdict. *Lewis v. Overby*, 347.

Order of, premature while plea in bar is pending. *Austin v. Stewart*, 525.

Referee can not dismiss an action for want of jurisdiction in Superior Court. *Ibid.*

REGISTER responsible for wrongful issue of marriage license. *Wilkinson v. Dellinger*, 462.

REGISTRATION Act, and Statute of Frauds, both intended to prevent fraud and to be construed together. *Austin v. Staten*, 783.

Unregistered deed not now color of title. *Ibid.*

Deeds from common grantor—first registered *prima facie* effective. *Ibid.*

REHEAR, PETITION TO, not allowed, when defendant upon an amendment asked for, which is inconsistent with the facts developed on the trial, and which would be unfair to the court who tried the case upon the record presented a year ago. *Manufacturing Co. v. Gray*, 108.

Location of disputed line. Case reported in 123 N. C., 511, reaffirmed. *Tucker v. Satterthwaite*, 958.

RELEASE, for valuable consideration, of a party primarily liable, operates as a discharge of a party secondarily liable, who in the event of recovery against him would have recourse against the party released. *Brown v. Louisburg*, 701.

REMOVAL OF CAUSES for trial discretionary with the court and not reviewable, nor restricted. *Lassiter v. R. R.*, 507.

RENTAL VALUE determines measure of damages, and not the crop actually gathered. *Credle v. Ayers*, 11.

RIGHT OF WAY, of specified width, to be exclusive must be located and constructed. *Lumber Co. v. Hines Bros.*, 254.

Does not preclude the use of the land by owner which is not in conflict therewith. *Ibid.*

Trespass will not be enjoined where irreparable. *Ibid.*

Timber deeds, how construed. *Ibid.*

RESTRAINT OF TRADE—Sale of medical practice, how far enforceable. *Hauser v. Harding*, 295.

Sale of livery business. *King v. Fountain*, 196.

RETAILING SPIRITUOUS LIQUORS without license violates the general law and the Dispensary Acts—indictable under either. 1057.

ROAD LAW of 1899, ch. 581. Proper course of proceeding under the act indicated. *Wynn v. Beardsley*, 116.

Sentence to work the public roads is valid. *Ibid.*

SCAVENGER, City of Wilmington:

If licensed scavenger is inadequate, the property-owner is remitted to his natural right to keep his premises clean. *S. v. Hill*, 1139.

SEWERAGE OF GOLDSBORO—Rights of city and citizens defined and explained. *Slaughter v. O'Berry*, 181.

SMALLPOX—Neither the town of Morganton nor county of Burke are liable in their corporate capacity for the tort occasioned by their commissioners in the causing to be burned the house and property of plaintiff to prevent the spread of contagious disease—their act was *ultra vires*, without authority of law, and plaintiff must look elsewhere for redress. *Prichard v. Commissioners*, 908.

SPECIAL INSTRUCTION, clear and correct, shall be given without addition calculated to obscure it. *Dunn v. R. R.*, 343.

STATUTE OF FRAUDS excludes, on objection, evidence of parol lease of five years. *Jordan v. Furnace Co.*, 143.

Rule in construing the North Carolina statute. *Ibid.*

Applicable to executory contracts only. *McManus v. Tarleton*, 790.

The law will not enforce fraudulent executory contracts, and equity will set aside fraudulent conveyances. *Ibid.*

Unavailable to strangers to the transaction. *Cowell v. Insurance Co.*, 684.

Unless invoked as a defense, parol sale of real estate good *inter partes*. *Ibid.*

STATUTE OF LIMITATIONS stopped by partial payment made by executor or administrator, which admits the claim. *Hinton v. Pritchard*, 8.

When pleaded, burden to repel rests on plaintiff. *Gupton v. Hawkins*, 81.

Plaintiff not competent to prove payments and dates to repel statute, the maker being dead. *Ibid.*

Being usually a mixed question of law and fact is for the jury. *Crudup v. Thomas*, 333.

Will not avail against dower. *Brown v. Morisey*, 772.

