NORTH CAROLINA REPORTS

VOL. 127.

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1900.

REPORTED BY

ZEB V. WALSER

ANNOTATED BY

WALTER CLARK

REPRINTED BY THE STATE
EDWARDS & BROUGHTON PRINTING COMPANY,
STATE PRINTERS AND BINDERS
RALEIGH, N. C.
1910.

Citation of Reports.

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to 63 N. C. have been reprinted by the State with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N.C.Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Equity	"	62	"

☞ In quoting from the ***reprinted*** Reports, counsel will cite always the ***marginal*** (***i. e.*** original) paging, except 1 N. C. and 20 N. C., which have been repaged throughout without marginal paging.

JUSTICES

OF THE

Supreme Court of North Carolina.

SEPTEMBER TERM, 1900.

CHIEF JUSTICE:

WILLIAM T. FAIRCLOTH.

ASSOCIATE JUSTICES:

WALTER CLARK, DAVID M. FURCHES,
WALTER A. MONTGOMERY, ROBERT M. DOUGLAS.

ATTORNEY-GENERAL:

[1]ZEB V. WALSER.
[2]ROBERT D. DOUGLAS.

SUPREME COURT REPORTER:

[3]RALPH P. BUXTON.
[4]ZEB V. WALSER.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

---

[1]Resigned 13 November, 1900.
[2]Appointed by the Governor, 24 November, 1900.
[3]Died 6 November, 1900.
[4]Appointed by the Court, 13 November, 1900.

JUDGES

OF THE

Superior Courts of North Carolina.

NAME.	DISTRICT.	RESIDENCE.
GEORGE H. BROWN, JR.	First	Washington.
HENRY R. BRYAN	Second	New Bern.
E. W. TIMBERLAKE	Third	Louisburg.
W. S. O'B. ROBINSON	Fourth	Goldsboro.
THOS. J. SHAW	Fifth	Greensboro.
OLIVER H. ALLEN	Sixth	Kinston.
THOMAS A. McNEILL	Seventh	Lumberton.
ALBERT L. COBLE	Eighth	Statesville.
HENRY R. STARBUCK	Ninth	Winston.
W. B. COUNCIL	Tenth	Bakersville.
WILLIAM A. HOKE	Eleventh	Lincolnton
FREDERICK MOORE	Twelfth	Asheville.

SOLICITORS.

GEORGE W. WARD	1st Dist.	COLIN M. McLEAN	7th Dist.
WALTER E. DANIEL	2d Dist.	WILEY RUSH	8th Dist.
L. J. MOORE	3d Dist.	M. L. MOTT	9th Dist.
ED. W. POU	4th Dist.	MOSES N. HARSHAW	10th Dist.
A. L. BROOKS	5th Dist.	JAMES M. WEBB	11th Dist.
RUDOLPH DUFFY	6th Dist.	JAMES W. FERGUSON	12th Dist.

Licensed Attorneys.

September Term, 1900.

BARNHILL, ROSCOE THOMAS	Halifax County.
BELLAMY, JR., MARSDEN	New Hanover County.
BIZZELL, WILLIAM DREW	Scotland County.
CHEEK, GEORGE	Alleghany County.
COOKE, ARTHUR WAYLAND	Hertford County.
COWAN, HILEMAN CICERO	Jackson County.
CRANMER, EDWARD HENRY	Brunswick County.
DAVIS, THOMAS WALKER	New Hanover County.
DELLINGER, DAVID PLUNKETT	Gaston County.
DUNNING, ARCHER ROCK	Bertie County.
GODWIN, ADOLPHUS PILSTON	Hertford County.
GRADY, HENRY ALEXANDER	Sampson County.
HOYLE, THOMAS CRAWFORD	Alamance County.
JENKINS, ROBERT PALEMON	Pasquotank County.
KIRKPATRICK, THOMAS LEROY	Mecklenburg County.
KORNEGAY, HENRY ARTHUR	Duplin County.
LYON, HOMER LE GRANDE	Bladen County.
LYON, ROBERT HENRY	Bladen County.
MORRIS, JAMES PETTIGREW	Rutherford County.
NATTRESS, WILLIAM ELMER	Iredell County.
NICHOLSON, GEORGE BROCK	Iredell County.
NIMOCKS, QUINCY KELLOGG	Cumberland County.
POWELL, HENRY THURMAN	Vance County.
SMITH, THOMAS LACY	Alleghany County.
SQUIRES, MARK	Caldwell County.
SWINK, GILBERT ROSCOE	Forsyth County.
TUCKER, IRVIN BURCHARD	Columbus County.
SPENCE, JOHN WILSON	Sommerton, Va.
STRADLEY, WALTER PRESTON	Granville County.
VAN WINKLE, KINGSLAND	Buncombe County.
WILSON, GEORGE WOOD	Caldwell County.
WILSON, WILLIAM SIDNEY	Caswell County.
WOOD, WILLIAM FRANKLIN	McDowell County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Spring of 1901.

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in September of every year The examination for applicants for license to practice law, to be conducted in writing, takes place on the first Monday of each Term, and at no other time. The Docket for the hearing of cases from the First Judicial District will be called on the Tuesday next succeeding the meeting of the Court, and from the other Districts on Tuesday of each succeeding week in numerical order, until all the Districts have been called.

SUPERIOR COURTS.

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31.

FIRST JUDICIAL DISTRICT.

SPRING TERM—Judge O. H. Allen.
Beaufort—‡Feb. 18 (2); May 27 (2).
Currituck—March 4 (1).
Camden—March 11 (1).
Pasquotank—March 18 (1).
Perquimans—March 25 (1).
Chowan—April 1 (1).
Gates—April 8 (1).
Hertford—April 15 (1).
Washington—April 22 (1).
Tyrrell—April 29 (1).
Dare—May 6 (1).
Hyde—May 13 (1).
Pamlico—May 20 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM—Judge T. A. McNeill.
Craven—†Jan. 28 (2); †May 27 (2).
Bertie—‡Feb. 18 (1); April 29 (2).
Halifax—†March 4 (2).
Warren—†March 18, (2).
Northampton—†April 1 (2).
Edgecombe—†April 15 (2); †June 10 (2).

THIRD JUDICIAL DISTRICT.

SPRING TERM—Judge A. L. Coble.
Pitt—Jan. 7 (2); †March 4 (2); April 1.
Franklin—Jan. 21 (2); April 15 (2).
Wilson—†Feb. 4 (2); †May 13 (1).
Vance—Feb. 18 (2); May 20 (1).
Martin—March 18 (2).
Nash—†April 29 (2).

FOURTH JUDICIAL DISTRICT.

SPRING TERM—Judge H. R. Starbuck.
Wake—*Jan. 7 (2); †Feb. 25 (2) *March 25 (2); †April 22 (2).
Wayne—Jan. 21 (2); April 15 (1).
Harnett—Feb. 18 (1).
Johnston—March 11 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM—Judge W. B. Council.
Durham—Jan. 14 (2); †March 25 (2); May 13 (1).
Granville—Jan. 28 (2); April 22 (2).
Chatham—Feb. 11 (1); May 6 (1).
Guilford—Feb. 18 (2); June 3 (3).
Alamance—March 11 (1); May 20 (1).
Orange—March 18 (1); †May 27 (1).
Caswell—April 8 (1).
Person—April 15 (1); Aug. 12 (1).

SIXTH JUDICIAL DISTRICT.

SPRING TERM—Judge W. A. Hoke.
New Hanover—†Jan. 21 (2); †April 15 (2).
Sampson—Feb. 4 (2); April 29 (1).
Duplin—March 18 (1).
Greene—Feb. 25 (1).
Pender—March 4 (1).
Carteret—April 1 (1).
Jones—March 25 (1).
Onslow—April 8 (1).
Lenoir—Jan. 14 (1); May 6 (1).

SEVENTH JUDICIAL DISTRICT.

SPRING TERM—Judge Fred. Moore.
Anson—*Jan. 7 (1); †April 15 (1).
Richmond—Jan. 14 (2); April 22 (1); May 20 (2).
Scotland—Terms to be set by the Governor when requested by the county.
Moore—†Jan. 28 (2); April 1 (2).
Robeson—Feb. 11 (1); April 29 (1).
Bladen—March 4 (1).
Columbus—March 11 (1); Aug. 12 (1).
Brunswick—March 18 (1).
Cumberland—†Feb. 18 (1); †March 25 (1); May 6 (2).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM—Judge G. H. Brown, Jr.
Montgomery—Jan. 7 (2); April 15 (1).
Cabarrus—Jan. 21 (2); April 22 (1).

Iredell—Feb. 4 (2); May 20 (2).
Rowan—Feb. 18 (2); May 6 (2).
Davidson—March 4 (2).
Randolph—March 18 (2).
Yadkin—April 29 (1).

NINTH JUDICIAL DISTRICT.

SPRING TERM—Judge H. R. Bryan.
Alexander—Feb. 18 (1).
Rockingham—March 4 (2).
Forsyth—†Feb. 25 (1); †May 13 (2).
Wilkes—March 18 (1); May 27 (2).
Surry—†April 15 (2).
Alleghany—March 25 (1).
Davie—April 1 (2).
Stokes—April 29 (2).

TENTH JUDICIAL DISTRICT.

SPRING TERM—Judge E. W. Timberlake.
Catawba—March 4 (2).
McDowell—†April 15 (2).
Burke—May 6 (2).
Caldwell—†March 18 (2).
Ashe—April 8 (2).
Watauga—April 1 (1).
Mitchell—Feb. 18 (2).
Yancey—May 20 (2).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM—Judge W. S. O'B. Robinson
Mecklenburg—†Jan. 21 (1); †March 18 (2); †June 3 (2).
Union—Jan. 28 (3); June 10 (2).
Gaston—Feb. 18 (2).
Stanly—March 4 (2).
Lincoln—April 1 (2).
Cleveland—April 15 (2).
Rutherford—April 29 (2).
Polk—May 13 (1).
Henderson—†May 20 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM—Judge T. J. Shaw.
Madison—Jan. 21 (2).
Buncombe—Feb. 4 (3); April 29 (2).
Transylvania—Feb. 25 (2).
Haywood—March 11 (2).
Jackson—March 25 (2).
Macon—April 8 (2).
Clay—April 22 (1).
Cherokee—May 13 (2).
Graham—May 27 (1).
Swain—June 3 (3).

CRIMINAL COURTS.

EASTERN DISTRICT CRIMINAL COURT, Judge Augustus M. Moore, Greenville.
Mecklenburg—Jan. 7 (2); April 8 (1).
New Hanover—March 11 (1); June 3 (2).
Edgecombe—May 20 (1).
Robeson—April 15 (1).
Halifax—Jan. 28 (1); May 6 (1).
Cumberland—Dec. 31, 1900 (1); April 29 (1).
Craven—Feb. 25 (1).
Nash—Feb. 4 (1).
Warren—June 24 (1).
Wilson—June 17 (1).
Northampton—March 18 (1).

WESTERN DISTRICT CRIMINAL COURT, Judge Henry B. Stevens, Asheville. Judge sets terms for McDowell, Henderson, Forsyth, Surry and Caldwell.

UNITED STATES COURTS.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.

Raleigh Circuit and District—May 27, December 2.
Wilmington Circuit and District—April 29. November 24.
New Bern Circuit and District—April 22, October 28.
Elizabeth City Circuit and District—April 15, October 21.

WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

Greensboro Circuit and District—April 1, October 7.
Statesville Circuit and District—April 15, Oct. 21.
Asheville Circuit and District—May 6, November 4.
Charlotte Circuit and District—June 3, December 2.

*For criminal cases only. †For civil cases only. ‡For civil cases and jail cases. (1) one week; (2) two weeks, (3) three weeks.

Cases Reported in this Volume.

Cases Cited by the Court.

I. Cases From North Carolina Reports.

A.

B.

C.

D.

E.

F.

G.

L.

M.

S.

T.

U.

V.

W.

II. Other Cases.

A.

B.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1900.

MAYO v. DOCKERY.

(9 October, 1900.)

REMOVAL OF CAUSES—*Order, Non-appealable.*

Order of State court to its clerk to certify the record to a federal court, after the latter court has ordered it removed is not appealable.

ACTION, by L. R. Mayo against H. C. Dockery, heard by Judge *A. L. Coble,* at May Term, 1900, of BEAUFORT. From an order directing the Clerk to certify the record to the Federal Court, the plaintiff appealed.

Chas. F. Warren and *Wm. B. Rodman,* for plaintiff.
Fabius H. Busbee, for defendant.

FAIRCLOTH, C. J. The plaintiff sues for damages in an alleged unlawful seizure and conversion of his property. On application of the defendant, the Judge of the Circuit Court for the Eastern District of North Carolina ordered that the suit be removed to said Circuit Court, and that all proceedings therein be certified to said Court. At May Term of the Superior Court, his Honor made this entry in the cause: "That the Clerk of this Court is directed to certify the record in this cause" to said Circuit Court, from which order the (2) plaintiff appeals to this Court. We can not consider the merits of the appellant's exceptions; for the reason, that, in our opinion, the order appealed from was non-appealable. The order does not profess to remove the cause to the Federal Court,

nor to stay proceedings in the Superior Court, nor do we think that is its legal effect. The order simply directed the Clerk to do an act which he was bound by law to do without direction. The statute provides that, if the Clerk of the State Court shall refuse to any one of the parties applying for removal a copy of the record in the cause, he shall be deemed guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the Court. Act March 3, 1875, sec. 7 (18 Stat. 470).

Appeal dismissed.

PUGH v. BAKER.

(9 October, 1900.)

1. LIENS—*Crops—Administrator—Laborer.*

A laborer may enforce his lien on crops in hands of a wrongdoer, after death of employer, without bringing in the administrator.

2. LIEN—*Laborer—Employer.*

A laborer's lien filed after the employer's death, is valid, though the employer is named in the caption instead of the administrator.

3. EXECUTOR AND ADMINISTRATOR—*Employee.*

A contract by which a landowner hires another to make crops is binding on personal representatives of landowner, even where part of service is after death of employer.

ACTION by Augustus Pugh against George W. Baker,
(3) heard by Judge *H. R. Starbuck,* at Spring Term, 1900, BERTIE.

Francis D. Winston, R. B. Winborne and *St. Leon*
(5) *Scull,* for plaintiff. (Appellant.)
Robert B. Peebles, for defendant.

MONTGOMERY, J. This case is before us upon the following facts agreed: On 1 January, 1898, Wiley Carter, now deceased, hired Augustus Pugh to cultivate his home tract of land, do general menial service and work thereon, for the year 1898, at $10 per month. This action was commenced on 5 December, 1898, and there was due to Pugh up to 1 November, 1898, $100. Wiley Carter died on 5 April, 1898, and no administration was taken out on Wiley Carter's estate until May, 1899. Pugh filed a lien with W. T. Harrell, the nearest Justice of the Peace to the tract of land. No actual notice of the filing of the lien was

given to the defendant Baker, until the commencement of this action. Baker knew that Pugh was a laborer on the Carter farm. Baker, in September, 1899, seized and converted to his own use all the crops raised on the farm and cultivated by Pugh's labor, of the value of $219. The seizure was made in an action for the recovery of personal property against the widow and son of Wiley Carter. No action has been commenced to enforce said lien, the notice whereof was filed 10 November, 1898, unless this proceeding be such an action. His Honor, upon the record and the agreed facts, adjudged that the plaintiff could not recover, and dismissed the action. The defendant contended here that this action could not be maintained against him for the reasons—First, that the paper-writing filed before the Justice of the Peace was not sufficient in law to constitute a lien; and, second, that, if such paper did constitute a lien, yet it can not be enforced against the defendant, (6) because the debt was not proved and reduced to a judgment against the administrator of Wiley Carter; and, third, because the plaintiff worked on the farm and crops after the death of Carter without a contract with the administrator, and therefore was entitled to recover nothing for his services.

We have examined the lien with care, and we are of the opinion that it constitutes a good and valid lien against the crops mentioned therein. The fault which the defendant finds with it is that it was entitled in the Justice's Court, *"Augustus Pugh v. Wiley Carter,"* when the fact was that Carter was dead at the time of the filing of the lien. But that is not a valid objection. The object of the law, in requiring it to be filed with so much particularity, is to give public notice of the plaintiff's claim, and especially to give notice with certainty as to details to those who may be interested in the property upon which the lien is filed. Every reasonable requirement was met by the plaintiff, and the use of the name of the deceased employer in the caption of the proceeding did not affect the force and virtue of the lien. If the caption had been stricken out, or never used, the body of the lien set forth every necessary requirement, and gave a reasonable notice to every person as to the object of the plaintiff, including the contract with the deceased employer, a proper location and description of the land upon which the plaintiff performed his services, and a particular description of the crops cultivated by him thereon. The filing of a lien, then, for work and labor done upon crops or buildings, is a proceeding in rem, and. if sufficient in form and substance under the statutes, would be good and valid, even though it appeared that the per-

son who owned the buildings or crops at the time of making the contract had died before the filing of the lien.

It is true that if there had been an attempt on the
(7) part of the plaintiff to enforce his lien against the estate of Carter or against the crops in the hands of the administrator or the heirs at law of Carter, then it would have been necessary for the plaintiff to have brought the personal representative into Court for the purpose of reducing the claim to judgment, as required by section 1790 of The Code. But the crops had been taken into possession of the defendant under a claim of ownership and under process of law, and the contention was shifted as to the plaintiff's debt and his superior lien from a contention against the personal representative to one with the defendant, a wrongdoer.

But the defendant contends that the relation of debtor and creditor must be shown to have existed between the estate of Carter and the plaintiff, and that the plaintiff could not show indebtedness of the estate of Carter to himself, because, as matter of law, upon the death of Carter early in the spring, the plaintiff had no contract with the administrator of Carter to continue the work, and therefore was entitled to no compensation. In our investigation in our own Reports, we find no decision directly on this point, but we are of the opinion that the contract made by Carter, the employer, with the plaintiff did not end with the death of Carter. The plaintiff was employed by Carter, not at the will of Carter, but by the year, payments to be made monthly for his work, and the appointment of an administrator, and his ratification of the contract of his decedent, during the year 1898, could not have affected, one way or the other, the original contract between the plaintiff and Carter. The plaintiff did exactly what he contracted to do with Carter, and that contract was binding on Carter during his life, and on his personal representative after his death. But we find elsewhere numerous authorities for this position. "Under a contract for employment for a specified time, the employee may re-
cover from the personal representative as such for the
(8) whole term, though part of the services were rendered after the employer's death." 8 Am. and Eng. Enc. Law (2 Ed.), p. 1008, and cases there cited. Especially do we hold that that principle of law is a sound one when applied to the hiring of persons by the owners of land by the year to make crops. The plaintiff, upon the facts agreed, should have had judgment against the defendant for the amount due him. There was error in the judgment of the Court below, and the same is reversed.

Reversed.

BOARD OF EDUCATION OF VANCE COUNTY v. TOWN OF HENDERSON.

(9 October, 1900.)

JUDGMENT—*Supreme Court—Correction — Inadvertence — Records — Notice.*

Supreme Court may correct a judgment erroneously entered, at a former term, on notice to the opposite party.

ACTION by the Board of Education of VANCE County against the town of Henderson. Motion by plaintiff to correct judgment.

T. T. Hicks, for the motion.

A. C. Zollicoffer and *J. H. Bridgers,* in opposition to the motion.

FURCHES, J. This cause was before the Court at February Term, 1900, and is reported in 126 N. C., 689, and this is a motion by plaintiff to correct an erroneous entry of judgment made by inadvertence of the Court. The defendant had notice of the motion, and was represented by counsel (9) when the matter was taken up by the Court. Defendant contended that the Court had no power now to hear the motion, and moved to dismiss the same; but the Court, being of the opinion that it had the power to hear the motion, refused the defendant's motion to dismiss. *Summerlin v. Cowles,* 107 N. C., 459; *Cook v. Moore,* 100 N. C., 294.

In the order of Judge *Moore* referring this case to W. B. Shaw, Esq., he uses the following language:

"And thereupon the Court, having heard the evidence and argument of counsel, doth consider and adjudge: That the plaintiff's cause of action *is barred,* except for the period of three years next before the commencement of this action, and that the plaintiff is not entitled to recover of the defendant any fines, forfeitures, or penalties imposed or collected by the defendant town for the violation of the ordinances of the town.

"That the plaintiff is entitled to recover *all fines collected* by the town of Henderson and its officers since the three years prior to the bringing of this action, and all such fines imposed and collected hereafter,—that is, all fines imposed and collected by the town as aforesaid for violation of *laws of the State of North Carolina within said town.*" (Italics are ours.)

We construed the first paragraph of the above quotation to limit the plaintiff's cause of action to three years prior to its

commencement, and the last paragraph of the quoted matter as a direction or judgment that plaintiff was entitled to recover all the fines received by the defendant within that time.

So it appears to us that our inadvertence caused us to order that the judgment be affirmed, when it should have been error, and re-submitted to the referee to correct the account in accordance with the opinion of the Court. The Clerk of this
(10) Court will at once notify the Clerk of the Superior Court of Vance County of this correction in the order of the Court of February Term, 1900.

Motion allowed.

KING v. POWELL.

(9 October, 1900.)

LIMITATIONS, STATUTE OF—*Pleading—Demurrer—Answer.*

The statute of limitations can not be set up by demurrer, but must be specifically pleaded in the answer.

ACTION by J. G. King against A. M. Powell and another, to enforce a judgment lien against certain land, heard by Judge *H. R. Starbuck,* at March Term, 1900, of WARREN. From a judgment sustaining a demurrer to the complaint, the plaintiff appealed.

Cook & Green, for plaintiff.
Pittman & Kerr, for defendant.

FAIRCLOTH, C. J. The plaintiff had a docketed judgment against W. W. Powell, who conveyed his tract of land to A. M. Powell and John Powell after said judgment was docketed. The plaintiff institutes this action for an order to sell said land to satisfy said judgment. The defendants demur to the complaint on the ground that it appears therein that the plaintiff's lien had expired and was lost by the lapse of time. The demurrer was sustained, his Honor holding that the complaint stated no cause of action against the defendants. The plaintiff excepted, and appealed.

We express no opinion on the point decided by his
(11) Honor, for the reason that the statute of limitations can not be set up by demurrer. *Bacon v. Berry,* 85 N. C., 124. The objection that the action was not commenced within the time limited can only be taken by answer. Code, sec. 138;

Green v. Railroad Co., 73 N. C., 524; *Kahnweiler v. Anderson,* 78 N. C., 133; *Bank v. Loughran,* 122 N. C., 668. The Code requires the statute of limitations to be specially pleaded, whether the cause of action be legal or equitable. *Guthrie v. Bacon,* 107 N. C., 337.

Reversed.

BAZEMORE v. BYNUM.

(9 October, 1900.)

BOND—*Breach of Condition—Damages.*

Where one executes a bond containing a penalty, and it is agreed that the bond be broken and the penalty paid, action is properly brought on the bond to recover the penalty, which is in the nature of liquidated damages.

ACTION by J. P. Bazemore, as executor of the estate of Martha A. Lassiter, deceased, on a bond for support against J. R. Bynum, heard at Spring Term, 1900, of BERTIE, by Judge *H. R. Starbuck.* From judgment of nonsuit, the plaintiff appealed.

Francis D. Winston, for plaintiff.
Robert B. Peebles, for defendant.

DOUGLAS, J. This is a civil action brought upon the following bond: "Know all men by these presents that I, Joseph R. Bynum, am held and firmly bound unto Martha A. Lassiter, in the sum of two hundred dollars ($200), to the (12) payment of which I bind myself firmly by these presents. Signed and sealed this 7 November, 1895. The condition of this obligation is such that if the above-bounden Joseph C. Bynum shall, in consideration of a warranty deed made and executed to him, his heirs, forever, on 7 November, 1895, by Mrs. Martha A. Lassiter, truly give said Martha A. Lassiter a home so long as she shall live; further I, Joseph R. Bynum, do further covenant and agree to feed her so long as she shall live; further, the condition of the bond is such that, if Joseph R. Bynum shall comply with the above requirements, then the above obligation to be null and void and of no effect. Joseph R. Bynum. (Seal.)" Signed and sealed and delivered in the presence of W. W. Outlaw, J. P., and N. Bunch. The plaintiff also introduced a deed from Martha A. Lassiter to Joseph R.

Bynum, dated November, 1895, conveying in fee a tract of land containing 250 acres, and described in the deed, which is of record.

W. W. Outlaw testified: "I wrote the bond referred to for the defendant. He signed it, and gave it to Mrs. Lassiter. At the same time I wrote the deed that has been introduced from her to him, and she signed the deed, and delivered it to Mr. Bynum. I was Justice of the Peace. Both of them were present when the papers were written. Both papers were signed and delivered at the same time. The bond was given in payment of land."

T. F. White testified: "I knew Mrs. Martha A. Lassiter. Had known her 25 years. I attended to her business for her, and collected her rents for her lands. She died August, 1898. I knew the tracts of land. I had a conversation with Mrs. Lassiter and defendant, Bynum, in my store in Aulander about 1 January, 1897. I then had this bond in posses-
(13) sion. Mrs. Lassiter stated that she had left Mr. Bynum, and was not living with him then. He admitted that this was true. She claimed that he ought to pay her the amount of the bond, $200. He agreed to pay her that amount. I was called upon to bear witness to that bargain. He was, as part of that bargain, to be relieved from taking care of her in any way, both feeding her and giving her a home. [After making the deed she had gone to the defendant's home, and lived there some months, but had then left.] He at the time paid $50 of the amount to Mrs. Lassiter, which was credited by me on the bond in defendant's presence. Defendant had agreed with Mrs. Lassiter to pay her $50 in cash, and the balance of the $200 in equal annual installments. This was a part of the agreement releasing him from taking care of her, and which I was called on to witness. She made no complaint about him. She complained about his wife in his presence. Mrs. Lassiter first wanted him to pay the $200 down. He wanted time. She consented, and it was agreed that he should pay $50, and have time on balance as before stated. After the $50 had been credited, I gave the bond to Mrs. Lassiter, which she kept. On the back of the bond is this endorsement: '$50 credited on the within bond—fifty dollars. December 31, 1896. Martha A. (her X mark) Lassiter.'"

It is admitted that Martha A. Lassiter is dead, leaving a last will and testament, and that J. P. Bazemore is the executor named in the will, and has duly qualified as such.

This was the evidence for the plaintiff. The defendant moved, under the statute, to nonsuit the plaintiff, which mo-

tion was allowed, and the action dismissed. The only reason given for the action of the Court was the simple statement that his Honor was of the opinion that upon his own showing the plaintiff was not entitled to recover. It could not have been for any deficiency of evidence, for that is ample, as far as it goes. (14)

It was contended before us that there had been no breach of the bond, and that the subsequent agreement between the defendant and Mrs. Lassiter, if binding at all, was a new contract. We can not take this view of the matter. It appears from the evidence—and by this we mean that there is evidence tending to prove such facts that should have been submitted to the jury—that Mrs. Lassiter deeded to the defendant 250 acres of land upon the sole consideration of her support for life, as evidenced by the bond in question. This was the price of the land, and without it the defendant would never have owned the land. The defendant did not give her a home for the remainder of her life, as he was bound to do, and, under existing circumstances, it makes no difference what prevented him from doing so, as he appears to have admitted the breach. In fact, he seems to have willingly accepted her offer to pay her the full penalty of the bond in release of its conditions.

Under all the circumstances of the case, this appears to us to be an agreement to pay and receive a definite sum in the nature of liquidated damages. Suit was therefore properly brought upon the bond, and, as there was certainly more than a scintilla of evidence tending to prove the contentions of the plaintiff, there was error in the dismissal of the action.

New trial.

---

(15)

HOLLOMAN v. HOLLOMAN.

(9 October, 1900.)

DIVORCE—*Amended Complaint—Affidavit of Good Faith—Judgment.*

Where a complaint sets forth abandonment for one year, and demands divorce from bed and board, under Laws 1895, chap. 277, and is amended, setting forth abandonment for one year, and demanding an absolute divorce under Laws 1899, chap. 211, the failure to file affidavit of good faith with amended complaint renders it inoperative, and it will not support a decree for an absolute divorce; but plaintiff may in the court below move for judgment from bed and board.

ACTION by Kindred Holloman against Sarah A. D. Holloman, heard by Judge *A. L. Coble,* at Spring Term, 1900, of HERTFORD. From judgment for plaintiff, the defendant appealed.

Francis D. Winston, for plaintiff.
George Cowper, for defendant.

MONTGOMERY, J. This action was commenced under sec. 1286 of The Code for a divorce *a mensa et thoro.* It was begun after the passage of the act (chap. 277, Laws 1895), which provided for divorces *a vinculo* in cases of abandonment for two years, but before the expiration of two years from the time of the abandonment of the plaintiff by the defendant, his wife. After the enactment of chap. 211, Laws 1899, which amended the act of 1895 by substituting one year's abandonment for the two prescribed by the act of 1895 as the cause of divorce *a vinculo,* the plaintiff amended his complaint so as to allege abandonment for even more than two years, and prayed for a divorce *a vinculo.* The original complaint was filed at the Spring or Fall Term of the Superior Court (the record does not show clearly when), and was accom-
(16) panied by the affidavit required by sec. 1287 of The Code. The amendment set forth the same cause for divorce as that set out in the original complaint, viz.: abandonment by the wife, but there was a prayer for judgment for divorce from the bonds of matrimony. It was filed at the Fall Term, 1899, of the Superior Court, and was not accompanied by the affidavit required by The Code. No exception in the record appears to have been made to the order allowing the amended complaint, or to the matter or nature of the complaint, or to the failure of the plaintiff to file the affidavit required in such cases, and these points are raised for the first time in this Court. The amended complaint covers the period between the time of the filing of the original complaint and the time of the filing of the amendment as to the abandonment of the plaintiff by the defendant, and was not accompanied by the affidavit required by law.

We are of the opinion that the paper filed as an amended complaint is totally inoperative, because of the plaintiff's failure to have it accompanied with the proper affidavit. and that the Courts can not dispense with the requirement to file the affidavit. That requirement is for the good of the public at large, and not for the convenience or benefit of the parties to the action. The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action,

and is an indispensable part of the complaint and application and, if it is wanting, there is no jurisdiction in the Courts. *DeArmond v. DeArmond,* 92 Tenn., 40. Our Court, in the case of *Foy v. Foy,* 35 N. C., 90, recognized the correctness of the same principle, but did not decide the case be- (17) fore it on that point.

The plaintiff, under his original complaint and the issues submitted and the verdict rendered, was entitled to a decree for a divorce from bed and board, and in the Court below he will be allowed to move for such a judgment on the record—that is, on the complaint, answer, issues, and verdict,—or to take a non-suit, and commence a new action for a divorce *a vinculo,* under the act of 1899.

Error.

Cited: *Martin v. Martin,* 130 N. C., 28; *Hopkins v. Hopkins,* 132 N. C., 24.

RAWLS v. WHITE.

(9 October, 1900.)

1. EVIDENCE—*New Trial.*

Where a question which witness is not permitted to answer is afterwards asked and answered without objection, does not constitute ground for new trial.

2. HUSBAND AND WIFE—*Wife's Property—Assignment.*

A promissory note, the property of the wife, may be assigned by endorsement of both husband and wife.

3. ESTOPPEL—*Laches.*

The laches of a person who can not read, in not having a receipt read to her, does not estop her from setting up her rights under it.

4. RECEIPT—*Evidence—Contract.*

A party setting up and claiming benefits under a receipt is bound by all its terms.

5. COSTS.

That defendant, at close of evidence, admits plaintiff's right to the relief demanded, does not bar right of plaintiff to recover costs.

ACTION by J. B. Rawls and wife against T. J. White and others, heard by Judge *A. L. Coble,* and a jury, at Spring Term, 1900, of HERTFORD. From judgment for defendants, the plaintiffs appealed.

Winborne & Lawrence, for plaintiffs.
Shepherd & Shepherd, for defendants.

FURCHES, J. The plaintiffs, J. B. Rawls and wife Sarah Rawls, neither of whom could read or write, alleged: That the plaintiff, J. B. Rawls, owed W. J. White a debt evidenced by note of $110, to secure the payment of which, on 21 January, 1892, the plaintiffs executed a mortgage on land belonging to the wife. This note was assigned to one Perry, and is called the "Perry Note." That on 31 December, 1895, the *feme* plaintiff was the owner of a note given by Jernigan and Tripp for land she inherited from an aunt. That on the said 31st day of December this note for $210 was delivered to the defendant T. J. White by the plaintiff J. B. Rawls, and indorsed by him at the time of delivery, at which time the said White gave the said J. B. Rawls the following receipt: "I have this day received of J. B. Rawls a note given to him and his wife for their interest in their Kentucky property, dated 7 September, 1895, given for the amount of $210, for which I hereby agree to pay off and take in a mortgage against him held by J. W. Perry Co., of Norfolk, Va.; said note given for $110, and transferred to him by W. J. White. I, after deducting the amount of said note, and what he may owe me for store account, agree to pay balance over to him. 31 December, 1895. (Signed) T. J. White." This receipt the husband carried home and gave his wife, and she told him to put it in the drawer. At the time this receipt was given, and the $210 note indorsed by the husband, the defendant T. J. White told J. B. Rawls to tell his wife to come down and indorse the note, so he could collect it. The husband delivered this message to his wife, who
(19) went to the defendant's store the next day, or the day following, and indorsed the note by making her mark to her name. We hear nothing more of this transaction until a short time before this action was commenced, when the defendants advertised the land mortgage to secure the $110, or the Perry note, when the plaintiffs commenced this action to enjoin the sale, alleging that the defendant T. J. White had collected the said $210 and paid off the Perry note out of the proceeds thereof, and also to recover the balance left of the $210 note after satisfying the Perry note. The *feme* plaintiff alleged that the $210 was her property, given for the purchase of her land, and that the defendant knew this; that neither she nor her husband could read or write, and the defendant knew this. And she alleges that she gave the note to her husband to deposit with the defendant White to collect and pay off the Perry note; that she

could not and did not read the receipt brought home by her husband, and supposed it properly stated the conditions upon which said note was delivered to the defendant, and, as above stated, until her land was advertised for sale to satisfy the Perry debt. She also alleges that when she indorsed the $210 note she said to White that whatever remained after paying the Perry debt was to be paid to her, and that the defendant White agreed to this. The defendant White in his answer admitted that he knew the $210 note was given for land belonging to the *feme* plaintiff, and that he knew that she could neither read nor write. But he denied that he made any contract with the *feme* plaintiff at the time she indorsed the note, or at any other time, and insisted that he had the right to apply the whole of the proceeds to the husband's account, and, as the Perry note had been assigned to him, he had the right to foreclose the mortgage given to secure the $110 note, by sale of the *feme* plaintiff's land.

The *feme* plaintiff, while on the witness stand, was asked three times, in somewhat modified terms, to state (20) the conversation between her and the defendant White when she indorsed the note, and to state if there was any contract between them at that time. These questions were objected to by the defendants, and she was not allowed to answer. This was error, and would entitle the plaintiff to a new trial. But further on in her examination she was again asked the same question, and was allowed to answer without objection. This question and answer cured the error of the Court in ruling it out when asked before.

The plaintiffs contend that no title or right passed to the defendant White by the indorsement, and cite *Walton v. Bristol,* 125 N. C., 419, as authority for this contention. But upon examination it will be seen that *Walton v. Bristol* is not an authority for this position. In that case the husband did not indorse the note, but only the wife, while in this case both husband and wife signed (indorsed) the note. And therefore it falls within the doctrine of *Farthing v. Shields,* 106 N. C., 289; *Jones v. Craigmiles,* 114 N. C., 613; *Jennings v. Hinton,* 126 N. C., 48; and *Bates v. Sultan,* 117 N. C., 94.

The Court seems to have charged the jury fully and correctly as to whether there was a contract entered into between the plaintiff and the defendant White at the time she indorsed the note. The defendant testified that there was not, and, under the charge of the Court, the jury must have so found.

The plaintiffs further contend that the *feme* plaintiff testi-

fied that she could neither read nor write, and that she did not know the contents of the receipt, and, although she kept it for so long a time without having it read, that this was no more than laches on her part, and does not estop or bar her from setting up her rights. This, we think, as a single propo-
(21) sition of law, is true, and it seems to have been so held in the charge of the Court in this case. But as the jury must have found that there was no contract entered into by the defendant with the *feme* plaintiff, and as it was admitted that she indorsed the note to the defendant, her rights depended upon the written receipt which she introduced in evidence. As she introduced this receipt in evidence, and claims benefit under it, she was bound by the provisions that were against her. She could not accept a part and reject a part. If she accepted its benefits, she must submit to its burdens. And under the terms of this receipt she was not entitled to the residue of the $210 note after paying the Perry debt.

We see no relief for the plaintiff, except to correct the judgment as to costs. The principal ground of plaintiff's action was to have the Perry debt declared paid, and to have the note and mortgage surrendered for cancellation. In this she succeeded, and had judgment for the surrender and cancellation. And it makes no difference that the defendant, after denying her right to this relief, admitted at the close of the evidence that she was entitled to it. The first exception of the plaintiffs is that the judgment does not give the plaintiffs their costs, and, as we see no reason why they are not entitled to it, this exception is sustained, and the judgment will be so reformed as to give the plaintiffs their costs, and the costs of this appeal will be taxed against the defendants. There is error. Judgment will be modified in accordance with this opinion.

Error.

Cited: *Vann v. Edwards*, 135 N. C., 676.

(22)

POWELL v. PERRY.

(9 October, 1900.)

LANDLORD AND TENANT—*Advances—Lien.*

Where a landlord either pays or becomes responsible for supplies to enable tenant to make a crop, such supplies are advances.

CLAIM AND DELIVERY by J. M. Powell against J. W. Perry, heard by Judge *H. R. Bryan,* at Special Term, 26 February, 1900, of HERTFORD. From judgment for defendant, plaintiff appealed.

George Cowper, for plaintiff.
Winborne & Lawrence, for defendant.

CLARK, J. The only question presented is whether, when a landlord pays another for supplies which have been furnished to his tenant to make the crop, upon the landlord's promise to be responsible for the same, such supplies are an "advancement" entitled to the protection of the landlord's lien given by Code, sec. 1754. We think this falls within both the spirit and the letter of the enactment. It was upon the credit given to the landlord's promise that the supplies were furnished which enabled the tenant to make the crop. It was equally an advancement by the landlord whether he furnished the supplies direct, or procured another to do so upon his (the landlord's) responsibility; and it is immaterial whether he paid cash, or only promised to pay if the tenant did not. In either event the supplies are furnished by the landlord's aid, and for whatever he is out of pocket thereby, whether he pays before the goods are furnished, or after the tenant's failure to pay, he is entitled to the lien given by statute to any landlord making "advancements" to his tenant. Though here the plaintiff did not pay the amount of the bill for supplies till after he instituted this action against the defendant, who had seized (23) the tenant's crop, the lien upon such payment dated back (like laborers' and mechanics' liens, and liens for materials furnished) to the time when the supplies had been furnished upon the plaintiff's promise to pay for them. The cause of action existed against the defendant upon his taking the crop upon which the landlord had an inchoate lien. The nonsuit is set aside.

New trial.

PERRY v. PERRY.

(9 October, 1900.)

1. LANDLORD AND TENANT—*Lien—Mortgage.*

A lessee, who sublets land and furnishes supplies to sub-tenant, holds a prior lien to a mortgagor of the crops.

2. LANDLORD AND TENANT—*Lease—Lien—Fraud.*

That a lease between a lessor and lessee is void, does not affect relations existing between lessee and a sub-tenant as to lien for advancements.

ACTION by J. W. Perry against Philip T. Perry and another, heard by Judge *H. R. Starbuck,* and a jury, at Spring Term, 1900, BERTIE. From a judgment for defendants, plaintiff appealed.

Martin & Peebles, for plaintiff.
Francis D. Winston, for defendants.

MONTGOMERY, J. The defendant, Perry, had an agreement with the guardian of certain infant children by which a piece of land in Bertie County was put into the possession and charge of Perry, "with the privilege of working it him-
(24) self, paying rent therefor, or renting it out to others, and with the instruction that he should use it the best he could, just as he would his own land." Perry rented the land in the year 1898 to the other defendant, Warrington, for 1,000 pounds of lint cotton, and during the year advanced to Warrington supplies to aid him in making the crop, to the amount of $82. In May of the same year, Warrington executed his note in the sum of $250, payable on November . . following, to the plaintiff, and, to secure the same, executed a chattel mortgage on the crop growing and to be grown on the same land. After the payment of the rent there were left two bales of cotton, which the defendant Perry, intended to apply towards the payment of his supply account advanced to the other defendant; and, after the same was delivered by Warrington to the other defendant, it was seized by the plaintiff in an action to recover personal property, with the intent on his part to apply it to the debt which Warrington owed to him.

The first issue submitted to the jury was in these words: "Is the plaintiff the owner of the property described in the complaint, and is he entitled to the possession of the same?"

And his Honor instructed the jury to answer the issue, "No." There was no error in the instruction.

Under the agreement between the guardian and the defendant Perry, Perry, by his subsequent action became a tenant of the guardian, and his agreement with Warrington constituted in law the relation of landlord and tenant, or rather that of tenant and sub-tenant. And the defendant Perry therefore had the right to apply the crop made by Warrington towards the satisfaction of the amount due for the rent and for supplies furnished with which to make the crop. The contention of the plaintiff's counsel that the contract of rental by the guardian to Perry was void, under chap. 83 of the Acts of 1891, in so far as that contract can be con- (25) strued into a rental of the land, can not be maintained. Between the guardian and his wards, the agreement might be treated as a nullity by the wards, if there was either fraud or negligence in procuring a just and reasonable rent for the land. With that, however, the plaintiff has no concern.

No error.

DEITRICK v. CASHIE AND CHOWAN RAILROAD AND LUMBER COMPANY.

(9 October, 1900.)

MASTER AND SERVANT—*Burden of Proof—Discharge.*

The burden of showing cause for discharge of servant by master is on the latter.

ACTION by Julian A. Deitrick against the Cashie and Chowan Railroad and Lumber Company, heard by Judge *O. H. Allen,* at November Term, 1899, BERTIE. From judgment for defendant, plaintiff appealed.

R. B. Peebles, for plaintiff.
Francis D. Winston, for defendant.

FAIRCLOTH, C. J. The plaintiff alleges that in February, 1898, he contracted with the defendant to work for 12 months at a fixed price, and that the defendant paid him for his work until 1 September, 1898, and on or about that day discharged him without legal cause. The action is for the contract price for the balance of the 12 months, less the amount received from other work. The defendant denied that the employment was

for a year, and averred that it was by the day, and that the plaintiff was subject to be discharged at any time. This
(26) issue was submitted: "Is the defendant indebted to the plaintiff?" Each party introduced evidence, and the jury answered, "No." The only exception is to this part of the charge to the jury: "They must be satisfied by the greater weight of the evidence that the employment was for a year, and that the company wrongfully discharged the plaintiff." The plaintiff excepted. The contention is that the Court should have told the jury that the burden of showing that the discharge was for legal cause was upon the defendant, and that it was not incumbent on the plaintiff to show that he was discharged without cause. From such authority as we have, and upon common reasoning, we are of opinion that the burden of showing cause for the discharge was upon the defendant. If the plaintiff was able to show his alleged contract, and that he was discharged during the term, he showed *prima facie* a breach of the contract, and was entitled to damages unless the defendant could justify the breach by showing legal cause for the discharge. "Where he (the servant) was discharged while engaged in the performance of the contract, and before his term of service had expired, the burden is cast upon the employer of alleging and proving facts in justification of the dismissal." Abb. Tr. Ev. (2 Ed.), 473. "And in order to avoid liability the employer must show some act actually done by the servant, after the contract of hiring was entered into, that operates as a valid legal excuse for his refusal to receive him." Wood, Mast. & S., 267. "All that is required on the part of the servant is to establish a valid contract, and a *bona fide* purpose on his part to perform it, and a refusal on the part of the employer to accept his services; and, in the absence of proof by the employer of facts and circumstances that operate as a legal excuse for such refusal, he is liable for all the damages, not exceeding the contract price, sus-
(27) tained by the servant." Id., 268. This principle is held in Texas, Massachusetts, and Virginia. See note on page 268, above. The authorities cited by the defendant are applicable to cases and questions as to when the burden of proof shifts between the parties. In the case at bar the burden of showing cause originates and remains with the defendant upon this state of facts.

Error.

Cited: *McKeithan v. Tel. Co.*, 136 N. C., 216; *Eubanks v. Alspaugh*, 139 N. C., 522.

HAHN v. HEATH.

(9 October, 1900.)

1. PLEA IN BAR—*Appeal—Exception.*

Appeal lies immediately from overruling plea in bar or also after final judgment.

2. CHATTEL MORTGAGE—*Crops.*

Mortgage on crop of year next following the execution of the mortgage is valid.

ACTION by M. Hahn & Co., against J. H. Heath and others, heard by Judge *O. H. Allen,* at May Term, 1900, of CRAVEN. From judgment for plaintiff, the defendants appealed.

Simmons, Pou & Ward, for plaintiff.
W. D. McIver, for defendant.

CLARK, J. The plea in bar being overruled, the defendant noted his exception, and from the final judgment upon the referee's report he appealed. That exception being the only one presented, the plaintiff moves to dismiss the appeal upon the ground that it was waived by not appealing at the time. But the noting the exception in the record shows it was not waived. It is true that, upon overruling (28) the plea in bar, the defendant might have appealed at once. *Smith v. Goldsboro,* 121 N. C., 350, and cases there cited. This, however, is a privilege, and the defendant does not waive his right by not prosecuting his appeal at that juncture, provided he preserves his right to have the action of the Court reviewed by having his exception noted in the record. *Austin v. Stewart,* 126 N. C., 525, 527. Indeed, if an appeal had then been taken, but not prosecuted, it would be treated as an exception, and the matter of appeal reviewed upon appeal from the final judgment. *Alexander v. Alexander,* 120 N. C., 472; *Luttrell v. Martin,* 112 N. C., 593.

But, while the motion to dismiss must be denied, we find no merit in the exception to overruling the plea in bar. The mortgage was executed on 23 November, 1896, upon "all the crops of cotton, corn, and other products to be raised" on certain farms, sufficiently described, to secure a note falling due on 15 October, 1897. There can be no uncertainty in this which would vitiate the mortgage; for this language calls for the crops to be raised thereafter, not those already matured. Wheat might be sown that Fall, but it would not be raised till

the following year, and cotton and corn are planted in the Spring. Therefore the crop to be harvested in 1897 is clearly intended. The reasoning in *Taylor v. Hodges,* 105 N. C., 344, is exactly in point, and is not varied by the fact that there the mortgage on the crop was executed in April to secure a note falling due in October.

Nor is this mortgage void, under *Loftin v. Hines,* 107 N. C., 360. It is there held that a mortgage on the crop other than of the year current is invalid, but the context shows that by this is meant "the crop next following the conveyance" (29) (*Wooten v. Hill,* 98 N. C., 52), which case and language are cited in *Loftin v. Hines* as the authority upon which it rests. If it be contended that the mortgage here extended to the crops of all future years because no year is mentioned, then *Loftin v. Hines* is, indeed, authority for the plaintiff, since it holds that, even though future years are expressly named, the mortgage, while invalid as to them, is good as to "the crop next following the mortgage."

Affirmed.

Cited: *Odom v. Clark,* 146 N. C., 551.

MEEKINS v. NORFOLK AND SOUTHERN RAILWAY CO.

(16 October, 1900.)

EVIDENCE — *Sufficiency — Master and Servant — Personal Injuries — Damages—Nonsuit—Trial.*

Evidence in this case held insufficient to be submitted to the jury on the question whether the employer negligently caused the death of its employee.

DOUGLAS AND CLARK, JJ., dissent.

ACTION by J. C. Meekins, administrator of John Jones, against the Norfolk and Southern Railway, heard by Judge *A. L. Coble,* at Spring Term, 1900, of TYRRELL. From judgment of nonsuit, the plaintiff appealed.

The plaintiff introduced Eliza Jones, who testified the plaintiff's intestate was her husband. That he died 1 June, 1898. He was about forty years of age. They would have (30) been married 24 years last March. He was fireman on steamer "Mary E. Roberts," which was operated by the defendant company connecting its road from Edenton to Mac-

key's Ferry. He had been on the boat for a long time. He received $25.00 per month and board and place to sleep until the railroad cut the salaries of its employees and then he received $22.00 per month instead of $25.00. That he would send her every month for her and the family $10, $15, $20, and sometimes all of his salary. He took good care of his family. He stayed at his work regularly. He got hurt in March, 1898.

On cross-examination, she said he had some cough after he returned from the hospital in Baltimore, where he carried her for treatment. It did not hinder him from his work.

Henry Whedbee introduced for plaintiff, testified that he was on the boat the day John Jones got hurt, saw him five or ten minutes before he got hurt. He was standing on a plank, which reached across the boat in the engine-room. He was reaching up after something. The plank was in the boiler-room, where he was found. It was admitted by the defendant that the plank was placed, when in its usual place, for the firemen to walk on from one side of the boat to the other. The boat was about half way between Edenton and Mackey's Ferry when said Jones was injured. He was in the engine-room, the place he belonged. The witness went on the upper deck, and in four or five minutes news came that John Jones had fallen. He then went down to the engine-room and Jones was lying in the Chief's room. The Chief was binding up the leg of the deceased. The deceased said to witness that the plank you saw me standing upon slipped and he fell. Don't think the plank was fastened. Have seen others walk across this plank. He was fireman on the boat.

On cross-examination, witness said he used to cross on this boat about twice a week. Each end of the plank (31) was in middle of door on each side of the boat. That he has seen the plank at a different place near the boiler. The plank was in the door over the steps. The place he usually saw it was near the boiler. It generally stayed in jambs and when it stayed in the jambs it could not slip. It seemed as he had put the plank out to reach up for something. This day the plank was not in the jambs at all. Usually it stayed in the jambs and a portion of it in the door. When in its usual place there was nothing to keep it from being pulled out in the door in the position it was in that morning. When the plank was in the usual place it could not slip endwise and it would not hardly slip sideways unless some one pulled it out. It was a loose plank.

J. C. Meekins introduced, testified he saw the plank a great

many times; he never noticed plank enough to tell as to whether it would slip backward or forward. Saw nothing to keep it from slipping back and forward. That he is the administrator.

Dr. Ab. Alexander introduced and testified he knew deceased from childhood. He has seen the plank and does not think plank was fastened as to moving sideways. The large portion of plank was in front of the doors. He saw the deceased after his injury and would say the cause of his death was Bright's disease of the kidneys. Thinks the Bright's disease was caused by the fall. This fall shortened his life. His leg was broken and back hurt by the fall. The injury was the cause of the Bright's disease.

On cross-examination, he said that deceased had a cough and may have had some latent disease of the lungs. The deceased told witness that he was standing upon the board that was above the fire-room. That he was reaching above his head and the board slipped and he fell, falling on his back
(32) and breaking his leg. That they took him out of the engine-room and told him his leg was broken; that he was taken to Dr. Dillard, who attended him for the fractured leg and injuries received, and he had not been free from since.

The witness said on cross-examination that this was same plank spoken of over the fire-room.

Plaintiff rested. The defendant moved for judgment as of nonsuit under Acts of 1897 and 1899. Motion sustained and plaintiff excepted.

Holton & Alexander and E. F. Aydlett, for plaintiff.
Pruden & Pruden and Shepherd & Shepherd, for defendant.

MONTGOMERY, J. This action was brought by the administrator to recover damages for the death of his intestate, alleged to have taken place through the negligence of the defendant. The alleged negligence was that the defendant failed to provide for the deceased an appliance to be used over the hold of the boat for the use and convenience of the employees in passing from one side to the other, in the nature of a gang-plank, that was safe and suitable; the one in use having been alleged to have been made of unsound material, and not fastened and secured at its ends in jambs, so as to prevent its slipping and giving way. After the plaintiff had produced his evidence and rested his case, the defendant moved for judgment as of nonsuit, under chap. 109 of the Acts of 1897; and, upon the motion hav-

ing been allowed, the plaintiff excepted and appealed. It therefore becomes necessary for us to consider and to decide whether the plaintiff's evidence, in a just and reasonable view of it, was sufficient to warrant the jury in finding the issue as to the defendant's negligence in the plaintiff's favor. If there was more than a scintilla offered on that issue by the plaintiff, the matter ought to have been submitted to the jury, and (33) there was error in the ruling of the Court below. If there was no fit evidence offered by the plaintiff to be submitted to the jury, then his Honor was correct in allowing the motion.

The defendant railroad company owned and operated a steamboat as a transfer boat between Edenton, N. C., and Mackey's Ferry; and the plaintiff's intestate was engaged in the service of the defendant, as fireman on the boat, at the time he received the injury which resulted in his death. Four witnesses were introduced and examined by the plaintiff,—Eliza Jones, widow of the intestate; Henry Whedbee, who was aboard the steamer the day of the accident, and who saw the intestate just before and just after he was hurt; the plaintiff, and Dr. Alexander, who saw the intestate after he was hurt. The evidence of the widow and the two last-named witnesses is immaterial on the question of the defendant's negligence. Whedbee testified on his examination-in-chief, in substance, that he saw the intestate, five or ten minutes before he got hurt, standing on a plank which reached across the boat in the engine-room, and that he was reaching up after something; that the intestate was in the engine-room, where he belonged; that in a few minutes he heard that the intestate had fallen, and immediately went to where he was; that the injured man said to the witness that the plank the witness saw the intestate standing upon slipped, and he fell; that the plank was not fastened. On his cross-examination the witness said that he used to cross on this boat about twice a week. Each end of the plank was in the middle of a door on each side of the boat and he had seen the plank at a different place, near the boiler. The plank was in the door, over the steps. The place he usually saw it was near the boiler. "It generally stayed in jambs, and when it stayed in the jambs it could not slip. It seems that he had put the plank out to reach up for something. (34) This day the plank was not in the jambs at all. Usually it stayed in the jambs, and a portion of it in the door. When it was in its usual place there was nothing to keep it from being pulled out in the door, in the position it was in that morning. When the plank was in the usual place, it could not

slip endwise, and it would not hardly slip sideways unless some one pulled it out. It was a loose plank." We are of the opinion that the evidence was not sufficient in a just and reasonable view of it, to warrant the jury in finding the issue of negligence in favor of the plaintiff. The plank was sound, and it, or another like it, had been used for some time for the purposes alleged in the complaint; and the plaintiff's intestate had been employed a long time, as his widow testified. There was no allegation in the complaint that such a plank, if it had been sound and well secured at the ends, would not have been a proper and safe appliance for the purposes for which it was used. Jambs were prepared to receive the plank, and it generally stayed in jambs, and when it stayed in the jambs it could not slip. It seems from the evidence, therefore, that the defendant furnished the proper appliances to enable the employees of the boat to pass safely over the hold, but that the plaintiff's intestate misused them. The witness, Whedbee, said, "It seemed he (intestate) put the plank out to reach up for something." If any other person, however, than the intestate, had moved the plank from the jambs, the intestate would have used it in its misplaced position at his peril, under the facts in this case. The doctrine of the assumption of risk does not arise in this case; for, so far as the evidence discloses, the defendant furnished proper appliances for the plaintiff's intestate to do his work with safety. The trouble was that he did not use them as he should have done.

(35) No error.

DOUGLAS, J. I can not concur either in the opinion or the judgment of the Court, as I think there was sufficient evidence (that is, more than a scintilla) tending to prove the negligence of the defendant. This being so, the case should have been submitted to the jury, who alone can determine the weight of the evidence and the existence of the facts. It may be that the jury would have found for the defendant, and I would probably have done so had I been in their place; but I was not on the jury, and as a judge I have no right to usurp their functions. I would not feel justified in killing a man simply because I might think that he would eventually be hung. In fact, a nonsuit always looked to me to be somewhat in the nature of judicial lynching, resorted to by the Court when the orderly process of law, though amply sufficient, seemed too slow to meet the ends of justice. The Supreme Court of Georgia has characterized a nonsuit as a purely mechanical operation, not rising to the dignity of a mental process. It says in

Vickers v. Railroad Co., 64 Ga., 300: "Nonsuit is a process of legal mechanics. The case is chopped off. Only in a clear, gross case is this mechanical treatment proper. When there is any doubt, another method is to be used—a method involving a sort of mental chemistry; and the chemists of the law are the jury. They are supposed to be able to examine every molecule of the evidence, and to feel every shock and tremor of its probative force." I believe it is still the law in this State that on a motion for nonsuit the evidence must be taken in the light most favorable for the plaintiff. *Spruill v. Insurance Co.*, 120 N. C., 141; *Collins v. Swanson*, 121 N. C., 67; *Cable v. R. R.*, 122 N. C., 892; *Cox v. R. R.*, 123 N. C., 604; *Cogdell v. R. R.*, 124 N. C., 302; *Gates v. Max*, 125 N. (36) C., 139; *Brinkley v. R. R.*, 126 N. C., 88. This rule is clearly laid down by Justice FURCHES in delivering the opinion of the Court in *Johnson v. R. R.*, 122 N. C., 955, as follows: "In cases of demurrer and motions to dismiss under the Act of 1897, the evidence must be taken most strongly against the defendant. Every fact that it reasonably tends to prove must be taken as proved, as the jury might so find." Let us apply this rule to the case at bar. The evidence, taken in the light most favorable to the plaintiff, might well justify the following findings: That the plaintiff's intestate was using a plank furnished by the defendant for his use, and was hurt while using it for some purpose necessary to the proper performance of his duties, and, while so using it in a manner not palpably dangerous, was hurt by its sudden slipping; that, while the plank was "generally" kept in the jambs, it was not always kept there, and was occasionally or frequently taken out, with the consent or direction of the defendant, to be used in the same manner in which the plaintiff was hurt. In fact, it may be that the intestate was so using it when he was hurt. There is no evidence whatever of the fact, assumed by the Court, that the intestate himself had moved the plank. It is true, one witness says that "it seemed he put the plank out to reach for something"; but this is evidently a mere expression of opinion on the part of the witness, who does not pretend to have seen the intestate move the plank. It may well have been that the plank was moved by the captain of the boat, or some one under his direct instructions and supervision. If that were so, could not the plaintiff recover? It may be said that I am assuming something not shown in the evidence. That is true, but the assumption of the Court that the intestate (37) himself moved the plank is equally without evidence. If we attempt to account for the moving of the plank by mere

assumption, we must, on a motion for nonsuit, assume the theory most favorable to the plaintiff. This is not unjust to the defendant, because by his motion he deprives the plaintiff of his right to a trial by jury. If the defendant wants his evidence weighed in equal scales, let him leave it to the jury, who alone can do it. The plaintiff's intestate and the captain were not fellow servants, and, even if they had been, it would have made no difference, under the Act of 1897. The fact that the plank was not fastened in the jambs was some evidence tending to prove that other methods of use were contemplated. The master is bound to furnish safe appliances for the use of his servants, and these appliances must be safe under all conditions of probable use. The Court, in its opinion, says that the defendant furnished proper appliances, but that the plaintiff's intestate misused them. Here are two affirmative findings of fact, both of which are arrived at by construing the evidence in the light most favorable to the defendant. The Court again says that "if any other person, however, than the intestate, had moved the plank from the jambs, the intestate would have used it in its misplaced position at his peril." This can not be the law. Suppose the captain or some other duly authorized agent of the defendant had used it, and it had become necessary for the intestate to use it in the performance of his regular duties; he could surely have recovered, unless the danger was so obvious that no prudent man would have run the risk. But this of itself would have involved the question of assumption of risk, which the Court itself says does not arise in the case. In any event, would not that have been a question for the jury? If the Court means to base its opinion on the ground that there was no evidence tending to prove negligence on the part of the defendant, I must still respectfully dissent. It seems to me that the mere fact of the ac-
(38) cident happening to the intestate while using a plank admittedly provided by the defendant for his use is some evidence of negligence. It was so held as far back as the leading case of *Stokes v. Saltonstall,* 13 Pet., 181. The syllabus says: "The facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness or negligence or want of skill on the part of the driver, and throw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault." In the recent case of *Hogan v. Railway Co.,* 149 N. Y., the Court says: "This being so, it is further assumed that buildings, bridges, and other structures properly constructed do not ordinarily fall upon the wayfarer. So, also, if anything falls from

them upon a person lawfully passing along the street or highway, the accident is *prima facie* evidence of negligence, or, in other words, the presumption of negligence arises." In this latter case the Court below directed a verdict for the plaintiff, and this direction was sustained by the Court of Appeals. I must confess that I am not partial to nonsuits, and I may be mistaken in my view of the law, as may have been the great judges whose opinions I follow; but, such being my sincere convictions, I must give them effect so far as in me lies.

CLARK, J., concurs in dissenting opinion.

---

(39)

WRIGHT v. BOND.

(16 October, 1900.)

1. MANDAMUS—*Execution—Sheriff.*

Mandamus will not lie to compel a sheriff to sell land liable to execution, where there is an adequate remedy at law.

2. HOMESTEAD—*Execution—Exemptions.*

The acquisition of an additional interest in property subsequent to the levy of an execution will not deprive the owner of his homestead exemption.

3. FRAUD—*Debtor—Judgment—Execution.*

It is not fraud to acquire such an additional interest in land as to entitle the owner to a homestead and thereby defeat the levy of an execution.

APPLICATION for mandamus by Augustus Wright against Turner C. Bond, as sheriff of BERTIE, and C. L. Henry, heard by Judge *H. R. Starbuck,* at May Term, 1900, of BERTIE. From a judgment refusing mandamus, the plaintiff appealed.

Martin & Peebles, for plaintiff.
Francis D. Winston, for defendants.

FURCHES, J. The plaintiff has three judgments against one Henry, amounting to more than $300, docketed in the clerk's office of the Superior Court of BERTIE on 8 January, 1900, and therefore a lien on any land he may own, lying in BERTIE, for ten years from the date of docketing. The plaintiff has caused executions to be issued on said judgment, and placed them in

the hands of the defendant, who is sheriff of said county of Bertie. At the time these executions were issued and
(40) placed in the hands of the defendant sheriff, the said Henry, defendant in said judgment, owned the remainder after the dower estate of his mother in thirty-one acres of land lying in said county. And it is agreed that said land is worth $303.50, and that said Henry owns no other real estate; that the defendant levied said executions on said land, and advertised the same for sale thereunder, but before any sale was made the mother released and conveyed all her interest in said thirty-one acres of land to the defendant in said judgments, and he demands that his homestead exemption shall be laid off and assigned to him thereon. This the defendant proceeded to have done, and, there being no excess, declined to sell said land for the plaintiff's debts. The plaintiff thereupon brings this action, and asks the Court to issue a writ of mandamus commanding the defendant to proceed to sell said land, and to apply the proceeds to his judgments. It seems to us that, if the plaintiff has a remedy against the defendant, it is not in this action. The executions themselves are commands to the sheriff to proceed to sell such property as the defendant Henry may have, liable to execution and sale. And, if he has not done this, he and his sureties are liable by attachment, and in an action upon his bond; and there is no allegation or suggestion that the defendant is insolvent, or that his bond is not good. And, as a matter of law, we know that the plaintiff's lien continues for ten years, and longer, if he is prevented from enforcing it on account of the homestead; that, while the writ of mandamus will issue in proper cases to compel public officers to perform ministerial duties, it must be in cases where the party asking it does not have the ordinary legal remedies by which he can have redress for his wrongs. *Hughes v. Commissioners,* 107 N. C., 598. But from the argument of counsel, it would seem that it was expected that we should decide whether the defendant Henry was entitled to have his homestead in
(41) this land; and, while we can not admit that this question is properly before us, it may be not improper for us to express our opinion upon this question. The plaintiff admits that, if the defendant Henry had acquired his mother's life interest in this land before he docketed his judgment, he would be entitled to his homestead. But he contends that under the ruling of this Court in *Murchison v. Plyler,* 87 N. C., 79, the defendant Henry would not have been so entitled at the time he docketed his judgments, and the acquisition of the life estate after that time was a fraud on his rights. This, it seems to us,

would be to reverse the doctrine of frauds. The question of fraud is not unfrequently presented where a debtor disposes of his property. But no case has been called to our attention, and we do not think any can be found, where the creditor alleged fraud upon the ground that the debtor had acquired more property than he had when the debt was made or the judgment taken. The plaintiff, by docketing his judgment, acquired no estate in the land. His docketed judgment was only a lien on the land, and he has that now. He has been deprived of no vested right, and we are at a loss to see what legal right he has been deprived of. The judgment below, refusing the mandamus, is affirmed.

Affirmed.

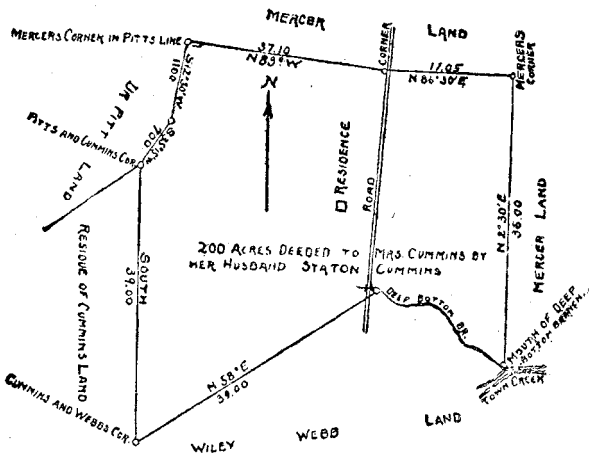
WEBB v. CUMMINGS.

(16 October, 1900.)

DEEDS—*Description, Sufficiency of—Boundaries.*

The language of the deed in this case held sufficiently descriptive to convey the land claimed by the grantee.

PETITION by W. G. Webb, administrator of estate of (42) Staton Cummings, against Anne Cummings and others, for a sale of lands for assets, heard by Judge *H. R. Starbuck* and a jury, at April Term, 1900, of EDGECOMBE. From judgment for defendants, petitioner appealed.



PLAT.

Gilliam & Gilliam, for plaintiff.
John L. Bridgers and *James Pender,* for defendant.

FAIRCLOTH, C. J. The plaintiff files a petition against the widow and children to sell, for assets, a tract of land which he alleges belonged to his intestate, Staton Cummings, containing 430 acres. The tract is irregular in shape, and is described by well-defined lines, with courses and distances. The widow, in her answer, alleges that she is the owner of 200 acres of said land by virtue of a deed made to her by her husband for a valuable consideration. The only question is whether
(43) the description in her deed is definite enough to convey the title to said 200 acres. The descriptive language is this: "A certain tract of land situated on the east side of Staton Cummings' tract, he now resides on, to contain 200 acres, and adjoining the lands of D. V. Mercer, W. Y. Webb, and Staton Cummings' land on the west side." It was admitted that Staton Cummings owned no land to the east of the tract above referred to. The plaintiff contends that the description is so indefinite that no title passed, and that the 200 acres can not be located. It is manifest that the husband intended to convey to his wife 200 acres of land on the east side of his tract of 430 acres. Of course, we can not observe his intention, unless his language in the deed is sufficient to carry the title as he intended. His Honor held that the widow is the owner of said 200 acres, and the defendant excepted and appealed.

Ordinarily the quantity of land is immaterial, but when the boundary line is uncertain, as in this case, the quantity becomes an important and material element. Clearly, to cut off 200 acres "on the east side of Staton Cummings' tract," etc., the division line must run north and south. On the plat filed in this case, it appears from the sixth station that a line due south is drawn to a point in the south boundary line of the whole tract, and the surveyor testifies that that line cuts off exactly 200 acres on the east side, and that no other north and south line will cut off exactly 200 acres. The method of locating this south and north line does not appear in the record, but the fact that it cuts off exactly 200 acres shows that the location can be ascertained. In *Stewart v. Salmonds,* 74 N. C., 518, a rude way of establishing the division line is pointed out, in a case involving a similar question. This case has been approved and followed in *Warren v. Makely,* 85 N. C., 12, and *Cox v.*
(44) *Cox,* 91 N. C., 256. The same result can be accomplished by the rules in trigonometry and the logarithmic system. No doubt, competent and practical surveyors have

other convenient modes of doing their work on scientific principles. We think, therefore, that his Honor properly instructed the jury that the defendant Anne Cummings was the owner of the 200 acres described in her deed from her husband.

Affirmed.

Cited: *Harris v. Woodard,* 130 N. C., 581.

MEBANE v. CAPEHART.

(16 October, 1900.)

BASTARDS—*Evidence—Admissibility—Parent and Child.*

Upon the issue of paternity under Act 1866, it is competent to show—

(a) That the alleged father did not have access for more than twelve months before birth of child.

(b) That the alleged father and mother separated on account of a dispute as to the paternity of the child.

(c) Admissions of mother as to paternity of child.

(d) That the mother was intimately associated with a man other than the alleged father sometime before and after the begetting of the child.

SPECIAL PROCEEDINGS for partition of land by Isaiah Mebane and others against Henrietta Capehart and others, heard by Judge *O. H. Allen* and a jury, at Spring Term, 1900, of BERTIE. From judgment for defendant, plaintiff appealed.

(49)

Francis D. Winston, for plaintiffs.
R. B. Peebles, for defendants.

FURCHES, J. This is a proceeding to partition land among the heirs-at-law of Moses Hoggard. It is admitted that the plaintiffs are heirs of the said Moses, but they deny that the defendant Henrietta Capehart is the child and heir-at-law of the said Moses. The said Moses was a slave, and had a woman named Zylphia, who was also a slave, for his wife. After their emancipation they were married under the provisions of the Act of 1866. The plaintiffs and the defendant were all children of Zylphia, and were all born during the time Moses claimed Zylphia as his wife. But the plaintiffs allege that Moses was hired out in Martin County, some thirty miles from where Zylphia lived, the year before the defendant was born in February, and had not been home during the year preceding

her birth, and was not her father, but a colored man named Ben Morris was. For the purpose of proving that Moses was not the defendant's father, the plaintiffs offered evidence to prove that Moses was hired out as stated above; and in addi-
(50) tion to this evidence they offered to show that when Moses came home at Christmas, before the defendant was born, he found Zylphia heavy with child, and that he left her, and they did not live together as husband and wife for two or three years. But they "made up" their troubles, and again lived together as man and wife, and were so living when they were emancipated. The plaintiffs also offered evidence to prove that Moses and Zylphia quarreled about the paternity of the defendant, in which Moses alleged that he was not the father of the defendant, and Zylphia admitted that he was not, but stated that Ben Morris was her father. The plaintiffs also proposed to show by evidence that Ben Morris was a frequent visitor of Zylphia during the absence of Moses, and made presents to the defendant in recognition of his paternity, as the plaintiffs allege. But all this evidence was objected to by the defendants, and excluded by the Court, and in this there was error. It seems to us that the case of *Erwin v. Bailey,* 123 N. C., 628, and *Woodard v. Blue,* 107 N. C., 407, fully sustain our ruling, and show that this evidence excluded by the Court should have been admitted; and the whole matters involved in these exceptions have been so fully discussed in these cases that we do not feel called upon to repeat the argument in this case. There was error in excluding this evidence, for which the plaintiffs are entitled to a new trial.

---

(51)

WILLIAMS v. BROWN.

(16 October, 1900.)

1. INJUNCTION—*Foreclosure of Mortgage.*

   A mortgagee may not be restrained by injunction from threatening to foreclose a mortgage.

2. INJUNCTION—*Assignment—Mortgagees.*

   Mortgagee may not be restrained from foreclosing a mortgage because he refused to assign the mortgage to a friend of mortgagor.

3. MORTGAGES—*Assignment.*

   The assignee of a mortgage may sell though the assignment is not registered.

WILLIAMS *v.* BROWN.

APPLICATION FOR INJUNCTION by M. M. Williams against H. A. Brown and others, heard by Judge *H. R. Starbuck,* at Spring Term, 1900, of CRAVEN. From refusal to grant injunction, the plaintiff appealed.

W. D. McIver, for plaintiff.
No counsel, *contra.*

FURCHES, J. This is an action in which the plaintiff asks to have the defendant enjoined from foreclosing a mortgage to secure a debt of $78, and to restrain the defendant from threatening to enjoin him from selling timber off the mortgaged land. The plaintiff alleges two grounds upon which he puts his right to this injunction. The first is that the defendant is the assignee of the mortgage, but the assignment has not been registered; and the other is that defendant threatens to stop him from selling timber off the mortgaged premises unless he will pay both the mortgage debt and also a docketed judgment which defendant holds on plaintiff; that he is (52) unable to pay either unless the defendant will let him sell timber off the mortgaged land; that, if the defendant will let him do this, he can sell the growing timber on said land for $80, and pay off the mortgage debt; that he has proposed to the defendant that if he will assign the mortgage debt to a friend of his, and agree not to interfere with his selling the timber off said land, said friend will pay him the amount of the mortgage debt, but the defendant refuses to do this. The amount of the docketed judgment is not stated, and it was admitted on the hearing by the plaintiff on the trial below, and so appears on the transcript of record, that the assignment of said mortgage to defendant was in writing, and conveyed the legal title to the defendant. It is also stated that plaintiff's land was not worth more than $1,000, and he claimed a homestead thereon. Upon this state of facts we are unable to see the plaintiff's right to the injunction prayed for. Of course, the plaintiff has the right to pay the defendant the mortgage debt, and thereby discharge the mortgage lien on the land. This he does not offer to do, but asks the Court to enjoin the defendant from foreclosing his mortgage because he will not agree to assign it to a friend of the plaintiff. This the Court can not do. The plaintiff's other ground is equally untenable. The Court can not enjoin the defendant from talking, nor from threatening to enjoin the plaintiff. This would be to enjoin the defendant from enjoining the plaintiff, and we think this would be carrying the injunction business a little too far. The attention of the Court was

called to *Jones v. Britton,* 102 N. C., 166. The facts in the case before us do not make it necessary to review that case; but it will be observed that *Jones v. Britton* was by a divided Court, there being two dissenting opinions filed, while Judge Shepherd filed a concurring opinion, which must be given
(53) the weight of the opinion of the Court, as he held the balance of power; Chief Justice SMITH agreeing with Justice MERRIMON, who wrote the leading opinion, and Justices AVERY and DAVIS dissenting from the opinion of Justice MERRIMON, concurred in by Chief Justice SMITH. Therefore that case could not be considered as authority further than the rule laid down in the concurring opinion of Justice SHEPHERD. We feel justified in saying this much, as that case was cited on the argument, but we do not think we would be justified in saying more than this in considering this appeal.

The judgment is affirmed.

Cited: *Morton v. Lumber Co.,* 144 N. C., 34.

GAMMON v. JOHNSON.

(ROYSTER, Intervener.)

(16 October, 1900.)

1. MORTGAGES—*Assignee—Rents and Profits.*

The assignee of a mortgagee, in possession, is chargeable with rents and profits.

2. MORTGAGES—*Burden of Proof.*

A mortgagee in possession is presumed to have entered as mortgagee.

3. USAGE—*Evidence—Custom.*

Custom is inadmissible where there is direct evidence that it was not observed in the transaction in question.

ACTION by G. R. Gammon against J. W. Johnson and wife, Indiana Johnson, and W. H. Johnson, to foreclose a mortgage, in which F. S. Royster, administrator of O. C. Farrar, a judgment creditor, intervened, heard by Judge *H. R. Starbuck* and a jury, at Spring Term, 1900, of EDGECOMBE.
(54) From judgment for plaintiff, intervener appealed.

J. R. Gaskill and *John L. Bridgers,* for plaintiff.
G. M. T. Fountain, for intervener.

FURCHES, J. In 1887 the defendant, Johnson, borrowed $1,350 from Sherrod & Bro., for which he executed his note, and also a mortgage or deed in trust on the land described in the complaint, to secure the payment of said note. Only $450 had been paid on said note when the plaintiff, on 5 April, 1899, became the purchaser and assignee of said note, and on the same day commenced this action for a foreclosure and sale of said land; and at Spring Term of said Court, no answer being filed, by consent of defendant the plaintiff recovered judgment for the sum of $2,282.62, and also had a decree of foreclosure and order of sale. A commissioner was appointed, and the land sold on 4 September, 1899, when the plaintiff became the purchaser at the price of $2,700. On 19 October, 1891, O. C. Farrar recovered a judgment against said Johnson for the sum of $2,183.92, which remains unpaid, and is a lien on said land, subject to the mortgage made to secure the Sherrod debt; that said Farrar is dead, and the intervener, F. S. Royster, is his administrator, and at October Term, and before said sale had been confirmed, by leave of Court became a party to said action, and filed his petition. In his said petition he alleges that after the plaintiff purchased and became assignee of the mortgage debt of Sherrod & Bro., and thereby became, in effect, the mortgagee, he took possession of said land, cut and sold timber therefrom, and worked a part thereof in cotton; and said intervener asks that the value of said timber and the rental value of the crop of cotton be applied on the mortgage debt, and that he have the resi- (55) due of the purchase paid for said land, after paying the mortgage debt, reduced by the value of the timber cut by plaintiff, and the rental value of the cotton. On the trial it was admitted that the plaintiff cut timber on said land in April, 1899, which the jury find to be worth $34; and the plaintiff admitted that he cultivated a two-horse crop of cotton on said land in the year 1899, and it was agreed that the rental value of the cotton was $140. But plaintiff says that the intervener has failed to show that he entered upon said land after the date of the assignment of the mortgage on 5 April, 1899, and in fact he alleges that the intervener introduced no evidence upon this point, while plaintiff says that the witness, Corbett, testified that the custom was to commence preparing for a crop early in the year, and that some persons commenced in the latter part of the old year. But the same witness (Corbett) also testified that he (witness) rented some of this land from the plaintiff in March or April, 1899. So it would seem that, if there was any such custom as testified to, he and the plaintiff did not observe this custom, and it seems that no such custom prevailed with

the plaintiff; and this evidence should not, as it seems from the charge of the Court it did, influence him in the trial.

The Court charged the jury, in substance, that the value of the timber cut by the plaintiff should be credited on the mortgage debt. He also charged the jury—correctly as we think, and as was admitted by counsel for plaintiff—that the plaintiff, after the assignment of the mortgage, sustained the relation of mortgagee to the mortgagor, and the general rule was that the rents and profits in the hands of a mortgagee in possession should be applied to the mortgage debt. And he further charged

(56) that the rule was that a mortgagee in possession of the mortgaged premises was presumed to have entered as mortgagee. The charge so far was correct. But he further charged that there was no evidence showing whether the plaintiff entered before or after he became the owner of the mortgage; that, if he entered before, he would not be liable for the rent cotton, and the burden was on the intervener to show that he entered after the purchase and assignment of the mortgage; and instructed the jury to answer this issue "No," that the plaintiff was not liable for the rent cotton. In this instruction there is error. The presumption being that the plaintiff entered as mortgagee, the burden was upon him to rebut the presumption, and to show that he did not so enter, if such were the fact; and it is singular that the Court, after it had stated the rule correctly, should have fallen into this error, for which a new trial must be granted.

Error. New trial.

Cited: *Green v. Rodman,* 150 N. C., 179.

---

(57)

VALENTINE v. BRITTON.

(16 October, 1900.)

1. JUDGMENT—*Index.*

"J. Mizell" or "Jo Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell."

2. JUDGMENT—*Cross-Index—Lien.*

One cross-index is insufficient for two judgments, though they appear on the same page and include the same parties, and only the first judgment on the page will constitute a lien.

3. ADMINISTRATORS—*Executors—Misapplication of Funds.*
An administrator is personally liable for misapplication of funds.

4. COSTS—*Administrator.*
An administrator should be taxed with the costs of a suit subjecting him to liability for misapplication of funds.

5. NOTICE—*Advertisement.*
Plaintiff need not show that he presented his claim if administrator fails to aver or prove that he had given notice to creditors.

FAIRCLOTH, C. J., concurs in result only.

ACTION by E. H. Valentine and W. E. White, administrators of D. A. Valentine, deceased, against D. W. Britton, administor of Josiah Mizell, deceased, heard by Judge *H. R. Starbuck,* at February Term, 1900, of BERTIE. It was agreed that a jury trial be waived and that the Judge render judgment upon inspection of the record introduced in evidence, to wit, the judgment docket and the cross-index to judgments, pleadings, etc. From judgment for plaintiffs, the defendant appealed.

Francis D. Winston, St. Leon Scull and B. B. Winborne, for plaintiffs. (58)
Martin & Peebles, for defendants.

CLARK, J. Ruffin N. White, on 25 May, 1886, obtained a judgment in Bertie against T. W. Brown, John Wilson and Josiah Mizell. and on the same day, and in the same Court, he obtained another judgment against C. J. Morris and Josiah Mizell. Both these judgments were docketed in the above order in Book B, page 163, and indexed. On the cross-index, however, the only entry containing Mizell's name is one entry, "J. Mizell et al., defendants. R. M. White, plaintiff. Judgment Docket Book B page 163." Subsequently the plaintiffs, administrators of Valentine, obtained a judgment against Josiah Mizell and another, which was docketed in Bertie, 9 July, 1892, and properly indexed and cross-indexed. The answer admits as to the two White judgments that "the first one docketed was indexed and cross-indexed," and has been duly satisfied. The defendant's contention, however, is that the one cross-index above set forth, "J. Mizell et al., defendants," etc., by referring to Book B, page 163, is sufficient cross-indexing as to both judgments on that page, and that, if it is not, it would be as much a reference to the second judgment as to the first. We concur with the defendant, as was also held by the Court below, that "J. Mizell," or "Jo. Mizell," was a sufficient cross-indexing for

a judgment against "Josiah Mizell"; but we further concur with his Honor that where two judgments, taken by the same plaintiff, are docketed against the same defendant, and only one is cross-indexed against that defendant, it is in law a cross-indexing of the judgment first entered on the judgment docket. Anyone turning to the page on the docket referred to in the cross-index (Book B, p. 163,) and finding the described
(59) judgment against Jo. Mizell canceled, could not be expected to look further on same page for another judgment against him. The second judgment not having been cross-indexed (for only one judgment, White against Mizell, was cross-indexed), it was not a lien upon the realty of Mizell. Code, sec. 118; *Hahn v. Mosely,* 119 N. C., 73; *Dewey v. Sugg,* 109 N. C., 328; *Holman v Miller,* 103 N. C., 118. The defendant, administrator of Mizell, who sold the land to make assets, erred in applying any part of the proceeds to such judgment in preference to the judgment of the plaintiff, which was duly docketed, indexed, and cross-indexed, and which was therefore a valid lien upon the realty.

The administrator was properly taxed with the costs. It is a proceeding to subject him to liability for misapplication of the funds, and not to recover a debt out of the estate, against which the plaintiff already had a judgment, and hence section 1429 of The Code does not apply. Section 1459 applies to cases where the administrator unreasonably denies a claim filed under Code, sec. 1448. Hence, also, the exception as to the administrator's commissions needs not to be considered. Besides, the record shows that, after paying the plaintiff's judgment, there is a sufficiency in hand for that purpose.

The exception that it is not shown that the plaintiff ever presented his claim will not avail, as it is neither averred nor proved that the defendant had given the notice required by Code, sec. 1421. *Love v. Ingram,* 104 N. C., 600.

No error.

(60)

WILLIFORD v. WILLIAMS.

(16 October, 1900.)

TRESPASS—*Burden of Proof—Cutting Timber.*

Where defendant admits cutting timber but claims the right under contract with plaintiff, who denies selling timber on entire tract, burden is on defendant to show the right to cut timber on the disputed part.

ACTION by J. B. Williford and another against J. C. Williams, heard by Judge *H. R. Starbuck,* and a jury, at Spring Term, 1900, of BERTIE. From judgment for defendant, plaintiffs appealed.

Martin & Peebles, for plaintiff.
Francis D. Winston, for defendants.

MONTGOMERY, J. The plaintiffs, in their complaint, allege that the defendant trespassed upon their lands, and cut and removed valuable timber trees therefrom, and was still trespassing and cutting timber. The purpose of the action was to recover damages for the trespass, including the value of the timber cut, and for an injunction to restrain the defendant from further trespass. The defendant, in his answer, admits that the title to the land is in the plaintiff, J. B. Williford, and Sarah E. Askew, the wife of the other plaintiff, A. J. Askew; but he avers that he had a contract with the plaintiffs under the terms of which he became the purchaser from the plaintiffs of the right for the term of a year to cut the standing timber on the tract of land, and that his entry and cutting the timber were not unlawful, but rightful, under the contract. The plaintiffs, in their replication, denied that they had made a contract with the defendant by which they sold to him the timber on the entire tract of land, as was alleged in the answer; but they admitted that the plaintiffs, Williford and A. J. Askew, sold to the (61) defendant the timber left on a certain portion of the land. to-wit, that part which had been cut over by Hoggard and Daniel. From the statement of case on appeal the only exception made by the plaintiffs (appellants) was one to the instruction of his Honor that the burden was on the plaintiffs by preponderance of evidence to establish their contention as to the contract, to-wit, that the timber to be cut was that part which had been cut over by Hoggard and Daniel. The contract was a verbal one, but in the pleadings the plaintiffs did not set up

as a defense the statute requiring such a contract to be in writing. The plaintiffs introduced testimony tending to show that their contract with the defendant embraced only that part of the timber on the Heart's Delight tract, which had been cut over by Hoggard and Daniel; and the defendant introduced evidence tending to show that the contract embraced the timber on the entire Heart's Delight tract. We are of the opinion that there was error in the ruling of his Honor. If the plaintiffs, in their replication, had denied absolutely the statements made and set up as a counter-claim in the answer, certainly the defendant would have had the burden of proving the contract which he set up in the answer, he having admitted that he had cut timber on the plaintiff's land, and carried it off. The fact that in the replication the plaintiffs admitted the defendant's right to cut timber off a part of the land did not relieve the defendant of proving by a preponderance of evidence the right to cut timber from the disputed portion. The case is analagous to one of a suit upon a note or bond, where the execution of the instrument had been admitted, and payment of the whole averred to have been made, and the plaintiff replied, denying the answer, but admitting part payment. The burden would be on the defendant to show by a preponderance of evidence that he had paid the whole debt; that is, the balance not admitted by the plaintiff to have been paid.

Error.

---

(62)

EDWARDS v. SUPERVISORS OF PUBLIC ROADS OF MANNING TOWNSHIP.

(16 October, 1900.)

HIGHWAYS—*Obstruction—Fences—Injunction.*

Under Acts 1899, chap. 437, fence commissioners are proper parties to maintain injunction against a board of road supervisors to prevent removal of gates across a highway erected in pursuance of such act, and a restraining order enjoining the road supervisors from removing such gates should have been continued to the hearing.

SUIT by William Edwards and others, Fence Commissioners, against the Board of Supervisors of Public Roads of Manning Township. From an order vacating a restraining order, heard and allowed by Judge *E. W. Timberlake,* at Chambers, at Louisburg, 7 July, 1900, the plaintiffs appealed.

F. S. Spruill, for plaintiffs.
W. M. Person, for defendants.

CLARK, J. By chapter 437, Laws 1899, certain territory in Nash County was placed in stock-law territory, and the plaintiffs were subsequently appointed, under the authority of said act, Fence Commissioners. Section 5 provides that said Fence Commissioners shall have all the powers of Fence Commissioners "in any other fence-law territory" in this State. Section 3 provides that chapter 20, volume 2 of The Code shall apply to the territory herein described. Code, sec. 2821, which is in said chapter 20, authorizes any persons own- (63) ing land adjoining stock-law territory to have their lands taken within the same. Under this authority, certain land-owners adjoining the territory described had their lands taken within the stock-law fence, and gates were erected across the roads where their outside boundaries came, instead of where the boundaries of the territory described in the act would have crossed. In this there was nothing not authorized by law. The defendants, the Township Board of Supervisors of Public Roads, made an order to remove the gates, whereupon the plaintiffs obtained a restraining order against such action upon a complaint setting forth the above facts, and the irreparable injury to crops in the stock-law territory if such gates should be taken down, sustaining the same by affidavits of the adjacent land-owners who have been taken into the stock-law territory. The defendants can not rely upon Code, sec. 2058, which requires license to be obtained to erect gates across a public road, because, by chapter 77, Acts 1885, that section does not apply to stock-law territory. We think the duties of the Fence Commissioners, as quasi trustees, authorized them to maintain this action against the tearing down of the gates erected by them. Doubtless they were further competent by being land-owners within the stock-law inclosure. The restraining order should have been continued to the hearing.

Error.

Cited: *Cabe v. Vanhook, post* 426.

(64)

CANTWELL v. BOYKIN.

(16 October, 1900.)

GAMING—*Futures—Sufficiency of Evidence.*

Evidence in this case held sufficient to go to jury on question whether a contract was within Laws 1899, chap. 221, prohibiting dealing in "futures."

ACTION by W. L. Cantwell against W. J. Boykin, heard by Judge *J. W. Bowman,* at February Term, 1900, of WILSON. From a judgment for defendant, the plaintiff appealed.

A jury was empanelled and the following issue was submitted:

Is the defendant indebted to the plaintiff, and if so, in what amount?

The only witness examined was W. L. Cantwell, the plaintiff. who testified as follows:

In 1896, I do not remember the exact date, I paid for Mr. Boykin, at his request, to Silsby & Co., stock brokers of Washington, D. C., $91.66. At the time his request was made, Boykin promised to reimburse me, but no payment has been made.

The said sum paid at his request was the sum for which I obtained the judgment in this action before the Justice of the Peace.

Cross-Examination.—I rendered Boykin a statement of this account. I don't remember the month the account was given Boykin; it was sometime prior to the first of May, 1896. He went to Virginia in May. I have a copy of the account. I lived in Wilson in 1896; I was acting as commission broker for Silsby & Co. Their head-office was in Washington, D. C. I represented them here, as correspondent, or agent to a limited extent—not to solicit, but to accept and forward orders.

(65) Had an office, but no private wire—the telegraph office was near by. I sent orders to Silsby for Boykin, Cozart & Washington for ribs—one lot of meat—one contract—don't remember the amount in pounds of the contract. I had no meat here. Boykin dealt in leaf tobacco, so did Cozart & Washington; they did not handle meat. It was what is termed a speculative contract; order was for the purchase of a rib contract for some future month. The margin was not paid by the customer until he was notified that his order had been executed. When the market went down on a purchase, until the margin was exhausted, Silsby had a right to close the contract, unless

the customer gave notice that he wished to hold longer, and this would end the trade. Boykin, Cozart & Washington had a right to close at any time and take the profits—either party had the right to demand actual delivery. Can't give date of contract now; it was prior to May, 1896; statement of account was rendered to Boykin. I have a copy of the account in book in my office; did not consider it necessary to bring it here. Margin was put up on this contract. When margin was exhausted I notified them. Cozart & Washington paid their part and Boykin requested me to pay the amount due by him and that he would reimburse me. I waited until October, 1898, to bring suit because I had the repeated promises of one I thought to be a gentleman that he would pay me, and on that account waited until the right to bring action was about to be barred by the statute of limitations. The reason why I did not take an appeal in a similar suit tried at the last Court was because the jury, under a charge from the Court, found an issue of fact against me. I was indicted and convicted for conducting this business. I got a commission on each order sent in.

Re-direct Examination.—I had no interest in the business beyond the commission which was paid me when the order was sent in. I got a commission on a contract of (66) cotton of $5, the same on ribs, in the sense that a fire insurance agent gets 15 per cent of the first premium paid to the company. Silsby was a commission merchant, and acted as Boykin's agent in making his purchase. Boykin could have demanded the delivery of the ribs at the time specified in the contract. I had form furnished by Silsby for customers to write their orders upon, and the fact that actual delivery might be demanded was printed on each of them. F. A. Woodard and John F. Bruton were the attorneys who assisted the State in the prosecution referred to above. The indictment was pending two years. I insisted at each term of the Court for a trial, and failing to get trial, I finally proposed to the Solicitor that if he would nol pros. the indictment I would pay the costs. This he promised to do. He did not quash the bill, however, but had the entry made that I had pleaded guilty. This was the conviction referred to in the cross-examination. Since that time and to the present day the same business has been and is conducted here by others.

Re-cross Examination.—Forms were not always used. I don't know, but presume that the forms were intended to avoid the statute. No one ever demanded specific delivery, but all customers had a right to demand the delivery of articles bought by them at all times.

On the completion of Cantwell's evidence the plaintiff rested.
The defendant then moved to nonsuit.
The plaintiff objected.
Objection overruled and the plaintiff excepts and appeals.
The plaintiff assigns as error:
1. The refusal of his Honor to allow the issue to be answered by the jury, and in rendering a judgment of nonsuit.

Deans & Cantwell and *Jas. H. Pou,* for plaintiff.
(67) *Fred A. Woodard,* for defendant.

FAIRCLOTH, C. J. This is an action to recover money alleged to have been paid by plaintiff for and at the request of the defendant. The defendant alleges that he does not owe the plaintiff anything, and that the contract was illegal and void. At the trial the plaintiff testified that he was acting as commission broker for Silsby & Co., and that he sent an order for the defendant for produce, of some future month, etc. At the close of the plaintiff's evidence, his Honor held that he could not recover. The plaintiff assigns as error the refusal of the Court to allow the issue to be answered by the jury. The defendant relied upon Laws 1889, c. 221, forbidding vicious contracts. The sole question is, was there sufficient evidence to submit the issue to the jury? After reading the evidence, we think there was, and that the refusal of the Court to do so was error. For instance, the plaintiff testified that "it was what is termed a 'speculative contract.'" Did that mean legal speculation, or speculation forbidden by Laws 1899, c. 221? Again, "either party has a right to demand actual delivery. * * * I don't know, but presume that the forms were intended to avoid the statute. No one ever demanded specific delivery, but all customers had a right to demand the delivery of articles bought by them, at all times." What does this evidence mean with reference to a contract for future delivery? The error of the Court renders another trial proper.

Venire de novo.

(68)

WHITTED v. FUQUAY.

(23 October, 1900.)

1. VERDICT—*Setting Aside—Weight of Evidence—Superior Court—Supreme Court—Trial.*

   The trial judge has the right to set aside a verdict as against the weight of evidence. The Supreme Court has no such power.

2. VERDICT—*Evidence—Sufficiency.*

   The Supreme Court can go no further than to say whether there is any evidence upon which the jury might reasonably have found the verdict.

3. SPECIFIC PERFORMANCE—*Defenses—Contract.*

   The fact that a party had made a bad trade does not relieve him from the specific performance of his contract.

4. SPECIFIC PERFORMANCE—*Contracts—Questions for Jury—Questions for Court.*

   In a suit to compel specific performance, whether a contract is inequitable is not a question for jury but for the Court, and the jury can only find the facts.

5. NOTICE—*Fraud—Specific Performance.*

   When a party is put upon inquiry, he is presumed to have notice of every fact which a proper examination would enable him to find out.

ACTION by W. A. Whitted and W. W. Whitted against A. P. Fuquay and T. B. Crowder, heard by Judge *W. A. Hoke* and a jury, at Spring Term, 1900, of WAKE. From a judgment for plaintiffs, defendants appealed.

Winston & Fuller and *H. E. Norris,* for plaintiffs.
Argo & Snow and *Shepherd & Shepherd,* for defendants.

(69) FURCHES, J. This is an action upon an alleged contract for the sale of land in which a specific performance is demanded. The relief prayed for was refused, and plaintiffs appealed to this Court. There were two issues submitted to the jury, upon which they passed: (1) Did the defendant, A. P. Fuquay, contract and agree in writing to convey to plaintiffs the lands described in complaint at the price of $1.000, as of date 19 November, 1898, reserving one acre near spring? Ans. Yes. (2) Would the specific enforcement of such contract be oppressive and inequitable? Ans. Yes. There were other issues submitted, but they were not passed upon by the jury.

Upon the argument before this Court, the defendant insisted that the evidence submitted did not constitute a contract for the sale of land, as contended by the plaintiffs; and, while this issue was found against the defendant, the judgment was in his favor, and he did not appeal. We mention these facts for the purpose of stating that the ruling of the Court on this issue is not before us on this appeal, and therefore is not considered.

The only matter before us is upon the evidence, ruling and judgment of the Court upon the second issue. The specific performance of a contract for the sale of land is an equitable relief, not demandable as a matter of absolute right, but a right that rests in the sound judicial discretion of the Court. *Lloyd v. Wheatley,* 55 N. C., 269; *Ramsay v. Gheen,* 99 N. C., 215. But where a valid legal contract is established, which possesses no objectionable features to prevent its specific execution, and no fraud appears as an inducement to making the same, the Court will, as a matter of course, decree a specific performance. 3 Pom. Eq. Jur., sec. 1402; *Stamper v. Stamper,* 121 N. C., 251; *Bryson v. Peak,* 43 N. C., 310; *Kitchen v. Herring,* 42 N. C., 190. The doctrine is well understood by the profession, and more easily stated than applied. The
(70) doctrine of specific performance is the same now as before The Code practice was adopted. It is still equitable in its nature, but administered in a Court having jurisdiction of both legal and equitable demands. But while the principle governing in actions for specific performance is the same, the mode of trial is changed, to some extent at least. Under the old equity practice, the Court found the facts shown by the evidence, and in this way enlightened its conscience and enabled it to pronounce its judgment. It might, *ex mero motu,* formulate issues, and send them to a Court of Law to be tried by a jury, and certified back to the Court of Equity. But the Court of Equity had the right to disregard the findings of the jury if it saw proper to do so, and proceed to find the facts. But under the Constitution of 1868 and The Code, either party has the right to have the issues of fact arising upon the pleadings found by the jury, unless they expressly waive this right. And, as this is now a constitutional right the parties have, we do not suppose the Court, though passing upon an equitable demand, would be at liberty to disregard the findings of the jury, as it might have done under the old practice. But the Court would have the right to set aside the verdict, if it thought it contrary to the weight of evidence, and to order a new trial. And, while the trial judge has the right to set aside the verdict as against the weight of evidence, this Court has no such right. The fur-

thest it can go is to say whether there is any evidence upon which the jury might have reasonably found the verdict it did. It is contended by the plaintiffs that there was no such evidence in this case that authorized the finding of the jury upon the second issue, and this is one of the questions by this appeal for our consideration. Another is as to whether the facts found by the jury are sufficient to justify the judgment of the Court in refusing the demand of the plaintiffs for a specific per- (71) formance of the contract.

The evidence in the case must be considered by us with reference to its bearing upon the second issue, which is in the following language: "Would the specific enforcement of such a contract be oppressive and inequitable?" It will be seen that this issue submits but one question of fact to the jury; that is, would it be "oppressive" to specifically enforce the contract? The other part of the issue only contains the question, except the last word, "inequitable," and this was purely a matter for the consideration of the Court upon the facts found by the jury. They were not competent to say whether it was equitable or inequitable any more than it was lawful or unlawful. They could only find the facts, and then it was for the Court to say that the facts found made it inequitable—that is, against equity, against the law as administered in Courts of Equity—specifically to enforce the contract.

Then, does the evidence show that it would oppress, or would be oppressive, on the defendant to require him to perform this contract.—that is, to convey land recently worth $300 for $1,000? And does this justitfy him in withholding from the plaintiff the right he had to have the contract specifically performed, because the jury found that it would be oppressive for him to do so, without its being found that the plaintiff practiced a fraud on the defendant, or that he in some way dealt unfairly with the defendant, or that he took some unfair advantage of him in the transaction, or that plaintiff suppressed some fact from the defendant of which he had knowledge and the defendant did not have, and by reasonable diligence could not have? Without, at least, some of these elements, we are unable to see why a specific performance should not have been granted. There must be something more than the fact that a party had made a bad trade to relieve him from his obligation (72) to perform it. The simple fact that the defendant sold a tract of land worth $1.500 for $1.000 will not do so, and this is all the defendant can complain of, as he sold it to another for $1,500. after coming to this county, seeing the land. and knowing all about the railroads. The defendant was raised on this

land, and knew every foot of it. There had been no minerals found upon it to change its intrinsic value, of which the plaintiffs knew and the defendant did not. Nothing had happened to the land but what the defendant knew. The only thing alleged by the defendant is that two railroads had been built, one from Raleigh to the land, and another from Apex to a point near the land, and saw mills had been erected near the land, that enhanced its value. These roads are public enterprises, open and notorious, and of equal knowledge to all persons. The saw mills were the result of the construction of the roads, and it would hardly seem probable that the defendant, who owned the tract of land only worth $3 per acre a few years ago, would not have been quickened to find out something of the cause, when he had a dozen applications from different parties to buy it at a price above $10 per acre. But defendant testified that he "had heard rumors of a railroad contemplated to the property. * * * Had heard rumors that railroad was completed, but gave it no credence. These rumors came in a letter from the locality; letter written by either one of my brothers or Mr. Blanchard. * * * Forty or fifty, or sixty, or perhaps, ninety days, before 17 November, a brother of witness, who lived in one and one-half miles of spring, wrote that he believed there was to be a railroad, because Mr. Angier got some hands in part off his land, grading the road." It is a well-settled rule that any knowledge of a fact, the truth of which may be ascertained by proper inquiry, puts the party on notice, and deprives him of his equity. *Ijames v. Gaither,* 93 N. C.,
(73) 358. But, upon a thorough examination of the evidence (consisting principally of the correspondence), we see nothing concealed from the defendant, or unfair in the transaction, on the part of plaintiffs,—nothing that appeals to the Court to cause it to withhold from the plaintiffs a specific performance of the contract, taking it that there was a contract to sell. *Bryson v. Peak, supra.* We are therefore of the opinion that plaintiffs' sixth prayer for instruction, "that there is no sufficient evidence in the case to authorize the jury to answer the second issue, 'Yes,' and, if the jury believe the evidence, they will answer said issue, 'No,' " should have been given.

Error. New trial.

FAIRCLOTH, C. J. I agree to a new trial, but not with the opinion on the merits.

Cited: *S. v. Maultsby,* 130 N. C., 665; *Rodman v. Robinson,* 134 N. C., 515; *Brown v. Power Co.,* 140 N. C., 347; *Combs v. Adams,* 150 N. C., 68.

PORTER v. WHITE.

(23 October, 1900.)

VERDICT—*Directing—Prohibiting Defense—Trial.*

It is error for the Court, after plaintiff has rested, to direct a verdict for him and refuse to allow defendant to introduce competent evidence.

ACTION by A. T. Porter against C. A. White, executor of Samuel Cory, W. L. F. Cory, J. H. Cory, Lovie Worthington, Armetta Worthington and Louis Worthington, heard by Judge *J. W. Bowman,* at Spring Term, 1900, of PITT. From judgment for plaintiff, defendant appealed.

(74)

Skinner & Whidbee, for plaintiff.
Jarvis & Blow, for defendant.

FAIRCLOTH, C. J. This action is to have a deed absolute on its face declared to be a mortgage security. The plaintiff rested his case with evidence tending to show his contention, and his Honor directed the jury to answer the issue "Yes," in favor of the plaintiff. The defendant, in apt time, offered to introduce evidence to show (1) that the deed was not intended by the parties to be a mortgage or security; (2) that the redemption clause had not been omitted by ignorance, mistake, or undue advantage; (3) that the deed was made and accepted as an absolute deed; (4) that plaintiff occupied the land in controversy as the tenant of defendant's intestate, and paid him yearly rent therefor. The Court declined to hear the testimony and defendant excepted. We are not informed as to the kind or character of the evidence offered, or whether it was competent of not; but upon a very plain principle, the defendant was entitled to introduce any competent evidence that would sustain his contention, or defeat that of the plaintiff. We think his Honor's refusal to hear defendant's evidence was error, and renders another trial proper. It is. therefore, unnecessary to consider other questions discussed on the argument.

Error.

Cited: Mfg. Co. v. R. R., 128 N. C., 285.

(75)

TAYLOR v. BREWER & CO.

(23 October, 1900.)

1. CHATTEL MORTGAGE—*Tender—Sale—Trover—Conversion.*

A mortgagee unnecessarily selling, after a full and lawful tender, would be guilty of a breach of trust and thereby render himself liable to the injured party.

2. TROVER—*Conversion—Chattel Mortgage—Mortgagor—Agent—Sale—Evidence.*

It is error in an action by mortgagor for conversion, to exclude evidence that property was delivered by mortgagor to agent of mortgagee with authority to sell and apply proceeds to payment of certain debts.

ACTION by R. M. Taylor against W. C. Brewer & Co., heard by Judge *J. W. Bowman,* and a jury, at Spring Term, 1900, of FRANKLIN. From judgment for plaintiff, defendants appealed.

B. B. Massenburg and *W. M. Person,* for plaintiff.
N. Y. Gully, for defendants.

DOUGLAS, J. This is a civil action for damages for the wrongful conversion of certain personal property, to-wit, a horse, buggy, and harness, or rather the proceeds thereof. It appears that the plaintiff executed to the defendants a mortgage upon his crop as well as upon his horse, buggy and harness. Whether there were two mortgages given to defendants, or only one mortgage covering all the property, does not clearly appear, nor would it make any apparent difference. The plaintiff also executed a mortgage upon his crop to Mrs. Rayborn, but whether before or subsequent to the Brewer mortgage seems equally uncertain. There is, however, no question of priority, and, indeed, no apparent conflict of interest, between the mort-
(76) gagees, only one of whom is a party to this action. All three mortgages were placed in the hands of the witness, Gulley, for collection or foreclosure, who wrote to the plaintiff, asking him to pay them, or to bring back the horse, buggy, and harness, and deliver them to be sold for that purpose. In a few days the plaintiff delivered the said property to the said Gulley, at the same time putting him in possession of the crop. It seems that nearly all the defendants' debt was paid from the proceeds of the crop, the double-charged property, leaving a balance of $12.46 as claimed by the defendants, and $6.62 as found by the jury. The said Gulley, ostensibly acting as attorney for the defendants and Mrs. Rayborn, sold the horse, buggy, and harness for $28.50, paid $12.46 to the defendants. $20.70 to Mrs. Rayborn, and tendered $1.88 to the plaintiff. Before such

sale the plaintiff tendered to the defendants the full amount due them, and forbade the sale. This tender was refused, although it was clearly the duty of the defendants to accept it, if full, free, and unconditional. We do not mean to say that the legal effect of such a tender was to discharge the lien. That question is not before us, as the plaintiff is not seeking to recover the property sold. In any event, a mortgagee unnecessarily selling, after a full and lawful tender, would be guilty of such a breach of trust as would render him liable to the injured party. Hence we see but little error in the case, as tried, especially as there is no exception to the Judge's charge; but there is an exception to the exclusion of evidence which we think was competent, and which, if admitted, might have materially changed the character of the action. It appears in the record that "counsel for defendant then stated that they proposed to show that the propery was delivered to Gulley by the plaintiff, with instructions to sell it, and pay the Rayborn mortgage and the Brewer mortgages. His Honor excluded the testimony, and ruled (77) that, if plaintiff had directed Gulley by parol to sell the property, and pay off the Rayborn debt and the Brewer mortgages, that he could revoke that authority at any time." In this there was error. We do not see why the plaintiff could not lawfully have placed the property in Gulley's hands to be applied to the Rayborn debt, subject, of course, to the prior lien of the defendants. Such action, including manual delivery, would be equivalent to a pledge of the equitable interest, especially as Gulley appears to have been the attorney of the creditors, and not of the debtor. Even if Gulley had been the mere agent of the plaintiff, we doubt if the latter could have revoked his authority after he had used the proceeds of the doubly-charged fund to exonerate the property now in dispute, especially if by so doing he had incurred any personal responsibility. Moreover, in that event, how would the defendants have been liable for a mere breach of duty by the plaintiff's agent? We can not tell what the excluded evidence might have proved if it had been admitted, but it is at least possible that it might have raised questions of equitable rights, such as contribution or estoppel. In this event, other excluded evidence—such as that showing the disposition of the crop—might have become competent. As it seems to us that the exclusion of competent evidence prevented the proper development of the defense, a new trial should be ordered. The defendants are entitled to show for what purpose and on what conditions the property was placed in the hands of Gulley.

New trial.

(78)

COBB v. PERRY.

(23 October, 1900.)

TRUSTS—*Sufficiency of Evidence to Establish—Trustee.*

There being more than a scintilla of evidence that the defendant held certain property as trustee, that question should have been submitted to the jury.

ACTION by Maud P. Cobb against O. H. Perry, H. H. Perry and Caroline Foy, heard by Judge *H. R. Starbuck,* at Spring Term, 1900, of CRAVEN. Upon intimation by the Court that plaintiff and defendants other than O. H. Perry were not entitled to recover, the plaintiff and defendants other than O. H. Perry submitted to a non-suit and appealed.

W. D. McIver, for the plaintiff, and defendants others than O. H. Perry.

Simmons, Pou & Ward, for O. H. Perry.

FAIRCLOTH, C. J. The plaintiff sues to have the defendant, O. H. Perry, declared a trustee for the benefit of herself and other children of G. W. Perry and wife S. B. Perry. On 3 February, 1877, G. W. Perry and wife conveyed a tract of land by deed to A. W. Wood, and on 10 February, 1877, said Wood conveyed the same land to defendant, O. H. Perry; and it is alleged that the agreement was that the defendant should hold the land, pay off an incumbrance thereon, and then divide the land among the children. It is alleged that there was no other consideration in either deed. At the conclusion of the evidence his Honor was of opinion that plaintiff could not recover. A nonsuit and appeal was taken.

The only question for this Court to consider is whether the case should have been submitted to the jury, and that
(79) depends on the evidence. We will refer to only a part of the evidence. The plaintiff testified that she heard a conversation between the defendant and the mother on the day the deed was signed, after the father had signed, when "O. H. Perry asked her (the mother) if she could not trust him, and said that he did not want the property to cheat the other children out of it; that he was willing to do what was right." J. Oliver Foy testified: "The day the first deed was made, and before deeds were made, I came to Mr. Simmons' office, and found him writing a deed. O. H. Perry was there. I told O. H. Perry his father had said not to have the deed written; that he

would not sign it. Mr. Simmons said, 'Well, who is to pay for it?' O. H. Perry said he would pay for it, and told Simmons to go ahead and write it. I returned to Mr. G. W. Perry's home about 12 o'clock. About 1 o'clock p. m., O. H. Perry came in with J. E. West, Clerk Superior Court, into the room where G. W. Perry was, and had deed with him. I was present. G. W. Perry said to O. H. Perry, 'Didn't Bob (referring to witness) tell you I wouldn't sign the deed?' O. H. Perry said he could see no reason why G. W. Perry hesitated about signing the deed, and went into an adjoining room with O. H. Perry, and perhaps his daughter. He signed the deed in the adjoining room, and I was not present. The day after the deed was signed by G. W. Perry, but before Mrs. S. B. Perry signed it, I heard a conversation between O. H. Perry and her. I asked her in the presence of Oliver not to sign the deed; told her she had a dower interest in it, and insisted on her not signing it; told her it would not interfere with Oliver's attending to the estate as his father wished, and that by not signing it she would retain her dower interest. Don't recall that Oliver said anything. Am positive he did not say he was not taking it in trust. After the deeds had been executed, Oliver often stated to me that it was his purpose to settle off the in- (80) cumbrances upon the land, and divide the property, as his father wished. G. W. Perry was in bad health at the time deed was made; was confined to his bed, and died a few weeks afterwards. He was financially embarrassed." Miss Koonce said that she talked with O. H. Perry several times, and he said he meant to do right by the children. Mrs. Clara Foy testified for plaintiff and herself as follows: "On the day before the day the deed was signed by father, I had a conversation with O. H. Perry. He told me to use my influence with father to get him to make a deed for the plantation, and, as soon as he should get the deed, he would give me a right for my interest. After the deed was written, but before it was signed, Oliver came into the room where my father was, and said, 'I have the deed and check written by Mr. Henderson for $1,000, and Mr. Simmons said that will do just as well.' My father then said he would not sign the deed. 'You haven't done what you promised to do, and I won't sign it.' Oliver then said, 'Come into the room with me, and I will tell you why I didn't stand to my promise.' When they went into the other room, father again said, 'I won't sign it.' Oliver then said, 'If you don't sign it, I will take what I have got and leave.' I had gone into the other room with them. When Oliver said this, my father then signed the deed. Twelve years after this, I

asked Oliver to buy me a home in Richlands. He said he had promised his father to take the property, pay the debts, and keep a home for mother, and buy me a home, and take care of his little sister (the plaintiff), and that he intended to do it. He said he would buy me a home, but never did." Mrs. S. B. Perry testified: "Before I signed the deed, the defendant, Oliver, told me he did not want to hold this property to cheat the children out of it, but must do what was right; that Wood was to at once make a deed to him." The rule, so often
(81) stated, is that, when there is more than a *scintilla* of evidence, about which reasonable minds may differ, the evidence on the issue should be submitted to a jury. In the present case we think the evidence falls within the rule, and that the refusal to submit it to the jury was error. As the case goes back to trial, we refrain from expressing any opinion on other legal questions discussed on the argument.

Venire de novo.

CANTWELL v. HERRING.

(23 October, 1900.)

VERIFICATION—*Amendment—Answer—Pleading.*

It is discretionary with the trial court to allow an amendment of a verification to an answer.

MONTGOMERY, J., dissents.

ACTION by W. L. Cantwell against Doane Herring, heard by Judge *J. W. Bowman,* at Spring Term, 1900, of WILSON. From order permitting defendant to amend verification to his answer, plaintiff appealed.

Deans & Cantwell and *J. H. Pou,* for plaintiff.
Fred A. Woodruff, for defendant.

DOUGLAS, J. This was a civil action based on a contract coming on to be heard upon the complaint and answer. The plaintiff moved for judgment upon the sworn complaint, alleging that the verification of the answer was insufficient. The Court held with the plaintiff that the verification of the answer was not sufficient, whereupon the defendant asked leave to amend such verification. Such leave was granted over the objection of the plaintiff. On motion of the defendant, the Court then allowed

an amended answer to be filed, the plaintiff again object- (82) ing. The plaintiff assigns as error (1) the refusal of his Honor to grant the motion of the plaintiff for judgment on the sworn complaint; (2) in allowing the defendant to amend his verification of the answer; (3) in allowing an amended answer to be filed. This presents the sole question whether the Court below acted within the limits of its lawful discretion in permitting an amendment of the verification to the answer over the objection of the plaintiff. We think it did. Sections 272-274, Code, give ample powers of amendment, and these provisions have uniformly been beneficially construed by this Court. In fact, in *Gilchrist c. Kitchen,* 86 N. C., 20, it is held that, independently of The Code, "the Superior Courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with." From the wording of The Code, as well as its essential reason, we must conclude that the power of amendment extends to the verification of pleadings. We can find no decision in our reports to the contrary. We are cited to several cases, but, so far from sustaining the contention of the plaintiff, they sustain the ruling of the Court below. In *Mallard v. Patterson,* 108 N. C., 255, an unverified answer was filed to a verified complaint, and, after the lapse of five years, the defendant asked to be allowed to verify this answer, or to file a new one properly verified. This Court says, 108 N. C., 258: "Clearly, he was not entitled to do so as of right. It was discretionary with the Court to allow or disallow his application, or grant the same with limitations. The Court allowed him to answer, alleging 'meritorious' defenses, but not to avail himself of the statute of limitations, This the Court might do, and its exercise of discretion in such respect is not reviewable in this Court." In *Griffin v. Light Co.,* 111 (83) N. C., 434, the Court says: "The verification having been sufficient, it was error to refuse the plaintiff judgment because an unverified answer was filed. * * * It is true the Court might, in its discretion, have extended the time for the defendant to file its answer so as to give opportunity, if desired, to verify it, * * * and the exercise of this discretion is not reviewable. * * * But in the present case that discretion was not exercised. Why it was not asked does not appear, unless, as is probable, the defendant could not verify a denial of the plaintiff's allegations in a plain action on a note in his possession." In *Curran v. Kerchner,* 117 N. C., 264, the verified complaint set out two notes—one for $5,000, and the other for $2,000. The defendant answered as to the first note,

but was silent as to the second. The defendant did not ask to be allowed to amend his answer in any way, probably from his inability to verify a sufficient denial. Under such circumstances, the Court held that the plaintiff was entitled to judgment on the $2,000 note for want of answer. There was no question whatever as to the power of the Court below to grant leave to amend. *Skinner v. Terry,* 107 N. C., 106, refers entirely to setting aside a judgment for excusable neglect. The same question is raised in *Phifer v. Insurance Co.,* 123 N. C., 405. It there appears that at the January Term the defendant moved before Judge *Green* for a continuance in order to amend its verification. This motion the Court refused, apparently in the simple exercise of its discretion, and gave judgment for the plaintiff. Afterwards, at the August Term, before Judge *Starbuck,* the defendant moved to set aside the judgment on the ground of mistake, surprise, or excusable neglect. The Court, as a matter of law, refused to grant the defendant's motion, and it was this ruling that was sustained on
(84) appeal. Judge *Green's* refusal to continue does not appear to have been under discussion.

Having thus considered the cases cited by the plaintiff, we now come to those relied upon by the defendant. In *Payne v. Boyd,* 125 N. C., 499, the Court says, on page 502, 125 N. C., page 632: "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." In *Best v. Dunn,* 126 N. C., 560, the Court says: "*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." The concurring opinion in this case says: "I merely wish to emphasize the fact that this Court did not intend, by its decision in *Phifer v. Insurance Co.,* 123 N. C., 410; *Cole v. Boyd,* 125 N. C., 496, and *Payne v. Boyd,* 125 N. C., 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 verification, so that a pleader, who took advantage of the form of the statute, would be equally bound by its substantial purpose. * * * 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." The question as to whether the original verification to the answer was really insufficient (85) is not before us, and hence we express no opinion on that point. For the reasons above stated, the judgment of the Court below is

Affirmed.

BELL v. COMMISSIONERS OF JOHNSTON COUNTY.

(23 October, 1900.)

1. COUNTIES—*Part of State Government.*

   Counties are a branch of the State government.

2. COUNTIES—*When Liable for Damages.*

   Counties may be sued only in such cases as may be allowed by statute.

3. COUNTY COMMISSIONERS—*Hospitals—Damages.*

   County Commissioners are not liable for failure to establish hospitals under The Code, sec. 707, subd. 22.

4. COUNTY COMMISSIONERS—*Personal Liability—Neglect of Duty—Complaint—Sufficiency.*

   The complaint sets out no allegations of fact which amount to a cause of action against the defendants personally for neglect of duty.

MONTGOMERY and DOUGLAS, JJ., concur in the result, but not in the opinion.

CIVIL ACTION, by R. C. Bell against Commissioners of Johnston County and others, heard upon complaint and demurrer *ore tenus,* by Judge *W. S. O'B. Robinson,* at Fall Term, 1900, of JOHNSTON. From judgment sustaining the demurrer, the plaintiff appealed.

The plaintiff alleges:

1. That he is a citizen of Raleigh, Wake County, (86) North Carolina.

2. That the said town of Selma was duly incorporated under the laws of the State of North Carolina of the years 1872 and 1873 and the acts amendatory thereof, having the various pow-

ers and duties under The Code of North Carolina, chapter 62, as well as the other powers conferred in its said charter, among said powers being that of arrest and proper imprisonment and detention of such persons necessary to be arrested, imprisoned and detained for the benefit of the health of the inhabitants of said town and of the community at large, and for the peace and well being thereof; and to that end and for that purpose the said town of Selma, organized, accepted the said powers, and became a corporation according to law and fully exercised all powers and privileges thereunder, at and before the time hereinafter complained of and continues to exercise the same at the present time.

3. That before and at the time hereinafter complained of, and at the present time, the following officers were elected, qualified, inducted and installed into office, to wit: John Parker, mayor and *ex officio* chairman of the Board of Town Commissioners and member of the Board of Health for the county of Johnston; J. A. Spiers, William Richardson, David Price and William Driver, members of the Town Board of Commissioners; Dr. N. J. Noble, the duly and regularly appointed health officer of said Selma, a registered physician and *ex officio* a member of the Board of Health of said county of Johnston.

4. That the county of Johnston is duly organized according to law, with the rights, powers and duties incident thereto, and that James T. Whittenton is chairman of the Board of
(87) County Commissioners and that George W. Massengill and C. M. Wilson are associate county commissioners, and that L. D. Wharton is county superintendent of health of said county, and that all said county officers were duly elected, qualified, inducted and installed into office prior to the times hereinafter mentioned; that the said James T. Whittenton was and is *ex officio* member of the County Board of Health for said Johnston County; that the County Board of Health of Johnston County has been organized according to law prior to the times herein complained of.

5. That the disease of smallpox has been prevalent in the State of North Carolina for the past year or more, breaking out in localities surrounding said county of Johnston, and that said Johnston County, especially the said town of Selma, has been for the past year or more particularly exposed to and warned of said disease, and that all said officials hereinbefore named had actual or implied knowledge thereof, and of the fact that said Selma is located at the junction of two railroads, over which persons having said disease and exposed thereto were and are continually passing and repassing and staying

over in said Selma and other places within said Johnston County, and that heretofore and within twelve months from this day and date the said disease has broken out within the said town of Selma and other localities within said Johnston County.

6. That notwithstanding the matters stated in the next preceding paragraph, the said officials, or any of them, being careless and negligent, have not taken any steps to provide suitable prisons or hospitals or places of involuntary detention for those having said disease or from whom the contagion might be publicly spread, nor have they had such prisons or hospitals or places provided, though they were advised of and knew, or reasonably may have known, the danger of their not doing so.

7. That at or about the hour of eleven on the morning of 1 February, 1900, the said mayor and commissioners (88) of the town of Selma and the said county officials confined the plaintiff herein in the house of one J. H. Jackson, which was used as a boarding house, situated within said Selma, by placing guards armed with guns, pistols or rifles around the said house, with instructions to keep him therein and not permit him to escape until or about the hour of 10 p. m. of the following day, well knowing that within said house was a person having a malignant case of smallpox, and that the plaintiff's confinement in said house was dangerous to the health, comfort and life of said plaintiff, by keeping him in great dread and mental and physical suffering and anxiety.

8. That at or about the hours of 3 or 4 p. m. of said February 1, 1900, the plaintiff, being very frightened to find himself thus confined, and fearing and dreading that he would take the loathsome disease, wrote a note to the mayor and *ex officio* chairman of the Board of Commissioners of said town and member of the said County Board of Health, demanding and beseeching that some other place be immediately provided for his detention; that the said mayor received the note within a short time after it was sent and negligently and carelessly made no reply thereto, though he, the said Town Commissioner, the said member of the County Board of Health and the said County Superintendent thereof, and the said County Commissioners well knew that a proper place for said plaintiff's detention could readily have been temporarily provided within an hour at any time, except for their carelessness and negligence, before and during his unlawful confinement as aforesaid, and that the said confinement and the unlawful and improper manner thereof was well known to the county and town officials herein made parties defendant; that the plaintiff repeatedly

informed the said guard and the other representatives as aforesaid of the said town and county that he would pay the
(89) expenses of the necessary, proper and lawful place of confinement and detention, and that the said town and county would be put to no expense if they would provide the proper prison or place of detention and confinement.

9. That though confined and imprisoned as aforesaid and not permitted to go beyond certain prison bounds established by the order of the said town and county, the said plaintiff was willfully, carelessly and negligently abandoned by the authorities of the said town and county without their making any arrangements or provisions for his having food, clothing, or for his health and comfort. That the only manner in which he could procure anything to eat was by inducing said guard to employ chance passers-by to go and purchase it from the stores in said Selma, with his, the plaintiff's money, and at his own expense, and bring it to a place just within said prison bounds from which he could carry it within the said house of confinement.

10. That at or about the hour of 10 o'clock p. m., of 2 February, 1900, the said Town Commissioners informed the plaintiff that he was at liberty to go anywhere he pleased, excepting the said town of Selma, and acting accordingly, but so as not to spread any contagious disease, he went during the night of 4 February, 1900, through the country to Raleigh, N. C., where a suitable hospital, prison, or place of detention had been built, and where he received proper attention and remained for a few days until properly discharged by the proper officials of said Raleigh. That he could not leave his place of confinement in Selma before he did leave, for he knew not what would become of him if he succumbed to the loathsome disease without any place to lay his head and without help or medical attention, all owing to the negligent,
(90) careless and unlawful failure of the defendants herein to provide them, which it was their duty to do, and of which they had warning and notice.

11. That while fully acknowledging and alleging the power or authority of the said county and town officials to imprison him in a proper and lawful manner, the plaintiff contends that the manner of and place of imprisonment were wrongful and unauthorized by law, and that accordingly he has suffered in body and mind and has been endangered by his physical and mental suffering and anguish in the amount of ten thousand dollars.

Wherefore, the plaintiff demands judgment:

First. That he recover ten thousand dollars damage.

Second. That he recover his costs and disbursements, to be taxed by the Clerk.

Third. And for such other and further relief as he may be entitled to.

R. C. Strong, for plaintiff.

J. H. Pou, J. A. Narron and *F. H. Busbee,* for defendants.

CLARK, J. This was an action for tort. Upon demurrer *ore tenus* it was properly dismissed, both as to the defendants, the county commissioners of Johnston, officially as representing the county, and as to them individually. In the latter aspect, the complaint sets out no allegations of fact which amount to a cause of action against them personally for neglect of duty, under Code, sec. 711, but the averments are against the county commissioners in their corporate capacity, *i. e.,* against the county, for their failure to establish hospitals, under Code, sec. 707 (22). It is held by an unbroken line of decisions, and reiterated at last term (*Prichard v. Commissioners,* 126 N. C., 908), that counties, being a branch of the State (91) government, can be sued only in such cases and for such causes as are authorized by statute. In that case the Court says (page 912, 126 N. C.): "It is well settled in this State that counties (that is, the boards of county commissioners in their cooporate 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 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"—citing *Manuel v. Commissioners,* 98 N. C., 9, and *White v. Commissioners,* 90 N. C., 437. While there was dissent on other points in *Prichard v. Commissioners,* the Court was unanimous upon the above statement of the law. To like purport is *Threadgill v. Commissioners,* 99 N. C., 352, which holds that counties can not be held liable for the negligence of their officers and agents, except by express statutory provision, and there is none in this State. The same rule is affirmed in *Moffit v. Asheville,* 103 N. C., at page 258, and is stated as the general law. Dill Mun. Corp., secs. 963, 965.

No error.

MONTGOMERY and DOUGLAS, JJ. We concur in the result, but not in the opinion, as we do not think that the facts of this case or the opinion in the Prichard case justify the opinion.

Cited: *Moody v. State Prison,* 128 N. C., 16.

---

(92)

BAKER v. CARTER.

(23 October, 1900.)

1. ADMINISTRATORS—*Jurisdiction—Special Proceedings—Creditors —Clerk Superior Court.*

The Clerk of the Superior Court has exclusive original jurisdiction of proceedings to settle the estates of decedents.

2. JURISDICTION—*Superior Court.*

Where Superior Court acquires jurisdiction of any part of the matter involved in a suit it will proceed to determine the whole.

3. JURISDICTION—*Superior Court—Clerk.*

Acts 1887, chap. 276, allowing parties in an action before the Superior Court to have all matters in controversy heard, applies only to cases commenced before the clerk.

ACTION, by George W. Baker and others against Henrietta Carter and Wiley P. Carter, to set aside a certain conveyance of property, heard by Judge *H. R. Starbuck,* at Spring Term, 1900, of BERTIE. From judgment for defendants, the plaintiffs appealed.

B. B. Winborne, F. D. Winston and *St. Leon Scull,* for plaintiffs.

R. B. Peebles, for defendants.

FURCHES, J. This action was commenced in the Superior Court, returnable in term time, by G. W. Baker against Henrietta Carter and W. P. Carter, on 22 September, 1898, and is therefore a civil action, and not a special proceeding. In his complaint the plaintiff alleges that Wiley Carter, the husband of Henrietta and father of W. P. Carter, who was
(93) then dead, and whose estate had no personal representative, was indebted to him at the time of his death; that said Wiley, on 5 February before he died in May following,

conveyed the tract of land on which he lived, worth $1,000, to the said Henrietta, for life, with remainder to the defendant W. P. Carter; that this conveyance was without consideration, and void as to creditors, under the statute of frauds; that the said Wiley in the same conveyance gave all his personal property to the defendant Henrietta, in fraud of his creditors, and thereby rendered himself insolvent—and asks that the deed for said land and the conveyance for said personal property to defendants be set aside and vacated for the reason of said fraud. To this complaint the defendants demurred upon the ground that the complaint did not set forth a cause of action, and for the reason that the Court had no jurisdiction, as the personal representative was a necessary party. This demurrer should have been sustained, and the action dismissed. But it does not appear that there was ever a ruling by the Court upon the demurrer. And after the action had been pending more than a year there was an order making the plaintiff Brown, who qualified at that term of the court as administrator of the said Wiley Carter, a party plaintiff, and allowing the action to be "turned into a creditors' bill." This was done, and the said Brown, as administrator, and a number of other persons, who claimed to be creditors of the said Wiley Carter, made themselves plaintiffs; and the pleadings were reformed so as to make it a so-called creditors' bill, in which the insolvency of the said Wiley was set forth, and the fraudulent conveyances of the land and personal property, and again judgment was asked setting aside said conveyances for fraud. And it is stated that this order, and the making of new parties, and the amended or substituted complaint were made without objection on the part of the defendants. And before the trial the only original plaintiff, George W. Baker, took a nonsuit and "withdrew from (94) the action." But the Court went on with the trial, and submitted issues to the jury, who found that said conveyances were fraudulent, upon which the Court set aside and vacated the said conveyances and ordered a sale of the land, although this had not been asked in the plaintiff's prayers for judgment.

We do not deem it necessary to discuss the right of the original plaintiff, Baker, to maintain his action as originally brought, as he took a nonsuit and "withdrew from the action" before the trial. But it seems to us to be so apparent that he could not have maintained his action, that it would need no discussion if he had not abandoned it. It therefore remains to be seen whether the new plaintiffs, under the new complaint, can maintain this action. If Wiley Carter had not been dead, the proper course would have been for his creditors to have re-

duced their debts to judgment, sold the land, and to have bought the same if it did not bring its worth, taken the sheriff's deed, and brought their action of ejectment. But, as no sale could be made upon execution after the death of Wiley Carter, the creditors' only remedy was through the administrator. It was his duty to proceed, under sec. 1436 of The Code, to reduce the property fraudulently conveyed by his intestate to assets to pay the debts of his intestate; and, if he did not and would not, the creditors had the right to proceed against him and compel him to do so. But he had to do this in a speical proceeding before the clerk, who had the original and exclusive jurisdiction of the matter. *Stancill v. Gay,* 92 N. C., 455; *Hunt v. Sneed,* 64 N. C., 176; *Hendrick v. Mayfield,* 74 N. C., 626; *Hardee v. Williams,* 65 N. C., 56. A proceeding to sell land for assets is a special proceeding, and belongs to the clerk. *Hyman v. Jarnigan,* 65 N. C., 96;
(95) *Shields v. McDowell,* 82 N. C., 137. If there are equities involved that give the Superior Court jurisdiction of any part of matter involved in the litigation, and the Superior Court thus acquires jurisdiction of a part, it will proceed to determine the whole matter. *Devereux v. Devereux,* 81 N. C., 12; *Chambers v. Massey,* 42 N. C., 286. But there is no equitable element involved in this case, to bring it within the exception to the general rule, and to bring it within the doctrine of *Devereux v. Devereux* and *Chambers v. Massey.* Nor do Laws 1887, chap. 276, aid the plaintiffs in this case, as that act only implies where the case was commenced before the clerk, and by some means has been carried to the Superior Court, or judge, as distinguished from the clerk of the court. If it had not been for the want of jurisdiction, we do not say but what the new action, after the administrator became a party, might have been sustained, although the new complaint did not seem to have been drawn under sec. 1436, and no sale was asked for. But, if it could have been sustained, it would have been by giving a most liberal construction to what appeared from the pleadings, without their being distinctly alleged. This action can not be maintained, and must be dismissed.

Error. Dismissed.

(96)

LUTON v. BADHAM.

(30 October, 1900.)

1. VENDOR AND PURCHASER—*Parol Contract to Convey Land—Statute of Frauds—Improvements.*

   A vendor in possession, who repudiates a parol contract to convey land, is liable to vendee for the value of improvements.

2. EVIDENCE—*Parol—Parol Contract—Statute of Frauds—Vendor and Purchaser—Improvements.*

   That a party entered and placed improvements on land under a parol contract to convey, may be proved by parol evidence when the owner of the land denies the contract.

DOUGLAS, J., dissenting.

ACTION by Margaret Luton, administratrix, against Hannibal Badham, heard by Judge *A. L. Coble,* at Spring Term, 1900, of CHOWAN. From a judgment of nonsuit, the plaintiff appealed.

Busbee & Busbee, for plaintiff.

Pruden & Pruden, and *Shepherd & Shepherd,* for defendant.

FURCHES, J. The plaintiff is the administratrix of Alexander Badham, her former husband, and the defendant is the father of her intestate. The plaintiff alleges that the defendant was the owner of a vacant lot in the town of Edenton, and upon the marriage of her intestate the defendant proposed to him that, if he would build upon and improve said vacant lot, it should be his; that he would make him a fee simple title to it; that upon this agreement her intestate entered upon said lot, and greatly improved the same, by erecting a dwelling and other outhouses thereon, which improvements greatly enhanced the value of said lot, to the amount of $400; that her husband and intestate lived on said lot in the dwell- (97) ing house he had built with the plaintiff, his wife, from 1892 until 1897, when he died, leaving the plaintiff and two children, the result of their marriage; that plaintiff continued to occupy said house and premises for some time after the death of her intestate, when she surrendered the possession to the defendant upon his request, and upon his promise to give her a part of the rent for the benefit of her said children, but that since the defendant has gotten possession of said property he refuses to pay her any part of the rent, and refuses to convey said land to her children; that said contract and agreement between her intestate and the defendant was never reduced to

writing, her intestate having full confidence in the defendant, and believing that he would keep his said promise, and convey him the lot; that said contract and agreement being in parol only, and the defendant refusing to carry out the agreement and to convey said property, the plaintiff asks that he may be decreed to account and pay for the valuable and permanent improvements her intestate put upon said lot.

The defendant answers, and admits that the plaintiff's intestate was his son; that he went upon said lot and occupied the same with his family until his death; and that he built some small houses for his use while there, but not the dwelling house which defendant alleges he built. But he denies that there was any agreement between him and plaintiff's intestate that, if he would go upon said lot and improve it, he would convey said lot to the plaintiff's intestate, and denies that he said anything to said intestate to induce him to improve said lot with the expectation that he would convey the same to him; that, as the intestate was his son, he simply permitted him to occupy said lot without rent, and defendant admits a demand for title, and for an account and settlement for improve-
(98) ments, and that he has refused the same, but he did not formally plead the statute of frauds.

Upon the trial, the Court formulated issues as to whether there was a parol contract or agreement between the defendant and intestate that, if intestate would improve said lot, defendant would make him a title to it, and, if there was, did plaintiff's intestate, in pursuance of said agreement, enter upon said lot and place valuable permanent improvements thereon. Upon these issues the plaintiff introduced Isaac Owens and other witnesses, and asked them if they ever heard the defendant say how it was and under what circumstances the plaintiff's intestate entered upon, improved, and occupied said lot; stating that the purpose of asking these questions was to prove that there was such a parol contract between the defendant and intestate as that alleged in the complaint. The defendant objected, objection sustained, and the witness was not allowed to answer. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed. This is the case, and the only question presented for our consideration is as to the competency of this evidence.

It would seem that *Sain v. Dulin,* 59 N. C., 195, and *Dunn v. Moore,* 38 N. C., 364, cited by the defendant, sustain the ruling of the Court. But the question has been before the Court a great number of times, and we must admit that the opinions do not appear to be always in harmony. A parol contract for the sale of land is not a void contract, but void-

able, upon denial or a plea of the statute of frauds. *Thomas v. Kyles,* 54 N. C., 302; *Gulley v. Macy,* 84 N. C., 434. But when the alleged contract is denied, or the statute of frauds pleaded, this avoids the contract because the party alleging it is not allowed to show by parol evidence what the contract was. The English rule seems to have been that the statute of frauds must be pleaded, or the party would be allowed to proceed with parol evidence to establish the contract. But (99) our Courts have extended the rule so as to include a denial of the contract as well as by pleading the statute of frauds. *Gulley v. Macy, supra,* and many other cases. Whether it would not have been better that we had followed the English rule, is not now an open question, as the rule seems to be firmly established the other way in this State.

But the plaintiff contends that she is not claiming the right to establish—to set up—a parol contract; that she is not asking a specific performance, nor is she asking damages for the breach of a parol contract; that her contention is that, by reason of the contract or agreement between her intestate and the defendant, the intestate was induced to enter upon the defendant's land, place permanent and valuable improvements on the same; and that this is a new cause of action, collateral to the contract, based upon a new consideration given by equity to prevent fraud. If the plaintiff is entitled to maintain this action against the defendant, it is purely upon equitable principles. Before the junction of the jurisdiction of law and equity in the same Court, a bargainee, in a parol contract for the sale of land where the contract was repudiated by the bargainor, could not have relief against the bargainor in a Court of Equity, if legal demands alone were involved. If the bargainee had paid the purchase price, or a part of it, in money or specific personal property, he had a right of action at law to recover the same back. And a Court of Equity would not aid him, unless there was something else connected with the transaction that gave him an equity. Then the Court of Equity, having acquired jurisdiction of the matter, would proceed to investigate and settle legal as well as equitable demands. *Chambers v. Massey,* 42 N. C., 286. But no such question as this can arise now, as the same Courts have both jurisdiction, and administer both law and equity. (100)

If the plaintiff's intestate entered upon the defendant's land under a parol contract, and placed valuable and permanent improvements thereon, and the defendant, after such improvements were made, repudiates the contract, and refuses to convey, the plaintiff has an equitable cause of action. *Ellis*

v. Ellis, 16 N. C., 345; *Albea v. Griffin,* 22 N. C., 9; *Lyon v. Crissman, Id.,* 268; *Pitt v. Moore,* 99 N. C., 85; *Tucker v. Markland,* 101 N. C., 422; *Chambers v. Massey,* 42 N. C., 286; *Thomas v. Kyles,* 54 N. C., 302; *Love v. Nelson,* 54 N. C., 339, and many other cases. The Court says in many of these cases that it would be against equity and good conscience to allow the bargainor to repudiate his contract, and thereby to reap the benefit of the bargainee's money and labor.

But it is contended by the defendant that, if this is so, the defendant is protected from any liability to account for the reason that he has denied the contract, and the law will not allow the plaintiff to prove it. And this is admitted to be true, so far as establishing the contract for the purpose of enforcing a specific performance, or the recovery of damages for a breach thereof. But can not the plaintiff prove there was a contract under which her intestate was induced to enter and put valuable improvements on the land? If she can not, the fraud upon which the plaintiff's action is based is protected by the simple answer of the defendant. This, it seems to us, can not be and is not the law in this State. In *Albea v. Griffin, supra,* which seems to be regarded as the leading case, it does not distinctly appear that the defendant denied the contract, and, if he did not, certainly no stress is put upon that fact by the learned Judge who wrote the opinion. The opinion in *Albea v. Griffin* was written by Judge GASTON at June Term, 1838, and at June Term, 1839, he wrote the opinion in *Lyon v. Crissman,*

(101) 22 N. C., 268, in which he uses this language: "If the objection be that the agreement is void, because not reduced to writing, and this objection could avail anything, it should have been set up in the pleadings. But this has not been done. The plaintiff avers one agreement, and the defendant sets up another, and the parties have left to proof which representation is the true one." *Ellis v. Ellis,* 16 N. C., 245, was an action for specific performance of a parol contract for the sale of land, and alternate relief was demanded for betterments. The answer denied the contract, and the Court held that it could not be specifically enforced, but allowed evidence, and ordered an account as to rents and profits and for betterments. In *Pitt v. Moore,* 99 N. C., 85, which was an action on a parol contract for betterments, where the defendant did not admit the contract as alleged, and set up a different contract or state of facts to those alleged by the plaintiff (and this was an action by the personal representative), and the plaintiff was allowed to prove the agreement, and the Court granted the relief prayed for and ordered an account to be taken, in the opinion of the

Court the following language is used: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson,* 16 N. C., 381, in which there was a divided Court, but RUFFIN, C. J., and GASTON, J., concurring, and *Albea v. Griffin,* 22 N. C., 9, by a unanimous Court, to *Hedgepeth v. Rose,* 95 N. C., 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which can not be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, without compensation for the additional value which these improvements have con- (102) ferred upon the property and rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own acts." This was an action by the personal representative. *Tucker v. Markland,* 101 N. C., 422, is to the same effect as *Pitt v. Moore,* 99 N. C., 85, where plaintiffs brought an action for possession of land and defendants answered, setting up a parol contract of purchase by their ancestor, alleging permanent improvements, and asking payment for the same. The plaintiffs replied, denying the contract and defendants' right to have pay for improvements. But the Court allowed evidence to be introduced to establish the parol contract which the jury found to have been made by defendants' ancestor, and the Court ordered a reference as to rents and profits and improvements, and this Court affirmed the judgment. *Thomas v. Kyles,* 54 N. C., 302, is a case where the plaintiff alleged that his intestate made a parol contract with the defendant for the purchase of land, entered upon and took possession thereof, and put valuable improvements on the same. The defendant answered, denying the contract. But the plaintiff was allowed to prove the contract by parol evidence, and, while the Court refused to compel a specific performance, the plaintiff's claim for betterments was allowed. Other cases might be cited as authority for the admission of parol evidence, to show that the party entered and placed valuable improvements on land under a parol contract or promise to convey, but we do not deem it necessary to do so. It seems to be settled by this Court that it may be done; and the cases cited show that where a party is induced to go upon land, and put valuable improvements thereon, by the owner thereof, upon a parol promise to convey the same to the party putting the improvements on the land, and the owner afterwards refuses to convey, it is held by this Court to be a

(103) fraud upon the party so induced, and the Court will compel him to pay for such improvements.

It was also contended for the defendant that the right to have pay for improvements only exists while the bargainee is in possession, and *Albea v. Griffin,* 22 N. C., 9, and *Pass v. Brooks,* 125 N. C., 129, were cited as authority for this position. But neither of these cases, nor any other case that has been called to our attention, supports this contention. In these cases and other like cases, the bargainee being in possession, the Court said that such bargainee should not be turned out until the bargainor paid for the improvements. This was only a means resorted to by the Court to enforce the bargainee's recovery, and not as the grounds of the plaintiff's equity, which was made distinctly to rest upon the fraud of the bargainor; and it would be just as fraudulent and unconscionable for the bargainor to take profit by means of such fraud, if the bargainee was out of possession, as if he was still in possession. It is the fraud that gives the right of action, and not the possession. But the cases of *Tucker v. Markland, Pitt v. Moore, Thomas v. Kyles, supra,* and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks, supra,* that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that conflicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn,* 122 N. C., 766, in which case it is held that the bargainee was entitled to an account, and that, if anything should be found in her favor, it should be a lien on the land. It may be that this judgment was given owing to the peculiar circumstances

(104) of that case. But from the authorities cited, and the strong equitable reasons appealing to our consciences for redress against a fraud, we are of the opinion that the evidence should have been admitted; and if it shall be found on the trial that the plaintiff's intestate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits, while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

Error. New trial.

DOUGLAS, J. (dissenting). I can not concur in the judgment of the Court, because it seems to me to fly in the teeth of the statute of frauds. This statute, originally St. 29 Car. II, c. 3, sec. 2, now sec. 1554 of The Code, reads as follows: "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them shall be void and of no effect, unless such contracts or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." The avowed purpose of this statute, as originally expressed, was to prevent frauds and perjuries by doing away with the opportunities and inducements offered by certain parol contracts, those relating to sales of landed interests being perhaps the most important. It is similar in purpose to section 590 of The Code; and I regret to say that both sections, though founded on acknowledged principles of public policy and (105) repeatedly affirmed and reaffirmed by legislative enactment, seem doomed to ultimate emasculation by the well-meaning, but dangerous relaxations of the Courts, based upon the extension of equitable principles. We have frequently seen how sections 171 and 172 of The Code may be practically nullified by triennial payments of insignificant amounts or alleged promises not to plead the statute. A recent case, forcibly illustrating the former, is *Garrett v. Reeves,* 125 N. C., 529. In the case at bar the plaintiff is not in possession of the property, and this, in my mind, distinguishes this case from all those cited by the Court in support of its opinion. The plaintiff says that "she surrendered the possession to the defendant at his request and upon his promise to give her a part of the rent for the benefit of her said children." There was no allegation of force or fraud, further than a promise whose fulfillment rested entirely in the future. Under such circumstances, the "preventive" remedies of a Court of Equity have no place. The word "prevent" is derived from the Latin word *"praevenire"*—to come before; to precede. This was its original meaning in English, as given by Webster, its present meaning being "to intercept, to hinder, to frustrate, to stop, to thwart." All its meanings are anticipative. To prevent an injury, does not mean to redress an injury. By the very meaning of the words, the one necessarily comes after the injury, while the other must precede it. Hence the equities arising from a parol agreement for the sale of land were originally enforced only by enjoining the vendor from taking possession of the land. Even down to the present day. I am unable to find a single case in our Reports where the vendee in parol has recovered for improvements after his surrender of

possession. On this point, the Court cites *Tucker v. Markland,* 101 N. C., 422; *Pitt v. Moore,* 99 N. C., 85, and *Thomas v. Kyles,* 54 N. C., 302. In the last-named case specific
(106) performance was decreed for the greater part of the land.

The last clause of the opinion relating to the five acres is very short, and, while it does not specifically state that that portion of the land was in the possession of the plaintiff, there is nothing to the contrary. The natural inference is that the plaintiff was in possession, as the decree simply provides that an account of the improvements shall be taken without in any way making them a lien upon the land or the rents and profits thereof. Moreover, this case is distinguished and almost overruled in *Sain v. Dulin,* 59 N. C., 195, which is clearly against the contention of the plaintiff in the case at bar, as also is *Dunn v. Moore,* 38 N. C., 364. Both these latter cases have been repeatedly cited with approval. In *Pitt v. Moore,* 99 N. C., 85, also a suit for specific performance, the plaintiff and defendant appear to have been partners, jointly in possession of the mill. The Court says, on page 92 of 99 N. C.: "The action is substantially for the settlement of the partnership, and the plaintiff is entitled to have an account," etc. In *Tucker v. Markland,* the Court distinctly states the principle of its decision in the following words: "It would be inequitable and against conscience to allow the latter to turn him (the vendee) out of possession thereof without restoring his outlay in cash and for valuable improvements he put on the land while so in possession. * * * Shall the Court allow the vendor to keep the money of the vendee, which he thus obtained, while it helps him to get possession of the land? Surely not. The Court of Equity will not enforce the contract because the statute pleaded renders it void, but it will not help the vendor to consummate a fraud." In *Albea v. Griffin,* 22 N. C., 9, the leading case upon the subject, this Court says: "If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which
(107) these improvements have conferred upon the property."

To the same effect is *Pass v. Brooks,* 125 N. C., 129. In the very nature of things, what other remedy can be given without violating the letter and spirit of the statute? In the case at bar the Court can not say: "We will prevent the vendor from taking back his land without just compensation; we will not help him to commit a fraud." The vendor asks no help. His fraud is an accomplished fact. He is in possession of his land, and simply asks to be let alone. What then can we do? We can not decree specific performance, nor can we put the plaintiff

back in possession of the land which she voluntarily surrendered.

But it is said we can render an affirmative judgment for the amount of the improvements. In what way? Not in contract, for there was no agreement that the vendor would pay for the house. Not for breach of contract, for the only contract between them was one that lies under the ban of the law. Such a contract can not even be proved, much less enforced. It is true the vendee in possession may prove a parol contract of sale as showing the nature of his possession, but not as the sole ground of affirmative relief. This seems to be clearly recognized in *North v. Bunn,* 122 N. C., 766, an action in the nature of ejectment. There the Court says: "The contract for the conveyance of the land in dispute, being in parol and denied, can not be enforced by reason of the statute of frauds. When the contract is denied, the Court can not hear proof of a void contract," —citing *Dunn v. Moore,* 38 N. C., 364. Further on the Court, referring to compensation for improvements, says: "This relief is not founded upon the existence of any contract sought to be executed, or for the breach of which compensation or damages were asked. It is an appeal to the Court to prevent fraud."

The only case I can find in our Reports where the vendee has even asked for compensation for improvements (108) after his surrender of possession is *McCracken v. McCracken,* 88 N. C., 272, and there his right was absolutely denied by a majority of this Court. Justice RUFFIN, speaking for the Court, says: "But, neither in that case (*Albea v. Griffin*), 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 can be sustained in any form, or in any Court, whether at law or in equity, for damages for the non-performance 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." It is true in that case the vendor offered to let the vendee take his improvements, one of them being a millrace dug in the ground. A hole in the ground is not a very valuable piece of property when severed from the realty, and so the vendee asked the Court to give him something else instead. The Chief Justice dissented from the opinion of the Court in an able opinion, upon the reasoning of which the plaintiff's counsel, who has clearly presented every available point in his case, frankly stated he chiefly relied. There is much in the case at bar that appeals to our moral sensibilities, but not to our equitable jurisdiction. We must remember that such jurisdic-

tion attaches where there is no adequate remedy at law, but not where the contract is forbidden by law. There is a clear distinction between the illegality of a contract and the inadequacy of a legal remedy, as much so as there is between the statement of a defective cause of action and a defective statement of a cause of action. In one case the defect is in the substance; but in the other, merely in the accident.

That it is the policy of the law to regard the vendee's claim for improvements as purely a defensive remedy appears
(109) from section 473 of The Code, which provides that any defendant against whom a judgment shall be rendered for land may, at any time before the execution of such judgment, present a petition to be allowed for permanent improvements put upon the land in good faith. *Boyer v. Garner,* 116 N. C., 125, 130. It would seem that the decided current of authority in other States is to the effect that claims for improvements can not be entertained after surrender of the premises, but so much depends upon local statutes that the value of such decisions is frequently doubtful, as applying to general principles of equity. 16 Am. and Eng. Enc. Law, 103-105. In many States, perhaps in a majority, such parol contracts are enforced under the principle of part performance; but as this doctrine has been distinctly repudiated in this State, we must decide the question in accordance with the tenor of our decisions and the policy of our laws.

Cited: North v. Bunn, 128 N. C., 198; *Bond v. Wilson,* 129 N. C., 332; *Johnson v. Armfield,* 130 N. C., 577; *McCall v. Zachary,* 131 N. C., 468; *Love v. Atkinson, Ib.,* 548; *Wood v. Tinsley,* 138 N. C., 512; *Ford v. Stroud,* 150 N. C., 365; *Joyner v. Joyner,* 151 N. C., 82.

---

(110)

HENDON v. NORTH CAROLINA RAILROAD COMPANY.

(30 October, 1900.)

1. LOST INSTRUMENTS—*Lost Certificate of Stock—Reissue—Lost Records—Papers.*

   Acts 1885, chap. 265, regulating the manner of issuing certificates where certificate of stock has been lost, is valid. *Hendon v. R. R.,* 125 N. C., 124.

2. FORMER ADJUDICATION—*Res Judicata—Rehearing—Appeal.*

   It is not allowable to rehear a cause by raising the same points upon a second appeal.

3. TENDER—*Indemnity Bond—Costs.*

When plaintiff failed to tender an indemnity bond as provided by Acts 1885, chap. 265, and defendant admitted right of plaintiff to the reissue, plaintiff is liable for costs.

4. EXCEPTIONS—*Objections—Supreme Court.*

No other exceptions than those set out in the record will be considered by the Supreme Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest of judgment for the insufficiency of an indictment.

5. JUDGMENT—*Relief Demanded—Pleadings.*

Under The Code a party is entitled to any relief justified by the pleadings and proof.

6. APPEAL—*Practice—Trial.*

On appeal the case will be treated in the same aspect it presented in the court below.

7. APPEAL—*Objection on Appeal.*

On appeal defendant can not object to granting to plaintiff of a conditional judgment enforcing a statute the benefit of which defendant claimed in his answer.

8. APPEAL—*Indemnity Bond.*

On appeal defendant can not object that the Court required plaintiff to comply with Acts 1885, chap. 265, and give indemnity bond.

9. APPEAL—*Theory of Review.*

On appeal defendant can not object that the action was tried on a different aspect from that alleged, when he acquiesced in the variance.

10. VARIANCE—*Immaterial Variance — Complaint — Answer—Pleadings—Trial.*

An immaterial variance between the complaint and answer should be disregarded.

ACTION, to compel the defendant to issue and deliver to the plaintiff a certificate for two shares of stock owned by the plaintiff in defendant corporation, heard by Judge *Frederick Moore* and a jury, at Spring Term, 1900, of DURHAM. From judgment for plaintiff, the defendant appealed.

Cook & Green, for plaintiff.
Manning & Foushee, for defendant.

CLARK, J. The complaint alleges that plaintiff is the owner of two shares of stock in defendant company; that she lost the certificate therefor about 1874; that after the most diligent search she has not been able to find it, and that she has not sold,

transferred, or assigned said certificate of stock; that the defendant has all along continued to pay her dividends thereon,—and prays judgment that the defendant issue to her a new certificate for the same. The answer admits that the plaintiff is "the owner and holder of two shares of stock in defendant corporation;" that her name appears as such on the stock book, and that all dividends thereon down to the present time have
(112) been paid to her without objection or exception by anyone whatever; and that defendant has at all times recognized plaintiff as holder and owner of said two shares,—but denies any knowledge or information sufficient to form a belief as to loss of the certificate, and demands strict proof thereof. For further defense, the answer avers that the defendant corporation having been incorporated prior to the Constitution of 1868, and its charter and by-laws containing no authority to reissue certificates, it can not be compelled to do so; and, further, that before it is required to issue a duplicate certificate it is entitled to have the plaintiff execute a bond of indemnity, and that the reissued certificate should be deposited with the treasurer of defendant, as an escrow, for five years, before delivery to plaintiff both "as provided by chapter 265, Laws 1885"; and pleads further, also, that no tender of indemnity bond was made by plaintiff before bringing the action. The jury, upon issue submitted, found that the certificate of stock had been lost.

The principal exceptions by defendant call in question the power of the Legislature to pass the Laws 1885, c. 265, so far as the defendant company is concerned. But that point was decided against defendant when the case was here before (*Hendon v. R. R.*, 125 N. C., 124), where it is held that the statute "is in no wise an amendment to the charter of the defendant, but a general provision applicable to all corporations, regulating the manner of issuing certificates where certificates of stock have been lost, requiring indemnity bond," etc. The same point can not be raised again upon another appeal in the same action. That decision could only be reviewed by a rehearing. *Pretzfelder v. Insurance Co.*, 123 N. C., 164.

The judgment given in this case follows the provisions of chapter 265, Laws 1885, whose benefits are invoked in the
(113) answer, and is an exact copy of the former judgment, which was approved on the former appeal. The defendant having denied the plaintiff's right to the reissue of the certificate asked for, it is immaterial that no tender of bond was made before bringing the action. *Cui bono? McQueen v. Smith*, 118 N. C., 569; *Waterworks v. Tillinghast*, 119 N. C., 343; *Shannonhouse v. Withers*, 121 N. C., 376; *Springs v. Schenck*,

99 N. C., 551. If the relief demanded had been admitted by the answer, then failure to tender the bond before action brought would have justly thrown the costs of the unnecessary proceedings upon the plaintiff.

The only other point presented by defendant is that the prayer of the complaint is for the reissue of a certificate of stock in lieu of that lost, and the judgment is for issue of a duplicate certificate upon giving the indemnity bond, and filing with defendant's treasurer such duplicate certificate, as an escrow, for five years, as required by Laws 1885, c. 265. For many reasons, this objection is without merit: (1) The objection was not made at the trial, when, if made, the complaint could have been amended, if necessary. It can not be made for the first time here. Rule 27 of this Court, and cases cited thereunder; Clark's Code (3 Ed.), p. 920; and also *Id.*, p. 777. (2) The plaintiff is entitled to any relief which the law will grant, upon the facts alleged in her complaint, if proved, whether the appropriate remedy is demanded in the prayer for relief or not. Clark's Code (3d Ed.), pp. 200, 201. (3) On appeal the case will be treated in the same aspect it presented on the trial below. *Allen v. R. R.*, 119 N. C., 710. (4) The provisions of chapter 265, Laws 1885, are set up and invoked by the answer, and the defendant can not object to its invocation being granted. (5) The defendant can not object that the Court requires the plaintiff to give an indemnity bond, and deposit the duplicate certificate for five years with de- (114) fendant's treasurer. These requirements can work no prejudice to defendant, who, besides, can waive them if it wishes. (6) If the cause had in fact been tried upon a substantially different aspect from that alleged in the complaint, the defendant, after acquiescing in such variance, and making no objection to the issue submitted, can not now be heard to make this objection to vitiate the trial. If necessary, the pleadings would be reformed, even "after judgment," as authorized by Code, sec. 273, to conform to the facts proved. (7) The variance, if any, is so immaterial that it should be disregarded at any stage of the proceedings. Code, secs. 269, 270, and cases cited under same. Clark's Code (3 Ed.), pp. 290-293.

No error.

Cited: Mfg. Co. v. Blythe, post, 327; *Setzer v. Setzer,* 129 N. C., 297; *Jones v. R. R.*, 131 N. C., 135; *Stewart v. Lumber Co.*, 146 N. C., 82; *Britt v. R. R.*, 148 N. C., 42.

PERSON v. LEARY.

(30 October, 1900.)

1. RECEIVERS—*Foreign—Proof of Appointment.*

When receivers of a foreign court make a motion for a continuance of a restraining order, the fact of their appointment, if denied in the answer, in the absence of subsequent admissions, must be proved by a certified copy of their appointment.

2. RECEIVERS—*Appointment—Admissions.*

Where affidavit filed subsequent to answer, admits appointment of plaintiffs as foreign receivers, it relieves them from proving their appointment.

REPORTED in 126 N. C., 504. Petition to rehear granted.

Pruden & Pruden, and *Shepherd & Shepherd,* for peti-
(115) tioners.

F. H. Busbee and *E. F. Aydlett,* against petitioners.

DOUGLAS, J. This is a rehearing of the case reported in 126 N. C., 504. It has given us much trouble, because we are unwilling to overrule, or even materially modify, the essential principles governing the recognition of foreign receivers laid down in this case when here before. This trouble might have been avoided if the plaintiffs had followed the suggestions rather pointedly given in *Kruger v. Bank,* 123 N. C., 16. We have repeatedly recognized the right of foreign receivers, under the law of comity, to sue in this State. In *Insurance Co. v. Edwards,* 124 N. C., 116, 121, this Court says: "At this stage of the case we must assume that the suit in Massachusetts was properly conducted, and we see no reason why the Courts of that State should not wind up the affairs of its own insolvent corporation. Nor is there any objection to the receiver of a foreign Court suing in the Courts of this State. What may be the result of that suit is a different matter, but he will be given a hearing." However, in all such cases there is a preliminary question involving the legal existence of the receiver. His right to sue necessarily depends upon his right to exist, and when this is denied he must prove his right by such evidence as the law requires. The legal identification of a stranger living beyond the jurisdiction of our Courts, and coming here only to enjoy the prosecution of a lawful business, is just as important as the identification of one presenting a bank check for payment. Whether or not the check overdraws the account is a

matter of little importance, provided the holder has no right to present it, and of such right his own statement would scarcely be deemed conclusive proof. We think that on a motion for a continuation of the injunction, the plaintiffs should have proved their appointment as receivers by a certified tran- (116) script, if the fact had been seriously denied. It is true, the defendants, in their answer, say that they have not sufficient information to admit or deny the same; meaning, we presume, that they have no knowledge or information thereof sufficient to form a belief." This was in effect a statutory denial, and sufficient to put the plaintiffs to the proof of their allegation, provided the matter had there ended. But the principal defendant, in an affidavit subsequently filed by its president, Wirgman, practically admitted the appointment of the receivers, and this admission runs through several of the affidavits filed by the defendants. In his affidavit of 15 August, 1899, verified three months after the verification of the answer, Wirgman uses the following language: "This affiant has had investigation made, and the receivers, Person and Hazell, have neither listed nor paid the taxes on the property described in the complaint since they were appointed receivers of the bank." This admission is not inconsistent with the qualified denial in the answer. It may well be that Wirgman had no sufficient knowledge or information when he verified the answer, and yet on subesquent investigation was led to admit the appointment of the receivers—a fact susceptible of such easy proof. In two affidavits filed by the defendants, one Andrew Brown says: "Affiant is informed that the receivers took charge of the Bank of Commerce during December, 1896." Again he says: "This affiant has had several interviews with one of the receivers of the Bank of Commerce since its failure, and there was nothing said to this affiant regarding the Tyrrell County lands, or the taxes upon the same; nor has any inquiry been made by the receivers of this affiant regarding the same." Again he says: "Deponent states that there was not $163,000 unpaid paper, in which he was either directly or indirectly interested, in the Bank of Commerce at the time the receivers, Person (117) and Hazell, took charge." Similar passages occur elsewhere. In view of these subsequent statements by the defendant and its witnesses, we think that the qualified denial of the answer was practically superseded, and that the Court below properly treated the appointment of the receivers as in the nature of an admitted fact. We wish here to make a clear distinction, by limiting the operation of this opinion to the facts of the case. We mean to say that where a motion is made by the

receivers of a foreign Court for the continuance to the final hearing of an injunction, or the issuing of an injunction upon a restraining order already granted, the fact of their appointment, if denied in the answer, and in the absence of subsequent admissions, must be proved by a certified copy of such appointment. We do not mean to say that such strict proof would be required upon an application for a restraining order before the case had been brought to issue, and where any delay might work irreparable injury to the applicant. Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except in so far as it may come within some plain statutory provision. But the latter phase of the question it not now before us. Having been inadvertent to the subsequent admissions of the defendant, the petition of the plaintiff to rehear is granted, and the judgment below is affirmed.

---

(118)

JONES v. DUNCAN.

(30 October, 1900.)

CONSTITUTIONAL LAW—*Ordinances—Live Stock—Discrimination—Cities and Towns.*

It is not unconstitutional for the legislature to prescribe that resident owners of stock found running at large in a town shall pay a higher penalty than non-residents.

ACTION by W. J. Jones against W. H. Duncan, heard by Judge *Frederick Moore,* upon an agreed state of facts, at Fall Term, 1899, of HARNETT. From judgment for defendant, the plaintiff appealed.

F. P. Jones, for plaintiff.
Simmons, Pou & Ward, for defendant.

FAIRCLOTH, C. J. This is claim and delivery by the plaintiff to recover his hogs, which were seized and impounded by the defendant, marshal of the town of Dunn, in Harnett County. The hogs had strayed into the streets of said town. The town was incorporated under Private Laws 1889, c. 191, and amend-

ments thereto. The Board of Town Commissioners declared by an ordinance that hogs, etc., running at large in the town, were nuisances, and imposed a fine on the owners who should wilfully permit any such animals at large within the town, providing that owners of stock without the limits of the town, and within one mile thereof, should pay a smaller penalty than those within, and those more than one mile distant from the corporate limits would not be charged anything for the first three times. The only question presented, or so intended, is whether the said Commissioners had authority to enact the ordinance, or whether it is void. This question has been heretofore considered and settled. In *S. v. Tweedy,* 115 N. C., 704, it was held, upon previous decisions, that it was competent (119) for the town to pass such an ordinance, and to prescribe a penalty for its violation, whether the owner of the stock should live inside or outside of the corporate limits. In *Broadfoot v. Fayetteville,* 121 N. C., 418, it was held that the Legislature could discriminate, on this subject, between resident and non-resident owners of stock, as such discrimination is not forbidden by the Constitution of the State, or of the United States.

Affirmed.

PASS v. BROOKS.

(30 October, 1900.)

1. VENDOR AND PURCHASER—*Rental Value—Improvements.*

An issue as to the rental value of land sought to be recovered by a vendor, in failing to show that the value computed was that of the land, without the improvements thereon, is erroneous.

2. APPEAL—*Issues—Exceptions.*

When it plainly appears from the record that a certain issue should not have been submitted, on appeal the Court will so find, though there is no specific exception to the issue, but only to the finding.

3. APPEAL—*Rehearing—Arbitration—New Trial—Vendor and Purchaser.*

Where a judgment is set aside in an action between a vendor and purchaser, for error in issue as to rental value of property, and Supreme Court attempts to adjust the rent thereof, a new trial will be granted on rehearing, in order that such issue may be submitted.

(120) PETITION to rehear. Petition allowed. New trial. For former opinion, see 125 N. C., 129.

Boone, Bryant & Biggs, for petitioner.
J. W. Graham and *A. L. Brooks,* in opposition.

FURCHES, J. This case was before the Court at Fall Term, 1899, reported in 125 N. C., 129, and is before us again upon a petition to rehear. There is no complaint as to anything contained in the opinion, except what is said in the two last paragraphs, where the Court undertakes to settle the matter in dispute between the parties upon an equitable adjustment; and we do not see that the plaintiff is damaged by what is there said. It would probably have been better to have said in that opinion what was held by the Court when it was here before, and what we will say now: That it is so apparent to the Court, from the third issue as submitted to the jury, unexplained by the Court, and the finding of the jury thereon, that there is error, the Court will not allow this finding to stand. The issue is as follows: "What is the rental value of said land per year?" And the answer is: "$25." What is the rental value? This, unexplained, must necessarily mean the present rental value, and must necessarily include the improvements put upon the land by the defendant. It can not be contended that an acre and a half of unimproved land in the country would rent for $25 a year, and we do not understand the counsel of plaintiff to contend that it would. But let this be as it may; the Court sees that, as matter of law, there was no error in submitting this issue in the form it was submitted, without explanation on the part of the Court. The contention of the plaintiff on the argument of the petition to rehear, is that defendant did not except to the issue, nor the charge of the Court, and can not be heard to except here. And it is true that there seems to be no such specific exception. But defendants do not object
(121) and except to the allowance of $25 yearly rental value being charged against them. But where the Court undertakes to change the law, or to administer the law, and it plainly appears from the record of the trial that there is error, this Court will correct it; and the finding on the third issue is set aside. And if the plaintiff thinks he has been damaged by the equitable adjustment the Court undertook to make, and wishes an issue submitted to the jury as to what was the rental value of said land in its unimproved condition, when the ancestor of defendants bought it, and to have this deducted from the value of the improvements, the amount of the payment of

$39 on 1 January, 1891, and interest thereon, we think he is entitled to have it. But the opinion in every other respect, delivered at Fall Term, 1899, is approved by the Court.

Petition allowed. New trial.

CHEEK v. IRON BELT BUILDING AND LOAN ASSOCIATION.

(30 October, 1900.)

USURY—*Action at Law—Suit in Equity—Interest.*

In an action to recover usurious interest, under The Code, sec. 3836, paid by plaintiff to defendant, it is not necessary for plaintiff to account to the defendant for the legal rate of interest, it being an action at law, not a suit in equity.

DOUGLAS, J., dissenting.

PETITION to rehear. Dismissed. Reported in 126 N. C., 242.

Manning & Foushee, for petitioner.
Winston & Fuller, in opposition.

FURCHES, J. This case was here at the last term of the Court, and is reported in 126 N. C., 242, and is here again on a petition to rehear. It is an action brought, (122) under section 3836 of The Code, for usurious money paid by the plaintiff and received by the defendant. When it was here before, the principal matter discussed was the contract under which the money was loaned; the plaintiff contending that it meant 6 per cent, and defendant contending that it meant 8 per cent interest. That the defendant had charged the plaintiff, in giving him credit on the amounts paid by plaintiff, 8 per cent interest, was expressly admitted by defendant; and defendant filed a long itemized statement, commencing in April, 1893, and running to January, 1899, computing interest at 8 per cent, and crediting the plaintiff with the amounts paid by him, subject to such interest. We do not remember that it was seriously contended that defendant had not received usurious interest from the plaintiff, if it should be held that the contract was at 6 per cent. That was the ground upon which the defendant appealed; the Court having held it to be 6 per cent, as the rest of the judgment was in defendant's favor. But, be this as it may, we there held that, according to the defendant's admission in its answer, it had received usurious interest, and upon a review of the case we hold so now. But

we understand the petition to rehear to be put upon a technical rule of practice, which the petitioner contends is sustained by this Court in the recent case of *Churchill v. Turnage,* 122 N. C., 426, and which the petitioner thinks the Court must have overlooked (though it was cited in defendant's brief), as it was not discussed in the opinion of the Court. It would not be entirely just to the Court to conclude that, because a case cited in the argument was not discussed in the opinion of the Court, it had been overlooked. To discuss every case cited would be to devolve upon the Court an endless task, without profit. But, as this case is called specially to our attention—in fact, as the petition to rehear seems to rest
(123) almost entirely upon it—we have again carefully examined it, and are of the opinion, after such examination, that *Churchill v. Turnage* does not support the claim of the petitioner. *Churchill v. Turnage* was brought upon alleged frauds committed upon the plaintiff, in taking two notes and two mortgages for the same debt, for not applying payments made, and for charging usurious interest on certain claims the defendant held against the plaintiff, and for an account, and an injunction restraining the defendant from selling under his mortgages until the matter could be determined. That would have been a suit in equity under the former practice, and is an equitable action now; and it was said by the Court in that case that, as the plaintiff had to go into a Court of Equity to get relief, he must do equity, and must account to the defendant for the legal rate of interest. But this case is not that case, nor is it like that case, in our opinion. This case is purely an action at law given by the statute to recover of the defendant usurious interest paid by the plaintiff and received by the defendant, and charged by the defendant against the plaintiff at the rate of 8 per cent in giving the plaintiff credit for his payments. It is claimed by some that such actions are inequitable, but, if they are, the Legislature is responsible, and not the Courts. The decision of the Court in this case was reached by an examination of the facts of the case under the light of the recent case of *Smith v. Association,* 119 N. C., 249, and, finding the facts in this case almost identical with the facts in *Smith v. Association,* the law applicable in this case was the same as in that case. It is true that the plaintiff asked that the note and mortgage be surrendered and cancelled. But this was asked upon the ground that plaintiff alleged that he had paid
(124) off and discharged said note, principal and interest, at 6 per cent. This prayer was but an incident to the allegation of payment, and had no bearing upon plaintiff's action

for usurious interest. In *Smith v. Association, supra,* the defendant set up a counter-claim, being a balance due him on the note upon which the money was paid, and this claim was allowed, and the defendant association had a decree of foreclosure of the mortgage given to secure the claim. But the plaintiff was allowed to recover upon his claim of usury. In the argument of the case it was stated by counsel of petitioner that the complaint demanded an account, and that it was so held in the opinion of the Court. But upon examination it will be found that this is not the case. The complaint makes no such demand, and there were no grounds to base an account upon, as all the facts with regard to the payment by the plaintiff and receipts by the defendant were admitted by the answer, and set out in its schedule, made a part of the answer. Neither did the Court style it an action for account and settlement. It is true that the reporter in his statement of the case says: "Civil action for the purpose (1) of having a deed of trust executed by the plaintiff upon real estate declared satisfied." This, as it will be seen, was the work of the reporter, and not of the Court. But we admit that it was natural, and not improper, for the reporter to say this, from allegations contained in the complaint. But this does not affect the right of plaintiff to bring and maintain this action. And upon an examination of the facts and the opinion of the Court in *Smith v. Association,* and the facts and the opinion of the Court in this case, it will be seen that, if this case can not stand, *Smith v. Association,* 199 N. C., 249, should be overruled.

The petition is dismissed.

Cited: *Tayloe v. Parker,* 137 N. C., 419.

---

(125)

BOND v. CASHIE AND CHOWAN RAILROAD AND LUMBER COMPANY.

(9 October, 1900.)

1. DEEDS—*Exceptions—Reservations—Timber—Trespass.*

An exception in a deed of "good heart pine timber, suitable for mill-timber," constitutes an exception and prevents the grantee from recovering for a trespass committed by cutting such timber.

2. DEEDS—*Reservations—Exceptions—Timber—Trespass.*

An exception in a deed of "pine timber while I hold the mill," constitutes a reservation for the life of the grantor only, and a deed executed by his heirs conveys nothing.

BOND *v.* R. R.

ACTION by Humphrey Bond against the Cashie and Chowan Railroad and Lumber Company, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1899, of BERTIE. Both parties appealed from the judgment of the Court.

Robert B. Peebles, for plaintiff.
Francis D. Winston, for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant damages alleged to have arisen from a forcible trespass upon the plaintiff's premises, and also to recover the value of certain timber alleged to have been cut from the premises under the alleged trespass. The defendant in its answer, while it denies the plaintiff's title to the land, yet makes no claim to the land itself, and admits that at the times mentioned in the complaint it cut large quantities of timber from the land, and avers its right to do so, both by purchase and by having exercised that right for 40 years through itself and those from whom it claims. On the trial the plaintiff introduced a deed of date 25 January, 1871, from James D.
(126) Brickle to himself, to the land described in the complaint, in which there was an exception of "the good heart timber suitable for mill timber." The defendant offered to introduce a deed from Levi Harden to Calvin Hoggard, dated 15 March, 1863, to the tract of land mentioned in the complaint, the deed containing the following reservation: "Except the pine timber suitable for mill timber, which I hereby reserve while I hold the mill, or my children"; and also a deed from the heirs, by name, of Levi Harden to the defendant, dated 22 April, 1889, in which was conveyed "all of the pine timber measuring 12 inches and upward in diameter on the stump where cut." His Honor refused to allow the deeds to be read in evidence, and in the ruling there was no error. The language in the deed, "all of the pine timber," etc., constituted a reservation, and a reservation for the life, at longest, of the grantor. *Whitted v. Smith,* 47 N. C., 36; *Roberts v. Forsythe,* 14 N. C., 26. And so the deed from the heirs of Harden to the defendant conveyed nothing, Harden having died before the execution of the deed. The defendant offered no evidence tending to show that any person had cut any timber from the land, except such timber as was embraced in the exceptions in the deed from Brickle to the plaintiff.

There was no error.

PLAINTIFF'S APPEAL.

His Honor submitted a separate issue as to how much of the timber trees cut were "good heart pine timber suitable for mill timber," on 25 January, 1871, the date of the deed from Brickle to plaintiff, and the value thereof. The response of the jury was one-tenth of the amount, and the value thereof $46.87. His Honor held that the language in the deed from Brickle to the plaintiff, "except the good heart timber suitable for mill timber," constituted an exception, and (127) not a reservation, in its technical sense and that the timber was never granted, and that the plaintiff was not entitled to recover of the defendant the value of such timber.

In his Honor's ruling there was no error.

UPCHURCH v. ROBERTSON.

(7 November, 1900.)

1. SLANDER—*General Issue—Plea—Evidence—Competency—Damages.*

   When defendant pleads general issue, in a suit for slander, evidence in justification or mitigation is incompetent.

2. SLANDER—*Special Damages—Vindictive Damages—Malice—Exemplary Damages—Punitive Damages—Libel.*

   When the slander amounts to an indictable felony, it is not necessary to prove actual or special damages, and vindictive damages may be awarded if malice be shown.

3. INSTRUCTIONS—*Review—Appeal.*

   When the trial judge states that he adverted fully to the evidence, and it does not appear that he was requested to put his charge in writing, it will be presumed that he complied fully with sec. 413 of The Code.

ACTION by James W. Upchurch against George Robertson, heard by Judge *W. A. Hoke* and a jury, at Spring Term, 1900, WAKE. From judgment for plaintiff, the defendant appealed.

Armistead Jones, for plaintiff.
Douglass & Simms, for defendant. (128)

MONTGOMERY, J. The plaintiff in his complaint alleged that the defendant, to destroy his credit and standing in the community, falsely and maliciously spoke and

published of and concerning the plaintiff certain false and scandalous and malicious words, as follows: "He (meaning the plaintiff) stole a half bushel of my corn (meaning defendant's corn)" and that the plaintiff was damaged in the sum $5,000 by reason of those false and malicious and defamatory words. Defendant in his answer denied that he had used the language complained of; that is, under the old practice, his plea was that of the general issue. There were verdict and judgment for $100 in favor of the plaintiff, and the defendant appealed.

His exceptions to the rejection of his evidence by the Court can not be sustained. It was offered either in justification or in mitigation of damages. His Honor did not receive it, because the defendant in his answer relied on the general issue, and set up neither justification nor mitigating circumstances. *Smith v. Smith,* 30 N. C., 29; *Knott v. Burwell,* 96 N. C., 278. Under sec. 266 of The Code, however, it is provided that in actions of slander the defendant in his answer may plead "both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages." But, as we have seen, the defendant did not avail himself in his answer of The Code provision. In *McDougald v. Coward,* 95 N. C., 368, cited by the defendant's counsel, such evidence as was rejected in this case was received there; but the defendant pleaded justification, and set out the mitigating circumstances under which the words were spoken.

The first and second exceptions to his Honor's charge were correct, and were exactly on the theory upon which the defendant's testimony was rejected; that is, a denial of the complaint alone having been pleaded, the jury ought to have
(129) been instructed, as it was by his Honor, that if they were satisfied by the greater weight of the evidence that the defendant uttered the words set out in the complaint, they should answer the first issue "Did the defendant wrongfully utter," etc.? "Yes." The truth of the words was not in issue. His Honor also properly charged the jury that if words were spoken by the defendant amounting to an indictable felony, as appears in this case, it was not necessary to prove actual or special damages. *Gudger v. Penland,* 108 N. C., 593. His instruction was also correct when he refused to instruct the jury that there was no evidence of actual damage to the plaintiff, and therefore the jury could not award to the plaintiff vindictive damages. He properly instructed them that "the damages were very much in the discretion of the jury. If the first issue was answered, 'Yes,' they could award the

plaintiff what in their judgment was a full compensation for injury; and, if satisfied by the greater weight of evidence that the charge was made by defendant from personal malice, with a design and purpose to injure the plaintiff, or if in the judgment of the jury the charge was made in such manner that it showed a reckless and wanton disregard for plaintiff's rights, the jury might increase the amount awarded in compensation by exemplary or punitive damages." The defendant's counsel in the argument here found fault with the failure, as they allege, of his Honor to array the evidence and fully instruct the jury upon matters of law in contention between the parties. But his Honor in the statement of the case on appeal says that the Court adverted fully to the evidence in the case and positions of parties thereon; but only so much of the charge is set out as is deemed necessary to include defendant's exceptions. The whole of the charge is not set out, nor was it requested to be in writing. So far as we can see, enough of it was sent up to properly point the defendant's exceptions.

No error.

(130)

THE GOLDSBORO LUMBER CO. v. HINES BROS. LUMBER CO.

(7 November, 1900.)

1. INJUNCTION—*Dissolution—Right-of-Way.*

The grantee of an unlocated right-of-way for a tramroad across the land of the grantor can not enjoin the location of a subsequent right-of-way, specifically described and bounded, over the same land.

2. INJUNCTION—*Insolvency of Defendant—Damages.*

An injunction will not lie when the defendant is not shown to be insolvent or that the damages will be irreparable.

TEMPORARY RESTRAINING ORDER issued by Judge *George H. Brown, Jr.*, at Chambers, in Trenton, Jones County, on 30 March, 1900, against the defendant, and returnable at Chambers, at Jacksonville, 12 April, 1900, and continued for hearing until 10 May, 1900, at which time, at Chambers, Judge *George H. Brown,* Jr., dissolved the restraining order issued on 30 March, against the defendant, and refused the injunction. From this judgment the plaintiff appealed.

Simmons, Pou & Ward, for plaintiff.

No counsel, *contra.*

CLARK, J. One Phillips sold to the plaintiff all the timber on his land above a certain size, and further "granted an exclusive right-of-way to build, equip," etc., upon and across said lands, "such tramroads and railroads as shall be necessary for moving said trees and lumber 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 (131) right-of-way to be sixty feet wide and in fee simple." Subsequently said Phillips conveyed to the defendant a right-of-way 100 feet wide across his land, describing it specifically by boundaries, for the purpose of constructing a tramroad or railroad. Before the plaintiff had "located" its right-of-way or begun to construct its road, the defendant had staked out and ditched the right-of-way as located in its grant of the same. This is an action by the plaintiff to restrain the construction of the defendant's tramway or railroad across said land, alleging irreparable damage. His Honor properly refused to grant an injunction to the hearing.

1. The plaintiff had an unlocated "floating" right-of-way, which this Court has already held, in an action between these same parties, though as to another tract of land (*Lumber Co. v. Hines,* 126 N. C., 257), conferred no right upon the plaintiff to any particular 60 feet until "located." While the plaintiff's rights were in that nebulous state, the defendant, with a grant describing the location of his right-of-way, proceeded to occupy and ditch it out. It is open to the plaintiff to locate his right-of-way anywhere else on the land, and, if (which does not appear) the location of defendant's right-of-way throws the plaintiff's line into a worse place, his remedy, if any, is against Phillips for damages. We say, "if any," for it is not necessary for us in this case to decide whether or not a grant of an exclusive right-of-way for a railroad to transport "freight and passengers" is valid to the extent that damages can be obtained because of the grant of a right-of-way to another railroad when the space is sufficient to locate both without interference.

2. When a railroad has acquired a right-of-way, either by purchase or use of the power of eminent domain conferred by its charter, another railroad can condemn a right-of-way across the tracks of the former, or even a portion of the (132) right-of-way acquired by the former which is not necessary for its purposes, and no injunction lies to prevent it. *R. R. v. R. R.,* 83 N. C., 489, and cases there cited; *Richmond and D. R. Co. v. Durham and N. Ry. Co.,* 104 N. C., 665. If one railroad can not enjoin another from crossing its track, cer-

tainly a lumber road has no stronger equity to stop the construction of another lumber road.

3. It is not shown that the defendant is insolvent or that the damages will be irreparable. Indeed, the only damages apparent are the cutting of such trees on the land, above the prescribed size, which, having been granted to the plaintiff, the defendant may cut down in constructing its road; if, indeed, it will be any damage to cut down the trees which the plaintiff is there to fell, and of which it will still remain owner. Whether or not the plaintiff, who located its right-of-way subsequent to the defendant, can recover damages for any bridges or crossings it may be necessitated to make, is a question not arising on this appeal, which is only from the refusal of an injunction. Because the plaintiff has bought the timber of a certain size on the Phillips tract, it can not prevent the defendant building a tramroad or railroad across that tract to get to a destination beyond it. Could the plaintiff do this, even if it had bought Phillips' land in fee simple? If it could, then the owner of the front or riparian edge of forest or swamp land can render the interior inaccessible, and force its owner to sell at dictation. It is certain, however, that plaintiff's right-of-way, which is only 60 feet when located, is not broad enough to justify the Court's enjoining the defendant from building its track across the land, under Phillips's grant to it of a right-of-way. We do not now see how Phillips's granting the right-of-way to defendant has caused any legal damages to the plaintiff, but we do not pass upon that point, which can only arise in an action by the plaintiff against (133) Phillips for a breach of the covenant for an exclusive right-of-way, as intimated in the former appeal. 126 N. C., 254.

No error.

Cited: *R. R. v. Olive,* 142 N. C., 269; *May v. R. R.,* 151 N. C., 389.

LIFE INSURANCE COMPANY OF VIRGINIA v. DAY.

(7 November, 1900.)

1. TAX TITLES—*Trust Deed—Mortgages—Widow—Dower.*

A widow, having a right of dower in the excess of the proceeds from sale of land under trust deed, is a party in interest, and can not defeat the rights of the *cestuis que trustent* or the children of her deceased husband by buying the same at a tax sale.

2. MORTGAGES—*Taxes—Liens.*

A mortgagee is not liable for taxes on mortgaged property although his lien is secondary to the lien for taxes.

ACTION heard by Judge *Frederick Moore* and a jury, at Spring Term, 1900, of GUILFORD. From judgment for plaintiff, the defendant appealed.

L. M. Scott and *Scales & Scales,* for defendant.
Bynum & Bynum, and *R. D. Douglass,* for plaintiff.

MONTGOMERY, J. This action was brought to recover of the defendant Maria E. Day the possession of real estate. It appears from the record that in 1891 W. A. Day, the husband of the defendant, and who has since died, borrowed of the plaintiff the sum of $900, which was used in the erection of a house upon the land which is the subject of this dispute, and executed, together with the defendant Maria E. Day, a deed of trust upon the premises to secure the debt. In 1892 W. A. Day
(134) and his wife executed a mortgage upon the same property to C. M. Benninghaus to secure a debt of $695.96, due by W. A. Day. In 1893 the trustees in the deed of trust made by the defendants for the plaintiff's benefit advertised the property for sale, default having been made in the payment of the debt secured therein; and upon such advertisement Benninghaus, in May, 1894, brought actions against the plaintiff and Day and wife, in which usury was alleged to have been charged by the plaintiff against Day and his wife, and the sale was enjoined. In a judgment in that action at May Term, 1896, of the Superior Court, the plaintiff's debt was fixed at $657.51 and interest, and that of Benninghaus at $695.96 and interest. The property was ordered to be sold by a commissioner, and the proceeds to be applied, first, towards the payment of the plaintiff's debt; out of the residue Benninghaus was to be paid $695.96 and interest, and, if any surplus should remain, it should be paid to the defendant Maria E. Day and the infant

defendants, children of said W. A. Day, as their interest might appear—W. A. Day having died on 9 May, 1895. At the first sale of the premises made by the commissioner the defendant Maria E. Day bid off the property, but, having failed to comply with the terms, a second sale was made, at which the plaintiff became the purchaser, and received a deed therefor. The last sale was made in November, 1897, and confirmed at December Term, 1897. On 6 May, 1895, a few days before the death of W. A. Day, the property was sold by the city authorities of Greensboro for the taxes due for 1892, 1893 and 1894, at which sale W. B. Steele purchased the property, and received from the proper officer the proper certificate. Steele assigned this certificate to Wharton on 3 September, 1896, and on 11 December following Wharton assigned the same to A. G. Nelson for the benefit of the defendant Maria E. Day. There was a sale of the property also by the sheriff of Guilford (135) County for the taxes of 1894 on 5 May, 1896, at which Steele bought, received a certificate from the sheriff, and assigned it to Wharton, and by Wharton it was assigned to Nelson for the benefit of Maria E. Day, the defendant. After the time of redemption, deeds were made by the city of Greensboro and by the Sheriff of Guilford County to the premises to Nelson, the first dated 11 December, 1896, and the other 20 May, 1897. Nelson and wife, on 15 February, 1899, under their covenant to stand seized to the use of Maria E. Day of the premises of the date of his purchase of the certificate from Wharton—11 December, 1896—conveyed the property to Maria E. Day. The consideration expressed in the deed from Nelson and wife to the defendant Maria E. Day was $66.60, the amount of the taxes, interest, penalties, etc. In the complaint there was an allegation that Nelson and Mrs. Day colluded to bring about the tax sale that Mrs. Day might get title to the property to defraud the plaintiff of its debt, but on trial the whole of the evidence was to the contrary. Three issues were submitted to the jury, and answered by the jury as appears under the head of each, under the instruction of his Honor to so find if they believed the evidence: "(1) Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer. Yes. (2) What is the annual rental value of said land? Answer. $48 per year. (3) What is the amount of the taxes, costs, and penalties paid by the defendant Maria E. Day upon said land? Answer. $138.50."

Upon a review and consideration of the pleadings and verdict and judgment in this case and in that of Benninghaus against Day and others, and of the defendants' prayers for instruction,

(136) and their exceptions to the charge of his Honor in the present case, it is apparent that the only question in the case is, Was the defendant Maria E. Day so interested in the property sold, and so situated in regard to it, as that she could be permitted, in respect to the rights of the plaintiff adjudicated at the May Term, 1896, in the suit of Benninghaus against Day and others, to become the fee-simple holder of the property under the tax sales, and thereby defeat the plaintiff of its rights in the property and in the recovery of its debt? We are of the opinion that she can not be allowed, under all the circumstances, to defeat the plaintiff's debt by her purchase at the tax sale through her assignor, and that by her purchase of the certificates and her receiving the deed from Nelson she only relieved the property of the taxes, which in law she was required to do. She was not bound in her husband's lifetime to pay the taxes on the property. It was his duty to have paid them because the property was his individual property. But after the husband's death, and while she was residing on the premises with the children of the deceased husband and herself, and after the decree and judgment of 1896, in which she was recognized as having a right to the surplus after the payment of the judgment lien on the property, she can not be allowed to say she had no interest in the property, and could buy another and independent title through the tax sales. She was in possession with her children. She certainly, as the widow, was entitled to dower in the property, and the children as their father's heirs at law. It might have been that the property was vastly more valuable than the amount of the judgment liens, and in such a case certainly she would not have been allowed, under the circumstances of this case, to have defeated by a tax sale both the interest of the children in the estate and the judgment liens. She was in possession of the property as the widow of her husband, and entitled to dower in all the lands that her hus-

(137) band owned at any time during the coverture, and her estate in the dower was but the continuance of the estate of her husband. *Love v. McClure,* 99 N. C., 290. And this, notwithstanding she had joined her husband in the execution of the deed of trust and the mortgage, for she still had an interest in the proceeds of the sale of the premises, and was in possession through that claim. We have no direct authorities in our own State on the point, nor have we found any satisfactory ones from elsewhere, but we are satisfied that the law must be as we have declared it. We can not see anything in the contention of the defendant that the plaintiff, through its trustees, was bound in law to pay the taxes on the property. It would

certainly have been concluded of its rights and interest in the property if a sale thereof had been made for the taxes, and the property had been bought by an indifferent person; for, as was decided in *Powell v. Sikes,* 119 N. C., 231, the mortgagee's lien is subject to the lien for taxes, and he must pay them if the mortgagor does not, and he is barred by a sale of the land for taxes without notice from the sheriff. But that principle in no way can be fitted to the facts of this case, as we have shown.

No error.

Cited: *Smith v. Smith,* 150 N. C., 83.

(138)

SMITH v. SUPREME COUNCIL ROYAL ARCANUM.

(7 November, 1900.)

1. INSURANCE—*Benefit Certificate—Surrender.*

   A requirement in an insurance policy that the policy be surrendered before payment, is met by satisfactorily accounting for the same.

2. INSURANCE—*Admissions.*

   Where an insurance company fails to set up by way of defense that the insured ever requested or desired a change of beneficiary in the policy, it must be taken as an admission that no such change was made known to them by the assured.

3. INSURANCE—*Assignment—Beneficiary.*

   A person having an insurance policy in possession—not being named beneficiary therein—has no interest in the policy, it not having been assigned to him.

ACTION by B. N. Smith against Supreme Council of Royal Arcanum, heard by Judge *W. A. Hoke* and a jury, at Fall Term, 1900, of GUILFORD. From judgment for plaintiff, both parties appealed.

Scales & Scales, for plaintiff.
Chas M. Steadman and *W. H. Day,* for defendant.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. At the time of his death, Flavius Bingham Smith was insured in defendant company; the beneficiary named in the policy being the plaintiff, father of the insured.

Proofs of death were properly made out and received by the company, demand was made by the plaintiff for the amount of insurance, payment was refused, and this action was brought to recover it. The only defense set up in the answer is
(139) that the plaintiff failed, and still fails, to surrender to the defendant the policy of insurance—the benefit certificate; the said certificate containing a provision in these words: "These conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of the widows and orphans' benefit fund to B. N. Smith a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate." Among other averments in the answer is one to the effect that the defendant is now, and always has been, ready to pay the amount of the policy, upon the production and delivery of the said certificate. It is further set out in the answer that the policy of insurance is in the hands of Annie J. Smith, the widow of the insured, and that she claims to be the beneficiary and entitled to the insurance, and has made demand upon the defendant for payment, offering to surrender the policy upon payment to her of the amount of insurance. The plaintiff admitted that he did not have possession of the benefit certificate. The following issues were submitted to the jury: "(1) Was the benefit certificate mentioned in the complaint in the possession and control of Annie J. Smith, widow of the insured, or in possession and control of any one for her, at the time this action was commenced? And is it still in her possession and control, in the State of Virginia, and is she now making claim against the company on said policy? (2) Has the defendant company waived production of policy and certificate required by its terms before bringing suit? (3) Has plaintiff the present right to recover of defendant this amount of said certificate and policy, to-wit, three thousand dollars and interest from 1 March, 1898?" And at the conclusion of the evidence his Honor directed the jury, if they believed
(140) the evidence, to answer the first issue, "Yes;" the second, "No," and the third, "Yes; to be paid out only on the further order of court." The plaintiff excepted to these instructions, and then moved for a judgment *non obstante veredicto*, and tendered a judgment absolute for $3.000—the amount of the policy, interest, and costs—which his Honor declined. There were other grounds of alleged error set out by the plaintiff—among them, one that the Court directed the jury to answer the third issue, "to be paid out only on further order of the Court."