May be pleaded by one creditor against another upon deficiency of assets. *Dunn v. Beaman*, 766.

To be available as a defense must be pleaded. *Boone v. Peebles*, 824.

There is no statute of presumption of payment or abandonment. *Ibid.*

STORE SIGNS, when removable by city authorities, when not. *S. v. Higgs*, 1014.

SUPERIOR COURTS—Constitutional jurisdiction, intermediate between the Supreme Court and justice's court. *Mott v. Commissioners*, 866.

The Legislature may not deprive them of any constitutional provision essential to their existence. *Ibid.*

SUPERIOR COURTS—*Continued.*

A grand jury is an essential constitutional constituent, which may not be discontinued. *Ibid.*

Mandamus the proper remedy to preserve it. *Ibid.*

The solicitor the proper officer to apply for it. *Ibid.*

SUMMARY EJECTMENT—Real party in interest should be allowed to defend, and case remanded to justice's court for that purpose. *Cheek v. Sykes*, 210.

SUPREME COURT judgment final, and precludes the court below from all right and power to modify it in any respect. Direct proceedings necessary for that purpose, alleging fraud, mistake, imposition. *Merrimon v. Lyman*, 541.

TAXATION, failure to list for, a misdemeanor cognizant in justice's court, act 1899, ch. 15. *S. v. Harrison*, 1049.

TAXES illegally collected not to be illegally disbursed. *Edgerton v. Water Co.*, 93.

TAX TITLE—Sale of land for taxes before resorting to personal property does not affect the title of purchaser. Sheriff liable to tax debtor. *Geer v. Brown*, 238.

Dower land subject to sale for taxes, and may be purchased by reversioner. *Ibid.*

Sheriff's deed for land sold for taxes is presumptive evidence of publication, but may be controverted by tax debtor in suit by purchaser. Want of notice through mails only an irregularity not affecting title of purchaser. *Ibid.*

Land sold for taxes and bid in by the county, the county becomes mortgagee, and must foreclose. *Kerner v. Cottage Co.*, 356.

If certificate is transferred to purchaser he is entitled to the mortgage, and sheriff's deed will enable him to forclose. *Ibid.*

Remainderman entitled to two years after life estate in which to redeem land sold for county and State taxes. *Tiddy v. Graves*, 620.

Taxes assessed against decedent in his lifetime a valid debt against his administrator. *James v. Withers*, 715.

TELEGRAMS—In case of negligent, untrue assurance that a message has been delivered, such false assurance is actionable. *Laudie v. Telegraph Co.*, 431.

Sender, if practicable, should be informed that a message can not be delivered. *Ibid.*

Negligence in delivery, both tort and breach of contract, to be compensated for in damages. *Kennon v. Telegraph Co.*, 232.

In pecuniary transaction, for pecuniary loss. *Ibid.*

When subject-matter involves the feelings, notice of special circumstances necessary in some way. *Ibid.*

Price paid for the message recoverable. *Ibid.*

Failure to deliver with reasonable diligence and within reasonable time *prima facie* negligence to be accounted for. *Hendricks v. Telegraph Co.*, 304.

TENANT IN COMMON:

Possession not adverse without an ouster—twenty years sole possession necessary to ripen title against rightful owner. A deed for the entirety requires twenty years possession. *Shannon v. Lamb*, 38.

Deed by husband and wife for land held for them in trust, the trustee not joining, is invalid. So are all deeds based thereon. *Ibid.*

Since The Code, possession is recoverable upon equitable title. *Ibid.*

One tenant in common may sue for the whole against a stranger—proof required—effect of joint demurrer. *Morehead v. Hall*, 213.

Deed for one-half the land without particular description conveys a one-half interest. *Ibid.*

Possession of one presumed the possession of all. *Tharpe v. Holcomb*, 365.

Adverse possession for twenty years by one cotenant necessary to bar the others. *Ibid.*

Under The Code, sec. 141, after ouster and hostile attitude, seven years will bar other cotenants. *Ibid.*

Both parties being tenants in common, and the possession of defendant not having been adverse for twenty years, is that of plaintiff also. Code, secs. 143 and 146, to be construed together. *Conkey v. Lumber Co.*, 499.