There is no error pointed out in this appeal, except in the qualifying part of the instruction of his Honor to the jury to respond to the third issue, "Yes; to be paid out only on the further order of the Court," the incorporation of that feature of the verdict into the judgment, and the requirement of the clerk to cause notice to be given by publication to Annie J. Smith to come in and establish her claim, if she has any, to the fund. If the answer of the defendant is carefully read, it will be seen that the defendant does not make any averment that the insured had ever directed that a new certificate be issued to him by the company, in which the beneficiary was to be changed to Annie J. Smith, his wife, instead of the original beneficiary, the plaintiff, his father. Section 333 of the defendant's constitution and by-laws allowed a member, upon the payment of a small fee, to make a written surrender of his benefit certificate, upon which he would receive a new certificate, payable to such beneficiary as the member might designate. The written surrender, under sec. 334, was required to be forwarded, under seal of the council, to the supreme secretary, and sec. 335 declared that parol evidence of a member's intention or desire to change his beneficiary must be disregarded. Section 337 declares that the change of the beneficiary shall take effect upon the delivery of the benefit certificate, the written surrender, and direc-
tion for change. The defendant issued the policy, the plain- (141)
tiff being named beneficiary therein; and defendant does not set up in its answer any matter going to show that the assured ever had expressed any desire or made any request, either verbal or in writing, to change the beneficiary, or ever had surrendered, or ever offered to surrender, the benefit certificate for the purpose of having the beneficiary changed. The company knows better than anyone else whether the insured ever requested or desired a change of beneficiary in the policy, and, not setting up such matter of defense in the answer, it must be taken as an admission that no such change or desire of change was ever made known by the assured to the company. Besides, under the constitution and by-laws, Annie J. Smith, the widow, could have no interest in the policy, because she still holds it, and there never has been any change of beneficiary, and the constitution and by-laws forbid any assignment of the policy. Section 327. So the plaintiff is entitled to a judgment absolute for the amount named in the benefit certificate, unless that feature of the same which requires of the plaintiff the surrender of the original certificate is a barrier to his recovery. We are of the opinion that that requirement is not to be taken in its absolutely literal sense. Those words are to be construed rea-

sonably, justly, equitably. If the policy had been lost or burned since the death of the insured, surely upon proof of that the terms of the contract would be met. So in this case the policy is accounted for, just as if it had been burned or lost. It is in the hands of the widow of the insured, who doubtless got possession of it after the death of her husband, and in her hands it is as harmless as if it had been lost or destroyed. Under the constitution and by-laws of the company, it can not be made to pay the loss to Mrs. Smith. The plaintiff was entitled to a judgment absolute.

Modified and affirmed.

(141) DEFENDANT'S APPEAL IN SAME ACTION.

For the reasons set out in the plaintiff's appeal, there appears no error in the proceedings in this action of which the defendant can complain.

No error.

JOLLY v. BRADY.

(7 November, 1900.)

INJUNCTION—*Restraining Order—Dissolution—Bond—Liquor Selling —Damages.*

When it would be difficult and impracticable to ascertain actual damages, a restraining order ought to be continued until the final hearing.

DOUGLAS, J., dissenting.

MOTION by plaintiffs, B. F. Jolly and W. E. Jolly, to continue a restraining order issued against J. A. Brady, to the hearing, heard by Judge *H. R. Starbuck,* at Fall Term, 1900, of PITT. Order vacated and set aside. From this judgment the plaintiff appealed.

Jas. L. Flemming and *Skinner & Whidbee,* for plaintiff.
Jarvis & Blow, for defendant.

FAIRCLOTH, C. J. It appears from the complaint and replication that the defendant had leased his store, cornering on Fourth and Evans streets, in the town Greenville, to one Burnett, for retailing liquor; that Burnett sold his liquor business to B. F. Jolly, one of the plaintiffs, who subsequently sold out his business to W. E. Jolly, the other plaintiff; that on or

about 3 January, 1900, the defendant agreed with plain- (143) tiffs that, if they would purchase the stock of said Burnett and his interest in the lease, together with the bar fixtures in said store room, the plaintiffs should occupy the premises during 1900, at a rental of $30 per month, and that the defendant during the said term would not engage, directly or indirectly, in the retail of liquor in the town of Greenville, and that he would not use, or permit anyone else to use, the room adjacent to said corner room for the purpose of retailing liquor; that, in violation of said contract, the defendant has engaged in retailing liquor in said adjacent room in his building. The defendant denies that he agreed with plaintiffs, or either of them, at any time, not to engage in the liquor business in the town of Greenville. The plaintiffs obtained an order restraining the defendant from selling liquor in the town, and on the final hearing of the motion his Honor vacated the restraining order, upon the defendant executing a bond in the sum of $400, conditioned to pay such costs and damages as the plaintiffs may sustain by reason of the Court's refusal to continue said order to the hearing. It now appears that at the hearing of the motion the only fact in issue is whether the defendant agreed not to engage in selling liquor in the town during the year 1900. The defendant offered no proof of his contention, except his answer as an affidavit. The plaintiffs filed their affidavits in support of their allegation. They also filed an affidavit of said W. B. Burnett to the effect that "it was then and there agreed by J. A. Brady that the plaintiffs should have the use of said store until January, 1901, and that he (Brady), the defendant, would not during said year enter the retail liquor business in the town of Greenville, and that he would not rent the adjacent room department during the year to anyone for the retail liquor business; * * * and that, in his opinion, the stand is very materially damaged by a similar business being run in the adjacent (144) room, and especially so by J. A. Brady, who occupied the corner for ten years or more, the place he is now occupying being separated only by a thin partition." The plaintiffs also filed an affidavit of Edward Forbes, who said he was present with Burnett, the two Jollys and the defendant when the latter contracted as follows: "That the plaintiffs should have and use the corner store—the 'Old Brady Stand'—for and during the year 1900, and that the defendant J. A. Brady, should not rent or use the other apartments for the retail liquor business during the year 1900, and that he (the said Brady) would not enter or operate, directly or indirectly, any retail liquor business in the town of Greenville during the year 1900;" and, in con-

sideration of these matters, the plaintiffs agreed to pay $30 per month as a rental, which is an exorbitant price for said store; that a similar business in the adjacent room would materially damage the trade of the plaintiffs; and that in frequent subsequent conversations the defendant has admitted the contention of the plaintiffs. None of these witnesses are impeached, and we have to assume that all of them are credible. Whatever the fact may be, the evidence now preponderates in favor of the plaintiffs' allegation.

Granting injunctions is a serious question for the Court. It is a general rule, well settled, that when the injury complained of, actual or apprehended, can be compensated in damages, a court of equity will not interfere. But when the damage can not be reasonably compensated in a court of law, or the injury is irreparable, the Court will stay the injury, by injunctive order, until the parties shall have the main facts determined by jury. In some instances the Court finds serious difficulty in putting the case under either of the above classes. In such cases the

(145) Court will act upon its general jurisdiction as a Court of Equity, and administer relief *ex æquo et bono,* according to its own notions of general justice and equity between the parties. In doing so the Court will consider the facts, such as appear; also the conditions and circumstances surrounding each case. When the subject-matter is one of public concern, its object being the development of important industries, in which the public are interested, the Court will hesitate to enjoin the parties in such an enterprise. It refused to do so in *Commissioners v. Lumber Co.,* 114 N. C., 505, for reasons therein stated. We can not say that retailing liquor is an enterprise for the public good and benefit. If the defendant is allowed to continue selling (which, the evidence is, would be a great damage to the plaintiffs), and the plaintiffs should establish their alleged contract, it would be difficult and impracticable, from the inherent nature of the retail business, for them to ascertain their actual damage, and for these reasons we think the restraining order ought to be continued until the trial of the fact in dispute.

It is said in the argument that, as a bond to cover damages was required and given, the restraint should continue, as the rule was laid down in *Commissioners v. Lumber Co., supra.* In that case the act complained of was injuring and destroying county bridges crossing the river, and the damage could be easily ascertained. The Court refused to restrain the defendant's business upon condition that he file a sufficient and good bond to satisfy plaintiff's damages whenever they were ascer-

tained. The present case differs from that in the respect already mentioned, *i. e.*, the difficulty in ascertaining the damage. The bond would avail but little, if, in the nature of the subject-matter, the plaintiffs could not show their damage.

Error.

Cited: *Disosway v. Edwards,* 134 N. C., 257; *Reyburn v. Sawyer,* 135 N. C., 339; *Anders v. Gardner,* 151 N. C., 605.

(146)

McILHENNEY v. CITY OF WILMINGTON.

(13 November, 1900.)

1. MUNICIPAL CORPORATIONS—*Liability for Torts—Officers.*

A municipal corporation is not liable for the torts of its officers unless made so by statute.

2. MUNICIPAL CORPORATIONS—*Liability for Damages.*

Where a municipal corporation acts in its corporate capacity or in the exercise of powers for its own advantage, it is liable for damages caused by the torts of its officers or agents.

3. MUNICIPAL CORPORATIONS—*State Officers—Policeman—Officers.*

A policeman is a State officer and not an officer of the city.

ACTION by E. D. McIlhenney against the city of Wilmington, heard upon complaint and demurrer, by Judge *Geo. H. Brown, Jr.,* at Spring Term, 1900, of NEW HANOVER.

From a judgment sustaining the demurrer, plaintiff appealed.

Herbert McClammy, for plaintiff. (149)
Iredell Meares, for defendant.

CLARK, J. The defendant demurred to the complaint that it did not state facts sufficient to constitute a cause of action. The complaint alleged that the plaintiff, while quietly sitting on the steps of the bank, and not in any manner violating the laws of the State or city, was arrested in a brutal manner by one Temple, a policeman of defendant city; that the plaintiff, when brought before the mayor the following day, was discharged, after trial, on the ground that he had committed no

offense, and the policeman was reprimanded by the mayor; that the policeman (Temple) was notorious for his cruelty and want of judgment in making arrests, having on previous occasions made arrests without justification and been reprimanded therefor, and that the mayor and aldermen who appointed him on the police force were acquainted with his character.

The court below properly sustained the demurrer. The law is too well settled to admit of debate. It may, on a review of the authorities, which are uniform, be thus stated: When cities are acting in their corporate character, or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary, or legislative authority conferred by their charters, or are discharging a duty imposed solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor. *Moffit v. Asheville,* 103 N. C., 237; *Prichard v. Board,* 126 N. C., 908; *Hill v. Charlotte,* 72 N. C., 55; *Coley v. Statesville,* 121 N. C., 316. In the present case the policeman was, as it were, a sheriff, or State officer, and the liability for any assault or tort committed by him was personal, as in the case
(150) of a sheriff. The non-liability of municipalities in such cases is based upon the ground that they are subdivisions of the State, created in part for convenience in enabling the State to enforce its laws in each locality with promptness, and simultaneously, when occasion requires it, in the different subdivisions within its boundaries; and that while enforcing those laws which pertain to the general welfare of the State, and to the people generally in all its subdivisions, the State acts through these subdivisions, and uses them and their officers as its agents for the purposes for which a State government is instituted and granted sovereign power for State purposes; and, further, that the State has not made them the insurers of public or private interests, or liable for any careless or wilful acts of its officers. "Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature, and their appointment is devolved on cities and towns by the Legislature as a convenient mode of exercising the functions of government; but this does not render the city liable for their unlawful or negligent acts." *Buttrick v. Lowell,* 79 Am. Dec., 721. "If such officers are elected or appointed by the corporation, in obedience to a statute, to perform a public service, not local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the dis-

tribution of powers, they are not to be regarded as the agents of the corporation, but as public or State officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* does not apply." *Woodhull v. New York,* 150 N. Y., 450. "With regard to the liability of a public municipal corporation for the acts of its officers, the distinction is between the exercise of its legislative powers which it holds for public purposes and as part of the (151) government of the country and those private franchises which belong to it as a creation of the law. Within the sphere of the former, it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers deriving their rights and duties from the sovereign power." *Commissioners v. Duckett,* 20 Md., 476.

A case exactly "on all fours" is *Craig v. Charleston,* 180 Ill., 154, which says: "It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, can not commit a wrong through its officers in such a way as to render it liable for tort. It is contended, however, that the appellant does not base his right of recovery against the city upon the wrongful act of Apgar (a policeman) merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the State. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability can not be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the State or in the excess of the legal powers of the city. 2 Dill Mun. Corp., 950, 968; *Odell v. Schroeder,* 58 Ill., 353; *Chicago v. Turner,* 80 Ill., 419; *Wilcox v. Chicago,* 107 Ill., 334; *Blake v. Pontiac,* 49 Ill., 543."

Upon reason and authority, the defendant city is exempt from the liability here sought to be imposed upon (152) it equally whether it is for a tort or negligence, and whether the recovery is sought by reason of the misconduct of the officer in making the arrest, or in the act of the mayor and aldermen in appointing or retaining an unsuitable officer, with knowledge of his unfitness. In either aspect, the conduct of the officer is in the discharge of official and governmental duty, and

the taxpayers of the city are not answerable in damages for official misconduct in the discharge of governmental functions in the absence of a statute making them so. It is true it is recited in *Coley v. Statesville,* 121 N. C., 316, that the municipality in that case had appointed suitable police; but that was only a circumstance to the credit of the defendant, and not a ruling, that if it were otherwise the town would be liable, for it is immediately added: "The defendant is liable only for failure to properly construct the prison, or to so furnish it as to afford reasonable comfort and protection from sufferings and injuries to health. *Moffit v. Asheville,* 103 N. C., 237; S. and R. Neg. (5 Ed.), sec. 291." In this section of S. and R. Neg. and notes, the points involved in the present case are found fully settled. The reason the town is liable in the particular pointed out in *Moffit v. Asheville* is, as there stated, because of a statutory provision.

The non-liability of a municipality for the torts or negligence of its officials, when acting within their governmental powers, is discussed, and held as settled, wth citation of authorities. Dill. Mun. Corp. (4 Ed.), sec. 975, and cases cited; *Cook v. Mayor,* etc., 54 Ga., 468; *Bartlett v. Columbus* (Ga.), 44 L. R. A., 795. The above and many other authorities to the same purport are presented in the excellent brief of Mr. Meares, whose labors have been useful to the Court in preparing this opinion. The policeman Temple, if the facts are as al-
(153) leged in the complaint, is liable both civilly and criminally. Whether the same is true in regard to the mayor and aldermen, as seems to be intimated in *State v. Hall,* 97 N. C., 474, we express no opinion.

Affirmed.

Cited: *Moody v. State Prison,* 128 N. C., 16; *Levin v. Burlington,* 129 N. C., 189; *Williams v. Greenville,* 130 N. C., 97, 99; *Jones v. Comrs.,* 135 N. C., 224; *S. c.,* 137 N. C., 606; *Fisher v. New Bern,* 140 N. C., 511; *Hull v. Roxboro,* 142 N. C., 456, 460; *Metz v. Asheville,* 150 N. C., 749; *Light Co. v. Comrs., Ib.* 560.

TURNER v. COMMISSIONERS OF HILLSBORO.

(13 November, 1900.)

1. EVIDENCE—*Immaterial—Harmless Error—Map.*

It was harmless error to refuse to admit in evidence a map, a similar one already being in evidence.

2. LIMITATIONS OF ACTIONS—*Municipal Corporations—Adverse Possession—Trust.*

Statutes of limitation do not run against a municipal corporation holding land in trust for public use unless it has the power of alienation.

ACTION by C. D. and D. Turner, trustees of T. D. Turner, against the Board of Commissioners of Hillsboro, heard by Judge *Frederick Moore* and a jury, at Spring Term, 1900, of ORANGE. From judgment for plaintiff, the defendants appealed.

John W. Graham, for plaintiff.
Frank Nash, for defendants.

CLARK, J. This is an action for damages for trespass in entering upon plaintiff's premises to open up streets. The defendants claimed that the *locus in quo* was part of the commons originally conveyed to the town in trust, and that the plaintiffs, who did not show any paper title from the town, were not protected by any duration of adverse pos- (154) session. It was in evidence that 9 September, 1754, William Churton conveyed 653 acres to Francis Corbin, reserving the 400 acres on which the town of Orange had theretofore been laid out. For a few years the town was known as "Corbinton" or "Corbin New Town." On 20 November, 1759 (St. 33, Geo. II.), it was incorporated by the name of Childsburg. Section 3 of the act provided that, after laying out 200 acres in the streets and lots, "the residue thereof shall be and remain for a common thereto." The name of the town was changed to Hillsboro, 3 November, 1766. The town authorities had no authority to sell any part of said 200 acres of commons until chap. 152, Laws 1830-31, which empowered them "to sell or dispose of from time to time, as to them may seem most proper, all or any part of the commons of said town." There would have been no authority to sell such property without a special act of the General Assembly. *Southport v. Stanly,* 125 N. C., 464. There was evidence tending to show that thereafter, by virtue of said act, the town commissioners did sell

the greater portion of said commons, and in 1898 sold the remainder, except a portion adjoining the land in controversy, which the plaintiffs forbade the sale of. It was thereafter that the defendants, in opening up and extending streets already in existence, committed the alleged trespass.

The evidence tended to show that the land in controversy was part of the original 400 acres, but that the owners of the adjoining tract had cultivated up to a row of cedars, the dotted line on the map, to which plaintiffs now claim, for 70 years. The plaintiffs claim title by adverse possession for more than 20 years.

The map offered in evidence by defendants should probably have been admitted (*Andrews v. Jones,* 122 N. C., 666, (155) and cases cited) but we can not see that its exclusion was material or prejudicial. It was a map made by the town in 1889, and corresponded with the map already in evidence, which was made under an order of survey in this cause. The defendants requested the Court to charge: "If the jury believe that the land in controversy was originally part of the commons belonging to the town of Hillsboro, or its predecessor, Childsburg, then the possession of the plaintiffs, and those under whom they claim, had not ripened, and does not riven, into title against the town, said town being a municipal corporation, holding said commons for a public use." This the Court declined, and instructed the jury instead that if they should "find from the evidence that the plaintiffs, and those under whom they claim, have been in possession of the land in controversy, openly, continuously, and every part thereof, adversely, claiming the same as their own, under known and visible boundaries, for twenty years, it being admitted that the title is out of the State, then they have a title in fee to such land, and the jury must answer the first issue, 'Yes,' and then define the boundaries of such of the lands in controversy as they should find that the plaintiffs are entitled to because of such possession," and defendants excepted.

As to streets, ways, squares, parks, commons, and other property which a municipal corporation may hold in trust for the public use, without power to alienate, it is true that no statute of limitations can run. *Moose v. Carson,* 104 N. C., 431. Since no one would obtain any title thereto if he had a deed from the town, no adverse possession, however long, would bar the town. (*Alton v. Transportation Co.,* 12 Ill., 60; *Webb v. Demopolis,* 95 Ala., 116; 2 Dill Mun. Corp. [4 Ed.], secs. 669, 671); and the same was the Civil law (Id. sec. 670). This has been affirmed in this State by a statutory declaration (chap-

ter 224, Laws 1891; Clark's Code [3 Ed.], sec. 150a); but (156) as to all other matters the statute of limitations runs against a municipality as against anyone else. Laws 1831-32, above cited, took from the commons here in question its inalienability. Sale thereof was authorized. Much of it was sold. A conveyance from the town since that date for any part thereof would be valid, and it follows that 20 years' adverse possession, up to a known visible boundary—the row of cedars, the dotted line on the map—confers a good title.

It was in evidence that in 1844-46 it was contended by the town that Alfred Waddell was trespassing upon the town property at the *locus in quo,* and he was notified by the municipal authorities that he must pay rent therefor or be ousted, but there was no evidence that he complied. The defendants ask the Court to charge: "If the jury believe that Alfred Waddell's possession of the land in controversy was originally permissive, then the possession of those who claim under and through him can not become adverse until they, or some of them, by some positive act, such as a disclaimer, refuse to admit the original permission [and not even then, as against municipal corporation.]" The Court gave this as requested, omitting the words in brackets. The defendants can not complain of this modification, for the reason given above.

Affirmed.

Cited: *Elizabeth City v. Banks,* 150 N. C., 513; *New Bern v. Wadsworth,* 151 N. C., 312.

---

(157)

TAYLOR v. LAUER.

(13 November, 1900.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Preferences.*

   An assignment for the benefit of creditors omitting certain creditors is invalid as a preference.

2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Assignee—Fraud—Creditors.*

   The assignee represents the creditors and may recover property which has been fraudulently conveyed by his assignor.

3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Schedule—Time for Filing.*

   Assignor must file schedule of preferred debts within five days after registration of assignment.

TAYLOR *v.* LAUER.

ACTION by Z. V. Taylor, assignee of Max Pretzfelder, against Martin Lauer and Leon Lauer, merchants and partners, trading under the name and style of Louis Lauer; Isaac Selz, Moses Selz, and Benjamin Selz, merchants and partners, trading under the name and style of Selz Brothers, heard by Judge *Frederick Moore* and a jury, at Spring Term, 1900, of GUILFORD. From judgment for plaintiff, the defendants appealed.

Chas. M. Steadman and *Bynum & Bynum,* for plaintiff.
J. T. Morehead, for defendants.

MONTGOMERY, J. On 22 March, 1898, Max Pretzfelder, being hopelessly insolvent and owing many debts, executed and delivered to the firms of Louis Lauer (the defendant, Martin Lauer, being a partner) and Selz Bros., a bill of sale of his entire stock of goods and other personal property—substantially his entire assets. The consideration expressed in
(158) the deed was $3,447—the indebtedness of Pretzfelder to the two sets of creditors, grantees. A week later Pretzfelder made an assignment of the same property to Z. V. Taylor for the benefit of numerous creditors mentioned in a schedule annexed thereto, embracing the two firms above mentioned. Taylor, the assignee, called upon Martin Lauer, who had possession of the property conveyed in the bill of sale, and demanded possession of the same, and the demand was refused. This action was begun by Taylor, the assignee, by the issuance of a summons against all the individual members of the two firms, grantees in the bill of sale; and in the original complaint it was alleged that it was the purpose and design of Pretzfelder, in executing the bill of sale, to hinder and delay his creditors, and to afford ease and comfort and credit to himself, and that "said bill of sale, though absolute in form, was intended and understood by all parties interested therein, to be in the nature of a mortgage to secure the debts due said mercantile firms, amounting to between $3,400 and $3,500, all of which said facts, together with the said purposes and design of said Max Pretzfelder, to hinder and delay his creditors, and to afford ease and comfort to himself, were well known and understood to said mercantile firms of Louis Lauer and Selz Bros., who availed themselves of said facts, purpose, and design to illegally profit themselves at the expense of the other creditors of said Max Pretzfelder."

It was also alleged that Martin Lauer, one of the defendants, rapidly sold out the entire property, and turned over the proceeds of the sale to the grantees. The value of the property was

alleged to be $7,000, and judgment was demanded against defendants for that amount. The plaintiff afterwards amended his complaint by adding, "The said bill of sale, though absolute in form, was intended and understood by all parties interested therein to be in the nature of a mortgage to (159) secure the debts due said mercantile firms, amounting to between $3,400 and $3,500," and later by adding to the amendment the following: "In securing said bill of sale, an undue advantage was taken of the necessities of said Max Pretzfelder by his indebtedness to said firms of Louis Lauer and Selz Bros., who, availing themselves of their power over said Pretzfelder, obtained said bill of sale, promising and agreeing that after their debts were paid the balance of the stock of goods and articles conveyed to them should be returned to said Pretzfelder." Upon the trial the plaintiff introduced the assignment as evidence of his title to the property, the third section thereof being in the following words: "Thirdly, to pay and discharge in full, if there be sufficient for that purpose, all the debts and liabilities now due, or to become due, from the said party of the first part, and which are particularly enumerated and described in a schedule thereof hereto annexed, marked 'Schedule B,' together with all interest moneys due, or to grow due thereon, and, if there be not sufficient of said proceeds to pay the said debts and liabilities in full, then to apply the same *pro rata,* so far as they will extend, to the payment of the said debts and liabilities according to their respective amounts. And if, after payment of all the costs, charges, and expenses attending the execution of the said trust, and the payment and discharge in full of all the lawful debts owing by the said party of the first part, of any and every description, there should be a surplus of the said proceeds remaining in the hands of the said party of the second part, then lastly, to pay over and return the same to the said party of the first part, his executors, administrators, and assigns." There was undisputed testimony that there were two debts (one of considerable amount) due by Pretzfelder to other creditors than those named in the schedule of indebtedness. (160)

The plaintiff insisted that the assignment was a general one for creditors, and without preferences, and therefore offered no proof of the filing of a schedule of preferred debts by the assignor as required by chapter 453, Laws 1893. The defendant moved to dismiss the action under chapter 109, Laws 1897. We are of the opinion that the motion should have been allowed. It was incumbent on the plaintiff to make out his title

to the property. The fact that the debtor, Pretzfelder, at the time he made the assignment to the plaintiff, owed two debts which were not embraced in the schedule of indebtedness mentioned in the assignment, carried with it the conclusion of law that the creditors named in the schedule were, to all intents and purposes, preferred creditors. If this be not so, then all an insolvent debtor would have to do to avoid the provisions of section 1, c. 453, Laws 1893, would be to name certain of his creditors in the deed of assignment, without specially making any preference in their favor, and leave out of the assignment other of his creditors. The assignee here can not pay any part of the assets, if he should recover them from the defendants, to any of the creditors not mentioned in the assignment, until he has paid in full the debts named in the schedule. The form of this assignment, with respect to chapter 453, Laws 1893, would be a good one, as a general assignment for creditors, provided the schedule should contain the names of all the creditors and the amount of their debts, or as near the amount of their debts as possible; but when there are other creditors not named in the assignment, then such a form becomes an assignment with preferences. And it matters not whether the failure to insert all of the indebtedness in the schedule arises from intention or negligence or ignorance. The effect is the same. If an insolvent debtor desire to make a general
(161) assignment for the benefit of creditors, and is unable to state the names of all his creditors, through ignorance of the extent of his indebtedness, he should make that statement in the deed, and provide for the payment of all such indebtedness on an equal footing with his other creditors, upon proof of their claims, made within a reasonable time. If he should name, as in this case, certain of his creditors, and declare them to be all of his creditors, the assignee can recognize none others—at least, until those named are paid in full. In this case it appears from the testimony of the assignor that he knew of the two debts not embraced in the schedule. Two days before the assignment was executed, he was dunned persistently for one of them. Under the laws of North Carolina an insolvent debtor may, by deed of assignment, prefer certain of his creditors, but there is a condition attached to such act, which must be complied with, or the deed will be invalid; *i. e.*, the preferred debts must be reported by the assignor under oath, and filed in the office of the Clerk of the Superior Court of the county in which the assignment is made within five days of the registration of such deed of assignment, stating the names of the preferred creditors, the amount due each, when the debt was made,

and the circumstances under which the debt was contracted. *Bank v. Gilmer,* 116 N. C., 684; *Glanton v. Jacobs,* 117 N. C., 427.

Several other important questions were raised on the appeal, but the view we have taken of the case disposes of the necessity of a consideration of them. However, one of them is of so much consequence in the administration of the law in this State; and, having been for the first time only very recently determined by a decision of this Court, we have concluded to consider it. The defendant demurred to the complaint after having objected to the second amendment thereof. The ground of demurrer was to the effect that the plaintiff assignee was bound by the bill of sale executed to the defendants (162) by Pretzfelder, his assignor, and that the plaintiff could not attack the bill of sale for fraud. The demurrer was properly overruled. The plaintiff assignee is the representative of creditors, and for them can seek the recovery of property which may have been conveyed in fraud by his assignor. *Bank v. Adrian,* 116 N. C., 537; *Pillsbury v. Kingan,* 33 N. J., 287. The reasoning of the last-named case is entirely satisfactory to the Court, and the discussion is a full one. In one of the English cases cited there, it is said by the Judge who delivered the opinion: "I think that the assignee of an insolvent debtor represents the creditors for all purposes, and, if any fraud exists in a transaction to which the insolvent was a party, may take advantage of it. A deed which is void as against creditors is void, also, as against those who represent creditors." The Court, in *Pillsbury v. Kingan,* say that in that English case "the assignment was made under the act of 1 George IV., c. 119." In none of the cases (several others of like import having been referred to) was the decision placed on any language in the statute specially empowering the assignee to avoid the fraudulent conveyances of the assignor. In fact, neither of those statutes contained any express provision for setting aside conveyances of the assignor in fraud of creditors, and that fact was unsuccessfully pressed upon the attention of the Court by the counsel who argued against the authority of the assignee to exercise that power. The capacity of the assignee to appear in Court for that purpose was, in express words, or inferentially, adjudged on the ground that the assignee of the insolvent was the representative of creditors, and as such was entitled to take for their benefit the same advantage of the statute of Elizabeth as the creditors might have taken." (163)

We are not inadvertent to the decision of this Court in *Burton v. Farinholt,* 86 N. C., 260, and we can see no

difference in the principle between the rights and powers of an administrator of an insolvent intestate and those of an assignee for the benefit of creditors, against the fraudulent acts of their grantors, yet we affirm the ruling made in *Bank v. Adrian, supra,* and we will in this matter take no step backward. The Legislature had, too, conferred upon executors and administrators the power to subject lands conveyed by their decedents in fraud of creditors to sale for the payment of debts before the decision in *Burton v. Farinholt, supra.* There was error in the refusal of his Honor to dismiss the action of non-suit.

Error.

CRAFT v. MECHANICS' HOME ASSOCIATION.

(13 November, 1900.)

1. MORTGAGES—*Foreclosure Pending Partition—Tenants in Common.*

   A tenant in common can not estop the mortgage of his co-tenant from foreclosing by making such mortgagee a party to proceedings for partition.

2. MORTGAGES—*Sale—Redemption—Purchase by Mortgagee.*

   A director of a corporation buying land sold under mortgage by the corporation, is presumed to have bought for the corporation, and acquires only the legal title, the mortgagor still holding the equity of redemption.

ACTION by W. C. Craft against the Mechanics' Home Association, N. B. Rankin and W. B. McCoy, heard by Judge *George H. Brown, Jr.,* and a jury, at Spring Term, 1900, of NEW HANOVER. From judgment for plaintiff, against N. B. Rankin, the latter appealed.

McNeill & Bryan, for plaintiff.
(164) *Junius Davis,* for defendant.

FURCHES, J. The plaintiff, Craft, was the owner of an undivided four-fifths interest in a lot in Wilmington, and his sister, Mrs. Mathis, was the owner of the other fifth of said lot. Plaintiff borrowed $900 of the defendant, to secure the payment of which he mortgaged to the defendant corporation his four-fifths interest in said lot. After the date of the mortgage of plaintiff to defendant, Mrs. Mathis commenced a proceeding in the Superior Court of New Hanover County before the

Clerk for partition, in which she alleged that said lot could not be actually divided without great damage to the parties interested, and asked that a sale be ordered for that purpose. The plaintiff, Craft, and the defendant association were made parties defendant to this proceeding for sale and partition, and Mr. McKoy, as attorney, representing both the plaintiff, Craft, and the association, filed an answer, in which the defendant association asks that a sufficient amount arising from a sale of said property be set aside to pay the balance then due on its mortgage. Upon this petition a sale was ordered, a commissioner appointed, and a sale made, at which the lot brought something over $1,300. But a 10 per cent bid being put on the amount the lot sold for at this sale, another sale was ordered, and at this second sale Dr. Dreher bid off the lot at $1,710, and deposited his check with the Clerk for that amount. But there were back taxes due for two years, which were liens on said lot; and, besides this, the defendant Rankin, had recovered a judgment against the plaintiff, Craft (defendant in the proceeding for partition), and said Craft had also executed a mortgage to J. D. Bellamy to secure a debt of $800. This judgment and mortgage to Bellamy were subsequent to the mortgage to the defendant association, and also subsequent to (165) the commencement of the proceeding to sell for partition, but prior to the sale at which Dreher bought. While Dreher wanted the property at $1,710, he was not willing to take it at that price subject to these incumbrances, as he considered them, so he withdrew his check, and the sale to him was never confirmed. While this proceeding to sell for partition was still pending, the defendant association sold under the power of sale contained in its mortgage. At the time of this sale, on 31 August, 1898, there was due on the mortgage debt of Craft to the defendant association the sum of $661.60, and the defendant, Rankin, bid this amount, and the property was knocked off to him. It also appears from the evidence of McKoy, and other evidence not disputed, that McKoy, as the attorney of the defendant association, advertised the property to be sold under the power of sale contained in the mortgage.

From these facts the plaintiff alleges that the defendant association, being a party to the proceeding to sell for partition, could not sell under the power contained in the mortgage pending that proceeding; that, without alleging fraud or bad faith on the part of McKoy, the plaintiff alleges that McKoy was his attorney in the partition proceeding, and that his action in advertising the sale under power in the mortgage, and acting as attorney for the association, was a legal fraud, and vitiated the

sale; that the whole matter, as he alleges, is suspicious, as Dr. Dreher had bid $1,710 for the land, and had deposited his check, and withdrawn the same, and within a few days after the sale under the mortgage he had bought from the defendant, Rankin, at the same price. And he further alleges that the defendant, Rankin, was the agent of the defendant association, and bought for the association—the mortgagee. But, as the plaintiff in this action ratifies the sale made under the
(166) power contained in the mortgage, we are at some loss to see why the plaintiff should allege and insist on matters which he thinks should vitiate and annul the sale made under the mortgage. And we advert to these contentions, which seem to reflect upon Mr. McKoy and Dr. Dreher, for the purpose of showing that, in our opinion, they were not to blame. We have sometimes thought that counsel were not as careful as they should be to avoid complications. But in this case, it seems to that Mr. McKoy is not liable to this charge. He was the general counsel of the defendant association at the time he filed the answer in the partition proceeding, and this was known to the plaintiff. There seemed at that time to be no conflict in the interest of the plaintiff and the defendant association, and no reason why he could not represent them both. But, when the sale under the partition proceedings was delayed, the purchaser, Dr. Dreher, refused to take the land owing to the incumbrances. He then went to the plaintiff and informed him that his first duty was to his original client, the defendant association, and that he would have to sell the land under the power contained in the mortgage, when the plaintiff told him to do so; that he had been deceived in making the second mortgage; that Rankin was his friend, and if anyone was to make anything he had rather it would be Rankin. This, it seems to us, exonerated Mr. McKoy from any just criticism.

Neither can we blame Dr. Dreher for declining to take the lot at a full price, as it was incumbered. It was certainly liable for the back taxes, and we are not prepared to say but what the Bellamy mortgage was such an incumbrance as might have given him trouble. A sale of lands for partition among tenants in common is only a legal means of effecting a sale, and the purchaser only gets the title the tenants had, subject to incumbrances. Neither are we prepared to say that one ten-
(167) ant in common, by making a mortgagee of another tenant in common a party defendant to a proceeding before the clerk to sell lands for partition, can estop the mortgagee from selling under the power contained in the mortgage. That Court has no equitable jurisdiction; no power to foreclose a mortgage,

nor to adjust equities, nor to provide for the payment of mortgage debts out of the proceeds of such sales. And we are unable to see any reason, nor have we been cited to authority, authorizing us to so hold. While mortgagees must act honestly and in good faith towards mortgagors, they must be protected in their rights.

But the defendant association, a corporation created by law, had only a legal entity, and could only act by and through its authorized agents. It could only loan money and take a mortgage through its officers and agents, and could only collect such loans and foreclose such mortgages by such officers and agents. The law makes the officers of corporations—presidents, cashiers, and directors—not only agents, but trustees of the corporation. And the presumption is that any act of theirs, in loaning or collecting the money of the corporation, was done for the corporation. Rankin admits that he was a director of defendant association and chairman of its Finance Committee when the order to foreclose this mortgage was made and at the time of the sale. Rankin, in his testimony, says: "I bid off the property at building and loan foreclosure sale. * * * I bought property in at the amount due the building and loan association and I paid the building and loan association for it. I then purchased the other one-fifth interest from Mrs. Mathis, and paid her $342." He then says that he paid back taxes; the costs of the proceeding to sell for partition; his own judgment against the plaintiff, Craft, $159; "and I made $427 net out of the transaction." There is nothing in the evidence to negative the presumption that the defendant, Rankin, was (168) acting for the association at this sale. In fact, his own evidence tends strongly, as we think, to sustain this presumption. He says: "I bid off property at building and loan foreclosure sale. * * * I bought property in at the amount due the building and loan association, and I paid the building and loan association for it." We must therefore hold that the defendant, Rankin, was acting for the defendant association at this sale, and that the defendant association was the purchaser, and that the defendant, Rankin, was the purchaser from the building and loan association after the mortgage sale. If the building and loan association was the purchaser at its own mortgage sale, it was still mortgagee after as before the sale; and, if the defendant bought from it at private sale, while the legal title passed to him, he held subject to the trust and the mortgagor's right of redemption.

The plaintiff, Craft, in this action ratifies the sale of the defendant, Rankin, and asks that he may recover the remainder

after paying the debt of the defendant association. The Court below allowed Rankin to retain what he had paid on back taxes, the costs of the proceeding to sell for partition, and the amount of his own judgment of $159 against Craft, and gave judgment against the defendant, Rankin, for $427, which defendant, Rankin, says was his "net profits" left out of the $1,710, for which he sold the land to Dreher, after deducting the taxes, costs, and judgment above specified; and the plaintiff did not appeal, but the defendant, Rankin, did. We see no reason why he should complain of this judgment, and it is affirmed.

(169)

PETERSON v. FERRELL.

(13 November, 1900.)

1. DEEDS—*Estate Conveyed—Life Estate.*

A conveyance to a person and in default of issue of such person to the next of kin, conveys only a life estate.

2. WASTE—*Right to Restrain—Contingent Remainder—Injury.*

A contingent remainder is such an interest in land as will be protected against injury or waste.

MOTION by W. C. Peterson to enjoin T. M. Ferrell and J. A. Ferrell from selling, cutting, or removing timber from certain lands, heard by Judge *Frederick Moore,* at Fall Term, 1900, of DUPLIN. From judgment allowing the motion, the defendants appealed.

Stevens, Beasly & Weeks, for plaintiff.
F. R. Cooper, for defendant.

FAIRCLOTH, C. J. Kilby Peterson, by deed, conveyed the land in controversy to his daughter, Margaret J. Peterson, in these words: "To said M. J. Peterson and the heirs of her body (meaning her own children), and, if none, then at her and their death to next of kin, but, if the next of kin be not her brother or brother's child, or children, then to whom she may feel in good will to give it of her own accord"—reserving a life estate to himself and wife, both of whom are now dead. The plaintiff, W. C. Peterson, is the only grandchild of Kilby, and the only nephew and next of kin of said Margaret J. The defendants are the purchasers of said land at a sale under a mortgage made by said Margaret J., and her husband, L. W. Merritt. The said Margaret J. has never had any children; she still living, and be-

ing 64 years of age. This action is brought to restrain the (170) defendants from committing waste on said land. Had the said Margaret a fee-simple estate? If so, the plaintiff has no cause of action. We think it clear that she has only a life estate, capable of enlargement into a fee simple in the event she has issue of her body living at her death. *Cowand v. Meyers*, 99 N. C., 198; *Wright v. Brown*, 116 N. C., 26; *Douthett v. Bodenhamer*, 57 N. C., 444. The plaintiff has an interest in the land, depending upon the death of the life tenant, Margaret J., without children; and it is immaterial whether it is a vested or contingent remainder. It is such an estate as this Court will protect against injury or waste. *Braswell v. Morehead*, 45 N. C., 26; *Douthett v. Bodenhamer, supra; Gordon v. Lowther*, 75 N. C., 193; *Cowand v. Meyers, supra*—where the question is discussed and settled.

Affirmed.

---

(171)

AIKEN v. LYON.

(13 November, 1900.)

1. EVIDENCE—*Competency—Lost Record—Supreme Court Record—Transcript.*

   Where a Superior Court record is lost, a certified copy of the transcript of the same in the Supreme Court is sufficient evidence of the record.

2. ESTOPPEL—*Judgment notwithstanding the verdict—Record—Res Judicata.*

   Although judgment is asked notwithstanding the verdict, if the judgment is rendered upon the issues, it constitutes an estoppel.

3. ESTOPPEL—*Judgment—Record in Supreme Court—Evidence.*

   A certified copy of the record in the Supreme Court constitutes an estoppel as between the same parties when the subject matter in litigation is the same.

4. DEEDS—*Certificate—Sufficiency—Justice of the Peace.*

   The certificate of the justice of the peace in this case held sufficient.

5. EJECTMENT—*Demand and Ouster—Answer.*

   To deny plaintiff's title to land and plead sole seizin, admits a demand and ouster.

6. VERDICT—*Trial—Judge—Jury—Findings of Fact.*

   That the judge wrote the findings of the jury, if they agreed to and returned them as their verdict, does not vitiate the verdict though it is irregular.

AIKEN *v.* LYON.

ACTION by A. E. Aiken, J. P. Cash and wife, John Hays and wife, B. J. Coley and wife, B. F. Aiken and J. F. Sanderford v. T. B. Lyon, heard by Judge *Frederick Moore* and a (172) jury, at Spring Term, 1900, of GRANVILLE. The certificate of the Justice of the Peace is here set out in full.

I, E. E. Lyon, Justice of the Peace for Granville County, State of North Carolina, do hereby certify that W. D. Vaughan and S. E. Vaughan his wife, and B. F. Tingen and M. P. Tingen his wife, personally appeared before me and acknowledged the within deed and for the purpose therein expressed, and the said S. E. Vaughan and M. J. Tingen being by me privately examined, separate and apart from their said husbands, as touching their voluntary execution of the same, doth state that they signed the same freely and voluntarily and without fear or compulsion of their said husbands, or any other persons, and doth still assent thereto.

This, 25 March, 1898.

E. E. LYON,
Justice of the Peace.

From judgment for plaintiffs, the defendant appealed.

John W. Hays, Boone, Bryant & Biggs and *Royster & Hobgood,* for plaintiffs.

A. W. Graham, J. W. Graham, and *Winston & Fuller,* for defendant.

FURCHES, J. This is an action for possession of land, in which plaintiffs allege that they are tenants in common with defendant. The defendant denies that plaintiffs are owners of any interest in said land, and pleads *sole seizin.* The plaintiffs are the heirs at law and assignees of the heirs at law of W. E. and Lydia J. Aiken, and claim that they are the owners of 150-218 of the land in controversy. They allege that the land was bought for $218, and that Lydia J. Aiken paid $150 of the purchase money, but through ignorance or inadvertence the deed was made to her husband, W. E. Aiken, and that the said (173) Lydia J. was the equitable owner of 150-218 of said land; that the said W. E. in 1850 made and executed a mortgage to the defendant, in which he attempted to convey the whole of said land in fee simple. This mortgage was afterwards foreclosed, and the defendant became the purchaser at the foreclosure sale. The mortgagor and wife, Lydia, being in possession of the mortgaged land, the mortgagee and purchaser, Lyon, brought an action for possession against the said W. E. Aiken and wife, Lydia, in the Superior Court of Granville

County, in which action he alleged that he was the owner of the land in fee simple. To this complaint the *feme* defendant, Lydia, answered, and said that she was the equitable owner of said land; that the same was bought with money arising upon a sale for partition of land she inherited from her father, and that fact was known to plaintiff when he took the mortgage; that the deed therefor was made to her husband, through inadvertence, mistake, or ignorance, instead of being made to her; that she did not join in the mortgage of her husband to the plaintiff, Lyon, and was not a party to the action to foreclose the same—and asked that the plaintiff, Lyon, be declared a trustee of said land for her benefit. Upon this state of the pleadings, the case came on to be tried at Spring Term, 1876, of the Superior Court of Granville County, upon the following issues submitted to the jury: "(1) Was the land in controversy paid for in whole or in part with the funds of the defendant, Lydia J. Aiken, arising from the sale of her real estate, and, if so, how much of said fund was so applied, and when? Say that $150 was paid 15 March, 1850. (2) If the land was purchased with her funds, the proceeds of sale of her real estate, did the plaintiff have notice of that fact at the date of his mortgage from William E. Aiken, 23 July, 1861? Say he did. (3) What was the annual value of said land? Say $70. (4) Did defend-
ants, or either of them, commit waste on said land while (174)
in their possession, and, if so, to what amount? Say there was no waste." Upon the coming in of the verdict, the plaintiff moved for judgment "notwithstanding the verdict." And it appearing that the defendant, W. E. Aiken, and the defendant, Lydia J., intermarried in March, 1846, she being then 17 years of age; that in July, 1848, the husband purchased the land in controversy for $218, taking to himself a deed in fee simple therefor, and in 1850 paying for it with his wife's money, of which money $150 was derived from the sale of her land for partition; and the purchase having been made in July, 1848, and before November, 1848, when the act of the Legislature went into effect, preventing the sale of the wife's land by the husband without her joinder—the husband had an estate by the curtesy in said land for the term of his life, which he could convey. The Court therefore gave the plaintiff judgment for the possession of the whole tract of land, and $70 damages for the detention of possession by defendants. From this judgment the defendants appeal to the Supreme Court, where the judgment was affirmed, *Lyon v. Akin*, 78 N. C., 258. Upon the trial of this case at the Spring Term, 1900, of Granville, the plaintiffs stated that the papers—the judgment roll—of the

former action were lost, and diligent search had been made for them, and they could not be found. This was admitted by the defendant, and the plaintiffs then offered in evidence a duly certified transcript of the record of the case in the Supreme Court, containing summons, pleadings, issues, and judgment of the Superior Court of Granville County, and the judgment of the Supreme Court; also a transcript of the trial, issues, and judgment of the Superior Court of Granville County at Spring Term, 1879, upon the certificate of the Supreme Court. This evidence was objected to by the defendant, but allowed
(175) by the Court, and this is the principal question involved in this appeal. As we understand the defendant, he objected to it upon the ground that a record could not be proved except by a transcript of the record of the Court. The defendant further contended that it was incompetent, and, if admitted, that it would prove nothing, because there was no judgment upon the issues; that it stood as a judgment upon demurrer, which proved nothing, as the judgment "notwithstanding the verdict" was equivalent to setting aside the verdict, and the record then would not be competent evidence, and would prove nothing. We do not agree with the defendant as to these contentions. The defendant is the same person that was plaintiff in the former action. The plaintiffs are the heirs at law and assignees of the heirs at law of Lydia J. Aiken, the *feme* defendant in the former action, and the land in controversy is the same that was in controversy in the former action. So it would seem that there is every element contained in the record of the former trial necessary to constitute an estoppel, unless its effect is destroyed by the manner in which the judgment was rendered upon the record and issues found by the jury.

The first question to be considered is, was the transcript from the Supreme Court competent evidence? And it seems to us that this is hardly a debatable question. Where it appears that there has been a record, and it is lost or destroyed, the same may be supplied by other competent evidence. *Mobley v. Watts,* 98 N. C., 284; *Cox v. Lumber Co.,* 124 N. C., 78, and cases cited. But, to our minds, this is not secondary evidence. It is a certified copy of the very record of the former trial, which is the proper way of proving a record, and probably the only way, if objection is made. Then, if it was competent to offer this transcript in evidence, as we hold it was, it was like a prop-
(176) erly registered deed. It was competent evidence, though it might not prove what it was intended to prove. *S. v. Morris,* 84 N. C., 756. It is competent evidence, whether it amounts to an estoppel or not. This evidence being competent

and properly admitted, in our opinion it constituted an estoppel. The issues and the findings of the jury in the first action are incorporated in, and made a part of the judgment of the Court; and, although it is said that the plaintiff asked for judgment "notwithstanding the verdict," he was entitled to judgment against the defendant on the issues—the verdict—as found by the jury, and he had a judgment against them upon the verdict. It is true that he got a judgment for more than he would have been entitled to upon the findings of the jury. But this was owing to the fact that the husband was entitled to a life estate, as his curtesy, under the law in existence at the time the wife acquired title. We do not discuss this part of the law of the case, as it is so fully discussed and so clearly stated in the opinion in *Lyon v. Akin, supra.* It seems to be held by high authority that in some cases a judgment upon demurrer works an estoppel. Bigelow Estop. 56. Also, that a verdict, in a case between the same parties where the subject-matter in litigation is the same, though the judgment is different, may work an estoppel. This is called an "estoppel by verdict." Bigelow Estop., 90, 91. But, from the view we take of this case, it is not necessary to call into requisition either of these doctrines. The record being competent evidence, and the defendant having offered no evidence, it was sufficient to authorize the jury to find the verdict they did, even if it had not been an estoppel, as we think it was. *S. v. Morris, supra.*

The defendant's exception to the certificate of the Justice of the Peace to the deed of W. D. Vaughan and wife, and B. F. Tingen and wife to J. F. Sanderford, can not be sustained. *Lineberger v. Tidwell,* 104 N. C., 506; *Robbins* (177) *v. Harris,* 96 N. C., 557.

The exception taken by the defendant that plaintiffs have not proved an ouster can not be sustained. The defendant denied the plaintiff's title to any part of the land, and pleaded that he is sole seized. That was, in effect, to admit a demand and ouster. *Allen v. Salinger,* 103 N. C., 14; *Cable v. R. R.,* 122 N. C., 893.

The Judge did not direct the verdict, but instructed the jury, if they found certain facts, what their verdict should be; and the fact that he wrote their findings, if they agreed to them and returned them as their verdict, did not vitiate the same, though it may have been somewhat irregular. *Wool v. Bond,* 118 N. C., 1, 23 S. E., 923. So, upon a full consideration of the whole case, we are of the opinion that the judgment below should be affirmed.

Affirmed.

Cited: *Weeks v. McPhail,* 128 N. C., 133.

(178)

WILLIAMSON v. JONES.

(20 November, 1900.)

1. SHERIFFS — *Accounting — Insolvents—Fraud—Special Error—Defense—Taxes.*

   The auditing of account of sheriff by county commissioners is *prima facie* evidence of its correctness, and it is impeachable only for fraud or special error.

2. SHERIFFS—*Penalties—Taxes.*

   Where a sheriff fails to pay the taxes required by law, he is liable for penalty of $2,500, and 2 per centum monthly interest.

3. SHERIFFS—*Taxes—Defense—Insolvents—Pleadings.*

   Where defense of sheriff to an action on his bond for taxes due by him, is a refusal of credits to which he claims he is entitled, he must set out such credits specifically in his answer.

FAIRCLOTH, C. J., and DOUGLAS, J., dissenting.

ACTION by the State, on the relation of B. P. Williamson, Treasurer of Wake County, against H. T. Jones and the Fidelity and Deposit Company of Maryland, heard by Judge *W. A. Hoke,* at Spring Term, 1900, of WAKE, upon report of referee. From judgment for plaintiff, the defendants appealed.

Armistead Jones, for plaintiff.
Argo & Snow, for defendants.

CLARK, J. This is an action by the county treasurer against the sheriff and his bond for failure to pay the amount of taxes found to be due by him upon the auditing of his accounts by the county commissioners. The complaint avers that the defendant's account as sheriff had been audited by the committee appointed by the county commissioners, as provided by law, and the balance due by him ascertained, and (sec. 7) "that the account so audited was duly reported to the said board of county commissioners, and the same was approved by them, and filed with the clerk of the said board, and duly recorded on his book, and a copy of that, showing the amount due, was given to the defendant," appending thereto a copy of the report. The answer (sec. 7), avers "that it is admitted that the report was made to the said board, and filed, but the defendants aver that the said report was and is specially erroneous, and generally so in not giving the credits to which defendant Jones was entitled." The statute (Laws 1899, chap. 15, sec. 111).

(179)

provides that the fact that the account has been thus audited, reported to county commissioners, filed with the clerk, and recorded "shall be *prima facie* evidence of its correctness, and it shall be impeachable only for fraud or special error." The averment in the answer does not allege fraud or special error, and there can be no *probata* without *allegata*. The only other averment in the answer on the subject, "that said commissioners recklessly and unlawfully refused to credit defendant Jones with insolvents," is equally general, and as far from assignment of special error. Besides, the auditing was done by a committee. If defendants really had any cause of exception, they should have appended a list of the alleged insolvents claimed by the sheriff, under oath, as required by Code, sec. 3689, which were not allowed by the committee, if any, and which, on exception, were improperly and unjustly rejected by the county commissioners when they approved the report of the auditing committee. The sheriff is charged by law with the entire tax list, and the action of the county commissioners in relieving him from liability for insolvents is *quasi* judicial, and is presumed correct. This list he is required to publish at the courthouse door, under a penalty, that it may receive public scrutiny. (180) Code, sec. 2092. It is public policy that there should be as little delay as possible in collecting into the treasury for the support of the government the taxes received by the officer from the citizen. Therefore, all dilatory pleas are cut off, and, when an officer seeks to delay settlement by impeaching the integrity or correctness of his account, as adjusted by the county commissioners, he is required to show the *bona fides* of his objections by setting up under oath the fraud or the special errors which he avers in the account, and not a general "broadside" exception that there is error, which gives no information to the county authorities (who might admit it if specially pointed out), and imposes no liability upon the defendant for a false oath. If defendant by inadvertence (which is inconceivable in view of the explicit language of the statute), failed to make allegation of special error in the answer, he had ample opportunity thereafter to ask to amend and furnish a list of insolvents, which he claims should have been allowed him; but nothing of the kind appears. The statute is explicit, and, even in the absence of the statute, it would have been necessary, in order to impeach the account audited and settlement made by the county commissioners, to have averred fraud, or set out specially the errors assigned. *Commissioners v. White,* 123 N. C., 534 (in which the commissioners wished to attack the settlement); *Commissioners v. Wall,* 117 N. C., 377; *Suttle v. Doggett,* 87

N. C., 203; *Davenport v. McKee,* 98 N. C., 500. In this latter case, as in the present, the Judge thought the facts required the addition to the judgment of the penalty of 2 per cent monthly interest, and further penalty of $2,500 for detention of public funds, as authorized by our statute for a long time, and re-enacted in the same words by each General Assembly. Laws 1899, chap. 15, secs. 108, 112. These sections are ex-
(181) plicit and mandatory, and, indeed, there is no exception by defendants in this regard.

No error.

Cited: Com'rs v. Kenan, post 181.

COMMISSIONERS v. KENAN.

(20 November, 1900.)

[For syllabus, see preceding case of *Williamson v. Jones.*]

FAIRCLOTH, C. J., dissenting.

ACTION by the Board of Commissioners for the county of DUPLIN, trustees of the Dickson Charity Fund, and the State of North Carolina, on the relation of the Board of Commissioners and the County Board of Education of said County, against James G. Kenan, D. F. Chambers, Bland Wallace, A. F. Williams, L. M. Cooper, D. G. Morrisey, Thomas S. Kenan, W. L. Hill, and Stephen Graham, heard by Judge *Frederick Moore,* at Fall Term, 1900, of DUPLIN.

From judgment for plaintiffs, defendants appealed.

Stevens, Beasley & Weeks, for plaintiffs.
A. D. Ward, for defendants.

PER CURIAM. This case is governed by the decision in *Williamson v. Jones, ante* 178, and cases there cited. The account approved by the County Commissioners can not be attacked, except for errors specially assigned or fraud set up in the
(182) answer. Laws 1899, chap. 15, sec. 111. The agreement in this case that the pleadings might be amended has no bearing, for the amended answer does not comply with the statute.

It is unnecessary to consider the other assignments of error, for, when the case goes down, it is in the power of the Judge to permit amendments, and the contentions of the parties may be thereby materially changed.

New trial.

WILLIAMS v. SHOEMAKER.

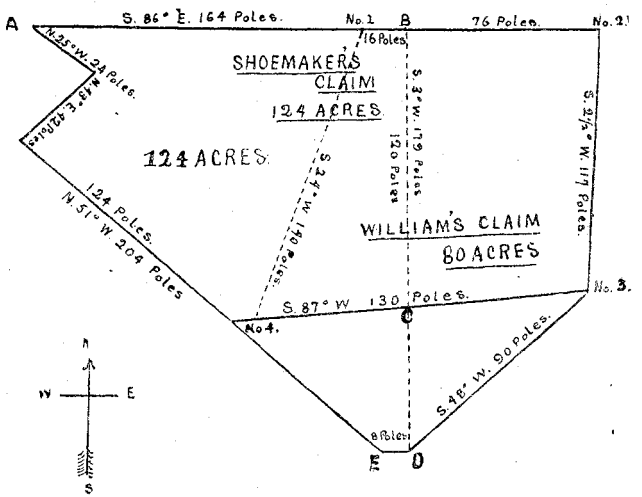
(20 November, 1900.)

1. BOUNDARIES—*Evidence to Establish—Sufficiency.*

Evidence in this case is held to be sufficient to warrant charge of Court to the jury to find the boundary claimed by the defendant.

ACTION by O. G. Williams vs. M. H. Shoemaker, guardian, Luphelia Dishman and her husband, Elam Dishman, Elizabeth Shoemaker, Delpha Shoemaker, Florence Shoemaker and James Shoemaker, heard by Judge *E. W. Timberlake* and a jury, at February Term, 1900, of IREDELL.

(183)



MAP.

From judgment for defendants, plaintiffs appealed.

L. C. Caldwell and *W. G. Lewis,* for plaintiffs.
B. F. Long, and *Armfield & Turner,* for defendants.

MONTGOMERY, J. The plaintiff instituted this proceeding before the Clerk of the Superior Court, under chapter 22, Laws 1893, to have established a line between himself and the defendants. It was transferred to the Superior Court in term, and the following issue was submitted to the jury: "Which is the true line between the plaintiff and the defendants—the line from 1 to 4, as claimed by the plaintiff, or the line from B to D, as claimed by the defendants?" His Honor instructed the jury that if they believed the evidence, they would locate the land between plaintiff and defendants from B to D, and that they answer the issue "from B to D," and the exception by the plaintiff to that charge is the only exception in the case. The plaintiff put in evidence a grant to himself from the State to the land which he claimed, and also a deed from one
(184) Hall to Burwell Shoemaker to the tract of land which the defendants claim. The point of beginning (the first call) in the Shoemaker deed is shown by all the witnesses to be a white oak at the letter A on the map. The call (second) from A is east 164 poles to a stake in the field on Sharpe's line. The claim of the plaintiff is that the line last mentioned should not have been run 164 poles, but that it should have been stopped at 1, a marked maple tree 148 poles from A. The land in dispute is almost a parallelogram, 16 poles at one end, and the other end being a little longer; the line claimed by the plaintiff running northwest and southeast from 1 to 4 on the map, and that claimed by the defendants being almost due north and south from B to D on the map. The survey of the plaintiff's tract, as it appears upon the map, locates the beginning point at the letter B, 164 poles from A, the beginning of the Shoemaker tract, according to the call; and the subsequent calls are followed according to courses and distances mentioned in the grant, the other corners represented by the figures 2 and 3 and the letters D and B. The plaintiff in his examination fixed the line as claimed by the defendants from B to D. He testified on cross-examination: "I entered this land. I was one of the commissioners to divide it among the minor heirs of Burwell Shoemaker, and while having it surveyed I found that the Shoemakers had no deed for the land I entered. I entered it the next day. Shoemakers had been in possession of the land for many

years, but I knew that they had no record, and I entered it, and brought suit and gained it. The first call in my grant 'begins at a pine, Shoemaker's corner.' There is a pine at B. When I had it surveyed, I directed the surveyor to start at the pine at B, and run from there to 2; thence to 3, thence to D; thence to B, the beginning. This will give me all the land I entered, and for which I received a grant. I do not know where the line between Shoemaker and myself is. That is what I (185) am trying to find out."

The only possible ground we can see upon which the plaintiff rested his claim was in the suggestion made in the brief of his counsel that G. W. Clegg, one of the witnesses, testified that he knew the old man Shoemaker, the point 1, the maple, and told him it was his (Shoemaker's) corner. But it appeared in the examination of Clegg, that the conversation with Shoemaker occurred 28 years before the trial; that at that time Shoemaker owned both sides of the disputed line; that he owned the Sharpe place, also; and that the maple at 1 was a corner of the Sharpe land, and is no part of the land in dispute. We have read with interest the testimony of the surveyor concerning the method by which he located the southern end of the line, claimed by the defendants at D on the map—the third call in the deed—and the brief of the defendant's counsel on that matter, but it is not necessary to make any decision on that point in this case.

No error.

(186)

AUTRY v. FLOYD.

(20 November, 1900.)

1. FORMER ADJUDICATION—*Res Judicata—Judgment—Estoppel—In Forma Pauperis.*

   The dismissal of an action for want of a prosecution bond and a denial of motion of plaintiff to prosecute the action without giving further security, will not bar a subsequent action for the same cause of action *in forma pauperis.*

2. MALICIOUS PROSECUTION—*Evidence—Witness—Competency—Malice.*

   In action for malicious prosecution, defendant may testify as to whether he was influenced by malice in instituting the prosecution.

ACTION by C. P. Autry against E. Floyd, heard by Judge *H. R. Bryan* and a jury, at Spring Term, 1900, of CUMBERLAND. From judgment for plaintiff, the defendant appealed.

N. A. Sinclair, for plaintiff.
S. M. Wetmore, for defendant.

FURCHES, J. The plaintiff was a mortgagor to Mrs. Floyd, wife of the defendant in this action, and who procured a State warrant, to be issued by a Justice of the Peace, against the plaintiff, Autry, for disposing of mortgaged property. The Justice of the Peace bound the plaintiff, Autry, to court, where Floyd procured a bill of indictment to be sent to the grand jury, who found it to be "a true bill." But upon the trial, the plaintiff, Autry, was acquitted, and brings this action against the defendant (in this action), Floyd, for malicious prosecution. Upon the trial the plaintiff, Autry, recovered, and the defendant, Floyd, appealed. He puts his appeal upon many
(187) exceptions, but it is only necessary for us to consider the first two.

It appears from the transcript of record that the plaintiff had commenced another action in the Cumberland Superior Court before this for the same cause of action and against the same defendant, and that said former action had been dismissed for the want of security for the prosecution, and that the plaintiff had moved the Court in that action for leave to prosecute without giving further security, which motion was denied; and the defendant moves to dismiss this action for the reason that the action of the Court in the former action estops and prevents the plaintiff from prosecuting this action *in forma pauperis.* We do not agree with the defendant in this contention, and the ruling of the Court in refusing this motion to dismiss is sustained.

The defendant's second exception must be sustained. The defendant was examined as a witness in his own behalf, and was asked by his counsel the following question: "Were you influenced by malice in instituting the prosecution? (Plaintiff objects upon the ground that it was a matter for the jury to say, and not himself. Objection sustained, and defendant excepted.)" Section 589 of The Code provides: "No person offered as a witness shall be excluded by reason of his interest in the event of the action." The defendant was, therefore, a competent witness, and, as such, it would seem that he might testify in any matter involved in the litigation, not excluded by section 590 of The Code, or as to such matters as public policy prevents a party from testifying to, as in *S. v. Brittain,* 117 N. C., 783. This evidence is not excluded by section 590, nor does it seem to be prohibited by any public policy known to us. But it seems that the defendant's exception is sustained by *Nixon v. McKinney,* 105 N. C., 23; *Phifer v. Erwin,* 100 N. C., 59; *McKown v.*

Hunter, 30 N. Y., 625. We are therefore of the opinion (188) that this question and evidence were competent, and the evidence should have been allowed to go to the jury. As this error permeates the whole trial, it would hardly be proper for us to express an opinion upon any other exception. The error, as pointed out in this opinion, entitles the defendant to a new trial.

Error.

JONES v. WILMINGTON AND WELDON RAILROAD CO.

(20 November, 1900.)

1. JUDGMENT—*When Supreme Court will reverse judgment of Court below—Issues—Special Verdict.*

   The Supreme Court will not reverse the judgment of the trial court, where issues were submitted to the jury, and a verdict rendered, unless the verdict was a special one.

2. APPEAL—*Premature—Exception.*

   An appeal from the refusal of the trial court, to dismiss an action in accordance with an opinion of the Supreme Court, is premature.

3. PROBABLE CAUSE—*Malicious Prosecution—Preliminary examination before Justice of the Peace—Waiver.*

   The voluntary waiver of a preliminary examination before a justice of the peace is an admission of probable cause.

DOUGLAS, J., dissents from the opinion only *arguendo.*

ACTION by William Wright Jones against the Wilmington and Weldon Railroad Company, heard by Judge *Henry R. Bryan,* at May Term, 1900, of CUMBERLAND. From refusal of trial Court to sign judgment dismissing the action, defendant appealed. For opinion, see 125 N. C., 227. (189)

N. A. Sinclair, W. A. Stewart, and *Douglass & Simms,* for plaintiff.

George M. Rose, for defendant.

MONTGOMERY, J. At the September Term, 1899, of this Court, a decision was made in this case, and the opinion duly certified to the Superior Court of Cumberland County. In that opinion, for errors in certain instructions, given by his Honor in the Court below, a new trial was ordered. The action was begun by the plaintiff to recover damages against the defendant for malicious prosecution. The plaintiff had waived examina-

tion before the Justice of the Peace, and had given bond for his appearance at Court. His Honor refused to instruct the jury, unqualifiedly, at the defendant's request, that the waiving of the preliminary examination before the Justice of the Peace was *prima facie* evidence of probable cause. It appearing to this Court, that from the whole of the evidence the waiver of the preliminary examination by the plaintiff was voluntary, it was decided that that act was a confession of probable cause, so far as the action of the defendant in procuring the warrant for his arrest was concerned, and this Court further said that the waiving of the examination before the Justice was fatal to the plaintiff's cause of action. At the next term of the Superior Court, after the opinion of this Court had reached the Superior Court, a judgment of dismissal of the plaintiff's action was tendered to his Honor for his signature, and his Honor refused to sign it, and the defendant appealed. In our opinion in this case, delivered at the Fall Term, 1899, we did not undertake to reverse the judgment of the Court below. That course is never followed when issues have been submitted to the jury and a verdict rendered, unless the verdict is a special one. We did intend,
(190) however, to intimate that, when the case was called again for trial in the Superior Court, the jury should be instructed, under our decision, that they should answer the issue against the plaintiff's claim; the presumption being, of course, that the plaintiff's evidence on the waiver of the examination before the Justice of the Peace, and his giving bond for his appearance at Court, was true. But the appeal was premature, and must be dismissed. The defendant should have noted its exception, and gone on with the trial of the case.

Appealed dismissed.

ARRINGTON v. ARRINGTON.

(20 November, 1900.)

1. JUDGMENT—*Foreign Judgment—Divorce—Alimony—Res Judicata.*

   Under Federal Constitution, Art IV, sec. 1, a judgment for divorce, rendered in another State, is *res judicata*, and binding on the parties in an action on the judgment.

2. LIMITATION OF ACTIONS—*Judgment—Lex Fori—Foreign Judgment.*

   The plea of the statute of limitations in an action on a foreign judgment is a plea to the remedy and the *lex fori* should govern.

3. LIMITATION OF ACTIONS—*Judgment—Alimony.*

In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they become due.

CLARK and DOUGLAS, JJ., dissenting. (191)

ACTION by P. D. B. Arrington against W. H. Arrington, heard by Judge *W. A. Hoke,* at April Term, 1900, of WAKE. From judgment of nonsuit, plaintiff appealed.

Douglass & Simms, for plaintiff.
B. H. Bunn and *F. S. Spruill,* for defendant.

FAIRCLOTH, C. J. It appears from the record in this case that the plaintiff and defendant were married in North Carolina about 1869, and that they lived together as man and wife in said State until 1879, when the plaintiff removed to the State of Illinois, and acquired a residence in that State; the defendant remaining a citizen of North Carolina until the present time. It also appears that the plaintiff, after acquiring her legal residence in the State of Illinois, about 1879, or 1880, instituted an action, or bill, for divorce against the defendant in the Circuit Court of Sangamon County, in said State of Illinois (a court of competent jurisdiction), alleging facts and matters, such as the violence and cruel treatment of her husband, as would entitle her in North Carolina to a divorce *a mensa et thoro,* which matters are adjudged in the State of Illinois sufficient to authorize a decree of dissolution of the bonds of matrimony; that is, a divorce *a vinculo.* After notice by publication, etc., the defendant appeared in said proceeding by an attorney; and in November, 1881, it was adjudged and decreed in said proceeding that the plaintiff be divorced and separated from the bonds of matrimony theretofore existing between her and her husband, the defendant therein, and that she have the care, custody, and education of their children. It was also adjudged that the defendant pay to the complainant for her alimony and maintenance, annually, the sum of $154, until the further order of the Court (said payments beginning and dating from 1 June, 1879, and to be payable semi-annually), and that the defendant also pay annually to the complainant $300 for (192) the care, custody, support, and education of their children, payable semi-annually till the further order of the Court (said last payment to begin and date from 1 June, 1879). The plaintiff, now a resident of North Carolina, brought this action to recover the amount due on said Illinois judgment, alleging nonpayment of the same, and files a duly authenticated

transcript of said record and judgment in this action. The effect of this judgment on the property rights of the plaintiff was before this Court in 1889, in *Arrington v. Arrington,* 102 N. C., 491, and it was held that said Illinois judgment of divorce was valid and binding. In the present action, among other defenses, the defendant relies on the statute of limitations. At the trial, when the pleadings were read, his Honor was of opinion that the plaintiff's action was barred by the statute, and thereupon the plaintiff took a nonsuit and appealed.

It is admitted that by the law of Illinois, alimony may be allowed when an absolute divorce *a vinculo* is granted. We might dispose of this appeal on this simple ruling, but another question is important to be settled and understood, to which the arguments were chiefly addressed, and we feel that it is proper to consider it. That question is, what is the force and effect of said judgment when sued upon in North Carolina, where both parties now reside. Is it *res judicata,* and binding on the parties, or can the defendant now plead to the merits of the original cause of action? This depends upon the construction given to Article IV, sec. 1, of The Constitution of the United States, in these words: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." By the act of
(193) 26 May, 1790, c. 11, Congress provided for the mode of authenticating the records and judicial proceedings of the State courts, and then further declared that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." At common law the judicial proceedings, etc., of foreign nations are not taken notice of, nor admitted as of course, by our Courts. They must be proved like other facts when brought into controversy in any suit. Whatever regard for them has been shown is the result of treaty, or mere comity. In the American colonies, before the adoption of our Constitution, there was no uniform rule as to judgments in other colonies. Some of the colonial courts held these judgments conclusive; some hold that they were not; some, that they were *prima facie* valid, open to be controverted by new proofs, etc. So that there was little or no extra-territorial force or effect given to foreign or domestic judgments. The latter were uniformly held conclusive on the parties in the colony, or State in which they were rendered, and

not open to be controverted or impeached with new proofs. No one will fail to see how inconvenient this system, before the adoption of our Constitution, must have been, and the attending danger of the grossest injustice. Suppose a judgment in one State, in a court having jurisdiction, after a trial and verdict by a jury upon a contract, or for a trespass or other just cause of action, in a place where all the witnesses lived; and after awhile the defendant should reside in another State, and material witnesses should die or remove, so that their testimony could not be had, and the defendant in a new suit could controvert anew all the facts found by the jury in the original suit, and so again and again; there could be no certainty of any just redress to the plaintiff. It must have been the pur- (194) pose, therefore, of the Constitution (Art. IV, sec. 1), with appropriate legislation, to suppress this irritation and mischief between citizens of different States, by declaring that full faith and credit should be given to the judicial proceedings, etc., of every other State. Any other interpretation would give no efficacy to that clause, and leave suitors in the same condition as they were before Art. IV, sec. 1, was adopted.

In 1813 the question was presented to the Supreme Court of the United States in *Mills v. Duryee,* 7 Cranch, 481, and it was held that *"nil debit* is not a good plea to an action founded in a judgment of another State." There a valid judgment had been rendered in New York State, and upon the certified copy a suit was instituted in the District of Columbia. STORY, J., for the Court, said: "It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument can not be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the State Court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature (viz., record evidence), it must have the same faith and credit in every other court. Congress has therefore declared the effect of the record by declaring what faith and credit shall be given to it. * * * Another objection is, that the act can not have the effect contended for, because it does not enable the courts of another State to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same State where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judg- (195) ments may be complete and perfect and have full effect, independent of the right to issue execution." "A decree for

the pay of alimony, like any other money decree, may be collected by execution, where the decree does not provide for its being executed by a master in chancery, or a commissioner. An execution may issue precisely as upon a judgment at law." *Dinet v. Eigenmann,* 80 Ill., 274. In 1818, the question came up in *Hampton v. McConnell,* 3 Wheat., 234, where MARSHALL, C. J., said: "This is precisely the same case as that of *Mills v. Duryee, supra.* The doctrine there held was that the judgment of a State court should have the same credit, validity, and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States." The same conclusion is repeated in *McElmoyle v. Cohen,* 13 Pet., 312; *Christmas v. Russell,* 5 Wall, 303, and *Cheever v. Wilson,* 9 Wall, 123, and others.

The question and the authorities are reviewed in *Barber v. Barber,* 21 How., 582. The parties resided in New York, where a decree of separation *a mensa et thoro* was entered. It was also adjudged that, for the purpose of maintenance of Mrs. Barber, there should be allowed and paid to her by the defendant, in quarterly installments, the annual sum of $360 in each and every year, from the day the bill was filed, during her life, and in case it was not so paid, the quarterly payments should bear interest as they respectively became due, and that execution might issue therefor, *toties quoties.* It was also decreed that the defendant should pay forthwith $960, being the alimony retrospectively due, and the plaintiff should have execution therefor. Soon after the decree of divorce and for alimony was made, the

(196) defendant removed to the State of Wisconsin, without paying any of the alimony due; and, upon a duly authenticated transcript of the papers in that suit, a suit was instituted in Wisconsin for the amount of the alimony due by the defendant. The case went to a hearing on the pleadings and proofs, and a judgment was entered in favor of the plaintiff according to the judgment in New York; and on appeal, the Supreme Court of the United States held that the court of Wisconsin had committed no error in sustaining its jurisdiction, nor in the decree which it had made. In this case, the Court remarks: "The parties to a cause for a divorce and for alimony are as much bound by a decree for both which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as

such by other courts. And such a judgment or decree rendered in any State of the United States, the Court having jurisdiction, will be carried into judgment into any other State, to have there the same binding force that it has in the State in which it was originally given." When the marital control and protection have been lost by a judgment of divorce, a decree for alimony "becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that can not be done, on account of the husband having left or fled from that jurisdiction to another, where the process of that court can not reach him, the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the State in which the decree was given. Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the de- (197) cree has been recalled, as any other judgment for money is." 21 How., 595. This doctrine has been expressly declared in several of our States.

In the cases cited, it appears that decrees for alimony due and collectible *in futuro* by installments annually are as efficacious and binding on the parties as if they were collectible as soon as they are recorded. From the authorities we have examined, it seems to be assumed that either party, upon a change of circumstances, may move in the court that made the decree to have the decree modified or discharged, as may seem proper in the opinion of that court. In harmony with the foregoing authorities are several cases in North Carolina. *Irby v. Wilson,* 21 N. C., 578; *Davidson v. Sharpe,* 28 N. C., 14; *Miller v. Leach,* 95 N. C., 229; *Walton v. Sugg,* 61 N. C., 98. In these cases, the conclusive effect of the judgment rendered in another State is recognized, holding that the record, properly authenticated, is the highest and most conclusive evidence. In all cases where the defendant is not served with legal notice, and not present in person or by attorney, the original judgment in another State is a nullity.

2. As to the statute of limitations: This, as we understand the record, is the only question on which his Honor intimated an opinion. The plea of the statute, in an action in our State on a judgment obtained in another State, is a plea to the remedy, and consequently the *lex fori* must prevail in such an action. *McElmoyle v. Cohen,* 13 Pet., 312. That, in North Carolina, is the 10-years statute. Code, sec. 152. The language

is, "From the date of the rendition of said judgment or decree." That must refer to a judgment which is at once due and collectible. It can not reasonably intend a judgment which in terms is not due and collectible until a future day, without presenting the absurdity of a statute barring or running against a judgment debt before the debt is due or collectible. We
(198) are of the opinion, therefore, that the annual sums adjudged in favor of the plaintiff which became due and collectible more than ten years before the institution of this action, are barred by The Code (section 152), and that those that became due within the ten years are not barred.

Error.

CLARK, J. (dissenting). This is an action for $7,836, alleged to be due for arrearages of alimony upon a judgment rendered in an Illinois court, November, 1880, decreeing an absolute divorce, and the payment of $154 alimony annually, and $300 annually for support of the children awarded to the custody of the wife. The laws of this State do not recognize alimony after the grant of an absolute divorce, and, in the nature of things, the children, or most of them, must long since have become of age. Besides, by the universal law, that part of the judgment which is alimony and maintenance of the children, is subject to modification by the court at any time, and is therefore interlocutory, and not a final judgment, upon which alone an action can be brought in the court of another State. In a very recent and well-considered opinion (*Lynde v. Lynde*, 162 N. Y., 405), the Court of Appeals of New York held, affirming 41 App. Div., 280, 58 N. Y. Supp., 567, that while a decree for alimony in a lump sum, or past alimony, is a final judgment, upon which an action can be brought in the courts of another State, a judgment for payment of alimony in the future is not such a judgment that action can be maintained upon it in the courts of another State. The reasoning and the authorities cited in this case (162 N. Y., 418-420, and cases there cited) leave nothing to be added. For these reasons, it is clear that the complaint does not state facts to constitute a cause of action.

Without citing further authorities upon propositions
(199) which would seem self-evident, the Judge below followed the plain, unambiguous language of the statute, when he held the cause of action barred by the statute of limitations. Code, sec. 152 (1) bars an action after ten years "upon a judgment or decree of any court of this State, or of the United States, or of any State or territory thereof, from the

date of the rendition of the said judgment or decree." The date of the rendition of the judgment in Illinois sued on is 16 November, 1880, and the date of the summons in this action is 27 March, 1899. This leaves no room for argument. There is no exception in the statute as to judgments upon which executions are to issue at stated periods thereafter, nor as to decrees in divorce, or any other kinds of decrees. The statute may be defective, in that it did not except some judgments from the limitation, or did not provide that, as to judgments framed like this, the statute should not run from the rendition of the judgment, but from the falling due of each payment. But, as this Court once justly observed, through Judge DANIEL, "We can not be wiser than the law." The Court has no legislative authority. It can not put into the statute words which the law-making power did not put there, nor amend it because we may think the General Assembly might have written the law differently if its attention had been called to this case, as to which our opinion might be at fault. The language of the statute bars actions on all judgments after the lapse of ten years "from the date of the rendition of said judgment," not from the date of its performance. The plaintiff could have sued on the judgment within ten years from its rendition, 16 November, 1880, and, not having chosen to do so, she is barred by the statute from bringing this action, which is upon that judgment. A State statute of limitations is a bar to an action in a State court upon a judgment rendered in a court of the United States, or of another State. *McElmoyle v. Cohen,* 13 Pet., 312; 13 Am. and Eng. Enc. Law (2 (200) Ed.), 1033, note 3. It is the statute of limitations of the State in which the action is brought which governs, and not that of the State in which the judgment sued on is rendered. *McElmoyle v. Cohen, supra;* 13 Am. and Eng. Enc. Law (2 Ed.), 1033, note 5; *Ambler v. Whipple,* 139 Ill., 311. The North Carolina statute contains no exception. It is too plain to be misunderstood by anyone, and the Court has no power to correct or amend it, as if the act of the General Assembly were the action of a subordinate court.

DOUGLAS, J., concurs in the dissenting opinion.

Cited: *S. c.*, 131 N. C., 144, in which the dissenting opinion herein was held to be the base.

HATCHER v. HATCHER.

(20 November, 1900.)

1. DEEDS—*Probate—Acknowledgment—Registration—Partition.*

Where probate of deed recites the acknowledgment and privy examination of the wife of the grantor only, it is insufficient and does not authorize registration.

2. DEEDS—*Probate—Evidence—Competency.*

Where probate of deed is insufficient, it is competent to prove acknowledgment of grantor before justice of the peace, if the deed is in evidence, or there is an averment that the deed is lost.

ACTION by William Hatcher and I. H. Hatcher against B. H. Hatcher, Betsy Wilkins, Tempie Hatcher, and others, heard by Judge *George H. Brown, Jr.,* at Fall Term, 1900, of CUMBERLAND. From judgment of nonsuit, plaintiffs appealed.

(201) *George M. Rose,* and *Robinson & Shaw,* for plaintiffs.
N. A. Sinclair, and *D. T. Oates,* for defendants.

CLARK, J. This is a petition for partition, transferred upon issue of *sole seisin* to the Superior Court. This assimilates the proceeding to an action in ejectment. *Alexander v. Gibbon,* 118 N. C., 796. The plaintiffs claim their interest under a deed as to which the acknowledgment and privy examination of the wife of the grantor were duly taken by a Justice of the Peace, but he failed to enter any acknowledgment by the grantor himself. In that condition the probate was adjudged in due form by the clerk, and the deed ordered to registration, and registered. It is clear that there were no valid probate and registration as to the grantor therein. *Todd v. Outlaw,* 79 N. C., 235; *Duke v. Markham,* 105 N. C., 131. At the trial, the plaintiffs attempted to offer direct proof of execution as at common law. To that end they offered the deposition of the Justice of the Peace, tending to show that the grantor did acknowledge the execution to him, but by inadvertence he failed to enter it with the acknowledgment and privy examination of the wife. It would be competent to prove execution by such acknowledgment if the deed had been produced in court. The deposition of the Justice of the Peace was competent, it being under circumstances authorizing a deposition to be used. But the deed was not in court, and, strangely enough, the plaintiffs offered to prove by their oath that the deed had never been in their possession. If the plaintiffs had amended their complaint in the

Superior Court to aver loss of the deed, they could have joined a prayer to set up such lost deed with a demand for partition. *England v. Garner,* 86 N. C., 366, and other cases cited in Clark's Code, sec. 267 (1). But there is no such (202) averment, and in the absence of the deed itself, the plaintiffs could not be allowed to prove the execution of the deed by direct proof.

The nonsuit is affirmed.

Cited: Bullock v. Bullock, 131 N. C., 30; *Cook v. Pittman,* 144 N. C., 531.

(203)

WILKIE v. RALEIGH AND C. F. RAILROAD CO.

(20 November, 1900.)

1. NEGLIGENCE—*Master and Servant—Injury—Railroad Track—Negligence per se.*

   Failure of railroad company to construct and maintain a safe roadbed is negligence *pe se.*

2. NEGLIGENCE—*Burden of Proof—Injury to Servant—Railroads—Master and Servant.*

   When a defendant railroad admits negligence, the presumption is that such negligence was cause of injury to employee.

3. NEGLIGENCE—*Assumption of Risks—Master and Servant—Track—Section Master.*

   Section master of a railroad has the right to assume that the track is safe, while traveling over it on a handcar.

4. NEGLIGENCE—*Master and Servant—Injury to Servant—Damages—Proximate Cause.*

   When there is a defect in a railroad track, and it is shown to be the proximate cause of injury to employee; and employee and railroad company have equal knowledge of such defect, the employee can not recover.

5. DAMAGES—*Evidence—Competency—Master and Servant—Personal Injuries.*

   An employee may prove any facts which tend to show his earning capacity, in an action for personal injuries.

6. NEW TRIAL—*Newly-Discovered Evidence—Laches.*

   New trial for newly-discovered evidence will not be granted, unless due diligence was used to secure the same.

7. NEW TRIAL—*Cumulative Evidence—Newly-Discovered Evidence.*

   New trial will not be granted for newly-discovered evidence which is merely cumulative.

8. INSTRUCTIONS—*Harmless Error—Judge.*

Where the Court in its charge to the jury generally used the formula, "if you find from the evidence," the use of the words, "if you believe," etc., in parts of the charge not material, was harmless error.

9. INSTRUCTIONS—*Special Instructions—Trial.*

The Court need not give special instructions where they are substantially included in the charge of the Court.

10. COMPLAINT—*Sufficiency—Cause of Action.*

The complaint in this case states a cause of action.

ACTION by C. D. Wilkie against the Raleigh and Cape Fear Railroad Company, heard by Judge *Frederick Moore* and a jury, at Spring Term, 1900, of CHATHAM.

From judgment for plaintiff, the defendant appealed.

Womack & Hayes, for plaintiff.

(208) *Douglass & Simms*, for defendant.

FURCHES, J. This is an action for damages received by the alleged negligence of defendant company. The plaintiff was an employee of the defendant at the time of the injury complained of, and, while he did not occupy the position of a "section master," his business was to do the work of a section master. He and a man by the name of Moring each had a squad of hands that worked under them, doing such work. But neither he nor Moring had any separate part or section of the defendant's road assigned to them, but they worked on any part of the road, under the directions of Mr. Mills, the President and Superintendent of the road; that the plaintiff had been sick and absent from the road, at his home in Chatham County, for two weeks just before he received this injury; that on his return to his work, Mr. Mills furnished him with a bill, or memorandum, of 11 points on the road that needed repairs. The ninth of these was in following language: "(9) Low joint south of second trestle below Willow Springs;" and it is contended by the defendant that this is the point at which the injury occurred. But this was disputed by the plaintiff, and both sides introduced evidence as to this being the point where the injury was received. The plaintiff and crew that worked under him were traveling over the road on a handcar at the time of the injury, the plaintiff standing upon the car when it became derailed, and, from the sudden jar, the plaintiff was thrown off and injured. The theory of the plaintiff is that

there was what is called a "dodged joint" in the road at this point; that defendant's duty was to keep its roadbed in good repair; that it was its duty to know if it was not in good condition, and that in fact it did know that its road was not in good condition, and that it negligently allowed it (209) to remain in bad condition, and that this negligence was the cause of the plaintiff's injury. The defendant contended that the plaintiff's own negligence was the cause of his injury; that he was running this car at too great speed at the time of the injury, by reason of which the car was derailed; that the car was worked by means of a lever, and was jerked off the track by the violent manner in which the lever was worked; that the plaintiff had been cautioned by the defendant against running his car so fast over the road, but continued to do so, in violation of the orders of the defendant; that, had the plaintiff been running his car at a proper rate of speed, the accident would not have occurred; that in this way the plaintiff, by his own negligence, was the author of his injury, and was not injured by the negligence of the defendant. The defendant also contended that the plaintiff was employed by defendant to do this work, and that he assumed the risk of danger and damage connected therewith, and that he can not recover on that account.

A great many points were raised and discussed during the trial below and here. But the principal questions, as it seems to us, are those we have stated, and will be first discussed. Both sides offered a great amount of testimony to sustain their contention, but it is not necessary that we should repeat or discuss the same at this time, as it seems to us it was fairly submitted to the jury. There is one exception to evidence which it will be necessary for us to notice before we conclude this opinion.

The defendant makes a great number of exceptions to the charge, all of which have been examined, but only a few of them will be discussed, as they can not be sustained, and their discussion would be of no benefit. The plaintiff's right to recover depends upon the application of the principles of law to the contention of the parties as to the negligence (210) of plaintiff and the negligence of the defendant—as to whether the injury was caused by the negligent speed and manner in which the plaintiff operated his car, or whether it was caused by the negligence of defendant in not making and keeping its road and roadbed in good and safe condition. It was the duty of the defendant to construct and maintain a safe roadbed, and a failure to do so is negligence *per se*. *Marcom v.*

R. R., 126 N. C., 200. It is admitted by the defendant that its roadbed was not in a good and safe condition at the point where this injury occurred, and that the defendant knew it was not. From this admitted negligence of the defendant, it will be presumed that defendant's negligence was the cause of plaintiff's injury. *Marcom v. R. R., supra.* And the burden is then cast upon the defendant to show that it was not its negligence, but that it was the negligence of the plaintiff, or that it was the concurrent negligence of the plaintiff, that caused the injury, or, as in Marcom's case, *supra,* it was caused by acts or influences over which the defendant had no control. The defendant in this case undertook to do this by showing that plaintiff was its employee, and in charge of the work of examining the roadbed and repairing the same; and, although it might have been the defect in the roadbed—the "dodged joint"—that caused it, that it was his fault and negligence that it was not repaired. But the evidence was that plaintiff had been absent for two weeks on account of sickness, and he testifies that the roadbed was in good condition when he left, and that he had not had time or opportunity to inspect the road after his return, as he had been working under the special directions of Mills, the general superintendent; and he denies that this defect was one of those mentioned in the list furnished him by the superintendent, or, if it was, it was not so described as to point it out to him as one of the points
(211) on the road that needed repair. These contentions were submitted to the jury, with proper instructions, as it seems to us.

The defendant also contended that the injury was caused by the concurring negligence of the plaintiff, in the manner and speed at which he ran and operated his car, and that the injury would not have occurred but for that, although the roadbed was defective. This contention, it seems to us, was also left to the jury, with proper instructions.

It is also contended by the defendant that, by the nature of plaintiff's employment, he assumed all risks incident thereto, and that he can not recover on that account. But we do not agree to this contention of the defendant. It is the duty (as we have stated) that defendant shall make and keep its roadbed in good and safe condition. The defendant admits that its roadbed was not in a good and safe condition at this point, and it knew it was not. The plaintiff had the right to assume it was in good condition if he did not know of the defect, as the jury must have found under the charge of the Court. The Court upon this point charged the jury as fol-

lows: "If the jury shall find from the evidence that there was a defect in the defendant's track, in regard to a 'dodged joint,' or a low joint, and shall further find that such defect was the proximate cause of the plaintiff's injury, yet, if the jury shall further find that both plaintiff and defendant had equal knowledge of the existence of said defect, then plaintiff can not recover." "If the jury shall find from the evidence that the proximate cause of the plaintiff's injury was a 'dodged joint,' or a low joint, in defendant's track, and that plaintiff had knowledge of the existence of such defect, or, in the course of his employment, should have known of the existence of the same, the plaintiff can not recover of defendant damages for such injury." This, we think, takes out of the case any grounds for the claim by the defendant that the plain- (212) tiff can not recover on account of his assumption of risk.

The defendant asked for several special instructions, which were not given by the Court. But the only one to which it was entitled was given in the charge of the Court in almost the exact language of the prayer, it being that part of the charge of the Court that we have quoted above.

The plaintiff was allowed, over the objection of defendant, to testify, with the view of fixing the amount of his recovery, that he was receiving $40 per month, or $480 per year, from the defendant company, and that he was making, in addition to this, a profit by selling rations to the railroad hands sufficient to make his earnings $600 per annum. It may be that this was not a very proper way of increasing his earnings, as was argued by the defendant's counsel. But we do not see enough of these transactions to judge of this matter. It may have been that he furnished these rations at a reasonable profit, and that it was an accommodation to the hands for him to do so. And it may be that he received this employment at $40 per month with this privilege, when he would have charged the defendant $50 per month without it. And as we can not see that there was anything wrong in these transactions, and the evidence was for the purpose of showing his earning capacity, we think it was competent.

The defendant also demurred *ore tenus* to the plaintiff's complaint, and contended that it did not state a cause of action. But we can not sustain his demurrer.

The defendant, during the progress of the trial below, moved, under chapter 109, Laws 1897, eight times, to dismiss the plaintiff's action, and each time its motion was refused, and it excepted; and the defendant in its argument here insists that it was right in all of the eight motions. But we find

(213) it to be our duty to sustain the ruling of the Judge below as to all eight of these motions. This, it seems to us, was to overwork the "Hinsdale Act."

The defendant also moved before us for a new trial for newly-discovered evidence. But it does not seem that the defendant used that diligence in trying to procure this new evidence that it should have done; these new witnesses all being known to defendant, living in the neighborhood, and employees of defendant. *Shehan v. Malone,* 72 N. C., 59; *Simmons v. Mann,* 92 N. C., 12. Besides, it was only cumulative evidence, and a new trial will not be granted for such evidence. *Love v. Blewit,* 21 N. C., 108. This motion is refused.

The Judge in charging the jury generally uses the approved formula, "if they shall find from the evidence." But in three paragraphs of his charge he uses the words, "if you believe," and the defendant excepts to this, and cites *S. v. Barrett,* 123 N. C., 753. When that opinion was written, it was supposed that such charges were made through carelessness and inattention, and we were in hopes that, upon the attention of the Judge being called to the matter, it would be corrected. The objection to this style of charging a jury is substantial. A juror should be governed in his findings by the evidence. Often jurors know something of the facts of a case, outside of the evidence, that causes them to believe that it is a certain way, and yet it would be highly improper for them to be governed in their verdict by such knowledge. They may believe it is that way, when they would not and could not so find from the evidence. The defendant would be entitled to a new trial for this error, if it had occurred in that part of the charge that was material to the verdict in the case. We are of the opinion that the law has been substantially and correctly administered

(214) by the court below, and we therefore affirm the judgment.

Affirmed.

Cited: Sossoman v. Cruse, 133 N. C., 473; *S. v. R. R.,* 145 N. C., 572, 7; *Merrell v. Dudley,* 139 N. C., 59; *Aden v. Doub,* 146 N. C., 13; *Gay v. Mitchell, Ib.,* 511; *Winslow v. Hardwood Co.,* 147 N. C., 280.

FLEMING v. BARDEN.

(27 November, 1900.)

1. MORTGAGES—*Discharge—Husband and Wife—Extension of Time—Separate Estate—Usurious Consideration—Usury.*

Where a wife executes a mortgage on her separate estate to secure a debt of the husband, and the husband secures an extension without consent of wife, such extension discharges the mortgage, though the consideration of the extension was usurious.

2. MORTGAGES—*Extinguishment of Debt—Discharge.*

The extinguishment of the debt destroys the power of mortgagee to sell.

3. NEW TRIAL—*Newly-discovered Evidence—Rehearing—Motion.*

A motion for new trial will not be entertained on a petition to rehear, even if due diligence has been shown.

PETITION TO REHEAR. Petition dismissed.

A. O. Gaylor, and *Shepherd & Shepherd,* for petitioners.
W. B. Rodman, in opposition to petitioners.

DOUGLAS, J. This case is now before us on a petition to rehear, having been decided in 126 N. C., 450. The facts are sufficiently set forth in the former opinion, to which, after careful consideration, we feel it our duty to adhere. The decisive question was, whether the contract for the extension of payment operated as a discharge of the debt as far as Mrs. (215) Brown was concerned. We think it did. In *Hinton v. Greenleaf,* 113 N. C., 6, this Court says: "It is settled by abundant authority that, 'where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, and will be discharged by anything that would discharge a surety or guarantor who was personally liable. * * * These contracts of forbearance were made without the knowledge or assent of Mrs. Greenleaf, and, in our opinion, resulted in a discharge of her property from all liability under the said deed of trust. This property occupied, as we have seen, the position of a surety, and it is common learning that time or forbearance given by a contract which binds him in law and would bar his action against the debtor will discharge the surety.'" This case cites a large number of authorities, and is cited with ap-

proval in *Weil v. Thomas,* 114 N. C., 197, 201; *Smith v. Association,* 119 N. C., 257; *Hedrick v. Byerly,* 119 N. C., 420; *Shew v. Call,* 119 N. C., 450, 55; *Meares v. Butler,* 123 N. C., 206, 208. It is needless here to recapitulate all the authorities cited in the above-named cases. It is contended in behalf of the defendant that, as the contract of forbearance was made upon a usurious consideration after the passage of the act of 1876-77, brought forward as section 3836 of The Code, the said contract was absolutely void and of no effect, either as to binding the creditor or releasing the surety. We can not adopt this view of the matter in the face of the repeated decisions of this Court to the contrary. In *Forbes v. Sheppard,* 98 N. C., 111, this Court says (on page 115): "The exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been
(216) paid;" citing *Scott v. Harris,* 76 N. C., 205; *Bank v. Lineberger,* 83 N. C., 454, modified in *Carter v. Duncan,* 84 N. C., 679; Brandt Sur., sec. 304; Baylies Sur., 251. In *Hollingsworth v. Tomlinson,* 108 N. C., 245, this Court says: "So it is now well settled that 'the exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid.' " As far as the surety is concerned, his exoneration by the creditor's contract of forbearance with the principal has the same effect as if the debt had been paid; that is, the debt is canceled as to him. As the wife's land under mortgage for her husband's debt stands simply in the relation of surety, as to it the debt is extinguished. There is a clear distinction between the extinguishment of the debt and the bar to its collection raised by the statute of limitations. We are, therefore, brought to the question, whether the extinguishment of the debt destroys the mortgagee's power of sale. We think it does. The mortgage is not the debt itself, but merely incidental thereto. It is intended merely to secure the payment of the debt, and when the debt is paid its object is fulfilled. It is true the legal title passes to the mortgagee, but only for the purposes of the mortgage as expressed upon its face. If the debt is paid before maturity, the title reverts by the very terms of the mortgage, which thereupon becomes null and void. After default the debtor still retains his equity of redemption, and upon payment of the debt before foreclosure, is entitled to a reconveyance of the legal title. If the mortgagee still retains the title, he holds it as a naked trustee for the mortgagor. Even while the mortgage is in full force and effect, the mortgagee with power of sale holds the land as trustee for the mortgagor as well as

for himself. *Bobbitt v. Blackwell,* 120 N. C., 253, (217) and cases therein cited. The practice of inserting powers of sale in mortgages was recognized by this Court with great reluctance, and has always been regarded with extreme jealousy, but not now with the same disfavor. *Kornegay v. Spicer,* 76 N. C., 95; *Whitehead v. Hellen,* Id., 99; *Mosby v. Hodge,* Id., 387; *Shew v. Call,* 119 N. C., 450. In *Capehart v. Biggs,* 77 N. C., 261, this Court says: "In our case the plaintiff might invalidate a sale made under the power by proof that nothing was due under the mortgages, and so the power was defunct." In *Hutaff v. Adrian,* 112 N. C., 260, this Court says: "Upon the allegations in the complaint taken as true, the defendant's bond and mortgage are alike barred by the statute of limitations. A sale under such mortgage would carry to the purchaser no title." In *Jenkins v. Daniel,* 125 N. C., 161, this Court says, on page 168, 125 N. C., page 240: "The extension of time without the consent of the surety discharges the surety, or the security given by a third party;" citing *Bank v. Sumner,* 119 N. C., 591; *Sutton v. Walters,* 118 N. C., 495. "This presents the question whether the mortgage of February, 1890, extended the time of payment of the note. * * * If it does, it was a discharge of the lien of the mortgage of the wife on her land. The mortgagee would have no right to sell under the same, and the defendant Speight would acquire no title by reason of said sale and her purchase." In the case at bar, as the lien upon the land had been discharged, the defendant's vendor purchasing at the mortgagee's sale acquired no title whatever, either legal or equitable, and hence could convey none to her. It matters not to her where the legal title may now be, since it is not in her. Whether it reverted to the plaintiffs or remained in the mortgage as their naked trustee does not affect the merits of this action. We are not inadvertent to certain authorities, which hold that a purchaser in good faith has a right to presume that (218) an uncanceled mortgage is still in full force. This doctrine, whether right or wrong, has no application here. However it may be presented, it finally rests upon the doctrine of estoppel. Are infant children estopped by a mere failure to assert their rights, of which they have no knowledge? We think not. They would not be affected even with actual notice, except, perhaps, in some rare instances, where their conduct would amount to actual fraud.

It is suggested that this is a case of conflicting equities, which should be resolved in favor of the defendant in possession; but we see no conflicting equities. Whatever may be the

equitable rights of the defendant, they do not conflict with those of the plaintiffs, because she has no equities against the plaintiffs. None of her money went to them, nor did it go to pay their debt, or exonerate their property. They never owed the debt, and their land had been exonerated by operation of law before it was bought by the defendant, or even sold by the mortgagee. If she has any equities, by subrogation, or otherwise—and that question is not before us—it seems to us that they must be against either the father, whose debt she paid, or those who received her money. What legal rights she may have against her vendor we have no means of knowing. This may seem a hard rule, and we frankly admit that we have carried it as far as we care to go; but so far we must go in deference to the settled decisions of this Court, and in justice to the trusting wife and helpless children. Perceiving no error in our former judgment, the petition to rehear is dismissed.

We do not think that a motion for a new trial for newly-discovered evidence is properly before us on a petition to rehear, even if due diligence had been shown.

Petition dismissed.

Cited: Smith v. Parker, 131 N. C., 471; *Vann v. Edwards,* 135 N. C., 676.

---

(219)

COOPER v. SECURITY CO.

(27 November, 1900.)

1. CORPORATIONS—*Actions Against Shareholders for Unpaid Subscriptions—Parties.*

   A creditor who has exhausted his remedy against a corporation may sue a stockholder to the amount of his unpaid subscription without making other stockholders parties.

2. CORPORATIONS—*Limitation of Actions—Stockholders—Subscriptions.*

   The statute of limitations does not run as against subscriptions to stock payable as called for.

ACTION by W. B. Cooper, trading as W. B. Cooper & Co., in behalf of himself and all other creditors of The Adel Security Company, against The Adel Security Company, Wm. McQueen and A. T. McKellar, heard by Judge *E. W. Timberlake* and a jury, at October Term, 1899, of ROBESON. From judgment for plaintiffs, defendant A. T. McKellar appealed.

McLean & McLean and *J. H. Gore, Jr.,* for plaintiffs.
McNeill & Bryan, for defendants.

FAIRCLOTH, C. J. For the purpose of this opinion, the facts are: (1) That prior to April, 1893, the defendant, The Adel Security Company, was a duly-organized corporation, and in 1893, became indebted to the plaintiff in the sum of $433.03, which was subsequently reduced to a judgment against said company; and said company became insolvent and (220) quit business in July, 1893, and the plaintiff has been unable to have his judgment satisfied out of any property of said corporation. (2) That the defendant A. T. McKellar is one of the stockholders in said company, and $1,050 of his subscription stock has not been paid into the company. (3) That the plaintiff's debt is not barred by the statute of limitations. (4) William McQueen was also an unpaid stockholder, and was made a party defendant, but at and before the trial a nonsuit was entered as to him. (5) The plaintiff attached the unpaid subscription of the defendant, McKellar, as the property of the said corporation, as a means of satisfying his judgment against said corporation. At the trial the plaintiff had a verdict, and judgment against McKellar, and he appealed.

There are several exceptions and prayers for instructions, but none of them raises a serious question, except the one that we will now consider. The defendant McKellar's contention is that he can not be held liable until all the creditors are made parties and their claims examined, and the affairs of the corporation wound up and its asests applied to the debts. He also contends that all unpaid stockholders must be made parties to the action, and the pro rata share of each one's ability ascertained, before any judgment can be taken against him in favor of any single creditor. Our examination discovers that the highest authorities fail to support his contention, and that they sustain the theory and demand of the plaintiffs. The opinion of the Court in *Hatch v. Dana,* 101 U. S., 205, contains a full discussion of this question, and is a direct decision on the point now before us. The syllabus of the decision, which is supported by the opinion, is in these words: "Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his (221) liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties, although by the terms of their subscriptions the

stockholders were to pay for their shares 'as called for' by the company, and the latter had not called for more than thirty per cent of the subscriptions." The reasoning is that the unpaid stock subscription is a fund held by the corporation for the payment of its debts; that the liability of a subscriber for the stock is several, and not joint—as much so as if he had given his promissory note for the amount of his subscription; that at law his subscription may be enforced without joinder of other subscribers; and that in equity his liability does not cease to be several. If the object of the bill was to wind up and settle the corporation matters, and to equalize the burdens of stockholders, it seems that the creditors and all stockholders are proper and necessary parties, in order to avoid a multiplicity of actions. But in our case the creditor is seeking satisfaction out of the assets of the company to which the defendant McKellar is a debtor. If the debt or stock attached is sufficient to pay his judgment, he need not look any further. He is not bound to settle up all the affairs of the corporation, and to adjust the equities between all the stockholders, corporators, or debtors. If a stockholder is made to pay a creditor, in this way, more than his share, he would have his remedy against other stockholders for contribution, in the same way that one of several sureties on a promissory note would have against the others. It is true that the liability of the obligors on a note is made joint and several by statute, but the right to contribution among sureties is quite independent of the statute. In the case above cited, several other authorities are referred to, equally as clear
(222) and decisive on this question. The defendant company is the agent of the defendant stockholder. We will refer to *Hawkins v. Glenn,* 131 U. S., 319, in support of his Honor's view on the statute of limitations, where it is held that the statute does not run, as against subscriptions to stock payable as called for, and the principal can not object, and say that his agent failed in his duty, and thereby defeat creditors. We see no error.

Affirmed.

FINLAYSON v. KIRBY.

(27 November, 1900.)

1. APPEAL—*Remand—New Trial—Rights of New Parties—Former Judgment—Pleading.*

Where Supreme Court remands a case to make parties, they are entitled to plead and be heard, notwithstanding the plaintiffs are thereby given a new trial.

2. APPEAL—*Remand—Jurisdiction of Supreme Court—Continuance of Docket—Dismissal.*

Where Supreme Court remands a case and it is inadvertently kept on its docket, any subsequent orders in Supreme Court are nullities.

MOTION by W. H. Finlayson and another to reinstate the case of W. H. Finlayson, *et al.*, against G. L. Kirby, *et al.*, reported in 121 N. C., 106. The motion was denied and the case was discontinued.

S. W. Isler, H. G. Connor, and *A. C. Davis,* for plaintiffs.

W. C. Munroe, and *Allen & Dortch,* for defendants.

FURCHES, J. This case was before this Court at Fall Term, 1897, when the Court, without disposing of the appeal upon its merits, for reasons stated in the opinion of the Court remanded it—sent it back to the Superior Court of Wayne County—in order that proper and necessary parties might be made. 121 N. C., 106. That should have been, and was, in fact, the end of that appeal in this Court. But, by inadvertence, it was continued upon the docket of this Court, and, at Fall Term, 1899, an order was directed to issue to the plaintiffs to make parties by the next term of this Court, or the case would be dismissed. At Spring Term, 1900, there was an order continuing the case, under former order, until the present term. And at this term, on motion of defendants, the Court ordered that the case be dismissed, and, on notice to defendants, the case is again called to the attention of the Court by a motion of plaintiffs to reinstate the case upon the docket of this Court.

Upon considering this last motion, the Court is of the opinion that the case is not in this Court, and has not been since the order at Fall Term, 1897, remanding the case to the Superior Court of Wayne County, and that the orders at Fall Term, 1899, at Spring Term, 1900, and at the present term are nullities, for the reason that the case is not here, and the Court had no jurisdiction to make any order in the case; that, the case be-

ing in the Superior Court of Wayne County, it is the duty of that Court to proceed with the cause, as directed by the order of this Court at Fall Term, 1897. As the order of this Court only remands the case to make parties, without saying more, there seems to be some uncertainty as to what rights the new parties have when they are made parties. They contend that
(224) they have the right to be heard—to plead, and set forth the ground of their contention, and to have the issues arising upon such pleadings tried in the ordinary way by the Court and jury; while the defendant, Kirby, contends that they are bound by what has been done—the verdict and judgment, already had on the former trial; that to hold otherwise would be, in effect, to give the plaintiffs a new trial. This may be so, but it seems to be the necessary result of the order of this Court. It would be most unjust to these new parties to order them to be brought into Court, and not allow them to plead and defend their rights. When they are brought into Court, they must come as freemen, with the rights of freemen, and not wearing shackles. They must have the right to plead and to be heard before the Court and jury. This case will be discontinued as a case on the docket of this Court; and it is so ordered.

Discontinued.

---

(225)

WRIGHT v. SOUTHERN RAILROAD CO.

(27 November, 1900.)

1. RAILROADS—*Brakes and Couplers—Questions for Jury.*

   Where a train was provided with proper appliances so as to prevent a derailment, is a question for the jury.

2. RAILROADS—*Defective Machinery—Questions for Jury—Directing Verdict.*

   Whether there was defective machinery on a derailed freight train, was a question for the jury, and the Court should not have directed a verdict for defendant on the evidence of the conductor.

3. NEGLIGENCE—*Railroads—Personal Injury—Burden of Proof.*

   A derailment of a train raises a presumption of negligence on part of railroad company.

4. VERDICT—*Directing Verdict—Questions for Jury.*

   The Court condemns the growing tendency to take causes from the jury, where the disputed issues of fact are to be passed upon.

5. RAILROADS—*Appliances—Questions for Jury.*

   It is for the jury to say from their own common sense and knowledge acquired by experience, whether a train could have been stopped in time to prevent the disaster.

FAIRCLOTH, C. J., and FURCHES, J., dissenting.

WRIGHT *v.* R. R.

ACTION by R. Lee Wright, Adm'r of Wilson Williams, against the Southern Railroad Company, heard by Judge *E. W. Timberlake* and a jury, at February Term, 1900, of ROWAN. From judgment for defendant, the plaintiff appealed.

Lee S. Overman, R. Lee Wright, and *A. C. Avery,* for plaintiff. (226)

A. H. Price, for defendant.

CLARK, J. The plaintiff's intestate was killed in a railroad wreck. Sixty feet west of a cutting, at a curve, wheel prints on the crossties showed that a derailment had begun. Three hundred feet further on, according to one witness, and seven hundred to one thousand feet, according to another, the cars rolled down a high embankment, and the intestate, who was in the car next to the tender, was so injured that he died. The freight train, on which he was the sole brakeman, was running 18 miles an hour, and down grade. There were nine cars, besides caboose, engine, and tender. Eight cars rolled down the embankment and became kindling wood. Four cars had air brakes and Janney couplers; the others were old style. The engine had air-brakes. The conductor of the train, who was summoned for the plaintiff, expressed the opinion that there was a sufficient number of air brakes to control the train. The plaintiff asked the Court to charge: "The jury are the judges as to the distance within which the train might have been stopped, with such appliances as the law requires a railroad company to furnish, and it is the province of the jury to say in this case whether, if the defendant's train had been furnished with air brakes and improved couplers, the train might have been stopped in time to prevent the derailment. *Lloyd v. R. R.,* 118 N. C., 1012, 1013." This the Court refused to give, but charged the jury: "All the evidence tending to show that the engine and four cars had air-brakes and Janney couplers, and that this number was sufficient to control a train of that size, you will not find defendant guilty of negligence in the second particular (*i. e.,* failure to have air brakes)." This was directing a verdict, and was error. It is true the plaintiff had gone "into the enemy's camp," and gotten a witness who testified to his opinion that the (227) brakes on the engine and four cars were "sufficient to control" a train consisting of nine cars and a caboose, besides engine and tender; but, on the other hand, there should have been left to the jury the fact that it did not control the train, and that after the first truck left the track at the curve the train ran 300 to 1,000 feet before the eight cars rolled down the em-

bankment. If the opinion of one witness, that having proper appliances on four cars out of nine was sufficient, governs, then the function of the Court, in holding that all cars must be so equipped, is evaded and set aside by the judgment of a railroad employee, and it is not for the railroad, and neither for this Court, nor the jury, to decide what appliances are necessary. Besides, the jury were deprived, by the Court's directing a verdict, of passing upon the question of fact whether these appliances were sufficient, when the accident itself showed that the train had not been under control. When this case was here (122 N. C., at page 959) the Court said: "If the defendant, by having proper appliances (air brakes), could have avoided the injury, it is liable." Moreover, the jury had a right, as asked in the prayer, to exercise their own common sense, and to use the knowledge acquired by their observation and experience in everyday life, whether the train could have been stopped in time to prevent the disaster. *Deans v. R. R.*, 107 N. C., 693, reiterated in *Lloyd v. R. R.*, 118 N. C., 1013. The improved coupler not merely prevents injuries in coupling cars, but, as stated in the Official Report of the Interstate Commerce Commission, quoted in *Troxler v. R. R.*, 124 N. C., at page 194, it makes the train solid, and, by doing away with the "slack" incident to the antiquated pin and link system, places the train more completely and quickly under the control of the engineer. This is a (228) matter of common knowledge and common observation, but, by the Judge directing the verdict, the jury were deprived of considering it.

The conductor testified that he inspected the train by merely walking round and looking under each car. Upon that testimony the Court directed the jury to find that there was no defective machinery, when it should have been left to the jury, under all the circumstances surrounding the derailment, to say what caused the disaster. They might have been convinced, notwithstanding such superficial examination, that there was some defect in the machinery which caused the truck to jump the track, or prevented the train thereafter from being stopped before several hundred feet further on, it rolled down the embankment.

Further, if the train "could have been controlled" by the air-brakes on four cars and the engine, and, in fact, it was not so controlled, but rolled 300 to 1,000 feet after the first truck jumped the track, without being stopped (and no evidence of an attempt even to stop the train was shown), the jury might well have found either that the machinery was defective, or the train undermanned, so that the engineer did not get prompt notice.

But the Judge deprived the jury of considering the defectiveness of the machinery, or insufficiency of appliances, or the undermanning of the train by restricting the jury to the sole question whether the killing of the intestate was caused by rotten crossties; yet there was uncontradicted evidence that the train "had only one brakeman that day; usually had two, and a flagman." The Court has heretofore had occasion to condemn the growing tendency to take causes from the jury, or limit their sphere, in damage cases. The right of trial by jury is guaranteed by the Constitution, and on all disputed issues of fact the courts can not be too careful to refrain from invading the province of the constitutional "triors of the facts." (229)

And, finally, the first prayer for instruction should have been given. While the mere fact that one has been injured while in a public conveyance does not raise a presumption of negligence in the carrier, it is otherwise when the injury results from something over which the carrier has control. 1 Shear. and R. Neg. (5 Ed.) sec. 59. Accordingly, when there is a collision, or a derailment, and in similar cases, there is a presumption of negligence. 2 Shear. and R. Neg., sec. 516, and numerous cases cited. Of course, this presumption extends to the occurrence, regardless of the party injured. The Court has held in *Kinney v. R. R.*, 122 N. C., at page 964, where the plaintiff was an engineer injured in a collision: "If the doctrine of *res ipsa olquitur* ever applies, it should certainly do so in such a case." In a still later case (*Marcom v. R. R.*, 126 N. C., 200), also by a unanimous Court, it is held: "Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the 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." It is true that a common carrier is not an insurer of the safety of an employee, neither does it insure the safety of a passenger; but when there is a collision, or a derailment, and in like cases, the presumption of negligence arises. It is a rule of evidence, which in no wise springs out of the contract for carriage, but which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the carrier, and therefore it arises equally, whether the injured party is a passenger or an employee. The negligence of a fellow-servant is a defense in cases where the injury occurred prior to the "Fellow Servant (230) Act" (chapter 56, Priv. Laws 1897). But the rule of evidence—the presumption of negligence arising from a disaster of this nature—applies none the less in such cases.

Error.

Cited: *Davis v. R. R.*, 136 N. C., 117; *Stewart v. R. R.*, 137 N. C., 689; *Overcash v. Electric Co.*, 144 N. C., 577; *Rollins v. R. R.*, 146 N. C., 157; *Whitfield v. R. R.*, 147 N. C., 240; *Winslow v. Hardwood Co. Ib.*, 278, 9; *S. v. R. R.*, 149 N. C., 478.

REIGER v. WORTH.

(27 November, 1900.)

SALES—*Warranty—Measure of Damages.*

The measure of damages for sale of seed rice, which failed to grow as guaranteed, is the amount paid for the seed, the preparation of the soil, the planting of the seed, and a reasonable rent for the land, less the amount for which the land could have been rented for some other crop.

ACTION by A. W. Reiger against the Worth Company, heard by Judge *E. W. Timberlake* and a jury, at Fall Term, 1899, of BRUNSWICK. From judgment for plaintiff, the defendant appealed.

E. K. Bryan, for plaintiff.
Franklin McNeill, for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages of defendant on account of a breach of warranty, the form of the action being that formerly known as "case." The plaintiff bought of the defendant a quantity of rice, which he alleged the defendant represented to be good seed rice, but which was in fact not good seed rice, and which failed to sprout after having been planted, although the land was well prepared. The plaintiff further alleged that it was too (231) late, after he discovered that the rice was worthless for seed, and had failed to germinate, to plant for another crop. The jury found these allegations of fact to be true. The plaintiff demanded judgment for the amount paid for the rice, for the amount he expended in preparing the land and in planting the rice, and for the amount of profit which would have been made by the plaintiff upon the anticipated crop had the rice sprouted. The following issues were submitted to the jury: (1) Was the rice sold by the defendant to the plaintiff warranted to be good seed rice? (2) If so, was it such as it was warranted to be? (3) If not, what damage has plaintiff sustained?

The third issue was subdivided into (1) actual damages, (2) the loss of crop. The third issue was subdivided, as is stated in the case on appeal, to make a new trial unnecessary in case the Supreme Court should hold damages of crop were too remote and speculative. The jury responded to the first issue, "Yes;" to the second, "No," and to the third (subdivision 1), "$284," and to the second subdivision, "$400," and judgment was rendered against the defendant for both amounts. The appeal of the defendant is from so much of the judgment as is contained in the amount which the jury found in response to the second subdivision of the third issue—for the loss of the crop.

The appeal, however, brings with it the question of the correctness of the submitting by his Honor of the second subdivision of the third issue; of his receiving the testimony of witnesses as to the price of rice in the fall of the year 1898, the time when the anticipated crop would have matured; and as to the average yield of rice on such land as the plaintiff's and as the plaintiff had prepared; and of his instruction to the jury on the second subdivision of third issue. That instruction was, after calling attention to the evidence and contentions of the parties, "that they would allow the plaintiff such a (232) sum as they would find from the evidence his net profit on the crop would have been if there had been no breach of the warranty. This is the sum left after deducting expenses of preparing for and working said crop, housing and marketing the same." The matter involved in his Honor's instruction to the jury is the one to which all of the defendant's other exceptions point, and the discussion of the charge is, therefore, the discussion of them all. The question for consideration and decision, then, is: Can one who sells a farm product to a purchaser, the purchaser making known at the time of the purchase that he wants the article for seed with which to plant a crop, and who guarantees that the article which he sells is good for the purposes of seeding, be made liable in damages in case of the entire worthlessness of the article for seed purposes, discovered after the land has been prepared and the seed sown, and too late to plant another crop, for such an amount as a jury might find upon the testimony of witnesses to be the value of the crop which might have been gathered if the seed had been good, and a fair crop raised? Compensation is to be made to the one who sustains an injury in his person, in his property, or in his reputation. This is a general principle underlying the law of damages. And there is another general rule to the effect that the remote consequences of an act, or conjectural consequences, do not make a person liable in damages. Damages can be recov-

ered against one only for the consequences of his act when those consequences are proximate, or natural. Great difficulty had been found in all the courts in the proper application of these general rules to the peculiar facts of particular cases, and many of the reported cases are in hopeless conflict. The correctness of his Honor's instruction is supported by two English
(233) cases. *Page v. Pavey,* 34 Eng. Com. Law, 628, and *Randall v. Raper,* 96 Eng. Com. Law, 84. In the first-named case there was a breach of warranty in the sale of wheat sold for seed. The wheat did not grow as it was warranted to do, and was of no value. The plaintiff, in his action for damages, was allowed to give in evidence of what the value of the crop might have been if it had grown, with the view to make out his damages. In the other case—*Randall v. Raper*—the plaintiff had bought from the defendant, with warranty, a quantity of seed barley, represented to be Chevalier seed barley, and then resold it to another, who sowed it for Chevalier seed barley; and the same, not being Chevalier seed barley, produced much less and inferior crops of an inferior quality of barley than if the seed had been Chevalier seed barley. The plaintiff obligated himself to compensate his vendee to the extent of the difference between the value of the crop raised and the estimated value of what the crop of barley would have been worth if the seed had been as they had been represented to be, and then brought his action against the defendant for the amount he had paid his vendee. A verdict was had, with leave to the defendant to move to reduce it to the difference in the price between Chevalier seed barley and the seed barley which was delivered. The rule was refused. Lord Campbell said: "I am clearly of the opinion that in case the plaintiffs had paid the damages sustained by their vendees, compelled to do so for breach of a warranty similar to that given by the defendant to the plaintiffs, they would have been entitled to recover such damages as special damages in this action. It was a probable, a natural, even a necessary consequence of this seed not being Chevalier seed barley that it did not produce the expected quantity of grain. That is a consequence not depending upon the quality of the soil, but one necessarily resulting from the contract as to the quality of the seed not being performed." *Erle,* J., said:
(234) "The question is, what amount of damages is to be given for the breach of this warranty? The warranty is that the barley sold shall be Chevalier barley. The natural consequence of the breach of such a warranty is that, the barley which has been delivered having been sown, and not being Chevalier barley, an inferior crop has been produced. This damage

naturally results from the breach of the warranty, and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from Chevalier barley." In the case of *Van Wyck v. Allen,* 69 N. Y., 61, the facts were that the defendants sold a quantity of cabbage seed to the plaintiff, representing the seed to be "Van Wycklan's Flat Dutch." The seed was well known in the market, and had a good reputation. They were sown by the plaintiff, and were totally unproductive of cabbage. It was held in that case that the law charged the defendant with a warranty that the seed sold and delivered was of the kind represented, and the plaintiff was allowed to show in damages the fair value of the crop that could have been raised had the seed been as represented. The cases in North Carolina upon this subject are not numerous, and the facts in each are so diverse that it is difficult to group any two under the same head, and they do not seem to be entirely harmonious. Under the head of remote damages, as distinguished from conjectural or uncertain damages, are *Sledge v. Reid,* 73 N. C., 440, and *Jackson v. Hall,* 84 N. C., 489. In the first of these cases the plaintiff sued the defendant, who was Sheriff of Halifax County, for wrongfully taking his mule. He was not allowed to recover for the loss of a part of his crop following the loss of the mule. It was held that such damage was not the proximate consequence of the act complained of, but was the secondary result, and therefore too remote. The Court said: "The loss of the (235) crop, though following the loss of the mule, was neither a necessary, nor natural consequence. The plaintiff might buy, or hire another, and finish his crop and because he preferred to throw out a part of the crop he is not thereby enabled to claim damages for the loss as an immediate and necessary consequence of the tort." So that point in these cases was decided against the plaintiffs because the damage was remote, and not proximate. It was not decided against them because the damage was conjectural or uncertain in the measure of it. In the case of *Roberts v. Cole,* 82 N. C., 292, it appears from the case that the parties to the action agreed to build and keep in repair separate parts of a common division fence, which divided and protected their respective crops. The defendant violated his agreement, permitting his part of the fence to become rotten, whereupon hogs broke into the plaintiff's field, and injured his crop. In the trial of the case his Honor told the jury that, if the fence was intended by the parties to guard their crops from the depredations of stock, the plaintiff was entitled to whatever he had expended in the renewing of the fence, and to have damages for

the injury to his crops, and that the measure of his damages was the difference between what the crop undisturbed ordinarily would be, and that which was made, diminished by the breaking in of the hogs. The Court said: "While the Court below very properly declined to restrict the plaintiff's claim to compensation for defendant's breach of contract, as requested, and correctly directed the jury to estimate and allow for the ravages of the hogs, the rule by which the measure of his injury was to be ascertained was too vague and uncertain to act upon. The value of the crop made is capable of definite calculation, but what it would have made if it had not been interfered with—
(236) the other element in the proposition—is and must be purely and wholly conjectural." No precedents are referred to in that opinion on the point we have been discussing; that is, upon the question of allowing the plaintiffs in actions to give in evidence the value of crops that might have been grown and reaped. *Boyle v. Reeder,* 23 N. C., 607; *Foard v. R. R.,* 53 N. C., 235, and *Mace v. Ramsey,* 74 N. C., 11, were referred to, but they referred to the loss of the profits of a business, or adventure other than farming or planting. But in *Bridgers v. Dill,* 97 N. C., 222, the plaintiff was allowed to show that the stock of the defendant were allowed to depredate on his growing crop, the defendant repeatedly pulling down the fencing as the plaintff would put it up again; and that, as a consequence, his crop was greatly damaged. He said: "They destroyed all but six bales of cotton. The damages were about twenty bales—fifteen anyhow—fifty acres where I never picked out a pound; value, $50 per bale. They damaged me 75 barrels of corn, value $4 per barrel." The Court, in its instructions as to the damages, told the jury that they should not consider what the plaintiff might have raised upon the land, and that such evidence was excluded. This Court said: "The exception to the evidence of Bridgers objected to by defendant can not be sustained. The trespass was repeated as often as the plaintiff would put up his fence. It was a continued trespass, and the case is unlike that of *Roberts v. Cole,* 82 N. C., 292, where the damages were properly limited to such a sum as would repair and put the fence in order, and cover the injury done to the crop before the plaintiff knew of the trespass." It is difficult to distinguish the difference as to the legal principle involved between the last mentioned case and the case of *Rob-*
erts v. Cole, supra. However that may be, we have con-
(237) cluded, after mature reflection and a careful study of all these cases to which we were referred in the argument, and which we have found in our investigation, that the principle

down in *Roberts v. Cole* applies, and that the plaintiff ought not to have been allowed to recover the amount estimated as the crop of rice which might have been produced upon the land if the rice had been good seed rice.

The plaintiff did not appeal from the judgment, and, ordinarily, we would have the judgment below reformed, striking out the amount allowed for the loss of the crop, and allowing it to stand for the amount found to be due by the jury under the first subdivision of the third issue; but, as we think, under all the circumstances of the case, the plaintiff is probably entitled, under a correct rule of estimating the damage he has sustained, to a larger recovery than for the amount expended by him in the preparation and planting of the land, and the value of the rice, we think it but just to him to declare error in the instruction, and send the case back, that it may be tried anew. We think the true rule for the measure of the plaintiff's damage in this case is the amount which he paid the defendant for the rice, the amount which he expended in the preparation of the soil for the crop and for the planting or sowing of the seed, and because it was too late to plant another crop of rice he ought also to recover a reasonable rent for the land—the 47 acres—for the year 1898, subject to be reduced, however, by such amount as the defendant may be able to show that the plaintiff could have rented the land for, after it was too late to plant or sow rice, to be put in other crops than rice. The costs of this appeal to be taxed against the plaintiff.

Error.

---

(238)

WACHOVIA NATIONAL BANK v. IRELAND.

(27 November, 1900.)

1. HOMESTEAD—*Married Woman—Husband and Wife—Separate Estate—Charge—Mortgage.*

   A married woman has a right to a homestead in her separate estate, where she, with the written consent of her husband, charges her estate for the payment of debts, but uses no words of conveyancing in the instrument charging same.

2. MORTGAGES—*Separate Estate—Charge.*

   The paper writing set forth in the opinion of the Court does not constitute a mortgage.

ACTION, by the Wachovia National Bank of Winston, N. C., against H. B. Ireland and A. S. Ireland his wife, heard by

Judge *E. W. Timberlake,* at Fall Term, 1900, of DAVIE. From an order overruling an exception to the allotment of a homestead to A. S. Ireland, the plaintiff appealed.

Jones & Patterson, for plaintiff.
A. H. Eller, for defendants.

MONTGOMERY, J. At January Term, 1898, of Forsyth, the plaintiff recovered a judgment against the defendants for the sum of $5,000, with interest and costs. The action was founded on certain promissory notes (renewals) executed by the defendants, H. B. Ireland and his wife, A. S. Ireland, and at the time of the execution of the original notes the defendant executed a paper writing which was intended to charge and bind certain real estate of the *feme* defendant, mentioned in the writing. That part of the instrument which recites the charging of the separate estate of the *feme* defendant is in the following words: "And, whereas, the said H. D. Ireland
(239) and his wife, A. S. Ireland, have executed and delivered said notes, and the said A. S. Ireland has indorsed the said notes, with good faith, and with full intention to pay the same according to the terms thereof; and whereas, the said H. B. Ireland desires to give his written consent to the signing and indorsing the said notes by his said wife, A. S. Ireland; and whereas, the said A. S. Ireland desires to bind her separate estate for the payment of her aforesaid obligation, and to mention specifically the separate estate so bound and charged by her: Now, therefore, the said H. B. Ireland for himself, does hereby ratify and confirm and give his written consent to the signing and execution and delivery and indorsement of the aforesaid obligations, and any and all renewals of the same, by his said wife, A. S. Ireland, and also gives his written consent to the execution of this paper writing by his said wife, A. S. Ireland, and the said A. S. Ireland, for herself, and by the written consent of her husband, does hereby charge and specifically bind her following separate estate for the payment of all her aforesaid obligations, and any and all renewals thereof." The judgment declared the instrument above referred to, to be a charge on the separate real estate of the *feme* defendant, binding said real estate to the payment of the indebtedness upon which the judgment was rendered. It was further adjudged that the real estate was subject to execution after the property of H. B. Ireland, the husband, subject to execution, should be first exhausted. It was further adjudged, "the plaintiff consenting, that the defendant A. S. Ireland is entitled to

her homestead in the said separate estate, as the same may be properly laid off and allotted to her under an execution issued on the judgment herein rendered." An appeal was taken from this judgment by the defendants. At the February Term, 1898, of the Supreme Court (122 N. (240) C., 571), it was decided that the instrument above referred to constituted a charge upon the real estate mentioned therein; but error was found in the judgment because it embraced a certain amount which the defendants in their answer had alleged to be usurious, and which defense the Court below refused to hear. At the February Term, 1900, of the Superior Court, $900 of the indebtedness was abated, "without any admission that the plea of usury contained in the answer of H. B. Ireland is just and true, and then judgment was rendered for the balance, which was declared to be a charge and lien on the land of the *feme* defendant by virtue of the deed and covenant in writing mentioned in the complaint, and that the land was subject to be sold under execution for the payment and satisfaction of the indebtedness upon which the judgment was rendered, and for the payment of the costs of the action. The judgment was docketed in Davie County, where the lands are situated, and execution was issued from Forsyth Superior Court; the execution reciting the lien and charge upon the land. The sheriff, finding no property of the defendant H. B. Ireland, subject to execution, had appraisers to lay off to the defendant A. S. Ireland her homestead. The plaintiff then filed an exception to the allotment of the homestead, alleging that she was not entitled to it, for the reason that the paper writing referred to constitued a lien and charge in favor of the plaintiff superior to the right of the defendant's claim for a homestead. At the Fall Term, 1900, Davie, the exception filed by the plaintiff to the allotment of Mrs. Ireland's homestead, was overruled, and the plaintiff appealed.

The question for determination is this: Does the paper writing transfer the title to the land described in the complaint, to the plaintiff? If it does, then the instru- (241) ment is a security by way of mortgage, and, the private examination of the wife having been taken, and the instrument registered, her homestead and dower rights are subordinated to the lien created by the paper writing, and the plaintiff's exception should not have been overruled. But in vain will be the search for any words of conveyancing in the instrument. "Charge" and "bind" are the words used. They mean no more in the writing referred to than they would have meant in a simple promissory note which might have been signed by

the *feme* defendant for the purpose of charging her separate estate. The statute (sec. 1826 of The Code), does not use the word "charge" in reference to a married woman's making a contract to affect her real or personal estate, but it only requires her promise to that effect to be made with the written consent of her husband. The word "charge" is one used in judicial construction, and, when used in connection with a married woman's property and her attempt to affect it by contract, simply means that the property is made liable for her debts under execution, as if she were a *feme sole.* It does not mean, where she has contracted, otherwise than by way of mortgage or deed of trust, with the written consent of her husband, in a manner to affect her separate estate, that a lien which prevents the free transfer of the property afterwards and before judgment is created on her property. She could still convey her property, or any part of it, by deed, her husband joining with her. The agreement of the plaintiff and the defendants, contained in the paper writing, simply enables the *feme* defendant to make a contract as if she were *feme sole,* and thereby to place her property on the footing of any other debtor, and make it liable to be sold under execution for the satisfaction of the debt. It follows, therefore, that as there was no
(242) lien or charge upon the real estate in the nature of a mortgage lien, and as the debt is a simple one, enforceable by execution against the married woman's property, simply because sec. 1826 of The Code has been complied with, and her separate estate thereby made liable, the *feme* defendant was entitled to her homestead in her real estate which was charged for the payment of the debt. In *Flaum v. Wallace,* 103 N. C., 296, where a debt was adjudged to be a charge on the separate personal estate of the *feme* defendant, it was decided that she could claim the same exemption from execution as she would have been entitled to if she had been a *feme sole.* The exemption secured to resident debtors by the Constitution is paramount to any charge, except by mortgage or deed of trust, to which the separate estate of a married woman becomes affected by reason of her promise to pay a debt out of her separate estate with the written consent of her husband. In *Bailey v. Barron,* 112 N. C., 54, it was held, that the same principle would apply to her right of homestead in her real estate, "unless [as the Court says] it appears from the complaint, that she has, by a proper deed, debarred herself from claiming a homestead out of the lands described, or a judgment has been entered against her which estops her from asserting such claim." We have seen that the paper writing in this case is not a

mortgage, the title to the real estate never having been passed to the plaintiff. The judgment first alluded to herein, allowed her the homestead, by consent of the plaintiff, and the second judgment (not appealed from), properly construed, means that the charge and the lien referred to therein, must be understood to be a charge and a lien subordinate to the *feme* defendant's homestead exemption, and that the sheriff, before levying the execution on the *feme* defendant's land, should allot to her her homestead exemption therein. In the case of *Bailey v. Barron, supra,* the *feme* defendant expressly (243) charged the payment of her note upon her separate estate, the consideration being for the benefit of her separate estate; and her husband consented in writing to the execution of the note, and for her to "bind her separate estate for the payment of the same."

There was no error in his Honor's overruling the plaintiff's exception to the allotment of the homestead. His Honor further refused to appoint a receiver to take charge of the land described in the complaint. Looking at the notice of motion to have a receiver appointed and at the affidavits, we see no error in the refusal of his Honor to grant the motion.

No error.

Cited: Hervey v. Johnson, 133 N. C., 356.

TAYLOR v. VANN.

(27 November, 1900.)

1. COSTS—*Appeal—Subject-Matter of Action Destroyed—Appellant—Quo Warranto—Supreme Court.*

   Where the subject-matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee.

2. COSTS—*Subject-Matter of Case Destroyed—Case Settled—Quo Warranto—Supreme Court.*

   The Supreme Court will not determine the merits of a case simply for the purpose of deciding who shall pay the admitted costs.

CLARK and MONTGOMERY, JJ., dissenting. (244)

ACTION, in the nature of *quo warranto,* on the relation of J. C. Taylor against John E. Vann, heard by Judge *A. L. Coble,*

on complaint and demurrer, at Spring Term, 1900, of HERTFORD. From judgment for plaintiff, the defendant appealed.

George Cowper, for plaintiff.
Winborne & Lawrence, for defendant.

DOUGLAS, J. This is an action brought for the recovery of the office of member of the Board of Education of HERTFORD. The plaintiff recovered judgment at April Term, 1900, and the defendant appealed. The term of office expired by original limitation on 1 July following, after the rendition of the judgment, and pending the appeal. This destroys the subject matter of the action, rendering futile any further judgment for the plaintiff; and this Court has repeatedly declared that it will not undertake to determine the merits of a case simply for the purpose of deciding who shall pay the admitted costs. *Herring v. Pugh,* 125 N. C., 437, and cases therein cited. Therefore, in accordance with the uniform rulings of this Court, long followed, with a single exception, the appeal must be dismissed. This would seem to end the case, but, as it is strenuously urged that we should dismiss the action itself, we are forced into a further discussion. The only difference in result would be to tax the plaintiff with the entire costs both here and in the court below. We do not feel called on to further extend the rule for the simple purpose of taxing the plaintiff with the costs of an action in which he has recovered judgment, and in which at the time of the recovery of such judgment he was clearly entitled to the relief which he sought. It is true that this Court, in *Colvard v. Commissioners,* 95 N. C., 515, dismissed the action—a proceeding that appears never since to have been followed; but it is significant that in that case this Court decided against the plaintiff on appeal (245) before it dismissed the action. Of course, under such circumstances, there remained no ground on which the plaintiff could claim his costs; and the unusual proceeding of the Court, while questionable in principle, involved no actual injustice. In *Commissioners v. Gill,* 126 N. C., 86, our latest case upon this subject, in which the appeal was dismissed, this Court says: "It is 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. * * * He has an unreserved judgment of a court of competent jurisdiction." So has the plaintiff in the case at bar,

and, if such a judgment was sufficient to protect the plaintiff from the imposition of any costs in the former case, why is it not equally efficacious in the present case? The principle is the same, and why are not both plaintiffs entitled to its equal application? That the plaintiff had a just and lawful cause of action, not only at the time his action was brought, but also at the time he recovered judgment, can not be denied, if we adhere to the doctrine of *Hoke v. Henderson,* 15 N. C., 1, so recently, repeatedly, and unanimously reaffirmed by us. That this celebrated case was regarded as the settled law for more than half a century is shown by the decision of this Court cited in *Greene v. Owen,* 125 N. C., 212, and in the concurring opinion of DOUGLAS, J., in *Wilson v. Jordan,* 124 N. C., 707. Contemporary expression will show that it equally received the commendation of the good and great, as being thoroughly consistent with the highest standard of public policy. Governor Graham, in his address upon Chief Justice RUFFIN, says: "Judge RUFFIN's conversancy with public ethics, public law, and English and American history seems to have assigned to him the task of delivering the opinions on (246) constitutional questions which have attracted most general attention. That delivered by him in the case of *Hoke v. Henderson,* in which it was held that the Legislature could not, by a sentence of its own, in the form of an enactment, divest a citizen of property, even in a public office, because the proceeding was an exercise of judicial power, received the highest encomium of Kent and other authors on constitutional law; and I happened personally to witness that it was the main authority relied on by Mr. Reverdy Johnson in the argument for the second time in *Ex parte Garland,* which involved the power of Congress, by a test oath, to exclude lawyers from the practice in the Supreme Court of the United States, for having participated in civil war against the government, and in which the reasoning on the negative side of the question was sustained by that august tribunal." An opinion delivered by RUFFIN, and receiving the highest encomium of Kent, Reverdy Johnson, and William A. Graham, is entitled to consideration, even without the unanimous indorsement it received from this Court, as now constituted, in *Wood v. Bellamy,* 120 N. C., 216, and *Ward v. Elizabeth City,* 121 N. C., 3. If it was the law then, it is the law now, and the Court that stayed the hand of the Legislature of 1897 is of equal authority to-day. But we are told that in view of the recent decision of the Supreme Court of the United States in *Taylor v. Beckham,* 178 U. S., 548, arising under the Constitution and laws of Kentucky, we should

abandon our own convictions, and overrule the uniform decisions of this Court for the past 70 years, in deference to the highest court of the republic. When did courtesy ever go so far? Moreover, the Supreme Court of the United States has never held or intimated that such was the law in North
(247) Carolina. On the contrary, *In Re Hennen,* 13 Pet., 230, it distinctly recognized *Hoke v. Henderson* as a valid construction of the Constitution and law of this State. That Court says, on page 261, 13 Pet.: "The case of *Hoke v. Henderson,* 15 N. C., 1, decided in the Supreme Court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina." It is true, that august tribunal, whose decisions we will always follow when authorities, and most carefully consider when only precedents, differs with us on that point, as a general principle of law, as it does on some other important principles; but that is not sufficient reason for us to disregard our own settled decisions and personal convictions.

Appeal dismissed.

CLARK, J. (dissenting). The plaintiff recovered judgment for the office of member of the Board of Education of Hertford, at April Term, 1900, of the Superior Court of that county. The term of that office expired on 1 July, 1900, pending the appeal here. This Court could now render no judgment that the plaintiff be admitted to the office, and it has repeatedly held that in such cases it will not go on to discuss a pure abstraction, and determine who would have won if the cause of action had not determined; that it will not decide the merits of an extinct controversy merely to award the costs. In *Colvard v. Commissioners,* 95 N. C., 515, ASHE, J., says: "Suppose there was no error; how could judgment in this case avail the plaintiff? He seeks to be inducted into office by virtue of the writ of mandamus, but what office? Why, that of sheriff for the term ending on 4 December, 1886. But that time has expired, and a new sheriff has been regularly elected for the term of two
(248) years from 4 December, 1886. A judgment, then, in favor of the plaintiff can not be followed by any practical results. If he ever had a right to the remedy he invokes, he has been so unfortunate as to lose it by the law's delay. We are of the opinion, for this reason, that the action should be dismissed, and it is so ordered." The same ruling (that the Court will not decide an appeal when the cause of action has

become extinct, for any reason, during the appeal) has been held in a uniform line of authorities which are cited in *Herring v. Pugh,* 125 N. C., 437, and reiterated at last term in *Commissioners v. Gill,* 126 N. C., 86. In *Commissioners v. Gill* the County Commissioners brought a summary proceeding against a tenant before a Justice of the Peace for possession of land. It was admitted that the land belonged to the county, but the novel defense was set up that defendant was entitled to possession by virtue of an office of which he had been dispossessed. The Judge below not sustaining this effort to try title to office as a counter claim in an action before a Justice of the Peace, the county recovered judgment. Pending the appeal the attempted defense ceased by expiration of the term of office, and nothing could be done except to dismiss the appeal, there being nothing left to be decided. In this case it is the plaintiff's cause of action which has expired pending appeal, and hence the action must be dismissed, unless we reverse all the precedents, and try the merits of a dead cause, and determine who would have won if the cause of action had not died, merely to settle who shall pay the costs. Whether the plaintiff might not have joined a cause of action for fees and emoluments (see *McCall v. Webb,* 126 N. C., 760), which cause of action might have survived notwithstanding the termination of the office sued for, is a question not presented by the record.

The doctrine of *Hoke v. Henderson* has been greatly expanded by this Court since January, 1899, but never (249) till now was it held to apply to a matter of costs, nor has it been deemed so sacred that other and well considered decisions shall be overruled, should it be deemed that even indirectly they impinge upon the new breadth given that case. In its original restricted limits, that case was based upon a construction of the clause of the Federal Constitution which forbids the impairment of the obligation of a contract. The construction placed by the United States Supreme Court upon the United States Constitution is binding upon all, and that high tribunal, in the very recent case of *Taylor v. Beckham,* 178 U. S., at pages 576, 577, cite the uniform rulings of that Court, notably, *Butler v. Pennsylvania,* 10 How., 402, 416, and *Crenshaw v. U. S.,* 134 U. S., 99, "in which latter case," the Court says, "Mr. Justice LAMAR stated the primary question in the case to be 'whether an officer appointed for a definite time or during good behavior, had any vested interest or contract right in his office, of which Congress could not deprive him'; and he said, speaking for the Court, 'the question is

not novel. There seems to be but little difficulty in deciding that there was no such interest or right.' *Butler v. Pennsylvania, supra; Newton v. Commissioners,* 100 U. S., 548; *Blake v. U. S.,* 103 U. S., 227, and many other cases. The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property, as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the Legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. True, the restrictions limit the power of the Legislature to
(250) deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." There can be no higher authority as to rights or immunities claimed under the Federal Constitution than the decisions of the United States Supreme Court. *Hoke v. Henderson* rests upon the doctrine that a public officer has contract or property rights in his office, which are protected against legislative action by the clause of the Federal Constitution which forbids the impairment of the obligation of contracts. The above explicit statement in the latest case (*Taylor v. Beckham,* 178 U. S., at page 577), reciting the uniform decisions of the highest United States court, and reiterating them, that the nature of a public office is "inconsistent with either a property or contract right" therein by the officer, necessarily puts an end to any right claimed under *Hoke v. Henderson.* It is henceforward a derelict floating upon the ocean of jurisprudence, and to be avoided. The opinion in *Taylor v. Beckham* was filed 21 May, 1900. Though there are some dissents, there is none as to the proposition above cited. In our own courts every Judge who took his seat upon the bench in 1868, necessarily negatived the doctrine of *Hoke v. Henderson,* since they recognized thereby the validity of the action of the convention in vacating the life-judgeships held by their predecessors, which the convention could not do if those offices were contracts. In *Ward v. Elizabeth City,* 121 N. C., 1, the Court, composed of the same judges as now, denied the application of *Hoke v. Henderson* to the facts of that case, and said, "This is the only State of the 45 which sustains that doctrine"; *i. e.,* of contract or property rights in an office. In *S. v. Wilson,* 121 N. C., at page 467, DOUGLAS, J., says: "With the exception of

this State, it is the well settled doctrine in the United (251) States that an office is not regarded as held under a grant or contract, within the constitutional provision protecting contracts." And further on he says: "Throop, Pub. Off., sec. 19, citing 92 decisions from the United States Supreme Court, and 32 different States; also, Black, Const. Law, p. 530, and cases cited: Mechem, Pub. Off., secs. 463, 464, citing numerous cases—says that, except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government, whose agent he is, nor can public office be regarded as the property of the incumbent." In *Caldwell v. Wilson,* 121 N. C., p. 468, DOUGLAS, J., further says of *Hoke v. Henderson*: "The fact that we are the only State in the Union recognizing the doctrine may well cause us to pause and consider if we have not carried it to the fullest legitimate extent. It may be doubted if the great Chief Justice ever contemplated the extent to which it would be carried." But since that decision the doctrine has been carried to a still greater and most unexpected expansion by *Day's Case,* 124 N. C., 362; *Wilson v. Jordan,* 124 N. C., 683, 33 S. E., 139; *White v. Auditor,* 126 N. C., 570, and numerous other office cases. The "92 decisions from the United States and 32 State Supreme Courts," cited by DOUGLAS, J., as holding that there is no property or contract rights in a public office, have been increased in number since, and still without any case to support *Hoke v. Henderson.* It is unnecessary to cite them, especially as the utterances of the United States Supreme Court, in *Taylor v. Beckham,* has given the *coup de grace* to *Hoke v. Henderson,* even in its comparatively modest limits, before it was extended by the recent cases in this Court. But it may be interesting and instructive to cite a few of the comments passed upon *Hoke v. Henderson,* by the highest courts of our sister States. The Supreme Court of (252) South Carolina, in *Alexander v. McKensie,* 2 S. C., at page 92, after laying down the doctrine that the Legislature may at will "remove the incumbents of offices created by the Legislature, and put others in their place," says: *"Hoke v. Henderson,* 15 N. C., 1, holds the contrary doctrine, but is without the support of reason or authority." The Supreme Court of Kentucky, in *Standeford v. Wingate,* 2 Duv., at page 448, says: "Within the range of our researches, the only adjudged case which could give any countenance to such an unreasonable doctrine is *Hoke v. Henderson,* 15 N. C., 1. * * * That anomalous decision is not, in our opinion, sustained by consistent argument, which, with all proper respect, we regard

as, in principle, a *felo de se,* even under the Constitution of North Carolina." In *Conner v. Mayor,* etc., 2 Sandf., at pages 373, 374, the Court says: "The North Carolina case (*Hoke v. Henderson*), stands out in strong contrast to every public decision and opinion on the subject which we have seen"—and accounts for the anomaly thus: "It appears to us, with much respect for the learned tribunal which pronounced this judgment, that it was unduly influenced by the common law rule, derived from prescriptive offices, and operating in a government whose genius and spirit are perhaps in no respect more unlike ours than in this very subject—the source and nature of the rights and interests acquired by public offices." In 25 Am. Dec., at page 704, the learned annotator, Judge Freeman, annotating *Hoke v. Henderson,* says: "Such a doctrine would certainly receive countenance nowhere else. * * * With all deference to the North Carolina courts, the conclusion may yet be drawn, with Mr. Pomeroy (Const. Law, sec. 553), that 'it may therefore be considered as a settled point of constitutional law—settled both by the national and State courts—that a public office bears no resemblance to a contract, and that Legislatures have full power over the public offices of a Commonwealth, except so far as they are restrained by
(253) the local Constitutions. The clause of the United States Constitution which prohibits State laws impairing the obligation of contracts has no application whatever to this subject.'" The list of similar criticisms might be greatly extended. *Hoke v. Henderson* was launched in 1831—nearly seventy years ago. In all that time it has received no approval from any other court, and has been treated as an alien by the judicial mind in all the State and Federal courts. After the recent clear enunciation of the United States Supreme Court, in *Taylor v. Beckham, supra, Hoke v. Henderson* should, in judicial subordination to the paramount authority of that Court, in construing the United States Constitution, be held of no authority here; for it is the clause of the United States Constitution, and not any provision of the State Constitution, which has been invoked to set aside the action of the Legislature in dealing with the agents of the State, created by a previous Legislature. It is small offset against this consensus of judicial authority to array the eulogistic remarks of counsel, quoted by one of our citizens in an obituary address in honor of his friend, the venerated and distinguished Chief Justice, whose error in delivering the opinion in *Hoke v. Henderson* is no blot on his fame; for, like all great Judges, he sometimes erred. A reference to *Ex parte Garland,* 4 Wall, 333, shows that *Hoke*

v. Henderson is not referred to by the Court, nor in fact in the brief of that counsel, which is published in full; and nothing in the opinion militates against the rule laid down in *Taylor v. Beckham* as the uniform ruling of that Court, which is that an office is a public agency, in which the officeholder (254) has neither property, nor contract rights. If, as in *Commissioners v. Gill, supra,* the defense set up by confession and avoidance, had terminated pending the appeal, the appeal by defendant would be dismissed. But here it is the plaintiff's cause of action which has ceased, pending the appeal, and to dismiss the appeal would be to affirm, against the defendant (appellant), judgment to recover an office which has ceased to exist, and costs. To do the latter, we must overrule our uniform decisions that when the cause of action dies pending an appeal, the Court will dismiss the action, and will not go on to determine which side "would have won if the cause of action had not died," merely to adjudicate the costs. But, should we overrule the line of decisions to above purport, still, in deference to the highest court of the republic, we should dismiss this action, for no cause of action is stated in the complaint.

MONTGOMERY, J., dissents from the opinion of the Court. He regards the point involved in this case as having been settled adversely to such a claim as the plaintiff's in the cases of *Colvard v. Commissioners,* 95 N. C., 515; *Herring v. Pugh,* 125 N. C., 437, and *Commissioners v. Gill,* 126 N. C., 86.

Overruled. Mial v. Ellington, 134 N. C., 162, 167.

---

(255)

HALTOM v. SOUTHERN RAILROAD CO.

(27 November, 1900.)

1. NEGLIGENCE—*Contributory Negligence—Questions for Court—Personal Injuries—Damages—Railroads.*

   Where the evidence is uncontradicted, the questions whether the evidence, if believed, constitutes negligence or contributory negligence, are for the Court.

2. EVIDENCE—*Credibility—Questions for Jury—Railroads.*

   The credibility of evidence is a question for the jury.

3. NEGLIGENCE—*Master and Servant—Contributory Negligence—Railroads—Personal Injuries.*

   When the injury of itself shows that an act ordered is dangerous, the railroad company is liable, unless the injury was caused by negligence in performance of the act.

4. CONTRIBUTORY NEGLIGENCE—*Negligence—Burden of Proof—Railroads.*

The burden of showing contributory negligence is on the party alleging it.

5. VERDICT—*Directing Verdict — Negative Verdict — Negligence—Railroads—Instructions.*

When there is no evidence tending to prove contributory negligence, the Court may instruct the jury to find that there was no such negligence.

ACTION by J. R. Haltom against the Southern Railway Company, heard by Judge *E. W. Timberlake* and a jury, at May Term, 1900, of ROWAN. From a judgment for plaintiffs, defendant appealed.

R. Lee Wright, for plaintiff.
A. H. Price, for the defendant.

(256) CLARK, J. The only witness was the plaintiff, who testified that he was in the employ of defendant as a yard-coupler and brakeman, at Spencer, at time of injury, which was 13 April, 1898; that at the time of injury he was in the discharge of his duties, under the orders and instructions of George Purkinson, the conductor of the train; that the said conductor had the power to discharge him if he disobeyed his orders; that a car had been cut loose and detached from the train in the night time, and was just barely moving along the track, when the said conductor ordered him to get a rock and scotch it, and that while looking for a rock the conductor brought him one, and while attempting to scotch it the wheel ran over three fingers of his left hand and mashed the ends off; that from the time he was ordered to scotch the car to the time he was injured not more than two or three seconds elapsed; that he got his orders and instructions from said conductor; and that his duty was to obey him. The defendant objected to all of the foregoing evidence relating to his getting orders from the conductor, and his duty to obey him. Objection overruled, and defendant excepted. The plaintiff here rested his case, and the defendant also rested. The Court said, "proceed with your argument to the jury," to the defendant's counsel, whereupon he arose, and insisted that, as the testimony was uncontradicted, the question of negligence was a naked question of law, and that the Court ought to direct a verdict on the two first issues one way or the other, and argued that there was no negligence, if the testimony should be believed. At the close of his argument, the Court

said: "I am with you as to its being a question of law, but I shall charge the jury, if they believe the evidence, to answer the two first issues in favor of plaintiff." The injury, of itself, shows that the act the plaintiff was ordered to perform was dangerous, and therefore the company was liable, unless the injury was caused by the negligent manner in which plaintiff performed the duty assigned him, and, as just (257) said, there was no evidence tending to show contributory negligence. The Court charged the jury, that if they believed the evidence, to answer the first issue "Yes," and second issue "No," and instructed them fully as to the issue of damages. The defendant asked the Court to instruct the jury (1) that there was no evidence of any negligence, such as was alleged, and that the jury be instructed to find issues in behalf of defendant; (2) that, upon the facts as shown, there being no dispute about the same, they did not constitute negligence. The Court refused to give these instructions, and defendant excepted. The defendant excepted, also, to the charge given on the first and second issues.

We concur with the counsel for defendant and the Court, that, there being no conflict of evidence, whether the evidence, if believed, constituted negligence on the part of defendant, or whether there was contributory negligence, were questions of law for the Court. *Russell v. R. R.*, 118 N. C., 1111; *Chesson v. Lumber Co.*, 118 N. C., 68. And we think that his Honor ruled correctly as to the law. He properly left the credibility of the evidence to the jury on the first issue. *Love v. Gregg*, 117 N. C., 467. To order the plaintiff to get a rock and scotch a rolling car in the night time was negligent on the part of the defendant, acting through its conductor.

As to the second issue, the uncontradicted evidence is that the plaintiff was in the discharge of his duty, under the orders and instructions of said conductor; that it was plaintiff's duty to obey the conductor, who had power to discharge him if he disobeyed the orders of the conductor. The burden was on defendant to prove the contributory negligence and there (258) was none shown. Laws 1887, c. 33; *Jordan v. Asheville*, 112 N. C., 743. Indeed, the Court might have directed a negative verdict on this issue. *White v. R. R.*, 121 N. C., 489. A case directly in point is *Shadd v. R. R.*, 116 N. C., 968. The evidence excepted to was pertinent and competent.

No error.

Cited: *Bryan v. R. R.*, 128 N. C., 395; *Smith v. R. R.*, 129 N. C., 178; *Graves v. R. R.*, 136 N. C., 10.

COMMISSIONERS OF MONTGOMERY CO. v. FRY.

(27 November, 1900.)

1. ASSUMPSIT—*Mistake of Fact—Mistake of Law—Fraud—Judgment —Interest—Overpayment—Money Received.*

Where an overpayment is made on a judgment, by reason of an erroneous computation of interest, the excess will be refunded.

2. PARTIES—*Overpayment—County Treasurer—County Commissioners —Pleading—Assumpsit.*

Where a county treasurer makes an overpayment on a judgment against the county, the county commissioners, and not the treasurer, are the proper parties to bring suit to recover the same.

ACTION by the Board of Commissioners of Montgomery County against Daniel Fry, heard by Judge *H. R. Bryan,* on an agreed state of facts, at October Term, 1900, of MONTGOMERY. From judgment for plaintiff, the defendant appealed.

Adams & Jerome and *J. R. Blair,* for plaintiffs.
McIver & Spence, for defendant.

(259) FURCHES, J. The county of MONTGOMERY was owing the defendant a debt, for which the defendant brought action, and at December Term, 1889, of the Montgomery Superior Court, recovered judgment thereon for the sum of $3,912.39. The principal of said debt was $2,502.01, and the judgment rendered was in the usual and proper form—that the plaintiff (Fry) recover of the defendant (county) the sum of $3,912.39, "with interest on the sum of $2,502.01 from 4 November, 1889, until paid." On 2 May, 1892, the county made a payment on said judgment of $200, and on 22 December, 1894, the county made another payment on said judgment of $4,000, both payments being receipted for on the docket by the plaintiff in that judgment, Fry. The defendant, Fry, made a calculation of the balance due on said judgment to 7 July, 1889, deducting the payments of $200 and $4,000 theretofore made, and gave his calculation to the attorney of the county some days before the last payment. This calculation of interest, deducting payments, left a balance due of $1,100.58. The attorney for the county, without recasting the calculation made by the plaintiff, Fry (defendant in this action), the Board of County Commissioners having passed an order directing the Treasurer to pay the balance due on said judgment, directed the Treasurer to pay Mr. Fry, which he did according to Fry's calculation, which

turned out to be too much. The error in the calculation, as plaintiff claims, consists in the fact that the defendant, Fry, calculated interest on $3,912.39, the whole amount of the judgment, principal and interest, instead of counting it on $2,502.01, the principal named in the judgment, and which was therein stated as the amount that should bear interest; making a difference of $502.38, which is agreed shall be the amount of plaintiff's recovery in this action, if plaintiff be entitled to recover anything.

The learned counsel for the defendant contended in (260) his brief that the defendant had the right to calculate and claim interest on the whole amount of the judgment. But in his argument here he properly abandoned that contention, saying that upon a more thorough consideration he thought that point was against him. But he insisted that the mistake was one of law, and the plaintiff could not recover on that account, and cited a number of cases that he insists sustain this contention. He further contended that, if he should be mistaken in its being a mistake of law, plaintiff's attorney knew all the facts—knew that under the judgment as it was drawn the defendant, Fry, was not entitled to interest on the whole amount of the judgment; that the calculation of the defendant, Fry, was furnished him, and he then had every opportunity of correcting it; that it was his negligence that he did not do so, and the courts will not assist in correcting an error caused by such negligence; and cites authorities to sustain this position. This is the strongest ground the defendant has to rest his defense upon. While the learned counsel for the plaintiff, on the other hand, insists that it is not a mistake of law, but of fact, but says, if he is mistaken in this, and it should be held that it was a mistake of law, that still he is entitled to recover; that there is nothing presented by the case to show that the defendant has any moral right to hold this money wrongfully gotten by him; that it would be unconscionable for him to keep said money, and that a court of equity will not allow him to do so. For this position the plaintiff cites a number of cases to sustain it. The case was well argued upon the contention of the parties on both sides. According to the contentions and admissions, there was an error in the calculation of interest by the defendant. There could not have been a mistake of law, as the judgment plainly stated that the defendant, Fry, was only entitled to interest on $2,502.01, which was the principal of the debt. The law in that case had been settled and declared by the judg- (261) ment of the court. It was as if A gives B a note for $3,000, with interest on $2,000 from date until paid. Could there

be any question of law in that case as to what sum was to bear interest? This proposition seems to us to be too plain for argument. As it is admitted that there was an error, it was an inadvertence of defendant to the facts when the calculation was made—a mistake as to the facts—or it was a fraud. We would have at once said that it was an inadvertence, an error, based upon the defendant's mistaking the amount to base his calculation upon, but for the fact that, after it has been pointed out to him, he undertakes to hold on to this money upon a technicality of law, which he thinks will protect him in holding it. But, whether it was a mistake of fact, or a fraud—and it must be one or the other—it was an error in the calculation of interest, and the Court will correct the error. It was an error in the calculation of interest that the Court will not allow. *Reade v. Street,* 122 N. C., 301. In that case there had been payments made that did not amount to as much as the interest due. In computing the interest, these payments were made rests, and the interest calculated to the date of payment, and added to the principal, and the payments deducted. The payments not being as much as the interest, this formed a new principal, larger than the original. The Court said this would not do. It was calculating interest upon interest, which could not be done. It was contended for the defendant on the argument that the calculation was correct, and the error was that the defendant, Fry, took the wrong basis for his calculation. So it was in *Reade v. Street, supra.* There was no error in the calculation in that case if it had been made on the right amount, the original principal. But by adding interest to the original principal, it became erroneous, and this Court corrected it. Pre-
(262) cisely this case. The defendant, Fry, by adding $1,410.38 interest to the original principal of $2,502.01, made a new principal $1,410.38 greater than the original principal, upon which he calculated interest. *Reade v. Street, supra,* is well sustained by *Worley v. Moore,* 97 Ind., 15; *Hanson v. Jones,* 20 Mo. App., 597; *Major v. Tardos,* 14 La. Ann., 10; *Boon v. Miller,* 16 Mo., 457. And it might, with much more reason, have been contended in *Reade v. Street, supra,* that the error in that case was an error of law, than it can be contended in this case, as the court had not passed upon that case, as it had in this.

As the jurisdictions of law and equity are united in the same court, it is not necessary for us to determine whether the plaintiff's relief is in equity, or at law. But it seems to us that there are authorities which sustain both. There are equitable elements in the case that would seem to support it in equity.

Equity, once acquiring jurisdiction, would administer the whole case. *Chambers v. Massey,* 42 N. C., 286. While the action of *assumpsit* was at law, it was equitable in its nature. *Davidson v. Land Co.,* 126 N. C., 704.

The defendant contended, as it was the County Treasurer who paid the money, he should have been the plaintiff, and moved to dismiss on that account. But it was the county's money that was paid to the defendant, and the county, by its Commissioners, is the proper plaintiff. *S. v. Candler,* 118 N. C., 888; *Commissioners v. Sutton,* 120 N. C., 298. The judgment of the Court below must be affirmed.

Affirmed.

---

(263)

BOARD OF SCHOOL DIRECTORS OF FORSYTH COUNTY v. COMMISSIONERS OF FORSYTH COUNTY.

(27 November, 1900.)

TAXATION—*Capitation Tax—Distribution—Public Schools—Constitution, Art. V, sec. 2.*

Not less than 75 per cent of the capitation tax must be devoted to school purposes.

ACTION by the Board of School Directors of FORSYTH, against the Board of Commissioners of Forsyth, heard by Judge *H. R. Starbuck,* at Chambers, in Winston, 31 July, 1900. From an order enjoining defendants from expending the capitation tax, except in accordance with the Constitution, Art. V, sec. 2, the defendants appealed.

Jones & Ratterson, for plaintiffs.
Glenn, Manly & Hendren, for defendants.

FURCHES, J. While this case, as constituted by the pleadings, involves several important questions, they are not presented by the order of the court and defendants' appeal. It is alleged in the complaint that the defendants, for the years 1897, 1898, and 1899, had levied a capitation tax of $2 on each taxable poll in Forsyth County, and had failed and refused to allot and pay over to the school fund of said county 75 per cent of said tax so levied; that for each of said years they had apportioned and paid to said school fund a less amount than belonged to it—for 1899, only 119-200 per cent, whereas they should have appor-

tioned and paid into said school fund 150-200 of said levy and collection; and that there was a much larger amount now in the hands of the defendants, and in the hands of the sheriff for collection, and which will be collected, than will be sufficient to pay the plaintiffs the amount due them for the year 1899. These facts are admitted, or not denied, by the defendants, and upon this state of facts his Honor
(264) made the following order: "It is ordered and adjudged that defendant Board of Commissioners of Forsyth County be restrained and enjoined until the final hearing of this cause from expending or using, or from having anyone to expend or use, other than for the purpose of education, in the manner prescribed by law, the poll-taxes for the year 1899, that may now be in the hands of, or that may hereafter be collected by, the Sheriff of Forsyth County, or anyone for him, up to an amount which, together with the sum heretofore applied to the purpose of education, shall be equal to $1.50 on each of the total number of polls then collected, and if, after reaching that amount, there shall remain uncollected other taxable polls, then the defendant is likewise enjoined from expending or having expended as aforesaid the sum of $1.50 on each poll-tax that may be collected out of the said residue." From this order, the defendants appealed. So the only question presented by the appeal is as to the correctness of this order. If the plaintiffs had also appealed, the case would have presented the other interesting question referred to above.

The question presented by this appeal seems to be too plain for discussion. It is settled by Art. V, sec. 2, of the Constitution, which reads as follows: "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose." It seems to us that this is too plain to be misunderstood by anyone qualified to be a County Commissioner. And, from the argument of the case, we are led to believe that the Commissioners did understand that the Constitution required them to devote 75 per cent of the capitation tax collected in their county to the public schools of the county of Forsyth. But it was said for them on the argument, that they were led into this error
(265) by some statute of the Legislature, making a different appropriation of this tax from that made by the Constitution. This may be the reason they had for making the distribution they did. But it can not be any justitfication for their making this erroneous distribution, or protection to them against its correction by the courts. It must be understood that

the Constitution is the supreme law in North Carolina, and whatever acts of the Legislature come in conflict with it must give way. The only case called to our attention as authority, was *Board of Education of Bladen v. Commissioners of Bladen,* 113 N. C., 379. The only bearing that case can have on this is that it decides that the act of 1889, providing a pension of 9 cents on the $100 for the old Confederate soldiers, to be paid out of the capitation tax, was constitutional, as it did not exceed one-fourth of said tax, which was allowed to the poor, as the old Confederate soldiers were a part of the poor of the State. That question is not involved in this appeal, but it shows that the three-fourths of the capitation tax devoted to the public school fund can not be entrenched upon, and the appropriation for the Confederate soldiers can only be sustained by treating them as a part of the indigent poor, and by taking the levy for their support out of the one-fourth of the capitation tax allowed to be appropriated to the support of the poor. There were some other parts of said opinion (113 N. C., 379) called to our attention on the argument; but any opinion we might give with regard to them would be but *dicta,* which, as a general rule, should be avoided and especially so when it appears that the court is not in perfect harmony as to them. But, as we can see no reason why the defendants should complain of the order appealed from, the same is affirmed.

(266)

SHEEK v. SAIN.

(27 November, 1900.)

1. DISCOVERY, PRODUCTION, AND INSPECTION—*Evidence—Inspection of Writings—The Code, sec. 1373—Slander.*

   Where no answer has been filed, the defendant is not entitled to an order to inspect check in possession of plaintiff under The Code, sec. 1373.

2. DISCOVERY, PRODUCTION, AND INSPECTION—*Evidence—Inspection of Writings—The Code, sec. 578—Slander.*

   Under the Code, sec. 578, a person will not be ordered to allow an inspection of the paper writing if the party making the request knows the contents thereof.

3. DISCOVERY, PRODUCTION, AND INSPECTION—*Order to Produce Paper Writings Will be Granted, When—The Code, sec. 578.*

   An order allowing others than the defendant to inspect a paper writing in the possession of the plaintiff, under The Code, sec. 578, is erroneous.

4. PLEADINGS—*Time—Filing—Judge—Discretion—Slander.*

The trial Court can not extend the time to plead beyond the next term of Court, unless by consent of the parties.

5. APPEAL—*Premature—Appealable Order—Inspection of Writings—Slander.*

An appeal lies from an order requiring a person to allow an inspection of paper writings.

DOUGLAS, J., concurs.

ACTION by J. L. Sheek against W. E. Sain, heard by Judge *O. H. Allen,* at Chambers, at Winston, 16 May, 1899. From an order requiring plaintiff to allow defendant to inspect certain documents, the plaintiff appealed.

(267) *Glenn & Manley,* and *E. L. Gaither,* for plaintiff.
Watson, Buxton & Watson, T. B. Bailey, and *Womack & Hayes,* for defendant.

FURCHES, J. This is an action of slander, founded upon the statement contained in the following complaint, filed at Spring Term, 1900, of DAVIE: "The plaintiff complains and alleges: (1) That on 31 October, 1898, at and in the county of Davie, and State of North Carolina, and at divers other times and places, the defendant, Wiley E. Sain, with intent to injure the good name and character of plaintiff, wilfully, falsely, and maliciously spoke of and concerning the plaintiff, in the presence of, and hearing of, J. M. Call, and divers other good citizens of the State, in substance and tenor the following words, to-wit: 'Jim Sheek (meaning the plaintiff) forged my name to a check,' intending thereby to impute to the plaintiff the crime of forgery. (2) That the said charge and imputation was untrue, (3) That 31 October, 1898, at, and in the county of Davie, and the State of North Carolina, and at divers other times and places, the defendant, Wiley E. Sain, with intent to injure the good name and character of plaintiff, wilfully, falsely, and maliciously spoke of and concerning the plaintiff, in the presence of J. M. Call, and divers other good citizens of the State, in substance and tenor, the following words, viz., 'Jim Sheek (meaning the plaintiff) forged a check.' 'Who would vote for Jim Sheek—any man that would forge a check? That he (meaning plaintiff) had forged one on him (meaning defendant). No man ought to vote for him' (meaning the plaintiff, who was then a candidate for sheriff), intending thereby to charge that plaintiff had forged a bank check on the defendant, and to impute to this plaintiff the

crime of forgery. (4) That said charge and imputation was untrue. (5) That on 31 October, 1898, at and in the county of Davie, and State of North Carolina, and at (268) divers other times and places, the defendant, Wiley E. Sain, with intent to injure the good name and character of plaintiff, wilfully and falsely and maliciously spoke of and concerning the plaintiff, in the presence and hearing of William McDaniel, and divers other good citizens of the State, in substance and tenor the following words, to-wit: 'Jim Sheek (meaning plaintiff) has forged a check on me for ten dollars, on one of the Winston banks,' intending thereby to impute to plaintiff the crime of forgery. (6) That the said charge and imputation was untrue. (7) That by reason of the said charges the plaintiff sustained damage to the amount of five thousand dollars. Therefore, plaintiff demands judgment against the defendant in the sum of five thousand dollars, and for costs." And at said term of court the defendant filed the following affidavit: "Wiley E. Sain, being duly sworn, says that he is informed and believes that the surety on plaintiff's prosecution bond is insolvent. (2) Affiant further states that the plaintiff charges defendant with having uttered words concerning him to the effect that he (the plaintiff) had forged the name of affiant on the back of a certain bank check. (3) That the plaintiff has in his possession the bank check, of which defendant spoke the words he did use of and concerning the plaintiff; that affiant has seen the check in the hands of plaintiff, and has seen the name of Wiley Sain indorsed thereon; that it is not the signature of affiant, was never written by him, nor did he ever have such a check in his possession, nor did he ever authorize any one to sign his name thereon. (4) That it is important to this defendant to have said check, or pretended check, in the custody of this Court, subject to the inspection of the parties to this action and their witnesses. (5) That it is necessary for this defendant to have access to said check, in (269) or to understandingly and intelligently answer the complaint filed herein. That plaintiff some years ago owed affiant for leaf tobacco bought of him. That a controversy arose as to whether affiant had been paid $10 by reason of a check on the bank, plaintiff affirming and defendant denying, the existence of such a check. That afterwards plaintiff showed this affiant a paper, purporting to be a check, with affiant's name indorsed on the same, which affiant at the time denied, and threatened to bring suit against plaintiff. That, under this threat of suit, plaintiff paid defendant the amount of the check. Whereupon, the defendant prays that the said check may be impound-

ed and placed in the custody of the Clerk of the Court for safe keeping and for inspection by the parties to this action, their attorneys, and witnesses, as often as may be necessary." Signed by W. E. Sain, and sworn to before the Clerk of the Court 12 April, 1899. And upon reading the defendant's affidavit, and after argument of counsel, the Court made the following order, to which the plaintiff excepted, and appealed: "The defendant herein, having moved the Court to impound a certain check described in the affidavit of defendant, and for permission to himself, his counsel, and witnesses, to inspect the same, and the motion having been by counsel postponed, to be heard by the Court during Forsyth Court, and now, on reading the affidavit and argument of counsel, it is ordered by the Court that the defendant, his attorneys, and such witnesses as he may designate, have inspection of said check, and the indorsements thereon, in the office of the Clerk of Davie Superior Court, upon notice of ten days to plaintiff to produce the same for such inspection, to be in the presence of plaintiff and his counsel, if they see proper to be present, and time to file answer is extended until (270) after such inspection."

The power of the Court, if it had the power, to make this order is statutory; and the defendant relies on secs. 578, 1373, Code, as authority for making the order. But it will be seen that it can not be sustained by section 1373, as the section is to produce "evidence pertinent to the issue;" and if the rule is upon the plaintiff, and he does not produce the evidence, or give a satisfactory reason for not doing so, the defendant may have judgment as of nonsuit. And if it be the defendant who is ordered to produce such evidence, and he does not do so, or give a satisfactory reason therefor, the plaintiff may have judgment by default. In this case there had been no answer filed and issue made. The validity of the order, therefore, depends upon section 578, which provides that "the court before which an action is pending, or the judge thereof, may, in his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy," etc. While the action was not at issue, no answer having been filed, it was an action pending, as the defendant had been summoned to appear, the case had been put upon the summons docket, and the plaintiff had filed his complaint, and we think section 578 applies to this case.

The object of this statute, we must suppose, was to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had. And, upon a careful reading of the defendant's affidavit, we are un-

able to see that an exhibition of the check, or a copy of the same, would give him any information he did not already have, or that a copy would furnish him more, or more definite, information than he already had. The defendant says in his affidavit that "affiant further states that the plaintiff charges defendant with having uttered words concerning him, to the effect that he (plaintiff) had forged the name of affiant on the back (271) of a certain bank check;" "that the plaintiff has in his possession the bank check of which the defendant spoke the words he did use of and concerning the plaintiff; that affiant has seen the check in the hands of plaintiff, and has seen the name of Wiley Sain indorsed thereon; that it is not the signature of affiant, was never written by him, nor did he ever have such a check in his possession, nor did he ever authorize any one to write his name thereon." What more information could an exhibition of the check give the defendant? He had seen the check, had seen the indorsement thereon, and knew that it was not his signature. An exhibition could not have given him more information than he already has, according to his own affidavit. The only thing he seems not to know, is as to whether he spoke and uttered the words of and concerning the plaintiff, that plaintiff charges him with speaking, and the exhibition of the check could give him no information as to that.

But, although it appears to us from defendant's affidavit that such exhibition could have done him no good, still we would have sustained the ruling of the Court upon the ground that the statute gives the Judge discretion to make an order requiring the plaintiff to exhibit the check to the defendant, and to give him, or to allow him to take, a copy of the same, if the order had done no more than this. But the order does much more than this. It puts it within the power of defendant to stay the plaintiff's action as long as he pleases. It is well settled that the Court has the right to give further time to parties to plead. But this extension of time is within certain limits and can not extend beyond the next term of Court, unless by the consent of the parties. To attempt to give further time than this would be to trench upon the prerogative of the Judge succeeding him. But this order does more than that. It puts it in the hands of the defendant to de- (272) termine when he will answer. He is to give the notice to the plaintiff whenever he wants the plaintiff to exhibit the check, and he is not required to answer until after this. Suppose the defendant does not choose to give this notice, he is not compelled to answer, and the case stands still. He has the "game in his own hands."

But, to our minds, there is another serious objection to this order, which is as follows: "It is ordered by the Court that the defendant, his attorneys, and such witnesses as he may designate, have inspection of said check and the indorsements thereon, in the office of the Clerk of Davie Superior Court, upon notice of ten days to plaintiff to produce the same for such inspection, to be in the presence of plaintiff and his counsel, if they see proper to be present, and time to file answer is extended until after such inspection." This order very much exceeds the power given in the statute. The power being statutory, the order can only be sustained by the statute, or it must fall. The statute is as follows: "The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, and documents in his possession, or under his control containing evidence relating to the merits of the action, or the defense therein." It is seen that the statute only authorized the Judge to order the plaintiff to exhibit the check to the defendant and to require him to give the defendant a copy, or permit him to take a copy of the same, within a specified time. This is the extent of the power contained in the statute, and it would seem that this is sufficient to serve all the purposes intended to be effected by the statute. We do not think it was intended by the statute to institute an investigation of the controversy between the
(273) parties—a kind of inferior court and petty trial—with witnesses and lawyers on both sides, without anyone being present with authority to keep order, or to command the peace.

It was contended on the argument that the appeal was premature; but we think not. *Commissioners v. Lemly,* 85 N. C., 341; *Justice v. Bank,* 83 N. C., 8. For the reasons given, we must hold that the order appealed from was erroneous.

Error.

DOUGLAS, J. (concurring). In concurring in the opinion of the Court, I deem it proper to state that I do not understand the Court as holding that the discretion of the Judge below is in all cases irreviewable, even when within the letter of the statute. The discretion confided to the Judge is a legal discretion, which must be exercised in subordination to other essential principles of law. *Marsh v. Griffin,* 123 N. C., 660. For instance, suppose that in the case at bar the plaintiff had declined to produce the check for inspection, even by the de-

fendant himself, upon the ground that it would tend to convict him of the crime of forgery; I have no idea that any court either would, or could, enforce its production. Even if within the letter of the statute, such a course would be against its essential spirit, and in direct violation of section 11 of Art. I of the Constitution of the State.

Cited: Mills v. Lumber Co., 139 N. C., 525.

(274)

WAINWRIGHT v. BOBBITT.

(27 November, 1900.)

EVIDENCE—*Deed—Sheriff's Deed—Execution—Sale—Issuance—Proof.*

The recital of execution and sale in a sheriff's deed is *prima facie* evidence thereof.

ACTION by M. H. Wainwright against Randall Bobbitt, Ann Harris, Mallie Q. Bobbitt, Ben. Bobbitt, and Sam. Bobbitt, the last two infants, by their guardian, F. S. Spruill, and B. B. Massenburg, attorney, etc., for Mrs. Rachel Judkins, heirs at law, heard by Judge *E. W. Timberlake* and a jury, at April Term, 1900, of FRANKLIN. From judgment for plaintiff, the defendants appealed.

W. M. Person and *W. H. Yarborough, Jr.,* for plaintiff.
Spruill & Ruffin, and *B. B. Massenburg,* for the defendants.

DEFENDANT BOBBITT'S APPEAL.

MONTGOMERY, J. This is an action for the recovery of the possession of land. The plaintiff claimed, through a sale under an execution, and the sheriff's deed made in pursuance thereof, of date 10 April, 1870, and registered on 31 December, 1885—the last day of grace, under chapter 147, Laws 1885. She (the plaintiff) had had possession from the date of the sheriff's deed, until about 1885, since which time the defendants have been in possession. The defendants do not set up any claim to the land. They have no paper title, and do not claim under possession and color of title; and they have not been in possession long enough to confer title by presumption of grant.
The sheriff's deed was introduced in evidence by the (275) plaintiff, and the recital therein of the execution, under which the sale was made, was the only evidence tending to show that such an execution had ever had existence,

if we may except the judgment docket, from which it appeared that numerous executions had been issued thereon in the case. The judgment docket, however, made no reference whatever to the execution recited in the sheriff's deed. If any execution ever issued, like that recited in the sheriff's deed, it does not appear in the Clerk's office from the judgment or execution docket; for the Clerk, in his examination, testified that no such execution could be found in his office, for ten years each way, in all files where they would likely be—files marked *"Fi. Fas.,"* or "Executions," from 1870. After unsuccessful motions to dismiss the action, under chapter 109, Laws 1897, and chapter 131, Laws 1899, his Honor instructed the jury, if they believed the evidence, to answer the issues in the affirmative. The issues were: (1) Is the plaintiff the owner and entitled to the possession of the land described in the complaint? (2) Do the defendants wrongfully withhold the possession thereof from the plaintiff?

The contention of the plaintiff is that the recital in the sheriff's deed of the execution is substantive evidence—*prima facie,* to be sure, in the sense that it is not conclusive as an official act, but yet primary in its character—and alone sufficient, to prove the existence of the execution unless rebutted by other evidence of the defendant. The defendant insists that the plaintiff in this action, who was not the plaintiff in the excution, should have shown the execution itself, and the sheriff's return thereon, as the best evidence that the execution had been issued, and was in his hands at the time of the sale; or that, if the execution was lost, then, upon proof of that fact, the recital in the sheriff's deed could have been introduced as *prima facie* evidence, but of a secondary nature,
(276) and admissible only because of the inability of the party offering it to procure the best evidence. It was incumbent on the plaintiff to show that an execution had been issued, that the same had been levied on the land, and that the land had been sold under the execution.

The main question in the case then is, is the recital in the sheriff's deed alone—without any other testimony—sufficient evidence to prove (the defendant having introduced no evidence) the existence of the execution? Or, to put it in another way, should the plaintiff have been required to show the execution iteself, and the return of the sheriff on it, as the best evidence, or, in the event of its having been lost, to have proved the loss, and then to have introduced secondary evidence, such as the sheriff's recital in the deed, or the testimony of the sheriff, or other collateral evidence that the execution had

been issued? In *Hamilton v. Adams,* 6 N. C., 161, it was decided that a purchaser of land at execution sale had to show both a judgment and an execution. The English rule, at the time when that decision was rendered, was that execution only was necessary to be shown where the purchaser was a stranger to the action. In *Rutherford v. Raburn,* 32 N. C., 144, it was said that the inconveniences attending the following out the principle of *Hamilton v. Adams* were so numerous and mischievous as to call for legislative action, and that in 1848 a bill was enacted into a law, entitled "An Act to secure the title of purchasers of land sold under execution;" and the Court in *Rutherford v. Raburn, supra,* in its construction of that Act of Assembly, restored the rule of the common law, as it was understood to have prevailed here before the decision in *Hamilton v. Adams.*

But to return to the main discussion: The plaintiff's counsel cited numerous authorities to the effect that a recital in a sheriff's deed that he had the execution at the time of sale was *prima facie* evidence of that fact, and we have (277) found other authorities from our court to the same effect, but in each and all of those cases the execution was either proved by other evidence than the recitals in the sheriff's deed, or it was shown that the execution had been issued and was lost. The first case in our Reports which we have been able to find, in which the question as to whether the recitals in a sheriff's deed of the execution, levy, and sale were evidence of these facts, was *Owen v. Barksdale,* 30 N. C., 81, and the decision seems to be in the negative. But, later, in *Hardin v. Cheek,* 48 N. C., 135, that ruling was insisted on by the plaintiff in the last-named action, but the Court held that the recitals were *prima facie* evidence of those facts. The Court said in that case: "It was insisted that the recital in a sheriff's deed was no part of the deed, and was therefore no evidence of the fact recited. This objection was founded, we presume, on what fell from the Court in *Owen v. Barksdale,* 30 N. C., 81, in which the Court says that a sheriff's deed is not evidence of the fact. If the Court intended to convey the idea that a recital in a sheriff's deed is not any evidence of the facts set forth in it, we do not concur in the opinion, but deem it an error. We hold that the recital in the deed was *prima facie* evidence of the facts set forth, it being the act of a public officer in discharging his official duties, reciting how and by what authority he made the conveyance, nevertheless open to proof that the fact did not exist." In that case, the sheriff's deed was introduced to show the levy and the sale, there being no

sufficient execution set forth in the sheriff's deed, the plaintiff's name being wanting. There a proper execution had been issued, and was shown to have been in the hands of the sheriff at the time of sale by the records of the Superior Court. In *Rol-*
(278) *lins v. Henry,* 78 N. C., 342, it was said: "The plaintiffs produced in evidence a *fi. fa.,* issued to the Sheriff of Buncombe, on 7 February, 1870, and levied on the *locus in quo* on 30 May, 1870. They then offered to prove by the Clerk of the Court that on 14 March, 1871, he issued a *venditioni exponas* on this judgment, which was never returned, and after diligent search could not be found in his office. This evidence was objected to, but admitted, as we think, properly." Then, in that case, the plaintiffs put in evidence the sheriff's deed as to the sale of the land, but did not offer the recital as evidence of the execution. Judge *Rodman,* who delivered the opinion of the Court, in that case, after remarking upon the difficulty of obtaining clear and definite decisions on the point, says for the Court: "The rule which seems to be established, and which is supported by reason, appears to be this: This return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution has not been returned to the Clerk's office, and it, with any return on it, has been destroyed, or lost, and it is proved otherwise than from the recital that there was a judgment and execution, the recital in the sheriff's deed is *prima facie* evidence of the levy and sale; they being official acts of the sheriff," etc. In *Miller v. Miller,* 89 N. C., 402, one of the objections raised was that there was no sufficient evidence of a sale of the land by the sheriff. The judgment and the execution both were in evidence, and the recitals in the sheriff's deed were admitted as *prima facie* evidence of a sale. In *McKee v. Lineberger,* 87 N. C., 181, the plaintiff offered in evidence a deed from a sheriff, reciting the judgment. It was received by the Court, over the objection of the defendant, upon the understanding that the plaintiff would show an execution, which was done. In *Curlee v. Smith,* 91 N. C., 172, the sheriff's deed containing recitals of the judgment, executions, and sale
(279) was admitted, but the Clerk of the Court also testified that he had made diligent search for the judgment and execution recited in the deed, but that he could not find them. And he also testified that "he found a statement of the judgment and *ven. ex.* on the execution docket of Union County Court, April Term, 1863," which was offered in evidence, and was as follows: "H. M. Houston against Calvin S. Austin. Judgment, $4.26, and interest from 7 April, 1862, and costs." "I advertised the within land according to law, and sold the

same at the court house, in Monroe, on 7 April, 1863, at which time and place C. B. Curlee became the last and highest bidder, in the sum of twenty-five dollars, which is applied as follows: My fees and commissions, two dollars and twelve cents, retained. C. Austin, Sheriff." The minute docket of the County Court was also offered in evidence, which contained the entry: "H. M. Houston vs. Calvin S. Austin. Attachment levied on land, and order of sale." In that case, the Court said: "It is incumbent on every one who purchases land at a sheriff's sale, and claims title thereto through a deed of the sheriff, to show, if he be the plaintiff in the judgment and execution, a judgment, execution, and sale; but, if he be a stranger to the judgment, then he need not show a sale and execution in the hands of the sheriff, authorizing him to sell, issued from a court of competent jurisdiction. *Rutherford v. Raburn,* 32 N. C., 144. And the recitals in the sheriff's deed are *prima facie* evidence of the sale and the execution, because, as said by Chief Justice NASH, in *Hardin v. Cheek,* 48 N. C., 135, 'It is the act of a public officer in discharging his official duties, reciting how and by what authority he had made the conveyance, nevertheless open to proof that the fact did not exist.' To the same effect in the more recent case of *Rollins v. Henry,* 78 N. C., 342." But the Court in the same case also said: (280) "The return there is *prima facie* evidence of what it states, and, taking all the evidence together offered by the plaintiff, we are of the opinion it was sufficient to supply the lost record, and establish the fact that there was a writ of *venditioni exponas* issued to the sheriff in the case of H. M. Houston against Calvin S. Austin, and that he sold the land in controversy, and that C. B. Curlee became the purchaser." In *Wilson v. Taylor,* 98 N. C., 275, the Court reiterated the doctrine that the recitals in a sheriff's deed were *prima facie* evidence of the facts recited, but there was in that case proof of the existence of the execution, and that it had been issued, and was lost.

The brief of Mr. Spruill, for the defendants, was well considered and interesting, and an examination of the authorities cited by him has resulted in the conclusion on our part that, under the earlier decisions of this Court, the recital in a sheriff's deed under which he sold real estate could be used only as secondary evidence, in cases where the original return and execution itself could not be procured, and after proof of its having been issued had been made. That rule, however, has been modified by more recent decisions, until it seems to be the settled doctrine of this Court that the recitals in a sheriff's deed are

prima facie evidence of the facts therein stated, and will be sufficient evidence upon which the plaintiff can recover, unless it is rebutted by proof to the contrary. In the present case the sheriff's deed was color of title, and the plaintiff had been in possession through her agent for more than seven years, and title had been shown to have been out of the State. But
(281) on the trial the deed was not introduced as color of title, but as a regular paper title, and we have had to consider the case in the aspect presented by the record.

No error.

DEFENDANT MASSENBURG'S APPEAL.

The defendant in this action (in the form and manner as they are represented by the defendant Massenburg) claim the land described in the complaint, through the will of Jeremia Ingram, and by a deed from Joseph J. Ingram, a son of Jeremiah, to the defendant's grantee. The testator in the will devised the land to his widow, Nancy, and his children, Samuel, Joseph, Johsua and Pressly, jointly between them (they thereby becoming tenants in common), and the will was proved in due form in the county of Franklin, in 1826, and the deed from Joseph was dated 9 December, 1844. Neither Joseph, nor any of those who claim under him, has ever been in possession of the land, and as the plaintiff has shown title out of the State, and the sheriff's deed for the same, she is entitled to possession of the land.

No error.

FURCHES, J. (concurring). I concur in the opinion of the Court, that the judgment should be affirmed for the reasons stated in this opinion. I do not think it necessary to determine whether the statements in the deed were primary or secondary evidence, or whether they proved the issuance of an execution, or only created a presumption of the issuance of an execution. It would have been necessary to determine these questions if it had been necessary for the plaintiff to rely upon the sheriff's deed as title to the land, unaided by possession. But this was not the case. The plaintiff became the purchaser of this land in 1870, took the sheriff's deed therefor, went into possession at once, and held possession thereunder until 1885, a period of fifteen years. This deed was, at least, color of title, and the plaintiff's possession ripened, and it became a perfect
(282) title in seven years, although it may have been defective when it was made, for want of an execution authorizing the sale, or for any other defect in the proceedings under which it was sold. And when the plaintiff had once acquired a good legal title by reason of her colorable title and her ad-

verse possession, it could only be destroyed by the defendant's afterwards holding adverse possession for seven years under color of title, or twenty years without color of title. *Christenbury v. King,* 85 N. C., 229. And it was not necessary that the plaintiff should have commenced her action at once, upon defendants' taking possession. *Id.* The defendants did not offer to show that they had any color of title, or that they had been in possession long enough to acquire title by possession. In fact, they offered no evidence of any kind. It was therefore the duty of the Court to charge the jury that if they found, from the evidence, that the plaintiff had been in possession of the land in controversy, holding it, under the sheriff's deed, for more than seven years, they should find that the plaintiff was the owner of the land. The judgment should be affirmed.

DOUGLAS, J., concurs in the concurring opinion.

---

(283)

CORPORATION COMMISSION v. THE SEABOARD AIR LINE SYSTEM.

(27 November, 1900.)

1. CARRIERS—*Railroads—Corporation Commission—Freight Rates—Car Load.*

   The corporation commission may fix freight rates and provide that ten tons shall be minimum car load for shipping fertilizers.

2. PLEADINGS—*Appeal—Carriers—Public Laws—Private Laws.*

   A corporation, to take advantage of a provision in its charter as a defense, must specifically plead it, a charter being a private statute.

ACTION by State of North Carolina on the relation of the North Carolina Corporation Commission against the Seaboard and Roanoke Railroad Company, the Raleigh and Gaston Railroad Company, the Durham and Northern Railroad Company, the Raleigh and Augusta Air Line Railroad Company, the Pittsboro Railroad Company, the Palmetto Railroad Company, the Louisburg Railroad Company, and the Roanoke and Tar River Railroad Company, heard by Judge *Frederick Moore,* at October Term, 1899, of WAKE. From a judgment sustaining the order, the defendants appealed.

Battle & Mordecai, and *Simmons, Pou & Ward,* for plaintiff.