TENDER AND PAYMENT of money into court in satisfaction of plaintiff's claim, with costs accrued, if withdrawn by plaintiff, amounts to satisfaction. *Cline v. Rudisill*, 523.

TOWN CONSTABLE serves court process when directed to him. Code, secs. 3810. *Baker v. Brem*, 367.

Process may be amended to show jurisdiction, not to confer it. *Ibid.*

TOWNS—demand against, to be made before suit *ex contractu*. Code, sec. 757—not before suit *ex delicto*, or the claim for unliquidated damages. *Neal v. Marion*, 412.

TRESPASS will not be enjoined unless damage is shown to be irreparable. *Lumber Co. v. Hines Bros.*, 254.

Timber deeds, how construed. *Ibid.*

Title not involved, when the enquiry is as to what extent a certain path was used by the public. *Cox v. R. R.*, 103.

Transfer of a mere expectancy in an estate amounts at most to a contract to convey—not enforcible by decree for specific performance. The claimant takes nothing under the will of testator. *Boles v. Caudle*, 352.

TRUSTEE who sells after the debt secured is arranged passes no title and gets no commissions—and the purchaser gets no title, and is liable for rents. *James v. Withers*, 715.

USURY exacted and paid, interest is forfeited and twice the amount paid is recoverable irrespective of question of intent. *Cheek v. B. and L. Association*, 242.

Note tainted with usury retains the taint in hands of subsequent holder. The forfeiture of interest is the decree of the law. *Faison v. Grandy*, 827.

VACCINATION, compulsory, a valid exercise of governmental police power for public welfare. *S. v. Hay*, 999.

Exceptional cases, where it would be dangerous, matter of defense for the jury. *Ibid.*

VENUE may be waived by a party not standing on his rights, and appearing to answer a rule in contempt proceedings, outside of his district, before a judge, different from the one who granted the rule. *Herring v. Pugh*, 852.

Wrong plea in abatement for, should name the proper county. *S. v. Carter*, 1011.

If plea found in favor of defendant he is recognized to proper county, if in favor of State, judgment as upon verdict of guilty—this is in case of misdemeanors; in felonies, if found in favor of State, defendant allowed to plead not guilty. *Ibid.*

VERIFICATION of pleadings must conform substantially with requirements of The Code. *McLamb v. McPhail*, 218.

WARDS having remedies against different persons in different capacities may elect whom to sue, leaving it to the parties after payment to adjust their own equities. *Loftin v. Cobb*, 58.

WARRANT, charging creation of disturbance in corporate limits of Elizabeth City—too indefinite. *S. v. Hettrick*, 977.

WATERWORKS not considered a necessary expense of city or town government within Article VII, sec. 7, of the Constitution. *Edgerton v. Water Co.*, 93.

WATER not to be diverted from its natural course to the injury of another by either an individual or corporation. They may increase and accelerate, but not divert. *Lassiter v. R. R.*, 509.

Damage occasioned by construction of railroad to be sued for in five years after cause of action, and jury to assess the entire amount of damages suffered. Statute does not run until damage is done. *Ibid.*

WIDOW of deceased vendor of a mule, being present at the sale, is a competent witness; may be corroborated by receipt given. *Little v. Ratliff*, 262.

WILL of testator devising to his children the remainder of his estate, real and personal, to be divided equally, including after-born children is a devise in fee simple. *Little v. Brown*, 752.

WILLS—Cardinal rule in construing: Find out the intention of testator.

Devise to son and two daughters, equally to be divided into three lots, and in case either should die and all their children, the lots to revert to his and their children. The son died during life of his father: *Held*, the daughters are seized in fee of one-half each in the land devised. *Houck v. Patterson*, 885.

WITNESS may be corroborated by showing he had made similar statements testified to by him, but not by other statements not testified to. *Bradley v. R. R.*, 735.