J. D. Shaw, W. H. Day, and *J. B. Batchelor,* for defendants.

DOUGLAS, J. This is a proceeding originated before the Corporation Commission, in the exercise of its statutory duty to regulate freight rates. It was appealed by the defendants (284) to the Superior Court, and thence to this Court. On 27 April, 1899, the plaintiff commission issued an order providing that "on and after 15 May, 1899, the maximum freight rates on fertilizers on all roads in this State will be as follows (specifying the rates per ton for different distances). On less than car load shipments, rates may be made 20 per cent higher than above." This order is headed, "C. L., Ten (10) Tons, Minimum." This, we presume, means that the minimum car load shall be taken as 10 tons, and this seems the bone of contention. The defendants filed the following exceptions before the commission, all of which were overruled: "The said railroad companies except to the order of the North Carolina Corporation Commission, circular No. 1: First. Because the said reduction in the minimum car load weight is directly antagonistic to the effort being made generally to reduce expenses through the furnishing of equipment of larger capacity, and involves an increase in the cost of transportation. Second. Because the said rates are not in themselves reasonable, or just, but the same are unreasonably low; would fail to yield a just and reasonable revenue for the service, and these defendants would thereby be deprived of the equal protection of the laws, contrary to the Constitution of the United States, Art. XIV, sec. 1, and without due process of law would be deprived of their property contrary to the Constitution of the United States, Art. XIV, sec. 1. Third. Because the figures established for the tons, minimum, were unreasonably low, even when applied on car loads of fifteen tons minimum; were protested against before the North Carolina Railroad Commission, and only accepted by the carriers after the fifteen tons minimum in basis was made a part of the tariff, and then in so far as the carriers composing the Seaboard Air Line System are concerned, with the understanding that they would be given a trial for the season of 1898- (285) '99 only. Fourth. Because circular No. 1 makes no exceptions in favor of weaker lines, whose earnings are at a low rate per mile, which lines are unable to exist at the low rate thus sought to be instituted. Fifth. Because such rates unjustly reduce the revenues of lines formerly allowed a percentage of rate above the stronger, or standard, lines, thus resulting in an unfair reduction, greater in the case of one line than another." At the hearing on appeal before the Superior Court, the defendants abandoned all contentions that the rate

was unreasonable. This practically disposes of all exceptions but the first.

It is true that the defendants in the Superior Court introduced, among other evidence, the original charters of the Raleigh and Gaston Railroad Company and the Seaboard and Roanoke Railroad Company, and contended that the provisions of those charters, passed prior to the adoption of the Constitution of 1868, exempted those roads from the operation of any order of the Corporation Commission reducing passenger or freight rates below the minimum charges allowed in said acts. Whatever merit there may be in this contention is not now properly before us, as it was not included in the defendants' exception to the order of the commission. Being a personal exemption, depending upon a private statute, it does not come within the judicial cognizance of the Court, and must be specifically pleaded in bar. Not having been so pleaded, it must be deemed waived, at least as far as the present case is concerned. What might have been the effect of such a plea is not before us, but its efficiency may well be questioned, in view of chapter 68, Private Laws 1899. *R. R. v. Commissioners,* 88 N. C., 519, 522; *R. R. v. Missouri,* 152 U. S., 301, 317.

The contentions of the defendants were ably presented, but do not seem to us to touch the real point at issue. They are best recited in the words of the defendants' brief, as (286) follows: "The defendants contend that the said commission possesses no powers in regard to regulating freight charges except such as are conferred on it by this act, and that a diligent search of this act does not disclose a section or clause conferring such power, and that the circular prescribing that the minimum car load should be ten tons is *ultra vires*—an arbitrary and unwarranted invasion of the rights of the defendants to conduct and manage their own manner of conducting their business; such right being secured to them by this charter contract with the State. If the commission has the power to order what number of tons shall be a minimum car load, then it has the same power to order what number of tons shall be a maximum car load. It is conceded that the commission, except as to the R. & G. R. R. Co., and S. & R. R. R. Co., under the acts creating it, has the right to order what rates the defendants shall have for fertilizers in car load lots, provided their rates be reasonable. This is a very different power from the one attempted to be asserted in this case. One allows the railroads to build and equip their roads in a manner that they deem likely to prove both useful and profitable. The other, if conceded, is the power to destroy. If the commission

has the power to order that ten tons shall be a minimum car load, then it has the power to order that one ton shall be. The concession that the commission has the power to order the building of a suitable depot at a certain station is a different power from ordering what dimension such depot shall be. As well concede that the commission denote the weight of rail to be used; whether it shall be iron or steel; whether the locomotive shall be swift or slow, and how swift and how slow; whether the trains shall be heavy or light, and how heavy and how light—in a word, that the Corporation Commission is the sole judge of both what is useful or profitable in the
(287) operations of railroads in North Carolina." This contention seems based upon an entire misunderstanding of the action of the commission. It assumes that, when the commission ordered that ten tons should constitute a minimum car load, it intended to regulate the actual amount that should be carried in any one car at any one time. Nothing could have been much further from its intention. Its order evidently had no relation to the carriage of the freight itself, but simply to the rate of compensation to be charged therefor. Translated into plain English, it means that the published rates are based upon individual shipments of ten tons, or over, and that when less than ten tons are shipped the carrier may charge 20 per cent more than the standard rates. The term "minimum car load" is clearly a misnomer, perhaps derived from former conditions that have ceased to bear any relation to each other. It is common knowledge that an actual car load (that is, a car filled with one shipment) can be more cheaply and conveniently transported than one containing several shipments consigned to different stations, and perhaps at different stations. There is less handling, and less risk of mistake or loss. We presume that originally an actual car load fixed the car load rate, but when cars became larger, and their capacity greater than the average wholesale shipment, it was deemed just and proper to fix upon an arbitrary car load as the standard of rates, in order to prevent what would otherwise amount to a large average increase. The term "car load rates," having acquired a settled meaning by long and general use, was probably retained purely as a matter of convenience. Whatever may have been its origin, its meaning now is purely arbitrary, and well calculated to mislead, as it seems to have done in the present case; and yet the term seems to be universally used by railroad men, as well as by different railroad commissions.

As, therefore, the commission has simply said, in fact,

that the specified rates shall apply to all shipments of (288) ten tons, or over, without any attempt whatsoever to regulate the actual mode of transportation, the only remaining question is as to the power of the commission to fix rates. That such rates are reasonable, is admitted by the defendants. That being reasonable, they were within the authority of the commission, aside from any alleged exemptions by charter, can not be questioned in view of the provisions of the statutes and our recent decisions. Laws 1891, c. 320; Laws 1897, c. 206; Laws 1899, c. 164; *Exp. Co. v. R. R.*, 111 N. C., 463; *Leavell v. Telegraph Co.*, 116 N. C., 211, 220; *Caldwell v. Wilson*, 121 N. C., 425, 472; *Abbott v. Beddingfield*, 125 N. C., 250; *In re R. R. Com'r Cases*, 116 U. S., 307; *Regan v. Trust Co.*, 154 U. S., 362, 394. The judgment of the Court below is affirmed.

Affirmed.

Cited: Corporation Commission v. R. R., 137 N. C., 15; *Industrial Siding Case*, 140 N. C., 240.

WISEMAN v. GREEN.

(4 December, 1900.)

DEEDS—*Description—Construction—Intent—Mistake—Ejectment.*

Where it plainly appears from the deed itself that there is a mistake in the description, as where the word "east" is written "west," the Court will construe the deed according to the intent.

ACTION by J. L. Wiseman against Jesse Green and H. A. Green, his wife, heard by Judge *Thos. J. Shaw*, at February Term, 1900, of MITCHELL. From judgment for plaintiff, the defendants appealed.

S. J. Erwin, for the plaintiff.
J. T. Perkins and *E. J. Justice*, for the defendants. (289)

FURCHES, J. This is an action for possession of a small piece of land lying on Toe River, in Mitchell County, on which there is an old grist and saw mill, said to contain two acres. The case has been here before on another appeal, and is reported in 123 N. C., 395. But, owing to the condition in which the case

was presented in that appeal, the opinion is of but little service to us in this appeal. The land in controversy at one time belonged to Alexander Wiseman, and both plaintiff and defendant claim title under him. In 1871 the Sheriff of Mitchell County, having an execution in his hands against Alexander Wiseman, undertook to lay off his homestead, and to sell the excess under said execution. Among other lands sold by the sheriff as such excess, he sold two acres of land lying on the Toe River, "on which is situated one saw and grist mill, known as 'A. Wiseman's Mill;'" and the deed contains the following calls: "Beginning on the southeast bank of Toe River, two rods below the mill house, and runs west, north, east and south, to the beginning, so as to include the mill and site and two acres of land, it being and including the land sold as the excess of the homestead of A. Wiseman." It appears from the survey and the evidence in the case, that the land contained in the calls of this deed does not include the saw mill, nor the grist mill, nor the mill site. But, if the first call "west" is reversed, and read "east," instead of "west," the description in the deed, "beginning on the southeast bank of the Toe River, two rods below the mill house," will include both the saw and grist mill, and mill site. The plaintiff claims that the word "west" should have been written "east," and was written "west" by mistake—

(290) was an inadvertence, a slip of the pen—and should be corrected. The defendant contends that there is no mistake, inadvertence, or slip of the pen about it, and that there is nothing to correct; that, instead of its being a correction, it would be a change of the deed, which the Court has no right to make. And the *feme* defendant claims that since the date of the sheriff's deed, under which plaintiff claims, she has become the owner of this mill, or an interest in it, and to make the change the plaintiff is contending for would be to divest her of her vested rights. But it seems to us that this last contention of defendant—that it would divest her of vested rights—can have no influence upon the Court in considering the rights of the parties, as it must be admitted that the Court has no right to alter the deed so as to make it convey land which was not sold and conveyed by the deed. But it seems to be well settled that the Court has the right to construe a deed, and, in proper cases, to correct an inadvertence—a "slip of the pen"—when it plainly appears from the deed itself. *Graybeal v. Powers,* 76 N. C., 66; *Davidson v. Schuler's Heirs,* 119 N. C., 682. In *Cooper v. White,* 46 N. C., 389, it is said "that it is now well settled that a mistake in the course, or distance, contained in the calls of a deed shall not be permitted to disappoint

the intention of the parties if that intention appears, and the means of correcting the mistake is furnished by a more certain description in the deed." In *Long v. Long,* 73 N. C., 370, it is said that a line to run from a given point to the Ramsey Ford, so as to include the cleared land on Shingle Island, must be run so as to include the cleared land on Shingle Island, although a straight line from the beginning corner to the Ramsey Ford would not touch Shingle Island. In *Clarke v. Wagner,* 76 N. C., 463, where the call in the grant was to the upper end of an island in the Catawba River, thence to the lower end of the island, "so as to include two small islands," the lower (291) end of the second island extending considerably lower down the river than the lower end of the first island, the Court said: "The line must be run to the upper end of the first island, and then it would run a straight line to the lower end of that island, though it splits island No. 1, but for the further call, or description, in the grant, 'so as to include two small islands.' Therefore the line must be run down the far side of the first island until the second, or lower island, is reached. Then it must go to the far side of the second, or lower island, which laps on the lower end of the first island, and down the bank of that island to the lower end, and thence east to the mainland, so as to include both islands." This was because the grant was to be so run, or bounded, as to include both islands, although the calls in the grant would have only included a part of the first island, and no part of the second island, but for the call "so as to include two small islands." The sheriff's deed, under which the plaintiff claims "includes the saw and grist mill, and mill site," and the deed must be run so as to include them. The mill is what is considered in law a permanent object, a natural boundary, or location, and is the most certain part of the description contained in the deed, and controls the other calls therein. The beginning corner is certain; no mistake about that—two rods below the mill house, on the southeast bank of the river. To begin at that point and run "west," as the deed calls, and then with the other calls in the deed, you entirely miss the mill house and the mill site. But to commence at this known beginning corner, thence "east," and then with the other calls in the deed, you include both mill house and the mill site. It seems to us that common sense, justice, law, and the precedents of this Court sustain the ruling of the Court, and the finding of the jury that "west" was a mistake, and should have (292) been written "east." This being so, the Court does not change the deed, but only puts a legal construction upon it, which creates no new rights, nor does it affect the rights of

others. There was much oral evidence introduced tending to support the contention of the plaintiff and to sustain the contention of the defendants. But the call and description of the land are so plainly stated in the deed itself, that we have preferred to put our judgment upon this alone, without referring to the oral evidence. This ruling of the Court gives the plaintiff the oldest title under Alexander Wiseman, the common source. There were a number of other exceptions, which have been examined, and can not be sustained. They do not affect the merits of the controversy. The main contention upon which the controversy turned was the one we have discussed, and, as we find no error in that, the judgment of the Court below will be affirmed.

(293)

GARDNER v. SOUTHERN RAILROAD CO.

(4 December, 1900.)

1. CARRIERS—*Negligence—Loss—Stipulations—Railroads.*

   A common carrier can not, by express stipulation, exempt itself from loss caused by its own negligence.

2. CARRIERS—*Negligence—Contract—Loss—Valuable Consideration—Railroads.*

   A common carrier can make a valid agreement, fixing the value of shipments, in case of loss by its negligence, if such agreement be reasonable, or based on a valuable consideration, and it must clearly appear that such was the intention of the parties.

3. CARRIERS—*Reduced Valuation—Burden of Proof—Railroads.*

   The burden of showing the valuation clause in a bill of lading reasonable, or to have been made for a valuable consideration, is on the carrier.

4. EVIDENCE—*Burden of Proof—Bill of Lading—Valuation.*

   A bill of lading is *prima facie* evidence of the actual value of the property therein named.

ACTION by J. W. Gardner against the Southern Railway Company, heard by Judge *E. W. Timberlake* and a jury, at May Term, 1900, of ROWAN. From judgment for plaintiff, defendant appealed.

R. Lee Wright and *T. F. Klutz,* for the plaintiff.
A. H. Price, for the defendant.

DOUGLAS, J. This is an action for the value of a carload of stone destroyed through the negligence of the defendant. The following, taken from the case on appeal, includes all the evi-

dence offered by either side: "It was admitted by de- (294)
fendant that it was negligent, and liable for the value of
the stone lost and destroyed; but defendant contended that
the value was the amount agreed on in the bill of lading.
Plaintiff testified that two years ago defendant placed a car
on a siding about four miles from Salisbury to enable him to
load the same with stone for shipment to Danville, consigned to
a purchaser there, whose name appears in the bill of lading.
After the car was loaded, it was moved by the company to an-
other place, and afterwards got loose, and *became* a wreck, by
reason of defective brakes. There was no depot at the siding,
nor was there an agent at that point. Plaintiff obtained from
the agent at Salisbury a blank bill of lading, and filled it up in
his handwriting, and signed the same. He was instructed how
to do this by the agent, and also instructed to value the load of
stone at the rate of 20 cents a cubic foot, which, as plaintiff fur-
ther testified, amounted to the sum of $46.60. Plaintiff testified
that the stone was worth $218. This was a release shipment.
Defendant objected to plaintiff's testifying that the stone was
worth a greater sum than the amount specified in the contract,
or bill of lading. Objection was overruled, and there was an
exception to this ruling by defendant. Defendant introduced the
bill of lading, which was admitted to be in the handwriting of,
and signed by, plaintiff." It is unnecessary to set out the bill
of lading in full, as the greater part of it has no relation what-
ever to the question at issue, and apparently was never intended
to have. It seems to be a general form used indiscriminately for
all kinds of business, and merely filled in with a few names and
figures to fit in some degree the particular shipment. That it is
not a special contract for this particular carload of stone shipped
from a siding near Salisbury to Danville is apparent from the
following express stipulations. Among other things, the
bill of lading, which is of considerable length, provides (295)
that: "As the packages aforesaid must pass through the
custody of several carriers, it is understood, as a part of the
consideration on which said packages are received, that the ex-
emptions from liability made by such carriers, respectively, shall
operate in the carriage by them, respectively, of said packages
as though herein inserted at length, and especially that neither
said carriers, nor either of them, shall be liable for leakage of
any kind of liquids, nor for the losses by the bursting of casks or
barrels of liquids, arising from expansion and unavoidable
causes, breakage of any kind of glass, carboys of acid, or articles
packed in glass, stoves, or stove furniture, castings, machinery,
carriages, furniture, musical instruments of any kind, packages

of eggs, or for loss or damage on hay, hemp, cotton, or the evaporation or breakage of alcohol, or leakage of oil of any description, or for damage to perishable property of any kind, occasioned by delays of any kind or change of weather, or for the loss or damage on the sea or rivers. * * * It is further understood and agreed between the parties hereto, that the railway company above mentioned, or any connecting railroad company, shall not be liable for any damages by fire, or collisions on the rivers and sea, or for loss or damage by storm or accident on water, as the Southern Railway Company and connecting railroads assume no marine risks whatever." On its face appear the following words and figures: "Val. 20 cts. cubic foot." This is the only allusion it contains as to the value of the stone; nor is there the slightest intimation that this valuation in any way affected the rate of freight, or was based upon any consideration inuring to the plaintiff. It is not even stipulated that this valuation shall be binding upon either party, unless it is found by implication in the following clause: "In consideration (296) of the facilities afforded by this through bill of lading, and the through rates of transportation agreed upon, ———— hereby consent to all of its provisions, and expressly agree to release the transportation companies and lines concerned in this bill of lading from any and all marine risks." It is somewhat difficult to see the direct application of this clause to the case at bar. The entire distance from the quarry to Danville is over the defendant's own line, and hence there is nothing in the nature of a through shipment, and certainly nothing that can properly be called marine risks. Nor does it appear that the plaintiff was afforded any unusual facilities. It is the duty of a common carrier to furnish all reasonable facilities, and the mere furnishing of such facilities affords no basis for any demand for additional compensation, or for the waiver of legal rights. The defendant admits that the loss occurred through its own negligence. It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. *Mitchell v. R. R.*, 124 N. C., 236; *Hart v. R. R.*, 112 U. S., 331; *Ins. Co. v. Transp. Co.*, 117 U. S., 322; *Steam Co. v. Ins. Co.*, 129 U. S., 397; *Ins. Co. v. Compress Co.*, 133 U. S., 387, 415; *Constable v. Steamship Co.*, 154 U. S., 51, 62. The measure of such liability is necessarily the amount of the loss; and if a common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for only a small

part of the loss—it is thereby exempted *pro tanto* from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts, and nullify the settled policy of the law. We do not mean to say that there are no cases where a common carrier can make a valid agreement as to the value of the article shipped, but all such (297) agreements must be reasonable, and based upon a valuable consideration. Moreover, it must clearly appear that such was the intention of the parties. This Court has said in *Hinkle v. R. R.*, 126 N. C., 932, 938: "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 shipper; and it has been further held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable"—citing *Compania La Flecha v. Brauer,* 168 U. S., 104, 118; 4 Elliott, R. R., sec. 1424, and other cases. Again, we say in that case, on page 939, 126 N. C., page 350: "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. *Fire Ins. Co. v. Coos Co.*, 151 U. S., 452; *London Assurance v. Campania de Moagens de Barriero,* 167 U. S., 149." The defendant relies entirely upon *Hart v. R. R., supra,* but it does not apply to the facts before us. That case was expressly put upon the ground that the rate of freight charged was based upon the valuation. The Court says, on page 336, 112 U. S., page 153: "The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts 'as just and reasonable.' The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed 'on the condition that the carrier assumes a liability on the stock to the extent of the following-agreed valuation: If horses or mules, not exceeding two hun- (298) dred dollars each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load.' * * * If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation." The facts of that case were essentially different from

those before us, and on such facts the Court held that the stipulation was reasonable. In the case at bar it appears to us that the stipulation, if it amounted to such, was unreasonable, and without consideration. In this view we are sustained by the latest case we can find upon the subject—that of *Ward v. R. R.*, 158 Mo., 226, 28, in which the Supreme Court, of Missouri, says on page 31: "There was no consideration for the 'reduced valuation clause' in the contract of shipment, and to that extent it was void and inoperative, and should not have been considered by the jury." In the case at bar the defendant asked the Court to instruct the jury "that the *quantum* of damages was the sum agreed on in the bill of lading, and that was admitted by plaintiff to be in the sum of $46.60." The Court refused to give this instruction, and instructed the jury "to find from the evidence what the real value of the stone was; that the law presumes it to be only 20 cents per cubic foot, and the plaintiff must satisfy them by the greater weight of evidence that it was more than the amount mentioned in the bill of lading; unless he had done so, to render their verdict for that amount, but, if so satisfied, to render a verdict for whatever sum they find from the evidence it was worth." In this charge and refusal to charge, we see no error. The judgment of the Court below is affirmed.

Cited: Parker v. R. R., 133 N. C., 339; *Everett v. R. R.*, 138 N. C., 71; *McConnell v. R. R.*, 144 N. C., 90; *Jones v. R. R.*, 148 N. C., 585, 7; *Winslow v. R. R.*, 151 N. C., 254, 5.

---

(299)

SMITH v. TEW.

(4 December, 1900.)

ADVERSE POSSESSION—*Color of Title—Partition—Ejectment.*

The record of partition proceedings is color of title, and seven years' possession thereunder will give good title.

ACTION by W. J. Smith, J. L. Smith, M. L. Williams, T. A. McNeill and wife, Caroline E., Mary G. McNeill, and Alice C. McNeill, by their next friend, Thomas A. McNeill, against L. J. Tew and A. C. Tew, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1899, of CUMBERLAND. From a judgment for plaintiffs, defendants appealed.

Geo. M. Rose, for plaintiffs.

N. A. Sinclair and *W. A. Stewart,* for defendants.

FAIRCLOTH, C. J. This is an action of ejectment. The plaintiffs claim under a grant from the State to Neill Purcell, in 1771, and *mense* conveyances. In a deed from Draughan to W. T. Smith two lines were omitted, as plaintiffs claim, by mistake. They introduced a surveyor, who testified that in running this deed, "there were along the lines marks on all the lines of the Purcell 200 acres, corresponding to the age of the grant, and that, in his opinion, as an expert, the 200 acres were correctly located, leading to a well-known corner, * * * and that the proper location of this deed was as claimed by the plaintiffs, and the calls would cover the land in dispute." Another witness gave similar evidence. The defendants excepted to the foregoing evidence. The defendants introduced a grant from the State, in 1897, for twenty-eight acres included in the Purcell grant, according to the marked trees and corners referred to by the surveyor and not included by the course and distance expressed in the deed.

We are relieved from remarking on the above matters by another view presented by the record. In 1866 the (300) heirs, and those claiming under them, of W. T. Smith, who claimed under the Purcell grant, had partition of said Smith land, and the lands were divided, and the report of the commissioners was confirmed by the Court and recorded. In that proceeding one lot was allotted to Julia Williams, and it covers the land now in dispute. J. L. Smith, for the plaintiffs, testified: "It (the lot) fell to my sister, Julia Williams, in the division of my father's estate. She had turpentine boxes cut on part of it, and worked it, and cut waste timber on it from the time it fell to her to within four or five years. Part of it is in round pine now. Work was done on the plantation in dispute. It was in her possession and those who claim under her, continuously for all this time, and taxes were regularly paid on it." His Honor instructed the jury that, if they believed the evidence, they ought to answer the first issue, "Yes." The defendants excepted to the admission of the partition proceeding as evidence, on the ground that plaintiffs had shown no title to the land, and that "such attempted division does not create a color of title in plaintiffs, and especially when plaintiffs have shown no possession or acts of ownership over the same." His Honor was of opinion that the partition record was color of title, and submitted the evidence to the jury to find the facts. The question was directly decided in *Bynum v. Thompson*, 25 N. C., 578, where the Court held that possession under partition proceeding was taken under a permanent, written, and recorded muniment of title, and constitutes color of title, as much as if

(301) the parties had made deeds to each one severally for his share. The plaintiff's possession, then, for more than thirty years, is a perpetual bar against the entry of all persons (Code, sec. 141), subject to secs. 148-150, Code. There were verdict and judgment for the plaintiffs. No error.

Affirmed.

Cited: Lindsay v. Beaman, 128 N. C., 192; *Hill v. Lane,* 149 N. C., 272.

LOVEN v. PARSON.

(4 December, 1900.)

1. COSTS—*Parties—Administrator—Judgment—Claim and Delivery.*
   A person not a party to an action can not be taxed with the cost.

2. FEES—*Allowance of Attorney's Fees—Counsel—Claim and Delivery.*
   The Superior Court can not allow attorney fees in claim and delivery proceedings.

3. APPEAL—*Special Appearance—Costs — Judgment—Parties—Claim and Delivery.*
   Where judgment is rendered against a person, not a party to the action, he may make a special appearance and appeal.

ACTION by G. A. Loven against A. B. Parson, heard by Judge *J. W. Bowman,* at November Term, 1899, of BURKE. From judgment taxing the costs against W. S. Hall, administrator of J. P. Hall, W. S. Hall entered a special appearance and appealed.

John T. Perkins, for plaintiff.
Isaac T. Avery, for the appellant.

CLARK, J. The plaintiff, collector of an estate, took possession of a certain personal property under claim and delivery proceedings. An administrator having been appointed, the plaintiff turned the personal property over to him. At (302) the term of Court the plaintiff obtained judgment by default final against the defendant for the goods, and was also entitled to judgment for costs against him. But, instead thereof, the judgment contains a recital that the defandant is insolvent, and a judgment that the plaintiff recover of the estate

in the hands of the administrator (who had not been made a party to the action) for the costs, and for the further sum of $10 disbursed for counsel fees. Why the collector did not deduct his expenditures when he turned over the property does not appear. Properly, the administrator should have been substituted as party plaintiff, having been appointed before final judgment. Certainly all just and proper disbursements for costs and counsel fees by the collector can be proved against the estate, and recovered against the administrator, if he refuses to pay. But this must be done in the proper legal method and *forum*, the administrator having his day in court, and an opportunity to contest the necessity, the validity, or the amount of such disbursements. It is error to engraft such alien matter in this action, and, even if that could be done, it was error to do so when the administrator had not been made a party. The Superior Court can not make an allowance for counsel fees in this action. *R. R. v. Goodwin*, 110 N. C., 175.

The administrator entered a special appearance for the purpose of appealing only, which was the course pursued in *Blount v. Simmons*, 118 N. C., 9. It is true, the administrator, not being a party to the action, might have treated the judgment as a nullity; but probably the simplest and least expensive method of contesting its validity was the course here taken. *Clark v. Manufacturing Co.*, 110 N. C., 111, differs from this in that there the defendant, in a court of a Justice of the Peace, and named as defendant in the order of publication, complained that the publication was insufficient, (303) but, instead of moving to set aside the judgment on that ground, or appearing specially at the trial and noting an exception, or proceeding under section 220, as he should have done, being a party upon the face of the record, he attempted to appeal specially. The judgment on its face was regular, and, without the refusal of some motion or refusal of something asked, he had nothing from which to appeal. But here the appellant is not a party upon the face of the record. Therefore, instead of moving in the action to set aside the judgment, it is admissible for him, an alien to the action, to enter a special appearance for the purpose of appealing to this Court from a judgment taken against him therein. The judgment should be corrected by entering judgment for costs against the defendant and striking out the judgment against the appellant.

It is presumable that the appellant has some meritious defense, else surely an appeal would not have been taken to this Court which involves so small an amount, and for a claim which apparently is a just disbursement, chargeable in a proper

proceeding against the estate in the hands of the administrator. It is true, the latter has not set up such grounds of defense as he may have, for in this proceeding he contests the judgment solely because of not having been made a party to this action, and not being a proper party if he had been.

Error.

---

(304)

GRAY v. LITTLE.

(4 December, 1900.)

1. DAMAGES—*Compensatory—Punitive—Death by Wrongful Act—Malpractice—Physicians—Surgeons.*

   The Code, secs. 1498 and 1499, restrict the recovery for malpractice to compensatory damages.

2. EVIDENCE—*Retrial—Former Appeal.*

   The opinion in a former appeal is not competent evidence on a retrial of the case.

3. COSTS—*Appeal—Transcript.*

   Where appellant inserts unnecessary matter in the transcript, against the objection of the appellee, the costs thereof will be taxed against the appellant.

ACTION by John Gray, administrator of the estate of Katie Gray, against H. McD. Little, heard by *A. L. Coble* and a jury, at August Term, 1900, of ALEXANDER. From judgment for plaintiff, the defendant appealed.

B. F. Long, J. L. Gwaltney, F. A. Linney and *J. H. Burke,* for the plaintiff.

R. Z. Linney, B. B. Burke, and *J. B. Connelly,* for the defendant.

CLARK, J. This is an action by plaintiff, as administrator of his wife, for damages by reason of the death of his intestate, caused by the malpractice of the attending physician, the defendant. The exception for submitting an issue as to punitive damages, the admission of evidence to prove the same, and the instruction thereon, must be sustained, Code, secs. 1498, 1499 (originally Laws 1868-'69, c. 113, secs. 70, 71), which conferred the right to recover in such cases, restrict the re-
(305) covery to compensatory damages. The statute is explicit and unambiguous, and it has been uniformly held that only compensatory damages could be recovered. The

learned Judge below was misled by what was said by this Court on the former appeal. 126 N. C., 385. That appeal came up from an instruction of the trial Judge that, if the death of the intestate was only accelerated by the malpractice and negligence of the defendant, the plaintiff was not entitled to recover compensatory damages, but only nominal damages. The opinion of the Court discussed this proposition, and found it erroneous, and said, "There must be a new trial as to the issue of damages only;" but by inadvertence in the opinion it is said, "There was error in refusing the prayer for instruction." That prayer contained an instruction that plaintiff could recover not only compensatory, but punitive, damages; but punitive damages are not discussed or referred to in the opinion, and it was a sheer inadvertence that the refused prayer for instruction is referred to, instead of the instruction given, which alone had been discussed in the opinion. It is our duty to correct the inadvertence. It was also error to admit the opinion in the former appeal as evidence. This point is so clearly stated by *Bynum,* J., in *S. v. Smallwood,* 78 N. C., 560, that we content ourselves with a reference thereto. On this appeal by defendant it was unnecessary to send up the evidence, and, as the same was excepted to by the plaintiff, the costs of that part of the transcript and of printing the same must be taxed against the appellant. Rules 22 and 31 of this Court, and cases cited in Clark's Code (3 Ed.) pp. 918, 929. The evidence thus sent up seems to show a case of aggravated negligence, if not of peculiar atrocity. It is difficult for us to comprehend how the jury could have returned a verdict of $100 as compensation for the death by malpractice, as is found, of a wife and mother thirty-three years of age; (306) but that matter was for the jury, subject only to the irreviewable power of the trial Judge in setting aside the verdict and granting a new trial whenever the verdict is either inadequate (*Benton v. Collins,* 125 N. C., 83) or excessive (*Benton v. R. R.,* 122 N. C., 1008). We are not advised whether the criminal arm of the law has been invoked. Considerations of humanity would seem to require that the case should be investigated by the Solicitor for that district.

New trial.

SHOAF v. FROST.

(4 December, 1900.)

1. APPEAL—*Former Appeal—Former Adjudication—Homestead—Appraisers.*

Questions decided on a prior appeal are *res judicata.*

2. APPEAL—*Findings of Court—Conclusiveness—Homestead.*

Finding of fact by the Court below, when there is evidence on both sides of the question, is binding on appeal.

DOUGLAS, J., dissents.

ACTION by C. J. Shoaf & Co. against E. Frost, heard by Judge *E. W. Timberlake,* at Fall Term, 1900, of DAVIE. From judgment for plaintiffs, the defendant appealed.

E. L. Gaither, and *Glenn & Manly,* for the plaintiffs.
(307) *Watson, Buxton & Watson,* for the defendants.

CLARK, J. The defendant excepted to the homestead allotment on the grounds: (1) That the land allotted to him is found by the appraisers to be worth only $700. (2) Because the judgment under which the homestead is allotted had been paid off before any return of homestead had ever been made by the appraisers.

As to the first point, it was decided and settled in this case on the former appeal (123 N. C., 343), that, the jury having fixed the value of the whole tract at $2,000, the land should be divided into two tracts of equal value in the opinion of the appraisers, with election to the homesteader to take his choice. This is *res judicata* as to this case, and we could not change the ruling on a second appeal presenting the same point. Besides, we think the former ruling correct.

As to the second point, the defendant filed affidavits to show that the judgment had been paid off before the proceedings to allot the homestead. On the other hand, the plaintiffs read to the Court the former affidavits in the cause, the executions, and the sheriff's returns, and further insisted on the fact that the proceedings had been pending six years, in which time this cause had been here on three appeals (116 N. C., 675; 121 N. C., 256, and 123 N. C., 343), and that all during that time the defendant had treated the judgment and execution as valid. The Judge overruled the exception, thereby deciding the question of fact with the plaintiff. The defendant did not ask any more

specific finding of fact. There being evidence on both sides of the question, this finding of fact by the Court below is binding and conclusive on appeal. *Whitehead v. Hale,* 118 N. C., at page 604, and cases there cited.

No error.

Cited: *Wright v. R. R.,* 128 N. C., 79; *Kramer v. R. R., Ib.,* 270; *Perry v. R. R.,* 129 N. C., 334; *Jones v. R. R.,* 131 N. C., 135; *Gastonia v. Engineering Co., Ib.,* 367.

(308)

SHOAF v. PALATINE INSURANCE COMPANY.

(11 December, 1900.)

INSURANCE—*Policyholder's Right to Sue Reinsurer.*

A policyholder may sue a reinsurer to recover a loss on property covered by his policy.

ACTION by C. J. Shoaf and W. J. Ellis, trading as C. J. Shoaf & Co., against the Palatine Insurance Company, heard by Judge *W. S. O'B. Robinson* and a jury, at May Term, 1900, of FORSYTH. From a judgment for plaintiffs, the defendant appealed.

Watson, Buxton & Watson, for the plaintiffs.

Glenn & Manly, and *Burwell, Walker & Cansler,* for the defendant.

FAIRCLOTH, C. J. Prior to October, 1898, the Merchants and Manufacturers Fire Insurance Company, of Baltimore City, Maryland, issued its policies of insurance on the property of the plaintiffs in the town of Salem, N. C., with the usual stipulations and conditions, and received the premiums therefor from the plaintiffs. During the life of said policies, to-wit, on 4 October, 1898, the said Merchants Company and the Palatine Fire Insurance Company, of Manchester, England, doing business in this State, entered into a written contract of reinsurance, in which the Palatine Company agreed to reinsure all outstanding risks of the Merchants Company for loss or damage by fire, etc., on any property located in the United States and Canada, and assumed all liability under any outstanding policies or risks theretofore written by said Merchants Company, and

on any policy or risk that might be written by the Merchants Company before 1 November, 1898, the later business to be for the benefit of, and under the direction of, the Palatine
(309) Company, which company assumed all expenses and taxes connected therewith, and all said risks and policies are reinsured by the Palatine Company. In consideration of such reinsurance, the Merchants Company agreed to pay one-half of the unearned gross *pro rata* premiums on all policies in force on 1 October, 1898, to furnish complete schedules of all policies, to retire from business and to transfer and deliver its good will, right, title, and interest in its business, daily reports, indorsements, registers, and books of record to the Palatine Company, except office fixtures, furniture, etc., with a provision of release on failure to perform the obligations of said contract. The tenth article of said reinsuring contract provides that it shall only be effective as between the parties thereto; that no holder of a policy in the Merchants Company shall be entitled to enforce this contract against the Palatine Company; that the holders of such policies shall prosecute against the Merchants Company any claim arising under said policies; and the Palatine Company "agrees to pay all such claims legally arising and duly proved; and, further, in case of any contest arising in connection with, or suit being brought for, or on, any such claim, said Palatine Company agrees to defend the same, and pay all costs and expenses incident thereto." This agreement was signed by the two companies, and the plaintiffs were not parties thereto. Subsequently the insured property was destroyed by fire, and the plaintiffs, having performed the conditions of their policy, instituted this action against the Palatine Company alone.

The question is, can the plaintiffs, upon these facts, maintain their action? This question has not until now been before this Court. There is some diversity of opinion in the decisions of the Courts in our sister States and the general authorities. There is no question raised as to the validity of the
(310) the insuring and reinsuring contracts, each being in due form, and supported by a valuable consideration. A policy of fire insurance is a contract of indemnity (*Darrell v. Tibbitts,* 5 Q. B. Div., 560); and such contract gives the insurer an insurable interest in the property insured, coextensive with its liability (*Insurance Company v. Insurance Company,* 17 Wend., 359). A contract of reinsurance seems to be a union and blending of the business of the two companies, presumably for the advantage of each party. The reinsurer absorbed the estate and rights of the reinsured, and assumed the risks and liabilities of the reinsured, with the privilege of the rein-

sured, in the present case, to continue issuing new policies for a time specified, with the same right and liabilities under the new policies as under those already outstanding; this to be done for the benefit of, and under the direction of the defendant. The plaintiffs were neither a party to, nor in privity with, said contracts. The question is, have they an interest in, or arising out of, the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured, at the same time, is bound to indemnify the plaintiffs for risk and loss. Does the defendant's liability inure to the benefit of the plaintiffs, and, if so, can the plaintiffs directly enforce their claim for loss against the defendant? The unearned premium at the date of the contract was a part of the consideration passing to the defendant for its risk and liability assumed. In this unearned premium the plaintiffs had an interest at the time of the reinsurance.

The principle sanctioned by several respectable authorities is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A.

The case before us seems to come within the same principle. Our Code (section 177) provides that every action (311) must be prosecuted in the name of the real party in interest, etc. In all the cases close attention is given to the language of the agreement. In the present case the defendant expressly assumes the liability in case of loss, but agrees to pay to the Merchants Company only after claims have been duly proved in an action against the Merchants Company. The defendant also agrees, in the event of such litigation, "to defend the same, and pay all costs and expenses incident thereto." We see no reason why the plaintiffs should be required to first sue the Merchants Company, and then, in case of that company's insolvency, have to sue the defendant on its contract. The defendant has all the means and information necessary to make a just defense.

We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely on the ground that it has no contract with the plaintiffs. *Johannes v. Insurance Company,* 66 Wis., 50, is decisive on this question. It does not appear clearly, either from the statement, or the opinion, whether the promise was to pay the loss to the insured, or the reinsured, but the reasoning in the opinion does not consider that

matter material. It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action. The defendant relies on the provision in Art. X of its contract as a protection against any action of the plaintiffs against that company. If the plaintiffs have a right to sue the defendant, as we think they have, the two companies can not, by any agreement between themselves, to which plaintiffs are not a party, defeat that right.

(312) There are numerous objections to evidence, exceptions, and prayers for instruction. Some relate to communications between plaintiff's attorneys, and Harris, the general agent, and Ballard, an assistant manager, of the defendant and the Merchants Company. These letters were written pending, and in connection with, the work of adjusting the loss caused by the fire, and have no material bearing on the present question. Carefully reading the evidence, we find no incompetent evidence admitted on any material matter. The issues found in favor of the plaintiffs dispose of most of the questions raised by the exceptions.

Another exception is the refusal of his Honor to charge, on the third issue, "that there is no evidence of reinsurance by the defendant upon which it can be liable directly to the plaintiffs in this suit, and the jury will answer the third issue, 'No.'" Another exception is, that his Honor refused to dismiss the action, on motion, under Acts 1897, c. 109. These exceptions are met by what we have stated above. The defendant says, in its brief and oral argument, that "the first and leading question in the case relates to the right of the plaintiffs to sue the defendant upon the policies, and to the liability of the latter, even if a good cause of action upon the policies has accrued to the plaintiffs." That is the crucial point in the case, and that we have considered. Our conclusion on that point, already stated, renders further investigation unnecessary.

Affirmed.

Cited: *Voorhees v. Porter,* 134 N. C., 601; *Jones v. Water Co.,* 135 N. C., 554; *Wood v. Kincaid,* 144 N. C., 395.

(313)

WITTKOWSKY v. BARUCH.

(11 December, 1900.)

1. COMPROMISE AND SETTLEMENT—*Accord and Satisfaction—Discharge—The Code, sec. 574.*

   The payment and acceptance of a less sum than is actually due, when received in compromise of an entire debt, is a complete discharge of the debt.

2. CONTRACTS—*Assignments for Benefit of Creditors—Fraud—Trust—Demurrer.*

   A complaint declaring on a promise made in fraud of the rights of creditors, under an assignment, is demurrable.

PETITION to rehear. Petition granted. For former opinion, see 126 N. C., 747.

Burwell, Walker & Cansler, and *Osborne, Maxwell & Keerans,* for the petitioners.

Jones & Tillett, in opposition.

FURCHES, J. This case was before us at the last term, and is reported in 126 N. C., 747, and is before us again upon a petition to rehear. The facts are fully stated in the report of the case when here before, and we will not restate them, further than we may find it necessary to do so to dispose of the petition to rehear. When the case was here before, we were of the opinion that the plaintiff could not recover upon the old notes, and so stated in the opinion; and, while the defendants seem to understand this to have been the decision of the Court, the plaintiff does not so understand the opinion. And the defendant says that, if that was the decision of the Court at last term, he asks to reconsider that opinion and to reverse the same, and the Court is still of that opinion, to say so in plain and unmistakable terms— in the language of counsel, to "emphasize it." We try not to use harsh expressions, or language that is too aggressive, or emphatic, in our opinions; but it is always to be regretted, if we have failed to make ourselves under- (314) stood by intelligent lawyers. But, as counsel have asked us to do so, we must state that it was the opinion of the Court at the last term that the plaintiff could not recover upon the old note, and it was intended to be so expressed in the opinion then delivered. This rehearing is asked by defendants upon other grounds of alleged error in the opinion of the Court, and the practice has been to hear the petition upon the assign-

ments of error stated in it. But, as the learned counsel for plaintiff insists with earnestness and great zeal that this opinion of the Court is erroneous, we depart from the usual practice for the purpose of reviewing and reconsidering that question, for the reason that the case is still within our control, and if it is erroneous it should be corrected at the earliest opportunity.

The plaintiff contracted and agreed with the defendant H. Baruch, to compromise his debt of $20,000 for $10,000, and to surrender his notes, amounting to $20,000, upon the receipt of $10,000; and under said contract and agreement of compromise the $10,000 was paid to plaintiff, and his notes for $20,000 surrendered. If this does not bring the case within the terms of section 574 of The Code, which reads as follows: "In all claims, or money demands, of whatever kind, and howsoever due, where an agreement shall have been, or shall be, made and accepted for a less amount than that demanded, or claimed to be due, in satisfaction thereof, the payment of such less amount, according to any such agreement in compromise of the whole, shall be a full and complete discharge of the same"—we are not able to understand the meaning of the English language. This was not so before the enactment of section 574 of The Code. *McKenzie v. Culbreth,* 66 N. C., 534; *Bryan v. Foy,* 69 N. C., 45. But section 574 changed the law as held in the case above cited, and the receipt of a part in
(315) satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. This section has been held to be constitutional and valid. *Koonce v. Russell,* 103 N. C., 179. The payment and acceptance of a less sum than is actually due, in compromise of the whole debt, is a complete and valid discharge of the whole debt, under section 574. *Kerr v. Sanders,* 122 N. C., 635. The facts that plaintiff agreed to receive $10,000 by way of compromise for his $20,000 debt, and that he received the $10,000, and, upon the receipt of the same, surrendered the four notes, amounting to $20,000, are fully set forth in plaintiff's complaint. If this was not a compromise and a discharge of plaintiff's debt, what becomes of the debts of the other creditors? Were they discharged? Or can they all sue for and recover the balance of their debts? If they can, where is the compromise? The defendant combats this doctrine, and, for the purpose of sustaining his contention that this transaction between the plaintiff and the defendant, H. Baruch, was not a discharge of the old notes, cites *Wilcoxon v. Logan,* 91 N. C., 449, and other cases. Upon examination it will be seen that this case has no application to the

case under consideration. There was no agreement in that case to compromise the debt and take a less sum than was claimed, and no amount was paid or received under any such agreement. The other cases he cites are where there is a valid debt, and a new note is given for the old debt, which is tainted with usury, and for that reason could not be enforced. It was held that the giving the new note did not discharge the debt. But these cases have no application to the case under consideration, as there was no agreement between the parties to compromise the old debt, and to take a less sum than was due upon the old debt in satisfaction of the old debt, and therefore do not fall under section 574. The learned counsel, in his brief and argument, seems to have entirely overlooked this section of The Code, which is the turning point in his case. (316)

We are, therefore, compelled to hold that the plaintiff can not recover on the old notes, and with this we might close this opinion and sustain the demurrer, if we were entirely governed by the argument of plaintiff's counsel. He contended in his argument that this action was brought expressly upon the old notes, and not on the new promise. And in his printed brief he says: "In order that the demurrer be sustained in this action, it is absolutely necessary that the first proposition argued by the defendant above be true. In other words, unless this is an action, not to recover the original debt, but for a breach of the promise to execute the new notes, then the whole argument of the defendant falls to the ground. * * * We submit that upon the face of the complaint it is clearly and undoubtedly an action to recover the original indebtedness set forth in the first paragraph of the complaint, which the demurrer admits to be true. * * * We are at a loss to see how anyone can read the complaint, and come to the conclusion that this is an action based upon the promise of the defendant to execute new notes, when it is alleged that this promise was merely a trick and fraudulent contrivance on the part of the defendant H. Baruch." A demurrer only admits facts stated in the complaint, and not arguments, or conclusions, that may be drawn from them. So it would seem that we have gotten ourselves into the trouble of this rehearing by undertaking to give plaintiff something that he does not ask for and does not want—by undertaking to give him a "chance" upon the new promise, which he says he does not ask for, and by his argument virtually admits can not be done. It is hard to overlook the admissions and argument of so learned a lawyer as represented the plaintiff, and the Court has decided to (317) reverse its former judgment and sustain the demurrer. But, in doing this, it is only just to the Court that we

should extend this opinion so as to give a short discussion to what we thought before was embraced in the complaint, called the "new promise;" that is, the promise of the defendant to execute new notes to the plaintiff for the balance of his debt. This fact is clearly stated in the complaint, and it seems to have led the Court into the error of considering it in the former opinion. It was contended in the argument for the defendants that the Court, on the former hearing, overlooked the fact that the plaintiff was a trustee of the assets of the defendant H. Baruch, and of the creditors of said Baruch, under the deed of trust, and that the Court was led into error by reason of this oversight. The defendants' counsel are in error in stating that the fact that plaintiff was the trustee of this fund was overlooked by the Court on the former hearing. This fact was considered by the Court, as the opinion will show, and some of the authorities cited for the defendants on the rehearing are cited in the opinion of the Court. But it may be (and as it now seems to the Court) that it did not give to this fact the weight it was and is entitled to. The case at last term was not argued by defendant upon this point with the care and elaboration it was at this term. This may have been because the defendant thought, with plaintiff, that the case depended upon the correctness of that ground of the demurrer—the right to recover an old debt. But, however this may be, the defendant cited many new authorities, not cited or considered before, which have influenced the Court to reverse its judgment. These authorities are to the effect that an executory contract, based upon a fraudulent or illegal consideration, will not be enforced. For this position the defendant cites many author-
(318) ities—among them, *Covington v. Threadgill,* 88 N. C., 186; *Bowman v. Donegal,* 92 Am. Dec., 537; *Blackford v. Preston,* 8 Term, 89; *King v. Winants,* 71 N. C., 469; *Hays v. Davidson,* 70 N. C., 573; and many other cases. But, as this is such common learning, we do not cite other cases. The Court before had no difficulty as to the correctness of this proposition.

The matter about which the Court erred was in not holding that it was unlawful for the plaintiff to sell out his trust to Latta. We said then that it was a badge of fraud, but, it seems, we stopped too soon. The authorities cited upon this hearing have satisfied us that it was not only a badge, but a fraud upon the other creditors of Baruch, who were his *cestius que trustent;* that it was illegal for him to do this. And no executory contract based upon this transaction will be enforced in the courts of this State. *Foot v. Emerson,* 33 Am. Dec., 205, is directly in point, and shows that a trustee can not sell his trust. *Hays*

v. Davidson, supra; Comstock v. Draper, 1 Mich., 481; *Phalen v. Clark,* 19 Conn., 421; *Buck v. Albee,* 26 Vt., 184. "It is a general principle, universally enforced, that trustees can not use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violating or abandoning a trust is illegal." *Elliott v. Chamberlain,* 48 Am. Rep., 327. "Trust funds must be managed exclusively in the interest of the beneficiaries, and can not be employed so as to work a benefit to the trustee." *McEachern v. Stewart,* 114 N. C., 370; *Cansler v. Penland,* 125 N. C., 578. The examination of these cases and the argument of counsel have satisfied us that the plaintiff (if he wished to do so) can not recover on the new promise.

While we reverse our judgment in this case, we find, upon reading the opinion of the Court at the last term, that it is not necessary to change or modify any argument or statement made in that opinion, except the last paragraph, (319) in which it is said that it does not sufficiently appear on the face of the complaint for us to declare it a fraud, and the sentence overruling the demurrer. We now think that it does sufficiently appear, and we will allow the petition to rehear, and sustain the demurrer. This will be certified to the court below, and the action dismissed.

Petition allowed.

Cited: Ore Co. v. Powers, 130 N. C., 153; *Drewry v. Davis,* 151 N. C., 297.

THOMAS v. NICHOLS.

(11 December, 1900.)

1. TAX TITLES—*Tax Sale—Sheriff's Deed—Notice—Redemption—Non-Resident—Publication—Deed.*

   Purchaser of land at a tax sale must comply strictly with the statute as to the time for giving notice by publication to a non-resident owner of the land.

2. TAX TITLES—*Notice—Tax Sale—Computation of Time—Redemption—Tender—Agent.*

   Where an owner of land has until a certain day to redeem land sold for taxes, a tender of the tax on that day by owner, or agent, is in time.

ACTION by E. A. Thomas, against R. L. Nichols, Sheriff, headr by Judge *T. J. Shaw,* upon an agreed state of facts, at January Special Term, 1900, of McDOWELL. From judgment for defendant, plaintiff appealed.

E. J. Justice, for plaintiff.

(320) No counsel *contra.*

MONTGOMERY, J. On 2 May, 1898, Dale and Marklin became the purchasers of the 50 acres of land mentioned in the facts agreed, at a sale made by the Sheriff of McDowell County for the taxes due by the owner of the land, Henry P. Leader, for 1896 and 1897, and received from the sheriff a certificate of purchase, to the effect that the purchasers would be entitled to a deed on 2 May, 1899, on surrender of the certificate, unless redemption should be made according to law. Leader did not live on the land at the time of the sale and at the time of the publications of the notice hereinafter mentioned, and was a nonresident of the State. Publication was made by Marklin of a notice which was intended to give Leader information, under sec. 64, p. 272, of the Act of 1897, of his purchase of the land, in whose name it was taxed, a description of the land, for what year it was taxed, and when the time of redemption would expire. The statute requires that the notice shall be inserted three times—the first not more than five months, and the last time not less than three months, before the time of redemption shall expire. The first notice was inserted on 10 February, 1899, the second notice was inserted 18 February, 1899, and the third notice on 24 February, 1899. Each and all of the insertions of the notice were less than three months before the time of redemption named in the sheriff's certificate, and although the purchaser undertook to extend the time of redemption to 2 June, 1899, yet he will not be allowed in that method to change the language and plain meaning of the statute. If a purchaser of land at a tax sale fails to comply with the terms of the statute, which requires notice to the owner of the land, he does so at his peril. A delay in demanding the deed from the sheriff will work no injury to the purchaser if he has given the notice in the manner and form required by the statute; *i. e.,* not less than

(321) three months before time of redemption, which is one year from the day of sale. But, besides this, the purchaser, in his notice, undertook to extend the time of redemption until 2 June, 1899, and upon that day one J. H. Atkins, representing himself as agent of Leader, paid to the sheriff the amount of taxes, and all interest, costs, and penalties, and the sheriff offered the same to the plaintiff, who had received an assignment from the purchaser of the certificate, and he refused to accept the same. The plaintiff contended that the tender of the taxes, etc., was too late, and that it ought to have been made before the 2nd day of June commenced; that is, on the 1st day

of the month. We think the whole of 2 June was given Leader in which to pay the taxes. But the plaintiff further contends that Atkins was not really the agent of Leader to make the payment of taxes and to redeem the land. In reply to that, in the facts agreed, it is stated that Atkins represented himself as the agent of the plaintiff, and offered to do what Leader had the right to do; and Atkins got no advantage under the transaction, personally, so far as we can see.

The judgment was, that the plaintiff was not entitled to a deed to the land from the sheriff—that being his cause of action—and that he take nothing by his suit, and pay, with the sureties upon his prosecution bond, the costs of the action. There is no error and the judgment is

Affirmed.

---

(322)

BAKER v. BREM.

(19 December, 1900.)

SERVICES OF PROCESS—*Summons—Justice of the Peace—Sheriff—Coroner—Special Officers—Laws 1891, Chap. 173.*

Laws 1891, ch. 173, providing for deputizing special officers where the sheriff and coroner are interested, apply to courts of justices of the peace.

PETITION to rehear. Petition granted. For former opinion, see 126 N. C., 367.

J. T. Perkins, for petitioner.
Avery & Erwin, in opposition.

CLARK, J. When this case was decided, our attention was not called to chap. 173, Laws 1891, and it was overlooked by us. That statute provides: "If, at any time, the sheriff of any county be interested in or a party to any proceeding in any court, * * * or if the coroner be interested in any such proceeding, then the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process," etc. This language, by its very terms, applies to "any proceedings in any court." It is not restricted to the Superior Courts, but the contrary intent is expressed. Here, the sheriff being insane, and the coroner being interested in this action before a Justice of the Peace, that officer, under au-

thority of this statute, deputized an officer specially to serve the summons, and he made due service as such. The petition to rehear should be granted, and the judgment below affirmed.

MONTGOMERY, J. (dissenting). This matter is before us on a petition to rehear. The case, as originally heard, (323) is reported in 126 N. C., 367. The grounds upon which the petition rests, in the language of the petitioner, are stated to be as follows: "(1) That in filing the opinion in this case it appears this honorable Court overlooked and were not advertent to the fact that John Wall had served the summons under a special deputation of D. C. Pearson, J. P., before the attempted amendment by the Justice in directing it to the town marshal, as shown by the exceptions of appellee to the statement on appeal by appellants, accepted by appellants, and thus a part of the statement on appeal, as follows: 'That it should appear that the Justice, D. C. Pearson, deputed John Wall to execute the summons and claim and delivery papers because the Sheriff of Burke County was insane, the coroner was *ex-officio* sheriff, and the defendant R. J. Hallyburton was an officer under him, and in his name had levied an attachment on the property in his possession, and as such, had it in his possession, and that said Wall was deputed under Laws 1891, chap. 173.' (See statement on appeal.) (2) That the Court overlooked the facts that Justice Somers, upon trial of the case on its merits, and finding the property belonged to Mrs. Mabel Baker, 'allowed the plaintiff to amend any process or return or proceeding herein in form or substance for the furtherance of justice, as provided by Code, sec. 908'; that the Superior Court affirmed the said ruling of the Justice, A. F. Somers, in allowing all required amendments of summons, service, and return, for the furtherance of justice, as shown by said exceptions, to statement on appeal; and that such amendment, in any view, was valid, and sufficient to make the special deputation of J. A. Wall and his return more specific under said Laws 1891, chap. 173, in view of the fact that it was made under said act, as shown by the statement." We did not consider the statute (Laws 1891, chap. 173) in the opinion in this (324) case, and the invocation of it now can not help the plaintiff petitioner. Section 658 of The Code, provides, in substance, among other things, that, if there be no person qualified to act as sheriff of any county, the coroner shall execute all process, criminal or civil, lawfully issued to him. Chapter 173, Laws 1891, provides an amendment to The Code section, by adding as follows: "And if at any time the sheriff of any

county be interested in or a party to any proceeding in any court, and if there be no coroner in such county, or if the coroner be interested in any such proceeding, then the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process," etc. This amendment plainly had reference to process issuing from courts other than Justices' courts. It evidently was intended principally to afford the means of having process served in cases in the Superior Courts, where neither the sheriff nor the coroner could legally serve the process. In the Justices' courts the summons is directed to any constable or other lawful officer (Code, sec. 832), and can be served by the sheriff or any constable of any of the townships of the county. The process issuing from the Superior Courts is naturally and primarily directed to the sheriff, and sec. 658 of The Code, and chap. 173, Laws 1891, are intended to supply machinery by which process can be served in the Superior Court in cases where neither the sheriff nor the coroner can act. But in the Justices' courts the necessity does not exist for having process from them directed to the sheriff or coroner, because such process can be issued to any constable of the county. It makes no difference that Wall was a constable in the town of Marion. He did not serve the process as constable, and he was not deputized to serve it as constable. The plaintiff made it a part of the statement on appeal that the summons was served by Wall as (325) special coroner, under Laws 1891, chap. 173. There was no error, in my opinion, in the opinion of the Court, and this petition ought to be dismissed.

NIMS MANUFACTURING CO. v. BLYTHE.

(19 December, 1900.)

AMENDMENT—*Pleading—Complaint—Breach of Contract—The Code, Sec. 273—Referee.*

The trial court may, upon the coming in of a referee's report, permit an amendment to the complaint to conform to the facts found if the amendment does not change substantially the cause of action.

ACTION by the Nims Manufacturing Company against T. A. Blythe, trading as R. A. Blythe, heard by Judge *O. H. Allen,* upon exceptions to referee's report, at June Term, 1900, of

MECKLENBURG. From judgment for plaintiff, the defendant appealed.

Burwell, Walker & Cansler, for the plaintiff.
H. W. Harris, for the defendant.

CLARK, J. This is an action for damages for breach of a contract by defendant to buy all its output of yarns for April, May, and June, 1893, at a fixed price. The defendant, in his answer, alleged a settlement made at Philadelphia, 29 April, 1893, by which he was to pay for all yarns in process of manufacture, but denied he was to pay for those that had been shipped; that is, for two other lots mentioned in the answer.

(326) The plaintiff filed, by leave of Court, an amended complaint giving its version of the Philadelphia adjustment, alleging that it was agreed that defendant should pay for said other two lots. On the trial before the referee the whole matter of the Philadelphia adjustment was gone into. The Court substantially sustained the referee's report, first allowing the plaintiff to further amend his complaint to conform to the facts found. The defendant's objection, presented in different forms, to this amendment, is the ground of appeal. Code, sec. 273, authorizes the Judge "before and after judgment" to make amendments in furtherance of justice, and, "when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Such is this case. The plaintiff sued for breach of contract. The defendant pleaded an adjustment. The plaintiff amended, and alleged the terms of adjustment were different. Without any exception by defendant, the evidence was fully presented, and on coming in of the referee's report the Judge, with some modification, approved the same, but, out of abundant caution, first allowed the plaintiff to further amend pleadings to conform to facts as proved. In *Houston v. Sledge,* 101 N. C., 640, *Id.,* 98 N. C., 414, the plaintiff sued for specific performance of a contract. Defendant pleaded rescission, and abandonment of contract, and plaintiff replied admitting the rescission, and alleged that defendant at the time of the rescission, agreed to reimburse him for certain improvements he had made upon the premises. It was held that, while the original cause of action was abandoned, and a new one in form substituted for it, this was not a departure in pleading, as the new cause of action was embraced within the original one, and was in law identical with it, and did not, by its introduction into the

case, essentially change the nature and legal effect of the pleading; and that "such a change is not such a departure from The Code system of pleading as necessarily to de- (327) feat the action and send plaintiff out of the court to pursue her remedy upon the rescinding agreement, for the vital and essential subject matter remains; and such an amendment accords with the new practice, which, ignoring the new forms, aims to adjust and settle controversies about the same matter in a single action when the other party is not misled to his injury and damage." To like purport, *Banking Co. v. Morehead,* 126 N. C., 279; *Craven v. Russell,* 118 N. C., 564; *Ely v. Early,* 94 N. C., 1; *Hendon v. R. R.* (*Ante* 110). In *Sams v. Price,* 119 N. C., 572, it is said: "The plaintiff could not abandon his cause of action, and recover upon an entirely different cause of action, without amendment. It is true, if the defendant makes no objection, and tries the case in changed aspect, he will be taken as assenting thereto, and the amendment of the pleadings can be made after verdict to conform them to the case as tried." In the present case there is not an entirely different cause of action, but a controversy over the terms of an adjustment of the original cause of action, which adjustment is set up by the defendant to reduce the amount of the recovery, and the amendment is made before judgment. This is the root of the matter, and it is not necessary to discuss the exceptions in detail.

Affirmed.

(328)

KRAMER v. THE SOUTHERN RAILWAY COMPANY.

(19 December, 1900.)

NEGLIGENCE—*Infant—Railroads—Cross ties—Instructions—Contributory Negligence.*

Where a railroad company piles its cross ties on an unused portion of a public street and in a dangerous manner, and the company has knowledge that it is the custom of children to play upon them, it will be held negligent where a child, too young to be bound by the rules of contributory negligence, is injured by the ties.

FAIRCLOTH, C. J., and FURCHES, J., dissenting.

ACTION by Sarah Kramer, administratrix of Hugo Kramer, against the Southern Railway Company, heard by Judge *T. J. Shaw* and a jury, at Special (January) Term, 1900, of Mc-

DOWELL. From judgment for defendant, plaintiff appealed, and the judgment was affirmed.

For the *per curiam* order, see 126 N. C., 1152. On rehearing, the petition was allowed, and a new trial ordered.

E. J. Justice, for the petitioner.

G. F. Bason, A. B. Andrews, Jr., and *F. H. Busbee,* in opposition.

MONTGOMERY, J. This case was disposed of at the last term of this Court by a *per curiam* order affirming the judgment below, which was in favor of the defendant. A petition by the plaintiff to rehear was allowed, and the case is again before us for our reconsideration. The action was brought by the mother of the child, as his administratrix, under sec. 1498 of The Code, to recover compensation for the pecuniary (329) injury resulting from the death. The plaintiff in her complaint alleged that the defendant owed the public and her intestate the duty of keeping the street and its road free from obstructions, dangerous or unsafe, and which might injure the public or any of its members, and that in violation of this duty it placed dangerous obstructions in the street, to-wit, a large number of railroad cross ties, which were so carelessly piled as that on 27 July they fell on the intestate of the plaintiff, a child of 9 years of age, and by which he received injuries from which he died on 17 August, 1898. The facts, so far as they are necessary to be stated for the purposes of this appeal, are these: On Garden street, in the town of Marion, where the defendant's railroad crosses the street, the defendant had piled a lot of cross ties, not in the manner called "cribbing," but straight and in rows, one on top of the other. The street at that point was originally laid out to be 60 feet wide, but only about 14 feet of it had ever been, or could have been, used in its then present condition as a public highway for vehicles, and there were no sidewalks for pedestrians. In the summer of 1898, some little boys had a habit of playing on the cross ties, and while so engaged in play, on 27 July, one of them, Hugo Kramer, the plaintiff's intestate, 9 years old, that he might get a better view of a passing train undertook to climb up on the cross ties, and in so doing, pulled some of them over, and upon him, by means of which he was so badly hurt that in a few weeks he died. The gravamen of the complaint is the defendant's negligence growing out of its obstruction of a public street.

If the cross ties had been piled upon the defendant's own

premises instead of in the street, and the defendant had had no actual knowledge that the children were in the habit of playing on the ties, the law would have imposed no duty upon the defendant to look out for their safety by having the ties piled with a view to that end. *R. R. v. Edwards,* 90 Tex., (330) 65. The principle announced in the Turntable case (*R. R. Co. v. Stout,* 17 Wall, 657, and others), would not apply if the ties had been carelessly piled on the defendant's premises. The Turntable decisions are necessarily based either on the idea that such machinery has such peculiar attractions for children as objects of play, that, when left unlocked, there is an implied invitation to use them, or, when not properly guarded, it is so obviously dangerous to children as to call for diligence in the owner to take precautions against the dangers. Those cases are exceptions to the general doctrine, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine. Indeed, the plaintiff's counsel, in his argument here, stated that he did not contend for the application to this case of the principle laid down in the Turntable Cases. His argument was mainly addressed to the discussion of three of the plaintiff's exceptions—two, the first and the fifth, bearing on the Court's instructions upon the obstructions of the public street or highway; and the third, on the negligence of the defendant, as connected with, and dependent upon, the defendant's knowledge of the habit of the children of playing on the cross ties.

In the portions of his Honor's charge to which exceptions one and five were directed, the jury were instructed, in substance, that there was no obstruction of the street, unless the cross ties were in that part of the street which was used by the public, and that if the ties were upon that part of the street which was not used by the public, and could not be used, there was no obstruction of the highway; and, further, that the defendant company was guilty of a wrongful act in allowing it to remain there; but, nothing else appearing, the only remedy for that wrongful act, would be indictment by the grand jury, and the defendant be punished in a criminal action for (331) obstructing the public highway; "and a private individual would have no right to maintain an action against the railroad company for obstructing the street, unless that private individual was injured—received special injuries—on account of the pile of cross ties being there, an obstruction to the highway, and while the party was using the highway as he had a right to do." We see no error in that instruction. If the whole—all parts—of the street had been in a condition to

be traveled and used by the public, and by habit and custom, the public had used only a certain portion of it, then the instruction would have been wrong. But that is not the case here. There was evidence that only that portion which was used could have been used; the other part being unfit for use. The piling of the ties on the unused part of the street might have been without leave of the town, and the defendant might have been a trespasser, but, under the facts of this case, it had not obstructed the street.

The Court further instructed the jury that, although they might find that the pile of cross ties was an obstruction, there in the street, the plaintiff's cause of action was not founded upon that primarily, and that, before they could say that the intestate's injury and death were caused by the negligence of the defendant, they should inquire whether or not the defendant knew that the pile of cross ties in the street was a common resort of little boys of tender years in that neighborhood to play, and the burden was on the plaintiff to show that the railroad company knew that fact, and that, if the defendant did not know it, then they should answer the issue as to the defendant's negligence, "No." That was a correct instruction, and was consistent with the one just discussed.

But his Honor further told the jury: "If you find
(332) that it [the pile of cross ties] was not an obstruction to the highway, then it would be your duty to answer this issue [as to the defendant's negligence] 'No.'" In this instruction there is error. The pile of cross ties was not on the defendant's premises. It was on a public street in the town of Marion, and, even though the defendant might have been tacitly permitted to use the street for the purpose of piling the ties, yet the plaintiff's intestate was not a trespasser. If he was too young to be bound by any rule as to contributory negligence, and had a habit of playing, with other boys, on the cross ties, with the knowledge of the defendant, and without the defendant's attempting to prevent such sport or to take precautions against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the cross ties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury; and this is particularly true as the ties were not on the defendant's property, and the plaintiff's intestate not a trespasser. The petition is allowed, and a new trial is ordered.

New trial.

FURCHES, J. (dissenting). This is an action for damages under the statute for the negligent killing of plaintiff's intestate, Hugo Kramer, a boy 9 years of age. The facts, briefly stated, are, that in 1896, one Grayson Lewis, the owner of a lot of cross ties, hauled and piled them on an unused part of Garden street, within ten or twelve feet of the defendant's railroad track. In the latter part of the year 1897, Lewis sold them to one Dysart, and in April, 1898, Dysart sold them to defendant railroad company. On 17 August, 1898, the intestate of plaintiff and other boys of about the same size and age were play- (333) ing on this pile of cross ties, when some of the ties fell upon the intestate, and so injured him that he died in a few weeks. The ties were piled lengthwise, not crossed, or "cribbed," as it is called, and, being so piled, it is alleged, were dangerous for boys to play on. But defendant did not place them where they were, nor did it pile them there, but they were just where Lewis piled them in 1896, and just as they were when defendant bought them. Upon the trial below, the verdict and judgment were against the plaintiff, and she appealed to this Court, and at the last term, her appeal was considered, and the judgment appealed from was affirmed. It is now before us upon a petition to rehear.

It has been held by this Court that the decision at the former hearing, on an application to rehear, is a precedent. But, if so, how far it should influence the Court, or what weight should be given to it, we will not undertake to say. But the general rule, as we understand it, is, that it devolves upon the appealing party to show substantial error which did or might have injured him, or the judgment appealed from will be affirmed. It may therefore be, and we will not say that there is, no error in the charge of the Court. But, if there is, upon a careful examination, we are unable to see that plaintiff is injured, or that she might have been injured, by any such error, if there was such error.

To make the defendant liable, it must be shown that defendant has been guilty of doing something wrong, or has been guilty of negligence which was the proximate cause of the intestate's injury and death. And it devolves upon the plaintiff to show this. To do this, the plaintiff shows that in April, 1898, the defendant bought a lot of cross ties that had been piled there two years before it bought them; that these boys (334) had been in the habit of playing on them for months before defendant bought them without being injured, but that by the accidental falling of some of these ties, some two or three months after defendant bought them, the intestate was injured

and killed. The plaintiff admitted on the argument, that the "Turntable Cases," as they are called (17 Wall, 657), did not apply, as those cases were put upon the ground that a turntable was specially attractive to a child, and exceedingly dangerous; that the principle involved in those cases had no application to this case, as a pile of cross ties was not specially attractive, nor was it, as a general rule, dangerous.

But, while the plaintiff properly conceded that the Turntable Cases did not apply, it was contended that defendant was liable upon another line of authorities, where it is held that if a lumber dealer piles wood or lumber on his own premises, though carelessly piled, and children play upon it, and are injured by its falling, the owner of the lumber is not liable in damages; but, if he piles his lumber on the land of someone else, he is a trespasser, and, if the lumber falls and injures the child, he is liable in damages. If there is such a distinction, it is upon the merest technicality. But suppose we admit this doctrine to be correct, and try the case by this rule, and the defendant is not liable. The defendant is compelled to have cross ties to repair and keep its road in order. It can not pile them on its track or roadbed. That would be to obstruct the running of its trains, and stop the transportation of passengers and the movement of freight. It is, therefore, compelled to put them on its right-of-way. And we know, as a matter of law (Laws 1854-55, chap. 228), that the defendant has an easement of 100 feet on each side of its roadbed for just such purposes as this. Sup-
(335) pose these cross ties had been piled on some other part of this easement that had not been located as a public road or street; could it be contended that it had no right to do so, and that it was a trespasser?

We must suppose that plaintiff would admit that defendant has the right to pile cross ties on its easement not occupied by anyone. But plaintiff says, if this is so, the defendant had no right to pile its cross ties in the public road, and in so doing it was a trespasser, and therefore, liable. Assuming, for the present, that they were piled within less than one hundred feet of defendant's roadbed, which we will presently show to be the fact from plaintiff's testimony, this is the question: Was the defendant a trespasser in allowing these cross ties to remain where they were when it bought them?

The public road or street having been located over the ground where they were piled did not take the defendant's easement from it, except so far as the public use demanded it as a public highway, and defendant had the same right to use it as public highway that any one else had. It could not, therefore, be a

trespasser by using the road, though it may have used it improperly. If anyone using the street as a public highway had been injured on account of the cross ties being in the public street he might have been entitled to damages. But his action would not have been against the defendant as a trespasser, but for unlawfully obstructing the public highway, whereby and by reason of such obstruction he was injured. The plaintiff cited *Dillon v. Raleigh,* 124 N. C., 184, as authority for her position; but upon examination it will be found that it does not sustain her, but sustains the position we have taken. That was not an action against the city as a trespasser, but for allowing its streets to be and remain obstructed, and by reason of said obstruction the plaintiff was injured. Suppose the plain- (336) tiff in *Dillon v. Raleigh* had gone upon the bridge over the railroad, where the obstructions were in the street below, and had fallen and been injured; would the plaintiff contend that the city was guilty of a trespass, and therefore liable in damages? But we have said that the defendant's rights, as the owner of the easement, were only suspended so far as the traveling public demanded their suspension. Here was a public street located fifty or sixty feet wide, but it had only been open for public use for a space of twelve or fifteen feet wide; the other thirty-five or forty feet had not been open for public use, and was not used by the public as a highway. Then, can it be possible that defendant's right to use it for the very purpose for which it was granted to defendant was suspended, and the defendant became a trespasser by using it? This is the turning point in the case, according to plaintiff's view, as the attorney of plaintiff in his brief, discussing this case in connection with the Turntable Cases, says: "If a railroad company puts a turntable and a pile of cross ties on its own land, and a boy is injured on the pile of cross ties, and another boy is injured on the turntable, then the distinction the Court made might save the company from liability as to the boy who was injured on the cross ties, and it might be said that as to him the company had done no wrong and neglected no duty."

So it seems to us that the only thing remaining to be shown is, that the cross ties were piled upon the company's easement, which, as we have said, the plaintiff's evidence shows to be so. D. H. Hudgins, a witness for plaintiff, on cross-examination, testified: "Question. The railroad crossed Garden street near where this pile of cross ties lay? Answer. Yes." Same witness: "Question. Do you know those cross ties were (337) piled east of the east end of the crossing? Answer. Just about on a line with it." Same witness: "Question, And in order

to run into that pile of cross ties a man would have to run into a ditch? Answer. No; he would have to cross the railroad track, and then go on, say ten or twelve feet, and then he would be opposite the end of the cross ties." The evidence is uncontradicted that the cross ties were piled on land located as a street, but had never been worked, and was not, and had never been, used by the public as a street. The evidence was all introduced by the plaintiff, and we are of the opinion that, taking every word of it to be true, the plaintiff failed to make a case, and that defendant's motion at the close of the evidence for judgment of nonsuit should have been granted. The petition to rehear should be dismissed.

Cited: *S. c.,* 128 N. C., 269; *Briscoe v. Lighting Co.,* 148 N. C., 406.

HOFFMAN v. THE STANDARD LIFE AND ACCIDENT CO.

(19 December, 1900.)

1. INSURANCE—*Accident—Increased Hazard—Policy—Occupations.*

   Where a railroad flagman, insured in an accident company as "freight flagman, not coupling or switching," was killed while placing a slack pin between two cars, this single act of the insured did not vitiate the policy or change his occupation to one more hazardous, the classification of the company being solely of occupations.

2. INSURANCE—*Contract—Policy—Evidence—Verbal Agreement.*

   Evidence of a parol agreement is incompetent to alter the terms of an accident insurance policy.

FAIRCLOTH, C. J., dissenting.

(338) ACTION by M. P. Hoffman and J. L. Hoffman against the Standard Life and Accident Insurance Company, heard by Judge *H. R. Starbuck* and a jury, at a Special (August) Term, 1900, of GASTON. From a judgment for plaintiff for $249.25, the plaintiff appealed.

Jones & Tillett, and *A. G. Mangum,* for the plaintiffs.
Geo. F. Bason, for the defendant.

MONTGOMERY, J. The defendant, in January, 1899, was engaged in the business of insuring railroad employees against accidents in their respective occupations, the risks and rates

being classified according to the several occupations of the employees. The plaintiff M. P. Hoffman, is the beneficiary in a policy or contract of that nature, issued by the defendant to C. J. Craig, who was killed in the service of a railway company on 31 January, 1899, and this action was brought to recover the amount alleged to be due under the contract. Craig, in his application for the insurance, represented to the defendant that his occupation was "*freight flagman, not coupling or switching,*" and the policy was issued to him as "freight flagman, not coupling or switching by occupation." He was insured "against bodily injuries sustained through external, violent, and accidental means," and in case of death from such injuries the amount which he would be entitled to receive from the defendant was $1,000. At the time of the death of the insured he was engaged in the same occupation as he was when he was insured, the premiums had all been paid, and proper notices and proofs of death had been given. There is an agreement constituting a condition in the policy, however, which is in these words: "If the insured is injured, fatally or otherwise, by any occupation or exposure classed by this company as more hazardous than that stated above, the company's liability shall be for such principal sum or weekly indemnity as (339) the premium paid by him will purchase at the rate fixed for such increased hazard." The plaintiff was killed while in the act of "putting in a slack pin," which act is the placing an extra pin behind the one already in use to couple cars to take up the slack. In the original answer the defendant set up two defenses—the first that the insured fraudulently misled the defendant in the procuring of the policy, in that he represented himself in his application to be "a freight flagman, not coupling or switching," when he knew that the representation was false; that at the time of the representation he was in the employment of the Southern Railway Company as a freight flagman, and was constantly required to couple cars and to switch; and that the defendant, not knowing the truth of the matter, and trusting to the representations of Craig, was induced to issue the policy to him, which it would not have done had it known that his duties were those of a brakeman or switchman. The second defense was, that, as the assured was killed while in the act of coupling cars, the loss was to be adjusted under the condition already mentioned and quoted, the amount to which he was entitled being not $1,000, but $270. The defendant afterwards filed an amended answer, by which the first defense set out in the original answer was abandoned and stricken out, and a new and an additional defense was pleaded. The new defense was,

in substance, this: That at the time the policy was issued, it was agreed verbally between the agent (Dunbar) of the defendant, and the insured, that, if the insured should be killed while performing the duties of flagman, the beneficiary should receive the $1,000, or, if injured, he would be entitled to $7.50 per week for the injury; but that, if he was killed or injured while in the act of coupling or switching, his beneficiary would get $270 for death, or he would get $6 a week if only injured. The
(340) language of the new cause of action is as follows: "That at the time said application was made and said policy issued, the said Craig, the assured, had before him the classification of risks of defendant company, and was fully advised by A. S. Dunbar, the agent of defendant, who received said application and issued said policy, that he could take his choice of insuring as 'flagman of freight train, not coupling or switching,' in which case he would have to pay $27 premium, and then, if he should be killed or injured while engaged in the discharge of the duties of such flagman other than coupling or switching, his indemnity would be $1,000 for death, or $7.50 per week for injury; or he could insure as a freight brakeman simply, in which latter case he would have to pay $30 premium, which would secure him an indemnity of $300 in case of death, or $6 per week in case of injury. It was further fully explained to said Craig, that if he insured as 'freight brakeman' he could in no event get a greater indemnity than the $300 for death, or $6 per week in case of injury, whereas if he insured as he did, to wit, 'as flagman of freight train, not coupling or switching,' he would, if killed or injured while discharging the duties of coupler or switchman, still get so much of the $300 for death, or $6 per week for injury, as the premiums he paid, to wit, $27, would pay for—that is, he would, in any event, get 27-30 of $300 for death, or the $6 per week for injury; and that, fully understanding the whole matter, the said Craig decided to insure as he did." The contention on the part of the defendant in respect to the second defense in the original answer (the first defense having been abandoned, as we have seen) is this: That Craig having been insured as a flagman, not coupling or switching, and having been killed while engaged in putting in a slack pin—which the defendant contends is in law coupling—can not recover the full amount mentioned in the policy, for the
(341) reason that under the condition in the policy he was reduced, when he was engaged in putting in a slack pin, to the class of freight brakemen, a more hazardous class than one in which he was insured; and that the plaintiff, under the condition in the policy, can only recover $270, the amount which

a freight brakeman could recover upon the payment of a premium equal to that paid by the insured. That contention of the defendant may be further simplified thus: That the words of the policy, "not coupling or switching by occupation," so far as the recovery of the full amount named in the policy is concerned, mean not coupling or switching at all, under any circumstances. The plaintiff's insistence, on the other hand, is that the language used by the defendant in the policy, "not coupling or switching by occupation," does not mean that the insured should not couple or switch occasionally or exceptionally under stress of circumstances, but that he should not habitually, or as an occupation, couple or switch; that the classification of risks made by the defendant is based on occupations, and not acts. Looking at the matter, then, without yet considering the effect of the alleged parol agreement between the defendant and the insured, we are of the opinion that the defendant's contention is not the law in the case. We think that the language of the policy referred to has reference to occupations, to employments, and not to isolated or individual acts. It may be that some ambiguity is produced by the word "exposure," which is used in the condition just after the word "occupation," but, looking at the entire policy, and considering its aim and object, it must be that the word is used in the sense of the risks arising from a business, occupation, or employment. *Stone v. Casualty Co.*, 34 N. J. Law, 371; *Fox v. Association*, 96 Wis., 390. In the last-named case, Fox was insured as "supervisor of lumber mill, not working." He was killed while cutting a tree in the woods, (342) where he was aiding in getting logs for the sawmill. The company had classifications of risks; one class known as "lumber men in the woods," and another "supervisor of a lumber mill, not working." The death indemnity was twice as great in favor of the last named class over the first named. The language of the condition was precisely the same as the language in the condition of the policy we are now considering, and the Court said: "By the scheme of insurance under which the contract in question was made, acts and exposures were not classified; occupations were. The term 'exposure' does not appear on that account to have any particular legal significance, if any. The classification was solely of occupations. The question here presented has been repeatedly before the courts, and it has been uniformly held that a particular exposure under such a condition of insurance, though not in pursuit of, and as a part of, the business or occupation mentioned in the certificate, is not material to affect the liability of the assurer." That part of

the case is, however, from our view, of little consequence, for the reason that the jury found from the evidence that the occupation of the insured was that of both flagman and coupler. But the plaintiff insists that the defendant company through its agent, Dunbar, who issued the policy, knew that the insured, though his chief business was that of a flagman, was also engaged in the business—the occupation—of coupling cars when he was not flagging, at the time the policy was issued; that by the evidence of Dunbar himself it appeared that the insured made a true and full statement of his occupation when the policy was issued—that is, that he was a flagman, without qualification—and that the plaintiff was classified by the defendant, and that, if the classification was an erroneous one, the defendant was bound by it. There was such evidence, and his Hon-
(343) or should have submitted that phase of the case to the jury, with an instruction to that effect, as requested by the plaintiff. Nibl. Ben. Soc. and Acc. Ins., sec. 414; *Carpenter v. Accident Co.*, 46 S. C., 541. It seems from the statement of the case on appeal that the defendant's real contention was over the defense set up in the amended answer—the alleged parol agreement between the agent, Dunbar, and the insured. It was stated in the case on appeal, that the defendant admitted that Craig, the insured, was engaged in the same occupation when killed, as he was when insured. His Honor permitted the agent, Dunbar, to give evidence of the alleged parol agreement, and instructed the jury as follows: "If the jury believe the evidence of Dunbar as to what took place between him and Craig at the time of making the application, and that the schedules were classified, the premiums charged, and the amounts to be paid in case of death, as appears in the book, Exhibit "C," and also believe the evidence relating to the duties of flagman, brakeman, and switchman, this evidence, taken in connection with the policy and application, shows that the only reasonable construction of the contract between defendant company and Craig, in so far as it relates to the case, was that, in consideration of the premium of $27, defendant was to pay beneficiary named in policy $1,000 in case of death caused by external, violent, and accidental means while engaged in the occupation of flagman other than performing duties of coupling and switching; and in case of death so caused while engaged in coupling and switching defendant was to pay 27-30 of $300. And if the jury should further find that the deceased was killed by violent, external, and accidental means while attempting to take up the slack between cars, and which would have the effect of strengthening the coupling, the issue

should be answered, '$270, less premium admitted to be (344) due, unpaid.'" We think that the instruction was erroneous. The verbal agreement entirely altered the contract as it appeared in the policy of insurance, and evidence of it ought not to have been received.

New trial.

IN RE VENABLE'S WILL.

(19 December, 1900.)

1. WILLS—*Revocation—Parol Evidence—Intent.*

   Parol evidence is inadmissible to show the revocation of a will by a subsequent one.

2. WILLS—*Revocation—Probate—Holograph—Subsequent Will.*

   A later will does not revoke a former one unless the two are so inconsistent as to be incapable of standing together.

APPLICATION by S. L. Venable for the probate of the holograph will of Haywood Venable, deceased, in connection with a subsequent will, heard by Judge *W. S. O'B. Robinson* and a jury, at Spring Term, 1900, of STOKES. From order denying probate, propounder appealed.

A. M. Stack and *Watson, Buxton & Watson,* for propounder. (345)

W. W. King and *Jones & Patterson,* for caveators.

FAIRCLOTH, C. J. On 29 August, 1891, Haywood Venable executed what purports to be his holograph will, found among his valuable papers, after his death. On 15 March, 1899, he executed another will a few days before his death, which was probated and duly recorded on 24 March, 1899. S. L. Venable, one of the devisees in the holograph will, offered the same for probate and recordation on 13 May, 1899. An issue of *devisavit vel non* as to the holograph will was framed and submitted to a jury at Spring Term, 1900, of the Superior Court, whose verdict was against the propounder of the said will, and the judgment of the Court was that said holograph paper was no part of the last will and testament of Haywood Venable, all devisees, legatees, and heirs of the testator having come in as caveators. Propounder appealed.

We will designate the holograph paper as the first will, and the one recorded, as the second will. The question submitted

to this Court is, whether the second will revokes the first, or whether, taken together, they constitute the last will of Haywood Venable. We are not aware that this issue has ever been before this Court, and we must, therefore, rely upon our own reasoning and such outside authorities as we can find. Each paper starts off by declaring this to be "my last will and testament," and neither has a residuary clause. The first will declares all other wills void. The second has no express words of revocation. The second disposes of some property not mentioned or referred to in the first will. After the verdict was entered, the propounder moved the Court for judgment *non obstante veredicto* in favor of the first will, except as to provisions therein altered by the second will. This presents the whole question. During the trial the caveators were allowed to introduce parol evidence reciting the statements and declarations of the testator concerning his will. The admission of this evidence was error. "Parol evidence of the revo-
(346) cation of a will was held to be inadmissible." *Jackson v. Kniffin,* 2 Johns., 31; *Smith v. Fenner,* 1 Gall., 170, Fed. Cas. No. 13,046; Pritch. Wills, sec. 248. These are considered leading cases. The argument made was, that parol evidence is admissible to relieve latent ambiguities. The argument is correct, but it is a misapplication of the principle. We are not construing the meaning of these papers, but simply whether one revokes the other, without regard to the meaning of either, even if there was any ambiguity in them. Looking at these instruments, we can see no ambiguity in either. Each one names the devisee and legatee, and each sufficiently describes the property devised. In construing wills the intention of the testator must be ascertained from the face of the will when there is no latent ambuigity, and the intent to revoke one instrument by another is to be gathered in the same way. By revocation is meant the destruction of the operative force of the will, either in part or entirely, by some extrinsic act in regard to it, or by making and publishing a later instrument in the nature of a will *animo revocandi.* 29 Am. and Eng. Enc. Law, 266; *White v. Casten,* 46 N. C., 197. Some courts have held that revocation is accomplished by simply disposing of an estate in an inconsistent manner. Schouler Wills, sec. 406. But, "on the other hand, the later will, though well executed, does not revoke the earlier one, as such, and without express words of revocation, except by being inconsistent with it; and by the extent of such inconsistency must be measured the extent of the revocation. To operate a total revocation in such a case, the two dispositions must be so plainly inconsistent as to

be incapable of standing together. Only a revocation *pro tanto* results where the effect is that of partial inconsistency. It is like making a will and then adding a *codicil;* the final disposition reading by the light of both instruments together as a corrected whole." Schouler Wills (2d Ed.), sec. 407; (347) Pritch. Wills, sec. 248. The manner of revoking wills is discussed in various ways in Pritch. Wills, chap. 2, Art. I, secs. 243-263, and supports the principle we have above stated. The appointment or nonappointment of new executors, and the usual expression, "my last will and testament," have little bearing on the issue. 1 Williams Ex'rs, 164. Our opinion is that the first and last wills together constitute the will of the testator, and his estate must be administered accordingly. There is no express revocation, which is the usual and natural way of showing the intention. There is nothing more than partial inconsistency, and nothing is disclosed on the face of the last will to indicate a purpose to destroy the operation of the first will entirely. It may be that we have missed the testator's intention. If so, it was his misfortune not to have expressed it in direct terms, so that it could be understood. All we can do is to attempt to arrive at his intention according to the established rules of construction. There was error.

Reversed.

(348)

DAVIS v. YELTON.

(19 December, 1900.)

SPECIFIC PERFORMANCE—*Statute of Frauds—Parol Evidence—Sale of Land—Vendor and Purchaser—The Code, Sec. 1554.*

A parol contract to buy land can not be enforced, if the statute of frauds is pleaded.

ACTION by Albert Davis and Sally Rayfield against Charles and William Yelton, heard by Judge *T. J. Shaw* and a jury, at Fall Term, 1900, of GASTON. From a judgment for defendants, the plaintiffs appealed.

D. W. Robinson, for the plaintiffs.
R. L. Ryburn, for the defendants.

FAIRCLOTH, C. J. The plaintiff contracted in writing to sell and convey a tract of land to the defendant, who agreed ver-

bally to pay $400 for the land at a day agreed on. Before the day, the defendant notified plaintiff, for reasons stated in his answer, that he declined to perform his promise. Plaintiff sues for specific performance, tenders his deed, and demands that defendant pay the purchase price. The defendant relies on and pleads the statute of frauds. Code, sec. 1554. The Court refused to admit parol evidence, and held that the plaintiff could not recover. *Rice v. Carter,* 33 N. C., 298; *Wade v. New Bern,* 77 N. C., 460; *Gwathney v. Cason,* 74 N. C., 5. These decisions are approved and followed in numerous other cases.

Affirmed.

---

(349)

GEER v. THE DURHAM WATER COMPANY.

(19 December, 1900.)

1. EVIDENCE—*Immaterial—Complaint.*

   Evidence tending merely to prove a cause of action not stated in the complaint is immaterial.

2. LIMITATION OF ACTIONS—*Diversion of Water—Easement—Damages—Trespass—The Code, Sec. 155—Waters and Watercourses.*

   The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations.

3. LIMITATION OF ACTIONS—*Railroads—Easements.*

   Acts 1895, chap. 224, relative to the limitation of actions, refer only to railroads.

4. NUISANCE—*Abatement—Water Company—Quasi Public Corporations.*

   A water company is a *quasi* public corporation, and can not be abated as a nuisance.

5. WITNESS—*Experts—Findings of Court—Evidence.*

   The finding of trial court that a witness is an expert is not reviewable where there is any evidence to sustain such finding.

6. DAMAGES—*Permanent—Conversion of Water—Water Company—Water and Watercourses.*

   Permanent damages may be awarded a *riparian* owner who is injured by the taking of water out of a river by a water company.

ACTION by F. C. Geer against the Durham Water Company, heard by Judge *Frederick Moore* and a jury, at January Term, 1900, of DURHAM. His Honor submitted to the jury the following issues, to-wit:

1. Has the defendant unlawfully and unreasonably di- (350) verted and used the water from Eno River and the Nancy Rhodes Branch?

2. What annual damages has plaintiff sustained by reason of such use and diversion?

3. What permanent damages has plaintiff sustained by reason of such use and diversion?

4. Is plaintiff's cause of action barred by the statute of limitations?

5. Is plaintiff's cause of action as to Eno River barred by the statute of limitations?

And the jury having responded for their verdict to the said issues as follows, to-wit: To 1, "Yes;" to 2, "One hundred ($100) dollars per year, from December 8, 1894, up to this trial;" to 3, "One thousand, one hundred and fifty ($1,150) dollars;" to 4, "No;" to 5, "No."

From judgment for plaintiff, the defendant appealed.

Manning & Foushee, and *Boone, Bryant & Biggs* for the plaintiff.

Winston & Fuller, for the defendant.

DOUGLAS, J. This is an action brought by a lower riparian owner for damages resulting from the unlawful diversion of water, seriously interfering with the running of his mill, and greatly lessening its productive capacity. Long after the establishment of the plaintiff's mill the defendant, organized for the purpose of supplying water to the city of Durham, constructed a dam across Eno River above the plaintiff's mill, and also a dam across Nancy Rhodes Branch, a tributary of said river. The branch was used for its water supply, while the river was used to run its pumps when there was a sufficient flow. Some little water was taken directly from the river when needed, but not regularly; the main diver- (351) sion being the water pumped from the branch, that would otherwise have flowed into the river. The plaintiff contends that he is entitled to recover for damages arising not only from the unlawful diversion of the water, but also from its improper use in running machinery too great for the power of the river. The defendant contends, on the other hand, that the only cause of action set out in complaint is the unlawful diversion, and in this we think it is correct. But the plaintiff again says that, even admitting this to be true, the diversion, being an unlawful act, renders the defendant liable for every other act connected therewith; that is, that, as the defendant had

no right to divert the water from the branch flowing into the river, he had no right to use the river for the purpose of accomplishing such diversion, and that the allegation of unlawful diversion in the complaint was sufficient to include every act connected therewith, including the "uneven and irregular flow" caused thereby. The nature of the respective damages claimed by the plaintiff more clearly appears from the following extract from his elaborate brief:

"The effect of defendant's use and diversion of the water of the Nancy Rhodes Branch and Eno River is seen at plaintiff's mill in two ways: (1) In a gradually diminishing flow of water; (2) in an uneven and irregular flow. The first is, of course, caused by the diversion of an increasing quantity of the water naturally flowing in and forming a part of Eno River, which is not returned to the river. The second is caused by the following facts, to-wit: The turbine wheels of the defendant, being so large, and taxing to the utmost, if not overburdening, the capacity of the river to operate them, require a very large quantity of water for their operation, and when they are running they discharge a quantity of water from defendant's
(352) pond largely in excess of the flow of the river, and this causes a flood of water at plaintiff's mill more than he can use or hold, and goes to waste; and when defendant stops its wheels to enable its pond to be filled, and furnish it the required power to operate its wheels to force the water to a reservoir, its dam being very tight, very much less water flows down the river than is the natural and accustomed flow. The uneven and irregular flow is caused by the use of the wheels to divert the water from the branch and the river, and is an integral and inseparable part of its system and operation as now used, and as used since the construction of its work." If this statement had been in the complaint instead of the brief, it would have presented a different question, but there is no allegation whatever as to the "uneven and irregular flow." If this were merely an evidentiary fact, as claimed by the plaintiff (that is, a fact used merely to prove or explain the main allegation of unlawful diversion), the plaintiff might be correct. It must be either a mere evidentiary fact, upon which no additional damages can be awarded, or it is a separate cause of action, which must be alleged in the complaint with sufficient particularity to put the defendant upon notice. We therefore think there was error in the Court's giving the plaintiff's ninth prayer, which is as follows: "If you believe from the evidence that the defendant built a dam across Eno River above plaintiff's mill, and at times detained the water for the purpose of getting a head of

water with which to run its wheel, which is used in pumping water from the Nancy Rhodes Branch; and then, if you believe from the evidence that water so detained was let loose upon plaintiff's mill property below, and that this ponding and letting loose caused an irregular flow in the river, and that this irregular flow damaged plaintiff's property, then the Court charges you that this use of the water is an unreasonable use, and plaintiff is entitled to recover such damages as you may (353) find he sustained from this cause." It naturally follows that all evidence tending merely to prove a cause of action not stated in the complaint is immaterial, and the exceptions thereto must be sustained. We do not mean to say that this instruction would be intrinsically erroneous under all circumstances, but that it is error in the present case, as presented to us by the pleadings. It is, therefore, unnecessary to discuss the numerous cases cited by both sides as to the unreasonable use of water apart from its diversion. It is equally useless as well as utterly impracticable to discuss separately the 94 exceptions filed in the case. Many are without merit, while others are harmless, or immaterial, in our view of the case. The greater part may not occur upon a new trial, and, in any event, should the case ever come before us again, we may express the hope that, even in the view of the appellant, there will be less error, or at least a greater condensation of error. There are, however, some important questions that we will consider.

We see no error in the issues submitted under the pleadings, especially as we can nowhere find in the record the issues tendered by the defendant. They may be there, but, if so, they have successfully eluded our search.

We do not think that the action is barred by the statute of limitations. The plaintiff recovered annual damages only for the three years next preceding the bringing of the action. While, perhaps, the taking of the water is not, in its strictest sense, an easement, which implies rather a use than a total conversion of a thing, it is so nearly in the nature of an easement as to be governed by the same general principles. This Court has repeatedly held that it requires the continuous and adverse use of an easement for 20 years to raise the presumption of a grant, and that even then the pre- (354) sumption extends only to the "state and extent" of such user during said period. *Wilson v. Wilson,* 15 N. C., 154; *Pugh v. Wheeler,* 19 N. C., 50; *Gerenger v. Summers,* 24 N. C., 229; *Ingraham v. Hough,* 46 N. C., 39; *Benbow v. Robbins,* 71 N. C., 338; *Kitchen v. Wilson,* 80 N. C., 191; *Knight v. R. R.,* 111 N. C., 80; *Parker v. R. R.,* 119 N. C., 677; *Nichols v. R.*

R., 120 N. C., 495. Acts 1895, chap. 224, refers only to railroads, leaving the law of easements unchanged as to all other parties. Although not a railroad company, we think that the defendant is a *quasi* public corporation, in its fullest sense, and that neither the public interest, nor the public safety, would permit its abatement as a nuisance. We see no reason why permanent damages can not be assessed under the general principles of equity, and, in fact, we do not understand that this right is questioned by either party. The awarding such permanent damages is equivalent to the acquisition of an easement by condemnation. *Beach v. R. R.*, 120 N. C., 498; *Hocutt v. R. R.*, 124 N. C., 214; *Lassiter v. R. R.*, 126 N. C., 509.

We do not see how the cause of action now before us can be considered as a "trespass upon real property," under section 155 of The Code, or as amended by chapter 165, Laws 1895.

We are not prepared to say that a man may not be an expert in his life's work, without a scientific education, nor that it requires expert testimony to prove that a river is higher or lower than usual. Whether a witness is an expert is, within proper limitations of law, a preliminary fact to be found by the Court below; and, when there is any evidence to sustain such finding, it is not reviewable in this Court. *S. v. Davis*, 63 N. C., 578; *S. v. Cole*, 94 N. C., 958; *Smith v. Kron*, 96 N. C., 392; *S. v. Hinson*, 103 N. C., 374; *Blue v. R. R.*, 117 N. C., 644.

(355) There does not seem to be any serious question as to the right of the plaintiff to recover for damages arising from the unlawful conversion. *Pugh v. Wheeler*, 19 N. C., 50; *Williamson v. Canal Co.*, 78 N. C., 156. The latter case is directly in point.

For the reasons above stated, we think there was error in the trial below.

New trial.

Cited: *Shields v. R. R.*, 129 N. C., 4; *Mullen v. Canal Co.*, 130 N. C., 505; *Phillips v. Tel. Co.*, *Ib.*, 527; *Leigh v. Mfg. Co.*, 132 N. C., 172; *Thomason v. R. R.*, 142 N. C., 331; *Allen v. Traction Co.*, 144 N. C., 289; *Roberts v. R. R.*, 151 N. C., 409.

(356)

HOWE v. HARPER.

(19 December, 1900.)

1. PARTIES—*Defect—Answer—Demurrer—Waiver—Pleading.*

   Objection for defect of parties must be made by answer or demurrer, or it is waived.

2. PARTIES—*Necessary—Railroads—Receivers—The Code, Sec. 1255.*

   An insolvent railroad company is not a necessary party to a suit against a purchaser at foreclosure of mortgage on its road, for an injury while it was operating the road.

3. PARTIES—*Railroads—Receivers—Foreclosure—Personal Injuries.*

   Where the receiver of an insolvent railroad company is discharged, he is not a proper party to an action against a foreclosure purchaser, to recover for personal injuries received after his discharge.

4. RAILROADS—*Judgment—Insolvent Corporation—Foreclosure—Personal Injuries—Receivers—The Code, Sec. 1255.*

   In an action for *tort* committed by an insolvent corporation, against purchaser at foreclosure of the property of the insolvent company, the receiver of the insolvent railroad company being a party, judgment should be against the purchaser, subject to be credited with the sum which the receiver may pay.

ACTION by S. B. Howe against G. W. F. Harper, receiver of the Chester and Lenoir Narrow-Guage Railroad, and J. G. Hall and David Hemphill, receivers of the Chester and Lenoir Narrow-Gauge Railroad, and the Carolina and Northwestern Railroad, heard by Judge *H. R. Starbuck* and a jury, at August (Special) Term, 1900, of GASTON. From judgment in favor of defendants, the plaintiff appealed.

(357)

Jones & Tillett, and *A. G. Mangum,* for the plaintiff.

No counsel for the defendants.

CLARK, J. The plaintiff was injured on the Chester and Lenoir Narrow-Guage Railroad, 31 March, 1894, and the jury have found negligence, and that the damages sustained were $500. The defendants, Hall and Hemphill, had been receivers of the said railroad company, but they had been discharged on 10 March, 1894, and the road had been turned over to the company and was being operated by it at the time the plaintiff was injured. Subsequently, in January, 1896, the company was again placed in the hands of the receiver (the defendant,

G. W. F. Harper), and its property and franchises were sold under foreclosure proceedings in November, 1896, and the purchasers were incorporated as the Carolina and Northwestern Railroad Company. This latter company, as well as both sets of receivers of the Chester and Lenoir Narrow-Gauge Railroad, are parties defendant, but the objection was made that judgment could not be entered on the verdict, because the Chester and Lenoir Narrow-Gauge Railroad Company is not a party to the action. The Judge, being of that opinion, rendered judgment against the plaintiff.

The objection for defect of parties came too late. It must be taken by answer or demurrer, or it is waived. *Mining Co. v. Smelting Co.*, 99 N. C., 445; *Kornegay v. Steamboat Co.*, 107 N. C., 115, and cases there cited. But, even if the objection had been taken in apt time, it is without merit. By virtue of Code, sec. 1255, the mortgage made by the Chester and Lenoir Narrow-Gauge Railroad Company, "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." *R. R. v. Burnett*, 123 N. C., at page 215. Whether the mortgage was executed before or after the date of injury to the plaintiff, the mortgagees took subject to this statute, and the purchasers take no greater interest. The contention, however, is, that the defunct corporation is a necessary party. Why or how is it necessary, and for what purpose? It is insolvent; its property and franchise have been sold under the mortgage; it no longer exists; it has neither agents nor officers who can be served with process. If the ex-officers of the extinct corporation could be found and brought in, why should they defend the action? What interest have they to protect? The action is against the present company, which has bought the property under foreclosure sale, which property is liable in its hands for payment of damages for *torts* committed by its predecessor. The company now in possession of the property is the only party interested in defending this action, which it has done. The defendant, Harper, appears to have not been entirely discharged as receiver when this action was begun, 4 March, 1897, as his answer admits that he still had a small balance in his hands, though he had turned over the property to the purchaser, the new company. But we place no stress on that circumstance, for, if he had been entirely discharged, the property in the hands of the new company was liable for payment of the plaintiff's claim, and the new corporation is the real party in interest. If any other property of the defunct corporation is in existence, which should be

(358)

first applied to satisfaction of plaintiff's judgment, its receiver (Harper) is a party, and represents it (*Farris v. R. R.*, 115 N. C., 600); and if he had been discharged, the real defendant, the new corporation, on suggestion that there was other property of the old corporation, might have possibly (359) moved that a receiver be appointed, and he made a defendant, that he might be directed to apply such property first to the plaintiff's debt; but that is a matter between the two corporations. The mortgage being nonexistent as to plaintiff's judgment, the present corporation, having succeeded to its property and franchises, is liable, not to exceed the extent of the mortgaged property bought by it. If any property of the old corporation remains in the hands of Harper, receiver, which has not been disbursed in discharging his trust, it should be applied to the plaintiff's judgment, but judgment should have been rendered against the new corporation for the $500 damages assessed by the jury and (though he sues as a pauper) for costs (Laws 1895, chap. 149), to be credited by whatever amount, if any, is paid by Harper, receiver, as aforesaid. Hall and Hemphill are not proper parties to this action, having been discharged as receivers before the injury was sustained by the plaintiff. Upon the facts found, judgment should have been entered as above.

Reversed.

Cited: Bridgers v. Staton, 150 N. C., 221.

(360)

MARSH v. DELLINGER.

(19 December, 1900.)

1. ESTATE—*Life Estate—Contingent Remainders—Sale—Infants—Equity—Wills.*

   Where there are contingent and vested interests under a will subject to a life estate, a court of equity has power to order a sale to subserve the interests of all the devisees, if any of the contingent remaindermen are *in esse* and represented; but if infants are interested, equity requires that they be properly represented and protected, and it must be found as a fact that a sale of the property before the death of the life tenant will be for their benefit.

2. WILL—*Distribution.*

   Where a will directs that property be divided equally among four children and two grandchildren, naming them, each of the grandchildren is entitled to a one-sixth part.

MARSH *v.* DELLINGER.

ACTION by James H. Marsh, J. C. Marsh and Dora A. Marsh, A. F. Kritz and Annie M. Kritz, Henry F. Marsh and Amelia Marsh, Mary C. Bynum and W. K. Bynum; James and Henry Marsh, and James C. Marsh, executors of Sarah Rachel Marsh, against Henry Marsh Dellinger and Chester A. Dellinger, minor heirs, heard by Judge *T. J. Shaw, at* October Term, 1900, of MECKLENBURG. From judgment decreeing a sale, the defendants appealed.

Clarkson & Duls, for the plaintiff.
No counsel for the defendant.

FURCHES, J. It appears from the will of Sarah Rachel Marsh, dated 3 October, 1894 (a copy of which, marked "Exhibit A," was made a part of the case on appeal), that she willed and devised the lands mentioned in the pleadings
(361) as follows: "I give and bequeath to my beloved husband, James Henry Marsh, the house and lot we now occupy, situate in the city of Charlotte, N. C., No. 313 E. Seventh street, and all of the furniture and other goods that I may die possessed of, for his lifetime; also, one house and lot at Iron Station, Lincoln County, N. C., known as the 'Rankin Place,' and if the said Rankin be needed for my husband's support at any time, he may sell it, and if not needed, it shall be sold, and a monument be bought and erected on our lot in the cemetery; and I do devise that after the death of my husband the house and lot, No. 313 E. Seventh street, be sold, and the proceeds be equally divided between my children, Mary C. Bynum, James C. Marsh, Henry F. Marsh, Sarah Rachel Dellinger's two children, Marsh and Chester, and Annie M. Kritz; and I do devise that Mary C. Bynum's part be kept in trust for her benefit, and, should she die without issue, then her part shall revert back, and be divided among the rest of my heirs; and I do hereby devise that Henry F. Marsh's part be kept in trust for his benefit, and, should he die without issue, then his part shall revert back, and be divided among the rest of my heirs; and I do hereby devise that if either of my children shall wish to retain the house and lot, No. 313 E. Seventh street, shall have the privilege so to do by paying to the other children their parts."

The action is brought in the Superior Court, and all devisees, including the life tenant, are made plaintiffs except the two infant grandchildren, Henry Marsh Dellinger and Chester A. Dellinger, and they are made defendants. At the commencement of the action they had no guardian, but the Court ap-

pointed James A. Bell guardian *ad litem* of these two defendants. The guardian *ad litem* answered for the infant defendants, and admitted the facts set out in the complaint, among them, that it would be to the interest of his wards to have the property sold. Upon the case coming on for (362) trial upon the complaint and answer, a sale was ordered of both lots; and a decree and order of sale were made, in which the Court found that the life-tenant, James H. Marsh, was 74 years old, and he was entitled to 28-674 dollars of the price of the lot in Charlotte, and the whole of the price of the lot at Iron Station.

The action was properly brought in the Superior Court, having equitable jurisdiction, and it seems to us that the Court had the power to order a sale of the property mentioned in the pleadings. It is distinguishable from *Hutchinson v. Hutchinson,* 126 N. C., 671; *McKay v. McNeill,* 59 N. C., 258; *Justice v. Guion,* 76 N. C., 442; *Ex parte Miller,* 90 N. C., 625; and *Watson v. Watson,* 56 N. C., 400. Indeed, the facts in this case distinguished it from any case we have examined, where the question of the power of the Court to order a sale for partition, or reinvestment, is involved. It is held in *Ex parte Dodd,* 62 N. C., 97, that, where there are contingent interests, the Court has the power to order the sale if any of the class of contingent remaindermen are *in esse,* and are represented. This case is more like *Ex parte Dodd* than any of the other cases cited, and is distinguishable from that case. But this case is much stronger for the plaintiff, or in support of the power of the Court, than *Ex parte Dodd.* In this case, all the parties are *in esse,* and are parties to this action, though the defendants are somewhat irregularly before the Court.

But the will expressly provides that if it became necessary for the support of the husband, J. H. Marsh, he shall have the right to sell the house and lot at Iron Station. It also provides that the house and lot in Charlotte shall be sold at the death of the life-tenant, J. H. Marsh, and the proceeds distributed and secured as above stated. And the only question, then, is as to whether the Court can order this sale before the (363) death of the life-tenant. The interests of all the parties are settled by the will. It is true that the interests of two of the devisees are limited estates, depending upon whether they die without issue. But in that event there is no uncertainty as to who would take their estates, as they are to revert to the heirs of the devisor, who are the other parties to this action. So we see no legal reason why the Court may not order the sale. And doubtless this was the only question intended to be presented

by this appeal, and our recollection is that the attorney who argued the case so stated.

But, upon an examination of the case, we find other reasons that prevent us from affirming the judgment appealed from. The defendants are infants, and the Court of Equity, while it has the power to order the sale, must see that the infants are properly represented and protected, and must find as a fact that a sale of this property, made before the death of the life-tenant—the time specified in the will for its sale—will be for their benefit. In Courts of Equity, in such cases, the usual rule was for the Court to refer the matter to the Master, or to some other competent person, who inquired—took evidence, by affidavit, of reliable disinterested persons—as to whether it would be to the interests of the infants to order the sale, which he reported to the court, with a statement of the evidence. We do not mean to say or to intimate that anything intentionally wrong has been done in this matter, but to say that it devolves on the Court to take these means of informing itself, in order that infants may be protected. *Ferrell v. Broadway,* 126 N. C., 258. In this case the inquiry should be directed as to the benefit to the infant defendant, so far as the house and lot in Charlotte are concerned, and as to the value of J. H. Marsh's life-estate,

(364) and as to whether it is necessary to sell the house and lot at Iron Station for the support of the plaintiff, J. H. Marsh.

There is one other error in the judgment of the Court. It gives Henry Marsh Dellinger and Chester A. Dellinger only one-tenth each, whereas they are entitled to a full share with the four children. There should be six shares, instead of five, and each one of them is entitled to one-sixth. The will provides that the Charlotte property "be sold, and the property be equally divided between my children, Mary C. Bynum, James C. Marsh, Henry F. Marsh, Sarah Dellinger's two children, Marsh and Chester, and Annie M. Kritz." The will does not only put all these parties in one class, but it names them by name.

There is error.

Cited: Seaman v. Seaman, 129 N. C., 294.

(365)

S. BLAISDALE CO. v. LEE.

(19 December, 1900.)

1. FACTORS—*Commission Merchants—Advances—Contract.*

Where a factor made advances on cotton shipped for sale, he may, after demand and refusal of repayment of advances, sell the same for less than the stipulated price.

2. FACTORS—*Advances—Reimbursement—Waiver—Principal.*

The right of a factor to sell for less than the stipulated price, to reimburse himself for advances, is not waived by an agreement to wait longer for reimbursement, the principal agreeing that he shall lose nothing thereby.

3. FACTORS—*Advances—Counterclaim—Questions for Jury.*

Where a factor brings an action to recover advances, and defendant sets up counterclaim for wrongful sale, the issue raised is a question for the jury.

4. FACTORS—*Advances.*

Where a factor brings suit for the whole amount of advances made, and asks for sale of cotton, which was not within the jurisdiction of the Court, he does not waive his right to sell the cotton to reimburse himself for advances.

ACTION by the S. Blaisdale Company against R. O. Lee and H. J. Gregg, trading under the name of R. O. Lee & Co., heard by Judge *O. H. Allen* and a jury, at March Term, 1900, of MECKLENBURG. From judgment for defendants, the plaintiff appealed.

H. W. Harris, for the plaintiff.
Jones & Tillett, for the defendants.

FURCHES, J. The plaintiff is a corporation doing business of a cotton broker, at Chicopee, Mass., and the defendants are partners living, and doing business as cotton dealers, in Charlotte, N. C. About 1 July, 1897, the defendants (366) sent the plaintiff samples of 50 bales of cotton, and engaged the plaintiff to sell it, for which the plaintiff was to have $1 per bale. The plaintiff effected a sale of the cotton at price of 11 1-4 cents per pound, and so informed the defendants. Thereupon the cotton was shipped to plaintiff, in Massachusetts, and defendants drew a check upon plaintiff, with bills of lading attached, for said cotton, at the price of 11 1-4 cents per pound, less commissions. The plaintiff at once paid the draft, but when the cotton reached Chicopee 25 bales were rejected by

the purchaser as not being as good as the samples. The purchaser took the 25 bales which were as good as the samples at 11 1-4 cents, and refused to take the other 25. The plaintiff at once notified the defendants that the party to whom it had sold refused to take 25 bales of the cotton shipped, for the reason that it did not come up to a sample, and asked for instruction. Upon this a long correspondence ensued by letter and telegram, until finally the plaintiff notified the defendants that business was opening up, and it must have the money it had advanced, and, if it was not paid soon—in a week or two—plaintiff would sell the cotton and apply the proceeds in payment of the money advanced. The defendants at one time in this correspondence authorized plaintiff to sell for 10 1-2 cents, but plaintiff at once wrote them that it was impossible to get that price for the cotton; that plaintiff had made every effort to sell, and 9 1-2 cents was as much as it had been offered. The defendants made no reply to this, until finally, after more than a year, plaintiff sent its claim to an attorney in Charlotte for collection. The attorney called upon defendants and demanded payment, when defendants said that when cotton advanced to what it was selling for when they sent the cotton to
(367) plaintiff, they would settle the claim. But defendants then wrote plaintiff that its attorney had called upon them and demanded payment, and asked plaintiff to hold the cotton a while longer, and they would try and sell the same, and that plaintiff should not lose anything by so doing. The plaintiff, in reply to this letter, said it was satisfactory, and there is evidence tending to show that both parties tried to sell the cotton. This was in October, 1898, and the matter seems to have rested here for some time, when plaintiff's attorney called upon defendants again and demanded payment, and defendants again told him that they would settle with him when cotton got to be worth as much as it was when they shipped the plaintiff the cotton. This demand of plaintiff's attorney was repeated more than once, when he received the same reply. Finally, on 12 January, 1899, plaintiff commenced this action, returnable to January Term of Mecklenburg. At that term, plaintiff filed complaint in which it asked that the cotton might be sold under the order of the Court. But no answer was filed at that term, and plaintiff obtained leave of the Court to file a new complaint, which seems to have been filed at that term, but which was not filed until 12 March, 1900. In this complaint it is stated that on 5 January, 1899, plaintiff sold said cotton for 8 1-2 cents per pound, and applied the proceeds of said sale towards paying the balance due plaintiff,

which left a balance due plaintiff for advances, storage, and insurance, of $639.87, for which plaintiff demanded judgment. The defendants answered, alleging bad faith on the part of plaintiff in the transaction, denying that they had any notice of the sale until the filing of the amended complaint, and denying plaintiff's right to sell the cotton, and alleged that plaintiff had agreed to hold the cotton, and that plaintiff and defendants together were to sell the same. But defendants ratify the sale, and admit that they are indebted to the (368) plaintiffs on account of said cotton transaction $639.87, as claimed by plaintiff, but set up a counter claim against plaintiff of $1,900 as damages for plaintiff's wrongful selling of said cotton. Upon the trial, these issues were submitted to the jury: "(1) What amount, if any, is plaintiff entitled to recover of defendants? Ans. Nothing. (2) What amount, if any, are defendants entitled to recover of plaintiff? Ans. $137.36."

Among other prayers asked by plaintiff was No. 3, which was as follows: "That the Court instruct the jury that a factor, or commission merchant, who has in possession cotton or other goods to sell at a certain limited price, and has made advances to the owner upon such cotton or goods, has a right to reimburse himself by selling the same at the fair market price, though below the limited price, if his principal refuses, upon demand or request, after a reasonable time, to repay the advances." This prayer was refused, and the Court charged the jury as follows: "That, if the jury believe the evidence in this case, the sale of the cotton in question made by the plaintiff in January, 1899, was wrongful and unlawful, and the defendants are entitled to recover of the plaintiff the damages sustained by reason of the sale." There was error in refusing plaintiff's prayer, No. 3, and in the instruction given by the Court. It would be remarkable, if defendants could employ plaintiff to sell 25 bales of cotton upon samples, and plaintiff should effect a sale at 11 1-4 cents per pound, and defendants should ship plaintiff 25 bales of cotton, and draw upon the plaintiff for the full amount at the price of 11 1-4 cents, which plaintiff paid; and when the cotton shipped did not come up to the sample, and for this reason the purchaser would not take the cotton; that, after a delay of more than two years, with repeated demands upon defendants to repay plaintiff the money it had advanced and paid upon defendants' draft, and defendants' (369) repeated refusal to repay the same, until plaintiff finally sold the cotton, and sued defendants for the balance due it on said advance and for storage and insurance—that defendants should, by way of counter claim, recover $137.36 more than they

had already received. It was admitted by defendants on the argument that plaintiff would have had the right to sell the cotton to reimburse it for the money advanced, if it had not waived this right; and it was contended by defendants that plaintiff had done this by agreeing, in October, 1899, to wait longer, upon the promise of defendants that plaintiff should lose nothing by doing so, and that they would try and sell it together. But it seems now, by defendants' contention and the verdict and judgment in this case, that plaintiff is about to lose something by agreeing to defendants' request, and waiting awhile longer. But, if there was anything in plaintiff's acceding to this request, it was put an end to when plaintiff, through its attorney, called upon defendants more than once and demanded payment, and when it "received much as it was when we shipped the cotton to the plaintiff, we will settle." We say, if there was anything in this correspondence, it was done away with by these demands and answers. But we do not think there ever was anything in this correspondence that took from the plaintiff its right to sell this cotton. It seems to us that plaintiff had this right all the while. 12 Am. and Eng. Enc. Law, 651; *Bessent v. Harris,* 63 N. C., 542.

The other ground upon which defendants claim that the sale of the cotton by plaintiff was unlawful is that plaintiff, in January, 1899, brought this action for the full amount of advances to defendants, and filed a complaint in which it asked
(370) that the cotton be sold under order of the Court. This was certainly a very awkward demand on the part of plaintiff, but we do not see how it benefits the defendants. There is not an allegation in the complaint to base such a prayer upon, and, besides, the cotton is admitted to have been in the plaintiff's warehouse in the State of Massachusetts, outside of the jurisdiction of the Court. This being so, the plaintiff's rights under the original consignment were not taken away. *Craft v. Association, ante* 163. The only right of action the defendants may have against the plaintiff, and which they might set up by way of counter claim, is that based upon their allegation of bad faith and want of skill on the part of plaintiff. And these were questions of fact, and should have been submitted to the jury. There is error, for which there must be a new trial.

(371)

FAISON v. HICKS.

(19 December, 1900.)

1. MORTGAGES—*Judgment—Estoppel.*

   Where a person fails to object to a judgment of foreclosure decreeing a sale and distribution of funds, he is estopped from objecting to a distribution under the judgment.

2. MORTGAGES—*Receivers—Rents—Junior Mortgagees—Senior Mortgagees.*

   Where a junior mortgagee in a foreclosure suit makes a motion for a receiver, such mortgagee is entitled to the rents accruing during the foreclosure.

3. MORTGAGES—*Foreclosure—Resale—Costs.*

   Where a junior mortgagee in a foreclosure suit deposits a check as a 10 per cent advance bid on the property, it is error to appropriate a part of the check to payment of costs.

ACTION by Isham R. Faison against Lewis T. Hicks and wife, R. W. Hicks, and Isham F. Hicks, heard by Judge *H. R. Bryan,* at December Term, 1899, of DUPLIN. From a decree in favor of the plaintiff, the defendant, R. W. Hicks, appealed.

Aleen & Dortch, and *H. E. Faison,* for the plaintiff.
Stevens, Beasly & Weeks, for the defendants.

MONTGOMERY, J. On 15 February, 1886, the defendant, L. T. Hicks, and his wife executed a deed of trust upon certain land and personal property, therein described, to secure a debt to the defendant, I. F. Hicks, of $528 and interest due by note, a debt due to the plaintiff of $2,300 by note, and a debt to the defendant, R. W. Hicks, in the sum of $400, by (372) open account for goods sold and delivered. The deed provided that if the debtor, Lewis T. Hicks, should pay the indebtedness on or before 1 January, 1887, the instrument should be void; but that if default should be made in the payment of the indebtedness when the same should become due on 1 January, 1887, then that the plaintiff, after a notice to the debtor and wife, and advertisement as required in the deed, should be empowered to sell the land and the personal property, and apply the proceeds of the sale towards the payment—First, of the debt due to I. F. Hicks; second, to the debt due to the plaintiff; and, third, to the debt due to R. W. Hicks; and if any surplus should remain, the same to be paid to Lewis T. Hicks and wife. The plaintiff brought this action to recover judgment against the defendants,

Lewis T. Hicks and wife, for the amount of his note, to have canceled and declared settled in full the other debts mentioned in the deed of trust, the allegation having been made in the complaint that they had been paid by the debtor, L. T. Hicks, and that the land and personal property conveyed in the deed of trust should be decreed to be sold by the Court, the proceeds of the sale to be applied to plaintiff's debt. The debt of I. F. Hicks having been paid, he did not answer. The defendant, R. W. Hicks, filed an answer, in which he averred that his debt was on the day of the execution of the deed of trust much more than $400, the amount named in the deed, for goods and merchandise sold and delivered to L. T. Hicks, and that after numerous payments the debt was still more than $300, with interest on the same. He further averred that it was the duty of the plaintiff, as trustee, on 1 January, 1887, the debts mentioned in the deed, at least the debt due to him, R. W. Hicks, not having been paid, to have sold the property described in the deed, and out of the proceeds of sale to have paid the debt, but that the plaintiff had failed to discharge his duty in that respect. Affirmative relief was prayed by the
(373) defendant against the plaintiff for an account and for a judgment against him for the balance of his debt. At the August Term, 1896, of the Superior Court, there was a consent reference under the Code. A hearing was had before the referee, and a full report made by him to the Court, and to which report numerous exceptions were filed by the defendant. The exceptions were considered and passed upon at the December Term, 1896, and a judgment was rendered in which the Court overruled the referee's finding of law that only $400 of the defendant's debt was secured in the deed of trust, and in which it was declared that the whole debt due by L. T. Hicks to the defendant by open account, at the time the deed of trust was executed was secured, and that $327.24 was still due and secured in the deed of trust. The plaintiff was charged, because of his neglect of duty by which most of the personal property had been lost, or wasted, with the value of the property conveyed to him in the deed of trust, as found by the referee, to-wit, $2,240, and interest on the same from 1 January, 1887, and the plaintiff was allowed his debt, to-wit, $2,300, and interest on the same from 15 February, 1886, to be paid out of the property. And it was recited in the judgment that, as the payment of the plaintiff's debt exhausted the amount with which he was charged, it was therefore further adjudged that R. W. Hicks recover nothing from the plaintiff, but that he recover the balance of his debt, with interest, from L. T. Hicks,

and that the plaintiff recover of L. T. Hicks his debt of $2,300, with interest from 15 February, 1886, and his costs. A decree of foreclosure was then entered, and commissioners appointed to make sale of the property, the proceeds to be applied to the payment, first, of the plaintiff's debt, then to the payment of the debt of R. W. Hicks, and the surplus, if any should remain, to be paid to L. T. Hicks and wife. The plaintiff was allowed to bid at the sale, and the commissioners ordered (374) to make a sale of the property, and report at the August Term, 1897, of the Superior Court. There was no exception made by either the plaintiff or defendant to that judgment. At the December Term, 1899, of the Superior Court, the report of the sale of the property by the commissioners was confirmed, and they were ordered to make deed to the purchaser. It was further adjudged that the plaintiff, when the deed should have been delivered to him (he having been the purchaser), should credit his judgment against the defendant, L. T. Hicks, with the amount of his bid, to-wit, $2,223.10 less the sum of $50, which was allowed the commissioners for making the sale and deed. It was further adjudged that the amount of $80.30, proceeds of rent collected and returned by the receiver in the case, be paid over to the plaintiff, less $12.50, which was allowed the receiver for his services, to be credited on his judgment. It was further adjudged that a certain check, which the defendant, R. W. Hicks, had deposited with the Clerk of the Court, in this cause (the same having been deposited as the 10 per cent advance bid on the property, in order that a resale might be had), be returned to R. W. Hicks, less the cost of this case since the first sale was reported to the Court. The defendant, R. W. Hicks, excepted to the judgment, and appealed.

In respect to the exception to that part of the judgment, which appropriates the proceeds of the sale of the property (the bid of the plaintiff for the same) to the plaintiff's debt, we can hardly take the brief of the defendant's counsel to be serious. For the purpose of determining whether or not the defendant, R. W. Hicks, had been injured by the failure of the plaintiff to take into his possession and sell the property described in the deed of trust when the debts mentioned therein fell due, to-wit, on 1 January, 1887, his Honor Judge COBLE, who rendered the first judgment, charged the (375) plaintiff with the entire value of the property as it was found by the referee, and added the interest thereto from the last-mentioned date up to the judgment. He then gave judgment in favor of the plaintiff for his debt against the common debtor, L. W. Hicks, which debt, with the accumulated interest,

exceeded the value of the entire property. The sale of the property then was ordered, the proceeds of the sale to be applied to the debt of the plaintiff first, with the distinct declaration that R. W. Hicks should not recover anything of the plaintiff for his imputed negligence. The defendant did not, as we have seen, make exception to this judgment; and yet, in his exception to the judgment of Judge *Bryan,* in which the proceeds of the sale were distributed according to the judgment of Judge *Coble,* he in substance, demands that the Court will charge the trustee with the value of the property, the whole being in amount less than the plaintiff's debt first secured in the deed, and then take it from him. The bare statement of the contention is its own refutation. There was no error in that part of the judgment which adjudged the application of the proceeds of the sale—the bid of the plaintiff—to the credit of the plaintiff's judgment. The defendant was entitled to no part of it.

There was error, however, in that part of the judgment which ordered the application of the fund derived from the rents in the receiver's hands to the plaintiff's debt, and the appropriation of a part of the check deposited by the defendant with the Clerk to the payment of a part of the costs. If the defendant had made the motion for a receiver in a separate action, he certainly would be entitled to the rents. In *Post v. Door,* 4 Edw. Ch., 412, it is said: "It appears to be an established rule that a second or third mortgagee, who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf, and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them; and, if he be a second or third incumbrancer, the Court will give him the benefit of his superior diligence over his senior in respect to the rents which accrue during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit." We see no reason why the same rule should not be applied in this action. The plaintiff was seeking to have judgment of foreclosure, and had allowed eight years to pass before he commenced his proceedings, and during their pendency—during four years—failed to take any steps to reach the rents through the appointment of a receiver, and when the defendant made the motion, notice of which was given to the plaintiff, the plaintiff then failed and refused to take any active part in the mat-

(376)

ter. He was therefore not justly entitled to the rents. As to that part of the judgment condemning a part of the check to the payment of a part of the costs, it is enough to say that the check was placed in the hands of the clerk for a specific purpose. It had answered that purpose, and was not before the Court for any other purpose, and was no more subject to the order of the Judge than any other property of the defendant not before the Court. The judgment is affirmed, subject to the modifications pointed out in the errors mentioned.

Modified and affirmed.

---

(377)

JEFFREYS v. THE SOUTHERN RAILWAY COMPANY.

(19 December, 1900.)

CARRIERS—*Negligence—Personal Injuries—Release—Railroads.*

An instrument, releasing a railroad company from liability by reason of an injury sustained by a person, containing the following provision: "It being hereby expressly declared to be the intention of this instrument to forever release the said Southern Railway Company and the North Carolina Railroad Company from any and all other claims, demands, or rights of action of every nature, originating prior to this date, because of any like cause or causes of complaint"; does not release the railroad company from liability by reason of any injury to the person, except that expressly stated in the release.

FAIRCLOTH, C. J., and FURCHES, J., dissenting.

ACTION by S. B. Jeffreys against the Southern Railway Company, heard by Judge *Frederick Moore* and a jury, at June Term, 1900, of GUILFORD. From judgment for defendant, the plaintiff appealed.

J. T. Morehead, for the plaintiff.
King & Kimball, for the defendant.

DOUGLAS, J. As this case depends entirely upon the construction of a written instrument, it seems proper to set out the entire instrument. We have placed in parentheses the only section that can by any possibility afford a basis for the contention of the defendant, and have italicized some important words. The alleged release is as follows:

"Southern Railway Company. To S. B. Jeffreys, Dr. Address, Greensboro, N. C. Payable to S. B. Jeffreys. Address, Greensboro, N. C. Know all men by these presents, that, for,

and in consideration of the sum of forty dollars, to me paid by the Southern Railway Company, the receipt whereof is hereby acknowledged, I, the undersigned, S. B. Jeffreys,
(378) do hereby release and forever discharge the said Southern Railway Company and the North Carolina Railroad Company from any claim, demand, or liability for payment of any further or other sum or sums of money for and on account or growing out of the following mentioned matter and claim, viz.:

1897.
Oct. 30. For all damages and claims for damages *for injuries received on the night of 30 October, 1897, caused by stepping in a hole in platform on south side of old freight depot, Greensboro, N. C.*..... $40.00

This is in full and final settlement of all claims of any nature whatever arising from *above-mentioned accident.*

"And in consideration of the payment of said sum of $40 to the above named payee, evidenced by my signature to the receipt hereto below annexed, I, S. B. Jeffreys, do hereby promise and agree that said payment and receipts shall and will operate as a full and complete release, discharge, and satisfaction of any, every, and all cause or causes of action, claims and demands against the said Southern Railway Company or the North Carolina Railroad Company, arising or growing out of the cause or matter *above set forth,* and also as a perpetual bar to any warrant, suit, or other process or proceeding for the collection or legal enforcement thereof, or to any claim or demand for damages under and by reason of the provisions of any statutory enactment whatsoever, or at common law, or otherwise, for the results or in consequence of *the said personal injury* to me, the said S. B. Jeffreys, which may have been or may be asserted or instituted. And this agreement shall further operate and be in full discharge, satisfaction, compromise, settlement, and bar of any claim, demand, warrant, remedy, suit, or proceeding which may have been instituted by me and be pending before any court or tribunal against said
(379) companies, or either of them, or of any judgment, order, or decree which may heretofore have been entered or obtained in my favor against said companies, or either of them, for any sum arising or growing out of the claim or demand *set forth above.* (It being hereby expressly declared to be the intention of this instrument to forever release the said Southern Railway Company and the North Carolina Railroad Company from any and all *other* claims, demands, or rights of action of every nature, originating prior to this date, because of any

like cause or causes of complaint.) And it being hereby expressly understood and agreed that neither of the above companies is under any obligation or requirement to take or retain me in its employment or service in any position or capacity whatever. Given under my hand and seal this 9 December, 1897. S. B. Jeffreys. [Seal.] Witness: W. A. Wingate, Witness: Robert Chrismon.

"Certified to as correct. Jas. D. Gleen, Law Agent. N. J. O'Brien, Superintendent. Chas. Price, Div. Counsel.

"Examined and entered. H. I. Bettis, Auditor of Disbursements. A. D. M.

"Audited. F. W. Crump, Asst. Auditor M. C. M.

"Approved for payment. S. Gannon, Third Vice-President.

"Received, 30 December, 1897, of the Southern Railway Company, forty dollars, in full for above account. $40. S. B. Jeffreys. Witness: W. E. Coffin, Agent."

It will be seen that the clause relied upon by defendant does not pretend to be in itself a release of anything, but simply undertakes to construe the foregoing clauses in a manner directly contrary to their letter and spirit. It says that a release which by its express terms, is confined to "injuries received on the night of 30 October, 1897, caused by stepping in a hole in platform on south side of old freight depot, Greens- (380) boro, N. C.," shall be taken as intending to cover all other injuries arising from any like cause of complaint. It further construes "any like cause of complaint" as meaning any kind of personal injury. If it so intended, why did it not say so in plain words, and simply say: "In consideration of the payment to him of forty dollars in money, S. B. Jeffreys hereby releases the Southern Railway Company from all claims whatsoever for damages for personal injuries of any nature received by him at any time heretofore through the negligence of the said railway company or any of its employees." Such a release would have required fewer words and less trouble, and would have been less liable to misconstruction. It is evident that this release was not written by the plaintiff. It bears on its face unmistakable evidence of its origin. It was probably a printed form prepared with great care by the defendant for the purpose of meeting all possible contingencies, foreseen and unforeseen. As it clearly appears that no other part of the paper even pretends to release any claim for injuries received by the plaintiff on 8 March, 1897, it follows that the clause in question is a separate and independent release, if a release at all; that is, if it releases anything, it must release a separate and independent cause of action, not alluded

to in any other part of the contract. It is, therefore, if viewed as an additional release, wholly without consideration, as the contract distinctly states the $40, the only consideration therein mentioned, was paid on account of the injuries received on 30 October, 1897. Being, at best, equivocal in terms, and utterly without consideration, should it be upheld as construed by the defendant? We think not. Suppose A should agree to sell to B two acres of land for the sum of $40, and that B should afterward induce A to execute a deed conveying the two acres by metes and bounds, but containing a clause, inserted
(381) down among the covenants of warranty, that this deed was intended to convey all lands owned by the grantor in the State of North Carolina; would this Court hold that the deed conveyed 1,000 acres of land owned by the grantor in another county? The receipt of the plaintiff at the bottom of the contract expressly states that the $40 is "in full of above account;" the only account stated being that for injuries received on 30 October, 1897. We are clearly of the opinion that the legal effect of the instrument is to release only the cause of action therein specifically set forth, and there are facts tending to prove *aliunde,* if such were necessary or competent, that this was the original understanding of both parties. It was clearly the understanding of the plaintiff, and this seems to have been, also, the original understanding of the defendant, because, after taking two months for preparation, it files its verified answer on 20 August, 1898, simply denying the allegations of the complaint and pleading contributory negligence. This answer contained no allusion whatsoever to any release or pretended release, although the contract in question was at that time in its possession. No allegation of any such release was ever made by the defendant until its amended answer of 23 December, 1899—more than a year and four months after the filing of its original answer. The action had then been at issue over sixteen months, and all new matters, both in the original and amended answers, were deemed controverted by the plaintiff, under sec. 268 of The Code. As there was nothing in the nature of a counter claim, any reply would have been superfluous. The plaintiff is deemed to have denied the making of any such release, and he offered to prove by competent testimony that "at the time he signed the paper he was told by defendant that the same applied only to an injury suffered by plaintiff by falling through a platform of defendant [a
(382) different injury from the one complained of in this action.]" For the purposes of this appeal, this evidence must be taken to be true; and, if true, we are forced to

one of two conclusions: (1) That the paper does not amount to a release of the present cause of action; or (2) that such release was inserted by mutual mistake. It is not necessary for a determination of this appeal to consider the second conclusion, since we think that the contract itself, on its face, does not amount to a release of the present cause of action. Therefore, there was error in nonsuiting the plaintiff in the Court below, and a new trial must be ordered.

New trial.

FAIRCLOTH, C. J. (dissenting). The plaintiff claims damages for personal injuries on defendant's cars on 8 March, 1897. It appears in the record and the argument of counsel that plaintiff was injured by stepping in a hole in defendant's platform on 30 October, 1897. On 9 December, 1897, the plaintiff, for a valuable consideration, in writing specifically released and discharged the defendant from any further claim or demand arising out of the injury received on 30 October, 1897, and further recited in said release and discharge as follows: "It being hereby expressly declared to be the intention of this instrument to forever release said Southern Railway Company and the North Carolina Railroad Company from any and all other claims, demands, or rights of action, of every nature, originating prior to this date, because of any like cause or causes of complaint." This release must embrace causes of every nature prior to its date. It does not necessarily mean identical, especially as there is no suggestion of any identical cause of action prior to the settlement. The issue was whether the alleged wrong had been settled or adjusted by payment, as alleged in the answer. The plaintiff proposed to prove by himself that when he signed the said paper he was told by defendant that the same applied only to his injury by falling through the hole in defendant's platform. (383) This proposed evidence was not admitted, and the plaintiff appealed. The question, therefore, in this case is one of evidence. The rule that parol evidence will not be heard to contradict, add to, or vary the terms of a written contract is so well settled, and its importance in the administration of justice in both courts of law and equity, so evident, that no citation of authorities is necessary. The rule rests upon the presumption that when parties reduce their contracts to writing, they have inserted every provision by which they intend to be governed. 1 Greenl. Ev. (14th Ed.), sec. 275. When a contract not required to be written is reduced to writing and signed by the parties, and a material part of the agreement is omitted

by mistake in drafting the writing, or by fraud in its procurement, parol evidence will be received to supply the unwritten part. But, in order to overcome the presumption above referred to, the complaining party must allege and prove the mistake in the writing, or the fraud in procuring it. The plaintiff fails to aver either mistake, imposition, or fraud, and it follows that the proposed evidence was inadmissible. The special plea in the answer being established, it operates as a bar to the action. *White v. R. R.*, 110 N. C., 456; *Bank v. McElwee*, 104 N. C., 305; *Wright v. R. R.*, 125 N. C., 1.

Affirmed.

FURCHES, J. (dissenting). It is stated in the case on appeal that plaintiff offered to prove that he was told at the time he signed the paper called a "release," that it only applied to the injury received when he stepped in a hole on the platform. This evidence was ruled out, on objection by defendant, and plaintiff excepted. But the learned counsel for plaintiff did not insist on this exception, properly admitting that it was (384) incompetent, except upon the allegation of fraud, and that was not alleged. And, notwithstanding this admission, it is made one of the principal arguments in the opinion of the Court. It is true, that after making this argument, the Court says it was not necessary to do so, as the instrument does not amount to a discharge, without this evidence. If this evidence was incompetent and unnecessary to the decision of the case, why make the argument that the plaintiff offered evidence to prove this fact? It must have had some influence upon the Court in reaching its conclusion that the release was not a discharge, or it would not have been made, as the Court would not wish to influence others by something that had no influence upon the Court. I admit that if it had been alleged that this paper had been procured from the plaintiff by fraud and imposition, and this had been submitted to a jury, this evidence would have been competent. But I submit that it was not competent evidence to be considered by the Court in construing this written instrument. The learned counsel for the plaintiff did not allege or admit that his client was an idiot, lunatic, or *non compos mentis*, nor that he was even a man of weak understanding. And it seems true that he must have been afflicted with some one, at least, of the infirmities, if he did not intend to release the defendant from this liability. If he was not afflicted with at least some of these infirmities, he would not have said, "It being hereby expressly declared to be the intention of this instrument to forever release the said South-

ern Railway Company and the North Carolina Railroad Company from any and all other claims, demands, or rights of action of every nature originating prior to this date because of any like cause or causes of complaint." The Court seems to lay stress upon the expression "like cause." It construes this expression to mean stepping in a hole in the platform. It can not give this expression, so construed, such a meaning as this. To give it this meaning, to my mind, is to ren- (385) der it nugatory and senseless, as there is no pretense that plaintiff had stepped into another hole in the platform. It must have meant some other injury—the one complained of—as this is the only other injury he had received, or it meant nothing. It is said in the opinion that it is void for want of consideration. It is true, the consideration is small, but it appears that plaintiff received $40 for signing this paper This is a consideration, and it is not for us to say whether it is as much as he ought to have received or not. That would be to make a contract for the plaintiff, which we can not do. If fraud had been alleged, and an issue submitted to the jury upon that allegation, the smallness of the amount paid might have been considered as some evidence upon that issue. But it is not a matter that we can consider in putting a construction upon a written contract. In the absence of fraud, it is a sufficient legal consideration, and that is all that we consider. For these reasons, I am of the opinion that the judgment should be affirmed.

Cited: Bank v. Deposit Co., 128 N. C., 373.

(386)

COCHRAN v. LINVILLE IMPROVEMENT COMPANY.

(19 December, 1900.)

1. REFEREES—*Findings of Fact—Appeal.*

   Findings of fact by a referee, under a consent reference, are final and can not be reviewed on appeal, unless based upon incompetent evidence.

2. ADVERSE POSSESSION—*Vendor and Purchaser.*

   The possession of a vendee of a part of a tract of land extends no farther than the boundaries in his deed so as to inure to the benefit of the vendor of the entire tract.

3. ADVERSE POSSESSION—*Lessor—Lessee.*

   Where a person enters as lessee a certain part of a tract of land, covered by a deed, under which his lessor claims, his possession inures to the benefit of the lessor, to the outside limits of the deed of the latter.

4. ACKNOWLEDGMENT—*Probate—Power of Attorney—Deed—Principal and Agent.*

Where a power of attorney appears to be regular and authorizes an acknowledgment of a deed, a probate under such authority will be presumed to be regular, nothing appearing to the contrary.

5. DEED—*Probate—Presumption—Collateral Attack.*

The probate of a deed is a judicial act and is presumed to be correct until the contrary appears, and can not be collaterally impeached.

6. DEED—*Probate—Presumption.*

Probate of a deed will be presumed to be regular from the fact of registration.

7. DEED—*Registration—Presumption.*

The registration of a deed is presumed to be correct.

8. DEED—*Probate—Presumption.*

The probate of a deed will be presumed from the fact that it is registered.

9. DEED—*Probate—Registration.*

It is not necessary to register the certificate or evidence of probate.

(387) ACTION by Arthur E. Cochran, Sallie Riche, J. C. Hamilton and wife Carrie, Eloise Jones and J. D. Jones, R. M. Caruth, H. M. McGinsey, James Cochran, and Willie Lou Cochran, the two last suing by their next friend Arthur E. Cochran, against The Linville Improvement Company, S. T. Kelsey, C. H. Nimson, heard by Judge *O. H. Allen* at August Term, 1899, of MCDOWELL. From a judgment in favor of defendants, entered on the report of the referee, both parties appealed.

E. J. Justice, D. W. Robinson, and *Davidson, Jones & Adicks,* for the plaintiffs.

Chas. A. Moore, and *M. H. Justice,* for the defendants.

FURCHES, J. On 14 July, 1795, the State of North Carolina granted to William Tate and William Cochran 100,640 acres of land, lying and being in the county of Burke. The plaintiffs are heirs-at-law of William Cochran, and claim under this grant of 14 July, 1795. The defendants admit that they are in possession of a part of the land covered by the grant to Tate and Cochran, but deny that plaintiffs are the owners of said land, or that they are entitled to possession of same, or any part thereof. The defendants say that plaintiffs acquired and took

no title under said grant, for the want of proper registration, but, if any title passed under said grant to the grantees therein named, that said grantees, Tate and Cochran, soon thereafter, to-wit, on 17 December, 1796, bargained, sold, and conveyed the same to William Constable, and that neither (388) Tate nor Cochran, nor the plaintiffs who claim as the heirs of Cochran, have owned any part or interest in said land since the date of said deed to William Constable. The defendants further allege and say that, while said grant was made to William Tate and William Cochran, in fact they were only the absolute owners of one-half thereof, and trustees of Thomas Buchell and Andrew Baird of the other undivided one-half of said land, and that on 12 March, 1796, the said William Tate, William Cochran and Thomas Buchell, made and executed their deed to Andrew Baird for one-fourth of said land, in which they set forth fully and in detail the fact that the money used to procure said grant was furnished in equal parts by the said Baird, Buchell, Cochran and Tate, and that, while the grant was issued to Tate and Cochran, Baird and Buchell were equally interested in said land with them, and that they held one undivided fourth thereof in trust for said Baird, and one undivided fourth thereof in trust for said Buchell. The defendants further allege and say that on the same day that Tate, Cochran, and Buchell conveyed the undivided one-fourth of said land to Andrew Baird, to-wit, on 12 March, 1796, said Baird sold and conveyed the same to William Constable. The defendants further allege that on 20 July, 1796, the State of North Carolina granted to William Cathcart 59,000 acres of land in the county of Burke; that this grant was located on the land embraced within the boundaries of the grant to Tate and Cochran; that defendants are the owners of this Cathcart grant, and have been in possession of the same, through their lessees, bargainees, and tenants, for fifty years or more; and that their said title, though it may have been once defective, is thus ripened into a good, perfect and indefeasible title to all the lands covered by the Cathcart grant. (389)

While there were a number of other questions raised by the exceptions of plaintiffs, the case depends upon the correctness of the findings and rulings of the referee and of the Court upon the admission of the deeds of Tate and Cochran to Constable, and the deed from Tate, Cochran, and Buchell, to Baird, and the possession of defendants, claiming under the Cathcart grant of 59,000 acres. The case, by consent of parties, was referred to Judge Burwell, who took and considered the evidence, and made a report, finding the facts, and declaring

the law arising thereon. This report was in favor of the defendants upon the disputed facts, and upon the law based thereon, and plaintiffs excepted. The reference being by consent of the parties, the facts found by the referee are final, and we have no right to review these findings, unless they shall appear to have been found without any competent evidence to support them. *Morrison v. Baker,* 81 N. C., 76; *Holt v. Couch,* 125 N. C., 456. If found upon incompetent evidence, the finding would be erroneous; and, if there is no competent evidence upon which to base the finding, such finding may be reversed by this Court, and such error pointed out.

We will consider first the Cathcart grant. It was contended by the defendants, and not denied by plaintiffs, that there are now 500 (and probably more) settlements upon the land embraced in the Cathcart grant, holding and claiming their title under said grant and *mesne* conveyances from the defendants and those under whom they claim. The plaintiffs admit that many of these titles may have riped by possession, as against them, but, if so, that their possession would not inure to the benefit of the defendants; that their possession only extended to the boundary lines of such purchases. This position of (390) plaintiffs seems to be correct. *Ruffin v. Overby,* 105 N. C., 78; *Worth v. Simmons,* 121 N. C., 361. But the referee found that outside of these conveyances, which only extended possession to their own boundary line, the defendants had held adverse possession of the land embraced in the Cathcart grant for more than seven years. We can not review this finding of fact, and it must stand as true, if there was any evidence to base such finding upon. For the purpose of showing adverse possession, the defendants offered in evidence a lease from them to Abram Johnson, dated 7 September, 1838, of the whole 59,000 acres contained in the Cathcart grant, lying in the county of Yancey. The defendants then offered evidence tending to show that said Johnson entered upon said land as the lessee and tenant of defendants, made a settlement thereon, and remained upon said land as such tenant for twenty years or more, and certainly for a longer time than seven years; that he settled upon said land under said lease, cleared land, built an iron forge, dug ore at different points on said land, cleared land, and cut wood for coaling purposes at his forge. It was shown that defendants contracted to sell to said Johnson 300 acres of land where he settled, which was never conveyed to him, but was afterwards sold and conveyed to a son of said Abram Johnson, but said Johnson still continued to hold under said lease as defendants' lessee and tenant, and to dig ore, cut

cordwood, and to clear land. The plaintiffs contended that the point where Johnson dug ore was not on the Cathcart land, and, to determine this question, it became material to locate a former grant to Reuben White; plaintiffs contending that the Reuben White grant was west of the Cathcart boundary, while defendants contended that it was within the Cathcart boundary. The referee found it to be within the Cathcart boundary. And as this seemed to be considered a crucial point in the case, as to adverse possession, we have examined it with (391) care, and agree with the commissioner that it is within the Cathcart boundary. How far from the outside boundary, we are unable to say, as these boundaries are so large, but a considerable distance—a mile or more. This seems plain to us, as we find a grant to "Waightstill Avery, dated 16 December, 1793, on Cranberry creek, between his own and Reuben White's suvey, beginning at three chestnut trees, runs west, with his own line, crossing Cranberry creek, 33 chains and 30 links, to a stake; thence south 30 chains to a white oak; thence east, with Reuben White's line, crossing both forks of the creek, 33 chains and 33 links, to a chestnut tree; thence north to the beginning." The map shows this survey as crossing Cranberry creek, in its first and third calls; the third call being, "with Reuben White's line." No other grant of said Avery crosses Cranberry creek, running south and north, as this does. And if the question of adverse possession depends upon the location of the Reuben White grant, as seemed to be contended by counsel, we do not only think there was some evidence to support the finding of the commissioner, but, to our minds, it was full and satisfactory. But it seems to us that there were other acts of Johnson, taken in connection with this lease, that were sufficient to constitute adverse possession. The plaintiffs contended that these acts of Johnson were simply trespasses, and did not constitute adverse possession. And it is true that some of them might not have amounted to more than trespasses, if Johnson had not had color of title, under which he entered and occupied said land; that is, a lease from the defendants.

We therefore sustain the finding that defendants had held the Cathcart land under color of title for more than seven years, which perfected their title, if it was before imperfect. But as the Cathcart grant may not cover all the land of (392) which the defendants have possession, and which is claimed by plaintiffs under the grant to Tate and Cochran, we proceed to consider the other principal question presented by the appeal: If Tate and Cochran had conveyed all the estate they had in the land embraced in the grant to them of 14 July, 1795,

to Constable and Baird, as contended by defendants, the plaintiffs have no title to support their action, and it must fall. If the plaintiffs recover, they must do so upon the strength of their title, and not upon the weakness of defendants' title. This question depends upon the competency—the admissibility—of the deed from Tate and Cochran to Constable, and the deed from Tate, Cochran, and Buchell to Baird. If these deeds are competent testimony, the plaintiffs have no title.

It is shown in evidence that the register's books were taken from the register's office in Morganton by the Federal army in 1864, and thrown in a tan vat at a tan yard near Morganton; that said books were thereby greatly mutilated and damaged, and many of them defaced and destroyed; that diligent examination has been made through those not destroyed, and these deeds can not be found. Upon this proof, the defendants offered certified copies of said deeds, but they were objected to by plaintiffs. The copy offered purporting to be a deed from Tate and Cochran to Constable, bearing date 17 December, 1796, has the names attached of William Tate (seal), and William Cochran (seal), with the following evidence of its execution, probate, and registration:

"Signed, sealed, and delivered in the presence of Tench Coxe, Ann Coxe, Rebecca Coxe.

"Acknowledged in open court by William Tate, and also by William Tate by virtue of power of attorney from William Cochran, now filed April Term, 1797. W. W. Erwin, (393) D. C.

"Registered by William Walton, C. R., 19 May, 1797.

"State of North Carolina, Burke County. I, Thomas Walton, register of said county, do hereby certify that the within and above is a true copy of a deed, William Tate and William Cochran to William Constable, as appears on record in Book No. 7, page 543. Certify, this 15 May, 1859. Thomas Walton, C. R."

The defendants then proved the signature of Thomas Walton upon said copy to be his genuine handwriting and signature, and that he was register of deeds of Burke County; and, there being no evidence by plaintiffs in rebuttal, the commissioner allowed the copy to be offered as evidence. The plaintiffs, among other grounds, object for the reason that it appears that William Tate, under a power of attorney, acknowledged the deed of William Cochran. But if the power of attorney was regular, and authorized Tate to acknowledge the deed, it was sufficient. 1 Am. and Eng. Enc. Law (2 Ed.), 508. And, as there is nothing to show but what it was in all things regular,

it will be presumed that it was, as this was a judicial act, and everything is presumed to have been regular, under the maxim, *"Omnia præsumuntur,"* etc. If there was no error in allowing this evidence, it proves that plaintiffs have no title to three-fourths of the land embraced in the grant of 1795 under which they claim. This is an important question, and one that seems not to have been decided by this Court, though we have many decisions bearing more or less directly upon it. It has been a long time since this deed was registered—more than one hundred years. In the course of nature, we must know that no one is now living who was living in 1796 and 1797. By the fluctuations and vicissitudes of time, the original deed is lost, or its whereabouts unknown to defendants. And, if they had it, no one is now living by whom it could be proved (394) for registration. And if a preserved copy, certified to by the public register of Burke County, can not serve the defendants (the original registry being destroyed), the defendants would seem to be without protection against the plaintiffs, who have slept on their rights, if they had any, for 100 years. It may be that, if they had asserted this claim seventy-five or even fifty years ago, the execution of this deed might have been established by living witnesses. While the Court must have inherent evidence of the truth of the matter to be proved, when it has this it will be presumed that all matters were regular that are necessary to establish the facts, and cast the burden of disproving them, or of rebutting this presumption, upon the other side. And the great length of time will be taken into account in raising this presumption, as well as of the destruction of the records. *Morris v. House,* 125 N. C., 550; *Sledge v. Elliott,* 116 N. C., 717. We have in this case evidence from the register's books of Burke County, a certified copy made by a public officer (the Register of Deeds) more than forty years ago. This copy gives the deed—every word of it—and, if it was properly proved, it is made competent evidence by our statute (sec. 1261 of The Code). The question, then, is, was this deed properly proved? The entry on the docket, or the certificate of the Clerk or Judge, is not the proof or acknowledgment of a deed. It is a memorial or evidence of the fact that it was proved or acknowledged as provided by law for perpetuating the fact that the deed was proved or acknowledged. *Starke v. Etheridge,* 71 N. C., 240. And the usual way of showing that a deed has been proved or acknowledged, where the trial is not in the county where the probate was taken, is by the certificate of the Clerk. Here we have the certificate of the Clerk that this deed was "acknowledged in open court" by "W. W. Erwin, D. C.,"

(395) which, we suppose, means Deputy Clerk. It is true that this does not appear in the handwriting of W. W. Erwin, as it is a copy; and, if it was in his handwriting, it could not be proved now, after more than one hundred years. But it would be presumed that it was written by him, because it had his name and insignia of office. If the Clerk of Burke Superior Court were to give such a certificate now, he could do no more, because he would not know the handwriting and signature of W. W. Erwin, or of the Clerk, a hundred years ago. Then we have the Clerk's certificate of this probate given to us by William Walton in his official capacity as "C. R." (County Register), and certified to by Thomas Walton, "C. R." (County Register), on 15 May, 1859. These men (William Walton, in making this entry, and Thomas Walton, in making this certificate), were acting in their official capacity, and the law presumes that these entries and this certificate are correct. But it is shown by T. G. Walton that Thomas Walton was register in 1859, and that the certificate on the copy of the deed of Tate and Cochran to Constable is his genuine handwriting and signature. This entry states that the acknowledgment was in open court at April Term, 1797. This must have been done in the County Court of Pleas and Quarter Sessions, as there was no other court at that time that indicated its term by the month in which it was held. The terms of the Superior Courts were designated as Spring and Fall Terms. And, besides, the Superior Court, as a Court, had no jurisdiction of the probate of deeds. The County Court had this jurisdiction when in session, in open court, as it seems this deed was probated.

But it is objected by plaintiffs that the Deputy Clerk could not take the probate of deeds. This is true. Neither could the Clerk of the Court at that time take the probate of a

(396) deed, but it was done in open court, and by the Court. The deputy, W. W. Erwin, did not take the probate of this deed, but only certified to the register that it had been proved in open court. We see no objection to his doing this, and if the original deed had been offered in evidence, with this certificate upon it, or the original registry of this deed had not been destroyed, we must think it would have been admissible evidence. *Perry v. Bragg,* 111 N. C., 163. The probate of a deed is held to be a judicial act—a judgment of the Court—and not only presumed to be correct until the contrary appears, but that it can not be collaterally impeached. *Davis v. Blevins,* 123 N. C., 379; *White v. Connelly,* 105 N. C., 65; *Perry v. Bragg, supra,* involved a question of probate and registration of a deed, growing out of the Clerk's certificate; and the Court held that

there was no statute at that time of the probate and registration of that deed requiring the certificate of probate to be registered; citing and approving *Freeman v. Hatley,* 48 N. C., 115. In *Starke v. Etheridge,* 71 N. C., 240, BYNUM, J., delivering the opinion of the Court, says: "But, assuming that some written memorial of the fact of probate is necessary, it still appears that at the time of probate the officer who took it did indicate his official act by indorsing upon the deed the word 'jurat' (*juratur*), the primary meaning of which is 'sworn,' but the derivative signification is 'proved.' In support of the deed, *'Ut res magis valeat, quam pereat.'* Such an indorsement upon an instrument in all respects regularly executed and *bona fide,* will be held sufficient compliance with the law." In *Howell v. Ray,* 92 N. C., 510, the case of *Starke v. Etheridge* is cited with approval, and the Court further holds that "the presumption of rightfulness of what was done" is strengthened by the oral evidence. *Starke v. Etheridge* is also cited with (397) approval in *Quinnerly v. Quinnerly,* 114 N. C., 145, where it is held that "where the certificate of the probate court did not state that the execution of the mortgage had been acknowledged by the grantor or approved by the witness, but merely recited that 'the mortgagee had procured the same to be proved by the Clerk,' the presumption is that the probate was properly taken." The case of *Strickland v. Draughan,* 88 N. C., 315, is almost the case under consideration. It was an action for possession of land, and the principal question was the competency of a copy of a deed offered in evidence by the plaintiff. The only evidence of its probate was the following entry made on said copy: "Sampson County, August Term, 1812. Then was the above deed acknowledged in court for registration. H. Holmes, C. C." The defendant objected and appealed, but the ruling of the Judge in admitting this copy was affirmed; and the Court, in rendering its opinion, said: "Indeed, there was no necessity for any other evidence of probate, or registration, than such as was contained in the copy certified from the books of registry of deeds. The statute in express terms declares that the registry or duly certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be registered or recorded, may be given in evidence in any court." In this case we have everything that the plaintiff had in that case. We have a certified copy from the register's office. The plaintiff in that case had a certified copy of the deed from the register's office, with certificate indorsed thereon, not as full and complete as the one in this case; and the Court says

that it is all that was needed. *Darden v. Steamboat Co.*, 107 N. C., 437, is very much to the same effect. From the "reason of the thing," as well as from the authorities cited, we are of the opinion that the copy of the deed from Ttate and Cochran to Constable was properly admitted in evidence.

We do not propose to devote a separate discussion of
(398) the deed from Tate, Cochran, and Buchell to Baird, as we think the argument and authorities cited in the discussion of the deed from Tate and Cochran to Constable apply and dispose of the execution of the deed to Baird, though, as there was some difference in the execution and probate of the two deeds, they could not be treated together. In this deed we have a certified copy from the registration books of Burke County, certified to by Thomas Walton, on 14 May, 1859; the only difference between the two being that on the registry this entry appears: "Signed, sealed, and delivered in presence of W. H. Williams, James Murphy, B. Collins." "Enrolled in register's office 18 March, 1796. William Walton, C. R.," followed by a similar certificate from Thomas Walton, as that in the case of the deed from Tate and Cochran to Constable. And it appears that, on the same day this deed bears date (12 March, 1796), Andrew Baird made a deed to said Constable, conveying to him one undivided fourth in the land embraced in the grant to Tate and Cochran, witnessed by W. H. Williams, one of the witnesses to the deed of Tate, Cochran, and Buchell to Baird. It is said in *Starke v. Etheridge, supra,* that the entry on the record is not the probate of the instrument, but only a memorial of the fact, and, if it be necessary that there should be some written *indicia* made at the time, it appears in that case by the word *"jurat,"* not deciding that it was an indispensable requisite, but the inference is that it was not. It is held in *Howell v. Ray, supra,* that it must be presumed from the fact of registration that the deed was properly proved, nothing to the contrary appearing. And it must be presumed that the deed was properly put on the registry, until the contrary is shown. *Strickland v. Draughan,* 88 N. C., 317; *Love v. Harbin,* 87 N. C., 249. The probate will be pre-
(399) sumed from the fact that the deed was registered. *Tatom v. White,* 95 N. C., 455. And the probate need not be registered. *Perry v. Bragg, Love v. Harbin, Starke v. Etheridge,* and *Freeman v. Hatley, supra.*

From the facts and circumstances of this case, the great length of time since the date of this deed and its registration; the fact that in December, 1796, eight or nine months after the date and registration of this deed from Tate, Cochran, and

Buchell to Baird, Tate and Cochran conveyed to Constable their undivided three-fourths in said land, and the presumption arising in favor of its regular probate from the fact of registration (nothing appearing to rebut such presumption, but all the circumstances going to sustain this presumption); and the fact that it is not necessary to register the certificate or evidence of probate, we must hold that this deed was properly admitted in evidence, and sustain the ruling of the commissioner and the Court below, and affirm the judgment appealed from. "Let the tail go with the hide."

Affirmed.

DEFENDANT'S APPEAL.

We are of opinion that the copy of the grant to Tate and Cochran was properly allowed as evidence, and that defendants' exception thereto is not sustained. Neither do we think the defendant's other exceptions can be sustained. But defendant's exceptions become immaterial, as we have affirmed the judgment appealed from, in the plaintiff's appeal. The parties will be taxed with the costs proper in their respective appeals. The cost of printing transcript of record will be divided equally between the parties.

Affirmed.

Cited: *Cozad v. McAden*, 148 N. C., 12.

---

(400)

BRITTAIN v. HITCHCOCK.

(22 December, 1900.)

DEPOSITIONS—*Objections—Time—The Code, Sec. 1361.*

Objection to a deposition must be made in writing and before the trial.

DOUGLAS, J., *dubitante*.

ACTION by M. L. Brittain against Martha T. Hitchcock, heard by Judge *Thomas A. McNeill* and a jury, at Spring Term, 1900, of CHEROKEE. From judgment for plaintiff, the defendant appealed.

Dillard & Bell, for the plaintiff.
R. C. Cooper, and *E. B. Norvell*, for the defendant.

FAIRCLOTH, C. J. This is an action on contract for board. The account is denied, and counter claims are pleaded. On notice, the defendant took the depositions of defendant and others in California in September, 1896. The commissioner certified that he took the depositions pursuant to his commission on 25 September, 1896. On the envelope containing the depositions was indorsed on 26 September: "To the Clerk of the Superior Court of Cherokee County, North Carolina, Murphy, N. C. In the Superior Court of Cherokee County, State of North Carolina. M. L. Brittain, plaintiff, against Martha T. Hitchcock. Deposition on the part of defendant." The envelope had been torn open by someone. There was no evidence offered to show how long said depositions had been on file, or by whom or when they were opened, nor had their regularity been passed upon by anyone. The then Clerk of the Court died before the trial. When the plaintiff rested his case, the defendant offered in evidence said depositions.

Plaintiff objected, on the ground that they had not been
(401) opened and passed upon by the Clerk or the Court after proper notice. The Court sustained the objection and defendant excepted. This was error. Depositions may be rejected by any party on motion in writing at any time before the trial. Code, sec. 1361. Referring to this statute, the Court said: "This provision is a very useful one. Its obvious purpose is to prevent surprise at trials. It does not appear that the deposition was formally passed upon, but there was no motion by defendant to suppress it for irregularity, and when a deposition lies on file for a reasonable time up to trial, without objection, it must be presumed to have been passed on, and all objections for irregularity are waived." *Kerchner v. Reilly,* 72 N. C., 171. This was followed in *Wasson v. Linster,* 83 N. C., 575; *Woodley v. Hassell,* 94 N. C., 157, and others.

Another exception was made in the course of the trial, but, as that may be materially affected by the reading of the depositions, we will express no opinion on it.

New trial.

Cited: *Willeford v. Bailey,* 132 N. C., 403.

NORVELL v. MECKE.

(22 December, 1900.)

JURISDICTION—*Justices of the Peace—Splitting Causes of Action—Courts.*

An indivisible cause of action can not be split in order that separate suits may be brought for the various parts before a justice of the peace.

ACTION by E. B. Norvell, receiver of the Valleytown Mineral Company, against H. Mecke, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of *Cherokee*. From judgment for defendant, the plaintiff appealed. (402)

F. P. Axley, Ben Posey, and *E. B. Norvell,* for the plaintiff.
Dillard & Bell, for the defendant.

MONTGOMERY, J. The defendant executed to the plaintiff, as receiver of the Valleytown Mineral Company, a receipt in writing for certain personal property, embracing a large number of articles, which he agreed to keep for the plaintiff, and to return to the plaintiff when called for. The property was worth $100. Upon failure of defendant to deliver the whole of the property when called for by the plaintiff, the plaintiff brought this action before a Justice of the Peace to recover certain mentioned of the articles of property, of the value of $50. The action was dismissed by the Justice of the Peace upon the ground that it appeared that the plaintiff had brought another action in the Justice's Court for the balance of the property mentioned in the receipt, which was still pending, and that this course was a fraud upon the jurisdiction of his Court. The plaintiff appealed to the Superior Court. In the case on appeal this statement appears: "It was admitted that on the same day this action was begun the plaintiff began another action before the same Justice to recover the possession of all the property embraced in said receipt not included in the summons in the action tried, that the aggregate value of the property in both actions was $100, and that the purpose of the plaintiff in bringing two actions before a Justice of the Peace was to avoid bringing an action in the Superior Court." Thereupon the defendant made a motion to dismiss the action upon the ground that the same was an attempt to evade the Constitution of the State in its pro- (403) visions respecting the jurisdiction of the courts and the motion was sustained. If the jurisdiction had really been in the

Justice of the Peace, then the plaintiff's admission would have been harmless, for his motive would not and could not have altered the law of jurisdiction. But the facts as they appear show that the Justice did not have jurisdiction. He had in his court the two actions, and therefore had knowledge that the plaintiff was not seeking to recover a part of the property of the value of $50, or less, in good faith, as was the case in *Kiser v. Blanton,* 123 N. C., 400, of which he would have had jurisdiction, but that he was seeking to recover the whole of the property in two separate actions, under a paper writing which was one and entire, and indivisible as a subject of a civil action. The attempt to evade the constitutional jurisdiction of the Superior Court was therefore apparent. The plaintiff, no doubt, could have brought an action for certain articles of the property, of the value of $50 or less, in the Court of the Justice of the Peace, and have recovered, because his right to the property was not disputed; but he could have recovered none of the remaining part in another action, as the first recovery would be regarded as a release of that part to the defendant.

No error.

(404)

FERRELL v. BROADWAY.

(22 December, 1900.)

For syllabus, see *Arthur v. Broadway, post* 407.

Under ruling in *Arthur v. Broadway, post* 407, the former decision in this case (126 N. C., 258), is overruled and the judgment appealed from is affirmed.

MONTGOMERY and DOUGLAS, JJ., dissenting.

ON PETITION for rehearing. For former opinion, see 126 N. C., 258. Petition granted.

Allen & Dortch, and *Battle & Mordecai,* for the petitioner. No counsel in opposition.

CLARK, J. This is a petition to rehear this case, which is reported in 126 N. C., 258. The proceeding is a motion in the cause to set aside a judgment rendered at August Term, 1887, of LENOIR. The Judge found as facts: That in 1883 an action was brought by W. B. Ferrell and others (among whom are all the movers herein) to have E. S. Broadway, who had in 1880 bought a tract of land at foreclosure sale, declared a trustee for the plaintiffs in that action. The movers herein

were parties-plaintiff therein, and, being minors, were represented by their next friend, W. B. Ferrell; and their counsel were George V. Strong and D. E. Perry, both of whom are since dead. That at August Term, 1887, the defendant having filed answer, judgment was entered as follows: "The following jurors, having been chosen, impaneled, and sworn to try the issues arising upon the pleadings, for their verdict say that they find all the issues in favor of defendant; and it is thereupon ordered and adjudged that the plaintiffs take nothing," etc. That W. B. Ferrell, the next friend of the movers herein, died during the pendency of the action, but his death was not suggested, and no other next friend was appointed (405) for the infant plaintiffs. That nothing indicated the death of the next friend during the pendency of the action, and the proceedings, upon their face, are entirely regular. The Court further found that E. S. Broadway, in 1887, mortgaged the realty in question to J. W. Grainger, and in 1890 conveyed said land to Grainger for full value, and that said Grainger had no notice of any irregularity in the proceeding, and no notice, either, that W. B. Ferrell died pending said litigation, or that no next friend was appointed. The judge further found that no notice of the motion to set aside said judgment of 1887 for irregularity was served on Grainger till November, 1899, and that he was a "purchaser for full value, in good faith, and without notice." Upon these findings of fact, his Honor properly refused to set the judgment aside. *Williams v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 470. The proceeding to have E. S. Broadway declared a trustee for the movers was terminated in 1887. The proceedings were regular on their face. The only irregularity complained of is that the next friend of the infant plaintiffs died pending the action. But they were represented by able and honorable counsel, and the presumption of regularity in judicial proceedings is that in fact they had another next friend appointed, and that the order failed, by some accident, to be recorded (as is extremely probable, from the high character of the counsel), and has since been lost. At any rate, the proceedings were regular on their face, and the Judge finds explicitly that J. W. Grainger bought without notice of the irregularity alleged, for full value, and in good faith. The plaintiffs slept on their rights, if any they had, for 12 years, before taking this proceeding.

On the former hearing the Court was impressed by an affi- (406) davit which averred that the judgment at August Term, 1887, was entered by consent. What effect, if any, that should have on a subsequent purchaser for full value and with-

out notice, we need not discuss. (*Tyson v. Belcher,* 102 N. C., 112, and numerous cases there cited); for, upon examining the record, we find the judgment does not so state, nor is that assertion found to be true by his Honor, who set out the recital of the verdict by jury, on issues raised, as the truth of the matter. It was not necessary that the Judge should, in his findings, expressly negative every averment in the affidavits that he does not find to be true, even when there may be no affidavit expressly denying a particular allegation in an affidavit. Besides, that affidavit was filed in another cause, *Arthur v. Broadway, post* 407; and involving the same tract of land (*Branch v. R. R.,* 88 N. C., 573; *Perry v. Adams,* 96 N. C., 347). A party aggrieved by a judgment must move to set it aside before the right of innocent third parties have intervened. *Le Duc v. Slocomb,* 124 N. C., 351; *Vick v. Pope,* 81 N. C., 22. His Honor having found that Jesse W. Grainger bought for full value in good faith, and without notice of any irregularity, it could serve no purpose to remand the case to find whether the judgment was by consent or not, which, if it be an irregularity, is not alleged in the motion, and whose existence, indeed, would not impair the title of a *bona fide* purchaser for value and without notice, any more than that which is alleged, and which would not excuse to any greater extent the negligence of movers for 12 years to take any steps to set aside the judgment. Petition allowed, and the judgment below affirmed.

MONTGOMERY, J. (dissenting). My views of the matters involved in this appeal remain as they were when the former opinion (126 N. C., 258) was delivered. His Honor (407) did find as a fact that the purchaser, Grainger, bought the land without notice and for a fair price, but there was no evidence before him upon which that fact ought to have been found. He did not find the material fact to be found, that Grainger did not know that the judgment against the plaintiffs was a compromise judgment entered into by their consent, without having been submitted to the Judge who presided, and that the verdict of the jury was merely and purely formal, as was alleged in the affidavits. The counsel employed were honorable men, but they were not empowered to make a compromise verdict and judgment for infant clients, especially as their next friend in the action was dead when the judgment was entered and the agreements made. The supervision of the Judge presiding was necessary.

DOUGLAS, J., concurs in the dissenting opinion.

ARTHUR v. BROADWAY.

(22 December, 1900.)

JUDGMENT—*Setting Aside—Mortgages—Foreclosure—Waiver.*

A motion to set aside a judgment of foreclosure for irregularity, made nineteen years after rendition, and after the rights of innocent third parties have intervened, should be denied.

DOUGLAS, J., dissenting.

MOTION by W. D. Broadway, Alice Faulkner, M. L. Broadway, and Quince A. Faulkner, to set aside a judgment in the case of F. P. Arthur and Nancy Arthur, his wife, (408) against J. W. Broadway, heard by Judge *H. R. Bryan* at November Term, 1899, of LENOIR. From an order denying the motion, the movers appealed.

W. J. Rouse, and *A. J. Loftin,* and *Geo. Rountree,* for the plaintiffs.

Aycock & Daniels, Allen & Dortch, and *Battle & Mordecai,* for the defendants.

CLARK, J. This was a motion in the cause to set aside a judgment rendered at Spring Term, 1880, of LENOIR. The Judge found the following facts: The action was begun 6 October, 1879, to foreclose a mortgage executed by Jesse W. Broadway upon the land in question, who was the owner in fee and mortgagor thereof, and a decree of foreclosure was made at Spring Term, 1880, and a commissioner appointed to make sale, which he did at public auction at the court house door after due advertisement, when E. S. Broadway became the purchaser. Sale was duly reported to the Court, and confirmed by decree of Special Term, 1880, of the Court, and the commissioner executed title thereunder to the purchaser. The land was then worth less than $1,500, and brought $725.68. The Court further found: That Jesse W. Broadway died after the decree of sale under foreclosure was made, but before the sale thereunder. That there was no suggestion on the record of his death, and the records upon their face appear to be entirely regular. That in 1883 an action was brought by W. B. Ferrell and wife and others (among whom are all the movers herein), who allege that at said sale in this cause as aforesaid E. S. Broadway bought said land as trustee for them, and asked that E. S. Broadway

be declared trustee for them. That they were represented by Hon. George V. Strong and Daniel E. Perry. E. S. Broadway filed answer, and judgment was entered at August Term, (409) 1887, as follows: "The following jurors, having been chosen, impaneled and sworn to try the issues arising upon the pleadings, for their verdict say that they find all issues in favor of defendant, and it is thereupon adjudged that the plaintiffs take nothing," etc. That W. B. Ferrell, who was appointed next friend for the petitioners herein, died during the pendency of the action, but his death was not suggested, and no other next friend was appointed for the infant petitioners. That there is nothing on the records which indicates that W. B. Ferrell died during the pendency of the action, and the proceedings are, upon their face, regular. That E. S. Broadway mortgaged said land to J. W. Grainger in 1887, and in 1890 he purchased the land in fee from Broadway for full value, and had no notice at the time of his purchase that J. W. Broadway had died in 1880, before sale made, nor did he have any notice that W. B. Ferrell died during the pendency of the action instituted in 1883, or that no next friend was appointed in his stead. That notice of this motion to set aside the judgment of 1880 was not served on J. W. Grainger till November, 1899. That J. W. Grainger was a purchaser for full value in good faith and without notice, and that the movers herein, W. B. Broadway, Mead L. Broadway, and Alice Faulkner, are not heirs of said Jesse W. Broadway, but claim their interest as the heirs of John Broadway. Upon the above findings of fact, his Honor refused to set the motion aside.

As this is a motion to set aside the judgment of Arthur against Jesse W. Broadway, rendered in 1880, it is only necessary to consider that judgment. It is not suggested that the mortgage was invalid. The decree of foreclosure was entered while Jesse W. Broadway was living, and this cut off his legal title. There was nothing, as the Court finds, to suggest (410) that he died before the sale and confirmation thereof. But the record was entirely regular. The petitioners, if they had any rights, have slept upon them for 19 years before making this motion! and not only this, but in 1883 they treated said sale of 1880 as valid, and joined in an action to have E. S. Broadway, the purchaser at said sale, declared a trustee for them, upon allegation that he bought as their agent. Then the Judge finds as a fact that J. W. Grainger bought the land in 1890 for full value, and without notice of the irregularity in the confirmation of the sale. A party aggrieved must move to vacate a judgment before the rights of innocent third parties

have intervened. *Le Duc v. Slocomb,* 124 N. C., 351, 726; *Vick v. Pope,* 81 N. C., 22. The Judge also finds that the movers herein are not the heirs-at-law of Jesse W. Broadway. There was strong evidence to support this finding. The verdict to the contrary was in a proceeding to which J. W. Grainger was not a party, and as to him such finding would only be evidentiary, at most. Upon the findings of fact, the movers have no interest in the realty. If they had, they waived the right to set aside this judgment for irregularity by endeavoring to obtain title to themselves as beneficiaries under said sale by the action brought in 1883, and have slept on their rights for 19 years before making this motion to impeach the judgment for irregularity; and in the meantime Jesse W. Grainger has bought the land for full value, under proceedings regular on their face, and without notice of any irregularity. The judgment below must be

Affirmed.

Cited: Ferrell v. Broadway, ante, 404.

(411)

BIRD v. BRADBURN.

(22 December, 1900.)

1. SPECIFIC PERFORMANCE—*Contract—Question for Jury—Issues—Trial:*

Where a person alleegs that he sold land *in solido* and the defendant contends that it was sold by the acre—there being a deficiency—it is for the jury to say how the land was sold.

2. SPECIFIC PERFORMANCE—*Executory Contract.*

A person asking for specific performance of an executory contract must show he is able and ready to perform his part of it.

ACTION by J. W. Bird against J. F. Bradburn, heard by Judge *T. A. McNeill* and a jury, at Spring Term, 1900, of JACKSON. From judgment for defendant, the plaintiff appealed.

Walter E. Moore and *Chas. A. Moore,* for the plaintiff.
C. C. Cowan, for the defendant.

FURCHES, J. On 7 November, 1894, the plaintiff and defendant contracted for a sale and purchase of a tract of land in

Jackson County, the plaintiff entering into bond to make title when the purchase money should be paid, and the defendant paying part of the purchase money at the date of the contract, and giving five notes for the balance of the purchase money, each in the amount of $120, and falling due in one, two, three, four, and five years. The bond describes the land sold as "lying in Jackson County, in Quallatown township, known as 'Bower's Cove,' containing 140 acres, more or less, beginning on a black gum at the top of the ridge dividing the lands of C. A. Bird and said lands, running a northerly direction, with main top of
(412) said ridge, to J. H. Teague's line; thence, with the top of the ridge and Teague's line, westwardly to the head of the ridge, dividing said land with the Mr. Ingle's line; thence southwardly, with the top of the said ridge, to a pine (now down) corner of J. F. Battle's land; thence a straight line to the beginning." This action was originally commenced to recover judgment on the first two notes, which were then due. But the defendant, answering and setting up fraud in the contract, and also claiming that in fact there were only 80 acres of land in the boundary described, which he bought for 140 acres, claimed that he was entitled to have a reduction in the price agreed upon, in proportion to the deficiency in quantity of acres sold; and it was then agreed between the parties that this action should be considered an action in the nature of an action for a specific performance of the contract. On the trial the plaintiff contended that he sold the land as a whole, *in solido,* and not by the acre; that the defendant proposed to buy it by the acre, and he refused to sell it to him in that way, and told the defendant that his price was $1,100 for the land, be it much or little, and if defendant did not want it at that price he need not take it; while the defendant contended that he bought it by the acre, or for the amount that plaintiff alleged the tract contained, and that these statements induced him to buy the land at that price, and that he would not have bought the land at that price but for the representation of plaintiff that it contained 140 acres; and both parties offered evidence tending to sustain their contentions. These allegations and denials made the issues that should have been submitted to the jury; and we do not think they have been submitted to the jury by direct issues, as we think would have been best, nor by the charge of the Judge to the jury.

This is an executory contract for the sale of land, and
(413) the plaintiff is seeking to have it specifically performed. To do this, he must show that he is able and ready to perform his part of the contract. And if he agreed to sell the land

by the acre, estimated to be 140 acres, and he is only able to convey to the defendant 80 acres, he is not able to perform his part of the contract, and would not be entitled to a decree for specific performance. Here the defendant does not seek to avoid the contract, but is willing to comply with it, as he says it was made, and only asks that the price agreed upon may be reduced in proportion to the reduction of acres in the tract of land.

The general rule is, that where there is so great deficiency in the amount as here, a loss of 60 acres in 140, the defendant would be entitled to a reduction in the price, provided he bought it for 140 acres, relying on the representations of the plaintiff, whether the plaintiff knew of the deficiency or not; while, on the other hand, if such representations did not induce him to buy the land, that he knew when he bought that it did not contain 140 acres, and took it as a whole whether it contained that amount or not, he would not then be entitled to a reduction in the price agreed upon.

It is alleged by plaintiff that there are peculiarities in the boundary of this land that exclude it from the general rule—the peculiar location and boundaries. These are only evidentiary facts that may be offered for the consideration of the jury in passing upon the issues that will be submitted to them. The jury found there was no fraud. There is error, for which there will be a

New trial.

---

(414)

CALLOWAY v. ANGEL.

(22 December, 1900.)

1. CONTRACT—*Acknowledgment of Indebtedness—Option on Land.*

   A person is entitled to recover the amount of a debt on a written acknowledgment thereof, though coupled with a promise to pay it out of proceeds of certain land with an option on the land.

2. JURISDICTION—*Justices of the Peace—Real Estate—Executory Contract.*

   A promise to pay $200 out of the proceeds of the sale of land is an executory contract, and may be recovered before a justice of the peace.

ACTION by Joseph Calloway against B. M. Angel, administrator of Thomas M. Angel, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of MACON. From judgment for plaintiff, defendant appealed.

Ray & Kelly, for the plaintiff.
Jones & Johnston, for the defendant.

CLARK, J. This was an action begun before a Justice of the Peace for the recovery of $200 upon the following instrument: "This is to certify that I am due Joseph Calloway two hundred dollars, to be paid out of the proceeds of the sale of the lands I own on Clear Creek, in Highlands township, Macon County, and I hereby agree to make, or cause to be made, a deed to all of the land I own on Clear Creek (one-half mineral interest excepted) to anyone the said Calloway may designate, whenever he pays me $300 over and above the $200 due him. Witness my hand and seal this 7 January, 1897. Thos. M. Angel." It was admitted that Thomas M.
(415) Angel signed said written instrument; that he was dead; and that the defendant was his only heir, and had duly qualified as his administrator. It was in evidence, and not contradicted, that the defendant had sold the Clear Creek land. The issue submitted to the jury by the Court was as follows: "What amount, if any, is the defendant indebted to the plaintiff?" The Court, being of the opinion that if B. M. Angel was the sole heir of Thomas M. Angel, and had sold the Clear Creek land, his intestate's estate would be liable upon the admissions, etc., instructed the jury that if they believed the evidence they should answer the issue $200, subject to a credit of $3—a payment of $3 being admitted. Defendant excepted to this charge of the Court. The jury returned a verdict, and answered the issue, "$200, subject to a credit of $3." This contract is an acknowledgment of an indebtedness of $200, an executory promise to pay it out of proceeds of the land named, and an option to plaintiff to take the land named for said $200, and $300 additional. This is not an action to enforce either the option or to subject the proceeds of the land sold, but a simple action to recover judgment for the $200. This could be done, of course, before a Justice of the Peace. The $200 indebtedness was in no wise dependent upon the sale of the land. The contract acknowledges that it was already due. Whatever error the Judge committed was against the appellee.

Affirmed.

(416)

AIKEN v. CANTRELL.

(22 December, 1900.)

NEW TRIAL—*Appeal — Remand — Interest — Computation—Usury—Mandate.*

Where the Supreme Court can not tell from the case on appeal by what rule interest was calculated in an account, or whether the calculation was correct, the case will be remanded for new trial.

ACTION by Mrs. A. M. Aiken, administratrix of L. O. Aiken against J. McD. Cantrell, heard by Judge *T. A. McNeill,* on report of referee, at Spring Term, 1900, of TRANSYLVANIA. From a judgment for defendant, the plaintiff appealed.

W. W. Zachary, for the plaintiff.
No counsel for defendant.

FAIRCLOTH, C. J. The defendant held plaintiff's intestate's note, and plaintiff insists that the money actually paid and the property purchased by defendant were in excess of the true amount due on the note, and that question depends on a correct calculation of interest. The matter was referred, and the referee's report shows a detailed and itemized calculation of a dozen small credits, and the interest due from one credit to another, and finally concludes that defendant is due plaintiff $63.39. At the hearing, his Honor disregards the referee's calculation of interest and payments, and makes and sets out his calculation of interest and payments in detail with much particularity. He concludes that defendant owes plaintiff nothing, and adjudges accordingly. If the referee and the Judge intended to calculate interest on the general rule, each one was mistaken as to the rule, in that they allowed interest upon interest, when the interest due at the day of the payment (417) was more than the payment. The rule was first laid down in this State in *Bunn v. Moore,* 2 N. C., 279, and has been ever since followed. *Overby v. Association,* 81 N. C., 61. If they intended to calculate on the particular rule laid down in *Bledsoe v. Nixon,* 69 N. C., 89, we are unable to see whether they worked according to that rule or not, as neither the note nor a copy is sent with the record to this Court. We therefore remand, and order a

New trial.

SMITH v. DURHAM.

(22 December, 1900.)

TROVER—*Conversion—Possession by Bailee.*

Where a bailee refuses on demand to deliver a note to the owner, who is entitled to the possession thereof, it constitutes a conversion, and an action of trover will lie against the bailee.

ACTION by J. A. Smith against S. J. Durham, heard on complaint and demurrer, by Judge *O. H. Allen,* at Spring Term, 1900, of GASTON. From judgment sustaining a demurrer to the complaint, the plaintiff appealed.

Osborne, Maxwell & Keerans, for the plaintiff.
Burwell, Walker & Cansler, for the defendant.

FAIRCLOTH, C. J. This is a civil action in the nature of trover for the conversion of a certain promissory note, payable to the plaintiff, in the sum of $2,400, signed by W. D. Rice. The plaintiff was president of the Bessemer City Cotton (418) Mill Company, and for a debt due by his company to Lyon, Conklin & Co., of Baltimore, Md., he deposited said note as collateral security; and the depositee sent the note to the defendant, as its attorney, for collection. By agreement with defendant, the plaintiff, for his company, confessed judgment for the amount due Lyon, Conklin & Co. Thereafter said judgment was paid in full by the Bessemer Company, and the debt for which said note was deposited as collateral security was thereby extinguished. After said judgment had been paid as aforesaid, the plaintiff demanded of the defendant, Durham, the surrender of said note, and he failed and refused to surrender it. At the time of said demand the maker of the note agreed with plaintiff to pay 25 cents on the dollar, and was able and willing to do so, and would have done so but for the defendant's refusal to surrender said note to the plaintiff, who alleges that he was damaged in the sum of $600 and interest, and demands judgment accordingly. The defendant, by his demurrer, admits the truth of the allegations in the complaint, and avers that the complaint does not set forth facts to constitute a cause of action in favor of the plaintiff and against the defendant.

It is admitted that plaintiff is the owner of the note, and that it was in the possession of the defendant when last heard of Presumably, it is still in his possession. Trover may be

brought by the owner for the recovery of damages for the conversion of every species of personal property which has value. 26 Am. and Eng. Enc. Law, 765. It may be maintained upon the refusal to deliver a letter. *Teal v. Felton,* 12 How., 284; 13 L. Ed., 990. Trover will lie for a bond or note. *Brickhouse v. Brickhouse,* 33 N. C., 404. "The injury lies in the conversion, for any man may take the goods of another into possession if he finds them, but no finder is allowed to acquire a property therein unless the owner be forever unknown; and therefore he must not convert them to his own use, (419) which the law presumes him to do if he refuses them to the owner, for which reason such refusal alone is *prima facie* sufficient evidence of a conversion." 3 Bl. Comm., 152; *Abrahams v. Bank,* 7 Am. Rep., 33. There is quite a list of decisions which hold that conversion is an act of ownership exercised over the personal chattels of another, inconsistent with the owner's right. It must be an act. Mere words will not do. If a bailee publicly sells his bailor's goods, and becomes the purchaser, and holds them in defiance of his bailor, in such case no demand in necessary. *University v. Bank,* 96 N. C., 280; *Carraway v. Burbank,* 12 N. C., 306; *Glover v. Riddick,* 33 N. C., 582. One in possession of another's property is bound to surrender it upon demand. *Dowd v. Wadsworth,* 13 N. C., 130. Lord Holt, in an early case, said: "The very denial of goods to him that hath the right to demand them is an actual conversion, not only evidence of it." *Baldwin v. Cole,* 6 Mod., 212. We see from this course of reasoning that one in lawful possession of another's property, after demand and refusal, is in no better position than if his original possession had been wrongful. The defendant assigns no reason or explanation why he detains the note in question. As the case is now constituted, we see no reason why the demurrer was not overruled.

Error.

---

(420)

TOMS v. FLACK.

(22 December, 1900.)

HUSBAND AND WIFE—*Separate Property of Wife—Possession by Husband—Evidence.*

Evidence in this case held sufficient to warrant the instruction that if the jury believed the evidence, the plaintiff was the owner of the notes and mortgages in controversy.

TOMS *v.* FLACK.

ACTION by Mrs. M. C. Toms against J. F. Flack, administrator of J. M. Toms, and M. L. Bridgers and Dora Bridgers, heard by Judge *Thos. J. Shaw* and a jury, at Fall Term, 1900, of RUTHERFORD. From judgment for plaintiff, the defendant appealed.

George P. Martin, for the plaintiff.
R. S. Eaves, for the defendants.

FURCHES, J. The plaintiff is the widow of J. M. Toms, who died after 22 October, 1897, and before the institution of this action; and the defendant J. F. Flack is his administrator. The plaintiff was the owner of a tract of land, a part of which was willed to her by her father, and a part of which she bought, and the deed was made to her. The plaintiff and J. M. Toms were married about 14 years ago. The plaintiff alleges that she sold said land to M. L. Bridgers and wife, Dora Bridgers, which trade was consummated on 22 October, 1897; that the price of the land agreed to be paid by Bridgers was $1,000, $700 of which was paid to her at the time of executing the deed to Bridgers, and three notes given for the remainder of the price; that it was distinctly understood by her and her husband and by Bridgers, the purchaser, that she was to receive the purchase money for said land; that $700 was to be paid "down," and that Bridgers was to give her three notes, of $100 each, secured by mortgage on said land; (421) that through the mistake or inadvertence of Mr. Carpenter, who was procured to do the writing—drawing deed, mortgage, and notes—the notes and mortgage were made payable to her husband; that the notes are now in the hands of the defendant Flack, administrator of her husband's estate, who refuses to surrender them to her, and claims them as a part of her husband's estate. This action is to recover said notes and to correct the same. The defendant denies these allegations of plaintiff, and claims the notes as administrator. Mrs. Toms, the plaintiff, testified. "I know the property sold M. L. Bridgers. I sold him a part of the Whitehouse land, willed to me by my father, and the part I bought from J. B. Carpenter. He was to pay me $1,000. He paid $700. Three hundred dollars is still due, secured by mortgage. I made him a deed, and took a mortgage to secure balance of purchase money. Question, How were these notes to be made payable? Answer, To myself. That was the arrangement between Mr. Bridgers and myself. He knew it was

my land. We had talked about it three or four times. Mr. Toms was present when the agreement was made between Mr. Bridgers and myself." J. B. Carpenter was examined as a witness, and testified: That he drew the papers—the deed, mortgage, and notes. That Mr. Toms was not present. Does not know how he came to draw the notes to Mr. Toms. Knew the land belonged to Mrs. Toms. Do not think she told him to draw them to Mr. Toms. That he is a creditor of Tom's estate. M. L. Bridgers testified: That he bought the land from the plaintiff for $1,000. "She agreed to sell it with the understanding that all the money was to go on a mortgage on her separate property. This was the understanding at the time of the trade. I don't know to whom the notes were made payable. I did not know they were payable to Mr. Toms till after his death. When I went to pay the notes, I went first to her, and found out that Mr. Flack had them. There was nothing said about whom the notes were to be made (422) payable to." The defendant introduced no evidence, but moved to dismiss plaintiff's action under Laws 1897, chap. 109, as of nonsuit. This the Court refused to do, and the defendant excepted. But the Court charged the jury, if they believed the evidence, they should find the issue which is as follows: "Is the plaintiff the owner of the notes and mortgage, as alleged in the complaint?" "Yes." To this charge the defendant again excepted.

There were exceptions taken on the trial to some of the evidence, but all exceptions to the competency of evidence were withdrawn by defendant's printed brief; and the case was put solely on the lack of sufficient evidence to warrant the charge of the Court, and this is the question we have to consider. The defendant, in his brief, argues the case as if it was an action to correct a written instrument, and insists that the rule in such cases is that the evidence shall be strong and convincing; that it must be more than a mere preponderance of the evidence in favor of the plaintiff. And if it was an action for the correction of a deed or other instrument of writing, and nothing more, the defendant has correctly stated the rule as to the weight of evidence. But here is where the defendant has fallen into error. This may be for the reason that the complaint contains a paragraph for the correction of the notes, as well as for possession. But the issue was tried upon the ground of the ownership of the notes, and this was the only issue submitted to the jury. Therefore the rule contended for by the defendant is not applicable to this case, and it depended on the weight or the preponderance of the testimony. In deciding

this case, it is necessary for us to consider, to some extent, the changed relations of husband and wife as to their property before and since the Constitution of 1868. Before the Constitution of 1868, the husband, by virtue of his marital rights, became the absolute owner of his wife's personal prop-
(423) erty; and, if she sold her land and converted it into money or other personal effects, this became the husband's, unless there was a contract or agreement between them that it should not, as in *Lyon v. Akin,* 78 N. C., 259. But by the Constitution of 1868 (Art. X, sec. 6), the wife's personal property, as well as her real property, is and remains hers, the same as if she were unmarried. Therefore the simple possession of the wife's personal property by the husband does not give him a title to it, as it did before 1868. Of course, the wife can give it to her husband. But the presumption is that it is still hers, though he may be in possession of it. And, to meet this presumption, there must be evidence to rebut the presumption, and to show that the husband has acquired title from the wife by gift or otherwise. The debt from Bridgers was a part of the price for land belonging to the plaintiff, and it belonged to her. The notes were not the debt, but only evidence of the debt. And, as the debt was the plaintiff's, the notes were hers, unless the husband acquired them from her; and this burden was on the defendant. After the plaintiff had established the fact that the land, the consideration of the notes, was hers, the debt was hers, and the notes are hers, unless the husband acquired title to them from her. And, after she had proved that the land was hers, the trade was made by her for the sale of the land to Bridgers, with the understanding between him and the plaintiff, in the presence and by the consent of the husband, as she swears it was (and all objection to this evidence is withdrawn), and there being no evidence in conflict with this evidence, we can not see why the Court should not have charged the jury that, if they believed the evidence, they should find the issue, "Yes." We see no error, and the judgment is

Affirmed.

(424)

CABE v. VANHOOK.

(22 December, 1900.)

1. FORMER ADJUDICATION—*Judgment—Two Causes of Action—Will—Specific Performance.*

A judgment that a party can not recover a sum set aside in a will for the erection of a fence, is no bar to an action against the executor for the specific performance of the provision to build such fence.

2. PARTIES—*Trustees—Executor—Fence—Cemetery.*

Where a testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision.

ACTION by J. L. Cabe, J. P. Brown, and others, trustees of Clark's Chapel and Cemetery, against A. J. Vanhook, executor of T. C. Vanhook, heard by Judge *Thos. A. McNeill,* at Spring Term, 1900, of MACON. From judgment for defendant, the plaintiffs appealed.

J. F. Ray, for the plaintiffs.

Jones & Johnston, and *Shepherd & Busbee,* for the defendant.

CLARK, J. The defendant's testator, in the second clause of his will, provided: "I set apart five hundred ($500) dollars, or so much thereof as may be necessary, to build a good rock fence around the Clark's Chapel graveyard, or cemetery; said fence to be two feet at the base and one foot at top, three and a half feet high, and no top rock shall be shorter than 24 inches, and 12 inches wide." With the exception of $100, the testator left the residue of his estate to his brother, the defendant, who was also appointed executor. In 1896 the trustees of said Clark's Chapel brought an action against the defendant to recover the $500, to be expended by them in putting up the wall provided for in the will. The de- (425) fendant demurred on the ground that the will did not devise said sum, or any other amount, to the trustees of Clark's Chapel, and that they were not entitled to recover. At Fall Term, 1897, the demurrer was sustained, and judgment rendered against the plaintiffs that "they take nothing by their action," and that the defendant recover costs. Immediately thereafter the plaintiff began this action against the defendant, alleging, among other things, besides the clause of the will and other matter stated in the first section, that several thousand dollars over and above the debts and liabilities of the estate had come into the hands of the defendant, and that he had refused

either to turn the $500 over to the trustees of the church to build the fence prescribed in the second clause, or to build the same himself, though he had often been requested so to do, and that the defendant had time and again declared that he intended to put the $500 in his own pocket (he being the residuary legatee), and that no fence should be built with the funds of the testator set apart in the will for that purpose, and praying judgment either that defendant turn over to them sufficient funds to build said wall, or that the Court decree specific performance, by requiring the defendant to erect, or cause to be erected, the wall as prescribed and directed by the second clause of the will. The defendant answered, and, among other things, set up as a defense the pleadings in the former action, and the judgment as aforesaid upon the demurrer, rendered at Fall Term, 1897. His Honor sustained the plea of *res judicata,* and held that this action was barred by said judgment. In this there was error. It is true, the plaintiffs and defendant are the same, and the subject matter (the devise for the erection of a wall around the graveyard) is the same. But the cause of action is different. The former action was for the recovery of $500, to be expended by the plain-

(426) tiffs. The present cause of action is for specific performance of that clause of the will by the executor; there being an allegation of sufficient assets in the hands of defendant, and of refusal by him to erect the wall, and of declarations by him that he intended to divert the $500 devised for the erection of the wall to his own uses. These are distinct causes of action, and, if they had both been stated in the complaint in the former action, a demurrer might have been sustained as to one and overruled as to the other. It follows that, when those two causes of action are set up in different actions, a judgment in one case is not *res judicata* as to the other. This cause of action was not raised or determined, and could not have been determined, upon the complaint filed and demurrer thereto in the former action. *Tyler v. Capeheart,* 125 N. C., 64; *Glenn v. Wray,* 126 N. C., 730.

We are also of opinion that the plaintiffs, as trustees of Clark's Chapel, upon whose grounds the will directed the wall to be built, are the proper parties-plaintiff in an action to require the executor to perform this provision of the will. *Edwards v. Supervisors* (*ante* 62). The judgment is therefore set aside.

Error.

Cited: *Shakespeare v. Land Co.,* 144 N. C., 521.

(427)

HOWLAND v. MARSHALL.

(22 December, 1900.)

1. APPEAL—*Findings of Court—Mixed Questions of Law and Fact.*

   The findings of trial court, on mixed questions of law and fact, are reviewable, at least as far as the relation between law and fact.

2. ATTACHMENT—*What is Not Fraudulent Disposition of Property—The Code, Sec. 349.*

   The Code, sec. 349, subsec. 2, authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of, not to the manner in which the property is acquired.

3. ATTACHMENT—*What is Not Fraudulent Disposition of Property—The Code, Sec. 349.*

   Under The Code, sec. 349, subsec. 2, a deposit of money by a debtor in the hands of another to induce the latter to go on his bond to secure his release from jail, is not a fraudulent disposition.

ACTION by R. S. Howland against L. J. Marshall, heard by Judge *O. H. Allen,* at November Term, 1900, of BUNCOMBE. From an order containing an attachment against the property of the defendant, L. J. Marshall, he appealed.

Merrimon & Merrimon, for the plaintiff.
George A. Shuford, for the defendant.

DOUGLAS, J. This is an action to recover the sum of $1,000 on account of the alleged wrongful and fraudulent appropriation by the defendant, Marshall, of moneys belonging to the plaintiff. On 9 August, 1900, the plaintiff obtained an order of attachment against the property of the defend- (428) ant on the sole ground of nonresidence, and on 29 August, 1900, served a notice of garnishment on the defendant, Baird, in whose hands Marshall had caused to be deposited the sum of $450 to secure said Baird from liability as surety for the appearance of Marshall on a criminal charge. Baird admitted the receipt of the said sum, and that he had surrendered Marshall to the sheriff, but claimed that he was entitled to a part of said money on account of certain personal transactions with Marshall. Upon the hearing the Clerk made the following order: "This cause coming on to be heard upon answer of John R. Baird, garnishee, to notice of garnishment served upon him, and it appearing to the Court that upon the statement of facts contained in said answer of said garnishee, the Court can not

proceed to judgment, the Court thereupon, upon motion of plaintiff, orders an issue to be made up, and does make up the following issue, to be tried by a jury, as prescribed by sec. 366 of The Code, to-wit: 'Is the fund and money in the hands of John R. Baird, garnishee? Is any part thereof the property, or money, of the defendant, L. John Marshall, and, if so, what part?' and hereby transfers said issue to the civil issue docket of the Superior Court for trial; and the said John R. Baird is hereby enjoined and restrained from making any disposition of said fund and property until the further orders of this Court. This 29 August, 1900. Marcus Erwin, C. S. C." On motion of defendant, and after notice and hearing, the Clerk made an order vacating the attachment, "the Court being of opinion that the defendant is a resident of the State of North Carolina, and the ground on which said warrant of attachment was issued was issued was false in fact." From this order the plaintiff appealed.

(429) All parties below seem to have recognized this action of the Clerk as within his jurisdiction, subject, of course, to review on appeal. The plaintiff insists that the Clerk merely "expressed the opinion" that the defendant was a resident of this State, and did not find it as a fact. We think otherwise. In any event, the Clerk vacated the attachment, and on appeal the matter was fully heard and considered in the Superior Court, where the following order was entered: "This cause coming on to be heard in open Court, in term time, by consent of both sides, upon the appeal of plaintiff from the order of the Clerk dissolving the attachment upon the ground that the Clerk was a nonresident of the State, and being argued by counsel for both sides, the Court is of opinion that, without passing upon the question of fact as to nonresidence of defendant, the evidence is sufficient to justify the Court in continuing the attachment upon the ground of a fraudulent disposition of the funds in the hands of the garnishee; and therefore, on motion of counsel for plaintiff, the order of the Clerk dissolving the attachment is reversed, and the said attachment continued in force; and the issue between the plaintiff and the said garnishee, which has been transferred to this Court for trial, will be duly placed upon the civil issue docket, and stand for trial according to law. O. H. Allen, Judge Presiding." This case seems to come peculiarly within the rule laid down in *Cushing v. Styron,* 104 N. C., 338, where this Court says: "The Clerk of the Court, acting as and for the Court, had authority out of term time to grant the warrant of attachment (Code, sec. 351), and likewise to allow all proper amendments in that respect and

connection. From his decision an appeal lay to the Judge. * * * But it was not necessary to return the statement of the case to the Clerk in this case, because the parties agreed that the Judge should hear the appeal in term time, as he did do. This gave him complete control of the matter in every aspect of it. The whole action was before him, and he (430) could grant or deny the amendment of the affidavit, in the exercise of a sound discretion. The jurisdiction of the whole action, including all the incidental and ancillary proceedings, was that of the Court, not that of the Clerk thereof. He was acting out of term for the Court, and as its servant. As the Court had such jurisdiction, and the judgment entered by the Clerk was objected to and appealed from, the motion to amend the affidavit was not determined. It was open still and the Court—the Judge in term—might have heard it upon its whole merits, and have granted or denied it; indeed, it should have done so." Chap. 276 Laws 1887 gives such power to the Judge in all cases. In the case at bar the Court seems to have heard the case "upon its whole merits," and to have decided it upon a point not even suggested before the Clerk. The plaintiff contends that we can not review the findings of the Court below. That depends upon the nature of those findings. If they are purely findings of fact, they are not reviewable if there is any evidence to support them; but, where they are mixed questions of law and fact, they are necessarily reviewable, at least as far as the relation between law and fact. *Wheeler v. Cobb,* 75 N. C., 21, 26. In that case this Court, reversing the Court below, says: "His Honor in the Court below decided the question of nonresidence as one of fact, whereas it is one of law and fact." That case also draws a very clear distinction between domicile and residence, which, we think, is applicable to the case before us. The Court below did not pass upon the question of non-residence, the only ground alleged for the original attachment, but continues the attachment "upon the ground of a fraudulent disposition of the fund in the hands of the garnishee." We are compelled to say that we see no evidence of such fraudulent disposition. It appears that the defendant (431) has been arrested on four different criminal warrants issued at the instance of the plaintiff, and that, so far from being a nonresident, his present residence is in the Buncombe County jail. It appears from the entire evidence, as far as we can see, that he deposited the money in the hands of Baird in accordance with an agreement with Baird to induce the latter to go on his bond. His purpose was evidently to keep out of jail, and we are at a loss to see how such a purpose is in itself fraudulent. It

seems to us that his Honor was inadvertent to the difference in the requirements for a warrant of attachment and that in arrest and bail, especially as he finds as a fact in this case that "there are four indictments now pending in the Superior Court against the defendant for obtaining money and property of plaintiff by false pretense." This finding meets none of the requirements of sec. 349, subsec. 2, Code. That section has nothing to do with the manner in which the property is acquired, but assigned, disposed of, or secreted. The only property or money that he appears to have disposed of is that which he put up in lieu of bond, and that which he put up to secure a bond in criminal prosecutions apparently instigated by the plaintiff. As we see no legal grounds for the warrant of attachment, it must be dismissed. The judgment of the Court below is reversed.

Reversed.

CLARK, J. (Concurring.) This action was brought to the term of Court. The Clerk had jurisdiction to issue the warrant of attachment, the ancillary remedy in the cause. Upon answer filed, he transferred the issue thereby raised on 29 August, to the Court at term. He was, therefore, *functus officio,* and acting without authority, when, in October, he entertained (432) and granted a motion to vacate the attachment, which was no longer before him. *Forbes v. McGuire,* 116 N. C., 449. But on appeal to the Judge the latter had jurisdiction (Laws 1887, chap. 276; *Roseman v. Roseman, post* 494), and the action of the Judge was erroneous, for the reasons given in the opinion of the Court.

BATTERY PARK BANK v. WESTERN CAROLINA BANK.

(22 December, 1900.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Validity—Corporations—The Code, Sec. 685.*

   A deed of assignment by a corporation is void as to existing creditors, if such creditors begin proceedings to enforce their claims within sixty days after the registration of said assignment.

2. RECEIVER—*Appointment—Circuit Court — Jurisdiction—Corporations—Creditor's Bill.*

   A circuit Judge has no power to appoint a receiver.

3. RECEIVERS—*Title—Appointment.*

The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested thereby.

4. CREDITOR'S BILL—*Lien—Realty—Personalty—Debtor.*

The bringing of a creditor's suit creates no lien on the realty, or tangible personal property of the debtor.

5. RECEIVER—*Appeal.*

A receiver is not justified in appealing from a judgment in an action between creditors, as to the distribution of a fund.

ACTION by the Battery Park Bank against the West- (433) ern Carolina Bank, heard by Judge *O. H. Allen,* at November Term, 1900, of BUNCOMBE. A receiver was appointed for the defendant, which was insolvent, and from a judgment as to distribution of funds, receiver George H. Smathers, and the creditors other than those in whose favor judgment was rendered, appealed.

George A. Shuford, J. C. Martin, and *Chas. A. Moore,* for petitioning creditors.

Merrimon & Merrimon, for the receiver and creditors other than the petitioning creditors.

CLARK, J. On 11 October, 1897, the defendant bank became insolvent, closed its doors, and executed an assignment for the benefit of all its creditors. On the morning of 12 October, the plaintiffs sued out a summons in a creditors' bill to wind up its affairs, and filed an affidavit for the appointment of a receiver. On said 12 October a temporary receiver was appointed by Judge Ewart, of the Circuit Court of Buncombe, etc., who was by him made permanent receiver on the next day. At night on 13 October the same person was appointed a temporary receiver by Judge Norwood, the Judge of the Superior Court, holding the courts of that district. On 12 and 13 October, after the summons in this creditors' bill was sued out, and after the order of Judge Ewart appointing a temporary receiver, each of the petitioning creditors sued the defendant bank before a Justice of the Peace, obtained judgments aggregating $5,000, and had transcripts docketed in the Superior Court of Buncombe before any action was taken by Judge Norwood upon the application for appointment of a receiver. These judgment credi- (434) tors, at March Term, 1898, filed petitions in this cause, claiming liens on the real estate of defendant bank in Buncombe County, superior to the rights of the general credi-

tors. They have not become parties to this action otherwise than by filing said petition asking for payment in full of their judgments.

The deed of assignment is void as to petitioners by virtue of Code, sec. 685; *Duke v. Markham,* 105 N. C., 138; *Langston v. Improvement Co.,* 120 N. C., 133; *Cotton Mills v. Cotton Mills,* 115 N. C., 485. The appointment of receiver by Judge Ewart was a nullity. *Rhyne v. Lipscombe,* 122 N. C., 660. The title of the receiver appointed by Judge Norwood relates only to the time of his appointment (*Worth v. Bank,* 122 N. C., 397; *Pelletier v. Lumber Co.,* 123 N. C., 596), and valid liens existing at the time of his appointment are not divested thereby (*Cotton Mills v. Cotton Mills,* 116 N. C., 648). This narrows the controversy to the single inquiry, does the issuance of summons in a proceeding in the nature of a creditors' bill, and filing an affidavit for a receiver therein, confer any lien upon the property of the defendant? The law, we think, is correctly stated as follows: The lien obtained by the commencement of an action in the nature of a creditors' bill creates a lien upon the choses in action and equitable assets of the debtor, but not upon his tangible personal property. If the latter is levied upon by execution or attachment prior to the appointment of a receiver, at which time the property first passes *in custodia legis,* it passes to the receiver subject to the lien of the levy. *Davenport v. Kelly,* 42 N. Y., 193; *Knower v. Bank,* 124 N. Y., 552. The docketing of the petitioners' judgments conferred the same lien upon the realty as a levy upon the personalty would; hence the realty of defendant passed to the receiver subject thereto. There are authorities cited in Smith Eq. Rem. Cred., sec. 222, that the lien

(435) by virtue of the commencement of the creditors' bill does not extend to choses in action, but only to equitable assets. Upon the reasoning, we are inclined to think the other authorities above cited are correct, and that no liens are acquired as against a receiver, except by levy upon personalty and upon realty (in this State), by docketing a judgment. But that question (which seems to be the only conflict in the authorities) whether a lien is acquired as to the choses in action from the commencement of the creditors' bill it is not necessary for us to decide in this instance. The judgment of the Court below directing the payment of the petitioners' judgments out of the proceeds of the realty as preferred liens thereon is affirmed. But we fail to see why the receiver appealed from the judgment. He is in no wise concerned, nor is the interest of the defendant bank affected, as the indebtedness is admittedly valid. The method of application of this fund concerned only

the plaintiffs, and an appeal should have been taken by such of them as are dissatisfied; and at their own costs, not at the cost of the fund. The receiver is the agent of the Court. Its judgment is full protection to him, and it is a rare case that he can be justified in appealing, and certainly he is not when, as in this instance, the question is merely between two sets of creditors as to the distribution of the fund.

No error.

Cited: Fisher v. Bank, 132 N. C., 776.

(436)

TREADAWAY v. PAYNE.

(22 December, 1900.)

1. WILLS—*Executor—Legatee—Estoppel—Deed.*

A legatee who procures the probate of a will and executes the duties of executor can not take devised property under a deed executed by the testator subsequent to making the will.

2. ESTOPPEL—*Executor—Will.*

One who executes the duties of executor under a will is estopped from denying his qualification as such.

ACTION by Elizabeth Treadaway, Tempie Lunsford, and Levi Lunsford against James Paynes and R. F. Payne, heard by Judge *A. L. Coble* and a jury, at Fall Term, 1899, of MADISON. From judgment for defendants, the plaintiffs appealed.

W. W. Zachary, for the plaintiffs.
J. M. Gudger, for the defendants.

MONTGOMERY, J. This action seems to have been commenced under chap. 6, Laws 1893, but was tried as an action for the possession of the land mentioned in the complaint. The plaintiff Tempie Lunsford claimed the land under the will of her father, Daniel Payne, which was probated on 30 September, 1889, before the Clerk of Madison County; the testator having died on the 5th of the same month and year. The defendant's claim to the land is under a deed executed by the testator a few months before his death, and registered after his death. The plaintiff, in her complaint, alleged that the deed was a forgery on the

part of the grantees; but the jury found that issue in favor of the defendants, under proper instructions from the Court.

(437) The main contention of the plaintiff in this Court is that the deed is of no force and effect as to R. F. Payne, because he was a large beneficiary, devisee, and legatee under the will of the testator, and himself probated the will and acted as executor, and therefore elected to take under the will. On the trial, R. F. Payne admitted that he brought the witnesses before the Clerk and had the will probated, Mr. Pritchard being employed as his attorney, and that he took charge of the estate under the will; that he sold the personal property at public sale as executor; that, as executor, he charged in his account for the expenses of 25 trips to Marshall on business as executor; that he took a note from a debtor of the testator's estate to himself as executor, and received payment on the same as executor; that he collected all of the debts due to the estate that could be collected, and paid all the debts of the estate; that he made a report to the Clerk of the Superior Court, in response to a notice to make that report from the Clerk, of his administration, in which he set out the property of the estate, the receipts and disbursements, including an allowance as a fee to his attorney, and the charges of regular commissions. He said, however, that he did not remember to have been qualified as executor of the will, nor did he remember whether or not the oath required of executors had been administered to him by the Clerk. The Clerk of the Court, upon his examination, testified that he had examined the records in which the appointments of executors were kept, and that he found no record in any book of R. F. Payne ever having qualified as the executor of Daniel Payne. His Honor instructed the jury, in substance, that before they could answer the second issue, "Did R. F. Payne qualify as one of the executors of Daniel Payne, deceased, and take charge of the estate of the said Daniel Payne as such executor?" they must be satisfied that he not only applied for letters testamentary and took charge of the es-

(438) tate as executor, but that he took the oath of the office of executor, and that letters testamentary were issued to him by the Clerk. We think there was error in that instruction. The defendant R. F. Payne, as we have seen, had the will probated, executed the duties of executor, made an inventory of the estate and an account of receipts and disbursements, and charged his regular expenses and commissions in his account as executor; and he can not be allowed to deny his qualification as executor. His Honor should have instructed the jury that, if they believed the evidence, they should answer

the second issue, "Yes." Upon such finding of that issue, the plaintiff would have been entitled to a judgment for one-half of the land in dispute—the share claimed by R. F. Payne. His course was an election to take under the will. *Allen v. Allen,* 121 N. C., 328.

New trial.

Cited: Tripp v. Nobles, 136 N. C., 104.

---

(439)

OATES v. MUNDAY.

(22 December, 1900.)

1. HOMESTEAD—*Allotment—Irregularity—Judgment.*

   Where a homesteader acquiesces in allotment of homestead for many years, a grantee of homesteader will not be permitted to defeat judgment creditors by proof of purchase in good faith for a full price.

2. HOMESTEAD—*Allotment—Exceptions—Appraisers—The Code, Sec. 519.*

   That appraisers laying off a homestead were sworn by a deputy sheriff, is, at most, an irregularity, and can not be taken advantage of in a collateral proceeding if exceptions were not taken in apt time.

3. EVIDENCE—*Homestead—Advice of Counsel.*

   In a contest between judgment creditors and purchasers of land subject to the judgment, the wrong advice of counsel given to the latter is inadmissible.

ACTION by Oates, White & Co., Stoneberger & Richards, James Carey & Co., Eddleman & Brown, and Samuel Bevens & Co., against J. W. Keener (Administrator of W. A. McCoy), A. P. Munday and wife Ada, and J. A. Munday and wife Belle, heard by Judge *O. H. Allen,* at Fall Term, 1900, of MACON. A jury trial was waived and it was agreed that the Court might find the facts and answer the issues. From a judgment for plaintiffs, defendants appealed.

Jones & Johnston, W. E. Moore, and *Shepherd & Shepherd,* for plaintiffs.

Kope Elias, and *Ferguson & Son,* for defendants. (440)

FURCHES, J. This is an action by judgment creditors to enforce judgment liens. In 1879 plaintiffs recovered sev-

eral judgments against W. A. McCoy before Justice of the Peace, which were duly docketed in the Clerk's office of Macon County. Before the taking and docketing of plaintiff's judgments, Clark and other creditors of said McCoy had taken judgments against him, which were docketed prior to plaintiffs' judgments. Clark and said other judgment creditors of McCoy had caused executions to issue upon their judgments, which where placed in the hands of the Sheriff of Macon County for collection. The sheriff, under said execution, by his deputy (one Jacobs), caused the homestead of said McCoy to be laid off and allotted. The homestead, as laid off and set apart to said McCoy, was a house and lot in the town of Franklin, upon which lot said McCoy resided. A report was made by the appraisers, giving metes and bounds, which they returned to Court, and the same was properly docketed and recorded. It appears in all things to be regular and in compliance with the statute, except it states that the appraisers were sworn by said Jacobs, the deputy sheriff. Under these executions issued upon the judgments of Clark and others, the sheriff sold the excess of McCoy's property after laying off his homestead as stated, and applied the proceeds to their judgments, but they were not sufficient to satisfy them, and on 22 May, 1883, they were compromised by the defendant W. A. McCoy and his wife giving their notes for the balance of said judgments, secured by a deed of trust made to one Crawford on the property allotted to the defendant McCoy as a homestead, and on other property, in which the wife of McCoy joined. And the judgments of Clark and others, upon whose judgments the homestead had been laid off, were receipted in full upon the docket. But these compromise notes secured in the trust were not paid, and the trustee, Crawford, sold the land conveyed in the trust; and Mary A. McCoy,

(441) wife of W. A. McCoy, became the purchaser at the trust sale, and a deed was made conveying the property to her, including the lot that had been allotted to her husband as a homestead. Some time after, the wife, Mary A. McCoy, purchased the land at the trustee's sale (the exact date seems not to be stated), and probably after the death of the husband, she sold to A. P. Munday, as the record stated that A. P. Munday bought the lot assigned as a homestead in good faith and for a full price, paying $2,500 for it; that he kept it a short time, and sold it to J. A. Munday on 18 May, 1893, for $2,660. The defendants therefore allege that the defendant J. A. Munday is now the rightful owner of said lot; that Mary A. McCoy acquired title from Crawford (the trustee), A. P. Munday from Mrs. McCoy, and J. A. Munday from A. P. Mun-

day. They allege that the homestead of W. A. McCoy was never legally laid off and assigned to him, for the reason that Jacobs, the deputy sheriff, superintended laying it off, and that the return of the appraisers shows that he swore the appraisers, and for this reason the allotment is void, and does not suspend the running of the statute of limitations, which is pleaded, and that plaintiffs' right of action is therefore barred. The defendants alleged and offered to prove that George A. Jones, an attorney living at Franklin, was consulted by defendants before they bought of Mrs. McCoy, and he gave it as his opinion that Mrs. McCoy's title was good, saying that he had bought a part of the homestead property from her. But upon objection this evidence, they say, was erroneously excluded. The plaintiffs, in reply to defendants' objection, as to Jacobs, the officer who had the homestead laid off and swore the appraisers, were allowed to offer in evidence a copy of an oath that Jacobs had taken as deputy sheriff, and which had been acknowledged and registered. The oath, in form, is very full and complete as to the discharge of his duties as an officer, and to obey the Con- (442) stitution and laws of the United States and the Constitution and laws of North Carolina. There were some other exceptions taken, but these are all that seem to affect the merits of the case, and all that are necessary for us to consider.

The fact that defendants bought for a full price, in good faith, and without notice, can not benefit them, if the plaintiffs' liens still continue. This doctrine of full price and without notice only applies to equities, and not to legal title, or liens, created by law, as docketed judgments. But, if that doctrine applied, the defendants had legal notice—the docketed judgments and the record of the allotment of the homestead. The evidence as to what Jones said about the title was irrelevant and incompetent. It was not offered with the view of showing fraud, and, if it was a mistake as to the title of Mrs. McCoy being good, he does not stand alone in not knowing the law.

The question, then, comes down to the homestead. If the homestead allotted to W. A. McCoy was void, judgments were barred by the statute of limitations, the judgment liens discharged, and the plaintiffs have no right of action, and the defendants' title is good. But there is quite a difference in its being void and in its being irregular. If the sheriff had acted in person in laying off this homestead he could have sworn the appraisers. And the only irregularity alleged is that the appraisers were sworn by the deputy sheriff. In every other respect it seems to have been regular and complete. Section 3316 of The Code provides that, when a public officer is authorized

to administer an oath, his deputy may do so, if he is sworn. As the sheriff could have sworn these appraisers, and as it was shown that Jacobs was his sworn deputy, the plaintiffs contend that he was authorized to swear the appraisers. This would seem to be so, but we find no statute authorizing deputy
(443) sheriffs to be sworn, as we do as to deputy clerks, unless this section of The Code authorizes it. But whether it does or does not, and whether it might not have been taken advantage of by exceptions filed in apt time, as provided by statute, we do not think it necessary to decide. It was, at most, but an irregularity. *Brickhouse v. Sutton,* 99 N. C., 102. The homestead was, in fact, laid off and the return filed with the judgment roll, noted on the docket, and registered as the statute directs. The time allowed by law for filing exceptions was intended to give time to parties interested to make their objections. And when they do this they have a standing in court, and will be heard. In the fact that this homestead was laid off by Jacobs, a deputy, and that he swore the appraisers, was a ground for exception, but the exception should have been made within the time allowed by law. The Constitution gives to every insolvent debtor a homestead. It is not the appraisers that give it to him. The appraisers only locate the homestead so as to determine whether there is an excess or not, so that the excess may be sold. That was done in this case, and the excess sold; and that part of McCoy's real estate that was allotted to him was not sold, but he lived on it under the protection of this allotment until his death. Both he and Mrs. McCoy knew of this allotment of homestead. It was recognized by them in the compromise of the claims of Clark and others. It was recognized by Mrs. McCoy in her deeds from the sheriff for the excess which she bought—the deed stating that it was for the excess of the homestead. It was recognized and called the homestead in the deed of trust to Crawford, which was one of the links in defendants' chain of title, and therefore, in law, was known to him. It would be singular if the McCoys should have the benefit of this allotment as being a homestead for so Many years, if they should now have the benefit of its
(444) not being a homestead. It may be, and probably is, a hardship on the defendants, who have purchased the property, and it seems paid a full and fair price for it. But it is no more than hundreds of other persons have done—bought property when the title turned out to be defective. The trouble may be that they were badly advised, but that neither changes the facts nor the law. It is a matter of great public interest that homesteads, once allotted, and allowed to stand

for years without objection or exception, should be considered settled. Suppose McCoy had been comparatively a young man, with a big family of young children, when this homestead was allotted to him, and no exceptions had been filed thereto, and defendants should have bought his homestead for a full price, and plaintiffs had, after awhile, said that the homestead was void; that Jacobs, a deputy, laid it off, and swore the appraisers; that it is twice as large as it should be, would he think it fair to set it aside and reallot the homestead, and take half the land he purchased? We only mention this to show that it is like the most of questions—it has two sides to it. But hardships are said to be "the quicksands of the law," and we are not allowed to let them influence us in deciding what is the law.

We are of the opinion that this allotment was not void; that, at most, it was only irregularly laid off; that, if the matter alleged was such an irregularity as would have entitled a party excepting within the time and manner prescribed by the statute to have had it set aside (and we do not say that he would not have been so entitled), it has remained and been acquiesced in for too long a time for us to do so now, especially in this collateral proceeding. Therefore, under the authority of *Bevan v. Ellis,* 121 N. C., 230, we are obliged to hold that plaintiffs still have their statutory judgment liens on the property allotted to W. A. McCoy as his homestead.

Affirmed.

FAIRCLOTH, C. J. (concurring in the result). The (445) plaintiffs obtained and docketed judgments in 1879 and 1880 against W. A. McCoy, and this action is to have a commissioner appointed to sell the homestead land of said McCoy to satisfy said judgments. It is admitted that McCoy died insolvent in 1892, and that his youngest child was over twenty-one years of age when this action commenced. Several issues were submitted without objection, and the case on appeal states that a jury trial was waived; the plaintiffs and defendants agreeing that the Court might find the facts and answer the issues. Several years before his death said McCoy and wife sold his homestead to another, under whom the defendant Munday claims title. Each party introduced evidence, and his Honor answered the issues and rendered judgment in favor of the plaintiffs; *i. e.,* that said land be sold to pay plaintiffs' judgments. Under a judgment against said McCoy, prior in date to plaintiff's, an execution thereon came to the hands of an acting Deputy Sheriff of Macon County, who summoned and

swore a board of appraisers of the homestead and exemption of said McCoy, whose report was made and filed 10 December, 1878, with the judgment and levy made on the excess, signed, "B. P. Jacobs, Deputy Sheriff." The oath of office of said deputy was introduced by plaintiffs. Said homestead was described by distinct boundaries, and the homesteader and the defendants have ever since been in possession of said homestead premises. The defendants objected to the introduction in evidence of the foregoing homestead return, because: "(1) The law does not recognize such an officer as deputy sheriff. (2) That a deputy sheriff has no authority to administer an oath. (Objections overruled. Exception.)" This exception is (446) the main contention in the case, to which the argument was chiefly directed, as well as the duties and liabilities of a sheriff, and his deputy *inter se* and to third parties. We are relieved from considering these two exceptions, on reason and authority. The homestead, as a matter of fact, was laid off by well defined lines, whether regularly or irregularly, and no objection was made to it by exception, or appeal. The debtor accepted the assignment and has enjoyed the benefit thereof for more than twenty years, and the creditors have submitted to it for the same time. Both parties are thereby estopped from denying an accomplished fact, so long recognized by them. *Spoon v. Reid,* 78 N. C., 244; *Whitehead v. Spivey,* 103 N. C., 66, Herm. Estop., 949, 952. If either party is dissatisfied with the allotment, Code, sec. 519, *et seq.,* affords ample remedy. If these remedies are not availed of, the allotment can not be attacked collaterally by the debtor, or anyone claiming under him. His remedy is Code, sec. 519. *Welch v. Welch,* 101 N. C., 565; *Burton v. Spiers,* 87 N. C., 87. When the creditor and debtor have for a long time acquiesced in the allotment as it was made, and availed themselves of their rights and benefits thereunder, they are precluded from denying the validity of the allotment. *Cobb v. Halyburton,* 92 N. C., 652; *Ladd v. Byrd,* 113 N. C., 467.

Another exception made in the argument is that the Judge erred in not finding the facts. When facts are found at the trial, they are conclusive, and can not be reviewed by this Court, with few exceptions. If the answers to the issues failed to present all material facts, it was incumbent on the defendant to show by his exception what error was committed. This can only be done by averring that there was no evidence (447) to support the finding, that competent, or incompetent, evidence was rejected, or admitted, and that the Court refused, or failed, after request made in apt time, to pass upon

a material issue, or question of fact, when there was evidence tending to support the same. *Fertilizer Co. v. Reams,* 105 N. C., 283.

The defendants also relied on seven years' adverse possession under color of title. That can not help the defendants, as statutes of limitation are suspended and will not run against any judgment due by the owner of a homestead, or homestead interest during the existence of such homestead. Acts 1885, chap. 359; *Formeyduval v. Rockwell,* 117 N. C., 320. In this case the homesteader died in 1892, and his youngest child is of full age and still living. Four years after plaintiffs' judgments were docketed, said McCoy and wife, Mary A. McCoy, conveyed their interest in said homestead lot to a trustee to secure creditors, and at said trustee's sale said Mary A. McCoy was the purchaser, and under her the defendants claim title. This conveyance to the trustee and his sale to Mrs. McCoy were subject to the lien of plaintiffs, acquired by their docketed judgments. No error.

Affirmed.

Cited: Norwood v. Lassiter, 132 N. C., 58.

---

(448)

DARLINGTON v. WESTERN UNION TELEGRAPH COMPANY.

(22 December, 1900.)

1. NEGLIGENCE—*Damages—Actual—Telegraphs.*

   Where there is negligence by a telegraph company in sending a message, it is liable for actual damages to the sender.

2. TELEGRAPHS—*Damages—Notice—Mental Anguish.*

   A telegraph company is liable for damages for mental anguish, caused by failure to promptly deliver a message, only when it has notice of its importance.

3. TELEGRAPHS—*Evidence—Competency—Hearsay Notice.*

   Conversations with an agent of a telegraph company before, and declarations by him after sending a message, are incompetent to fix the company with notice of its importance.

MONTGOMERY, CLARK and DOUGLAS, JJ., concur in the result only.

ACTION by W. M. Darlington against the Western Union Telegraph Company, heard by Judge *W. S. O'B. Robinson* and

a jury, at May Term, 1900, of WILKES. From judgment for less than the relief demanded, the plaintiff appealed.

Finley & Green, for the plaintiff.
Glenn & Manly, and *F. H. Busbee,* for the defendant.

FAIRCLOTH, C. J. Action for damages. The plaintiff delivered to defendant's agent for transmission the following: "North Wilkesboro, N. C., 6 September, 1899. Mrs. S. J. Franklin, Ridgeway, Henry Co., Va.: Leave on this evening's train. Be here to-morrow. W. M. Darlington." Mrs. Franklin was examined as a witness, and testified that on 6 September she received this message: "Leave on evening train. Be there to-morrow." Mrs. Franklin, being misled by the language of the telegram, did not arrive at Wilkesboro
(449) until 10 September at 1:10 p. m., and her daughter, wife of the plaintiff, died that night at 12 o'clock, and knew her mother and conversed with her. The plaintiff sues for actual damage and damages for mental suffering. He did not show that defendant's agent was in any way informed of the important nature of the message, or of any special circumstances connected with it. His Honor allowed plaintiff to take judgment for the cost of sending his message, but refused to allow damages for mental anguish. The plaintiff excepted and appealed.

All the authorities hold that, when there is negligence in sending the message the company is liable for actual damages to the sender. In *Hadley v. Baxendale,* 9 Exch., 353, it was held that damages are to be allowed only when the defendant has notice of the special circumstances and importance of prompt action. When such notice is given, failure to act promptly and correctly is negligence, and subjects the defendant to damages for negligence. This doctrine is laid down in Crosw. Electricity, sec. 649, and Thomp. Electricity, secs. 386, 387. In several decisions of this Court, from *Sherrill v. Telegraph Co.,* 116 N. C., 655, to the present, the same principle is recognized, although the precise question was not presented. In *Kennon v. Telegraph Co.,* 126 N. C., 232, this Court decided that no damage for mental suffering could be recovered, unless notice of the urgency or importance of the dispatch was brought to the attention of the company in some way, and this is the rule in this Court. Ten, or a dozen, of our decisions on this subject are collected and cited in *Kennon v. Telegraph Co., supra,* with ear marks indicating the evidence of the notice of the urgency and importance of the message. See, also, *Tele-*

graph Co. v. Bryant, 17 Ind. App., 70. These authorities are conclusive against the contention of the plaintiff, and we think the rule is reasonable and just to each party.

His Honor directed the jury to answer the first is- (450) sue, "Yes," and to assess the plaintiff's damages at 25 cents, the cost of sending the message, and held that he was entitled to no other damage. The plaintiff offered to prove by himself a social conversation with the defendant's agent on the street several days before the message was sent, and the declarations of the same agent after the sending of the message, for the purpose of fixing the defendant with notice of the importance of the dispatch. This evidence was incompetent, and was properly excluded. The rule in that respect is that what an agent says, or does, within the scope of his agency, and while engaged in the very business, is evidence for, or against, his principal, because it is a part of the *res gestae.* His declarations, made subsequently, as to what he had done, or said, are hearsay, and are not evidence, although he may be still acting as agent for the same principal generally, or in any other matters. *Smith v. R. R.,* 68 N. C., 107; *McComb v. R. R.,* 70 N. C., 178; *Stenhouse v. R. R., Id.,* 542. No error.

Affirmed.

Cited: Sparkman v. Tel. Co., 130 N. C., 449.

---

(451)

ANGEL v. ANGEL.

(22 December, 1900.)

1. WITNESS—*Competency—The Code, Sec. 590—Evidence.*

Where defendant in an action on a note by an administrator, claimed a set off for goods furnished decedent, evidence that "no one had paid him for these articles" was incompetent.

2. ACCOUNTS—*Compromise and Settlement—Presumption.*

A settlement of mutual running accounts by payment, or giving note for balance, is presumed to include all pre-existing demands of either party to the settlement, which appropriately belong to such an adjustment.

ACTION by B. M. Angel, administrator of Thomas M. Angel, deceased, against J. P. Angel, heard by Judge *T. A. McNeill,*

at Spring Term, 1900, of MACON. From judgment allowing a set off, the plaintiff appealed.

Jones & Johnston, for the plaintiff.
Ray & Kelly, for the defendant.

DOUGLAS, J. This is an action brought upon a note under seal for $130 and interest, executed by the defendant on 27 November, 1899, to Thomas M. Angel, now deceased. The defendant admitted the execution of the note, but claimed that the same had been paid, and set up a counter claim. In his reply, the plaintiff denied the defendant's set off and counter claim, and also pleaded the statute of limitations in bar thereof. By leave of the Court, the defendant amended his answer and abandoned his counter claim, but pleaded set off and payment. It is admitted that the said Thomas M. Angel, payee in said note, died intestate in Macon County, in December, 1897, and that the plaintiff duly qualified as his administrator in January, 1898.

(452) Three witnesses, named Stonecipher, Calloway, and Tom Angel, testified that at different times before the execution of said note, the defendant had furnished certain merchandise and done certain work for the intestate, and the defendant testified that the merchandise and work were worth in the aggregate the sum of $50. The plaintiff admitted that $12 had been paid on the note. The transcript states that there was evidence tending to show that there had been for many years a mutual account and dealings between plaintiff's intestate and defendant, and the defendant offered in evidence his books, and swore they were correct. The account aggregated $116.17, which, we suppose, was intended to mean the amount claimed to be due by the intestate. The defendant, as a witness in his own behalf, was asked, over the objection of the plaintiff, if anything had been paid to him by anybody for the articles mentioned in the testimony of Stonecipher, Colloway, and Tom Angel. Thereupon the defendant testified that no one had paid him for these articles. We think that this evidence was clearly incompetent, under section 590 of The Code. It needs no citation of authority to show that the defendant could not have testified that the intestate had never paid for the goods, and yet that was exactly the effect of his testimony when he said that nobody had paid him. Such a palpable evasion of the statute, which would be contrary to its essential meaning and would destroy its beneficial purpose, can not be permitted. This, of itself, would entitle the plaintiff to a new trial, but, as an important question has been raised as to the presumption

arising from the giving of a note, we deem it best to consider it. It has been held by this Court, in *Smathers v. Shook,* 90 N. C., 484, that "every settlement of mutual running accounts by payment, or giving a note for the balance, is presumed to include all pre-existing demands of either which appropriately belong to such an adjustment; still the presumption may (453) be overcome by proof of the omission of any claim." In the case at bar all mutual running accounts are presumed to have been included in the settlement represented by the note, and this is especially so where the items set up as payments upon the note existed from three to five years before the execution of the note. This presumption may be rebutted by the defendant, but only by competent evidence, and where there is no such evidence a charge that the jury might infer the fact of payment would be erroneous. In the case as now before us, we see no legal evidence tending to rebut the presumption, or to show the fact that the intestate agreed to consider such items as payments upon the note. What evidence may be produced upon a new trial, we can not anticipate, and a charge that would be proper upon one state of facts might be erroneous where the facts are different.

New trial.

---

(454)

AUSTIN v. MURDOCK.

(22 December, 1900.)

1. PARTIES—*Corporation—Subscriptions—Fraud—Deceit.*

   Where persons are sued for fraud and deceit in procuring subscriptions to a future corporation, the corporation is not a necessary party defendant.

2. CORPORATIONS—*Election of Remedies — Stock—Subscriptions—Fraud—Deceit.*

   Where persons seek to recover for fraud in inducing them to subscribe for stock in a future corporation, they are not bound to seek redress from the corporation before suing those who had practised the fraud.

3. EVIDENCE—*Sufficiency—Corporations—Fraud—Deceit.*

   Evidence in this case held sufficient to be submitted to the jury on the question whether certain parties were induced by fraud and deceit to subscribe for stock in a future corporation.

ACTION by J. D. Austin, H. T. Sawyer, R. W. Ivey, G. C. Hegler, W. M. Ivey, H. S. Trott, J. L. Palmer, Richard Car-

mon, J. L. Culp, Cline Austin, R. J. Ross, J. L. Palmer, and B. F. Ivey, executors of J. R. Ivey, deceased, against F. J. Murdock, N. B. McCanless, and The Silver Springs Cordage Company, a corporation, heard by Judge *T. A. McNeill* and a jury, at December Term, 1899, of STANLY. From an order dismissing the complaint and directing a nonsuit, the plaintiffs appealed.

Montgomery & Crowell, for the plaintiffs.
Lee S. Overman, for the defendant.

MONTGOMERY, J. This action was brought by the plaintiffs against the defendant for an alleged fraud and deceit practiced on the plaintiffs by the defendant in the procurement (455) of certain subscriptions, in money and notes, for the purpose of buying machinery to be used by a corporation thereafter to be formed, and to consist of the subscribers, the defendant, and others. The corporation, The Silver Springs Cordage Company, and one McCanless, were also made defendants, but nonsuits have been taken as to them. The defendant, in his answer, denied all the allegations of fraud and deceit alleged in the complaint. Upon the reading of the pleadings the defendant moved to dismiss the complaint because it did not state a cause of action, for that "(1) The complaint does not show that the representations made by the defendant bound the corporation; (2) that the complaint does not allege that upon the discovery of the fraud alleged the plaintiffs immediately disaffirmed the contract; (3) that from the admissions in the pleadings and the plea in avoidance, not denied, shows an affirmation and ratification of the contract; (4) that the complaint does not allege that the plaintiffs made any effort to get redress within the corporation, or requested any action taken; (5) because the corporation and the stockholders are not made parties to the action." The motion was not acted on at the time, but at the close of the evidence his Honor adjudged that "upon an examination of the record and the pleadings in the case, and upon the motion of the defendant to nonsuit plaintiff at the close of the testimony, the said motion be allowed."

The corporation was in no way involved in the matter of which the plaintiffs complain of the defendant. It was alleged in the complaint that before the corporation was formed the plaintiffs were induced to pay money and to subscribe for stock in the corporation by the false statements of the defendant—the statements alleged to have been known to be false when made. If such was the fact, the defendant was liable, and the

corporation had no connection with the matter. Cooley (456) Torts, p. 504. And the same reason the plaintiffs were not put to their election between the remedy they chose to seek and any other. The matter set up in the answer in avoidance does not profess to relieve the defendant in the matter of which the plaintiffs complain, and, besides, did not exist when the action was commenced, but occurred afterwards. The correctness of his Honor's ruling depends, then, on whether there was any evidence which ought to have been submitted to the jury on the issues joined between the parties. It seems that a majority of the plaintiffs (in number and in value of stock) testified on the trial that they had not been injured by the representations (made in a public address) of the defendant, for they had paid nothing, and several of the largest said that they claim no damages. And several said that the defendant himself expressed disappointment at the machinery when it arrived, declaring it was not such as it was represented to him to be. The plaintiffs Palmer and Carmon, testified that Will Ivey induced them to subscribe, and it appeared that Ivey was employed about the machinery, after it was put in place, at $1.75 per day, but that he could not run it, and another person was employed in his place. Certainly the evidence of the last named witness, and that of his father, both of whom testified that they subscribed in money and notes to the stock of the corporation, and upon the representations of the defendant, was more than a scintilla and the jury should have had it, with all the competent evidence in the case, submitted to them upon the issues between the parties, with proper instructions from his Honor.

New trial.

---

(457)

CULP v. LOVE.

(22 December, 1900.)

CONTRACTS—*Restraint of Trade—Enforcement—Competition.*

A contract whereby persons enter into a combination to destroy competition in trade in the necessities of life is against public policy and illegal.

ACTION by James P. Culp against R. C. G. Love & Son, and Edgar Love & Co., heard by Judge *H. R. Starbuck* and a jury, at August (Special) Term, 1900, of GASTON.

From judgment for defendants, the plaintiff appealed.

(459) *Jones & Tillett,* and *A. G. Morgan,* for the plaintiff.

Burwell, Walker & Cansler, and *D. W. Robinson,* for the defendants.

FAIRCLOTH, C. J. The plaintiff demands damages for breach of contract (Exhibit A, in the record). The defendants deny the alleged breach of contract, and rely upon the illegality of the contract as their defense. It is agreed by the parties that at the time the contract was made the plaintiff, Culp, was the agent and broker of the Cumberland Flour Mills, for
(460) the sale of their flour, and the defendants were agents and brokers for the Sweetwater Flour Mills (located in Tennessee), for the sale of their flour, and that the flour of the respective companies were competitive brands of flour in the territory mentioned in the contract. In the contract (Exhibit A), the plaintiff, Culp, for a valuable consideration, agrees with R. C. G. Love & Son, and Edgar Love & Co., not to sell meats, lard, and oil in certain territory, including several counties, for a certain number of months, and the said R. C. G. Love & Son and Edgar Love & Co. agree not to sell flour at wholesale in the same territory and for the same period of time. They also agree to obtain for the plaintiff, Culp, the sale of the Sweetwater Mill Company's flour at all the towns on several railroad lines for the full term of this contract. It was further agreed that the plaintiff is not to neglect the sale of Cumberland Mills flour for that of Sweetwater Mills, nor "to push sale of said Sweetwater Mills flour further than it may be to his interest to do." The plaintiff also agreed to divide with the other contracting parties his brokerage on sale of the Sweetwater Mills flour for the same term and in the same territory. The parties then agreed severally to forfeit and pay $500 if either failed to perform his part of this contract. It appears, from the evidence, that defendants notified the Sweetwater Company that they had transferred their agency to sell flour to the plaintiff, but did not inform the Sweetwater Company of the true nature of said contract, Exhibit A. The Sweetwater Company recognized the transferred agency on condition that the plaintiff handle its goods exclusively. In a few months the Sweetwater Company withdrew plaintiff's agency to sell its flour, and plaintiff sues for the penalty
(461) and damage. At the close of the plaintiff's evidence, his Honor held that plaintiff could not recover. Plaintiff took a nonsuit, and appealed.

Concealing the true nature of the contract under consideration was a fraud on the Sweetwater Company, and contrary

to good morals, and the combination between plaintiff and defendant to suppress and destroy competition in trade in the necessaries of life was an imposition on the people and against public policy. The agreement was therefore illegal, and no court of justice will lend its aid to either party to enforce such an executory contract.

The objection of a party to an illegal contract does not sound well in his mouth. It is not for his sake that the objection is allowed, but it is found in general principles of policy, of which he has the advantage by the accident of being sued by his confederate in wrongdoing. "An executory contract, the consideration of which is *contra bonos mores,* or against the public policy, or laws of the State, or in fraud of the State, or of any third person, can not be enforced in a court of justice." *Blythe v. Lovinggood,* 24 N. C., 20. In *Armstrong v. Toler,* 11 Wheat, 258, the Court spoke in these words. "The principle of the rule is, that no man ought to be heard in a court of justice who seeks to enforce a contract founded in, or arising out of, moral or political turpitude." In Story Ag., sec. 348, this clear distinction is laid down: "The distinction between the cases where a recovery can be had and the cases where a recovery can not be had of money connected with illegal transactions, which seems now best supported, is this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract, or transaction, or where it appears that he was privy to the original illegal contract, or transaction, then he is not entitled to recover any advance made by him connected with that contract. But when the advances have been made upon a new contract remotely connected with the original illegal contract, or transaction, but the title of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to (462) recover." In the case before us, it is the illegal contract itself between the parties that we are asked to enforce. The proof shows that defendants agreed not to compete with plaintiff in selling flour, leaving him to demand of the public his own price, and he agreeing not to sell meats, lards, and oil in their chosen territory, and to divide with them his brokerage on sales of the Sweetwater flour, and the Court is called on by one party to make the other party pay money for failing to perform his part of this unlawful transaction. A and B agree to rob C. O does the work; B stands off and simply looks on, and then B calls on the Court to make A divide the spoils; or, if they have stipulated that either one failing to do

his part of the nefarious work, shall forfeit and pay the other $500. Has any court of justice ever responded favorably to such request by either party? We do not mean to classify these parties with robbers, or to characterize their transactions other than according to the facts which they have brought out in their case. The intention of the parties is immaterial. They may have thought it permissible to make a sharp bargain at the expense of the public and injury to a third party, but we can not agree with, or help them, to do so. *King v. Winants,* 71 N. C., 469.

Affirmed.

(463)

RABY v. STUMAN.

(22 December, 1900.)

1. LIMITATION OF ACTION—*Acknowledgment—New Promise—The Code, Sec. 172.*

   A new promise to pay, if not in writing, can not defeat the operation of the statute of limitation.

2. LIMITATION OF ACTIONS—*Estoppel—Agreement.*

   A request not to sue will not stay the statue of limitation, but it must be an agreement not to plead it.

ACTION by John B. Raby, administrator of E. Raby, against E. C. Stuman, heard by Judge *Thos. A. McNeill* and a jury at Spring Term, 1900, of MACON. From judgment for defendant, the plaintiff appealed.

Ray & Kelly, for the plaintiff.
Jones & Johnston, for the defendant.

FAIRCLOTH, C. J. The defendant bought land from plaintiff's intestate, and received a deed. Defendant made his note, not under seal, payable to the intestate, for $250, dated 23 June, 1894, and added these words: "I agreeing, further, in the event I succeeded to sell the land, to pay E. Raby an additional fifty dollars." The action was commenced 2 September, 1899. Defendant pleaded the three years statute of limitation. The defendant told the plaintiff before the statute became a bar that he had optioned the land to a mining company, and as soon as the trade went through the debt would be paid, and at another time promised to pay the same. The last option expired on 6 June, 1896. The Court was of opinion that the $250 was barred by the statute, and judgment was entered accordingly.

The promise to pay, not being in writing, can not be (464) received as evidence of a new, or continuing contract to defeat the operation of the statute. Code, sec. 172. The defendant is not estopped to plead the statute, as his promise was not an agreement not to plead it, as it was in *Haymore v. Commissioners,* 85 N. C., 268. A request not to sue will not stay the statute, it must be an agreement not to plead it. *Hill v. Hilliard,* 103 N. C., 34. Plaintiff can not recover the $50, as there is no evidence that any option "went through." We can find no error in law, and we can not deal with the morality of the matter.

Affirmed.

Cited: Brown v. R. R., 147 N. C., 218.

TOMS v. JONES.

(22 December, 1900.)

NEGOTIABLE INSTRUMENTS—*Bills and Notes—Bona fide Purchasers—Evidence—Promissory Note.*

The purchaser of a promissory note for valuable consideration before maturity, without any knowledge or actual notice of any defense to, or infirmity in the note, or of the nature of any existing equities among the signers and endorsers, may recover thereupon.

ACTION by M. C. Toms against John Jones, M. S. Justus, James Jackson, J. B. Freeman, R. J. Brown, H. D. Justice, W. H. Stepp, H. Y. Gash, W. M. Justus, I. T. Laughter, B. B. Jackson, Jason Orr, W. B. Ledbetter, W. D. Miller, D. R. Myers, J. S. Rhodes, G. W. Butler, J. W. C. Blythe, R. G. Souther, E. R. Israel, C. J. Edney, Jay W. Freeman, P. S. Brittain, and G. M. Guice, heard by Judge *T. A. McNeill* and a jury, at Fall Term, 1899, of HENDERSON. From judgment for the plaintiff, defendants appealed.

Chas. F. Toms, for the plaintiff. (465)
S. V. Pickens, for the defendants.

FAIRCLOTH, C. J. This is an action to recover money on a promissory note. The note was payable to J. M. Waldrop, six months after date, and signed by R. J. Brown and four others, and indorsed by John Jones and twenty-four others, "Per W. H. Stepp (and four others) attorneys in fact." Before maturity, said note was assigned by the payee to the plaintiff, for

value. The plaintiff introduced his note, and testified that he purchased it before maturity, for value, in the usual course of business, from the payee, without knowledge of any offset, counter claim, or defense against the same. "The correctness of this statement was uncontradicted by the defendants at any time during the trial." The plaintiff also testified that he knew from general talk that there was a power of attorney, duly recorded, made by some of the indorsers, to the parties signing the note, and that the money he was lending was to be used for the Israel trust and winding up the Israel affairs, in which defendants, or some of them, were interested as trustees and otherwise. The plaintiff introduced the power of attorney referred to, which authorized the parties therein named to make said indorsements on the note as they appear. Said attorneys were also authorized in said power of attorney to execute a mortgage on the Israel property to whoever would lend them money to pay off and liquidate the judgment against them (the indorsers), and to indorse any bond or note which they may see proper to give in order to procure the money, "by signing our names to, or upon, the said bond, or note," with full au-
(466) thority to do all and such acts as they may deem necesary to accomplish the purpose for which the power is given. The power of attorney was introduced without objection. The defendants proposed to introduce the said mortgage and said judgment for the purpose of showing a termination of the attorney's agency, and to show that said judgment was paid off before the note was given for the money. Objected to, and excluded by the Court. His Honor stated that, as the plaintiff purchased the note before maturity, without knowledge of any defense thereto, he would exclude the evidence, unless defendants introduced evidence connecting plaintiff with said mortgage, or that he had knowledge that said agency had been terminated, or that the money was not to be used for the purposes mentioned in said power of attorney. No such evidence was offered by the defendants. Other exceptions are similar to the above. The case is simply this: The plaintiff purchased the note for a valuable consideration, before maturity, without any knowledge, or actual notice, of any defense to, or infirmity in, the note, or of the nature of any existing equities among the signers and indorsers. It has been held so often, and by so many courts, that the assignee (plaintiff in this case) can recover, that we will simply refer to *Black v. Bird,* 2 N. C., 273; *Reddick v. Jones,* 28 N. C., 107. We find no error.

Affirmed.

(467)

HANOVER NATIONAL BANK v. COCKE.

(22 December, 1900.)

1. PRINCIPAL AND AGENT—*Contract—Power of Attorney—Stockholders—Trustee—Banks and Banking.*

   Where the shareholders of an insolvent bank authorize a trustee to borrow money to pay its debts and to bind them individually therefor, an action may be sustained against such shareholders by the persons loaning the money.

2. PARTIES—*Joinder—Trustee—Contract—Shareholders—Banks and Banking.*

   Shareholders authorizing a trustee of an insolvent bank to borrow money on their credit are properly parties-defendant in a suit to recover the borrowed money.

3. PARTIES—*Necessary—Banks and Banking.*

   Where a trustee is authorized by the stockholders of an insolvent bank to borrow money on their credit, the bank and trustees are not necessary parties to an action to recover the money borrowed.

4. GUARDIAN AND WARD—*Contract—Stock in National Bank.*

   A ward is bound by the contract of a guardian who owns shares in an insolvent national bank for his ward, which contract authorizes the trustee to borrow money to pay the bank's liability.

5. APPEAL—*Exceptions—Waiver.*

   Where no objection is made in the trial court to a defective statement of a good cause of action, the objection is deemed waived, and can be made on appeal.

(468)

DOUGLAS, J., dissenting.

ACTION by the Hanover National Bank, the Asheville Cotton Mills, the Battery Park Bank, the Merchants and Farmers National Bank, S. M. Thomas, Annie L. Weaver, Atlantic National Bank, and any and all other persons interested in the subject matter of this action who may become parties hereto and contribute to the costs and expenses of this suit, against W. J. Cocke, Julia A. Sluder, Julia A. Sluder (Trustee), Julia A. Sluder (executrix), Karl Von Ruck, Houston Merrimon, J. B. Bostic Company, A. J. Lyman, W. P. Cheeseborough, T. B. Lyman, Erwin Sluder, F. Kingsbury Curtis, Mary E. Benedict (executrix), and Thos. Wilmarth (executor of C. B. Benedict), J. E. Rankin (guardian of Timothy Cocke, Mattie Ella Cocke, Jere Cocke, Phillip Cocke, and Eugene Cocke, minor heirs of W. M. Cocke, and Maria W. Cocke), Carl V. Reynolds and wife Nellie Reynolds, heard by Judge *O. H.*

Allen, on complaint and demurrer, at August Term, 1900, of BUNCOMBE. From judgment overruling the demurrers, the defendants appealed.

Davidson, Jones & Addicks, and *George A. Shuford,* for the plaintiffs.

Julius C. Martin, and *F. H. Busbee,* for the defendants.

CLARK, J. The National Bank of Asheville, becoming embarrassed, closed its doors 22 October, 1897. A few days thereafter its stockholders, in meeting duly held, resolved to go into voluntary liquidation of the affairs of the bank, and, in order to secure the speedy and prompt payment of the creditors of the bank—especially its depositors—and to avoid unnecessary expense, authorized the conveyance of all the assets of the bank to W. B. Williamson, trustee, and by an agreement signed by a large number (if not all) of the stockholders empowered and directed said trustee to borrow a sum not exceeding $75,000, at not exceeding 6 per cent interest, payable twelve months after date, to be used in paying off the liabilities of the bank. It is specified in said contract: "This agreement witnesseth that we, whose names are hereunto subscribed, being share-
(469) holders in said bank, each owning and holding the number of shares as set forth and appear on the books of said bank, do now each for himself, his executors, administrators, and representatives, but not jointly, undertake and agree with each other and with such persons, or corporations, as may agree and shall advance or lend the sum of money which may be necessary to carry into effect the voluntary liquidation of the affairs of the bank, as follows." Here follows an agreement (1) that all the assets of the bank shall be turned over to W. B. Williamson in trust to collect, and convert into cash, and apply to the liabilities of the bank; (2) that the trustee be directed, as above set forth, to borrow not exceeding $75,000, and to pledge as collateral all the assets of the bank, "and for us and in our name, each and severally, but not jointly, to enter into an agreement with such person or persons, corporation or corporations, as will make such loans, that we and each of us, our heirs, executors, and administrators, will contribute, make good, and pay to such lender or lenders, his, its or their executors, administrators, assigns, or successors, on demand, such parts or proportions of any difference or deficit which may exist at the expiration of 12 months from the date of making said loan between the amount then realized from the collection, or sale, of said assets and resources so pledged as collateral se-

curity, after paying therefrom the necessary expense of administering said trust, and the amount then due said lender or lenders, as the number of shares held by each of the signers hereof bears to the aggregate number of shares held by all the signers." The aggregate sum of $75,000 was borrowed by the trustee in divers sums on the faith of the authority conferred on him by the above power of attorney, and the assets of the bank were transferred to him, collected, and applied to above indebtedness. Twelve months having elapsed, this action is brought by the lenders of said sum of (470) $75,000, or their assignees, after application to said indebtedness of all the net proceeds of the assets and resources of the bank, for the deficiency still remaining, first reducing said deficiency by the *pro rata* part, according to number of shares, of those signers, who, on demand, have paid the same. The defendants are those signers of the above instrument who have not paid, and the complaint sets out a table showing the *pro rata,* according to number of shares, due by each of the 13 defendants, signers of the contract, who have not paid, and to each of the 10 plaintiffs, and seeks to recover a judgment for each plaintiff for the part due him by each defendant.

There are three demurrers filed. The first, by Erwin Sluder, sets up as grounds of demurrer:

1. That the plaintiffs are not parties to the transaction set up as a foundation of the action. The contract, on its face, is a power of attorney to Williamson, as their agent, to borrow said money, and to bind them for the payment of the deficiency, after application of the bank assets (which the complaint avers has been done), severally in proportion to the number of shares held by each. The defendants are principals, and properly sued as such.

2. Misjoinder of causes of action and parties. There is but one cause of action—the breach of the contract—set up, and the plaintiffs and defendants are the parties thereto. As is well stated in the complaint: The questions which are the subject of this action are of common and general interest to all the plaintiffs and all the defendants, and all arise and grow out of the transaction and agreement herein set forth, and a litigation by each of the said plaintiffs with each of said defendants by a separate action upon his individual claim would subject the plaintiffs and defendants alike to great and unnecessary expense and trouble, and would be oppressive and vexa- (471) tious." The cause of action is the breach of a single contract. If each plaintiff should bring action against each defendant, there would be 130 actions involving the same facts,

the same principles of law, and the same transactions. Had such actions been brought, if they had not been dismissed or held defective for want of other parties, any court would have consolidated them to avoid unnecessary and vexatious costs. There is no misjoinder.

3. His last ground of demurrer is the opposite proposition—that there are not enough parties, in that the National Bank itself and W. B. Williamson should be parties to the action. Williamson was merely the agent of the defendants who were the principals to the contract sued on, and has no interest in this controversy, and is in no wise necessary to the determination of the action; nor is the defunct bank, whose assets, as the complaint avers, have been all applied (which is admitted by the demurrer) to the reduction of defendants' indebtedness, a needed party. If the ex-officers of the extinguished corporation could be served with summons and brought into court, that could serve no end. *Howe v. Harper* (at this term).

The second demurrer is filed by Nellie V. Reynolds and husband. Their demurrer, besides the points raised by the demurrer of Sluder, presents the additional objection that W. J. Cocke, who signed the contract sued on, did so by virtue of certain shares which he held for his wards, one of whom was said Nellie V. Reynolds, who, it seems, has since married; and her demurrer objects that it does not appear that said Cocke had any power, or authority, to sign said contract so as to bind his wards, and, if any liability is created thereby, it is the personal liability of said Cocke, and not of his said wards. By the National Bank act, the owner of each share of stock in any
(472) National Bank is liable to the creditors of the bank in double its amount. That liability attached to Cocke as guardian, and not individually. The action taken was done in a stockholders' meeting, and on its face was for the benefit of the stockholders, and to reduce their respective liabilities. Certainly nothing to the contrary appears. Having benefited by the action taken, the wards are in no position to absolve themselves from the liability incurred in so doing. If there are any facts to the contrary, they can be set up in the answer. Cocke is a party to this action.

The third demurrer is by the other wards of said Cocke, and who are now represented by a new guardian, J. E. Rankin. His demurrer simply duplicates that of Mrs. Reynolds.

Certain other defendants adopted the demurrer of Erwin Sluder.

His Honor properly overruled the demurrers, and gave defendants filing them time to file answers.

At the bottom of the contract sued on is this paragraph: "This instrument shall become effective and operative upon the signing thereof by the owners of two-thirds of the capital stock of the aforesaid bank." It is not averred in the complaint that the said contract was in fact signed by the owners of two-thirds of the capital stock. It is extremely improbable that $75,000 would have been loaned on the contract if it had not been so signed, or that, if it had been otherwise, the demurrers would have failed to raise objection for the absence of such averment. It was called to our attention by argument in this Court by counsel who did not appear below, and who frankly stated he did not know how the fact was. The objection is not jurisdictional, and therefore is not a matter of which we could take notice *ex mero motu,* or which could have been raised by a demurrer *ore tenus* in this Court. The averment should properly have been made in the complaint. But its omission (473) is "a defective statement of a good cause of action," and not "a statement of a defective cause of action," and therefore the omission is cured, as to this appeal, by failing to demur therefor. The test between the two is this: If the defendants had demurred, could the Judge have cured it by permitting the amended averment? If so, the failure to demur waives the objection. If, on the other hand, the defect is so organic that permission to amend can not cure it, then it is a defective statement, of which advantage could be taken here. *Mizzell v. Ruffin,* 118 N. C., 69; *Ladd v. Ladd,* 121 N. C., 119. But, in any event, the defendants have suffered no harm. The points they wished to raise by demurrer have all been presented, and, if there is any doubt as to the contract having been signed by the owners of the requisite number of shares, the failure in that respect can be set up in the answer, if any shall be filed.

No error.

Cited: *Bennett v. Tel. Co.,* 128 N. C., 104; *Harrison v. Garrett,* 132 N. C., 178.

(474)

BAILEY v. BAILEY.

(22 December, 1900.)

1. DIVORCE—*Alimony—Mutual Releases—Attorney's Fees—The Code, Secs. 1835, 1836.*

Mutual releases between husband and wife of their interests in the separate property of one another, does not bar the wife from making application for temporary alimony and attorney fee in a subsequent suit for divorce.

2. DIVORCE—*Alimony—Attorney Fee.*

In a suit for divorce by the wife, the land of the husband, who is out of the State, may be charged with temporary alimony and attorney fees.

ACTION by Hannah J. Bailey against Joel N. Bailey, heard by Judge *O. H. Allen,* at Chambers, in Asheville, September 29, 1900. From judgment and order granting plaintiff temporary alimony *pendente lite* and an attorney fee, and charging the same on the land of the defendant, the defendant appealed.

Mark W. Brown, and *Luther & Wells,* for the plaintiff.
Sam'l H. Reed, for the defendant.

MONTGOMERY, J. The question before us arises upon an application for alimony *pendente lite.* The defendant, to defeat the application, offered in evidence a paper writing properly executed between the plaintiff and the defendant. The preamble of the contract sets forth that the plaintiff and defendant, being anxious to adjust and settle all matters in reference to their separate property, have agreed among themselves "to convey, release, and quit-claim to each other, his or her heirs and assigns, all right of dower, all tenancy by the curtesy, all right of tenancy by the curtesy, and all other rights
(475) which they, or either of them, respectively, may acquire, or may have acquired, by their marriage in the property of each other; and to that end the said Joel N. Bailey, for and in consideration of the premises," etc., "does hereby convey, release, and quit-claim, and by these presents has conveyed, released, and quit-claimed, unto the said Hannah J. Bailey, her heirs, and assigns, forever, all right to and estate in her lands and tenements as tenant by the curtesy, and all other rights which the said Joel N. Bailey might acquire, or may hereafter acquire, in and to the property, whether real or personal, of the

said Hannah J. Bailey, by reason of said marriage." The said Hannah J. Bailey, in consideration of the premises and of the sum of $1,450 paid to her by her husband, Joel N. Bailey, "conveys and releases and quit-claims unto him, his heirs, and assigns, all claim of dower, all right of dower, and all other rights which she may acquire, or which she may hereafter acquire, or be entitled to in any manner whatever, by reason of her marriage with the said Joel N. Bailey, in and to all his real estate that he may now own, or hereafter may acquire, and also in and to all personal estate that he may now own, or may hereafter acquire." All of the provisions of section 1835 of The Code were complied with in the execution and probate of the contract. His Honor held that the contract was not a bar to the plaintiff's claim of alimony, and entered up a decree giving the petitioner a small monthly allowance and her attorney's fee. We see nothing in the contract which is against public policy. No separation is hinted at, even, and the matter seems to have been purely a business transaction in reference to the property owned by each of the parties to the instrument. It is a contract authorized by sections 1835 and 1836 of The Code. But the execution of the contract did not have the effect, if the wife continued to live with the husband, or if he abandoned her, to release him from her support—to furnish her (476) with the necessaries of life. That was a duty which the law imposed upon him when the marriage was contracted, and no business arrangement concerning their several property could have the effect to relieve him from that obligation. In his judgment his Honor declared that it appeared to him that the complaint stated facts sufficient to entitle the plaintiff to divorce, and that the defendant has real property in the State of considerable value, and that it further appeared that the plaintiff is entirely dependent upon her own labor for support, and that she is old and in poor health. There was condemnation of so much of the land described in the complaint, to be sold by the receiver, as will be necessary to pay the amount allowed as alimony. There can be no objection to that order, for the defendant is out of the State and beyond the jurisdiction of the Court. If he refuses to obey the order of the Court under such circumstances, such order may be enforced against his property found within the jurisdiction of the Court.

No error.

BURNEY v. ALLEN.

(22 December, 1900.)

WILLS—*Probate—Opinion Evidence.*

Upon trial of an issue of *devisavit vel non* it is competent to introduce evidence that, from the personal knowledge of witnesses of the room and the location of the furniture, the testator could have seen the subscribing witnesses as they signed the will, if the testator was lying in the position testified to by other witnesses on the trial.

FAIRCLOTH, C. J., and FURCHES, J., dissenting. (477)

ACTION by Sarah O. Burney, Sophia D. Evans, Emiline F. King against Edna Allen, Henry N. Allen, A. M. McNeill, executor of Henry Allen, heard by Judge *H. R. Bryan* and a jury, at March Term, 1900, of BLADEN. From judgment for defendants, the plaintiffs appealed.

J. B. Schulken, and *D. J. Lewis,* for the plaintiffs.
C. C. Lyon, for the defendants.

DOUGLAS, J. This was an issue of *devisavit vel non,* on the trial of which the will was sustained. There were two exceptions to the failure of his Honor to give the prayers of the caveators, but, as one of them was simply a prayer for a direction of the verdict, and the other was given in the charge substantially as far as it should have been given, we see no error in the refusal of the Court. The only remaining exceptions are those stated in the record as follows: "The propounders then introduced one Taylor, and asked him the following questions, to-wit: 'Question 1. Did you go to the house where they say Henry Allen died?' (The caveators objected to this question. His Honor overruled the objection, and the caveators excepted.) The witness then answered, 'I did.' (The caveators objected to this answer. His Honor overruled the objection, and the cavetors excepted.) 'Q. 2. Did you hear the witnesses testify here today as to the position Henry Allen was in at the time the witnesses signed the will; and from what the witnesses testified and from your knowledge of the room, could Henry Allen have seen the witnesses and the paper writing at the time the witnesses signed the same?' (The caveators objected to this question. His Honor overruled the objection, and the caveators excepted.) The witness Taylor then testified, under objections, as follows: 'I have been to Allen's house recently. I measured the room, and it is seventeen feet long and

fourteen feet wide. I have heard the witness testify as (478) to Allen's position in the bed, and, from my knowledge of the room, Allen could have seen the witnesses and the paper. I laid on the bed. If the witnesses were between Allen and the table, he could not have seen the paper. I went to Allen's house last Friday. Jones, Devane, and C. C. Lyon were there with me.' (The caveators objected to this testimony. Objection overruled. Caveators excepted.) The propounders then introduced one Marshall Pait as a witness, and asked him the following questions: 'Question 1. Did you hear the witnesses here to-day describe the position of the bed on which Allen was lying, and where the witnesses to the paper writing were at the time they signed the papers and from what the witnesses testified, and from your knowledge of the room, could Henry Allen have seen the witnesses and the paper writing at the time the witnesses signed it?' (Caveators objected to this question. His Honor overruled the objection, and the caveators excepted.) The witness Pait then testified, under objection, as follows: 'I have heard the witnesses describe the position of the bed and where the witnesses to the paper writing were at the time they signed the paper, and, from my knowledge of the room, Allen could have seen the paper when it was subscribed by the witnesses. If the witnesses were between Allen and the table, he could not have seen the paper. I went there yesterday.' (The caveators objected to this testimony. His Honor overruled the objection, and the caveators excepted.)" The ground given for the exceptions is that this testimony amounted simply to the witnesses' expressing their opinion as to the essential fact to be proved. The issue is the proper execution of the will—a mixed question of law and fact. While the testimony of these witnesses strongly tended to prove the issue, it was in itself rather a statement of fact than an expression of opinion. What the wit- (479) nesses evidently intended to say and what they did say substantially, is, that from their personal knowledge of the room and its furniture, if the testator were lying in the position testified to by the other witnesses, he could, as a matter of fact, have seen the subscribing witnesses when they signed the will. This was not expert testimony, and involved no question of technical or scientific knowledge. It was equivalent to saying, from their personal knowledge of the room, that a person lying in a certain position on a bed in a certain part of the room could see certain other persons in another designated part. This is rather the statement of a physical fact than the expression of a theoretical opinion, and seems clearly to come within the rule laid down in *Arrowwood v. R. R.*, 126

N. C., 629, 632. As we see no substantial error in the trial of the action, the judgment is affirmed.

FURCHES, J. (dissenting). I can not concur in the opinion of the Court. I think it is too plain for argument that a witness can not be allowed to do the work of the jury. The issue to be tried was whether the paper propounded was the last will and testament of Henry Allen, and the question involved was whether it was witnessed in his presence. The propounders, for the purpose of showing that it was, asked one Taylor, "Did you hear the witnesses testify here to-day as to the position Henry Allen was in at the time the witnesses signed the will; and from what the witnesses testified, and from your knowledge of the room, could Henry Allen have seen the witnesses and the paper writing at the time the witnesses signed the same?" This was objected to, but allowed, and the caveators excepted. Witness Taylor then testified, under objection, as follows: "I have been to Allen's house recently. I (480) measured the room, and it is seventeen feet long and fourteen feet wide. I have heard the witnesses testify as to Allen's position in the bed, and, from my knowledge of the room, Allen could have seen the witnesses and the paper." This evidence was based upon what the witnesses testified to as to Allen's position, and as to the place where the paper was signed. Taylor was not present when the paper was signed, and could not know the position of Allen, nor where the paper was when it was signed, except by the testimony of the witnesses that were there when it was signed. And to give the opinion he did he was compelled to pass upon the truth of the witnesses that had testified. If he had been an expert, he could not have done this, and the question and answer would have been improper. Indeed, it seems to me that the opinion of the Court in effect admitted that it was incompetent. This, I think, appears by the following sentence in the opinion: "What the witnesses evidently intended to say, and what they did say, substantially, is that from their personal knowledge of the room and its furniture, if the testator were lying in the position testified to by the other witnesses, he could, as a matter of fact, have seen the subscribing witnesses when they signed the will." This is putting a construction on the evidence that I think is not justified. But this construction does not cure the objection. It still leaves the witness's (Taylor's) opinion to rest upon what the other witnesses had testified to.

Cited: *Cogdell v. R. R.*, 130 N. C., 325; *Britt v. R. R.*, 148 N. C., 40.

(481)

WILLIAMSON v. PENDER.

(22 December, 1900.)

1. JUDGMENT—*Erroneous—Irregular.*

An erroneous or irregular judgment is valid till reversed or set aside, and can not be tested by disobeying it.

2. CONTEMPT—*Imprisonment—Refusing to Deliver Property—Receiver.*

A person refusing to obey an order of court to deliver property to a receiver may be imprisoned until the order is complied with.

3. CONTEMPT——*Evidence—Sufficiency.*

The evidence in this case is sufficient to justify court in adjudging a person in contempt for refusal to obey order to deliver property to a receiver.

ACTION by W. B. Williamson, Trustee of the National Bank, of Asheville, against R. H. Pender and M. R. Pender, heard by Judge *O. H. Allen,* at Webster, 3 October, 1900.

From judgment adjudging defendant Mary R. Pender (486) guilty of contempt, she appealed.

George A. Shuford, and *Davidson & Jones,* for the plaintiff.
Shepherd & Shepherd, for the defendants.

CLARK, J. This is an appeal from a judgment in proceedings for contempt rendered upon the following state of facts, somewhat condensed from the findings made by the Judge. The defendants are W. R. Pender and his wife, Mary R. Pender. The summons was served on R. H. Pender, 9 June, 1899, but not upon his wife. R. L. Leatherwood, Esq., a practicing attorney in said court, and whom the Court finds to be solvent, however, entered a general appearance for both defendants, having been employed by the husband, and waived notice of the motion for appointment of a receiver. At the June Term of SWAIN, 1899, Judge *Starbuck,* after finding as facts the appearance of both defendants in the waiver by them of notice of motion for a receiver, and that they were insolvent, appointed W. A. Gibson receiver of the real estate in con- (487) troversy. Out of abundant caution, however, an alias summons was issued, 17 August, 1899, and served upon the *feme* defendant, 22 August, 1899. Said *feme* defendant also had actual notice of the appointment of the receiver theretofore made, and on 17 November, 1899, she caused notice to be

served upon the receiver (Gibson) to show cause at Fall Term, 1899, why he should not be removed from the receivership; but the motion was not brought by her to a hearing, and the defendants filed their answer in said action 4 December, 1899. At Spring Term, 1900, both defendants being represented by counsel, Judge McNEILL corrected and amended the former order appointing a receiver *nunc pro tunc* so as to read: "It is now, on motion of counsel for plaintiff, considered and ordered that W. A. Gibson be, and he is hereby, appointed receiver to take charge of the land and rents and profits described in the plaintiffs' complaint, and that he is authorized and empowered to enter upon the duties of such receiver upon entering into bond," etc. After the said order by Judge McNEILL, the receiver again demanded possession of said premises of the defendants (which had theretofore been refused), but the defendants again refused to surrender possession of said premises, or to pay rent, or to recognize or obey the order of the Court, though they were in possession of the land and receiving the rents and profits. Upon affidavit to that effect, filed before Judge *Allen,* 18 August, 1900, he issued notice to the defendants, which was duly served, to appear and show cause before him at Brevard, 12 September, 1900, why they should not be attached for contempt. Neither of the defendants appeared at the return day of the rule. The male defendant sent an answer, which the Judge found insufficient, evasive, and frivolous, and the *feme* defendant filed no answer at all. Thereupon
(488) the Judge, finding the above facts, issued an order to the sheriff to arrest them, to be brought before him, at Waynesville, 20 September, 1900, to answer for the contempt of court. On that day the sheriff produced only the male defendant; whereupon the proceeding was continued for hearing at Webster, 3 October, 1900, and an alias order of arrest was issued for the *feme* defendant, and at that time and place, both defendants being present and heard, the Judge found the above facts, and, further, that the annual rental value of the land was at least $100, and that the defendants had been in continuous occupation of said premises, living in the dwelling house and using the other buildings, since the appointment of said receiver, and in receipt of all the rents and profits, except 31 1-4 bushels of corn paid by one of the tenants who had rented from the *feme* defendant for the year 1899. Upon these findings, the *feme* defendant was adjudged guilty of contempt of court, and fined $50, and taxed with the costs of the contempt proceedings. The Court further ordered the defendants to surrender immediate possession of the premises and the

crops to the receiver, and enjoined them, their aiders and abettors, from interfering with the possession of the premises. The Court committed the *feme* defendant to jail (the male defendant having disclaimed any right in, or control over, the realty, which was the property of the wife) till payment of said $50 fine and costs in contempt, and till she should surrender the premises and comply with the order of the Court; with a proviso, however, that if she should forthwith pay to the receiver $100, or secure the same to be paid within 90 days, she might be allowed to remain in possession as tenant of the receiver, and take the rents for this year. The question as to liability for rents and profits for the year 1899 was reserved till the next term of court.

The facts are thus recited at some length, though not (489) altogether as full as set out in the record and in the findings of the Judge. It is almost incredible that this Court should be asked to hold that the appellants were not guilty. They certainly have been very badly advised by some one.

If there was any error or irregularity in the appointment of a receiver, that could only be corrected by an appeal therefrom. In the meantime, such order would be valid and binding, and should be obeyed, unless suspended by the bond given on appeal. An erroneous or irregular judgment can not be tested by disobeying it. It is valid till reversed or set aside.

The only possible defense for disobedience of the order appointing a receiver, it not being appealed from, would be that the order is void for lack of service of process upon the *feme* defendant; but she has in the amplest manner been made a party to the proceedings, has had full notice of the orders of the Court, and has contemptuously disregarded them. The judgment of imprisonment till the order was complied with is valid. *Delozier v. Bird,* 123 N. C., 689.

Affirmed.

Cited: *In re Parker,* 144 N. C., 173.

(490)

COOPER v. COOPER.

(22 December, 1900.)

1. INJUNCTION—*Fraud—Judgment—Alimony—Divorce.*

Where, pending an action for divorce and alimony, the husband confesses judgments to third parties, and the wife institutes an action to set aside the judgments, and to enjoin the sale and execution thereunder, upon the ground that the judgments were fraudulent and intended to defeat her recovery of alimony, and the husband met the allegation of fraud, and filed affidavits showing every item of the indebtedness for which the judgments were confessed, it is error to continue the injunction.

2. INJUNCTION—*Irreparable Damage.*

An injunction will not be granted unless the damages are shown to be irreparable.

ACTION by Hannah G. Cooper against A. D. Cooper, W. M. Cooper and D. J. Williams, heard by Judge *O. H. Allen,* at August Term, 1900, of BUNCOMBE. From an order restraining a collection under a judgment in favor of W. M. Cooper and D. J. Williams against A. D. Cooper, the defendants appealed.

W. R. Whitson, for the plaintiff.
B. F. Long and *George B. Nicholson,* for the defendants.

CLARK, J. The plaintiff instituted an action for divorce against the defendant A. D. Cooper, and applied for a decree for alimony. Pending that litigation A. D. Cooper confessed judgment in Buncombe Superior Court to his brother W. M. Cooper, and one D. J. Williams, his co-defendants in this action, for $3,000. This action is brought by the wife, alleging that said confession of judgment is fraudulent, and that the purpose thereof is to defeat her recovery in the appli-
(491) cation for alimony and she seeks to set aside the judgment, and an injunction against the sale of her husband's property under the execution issued thereon. There was a temporary restraining order. Upon the motion to continue the injunction to the hearing, the answer of defendants squarely met the allegation of fraud as to the judgment confessed by A. D. Cooper, and numerous affidavits are filed in support of the answer. It was error to continue the injunction to the hearing. The plaintiff makes, on information and belief, a broadside allegation of fraud in the confession of judgment, but does not set out a single, solitary fact to support such belief, nor does any affidavit filed by her do so, whereas the affidavits filed

by defendants and others in their behalf, set out with minute circumstantiality and detail, every item of the indebtedness for which the judgment was confessed, accompanied by the checks and notes, and renewals of notes, and statements of accounts, showing the entire *bona fides* of the debt. The complaint does not aver that either A. D. Cooper or W. M. Cooper is insolvent. Indeed, it appears by complaint and affidavit of plaintiff that A. D. Cooper has property to the value of many times the judgments against him which the plaintiff is seeking to set aside. After satisfying W. M. Cooper's judgment, there should be ample property of A. D. Cooper to satisfy any judgment for alimony which the plaintiff is likely to recover, and there is no irreparable damage shown to justify the injunction. Upon the affidavits *pro* and *con* as to the *bona fides* of the debt, the great weight is in favor of defendants, and the Court was not justified in restraining W. M. Cooper from collecting under his judgment, merely because the plaintiff avers an expectation of obtaining a judgment, which, if obtained, will be junior to the judgment, execution upon which is sought to be restrained. In an appeal from an order granting or refusing an injunction, the affidavits are reviewed by this Court, and on such review we are constrained to hold that the injunction to the hearing was improvidently granted. (492)

Reversed.

Cited: Cooper v. Cooper, post 492.

COOPER v. COOPER.

(22 December, 1900.)

1. INJUNCTION—*Venue—Objections—Waiver—The Code, Sec. 337—Divorce.*

Where an injunction to the hearing is granted, in a district other than that in which the action is pending, each party appearing by attorney and not objecting to the venue, the objection is deemed waived.

(For additional syllibi, see *Cooper v. Cooper*, at this term.)

ACTION by Hannah G. Cooper against A. D. and W. M. Cooper, heard by Judge *O. H. Allen,* at August Term, 1900, of BUNCOMBE. From judgment restraining collection under the judgment, the defendants appealed.

W. R. Whitson, for the plaintiff.
B. F. Long and *George B. Nicholson,* for the defendants.

CLARK, J. This is an action to set aside a judgment for $5,000 obtained by one of the defendants against the other in Iredell Superior Court, and asks an injunction against sale under the execution issued on said judgment. The parties are the same as in *Cooper v. Cooper, ante* 490; and the facts are the same, except as to the amount of the judgment (which in this case is not by confession) and the court in which it was ob-
(493) tained. Hence this case is governed by the opinion in that.

The appellants, indeed, make the additional objection that the injunction to the hearing was granted at Asheville, in the Twelfth Judicial District, in this action, which was pending in Iredell Superior Court, in the Eighth Judicial District. This objection would have been effective if made at the hearing of the motion to continue the injunction to the hearing. *Hamilton v. Icard,* 112 N. C., 589. But no objection was made at the time, and the point was only referred to when making up the case on appeal. The objection, being in the nature of an objection to the venue, must be deemed to have been waived. Indeed, The Code (sec. 337) expressly provides that the parties may by stipulation in writing agree that any specified Judge may hear such motion for an injunction to the hearing, and forward the papers to said Judge, with the agreement attached. There being no inherent defect of jurisdiction, therefore, the personal appearance of counsel before such other Judge, and argument without exception taken, must be taken as a waiver. *Crabtree v. Scheelky,* 119 N. C., 56. Had the exception been taken, Judge Allen would, of course, have sent the papers to the proper Judge. An injunction granted under such circumstances, should not be held either void or erroneous because of defect of venue. But, for the reasons given in the case between same parties at this term in the appeal from Buncombe, we must hold that the injunction was improvidently granted.

Reversed.

(494)

ROSEMAN v. ROSEMAN.

(22 December, 1900.)

1. TRUSTS—*Trustee's Refusal to Act—Will.*

A trust created in a will, leaving certain property to a trustee to be invested for the benefit of daughter of testator and other persons, will not fail by reason of the appointed trustee failing to act.

2. TRUSTS—*Appointment of Trustee—Jurisdiction—Clerk of Court—Superior Court—Laws 1887, Chap. 276.*

Where Clerk of Superior Court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the Judge of the Superior Court may make such appointment.

3. HUSBAND AND WIFE—*Free Trader—Judgment—Parties.*

Where a married woman is a free trader and consents to a judgment which fixes no personal liability upon her the husband need not be a party to the proceeding.

4. HUSBAND AND WIFE—*Parties—Guardian ad Litem—Infants.*

Where an infant *cestui que trust* who has no general guardian, appears in a proceeding for the appointment of a trustee by guardian *ad litem*, the husband need not be a party.

5. SERVICE OF PROCESS—*Infants—Guardian ad Litem—The Code, Sec. 217, Subd. 2—Summons.*

Where an infant appears by guardian *ad litem*, a copy of the summons having been left with him, and served on his guardian, the fact that no copy of summmons was left with his "father, mother or guardian," is immaterial.

MONTGOMERY, J., dissenting.

ACTION by W. E. Roseman, and others, against Annie L. Roseman, and others, heard by Judge *E. W. Timberlake*, at February Term, 1900, of ROWAN. From judgment for plaintiffs, the defendants appealed.

(495)

L. S. Overman, Kerr Craige, and *T. C. Linn,* for the plaintiffs.

Burwell, Walker & Cansler, and *B. F. Long,* for the defendants.

CLARK, J. By the will of Tobias Kessler, one Woodson was appointed trustee, and certain real and personal property was devised to be held by him in trust to be kept invested, and the income paid to A. I. V. Newsome, a married woman, during her life, and at her death the principal to be paid over to her

issue; and certain other property was to be held by him on similar trusts for other beneficiaries named in the will. Woodson refused to accept the trust, and this proceeding was begun before the Clerk 1 December, 1897, for the appointment of a substituted trustee. The nature of the trust is not of the kind which being based upon confidence in the personal discretion vested in the trustee, fails upon the death or refusal of the trustee. The mere absence of directions in the will as to the nature of the investment does not make the trust a discre-
(496) tionary one in the sense that the courts can not appoint a new trustee. The Clerk dismissed the proceedings, on the ground of want of jurisdiction, and an appeal was taken to the Superior Court, and by consent of plaintiffs and defendants, was heard before *McIver,* J., at May Term, 1898, of Rowan. At that hearing the only contention besides the objection to jurisdiction was whether there should be only one trustee or two or three, and who should be appointed. The answer filed by A. I. V. Newsome consented to the appointment of a substituted trustee, but asked for a separate trustee for her interest in the property. The Judge sustained the jurisdiction, and appointed only one trustee (Coghenour) in the stead of Woodson, to discharge all the trusts declared in the will. The new trustee gave bond in the sum of $75,000. From this judgment no appeal was taken. At August Term, 1899, a further decree was made in the cause by consent expressed in the face of the judgment, said A. I. V. Newsome being represented by her counsel, Theo. F. Kluttz, Esq., containing instructions to said Coghenour as to the management of his trust, allowance of commissions, and filing his annual account. At February Term, 1900, a motion was made, upon notice, to set aside the judgments at May Term, 1898, and Fall Term, 1899. This being refused, the movers appealed.

They contend, first, that the Clerk had no jurisdiction of the proceeding to appoint a new trustee, except when the original trustee had been named in a deed (Code, Sec. 1276), and therefore the judgment taken in the Superior Court May, 1898, though not appealed from, and the judgment at August Term, 1899, though entered by consent, are void. The Superior Court undoubtedly had authority, under its general equity jurisdiction, to appoint a new trustee to prevent the failure of the trust, if the proceeding had begun by writ returnable to the Superior Court, and even if no writ whatever had been
(497) served, if the parties in interest appeared generally; and that is the case, in effect, here, since no appeal was taken. Even if an appeal had been taken from such judgments,

it would be an anomaly if a party sued before the Clerk, who is a part of the Superior Court, could, on appeal to the Judge, have the action dismissed, and thus require the plaintiffs to come right back into the identical court from which they have been dismissed, and in which the cause was originally brought before the Clerk of the Court. To prevent such useless countermarching, the General Assembly, by Chap. 276, Laws 1887 (incorporated in sec. 255, Clark's Code [3 Ed.]), provides: "Whenever any civil action or special proceeding begun before the Clerk of any Superior Court shall be, for any ground whatever, sent to the Superior Court before the Judge, the said Judge shall have jurisdiction," and requires the Judge to proceed to hear and determine all matters in controversy in such action, unless he shall deem it in the interest of justice to send the case back for further action before the Clerk. This section has been repeatedly sustained. *Faison v. Williams,* 121 N. C., 152; *Ledbetter v. Pinner,* 120 N. C., 456; *Lictie v. Chappell,* 111 N. C., 347. Counsel replied upon *Brittain v. Mull,* 91 N. C., 498, but it was to cure the inconveniences caused by that decision that the above amendment to Code, sec. 255, was enacted. That decision itself recognized (page 504) that the Clerk in special proceedings, as well as in other cases, was a part of the Superior Court, and that matters before the Clerk were in the Superior Court. The Judge in this case might have sustained the Clerk's judgment, but he took jurisdiction, as the statute authorized him to do.

It is also contended that the judgment is irregular because the husband of A. I. V. Newsome was not a formal party to the action. But it appears upon its face that the judgment was by consent as to her. It is averred, and not (498) denied, that she is a free trader, and the judgment fastens no personal liability upon her. Hence *McLeod v. Williams,* 122 N. C., 451, relied upon by defendant's counsel, is not in point, for that holds that "a personal judgment can not be rendered against a married woman, not a free trader, for her husband's debt." It is true that being a free trader affects the liability of a married woman for her contracts, and does not affect the manner of service of summons upon her. But, when she has assented to a judgment not involving a personal liability if she be a free trader, she surely can not plead that she is not bound by such judgment when she would be bound by a mere contract. *Grantham v. Kennedy,* 91 N. C., 148; *Neville v. Pope,* 95 N. C., 346; *Green v. Branton,* 16 N. C., 504.

It is further objected that the husband of Dora S. Goodman

should have been made a party, but she was at the time an infant, without general guardian, and appeared by her duly appointed guardian *ad litem,* as required by Code, sec. 181, and is estopped by the judgment.

The last objection is as to service of summons upon the children of Mrs. Newsome under fourteen years of age. Summons was served by delivering a copy to each of them personally, as prescribed by Code, sec. 217 (2). A guardian *ad litem* was regularly appointed. Summons was served upon him, and he filed answer. The statutory requirement has been sufficiently complied with. The objection that copy of the summons was not also left with the "father, mother, or guardian" is a refinement, and can not invalidate the judgment when a guardian *ad litem* has been duly appointed, and has filed answer, and there is no suggestion of fraud most especially when (as in this instance) the mother is a party to the action, has filed her answer consenting to the only relief asked, the ap-
(499) pointment of a substituted trustee, and has filed a consent judgment.

Affirmed.

MONTGOMERY, J. (dissenting). Tobias Kessler, of Rowan County, died, leaving a last will and testament, one clause of which reads as follows: "Item 15. The balance and residue of my estate of every kind I give, bequeath, and devise, to my daughter, Ingold Newsome, wife of A. H. Newsome, during her lifetime; said estate to be placed in the hands of my trustee, hereafter named and appointed, for the use and purposes as follows, to-wit, said trustee is to invest and keep invested said estate, and the interest and income accruing therefrom is to be by him paid to my said daughter, Ingold Newsome, for and during her natural life, and at her death said estate to be paid over by said trustee to her issue: *Provided, however,* that my said trustee shall not be chargeable with interest on any money or personal estate lying idle in his hands." H. N. Woodson, the trustee appointed in the will, declined the trust. The plaintiffs, who are also beneficiaries under another clause of the will, and whose interests were also placed under the management and control of Woodson, commenced a proceeding before the Clerk of the Superior Court of Rowan County against certain other of the beneficiaries in the will, including Mrs. Newsome and her children, to have a trustee appointed in the place of Woodson. Mrs. Newsome was a married woman, as was also her daughter, Dora S., the wife of Ed. Goodman, and the husbands of neither have ever been made parties. The

Clerk dismissed the proceeding for want of jurisdiction. An appeal by the plaintiffs carried the case to the Superior Court. At May Term, 1898, and August Term, 1899, of the Superior Court, by consent of all parties, orders and judgments, were made and entered, by which W. C. Coghenour was (500) appointed trustee with all the powers and authority conferred by the will on Woodson; and under these judgments Coghenour has taken possession of the property mentioned in the will. The present proceeding was instituted for the purpose of having the judgments and orders of the Superior Court made at May Term, 1898, and August Term, 1899, set aside. I think his Honor erred in not having set them aside. A Clerk of the Superior Court has no jurisdiction to appoint a trustee in place of one named in a will who refuses to accept the trust, or who has died. Clerks of the Superior Court, under sec. 1276 of The Code, are authorized and empowered to appoint trustees only in deeds of trust (which includes mortgages). And, besides, the trust was a discretionary one. Again, the Superior Court in term had no jurisdiction. The jurisdiction of the Superior Court in case of appeal from the Clerk is derivative, and, as the Clerk had no jurisdiction, the Superior Court acquired none upon the appeal. In *Helms v. Austin,* 116 N. C., 751, the Court, FAIRCLOTH, C. J., delivering the opinion, said: "We see no reason why the Court may not amend, and give any relief that the parties may be entitled to according to the facts in any case sent up by the Clerk either by transfer or appeal, provided the original subject-matter be within the jurisdiction of the Clerk." That decision was rendered, of course, long after the passage of the act (chap. 276, Laws 1887) referred to in the opinion in this case. If the opinion in this case is a correct construction of that act, then it necessarily follows that actions and proceedings of any nature—even such as slander, debt, actions for recovery of land—can be commenced before the Clerk, and carried by appeal, when dismissed for lack of jurisdiction, to the Superior Court in term time, when jurisdiction will be taken, and the matter heard just as if the suits or actions had been properly commenced in the Superior Court. If such is the meaning of the act, it (501) would have been plainer to have enacted a law giving to the Clerk original jurisdiction to hear and determine all civil actions and special proceedings.

The husbands of the two married women defendants were not made parties to the proceeding, and for that reason the judgment should have been set aside. But it is said that Mrs. Newsome was a free trader. There was no sufficient evidence on

that point upon which his Honor could have found that fact. In fact, there was no evidence in the case that Mrs. Newsome was a free trader. Only a statement to that effect appeared in the answer of Foil and his wife. In my opinion, the only evidence competent to prove that a married woman is a free trader, is the writing itself, with its registration indorsed thereon, or a copy of such writing duly proved and registered, and certified by the register of the county in which the same is recorded.

Cited: Howland v. Marshall, ante, 432; *In re, Hybart's Estate,* 129 N. C. 131; *Harrington v. Hatton,* 129 N. C., 148; *Ury v. Brown, Ib.,* 271; *Fowler v. Fowler,* 131 N. C., 170; *In re Anderson,* 132 N. C., 247; *R. R. v. Stewart, Ib.,* 249; *Austin v. Austin, Ib.,* 266; *R. R. v. Stroud, Ib.,* 416; *Parker v. Taylor,* 133 N. C., 104; *Robinson v. McDowell, Ib.,* 186; *Ewbanks v. Turner,* 134 N. C., 80; *Buchanan v. Harrington,* 141 N. C., 42; *Martin v. Briscoe,* 143 N. C., 357; *Oldham v. Reiger,* 145 N. C., 257; *Batts v. Pridgen,* 147 N. C., 135.

---

(502)

TIDDY v. GRAVES.

(22 December, 1900.)

1. PLEADING—*Complaint—Answer—Admission—Constitution, Art. X, Sec. 6.*

   Where a complaint alleges that the husband was entitled to an estate by the curtesy in the lands of his deceased wife, and it appears that she died intestate, and it does not appear that the marriage was contracted since 1868, and where the answer admits the estate by curtesy, it is an admission of fact.

2. TAX TITLES—*Redemption—Remainderman—Life Tenant—Municipal Taxes—Laws 1895, Chap. 119, Sec. 99—The Code, Sec. 3699.*

   A remainderman has two years in which to redeem from a tax sale, and this applies to taxes of the city of Greensboro.

CLARK, J., dissenting.

ACTION by T. C. Tiddy against G. C. Graves. A judgment was rendered in favor of plaintiff and reversed in Supreme Court (126 N. C., 620). Petition to rehear. Petition granted.

Osborne, Maxwell & Keerans, for the petitioner.
L. M. Scott, and *A. M. Scales,* in opposition.

MONTGOMERY, J. A petition to rehear this case was granted, and the matter is before us again for consideration. The action was brought by the plaintiff to recover of the defendant a house and lot in the town of Greensboro. The property was devised by Mrs. Annie G. Reed, who was the wife of J. W. Reed, to her son by a former marriage, Thomas C. Tiddy. There was no devise or bequest to the husband, J. W. Reed, who was named executor in the will. After the death of the testatrix, Reed, the executor, had the will probated, and qualified (503) as executor. He remained in possession of the property for some years, and listed it for taxation in 1892, in 1893, and 1894, as his property. He failed to pay the taxes to the State and county and city of Greensboro, for those years, and a sale was made for that failure to pay taxes by the Sheriff of Guilford County and by the tax collector of Greensboro, and, no redemption having been made, deeds were executed by those officers respectively, to the purchaser, George C. Graves, a brother of the testatrix, nominated to be her executor, together with her husband, in her will. The property is worth $2,000. The plaintiff, before two years had expired from the day of the sale, tendered the purchaser the amount of taxes and costs and penalties in redemption of the property, which was declined. The plaintiff bases his right to redeem, mainly on an admission made by the defendant in his answer. The third allegation of the complaint was "That J. W. Reed, the husband of said Annie G. Reed, at her death became entitled to an estate by the curtesy in said land, and he is still surviving." In answer to that allegation, there is an unqualified admission of its truth in the answer. In the trial below it was held by the Court that the defendant could not controvert that admission, although it was further held that "under sec. 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," and although "the husband, J. W. Reed, duly qualified as executor to said will, he can not claim a life estate as against the plaintiff, a devisee of this lot." It is necessary for us to discuss here only the first proposition. The Court, when the case was before us at the last term, in its opinion decided that the admission of the defendant was the admission of a pure matter of law, and therefore not binding on the defendant, and, of course, not binding on the Court. We were (504) treating the case as if it appeared from the pleadings that the marriage of Reed and the testatrix took place after the adoption of the Constitution of 1868. In the petition to rehear our attention was called to the fact that it is nowhere

in the case directly stated when the marriage did take place. The complaint simply alleged the issuable fact that J. W. Reed, the husband of Annie G. Reed, at her death became entitled to an estate by the curtesy in her land. The probative evidentiary facts need not have been pleaded, and the defendant in his answer did not name the date of the marriage, nor did he prove it on the trial. It is true that the testratrix in her will named her husband to be guardian of her son, Thomas, and that might be a presumption that he was an infant—but it would be only a presumption—and that, therefore, the marriage occurred after 1868, the will having been written in 1890. The admission in the answer overcame the presumption, because, so far as the record discloses, the son, Thomas, might have needed a protector and friend, which the testatrix called guardian, even though he was more than 21 years of age. If there had been anything in the case going to show clearly, notwithstanding the admission of the defendant in the answer, that the marriage occurred after 1868, then the admission would have been an admission of law which this Court would not have respected, for the law would have been clearly the other way. For the reason pointed out, we now think that the admission of the defendant that Reed was entitled to an estate as tenant by the curtesy in the property was an admission of fact, and that his Honor below was correct in holding that the defendant was bound by it. We agree with his Honor below, too, that the plaintiff had the right to redeem the property from the sale by the city of Greensboro. The defendant's contention was that under the charter of the
(505) city of Greensboro, there was no provision allowing a remainderman, or anyone else, to redeem land sold for city taxes after one year from the date of sale. We are of the opinion that sec. 99, chap. 119, Laws 1895, applies to land sold for city taxes as well as for State and county taxes. There is certainly no inconsistency between the Act of Assembly and the charter of Greensboro. And we are confirmed in this view when it is seen that sec. 3699 of The Code (Laws 1879, chap. 71, sec. 54), is in exactly the same words as sec. 99, Laws 1895. The retention of that section of the Act of 1879 in The Code seems to make it of general application.

Petition allowed, and judgment affirmed.

CLARK, J. (dissenting). It was held below that by virtue of the Constitution (Art. X, sec. 6), "the husband has no estate by the curtesy when the wife dies testate, and devises the property, as in this case." The defendant did not except, of course,

to that ruling, and as the plaintiff did not appeal, it could not be reviewed now. Indeed, both in the former opinion of the Court and on this rehearing it is held to be the settled law. *Walker v. Long,* 109 N. C., 510. The plaintiff's case for a rehearing rests upon the third allegation of the complaint: "That J. W. Reed, the husband of said Annie G. Reed, at her death became entitled to an estate by the curtesy in said land, and, he is still surviving." The answer admitted that allegation to be true. In the opinion in this case at last term (126 N. C., 620), it was held that this was an admission of the fact therein stated of the survivorship of the husband, but that the other averment that the husband, at the wife's death, "became entitled to an estate by the curtesy in said land," was an averment of a legal proposition, and could not be established by an admission; nor would the defendant be estopped if it had been intended to admit the law to be as averred. The rehear- (506) ing seeks to establish that this allegation of the husband being "entitled to an estate by the curtesy" was an allegation of fact. The plaintiff, in his complaint, avers that his mother devised the property to him in fee, and he sets out as his muniment of title, his mother's will as an appendix to the complaint. From that, it appears that in the will, dated 13 April, 1890, she appoints her husband, J. W. Reed, guardian of her son, Thomas C. Tiddy. The statute only authorizes the appointment of a testamentary guardian for infants. Thomas C. Tiddy, if an infant at the date of the will, 13 April, 1890, could not have been earlier than 14 April, 1869, and by no possibility could her last husband, J. W. Reed, have been married to her at the adoption of the Constitution in April, 1868. Upon the plaintiff's own pleadings his allegation that J. W. Reed was tenant by the curtesy, the will being set out, is palpably an averment of a legal proposition, and contrary to his averment of fact that the will, in its terms, gave himself the property in fee. Being erroneous, no admission of the answer (if intended to admit the legal proposition in that paragraph, which is improbable) can make it correct, or be binding upon the defendant or the Court. The will, which is a part of the complaint, expressly devises this realty in fee to plaintiff. As the complaint avers that Reed qualified as executor, it appears upon the pleadings that, even if the marriage was prior to 1868, he could not be tenant by the curtesy. *Allen v. Allen,* 121 N. C., 328. This was so held by the Judge below, and plaintiff did not except.

The judgments of this Court are not judgments *nisi.* They are rendered after argument and careful deliberation. They

(507) are, as has been said by this Court, precedents, and to be overruled on rehearing, like other precedents, only upon error being clearly shown. The judgments of the courts below are deemed correct until error shown. *A fortiori,* that rule applies to our own decisions, rendered by five judges, instead of one. If there is any doubt that we correctly held at last term that upon the pleadings the Constitution of 1868 applied to this marriage, the burden is upon the plaintiff, seeking rehearing, to show that upon inspection of the transcript of the record the marriage was prior to 24 April, 1868. He has shown nothing of the kind. His only argument is that it is doubtful. It is not doubtful; but, if it were, the rehearing should be denied, for the burden is on him to show that the former holding that this case is governed by the Constitution of 1868 was erroneous. It may seem a hardship that the plaintiff should lose his land for nonpayment of the taxes, because, perhaps, he erroneously thought that his stepfather had a life interest in it, and ought to pay the taxes. But, as Chief Justice PEARSON has well said: "Hard cases are the quicksands of the law." If the courts can be tempted to abrogate the law whenever the judges in any given case think it would bear harshly, then the law would be swallowed up, and the courts would become mere boards of arbitration, which are a "law unto themselves." The law-making power, in view of the increase of taxation, and the growing number of deserters from the duty of paying taxes, which throw upon better men the weight of paying defaulters' taxes as well as their own, adopted, in 1887, the report of a commission to change our tax laws. Till that time no tax title had ever been sustained in this Court, with the result that the payment of taxes became a purely voluntary matter, to the great injury of honest taxpayers. The object of the law is that, if taxes are not paid, the property upon which they are due shall pass by a valid title to (508) those who will pay the taxes thereon. With the hardship of any particular case we have nothing to do. From the plaintiff's own pleadings it appears that he was an infant at the date of the will, for he does not aver that, notwithstanding the appointment of a guardian for him therein, he was not an infant; and hence his averment that his stepfather was tenant by the curtesy was merely an averment of an erroneous proposition of law. Therefore, it follows that, not having redeemed within the year allowed by law, the defendant acquired a legal title by the purchase at the sale for nonpayment of State and county taxes, and should be protected in his legal rights by the courts. Even if it were true that the plaintiff held only a

remainder subject to Reed's tenancy by the curtesy, the provisions of the charter of Greensboro do not give plaintiff the additional year which is allowed tenants in remainder under the general law, which, by its terms, applies only to sales for nonpayment of State and county taxes, and not to sales for nonpayment of city taxes. This was held in the former opinion (126 N. C., at page 622), and no authority is cited to impeach that ruling.

Cited: *Watts Ex parte,* 130 N. C., 242; *Gross v. Smith,* 132 N. C., 606; *Watts v. Griffin,* 137 N. C., 579.

TURPIN v. CUNNINGHAM.

(22 December, 1900.)

CHATTEL MORTGAGES — *Registration — Notice—Horse—Change in Color.*

A mortgage on a horse is not affected by a change in color of the animal after execution of the mortgage and prior to sale by mortgagor.

ACTION by W. M. Turpin against D. C. Cunningham, heard by Judge *H. R. Starbuck,* at Spring Term, 1899, of HAYWOOD. From judgment for plaintiff, the defendant appealed.

No counsel for plaintiff. (509)
J. F. Ray, and *Ferguson & Son,* for the defendant.

CLARK, J. One Ray, being indebted to the plaintiff, executed to him 13 September, 1894, to secure the debt, a mortgage on a certain "bay horse, six years old, which I purchased of said Turpin." The mortgage was regular in all respects, and was filed for registration 2 March, 1895; the horse being left in possession of the mortgagor. After the registration, and before the mortgage fell due, the mortgagor traded the horse to a party in another county, who had no actual notice of the mortgage; and after the mortgage fell due (13 September, 1895), the horse was traded from party to party until the defendant purchased him, in 1897, with no actual notice of the mortgage. "At the time and prior to the time the defendant purchased said horse, he had entirely changed color, from some natural or unnatural cause, until he was not a bay horse,

but a white and sorrel spotted horse, without any appearance of bay whatever." The mortgagee had done all the law required him to do, when the horse was specifically described in the mortgage, and that instrument was duly recorded. There being no doubt as to the identity of the horse, the mortgagee does not lose his right to subject the horse to the payment of the lien, because of the change in appearance, due, probably, to old age. A mortgage on pigs, calves, or other young animals is not vitiated by their growing up into boars, sows, bulls, and cows, and the like. Nor would a mortgage upon boars and bulls be destroyed by turning them into barrows and oxen, which would be a more substantial alteration than a change of color. The horse may shed his color, but a mortgage is (510) not so easily shedded. It usually sticks closer than the skin. In adjudging that the mortgagee could recover the horse, or his value if not produced, to be applied to the mortgage debt, there was no

Error.

STATE v. FRANKS.

(9 October, 1900.)

1. PEDDLERS—*License—Hawkers—Criminal Law.*

One who sells goods by sample, which goods are shipped to purchaser in care of one who sold them and delivered by him, is a peddler under Acts 1899, chap. 11, sec. 25.

INDICTMENT against Nathan Franks, for peddling goods without a license, heard by Judge *A. L. Coble* and a jury, at Spring Term, 1900, of DARE. From a verdict of guilty and judgment, the defendant appealed. The special verdict is set out in full in the opinion.

Zeb. V. Walser, Attorney-General, and *B. G. Crisp,* for State.
E. F. Aydlett, for defendant.

FURCHES, J. The defendant is indicted for peddling without license to do so. Upon the trial at Spring Term, 1900, of Dare Superior Court, the jury found the following special verdict: "We, the jury impaneled to try the issue in this case, find the following facts as a special verdict: (1)

that the defendant, Nathan Franks, is employed by L. Lavanstein as salesman; that said Lavanstein is conducting a dry-goods and notions and clothing mercantile business in Elizabeth City, N. C., and during the latter part of (511) April, 1900, defendant spent three days going from house to house in the above county, exhibiting samples of goods of said Lavanstein, his said employer, and taking orders for said goods from his patrons in retail quantities, using a horse and buggy for the purpose of conveying trunks or boxes containing said samples from place to place—of dry goods, notions, and clothing. (2) That the orders for such goods were by said Franks transferred to his principal, in Elizabeth City, and there the goods so ordered were wrapped in packages, and marked to the various purchasers thereof in Dare County, and shipped to said parties in care of defendant, and by him delivered to said purchasers without buggy, cart, or wagon. (3) That prior to this time the Board of County Commissioners had made an order that no more peddlers' licenses should be granted for Dare County, which order was then in force, and defendant had no peddler's license. (4) That sales of goods were made in the above indicated manner to Mrs. Caroline Etheridge and a large number of others in said county, and the defendant announced it as his purpose to make other trips in the future for the purpose of selling merchandise as aforesaid, as clerk of said Lavanstein. If, upon the above state of facts, the Court be of opinion that the defendant is guilty, then the jury so find; if otherwise, the jury find him not guilty." Thereupon the Court was of opinion that the defendant was guilty, and the defendant appealed from the judgment pronounced. It would seem that the question presented by this appeal is settled by the decision of this Court in *Range Co. v. Carver*, 118 N. C., 328. Sec. 23, chap. 116, Laws 1895, is the same as sec. 25, chap. 11, Laws 1899. And, this being so, we are unable to distinguish this case from *Range Co. v. Carver*.

Affirmed.

Cited: Collier v. Burgin, 130 N. C., 635; *S. v. Frank, Ib.*, 725.

(512)

STATE v. PAGE.

(16 October, 1900.)

1. ASSAULT—*Intent to Commit Rape—Rape—Sufficiency of Evidence—Criminal Law.*

Evidence in this case as to intent held sufficient to go to the jury.

2. CONFUSION—*Findings of Court—Admissions—Evidence.*

Finding of Court that a confession was voluntary, there being no evidence to the contrary, is not reviewable.

FAIRCLOTH, C. J., dissents.

INDICTMENT against William Page, heard by Judge *H. R. Starbuck* and a jury, at Fall Term, 1900, of PITT. From a verdict of guilty and judgment thereon, the defendant appealed.

Zeb V. Walser, Attorney-General, for the State.
Skinner & Whidbee, for the defendant.

CLARK, J. This was an indictment for an assault with intent to commit rape. The defendant demurred to the evidence, and also requested the Court to instruct the jury that the evidence failed to show any intent to commit rape, and that there was not sufficient evidence to justify finding the defendant guilty of a greater offense than a simple assault. The demurrer was overruled, and the prayer was refused, and the defendant excepted.

The prosecutrix testified that the defendant, who was employed as a casual day laborer by her husband, opened the door of her room where she was lying down on a pallet with her baby, without knocking, and asked where her husband was. Being told that he was absent, the defendant expressed his intention to put his hands on her. She said, "No, you
(513) are not," whereupon he started into the room, when she jumped up, and ran to the back door, which was in an adjoining room, leaving her baby upon the floor. The defendant pursued her, and, as she caught hold of the knob of the back door, he caught hold of her, and also put his other arm between her and the door. After a struggle, she got loose, and, opening the door, she escaped into the back yard. He did not follow her further, it seems, and, being told by her that she would tell her husband, asked her not to do so, and said he had only felt of her breast. His confession that the above

statement was true was also in evidence, in which he further stated that he was "afraid that her husband would come in, and he stopped." The admission of the confession as evidence was excepted to on the ground that it was made under duress, but the Judge found as a fact that the confession was voluntary, and his admission of the evidence is not reviewable, as there was evidence to that effect (and, indeed, none to the contrary). *S. v. Crowson,* 98 N. C., 595; *S. v. Burgwyn,* 87 N. C., 572; *S. v. Andrew,* 61 N. C., 205. There was some other evidence which was properly submitted to the consideration of the jury, but is not material upon the inquiry whether there was any evidence. Upon the above testimony, we can not declare, as a matter of law, that there was no evidence of an assault "with felenious intent to have carnal knowledge of the person of the prosecutrix, forcibly and against her will." *S. v. Mitchell,* 89 N. C., 521; *S. v. Williams,* 121 N. C., 628. The intent of the defendant is solely for the jury. The Judge and jury see the bearing of the witness under examination and many other things incident to a trial which throw a vivid light in the investigation of the truth, but which can not be transmitted in the cold words of a transcript sent to this Court. One great advantage of a trial by jury is that they can see and hear and judge from their knowledge of human nature (514) and of everyday things of life in coming to a correct conclusion upon matters which are too intangible to be passed up to an appellate court in the transcript. But, at all events, the prosecutrix testified that the defendant invaded her house, threatening to lay hands upon her, pursued her to the back door, took hold of her, and attempted to prevent her escape, and that she got loose from him only after a struggle, and the defendant confessed the truth of her statement, and added that he stopped because he feared her husband would return. In submitting the evidence of his intent to the jury, there was

No error.

Cited: *S. v. Smith,* 136 N. C., 686.

STATE v. OVERBY.

(30 October, 1900.)

VERDICT—*Jury—Poll—Larceny—Burglary.*

Where, upon a poll of the jury, a juror responds, "I agreed to find him guilty of taking the money," it is error for Court to order verdict of guilty of larceny entered against defendant.

INDICTMENT against Amos Overby, heard by Judge *J. W. Bowman* and a jury, at Fall Term, 1900, of VANCE. From a verdict of guilty and judgment thereon, the defendant appealed.

Zeb V. Walser, Attorney-General, for the State.
Pittman & Kerr, for the defendant.

(515) FURCHES, J. This case comes before us upon objection of the defendant to the entry of the verdict of guilty. The defendant was indicted in two counts—one for burglariously entering the dwelling house of one Green Reavis "in the daytime," with the felonious intent to steal. The other count was for the larceny of money taken from said dwelling house. It seems that the jury had trouble in coming to a verdict, returned into court several times, and reported that they had not agreed, and that they did not believe they would be able to agree, and asked what was to be done when one juror would not act or come to any conclusion. The Court then stated to them that it was the duty of each juror to act for himself, and indicate his finding by his vote, and directed them to retire again. In the course of a few hours the jury came into court again, and were asked if they had agreed on a verdict, when the foreman responded that they had. They were then asked what was their verdict, when the foreman responded, "Guilty on both counts." The defendant then demanded that the jury should be polled on both counts, which was done, and 11 answered, "Guilty on both counts." But one of the jury, by the name of James M. Watson, said: "I don't know much about two counts. I agreed to find him guilty of taking the money." The Court then said to him: "How do you suppose he got the money?" And the juror answered: "I don't know very much about that. It was too long between drinks." The Court then ordered "a verdict of guilty to be entered on the second count, for larceny." This verdict is not such a verdict as should be allowed to stand. It is not a unit—an agreement in the minds of the 12 jurors, concurring in the guilt of the

defendant, which is necessary to constitute a verdict of guilty. It requires more than the simple "taking of property" to constitute larceny. It must be taken and carried away with the felonious intent which is the gravamen of the offense. The verdict of the juror Watson is lacking in this material element, and vitiates the verdict. But we can not close (516) this opinion without saying that, if the juror Watson was not punished for contempt, it must have been owing to the great leniency of the presiding Judge. Not that he failed to agree with his fellows upon a verdict of guilty, for in this matter he must be allowed to exercise his own judgment, without restraint from the Court or anyone else; but for the manner in which he demeaned himself, and for the impertinent answer he made to a pertinent question asked him by the Court—"that it had been too long between drinks." There was error in ordering the verdict of guilty to be entered against the defendant, for which he is entitled to a new trial.

Error. New trial.

STATE v. RIPPY.

(30 October, 1900.)

RAPE—*Punishment—Sentence—State's Prison—The Code, Sec. 1096.*

Sentence of a person convicted of rape to 10 years in the State's prison, under Laws 1895, chap. 295, does not conflict with The Code, sec. 1096.

INDICTMENT against Ollie Rippy, heard by Judge *W. A. Hoke* and a jury, at September Term, 1900, of DURHAM. From verdict of guilty and judgment thereon, the defendant appealed.

Zeb V. Walser, Attorney-General, for the State. (517)
Boone, Bryant & Biggs, for the defendant.

CLARK, J. The prisoner, indicted for rape, entered a plea of guilty upon the third count, for "unlawfully and carnally knowing and abusing" an innocent female between the ages of ten and fourteen years. The solicitor, with the sanction of the Court, accepted the plea, and the jury returned a verdict accordingly. This offense was created by chap. 295, Laws 1895, which provides that it "shall be punished by fine or imprisonment in the State's Prison, at the discretion of the Court." The

sentence is, "Ten years in the State's Prison," which is clearly within the terms of the punishment authorized. There is nothing to show that this discretion reposed by the statute in the Judge was abused. The only exception in the transcript is that Code, sec. 1096, provides that persons convicted of felonies for which "no specific punishment is prescribed by statute" shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the Court. But the penalty prescribed by chap. 295, Laws 1895, is specific—fully as much so as that laid down in Code, sec. 1096, and is different in kind. The former authorizes fine or imprisonment in the penitentiary at the discretion of the Court. The latter, a fine in the discretion of the Court, and imprisonment in jail or the penitentiary, not exceeding two years, etc. These sections (1096 and 1097) apply only where an act is prohibited or is made unlawful, without specifying the nature of punishment—as, for instance, Code, sec. 2799, construed in *S. v. Bloodworth,* 94 N. C., 918. To like purport, *S. v. Parker,* 91 N. C., 650; *S. v. Addington,* 121 N. C., 538; *S. v. Pierce,* 123 N. C., 745. The quantum of punishment, whenever mentioned in The Code, is either "in the discretion of the Court," or "not exceeding," etc. It can not be said that all the crimes in The Code, therefore, fall within the scope of secs. 1096 and 1097, because "no specific punishment" is prescribed. The punishment is specific (*i. e.,* specified as fine, or imprisonment in jail or in
(518) State's Prison), though the extent of the specified punishment is left in the discretion of the Court, or in its discretion not exceeding a limit stated.

No error.

STATE v. ALSTON.

(7 November, 1900.)

OBSTRUCTING JUSTICE — *Resisting Officers — Sheriffs — Deputy Sheriffs—Collection of Back Taxes.*

One who obstructs a deputy sheriff in the collection of back taxes, after term of office of sheriff has expired, is guilty of resisting an officer.

INDICTMENT against Bosem Alston, heard by Judge *Frederick Moore,* at February Term, 1900, of CHATHAM.

Zeb V. Walser, Attorney-General, for the State.
Womack & Hayes, for the defendant.

STATE *v.* ALSTON.

FAIRCLOTH, C. J. In this indictment the defendant is charged with wilfully and unlawfully resisting and obstructing a deputy sheriff in his office, who was attempting to collect back taxes. Laws 1889, chap. 51, sec. 1, declares (520) that any person obstructing a public officer in the discharge of the duties of his office shall be guilty of a misdemeanor. The sheriff's term of office expired on 30 November, 1898, with the tax list in his hands. The order of the Clerk on the tax list has the force and effect of a judgment and execution against the property of the person charged in such list. Laws 1899, chap. 15, sec. 30. Laws 1899, chap. 56, sec. 1, authorizes sheriffs and tax collectors who, by virtue of their office, have had the tax list in their hands, to collect arrears of taxes, etc. The defendant asked the Court to charge that, if the sheriff's office had expired before the time of the alleged offense, then neither the sheriff nor his deputy was a public officer, and that they had only a right of civil action to collect such back taxes, and that an indictment for resisting would not lie. His Honor refused this request, and told the jury that if the deputy was acting as tax collector of the ex-sheriff, then he was an officer of the State. So the question is, was the deputy an officer of the State? In similar cases it has been held that "the duty of collecting taxes is not an incident to the office of sheriff, though ordinarily discharged by that officer. The duty, therefore, does not terminate with the office, but he is bound to go on and collect the taxes after his term of office of sheriff has expired; and the sureties upon his bond are liable for the money by him collected, or that should have been collected, after that time." *S. v. McNeill,* 74 N. C., 535; *Perry v. Campbell,* 63 N. C., 257, approved in *Davis v. Moses,* 80 N. C., 144. Laws 1899, chap. 56, sec. 1, empowers the sheriff or tax collector of taxes in arrears to collect "under such rules and regulations as are now or may hereafter be provided by law for collection of taxes." The sheriff, then, having the same authority, under the same rules and regulations, after expiration (521) of his office, as before, would seem to be a public officer; and, if so, his deputy to perform the duty would be a State officer. We can see no error in the trial.

Affirmed.

STATE v. CALDWELL.

(7 November, 1900.)

INTERSTATE COMMERCE—*Licenses—Ordinances—U. S. Constitution, Art. I, Sec. 8—Constitutional Law.*

An ordinance taxing one "engaged in selling or delivering" portraits or portrait frames, is not violative of the Constitution of the United States, Art. I, sec. 8, as applied to an agent who received "knock-down" pictures and frames from his firm in another State, and placed them together and delivered to customers previously obtained.

FAIRCLOTH, C. J., and CLARK, J., dissenting.

INDICTMENT against E. M. Caldwell, heard by Judge *Frederick Moore* and a jury, at June Term, 1900, of GUILFORD. From a judgment against defendant on a special verdict, the defendant appealed.

Zeb. V. Walser, Attorney-General, and *Scales & Scales,* for the State.

Chas. M. Stedman, for the defendant.

FURCHES, J. This is a prosecution for an alleged violation of an ordinance of the city of Greensboro. There was no objection or exception to the manner in which it was commenced, and it may be maintained if the defendant has violated the city ordinance (*S. v. Higgs,* 126 N. C., 1014), unless the ordinance is in contravention of the doctrine of interstate (522) commerce, and therefore is unconstitutional. The case comes to this Court on appeal of defendant from the judgment of the Court below upon the following special verdict: "That on the .... day of ....., 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro. That the defendant went to the Southern Railway freight station, and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro. The defendant had been

engaged in this work two days when arrested. That sec. 57 of the charter of the city of Greensboro, N. C., is as follows: 'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely: * * * (21) Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the Board of Aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a (523) year.' The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section. That the following is an ordinance duly passed by the Board of Aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken: 'Be it ordained by the Board of Aldermen of the city of Greensboro, North Carolina: That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year. Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense.' That neither the defendant, the Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company, have paid the city any license tax. If upon the foregoing facts, the Court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise, they say that he is not guilty." Upon this special verdict the Court held that the defendant was guilty, and the verdict was so entered, and the defendant fined $20. From this verdict and judgment the defendant excepted, and appealed to the Supreme Court.

The defendant assigns as grounds of error: "(1) The facts set out in the special verdict do not make the defendant guilty of engaging in the business of delivering pictures without first

(524) having obtained a license so to do, within the purview and contemplation of the ordinance of the city of Greensboro. (2) That, should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with sec. 8 of Art. I of the Constitution of the United States, being an interference with, and an attempt to regulate, commerce among the States, and a burden upon the same." We will consider these assignments in the order in which they are stated; for, if the defendant has not been guilty of carrying on a business in violation of the city ordinance, then he is guilty of no offense—is not guilty—and there is nothing for the second assignment to rest upon.

It seems to us that a good way to test this exception is to divest our minds of the fact that the defendant was the agent of the Chicago Portrait Company, and to consider him as a citizen of Greensboro, who had bought these pictures, and had them shipped to him in the unfinished state they were. And if he had taken them to his house, opened them, assorted them, and put them together, and then sold and delivered them to parties in town, would he not have been a dealer engaged in selling and delivering pictures and picture frames in violation of the ordinance? We think he would, and would be guilty—would be, unless he is protected by reason of the unconstitutionality of the ordinance, as stated in the second assignment of error. And, it being claimed in this assignment that it involves a constitutional question—that it is in violation of "sec. 8 of Art. I of the Constitution of the United States, being an interference with, and an attempt to regulate, commerce among the States, and a burden upon the same"—it becomes an important question, and should be well considered. This has been well done, by arguments of the learned counsel, and the well-considered brief of defendant. It is contended in this brief that no State has a right to levy a tax on interstate commerce,
(525) and for this *Ferry Co. v. Pennsylvania,* 114 U. S., 196, and *Crutcher v. Kentucky,* 141 U. S., 47, are cited. This position is true. And the defendant then contends that this ordinance is unconstitutional because it levies a tax on interstate commerce. For this position he cites quite a number of cases which he says sustain it. Among them, we will only mention those apparently most relied on. *Robbins v. Taxing Dist.,* 120 U. S., 480; *Brennan v. Titusville,* 153 U. S., 289; *Adkins v. Richmond,* 98 Va., 91. The proposition of law contended for is undisputedly true—that a State can not tax interstate commerce. The trouble is, not in not being able to understand this rule of law, but in applying it. The defendant insists that

Brennan v. Titusville, supra, is directly in point—is in every essential fact this case—and should control the opinion of the Court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case the goods were shipped directly to the purchaser. In this case they were shipped by the Chicago Company to itself, in the city of Greensboro; and when they reached Greensboro the defendant, as the agent of the Chicago Company, received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of *Brennan v. Titusville, supra;* and we should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided differ- (526) ence between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. Tied. Sales, secs. 88, 89; *Drill Co. v. Allison,* 94 N. C., 548. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago; the railroad being deemed to be the agent of the consignee. *S. v. Groves,* 121 N. C., 632; *R. R. v. Barnes,* 104 N. C., 25, and *Brennan v. Titusville, supra,* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago, and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company), in Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago Company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them, in Greensboro, without becoming liable for a city tax for which its own citizens would be liable? It seems to us that it could not. This case seems to fall under the doctrine of *Emert v. Missouri,* 156 U. S., 296, and *Range Co. v. Carver,* 118 N. C., 328. There was no

sale—no title passed from the Chicago Portrait Company—until the pictures were completed and delivered to the purchasers. We are, therefore, of the opinion that the defendant was engaged in the business of selling and delivering pictures and picture frames in the city of Greensboro; and, as we (527) are not able to see how the enforcement of this ordinance interferes with interstate commerce, the judgment of the Court below is affirmed.

CLARK, J. (dissenting). The orders for the portraits and frames were taken in Greensboro by the traveling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made, this would have been interstate commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were by another agent of shipper, who came to Greensboro for that purpose from Chicago, put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk," in the legal meaning of the term; for each article, though shipped with others, kept its individuality. Each portrait could be of use only to the person for whom it had been made, and was as distinctly severed from the rest by that fact as if it had been sent in a separate cover. The only contract was that between the Chicago firm's agent, in the first instance, and the customer. The title does not pass until the picture is approved and paid for. This is the same case as *Robbins v. Taxing Dist.*, 120 U. S., 480, in which it was held that the business of offering for sale or selling goods to be shipped to the buyer from another State is interstate commerce. This is not the case of *S. v. French*, 109 N. C., 722, or *S. v. Wessell*, 109 N. C., 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer were sold to his customers. The sale by such buyer to his customers was a North Carolina business, and taxable. But here the only "dealing" is between the Chicago house, through its (528) agent, with a customer here, and the shipping of the identical article to an agent in Greensboro, whose sole duty is to complete the delivery upon payment of the purchase money.

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

Cited: *Collier v. Burgin*, 130 N. C., 635.

NOTE.—On writ of error this judgment was reversed. 187 U. S., 622.

STATE v. McBROOM.

(13 November, 1900.)

INDICTMENT—*Indorsement by Grand Jury—"A True Bill"—Arrest of Judgment—Perjury.*

The indorsement, "a true bill," is essential to the validity of a bill of indictment, and a bill endorsed, "this bill found," is not sufficient.

CLARK and MONTGOMERY, JJ., dissenting.

INDICTMENT against W. R. McBroom, heard by Judge *Frederick Moore* and a jury, at September Term, 1900, of PERSON. From a verdict of guilty and judgment thereon, the defendant appealed.

Zeb. V. Walser, Attorney-General, and *Brown Shepherd,* for the State.

Graham & Graham, and *Douglass & Simms,* for the defendant.

FAIRCLOTH, C. J. The defendant was indicted for perjury, and was convicted. In this Court the defendant moves to arrest the judgment on the ground that the record does not show that the bill of indictment was found a "true bill" by the grand jury. The indorsement on the bill was in these words: "Those marked 'X' sworn by the undersigned foreman, and ex- (529) amined before the grand jury, and this bill found. Wm. F. Reade, Foreman Grand Jury." Is the bill sufficient in law? We are informed by the Attorney-General that 31 States require, by statute, that bills of indictment shall be indorsed "A true bill," and that 14 States including North Carolina, have no statute upon the subject. In these 14 States the common-law requirement still prevails. In *S. v. Vincent,* 4 N. C., 493, TAYLOR, C. J., said: "An indictment is an accusation found by an inquest of twelve or more lawful jurors upon their oaths. The law has prescribed certain forms in which such accusations shall be drawn, and will not allow any citizen to be punished unless such precision is observed." In *State v. Calhoon,* 18 N. C., 374, this Court said: "It seems that the signing the name of the foreman to the indorsement of a 'true bill' on a bill of indictment, though a salutary practice, is not essential to its validity." This has been many times followed, and held that if the indictment is indorsed "A true bill," though not signed by the foreman and presented by the jury to the Court, and it is received as such, that is sufficient. In *S. v. Cox,* 28 N. C., 446, the Court said: "It is settled in this State that an indict-

ment need not be signed by anyone. * * * It is the action of the jury in publicly returning the bill into the Court as true, and the recording, or filing, it among the records, that make it effectual." In *S. v. Guilford,* 49 N. C., 83, PEARSON, J., explaining the distinction between an indictment and a presentment, said: "The manner of presenting a bill of indictment is for the grand jury, after having examined the witnesses on the part of the State touching the allegations set out in the indictment, to come into open court, and return the bill indorsed 'A true bill,' which is done by the foreman, acting for the grand jury, and the return is made in their presence;" and, if
(530) the bill is not passed, the return is, "Not a true bill."

These cases agree that it is not necessary that the record should be incumbered with useless details, such as who was appointed foreman, the signature of the foreman, the signature of the State's Attorney, what witnesses were sworn and sent, and who was the Constable of the jury, etc. It is sufficient and proper that the record should only set out the fact that it was presented by the grand jury. There are numerous other cases in line with the above, as *S. v. Bordeaux,* 93 N. C., 560, and *State v. Weaver,* 104 N. C., 758.

In all the cases we have examined in which such questions arose, it appears that the bill was indorsed "A true bill," and the question now before us was not under consideration. The questions were as to the signature of the foreman, the manner in which the bill was presented to the Court, and what ought to be spread upon Court record. In none was it denied that the bill must be indorsed "A true bill." In *S. v. Harwood,* 60 N. C., 226, the motion in arrest was that the record failed to show the indictment was found a "true bill" by the grand jury. The opinion of two lines on that feature is not plain. It, however, refers to *S. v. Guilford, supra,* as the authority, and we have already shown that upon that case the indictment should be indorsed "A true bill. We have therefore found no decision by this Court on the question now presented. The nearest approach is *S. v. Collins,* 14 N. C., 117, 121. The bill was found in Jones County, and removed to Lenoir County. The transcript to Lenoir was considered defective, and a *certiorari* brought forward all that was needed, and showed that the indorsement was a "true bill," and signed by the foreman. In his opinion, HENDERSON, C. J., said: "Indeed, I have been much at a loss to see the necessity of any indorsement. The
(531) grand jury come into court and make their return, which the court records not from that memorandum made out of court, but they pronounce, or are presumed to pronounce, it

in court. It is not the indorsement which is the record, but that which is recorded as the jurors' response. The indorsement is a mere minute for making the record. But I believe the law is understood to be otherwise." Here we have a suggestion of the Chief Justice (which is the State's contention now), and we have his belief that the law in this State is otherwise.

Turning to other authorities, we find in Archb. Cr. Pl. 64, that "A true bill," or "No true bill," must be indorsed on the indictment, as the evidence satisfies, or does not satisfy, the grand jury. The foreman and jury carry the indictments so indorsed into court, and deliver them to the Clerk, who states to the Court the substance of each, and the indorsement upon it. "In strict legal parlance, an indictment is not so called until it has been found 'A true bill' by the grand jury; before that it is named 'a bill' only." 1 Chit. Cr. Law, 324, says: "The jury indorses 'A true bill,' or 'Not a true bill.' * * * This indorsement ' A true bill,' made upon the bill, becomes part of the indictment, and renders a complete accusation against the prisoner. An indictment without such indorsement, signed by the foreman, is a nullity." In 4 Bl. Comm., 305, it is stated: "If they (the jury) are satisfied of the truth of the accusation, they then indorse upon it 'A true bill.' The indictment is then said to be found, and the party stands indicted. * * * and the indictment, when so found, is publicly delivered into court." Same in 2 Hale, P. C., 161. This proposition is expressly held in *Nomaque v. People,* 1 Breese 145, and in *S. v. Creighton,* 1 Nott. & McC., 256, and *S. v. Elkins,* Meigs, 109. In *Webster's Case,* 5 Greenl., 432, the bill was certified in the usual form, except at the bottom of the indict- (532) ment, and immediately before the signature of the foreman, the words "A true bill" were omitted. After conviction the defendant moved in arrest of judgment on the ground that there was no legal evidence that the indictment was a true bill. This is exactly on all-fours with the present case. Judgment was arrested.

Finding, therefore, that the uniform practice in this State and the other States, in the absence of statutes, has been settled from immemorial time, we can find no reason for changing proceedings in criminal cases, which would disturb practice in particulars which have, from long usage, acquired the character of legal principles. We can not presume that the jury intended a true bill, because it is equally as easy to presume that they intended not a true bill, in the absence of any indication either way in the indorsement. No inference of a true bill can be

drawn from the fact that the foreman returns true bills in open court, because it is also his duty to return bills found not true. The omission may have been inadvertent. We can not tell. It is certain that public officers should be careful in discharging their duties, as they are paid and sworn to do. Suppose a Register of Deeds should furnish a copy of a deed, and sign his name, even officially, without any certification. Such a paper would not be received as evidence, even in a civil proceeding. Code, sec. 1183, is no cure for the omission, as that applies only to informality, or refinement, "in the bill, or proceeding," even if the omission was only an informality.

Since writing the above, our attention has been called to *Frisbie v. U. S.*, 157 U. S., 160. That case holds that the omission of the indorsement "A true bill" is not "necessarily, and under all circumstances fatal, although it is advisable, that the indictment should be indorsed." The opinion pro-
(533) ceeds: "It may be conceded that in the mother country, formerly, at least, such indorsement and authentication were essential." The Court then intimates that in this country the common practice is different, and concludes that "it is advisable, at least, that the indictment be indorsed according to the ancient practice, for such indorsement is a short, convenient, and certain method of informing the Court of their action." From our review, it appears that the rule varies in the courts of different States. As the rule has been settled in North Carolina ever since her existence as a State, we are not disposed to disturb it, and open the way for each grand jury to adopt its own rule of practice.

Judgment arrested.

CLARK, J. (dissenting). The record in this case states: "The defendant was indicted in the following bill of indictment." Here follows the indictment for perjury in regular form, setting forth, "The jurors on their oath present," etc. There is nothing to contradict this record. The defendant pleaded not guilty, was tried, and sentenced to 12 months on the public roads. He made no motion to quash nor in arrest of judgment below, but the appeal came up solely on an exception to refusal of a prayer to charge the jury that the false oath was in a matter not material to the issue—an exception which we have had no hesitation in overruling. In this Court there is no suggestion that the record, as above certified, is untrue, and that in fact the bill was not found; for, if this could be done here at all, it should be upon affidavit, and the case remanded to the Judge to find the fact. But the motion in

arrest is made here for the first time on the ground that the bill of indictment is indorsed as follows: "Those marked 'X' sworn by the undersigned foreman and examined before the grand jury, and this bill found. Wm. F. Reade, Foreman Grand Jury." Immediately above that is the list of (534) witnesses, and the record shows that the same witnesses were examined before the petit jury, and upon their evidence the defendant was found guilty. Without any suggestion, upon affidavit, or otherwise, that in fact the bill was ignored by the grand jury, we are asked to say that such was their action, because the words, "and this bill found," are indorsed, instead of the words, "A true bill." The statute (St. 1811, chap. 809), which is brought forward in The Code (sec. 1183), provides that a "criminal proceeding, by warrant, indictment, information, or impeachment * * * shall not be quashed, nor the judgment thereon stayed, by reason of any informality, or refinement." In *S. v. Moses,* 13 N. C., 452 (at page 464), Judge RUFFIN says of this statute: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of form, technicality, and refinement, which do not concern the substance of the charge and the proof to support it. Many sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents." In *S. v. Parker,* 81 N. C., 531, ASHE, J., says: "Ever since 1811, it has been the evident tendency of our courts, as well as our law makers, to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common law, the adherence to which often resulted in obstruction of justice and the escape of malefactors from merited punishment." These and similar decisions—for they are all the same way—are cited with approval by the present Court in *S. v. Barnes,* 122 N. C., 1035, and other cases. If an indorsement that, upon the testimony of witnesses named and sworn, "this bill found," and the statement of the record, uncontradicted, that "defendant was indicted in (535) the following bill," is to be set aside in this Court, because of the absence of the technical words, "A true bill," it would, in the language of Judge RUFFIN, in *S. v. Moses, supra,* "be difficult to say to what unseemly nicety (as Lord Hale calls it), formality, or refinement, the act can extend."

The above is predicated upon the assumption that any indorsement by the grand jury is required. But such assumption is not correct at common law, and is directly contrary to our uniform decisions. In *S. v. Guilford,* 49 N. C., 83, an indict-

ment for murder, a motion was made in this Court in arrest of judgment, on the ground that it does not appear from the record that the bill of indictment upon which the prisoner was tried was found by a grand jury to be a "true bill." PEARSON, J., says: "It is not necessary that the record should set out the manner in which a bill of indictment was presented, or the evidence and memoranda and entries from which the record was made up. It is sufficient and most proper that the record should only set out the fact that that it was presented by the grand jury." In *S. v. Harwood,* 60 N. C., 226 (murder), there was another motion in arrest of judgment, "because the record does not show that the indictment was found a 'true bill' by the grand jury." MANLY, J., says: "The grounds taken in arrest of judgment are not tenable. They are settled against the prisoner by recent adjudications of this Court. *S. v. Guilford,* 49 N. C., 83; *S. v. Roberts,* 19 N. C., 540." In the latter case (which was also for murder), RUFFIN, C. J. (DANIEL and GASTON concurring), says, as to a motion in arrest of judgment: "The objection, if founded in fact, can not be raised in this stage of the proceedings, or rather in this form. Judgment can be arrested only for matter appearing in the record, (536) or for some matter which ought to appear, and does not appear, in the record. If a bill of indictment be found, without evidence, or upon illegal evidence, as upon the testimony of witnesses not sworn in court, the accused is not without remedy. Upon the establishment of the fact the bill may be quashed. *S. v. Cain,* 8 N. C., 352. * * * But none of these indorsements are parts of the bill, or are proper to be engrossed in making up the record of the Superior Court, which merely states that it was presented by the jurors for the State upon their oaths." In the present case the record states, "The defendant was indicted in the following bill of indictment," setting it out: "The jurors for the State on their oath present," etc. In *S. v. Cox,* 28 N. C., 440, NASH, J., says (RUFFIN, C. J., and DANIEL, J., concurring): "It is settled in this State that an indictment need not be signed by anyone. It is good without it, because it is the act of the grand jury, delivered in open court by them. In *S. v. Collins,* 14 N. C., 117, the opinion is first suggested by the then Chief Justice HENDERSON, but as the point did not necessarily arise, it was not decided. But in *S. v. Calhoon,* 18 N. C., 374, it was. The custom of indorsing the bill is declared to be no further material than as it identifies the instrument, expressing the decision of the jury; when made, it becomes no part of the indictment. Yel. 99. It is the action of the jury in publicly returning the

bill into the Court as true, and the recording, or filing, it among the records, that make it effectual." In *S. v. Mace,* 86 N. C., 668, RUFFIN, J., says the indictment "is the act of the grand jury, declared in open court, and need not be signed by anyone, and, if it be, it is mere surplusage, and does not vitiate." In *S. v. Calhoon,* 18 N. C., 374 (indictment for murder), cited in the last case above as settling the law, RUFFIN, C. J., says (DANIEL and GASTON, JJ., concurring): "It is the practice of the foreman to sign his name to the finding of the grand jury, and it seems to be a salutary prac- (537) tice, as it tends to the more complete identification of the instrument containing the accusation. We do not know in what it had its origin, but, though useful and proper, it does not seem to be essential, nor to have been at any time the course in England. 4 Bl. Comm., 306." In *S. v. Collins,* 14 N. C., 117, HENDERSON, C. J., says: "I have been much at a loss to see the necessity of any indorsement. The grand jury come into court, and make their return, which the Court records, not from that memorandum made out of court, but they pronounce, or are presumed to pronounce, it in court. It is not the indorsement which is the record, but that which is recorded as the juror's response. The indorsement is a mere minute for making the record." Though he adds, "But I believe the law is understood to be otherwise," it is clear that this referred to an erroneous impression generally prevailing, and not as to the law which he had just decided, and which has been reiterated since in the long line of cases above cited. In *Frisbie v. U. S.,* 157 U. S., 160, it is held that the omission of the indorsement "A true bill" is not "necessarily, and under all circumstances, fatal, although it is advisable that the instrument should be indorsed; * * * for such indorsement is a short, convenient, and certain method of informing the Court of their action." To same purport, see *Miller v. Com.* (*Va.*), 21 S. E., 499, and many other cases. The common law is thus stated in 1 Chit. Cr. Law, 322: "If the evidence does not support the charge, the grand jury say *'Ignoramus,'* or now, in English, 'Not found,' and, if they find a true bill, they say *'Billa vera,'* or in the plural, if there is more than one bill. This shows that the response of the jury entered by the Clerk was the record." There are States which have changed the common law by a statute which requires the indorsement by the grand jury of the words, "A true bill," and in their courts (538) alone are found the decisions which make the omission of those words fatal. Even there the statutory requirement has often been held merely directory. *S. v. Agnew,* 52 Ark., 275; *S. v.*

Mertens, 14 Mo., 94; *S. v. Murphy,* 47 Mo., 274. But the above numerous and uniform decisions declare that at common law and in this State, the record by the Clerk that the bill has been returned by the grand jury as found is the only record, and that it is not material that there should be any indorsement whatever, or signing by the foreman, as that is a mere memorandum, and does not come up as any part of the record. If this Court were the Legislature, it could change the law, as the Legislatures of several States have done, by making the indorsement of the foreman a record and obligatory. In *S. v. Harris,* 106 N. C., 689, it is said: "To sustain obsolete technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and, in some instances, would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not this last mentioned result, it is no advantage to defendants to resort to technicalities, and if it has such effect the courts should repress, as they do, a reliance upon them." But to support the defendant's objection to the indorsement of the indictment in this case is not to "sustain an obsolete technicality," but to create a new technicality, whose existence has heretofore been denied by our courts.

Furthermore, the objection comes too late. *S. v. Bordeaux,* 93 N. C., 560; *S. v. Weaver,* 104 N. C., 758. If, in fact, the bill was not returned a "true bill' by the grand jury, that was a matter which should have been raised below by a plea in abatement, and the fact found by the Judge. *S. v. Hor-*
(539) *ton,* 63 N. C., 595.

Unless the above uniform authorities are reversed, it appears to be well settled (1) that no indorsement by the grand jury is necessary, but if put there is does not vitiate the bill; (2) that to hold the indorsement, "This bill found" does not mean "A true bill," especially when the defendant pleads to it, and raises no objection till reaching this Court, is a "refinement" forbidden by the statute; (3) that, the record citing that "the defendant was indicted on the following bill," it must be taken as true. If any question is raised as to the fact (and it seems there is none), it should be raised by a plea in abatement below, upon affidavit, and not here for the first time, by a mere objection to the form of the indorsement by the grand jury.

MONTGOMERY, J., concurs in the dissenting opinion.

Cited: S. v. Ledford, 133 N. C., 717.

Overruled: S. v. Sultan, 142 N. C., 573; *S. v. Long,* 143 N. C., 676.

STATE v. TUCKER.

(20 November, 1900.)

INDICTMENT—*Variance—Allegation and Proof—Evidence—Intoxicating Liquors—Criminal Law.*

Where an indictment charges a sale of intoxicating liquors to Will Smith, it is incumbent on the State to prove a sale to *him*.

INDICTMENT against John Tucker for selling intoxicating liquors without license, heard by Judge *Thomas J. Shaw* and a jury, at April Term, 1900, of CABARRUS. On the back of the indictment was the following endorsement: (540) Witnesses—Will Smith, J. F. Harris, Jno. Cruse, Will Propst.

From verdict of guilty and judgment, the defendant appealed.

Zeb V. Walser, Attorney-General, for the State.
Montgomery & Crowell, for the defendant.

FAIRCLOTH, C. J. The defendant stands indicted for selling unlawfully and wilfully "to one Will Smith a quantity of spirituous liquors by the measure of a gallon," etc., without license so to sell spirituous liquors. The "case" sent to this Court states that the State's evidence was that the defendant came to town with about four gallons of whiskey, and that "he sold one of the witnesses for the State a gallon" at the price, etc., and offered the remainder for sale to "said witness, or to any other person." The defendant asked the Court to charge that there was no evidence to go to the jury for the conviction of the defendant, which was refused. The Court instructed the jury that, if they believed the evidence, to render a verdict of guilty. There was error. There is no evidence that defendant sold liquor to Will Smith, as alleged in the bill of indictment, "but to one of the witnesses for the State," and there were the names of four witnesses indorsed on the bill. The defendant's plea was not guilty. As the State alleged a sale to Will Smith, it was incumbent on the State to prove a sale to Will Smith. Defendant also moved in arrest, because the State failed to prove a sale to anyone within the statutory limit. *S. v. Carpenter,* 74 N. C., 230.

Venire de novo.

(541)

STATE v. JOYNER.

(20 November, 1900.)

REMOVAL OF CAUSES—*Mayor—Justices of the Peace—Criminal Law —Ordinances—Venue.*

In a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal.

INDICTMENT against William A. Joyner for violation of a town ordinance, heard by Judge *Henry R. Bryan* and a jury, at July Term, 1900, of CABARRUS. From verdict of guilty and judgment, the defendant appealed.

Zeb V. Walser, Attorney-General, and *L. F. Hartsell,* for the State.

Montgomery & Crowell, for the defendant.

CLARK, J. The defendant was tried before the Mayor of Concord upon a warrant for violation of a town ordinance. In apt time he filed an affidavit to remove the cause to some Justice of the Peace in that township. This being denied, he excepted. He was adjudged guilty, and fined three dollars. On appeal in the Superior Court, he moved to remand the cause to the Mayor, that it might be so removed. This being denied, the defendant excepted. He was tried, found guilty, sentenced to pay a fine of three dollars, and appealed.

Code, sec. 907, provides: "In all proceedings and trials, both criminal and civil, before Justice of the Peace, the Justice before whom the writ, or summons, is returnable, shall, upon affidavit, made by either party to the action, that he is unable to obtain justice before him, move the same to some other Justice residing in the same township," etc. There can be little, if any, doubt that, but for the statute, the filing of such petition
(542) that a party "can not get justice" would be a contempt of court. The act, by its terms, is restricted to Justices of the Peace, and the courts are not authorized, nor inclined to extend it to Mayors, or other judicial officers not named therein. It is true that by virtue of The Code (sec. 3820) violation of a town ordinance is a misdemeanor, and hence a Justice of the Peace has jurisdiction (*S. v. Wood,* 94 N. C., 855), and that, if a Justice of the Peace had been trying this cause, it could have been removed upon filing an affidavit under Code, sec. 907; but it does not follow that it could be removed when the Mayor is trying the case, for he is a different officer, selected by a different constituency. He does not become a Justice of the Peace

simply because he is exercising jurisdiction which the Justice of the Peace might concurrently exercise. Code, sec. 1132, authorizes the Justices of this Court, the Judges of the Superior, Inferior, and Criminal Courts, and Mayors, to issue warrants for the arrest of persons charged with any crime, equally with Justices of the Peace; but that does not make all these other judicial officers, including Mayors, Justices of the Peace, even *pro hac vice*. A party who should so construe the statute, and should file an affidavit for removal before any Judge "because he could not get justice," would doubtless find himself punished for contempt. Code, sec. 3818, makes the Mayor of every city, or town, an "inferior court," and a Magistrate and conservator of the peace, and confers on him the jurisdiction of a Justice of the Peace in all criminal matters. This merely adds the powers of a Justice of the Peace in criminal matters *ex officio* to the office of Mayor. It does not make him a Justice of the Peace. To a certain extent, he is that, but he is more besides. Nor has he, by that section, the civil jurisdiction of a Justice of the Peace. The two officers are distinct, though exercising concurrent jurisdiction in some matters. Counsel for defendant lay stress on the words "shall be a Magistrate and conservator of the peace," but the context shows (by not giving (543) the civil jurisdiction) that the word "magistrate" is not there used as a synonym for Justice of the Peace, but in the same general sense of a peace officer and conservator of the peace; as when we speak of the Governor, or President, as the Chief Magistrate. The latter part of the section, providing that the rules of law regulating proceedings before a Justice of the Peace shall be applicable to proceedings before a Mayor, and that he shall be entitled to the same fees, refers to the ordinary proceedings on the trial of causes depending before him, and neither gives the Mayor the same functions (such as civil jurisdiction) as Justices of the Peace, nor subjects the Mayor by construction to the provisions as to removal of causes under sec. 907, which does not name the Mayor, but by its terms is restricted to Justices of the Peace. In all sections of The Code in which it is intended to confer upon Mayors, or other officers, the same jurisdiction of any matter which is exercised by a Justice of the Peace—as in section 1132—the "Mayor of any town, or city," is named as such not being comprehended *ex vi termini* under the term "Justice of the Peace." Of course, the same must be true of section 907.

No error.

Cited: *S. v. Lord,* 145 N. C., 481.

(544)

STATE v. FREEMAN.

(20 November, 1900.)

1. APPEAL—*Case on Appeal—Counter Case—Service—Filing—Criminal Law.*

When counter case of the State has not been served or service acknowledged thereon or filed for more than a month after the State has accepted service of case of defendants, in an appeal by the defendant the counter case will not be considered.

2. AFFRAY—*Elements—Criminal Law.*

Persons engaged in a friendly scuffle are not guilty of an affray.

3. AFFRAY—*Burden of Proof—Criminal Law.*

Admission by persons that they were engaged in a friendly scuffle does not shift the burden from the State of proving them guilty of an affray.

INDICTMENT against H. R. Freeman and A. A. McKenzie for an affray, heard by Judge *Thomas J. Shaw* and a jury, at April Term, 1900, of MONTGOMERY.

From verdict of guilty and judgment, the defendants appealed.

(547) *Zeb V. Walser,* Attorney-General, for the State.
Douglass & Simms, for the defendants.

FURCHES, J. The defendants, Robert Freeman, Bud McKenzie, Henry Freeman, and Sam McLeod, were indicted for an affray. It seems, from the record, that all four of the defendants were put on trial, and the jury, "for their verdict, say they find the defendants guilty of simple assault. Judgment: Defendants fined fifty dollars each, and each pay one-fourth of the costs. (State accepted a verdict of not guilty as to defendants Sam McLeod and Henry Freeman.)" And it seems that the defendants Henry Freeman and A. A. McKenzie appealed. It also appears, from the record sent up, that defendants' counsel made up a statement of the case on appeal, service of which was accepted by the Solicitor on 18 April, 1900. There also appears to be a counter case made by the Solicitor, which was never served, nor was service accepted by defendants, or their attorneys, but on the back of which is marked, "Filed 28 May, 1900."

The counter case not having been served, or acknowledged, and not having been filed until 28 May, more than a month after service was accepted by defendants, the counter

case on appeal was too late, even if we were to hold that the word "Filed" of itself was sufficient to comply with the statute (sec. 550 of The Code). We will therefore have to be governed by the case made by the defendants; and, as we have to be governed by the defendants' statement of the case, we will say that, while there is some difference in the statement of facts in the two cases, there is very little difference in that part of them upon which our opinion is based. The "case" (548) states that "all the evidence in the case tended to show that the defendants were under the influence of liquor, and while returning from a fishing party along the public road, in company with various other parties, engaged in a friendly scuffle, when the defendant A. A. McKenzie caught his foot under a pole and fell, and the defendant W. R. McKenzie also fell over the same pole, and fell on the defendant McKenzie. One Sewell Freeman, who was standing near by, immediately caught the defendant Freeman by the arm, lifted him up, and carried him into a lot about twenty yards away, when the defendant picked up a small stick from the ground, but did not offer or attempt to use the stick. The defendants were introduced, and testified in their own behalf. They admitted that they engaged in a scuffle, but declared that they were not mad, and that the engagement was entirely friendly. His Honor, among other things, charged the jury that, the defendants having admitted that they were in a scuffle, the burden shifted from the State, and the defendants must satisfy the jury that they were not mad and fighting, and that the encounter was a friendly one. To this part of his Honor's charge, defendants excepted." The charge in this bill is an affray by fighting together in a public place. There must have been a fighting—an affray—before there could be a criminal offense. *S. v. Crow,* 23 N. C., 375. This must be admitted by the defendants, or found from the evidence by the jury, and the burden is on the State. Every man is presumed to be innocent until he confesses his guilt, or is found guilty by a jury of his country. The defendants did not confess their guilt. Indeed, they denied it. It can not be that parties "engaged in a friendly scuffle" are guilty of an affray, and this is all that they admitted. We see very little, if any, evidence of an affray. But, if there had been ever so much, it was still for the jury to say (549) whether there was an affray or not. *S. v. Baker,* 65 N. C., 332. That is, whether the defendants were mad and fighting or not. We know that the law is that where two or more parties are indicted for an affray, and the affray (the criminal offense) is admitted, or found from the evidence, then

the burden is shifted, and thrown upon any one of the parties engaged in the affray to justify or excuse himself from guilt. But this only takes place after the offense is established. To apply this rule before a breach of the peace has been established would be to compel the defendant to prove himself innocent of the charge preferred against him by the State. This is in violation of the constitutional rights of every freeman, and is not the law. If the Judge thought there was enough evidence to carry the case to the jury, he might have properly charged them that if they found, from the evidence, that the defendants were mad and were fighting, and not scuffling (with proper explanation as to what was a fight—an affray), then the burden changed, and if any or either one of them was not guilty, the burden was on him to show he was not. If it was only a friendly scuffle, it was a pretty dear one to them—$50 each, and one-fourth each of the costs. There was error, for which there must be a new trial.

Error.

---

(550)

STATE v. TORRENCE.

(27 November, 1900.)

1. FALSE PRETENSES—*Advances—Criminal Law—The Code, Sec. 1027.*

   One who obtains advances upon written representation of ownership of property and promising to apply the same to the payment of the debt, fails to do so, is indictable under The Code, sec. 1027.

2. FALSE PRETENSES—*Advances—Imprisonment for Debt—Criminal Law—The Code, Sec. 1027.*

   The Code, sec. 1027, making it a misdemeanor to obtain advances on representations of owning property, is not in conflict with the Constitution, Art. I, sec. 16, forbidding imprisonment for debt.

DOUGLAS, J., *dubitante.*

INDICTMENT against Will Torrence, heard by Judge *Henry R. Bryan,* at August Term, 1900, of ROWAN.

Indictment for obtaining goods under false pretenses, under Code, sec. 1027, tried before *Bryan,* J.: "The jurors," etc., "present that Will Torrence, with force and arms," etc., "on 20 June, 1900, with intent to cheat and defraud, did unlawfully, wilfully, and feloniously obtain from J. M. Surrat and another goods, wares, and merchandise to the amount of $22.34,

asserting at the time that he was the owner of a chose in action against the Southern Railway Company for wages earned by him in May, and agreeing in writing to apply said wages, or the proceeds, to the amount of $22.34, to the discharge of said debt, whereas the said Will Torrence has failed and refused to so apply said wages, but disposed of the same in some other manner than agreed in said representation, contrary to the form of the statute," etc.

Zeb V. Walser, Attorney-General, for the State. (553)
Lee S. Overman, for the defendant.

CLARK, J. The indictment charges that the defendant "did unlawfully, wilfully, and feloniously obtain from J. M. Surrat and another goods, wares, and merchandise to the amount of $22.34, asserting at the time that he was the owner of a chose in action against the Southern Railway Company, and agreeing in writing to apply said wages, or the proceeds, to the amount of $22.34, to the discharge of said debt, whereas the said Will Torrence has failed, or refused, to so apply said wages, but disposed of the same in some other manner than agreed in said representation, contrary to the form of the statute," etc. The defendant moved in arrest of judgment because "the bill of indictment did not charge an indictable offense." On the argument this was treated as an indictment for false pretense, and, if so, the motion should have been granted; for false pretense is the "false representation of an existing fact, made with intent to deceive, and which does deceive." But an examination shows that the indictment is under Code, sec. 1027, for "obtaining advances upon representation of the ownership of property and promising to apply the same to payment of the debt and failing to do so." The indictment follows the statute, and there is no ground for the motion in arrest of judgment unless the statute is in conflict with the constitutional provision (Art. I, sec. 16) prohibiting "imprisonment for debt, except in cases of fraud," and we can not see that it is. It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge. It is on the same footing as Code, sec. 1089, for disposing of mortgaged property. It is the fraud in (554) disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such *quasi* mortgage, to one who has thus *pro tanto* become the owner thereof, and the subsequent conver-

sion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. The evident object of the statute was to enable persons to obtain advances upon articles whose nature, or whose value, would not justify the execution of a formal mortgage thereon. The only case so far decided upon this section (*State v. Whidbee,* 124 N. C., 796) has no application; for that went upon the ground that the prosecutor, upon the face of the writing, knew that the property was not in existence, and that the defendant could have had no ownership of the article pledged, because it was a check to be issued at a future day. Here the written pledge upon which the advances were made is of a chose in action—an indebtedness to the defendant by the Southern Railway Company for past-due wages—and is in the following words: "I, Will Torrence, do hereby assert, that I am the owner of property to the amount of fifty dollars valuation, said property consisting of a chose in action against the Southern Railway Company, because of wages earned by me in May, 1900, and yet unpaid by the said Southern Railway Company. Now, in consideration of the fact that J. M. Surrat & Co. have this day allowed me advances on said wages to the amount of $20, I agree to apply said wages, or the proceeds thereof, to the amount of twenty dollars, to the discharge of said debt due J. M. Surrat & Co., on 20 June, 1900. Witness my hand and seal, this 20 May, 1900." (Signed and sealed by Will Torrence, and witnessed by C. A. Surrat.) The evidence justified the Court in refusing the prayer to instruct the jury that, if they believed the evi-
(555) dence, they should find defendant not guilty, and in instructing them, if they believed the evidence, to find him guilty.

No error.

STATE v. EWING.

(27 November, 1900.)

INDICTMENT—*Murder—Degree—Grand Jury—Demurrer—Homicide—Bill of indictment—Criminal Law.*

Where an indictment charges murder, the grand jury have no power to return it for murder in the second degree.

CLARK and DOUGLAS, JJ., dissenting.

INDICTMENT against D. A. Ewing, heard by Judge *H. R. Bryan,* at October Term, 1900, of MONTGOMERY.

Indictment for murder: "The jurors for the State," etc., "present: That D. A. Ewing, late of the county of Montgomery, State of North Carolina, on 17 March, 1899, at and in said county and State, with force and arms feloniously, wilfully, and of his malice aforethought did kill and murder one James Stewart, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Upon said bill was the indorsement: "A true bill for murder in the second degree." The defendant, before plea, moved to quash the bill upon the ground that the grand jury had no right to find the bill as indorsed. Overruled. Defendant excepted. Defendant then moved to quash upon the grounds set forth in certain affidavits filed, to which the State re- (556) plied, and the Judge found the following facts: "The defendant in this case having moved to quash the bill of indictment for causes set out in affidavits submitted to the Court, to which counter affidavits were submitted, the Court finds the following facts: (1) That Wiley Rush, Solicitor, was informed by the foreman of the grand jury, about the time the bill was being considered, that the defendant had some relatives who were members of the grand jury. That the Solicitor then told the foreman that he could excuse any relatives of the defendant if they so desired during the consideration of the bill. (2) That the foreman, in pursuance of such information from the Solicitor, and after one member of the grand jury had asked to be excused for the reason that he was related to the defendant, said to said member that he might be excused, and to the body of the grand jury that any member related to the defendant might excuse himself, whereupon said member who had spoken to the foreman and two other members excused themselves, and left the jury room. That no member was excluded otherwise than above stated. (3) That the name of Silas Robinson was indorsed upon the bill of indictment by the foreman by the direction of the Solicitor after the bill had gone into the hands of the foreman, and by direction of Solicitor was called and examined. (4) That said bill was brought into open court by the foreman alone. Upon this the Court refused the motion, and defendant excepted. And upon the facts so found the defendant again moved to quash the indictment. Overruled, and defendant excepted." Defendant then demurred to the bill of indictment upon the ground that, while the bill was drawn for murder in the first degree, the grand jury found and indorsed said bill, "A true bill for murder in the second degree." (557) His Honor sustained the demurrer, and rendered judgment requiring the defendant to enter into bond of $2,000

for his appearance at the next term of Court to abide further action of the Court. The Solicitor for the State appealed.

Zeb. V. Walser, Attorney-General, for the State.
Douglass & Simms, for the defendant.

FAIRCLOTH, C. J. The bill of indictment charges in one count that the defendant "feloniously, wilfully, and of his malice aforethought did kill and murder one James Stewart," contrary, etc. The grand jury returned "A true bill for murder in the second degree." The defendant, before pleading, moved to quash the bill upon the ground that the grand jury "had no right to find the bill as indorsed upon the back thereof." Motion overruled. The Court then found the facts as set out in the record, and thereupon the defendant demurred on the ground that the bill is drawn for murder in the first degree and the grand jury have found a true bill for murder in the second degree. Demurrer sustained, and the State appealed.

We believe this question has not heretofore been before this Court, and it is probably here now by reason of Laws 1893, chap. 85. Section 1 provides that the offenses mentioned therein shall be deemed murder in the first degree. Section 2 provides that all other kinds of murder shall be deemed murder in the second degree. Section 3 provides that nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or sec-
(558) ond degree. It is evident that the Legislature intended that the petit jury, and not the grand jury, should determine the degree of the offense upon the whole of the evidence. It is argued that the bill, with a single count, as in this case, contains the essential element of two counts, one in the first and one in the second degree, on the principle that the greater includes the lesser. If the grand jury is allowed upon the State's evidence alone, to fix the grade in the second degree, then the petit jury has nothing to determine except to adopt the conclusion of the grand jury, no matter what the whole evidence may disclose. It is not questioned that when the bill contains several counts the grand jury may find one count true and ignore the others, for each count contains a distinct charge, and the jury may find one true only. The law intends to punish the guilty and protect the innocent, and to that end it is necessary to adopt rules in the administration of the criminal law, and we know of none better than those developed and established by the wisdom of past ages. We are

inclined to think that Laws 1893, chap. 85, is well adapted to the just administration of the criminal law and to the present conditions of society. Turning, then, to the forms, precedents, and practice, we find them uniform on the question before us, and we find no contrariant decision in any courts of the American States. Whart. Cr. Pl. and Prac. (9 Ed.), sec. 374, expresses it: "Where there are several counts, the jury can find one true and ignore the others; but, where there is only one count, they must either pass or reject the whole." Chitty on Criminal Law, 322, says: "The jury can not find one part of the same charge to be true, and another false, but they must either maintain or reject the whole; and therefore, if they indorse a bill of indictment for murder *billa vera se defendo,* or *billa vera,* for manslaughter, and not for murder, the whole will be invalid, and may be quashed on motion." So, in Archb. Cr. Pl. and Prac., 99, it is laid down: "They can not, however, find a true bill as to part of a count, and ignore the rest (559) of it." To the same effect are 1 Russ. Crimes, 312, and *S. v. Wilhite,* II Humph., 602. In *S. v. Williams,* 31 S. C., *296, the charge was an assault and rioting in one count. The jury returned a true bill as an assault, no bill as to rioting. Held, that the jury could not so find, "but must find generally on the whole charge as contained in the indictment." In *S. v. Cowan,* 1 Head, 280, the bill was for murder, and indorsed, "The grand jury find a true bill for manslaughter." The Court said: "The rule seems to be well established that the grand jury can not find one part of the same charge to be true and another part false, but must either maintain or reject the whole and therefore on an indictment for murder they can not find a true bill for manslaughter. This is a technical rule, but the current of authority is in support of it." *S. v. Creighton,* 1 Nott. and McC., 256: "Where the grand jury, on a count for riot and assault in an indictment, find A guilty of a riot, it is a partial finding of the entire count, and therefore void." Other authorities of the same import may be found. We have copied freely, because the question under our statute is practical and important. We are satisfied that due care and caution in the conduct of grand juries in discharging their duties are not always observed in the districts, and in this connection we will call attention to *S. v. Brown,* 81 N. C., 568, where it is held that a bill of indictment returned into Court "Not a true bill' can not be amended and reconsidered by the same grand jury, for the reasons there stated. For the foregoing reasons we think the demurrer was properly sustained.

No error.

MONTGOMERY, J. (concurring in the result). If the evidence before the grand jury disclosed a case of murder in the
(560) second degree only, I think that that body should have made their finding on the bill that was sent to them (a bill for murder in the usual form before Laws 1893) simply "A true bill," without the qualifying words of "murder in the second degree." It was provided in the act that there need be no "alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." I think that if a grand jury, since the Act of 1893, in the investigation of a homicide, find from the evidence, that a killing has occurred which amounts to manslaughter only, the bill of indictment should be found and returned for manslaughter. But, if the homicide is of higher culpability than manslaughter, then the grand jury should return a true bill of murder in the form in use before the statute. The petit jury is the tribunal upon which is devolved by the statute the duty of fixing the degree of guilt, whether murder in the first or murder in the second degree, upon the evidence of both the State and the prisoner. The distinction between murder in the first and murder in the second degree, under the Act of 1893, is not for the grand jury to point out and determine, but is a matter for the action of the petit jury, after hearing all the evidence and receiving the instruction of the Court. The law declares that the form of the indictment is immaterial as between the two crimes, and that the petit jury shall be charged with the duty of declaring the grade of the crime as between murder in the first and murder in the second degree, and not the grand jury. And this appears to me to be necessarily so, for, if the Solicitor should conform to the wishes of the grand jury, as expressed in their finding, and send in a bill for murder in the second degree, the bill would be in the exact language of the one upon which the grand
(561) jury undertook to act. I am therefore of the opinion that the grand jury transcended its power in finding the bill "A true bill for murder in the second degree," in that it undertook to prescribe a verdict for the petit jury, and that his Honor was right in sustaining the demurrer.

CLARK, J. (dissenting). The forms of indictment for murder in the first degree and for murder in the second degree are identical. It may be that the Solicitor sent this bill for murder in the second degree, and the presumption of regularity is that he did; then, the indorsement, "True bill for mur-

der in the second degree," is correct. When this case goes back, the Solicitor will send a bill for murder in the second degree. It will be *verbatim et literatim et punctuatim* a copy of this bill. If the grand jury find that a true bill, they will return it, "True bill for murder in the second degree," and we shall have a duplicate of the paper now declared invalid, unless the opinion of the Court means that the grand jury, contrary to the intention of the Solicitor and their own view of the evidence, are compelled to return "A true bill," and thus put the prisoner on trial for murder in the first degree. If the grand jury, as in this case, think the evidence justifies only an indictment for murder in the second degree, it surely can not be that they, sworn men as they are, are compelled to make a return which the law will presume is an indictment for a higher offense, and thus put the prisoner on trial for his life, when the grand jury has found only evidence warranting a charge for an offense not capital.

Cited: *S. v. Hunt,* 128 N. C., 585.

---

(562)

STATE v. BROWN.

(4 December, 1900.)

1. GRAND JURY—*Quashing Indictment—Terms of Superior Court—Criminal Law.*

   Acts 1899, chap. 593, providing for an extra term of the Superior Court without a grand jury, is constitutional.

2. GRAND JURY—*Quashing Indictment—Terms of Superior Court—Criminal Law.*

   Quashal of an indictment returned by a grand jury at an extra term of the Superior Court, held proper, where the statute providing for an extra term makes no provision for a grand jury.

CLARK, J., concurs in the result.

INDICTMENT against Everett Brown, heard by Judge *W. B. Councill,* at Special (November) Term, 1900, of CATAWBA.

Defendant, in apt time, moved to quash the indictment upon the ground that, under said act authorizing the said term of Court, there should be "no grand jury summoned at this term of the Court." Laws 1899, chap. 593, sec. 2. The Court sustained the motion and quashed the bill, and the Solicitor for the State appealed.

Robert D. Douglas, Attorney-General for the State.
E. B. Cline, W. A. Self, and *J. T. Perkins* for the defendant.

FURCHES, J. The defendant was indicted for carrying a concealed weapon, upon a bill found at a term of Catawba Superior Court, began and held on the fifteenth Monday after the first Monday in August, 1900; and the "case on appeal" states that the defendant had been arrested on a warrant issued
(563) by a Justice of the Peace, and in default of bail had been imprisoned, and was in jail at the time of finding the bill of indictment, and is still in custody; that, upon the bill being returned "A true bill," the defendant moved to quash the same for want of jurisdiction. The motion was sustained, the bill quashed, and the Solicitor appealed.

On the argument, it was contended that the appeal presented two questions: The constitutionality of the Act of 1899, providing that there should be no grand jury at this term of the Court; and, secondly, the construction of the act, as to whether it prohibited the drawing and use of a grand jury at that term. The "case" states that the Solicitor for the Tenth Judicial District (Catawba being one of the counties composing that district), had demanded of the commissioners that they draw and summon a grand jury for that term, and under this demand they had done so. We suppose the Solicitor, in making this demand, thought his action was authorized under the opinion in *Mott v. Commr's,* 126 N. C., 866, and that it was the duty of the commissioners to draw and summon this grand jury. But this question was neither presented, nor decided in that case. There the act stripped the Superior Court of Forsyth County of all criminal jurisdiction. This was held to be unconstitutional, as it took from that court all criminal jurisdiction. The argument in that case was rested upon the ground that the Superior Courts were made constitutional courts by adoption; that their jurisdiction was not defined by the Constitution, but that they were adopted with the jurisdiction they had at the time of their adoption; and that the Constitution required that at least two terms of these courts should be held in each county every year. As a matter of judicial history, we know that for a long time after the State was divided into judicial districts, or "circuits," as they were called be-
(564) fore the Constitution of 1868, only two terms were held in each year, called "spring" and "fall" terms. Until then but very few counties had more than two terms a year, and those that had more were exceptions to the general rule. The Constitution of 1868, in recognition of this general rule, re-

quired that at least two terms of the Superior Court should be held in each county in the State every year. Const., Art. IV, sec. 12. These are constitutional terms of the Superior Court; that is, they are terms required by the Constitution to be held "at least twice each year," and can not be deprived of their constitutional functions. They can not be deprived of their grand juries. But if the Legislature establishes other terms of the Superior Court, which seems to be contemplated by the Constitution, in saying that there must be at least two terms held in each county every year, we see nothing in the Constitution requiring that these extra terms should have a grand jury. Laws 1899, chap. 593, provides two terms—spring and fall terms—for Catawba County, which have grand juries, and it provides an extra term to be held in November without a grand jury, and we see no constitutional reason why this may not be done.

Nor do we think the other contention made by the State can be sustained. The closing sentence of section 2 of the act is as follows: "And there shall be tried all civil cases pending and only such criminal cases as the defendants are in jail, or in custody." The State contends that the intention of the Legislature was that all criminals in jail, or in custody, should be tried at these extra terms of the Court; that defendant was in jail, and should be tried; that this could not be done without a true bill found, and this could only be found by a grand jury. The act is loosely drawn, and gives rise to this very ingenious argument. We find that chap. 180, Laws 1885, and other acts making similar provisions to Laws 1899, chap. 593, are more accurately drawn, and provide for the (565) trial of civil cases only, "except jail cases on the criminal docket, where a true bill has been found." Had this act used this language, there would have been no ground for this contention of the State. But the act, in plain terms, says there shall be no grand jury. This seems to be the controlling idea of this legislation, and we must construe the act to mean what is expressed in the other acts we have examined—that this extra term shall only try in cases "where there has been a true bill found." Putting this construction upon the act, the judgment appealed from must be affirmed.

Affirmed.

(566)

STATE v. COSTNER.

(4 December, 1900.)

1. EVIDENCE—*Identity of Defendant—Competency—Scintilla—Burglary—Criminal Law.*

Where there is more than a scintilla of evidence as to the identity of the defendant, it is for the jury to pass upon its weight.

2. ARGUMENT OF COUNSEL—*Solicitor—Abuse of Privilege—Trial—Criminal Law—Comment of Counsel.*

An attorney for the prosecution may comment before the jury on the failure of the defendant to examine a witness subpœnaed by him.

3. ARGUMENT OF COUNSEL—*Comment of Counsel—Abuse of Privilege—Trial—Criminal Law—Alibi.*

A solicitor may comment on the failure of defendant to prove his whereabouts at the time of the commission of the offense.

4. EVIDENCE—*Weight—Sufficiency—Jury—Criminal Law—Burglary.*

Where there is evidence, though it is not strong, it is for the jury to pass upon its weight.

FAIRCLOTH, C. J., dissents.

INDICTMENT for burglary against Wade Costner, heard by Judge *Frederick Moore* and a jury, at August Term, 1900, of CATAWBA.

From a verdict of guilty and judgment thereon, the defendant appealed.

(571) *Robert D. Douglas,* Attorney-General, for the State.

No counsel for defendant.

MONTGOMERY, J. The defendant, whose character was said to be good, by his employer on the trial, was convicted of burglary in the second degree at the August Term, 1900, of CATAWBA. The case, as we read it from the evidence, presents some peculiar phases. It appears from the evidence that the defendant was found lying or crouching on the floor, near the side of the bed in which one of the witnesses was sleeping, between 12 and 1 o'clock at night. There were three grown persons sleeping in the same room at the time. The windows were up. It is difficult to believe that the purpose of the defendant was to do any harm to the occupants of the room, and, from the evidence, nothing was disturbed. The evidence as to the identity of the defendant, while more than a scintilla, was little more

than shadowy. The two witnesses for the State who were occupants of the room did not claim to know the face of the defendant, and one of them did not know that the intruder was white or black, and both witnesses closed the testimony by saying, one, "I never claimed that I could swear that (572) the defendant is the person who entered the house;" and the other, "I do not claim to have identified the man who was in the room." There was evidence, however, concerning the defendant's whereabouts on the night of the occurrence, which to some extent compromised the defendant, and which probably had undue weight with the jury; but with that we can have no concern.

The first exception of the defendant was to the receiving by his Honor of certain evidence testified to by one of the occupants of the room. She had said that the man who entered the room was small of statute, without coat or hat, and that she knew defendant's figure, but not his face. She was asked by the Solicitor, "What is your opinion, from what you saw of the man that night, as to who it was?" She answered, "The figure in the room that night compared more favorably with Wade Costner than anyone else I could think of in that community." That evidence was weaker than that which was allowed in *S. v. Lyttle,* 117 N. C., 799, to prove the identity of Lyttle. There the witnesses said, in substance, that it was so dark he could not tell whether the man whom he saw in the road was white or black; that he had his back to him; that he had known him 10 years; that he was a low, chunky man; and that, if he had spoken to him, he would have called him Lyttle. But the evidence in the present case was more than a scintilla, and for that reason it has to be received.

The exception made by defendant's counsel to the refusal of his Honor to instruct the jury that, upon all the evidence, they should return a verdict of not guilty, can not be sustained. The evidence was not strong against the defendant, but there was evidence against him, and it was for the jury to pass upon its weight.

The defendant had subpoenaed, as a witness for (573) himself, Brad Edwards, who was present at the trial. One of the attorneys who was assisting the Solicitor commented before the jury on the failure of the defendant to examine this witness. His Honor refused to interfere, and the defendant excepted. The exception is without merit. The point is settled in *S. v. Jones,* 77 N. C., 520, and *S. v. Kiger,* 115 N. C., 746. The Solicitor commented upon the fact that defendant had able counsel, and had not brought a witness to

show or explain where he spent that night, and the defendant's counsel asked his Honor to stop the Solicitor in his remarks, which request was refused. The comments of the Solicitor were not out of place; for evidence had been introduced for the State tending to show that about the hour of the occurrence, or a little later, the defendant went to the house of one of the State's witnesses, and there spent the balance of the night—a thing which was most unusual with him—and that he was not at his own house that night. It is further testified to by one of the State's witnesses that on the next morning the defendant was asked by his employer where he had spent the night, and the defendant said, "At Uncle Eat's." The fact was, if Eaton Lawrence's (Uncle Eat's) testimony was true, the defendant spent only an hour or an hour and a half at his house, and that the defendant seemed tired and worried. *S. v. Johnson,* 88 N. C., 623, is, in principle, in point on this exception.

No error.

Cited: S. v. Carmon, 145 N. C., 486; *S. v. Walker,* 149 N. C., 531.

(574)

STATE v. BRYSON.

(22 December, 1900.)

INDICTMENT — *Sufficiency — Surplusage—Assault and Battery—The Code, Sec. 1183.*

The indictment in this case for assault and battery is sufficient.

INDICTMENT against Samuel D. Bryson, heard by Judge *O. H. Allen,* at Fall Term, 1900, of MACON.

The indictment was as follows: "Be is remembered, etc. [giving names of jurors.] The jurors for the State, upon their oath present: Samuel D. Bryson, Tom Shepherd (colored), and Thomas Magaha, late of the county of Macon, on 9 May, 1899, at and in said county, being evil-disposed persons, and wickedly devising and intending to intimidate, frighten, scare, assault, and injure one Glenn Vest and cause him, the said Glenn Vest, to feel less secure in the enjoyment and protection of his house, on the said 9 May, 1899, at and in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate, and agree together, unlawfully, forcibly, with a strong hand, and multitude of people, to threaten, intimidate, and

deter him, the said Glenn Vest, and cause him to feel less secure in his person, and in the enjoyment of the quiet, repose, and protection of his house. And the persons aforesaid, upon their oath aforesaid, do further say that the said Samuel D. Bryson, Tom Shepherd (colored), and Thomas Magaha, in furtherance of the said unlawful combination, conspiracy, and agreement so amongst themselves had as aforesaid, at and in the county of Macon aforesaid, on said 9 May, 1899, aforesaid, in the night time of said day, with the unlawful intent as aforesaid, with a strong hand multitude of people, armed with pistols, rocks, and other deadly offensive weapons, en- (575) tered upon the premises of the said Glenn Vest, and did then and there, unlawfully, wilfully, and with force and arms, remain and stay against the will of the said Glenn Vest; he being then and there present, commanding them, the said Samuel D. Bryson, Tom Shepherd (colored), and Thomas Magaha, to leave his premises. And the said Samuel D. Bryson, Tom Shepherd (colored), and Thomas Magaha, then and there him, the said Glenn Vest, did unlawfully curse, abuse, and with force and arms and deadly weapons, to-wit, pistols, rocks, and knives, did assault, beat, wound and ill treat, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. Ferguson, Solicitor."

The following was indorsed on the indictment: "Continued for defendants, and it is ordered by the Court that defendants give bonds in the sum of two hundred dollars each, with good and sufficient security, for their appearance at the next term of Court."

From quashal of indictment, the State appealed.

R. D. Douglas, Attorney-General, and *Ferguson & Son* for the State.

Kope Elias, and *J. F. Ray,* for the defendants. (576)

FURCHES, J. The defendants are indicted for an assault on one Glenn Vest, and upon the case coming on for trial they moved to quash for duplicity in the bill of indictment. The motion was allowed, the bill of indictment quashed, and the State appealed. This bill should not be used as a precedent, as it is certainly liable to be criticised for its multiplicity, though it may not be necessary to quash it for "duplicity." There is much more of it than is necessary, by which we suppose the Solicitor intended to intensify the charge of an aggravated assault. But finally, after going through all the variations set

forth in the bill, the Solicitor came down to business, and charged the defendants as follows: "And the said Samuel D. Bryson, Thomas Shepherd (colored), and Thomas Magaha, then and there him, the said Glenn Vest, to-wit, with pistols, rocks, and knives, did assault, beat, wound, and ill treat contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State. Ferguson, Solicitor." This, we think, is a sufficient charge of an assault and battery, and the other statement of intention to beat, conspiracy, etc., may be treated as surplusage, or as matters of inducement only. This view of the case seems to be in the spirit of our legislation (Code, sec. 1183), and in harmony with our decisions thereunder. *S. v. Harris,* 106 N. C., 682, and cases cited. While we feel called upon to sustain this bill for the reasons and upon the authorities we have given, we will say to Solicitors that it is much safer to adhere to precedents, as nearly as they can in drawing their bills. This would save them and the courts much trouble. There was error in quashing the bill of indictment.

Error.

MEMORANDA OF CASES DISPOSED OF WITHOUT OPINION.

J. W. GODWIN *v.* J. A. MITCHELL, from HERTFORD. F. D. Winston for plaintiff; Winborne & Lawrence, and Geo. Cowper for defendant. Per Curiam, affirmed.

J. M. BOYCE *v.* ELIZABETH BURKE, *et al.*, from CHOWAN. Pruden & Pruden, and Shepherd & Shepherd for defendants. No counsel *contra*. Per Curiam, affirmed.

R. B. JERNIGAN, *v.* DICEY JERNIGAN, *et al.*, from BERTIE. F. D. Winston for plaintiff; R. B. Peebles for defendants. Per Curiam, affirmed.

LIZZINA BULLOCK *v.* W. O. BULLOCK, from EDGECOMBE. G. M. T. Fountain for plaintiff; Gilliam & Gilliam for defendant. Per Curiam, affirmed.

B. S. SHEPPARD *v.* C. M. BERNARD, from PITT. Jarvis & Blow for plaintiff; Aycock & Daniels for defendant. Per Curiam, affirmed.

J. R. SHORT *v.* T. B. YELVERTON, from WAYNE. Allen & Dortch for plaintiff; I. F. Dortch and W. C. Munroe for defendant. Per Curiam, affirmed.

H. V. BUNCH *v.* W. A. PULLEY, from WAKE. Womack & Hayes, and W. J. Peele for plaintiff; Armistead Jones for defendant. Per Curiam, affirmed.

QUIGLEY & Co. *v.* CARPENTER, from WAKE. R. O. Burton for plaintiff; Armistead Jones, and Womack & Hayes for defendant. Per Curiam, affirmed.

J. R. SMITH *v.* BRYANT LANE, from WAYNE. Allen & Dortch for plaintiff; W. C. Munroe for defendant. Per Curiam, affirmed on authority of *Boon v. Drake*, 109 N. C., 79.

C. J. HUNTER *v.* JOHN LEACH, from WAKE. W. N. Jones for plaintiff; Busbee & Busbee for defendant. Per Curiam, affirmed.

J. R. GRIFFIN *v.* L. D. GULLEY, from WAYNE. Motion of plaintiff to docket and dismiss defendant's appeal, under Rule 17, allowed. Motion of appellant to reinstate denied October 31st.

PETERSON THORP *v.* W. S. COZART, *et al.*, from GRANVILLE. Motion of defendants to docket and dismiss plaintiff's appeal under Rule 17 allowed.

DAVIDSON & BAKER *v.* WEST OXFORD LAND CO., from GRANVILLE. Petition of both parties for rehearing denied.

C. H. LAMB, *et al. v.* D. C. MCPHAIL, *et al.*, from SAMPSON. F. R. Cooper, Shepherd & Shepherd, and Stevens & Beasley

for plaintiffs; Allen & Dortch, and J. D. Kerr for defendants. Petition of defendants to rehear denied.

COMMISSIONERS *v.* J. G. KENAN, *et al.*, from DUPLIN. Stevens, Beasley & Weeks for plaintiff; A. D. Ward for defendants. Per Curiam, new trial.

W. A. DUNN *v.* M. R. BEAMAN, *et al.*, from SAMPSON. H. G. Connor & Son, and R. O. Burton for plaintiff; Allen & Dortch, J. D. Kerr, and F. R. Cooper for defendants. Petition of defendants to rehear dismissed.

W. M. LERCH *v.* H. L. FENNELL, from NEW HANOVER. McNeill & Bryan for plaintiff; H. McClammy for defendant. Per Curiam, affirmed.

W. T. MERCER *v.* J. R. DAVIS, *et al.*, from NEW HANOVER. L. V. Grady for plaintiff; H. McClammy and Iredell Meares for defendants. Per Curiam, affirmed.

STATE *v.* S. ROBINSON, from BRUNSWICK. Attorney-General and Brown Shepherd for the State. No counsel *contra*. Per Curiam, affirmed.

WRIGHT EDWARDS *v.* LUMBER CO., from BLADEN. C. C. Lyon for plaintiff; J. B. Schulken and D. J. Lewis for defendant. Per Curiam, affirmed. DOUGLAS, J., dissenting.

STATE *v.* GEORGE CURRIE, from MONTGOMERY. Attorney-General for the State. No counsel *contra*. Per Curiam, affirmed.

EMMA MACON *v.* A. & A. RAILROAD CO., from RANDOLPH. J. T. Morehead and R. D. Douglas for plaintiff; Douglass & Simms, and Black & Adams for defendant. Per Curiam, affirmed.

G. S. DANIELS *v.* SOUTHERN RAILWAY CO., from IREDELL. L. C. Caldwell for plaintiff; Geo. F. Bason for defendant: Motion of plaintiff to docket and dismiss defendant's appeal under Rule 17 allowed. Motion of defendant to reinstate denied.

STATE *v.* A. L. STEVENSON, from FORSYTH. Attorney-General for the State; Holton & Alexander, and Spencer Blackburn for defendant. Per Curiam, affirmed.

W. E. HANDY, *et al.*, *v.* FARMERS MUTUAL FIRE INSURANCE CO., from WILKES. Finley & Green for plaintiffs; W. W. Barber for defendant. Per Curiam, affirmed.

STATE *v.* CHAS. CROWE, from WATAUGA. Attorney-General for State; E. F. Lovill for defendant. Per Curiam, affirmed.

HENKLE, CRAIG & CO. *v.* SOUTHERN RAILWAY CO., from CATAWBA. S. J. Ervin for plaintiff; G. F. Bason and A. B. Andrews, Jr., for defendant. Per Curiam, affirmed.

CASES DISPOSED OF WITHOUT OPINION.

STATE *v.* WILL RHYNE, from GASTON. Petition of defendant for *certiorari* denied.

J. W. AUSTIN *v.* C. STEWART, from UNION. Petition of plaintiff to rehear dismissed. DOUGLAS, J., dissenting.

MEARES, RECEIVER, *v.* MONROE LAND & IMPROVEMENT CO., from UNION. R. B. Redwine and Burwell, Walker & Cansler for plaintiff; Adams & Jerome for defendants. Petition of defendants to rehear dismissed. DOUGLAS, J., dissenting.

W. S. BIGGERS *v.* N. C. RAILROAD CO., from MECKLENBURG. Burwell, Walker & Cansler, and Osborne, Maxwell & Keerans for plaintiff; G. F. Bason for defendant. Per Curiam, affirmed.

POWERS, GIBBS & CO. *v.* W. C. KISER & CO., from LINCOLN. Motion of plaintiff to docket and dismiss defendant's appeal under Rule 17 allowed. Motion for judgment refused.

JOHN BASSETT *v.* H. ATWATER, from BUNCOMBE. Dismissed for failure to prosecute.

W. B. WILLIAMSON *v.* R. H. PENDER, from SWAIN. Dismissed for failure to bring case to the proper term of this Court, and for failure to print.

COWAN, MCCLUNG & CO., *et al.*, *v.* JAS. BARKER LUMBER CO., from MACON. Petition of appellant to reinstate appeal denied.

HARRIS CLAY CO. *v.* J. M. CARPENTER, *et al.*, from JACKSON. G. S. Ferguson and J. J. Hooker for plaintiff; C. C. Cowan for defendants. Per Curiam, affirmed.

T. T. PATTON, *et al.*, *v.* M. D. COOPER, *et al.*, from TRANSYLVANIA. W. W. Zachary for plaintiffs; Geo. A. Shuford for defendant. Per Curiam, affirmed.

J. H. DITMORE *v.* N. A. GOINS, from CHEROKEE. F. P. Axley and E. B. Norvell for plaintiff; Dillard & Bell for defendant. Per Curiam, affirmed.

A. Z. ROBERTS *v.* FRANCES ROBERTS, *et al.*, from CHEROKEE. Dillard & Bell for plaintiff; R. L. Cooper for defendants Per Curiam, affirmed.

J. H. MCADEN *v.* THOMAS LONGBOTTOM, *et al.*, from CHEROKEE. Dillard & Bell for plaintiff; R. L. Cooper for defendants. Per Curiam, affirmed.

JOHN KEENER *v.* S. L. KELLY, *et al.*, from MACON. J. F. Ray for defendants. No counsel *contra*. Per Curiam, affirmed.

INDEX.

INDEX.

INDEX.