NORTH CAROLINA REPORTS.

VOL. 134.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AUGUST TERM, 1903.
SPRING TERM, 1904.

REPORTED BY

ZEB. V. WALSER.

ANNOTATED BY

WALTER CLARK.

RALEIGH:
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1 " Eq.	"	36	"
2 " "	"	37	"
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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	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

AUGUST TERM, 1903.

SPRING TERM, 1904.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

WALTER A. MONTGOMERY, ROBERT M. DOUGLAS,
PLATT D. WALKER, HENRY G. CONNOR.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

ZEB. V. WALSER.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Name.	*District.*	*County.*
GEORGE H. BROWN	First	Beaufort.
ROBERT B. PEEBLES	Second	Northampton.
HENRY R. BRYAN	Third	Craven.
CHARLES M. COOKE	Fourth	Franklin.
OLIVER H. ALLEN	Fifth	Lenoir.
WILLIAM R. ALLEN	Sixth	Wayne.
T. A. MCNEILL	Seventh	Robeson.
WALTER H. NEAL	Eighth	Scotland.
THOMAS J. SHAW	Ninth	Guilford.
BENJAMIN F. LONG	Tenth	Iredell.
ERASTUS B. JONES	Eleventh	Forsyth.
WILLIAM A. HOKE	Twelfth	Lincoln.
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SOLICITORS.

Name.	*District.*	*County.*
GEORGE W. WARD	First	Pasquotank.
WALTER E. DANIEL	Second	Halifax.
L. I. MOORE	Third	Pitt.
CHARLES C. DANIEL	Fourth	Wilson.
RODOLPH DUFFY	Fifth	New Hanover.
ARMISTEAD JONES	Sixth	Wake.
C. C. LYON	Seventh	Bladen.
L. D. ROBINSON	Eighth	Anson.
AUBRY L. BROOKS	Ninth	Guilford.
WILLIAM C. HAMMER	Tenth	Randolph.
S. P. GRAVES	Eleventh	Surry.
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J. F. SPAINHOUR	Fourteenth	Burke.
MARK W. BROWN	Fifteenth	Buncombe.
THAD. D. BRYSON	Sixteenth	Swain.

LICENSED ATTORNEYS.

SPRING TERM, 1904.

ADAMS, JOHN S. ..... Buncombe County.
ALLEN, THOMAS A. ..... Granville County.
ANDREWS, IRA E. D. ..... Orange County.
AXLEY, WILLARD M. ..... Cherokee County.
BALEY, LEWIS J. ..... Tennessee.
BELL, WILLIE C. ..... Harnett County.
BROOKS, JULIAN C. ..... Union County.
BULWINKLE, ALFRED L. ..... Gaston County.
CARSON, JAMES M. ..... Rutherford County.
CASHWELL, DAVID J. ..... Cumberland County.
DANIEL, JOHN G. ..... Halifax County.
DRIGGERS, GETTIS H. ..... Henderson County.
DUNN, WILLIAM A. ..... Halifax County.
GREEN, GEORGE C. ..... Halifax County.
HARDING, COLIN H. ..... Beaufort County.
HARRIS, CHARLES U. ..... Wake County.
HERRING, ROBERT W. ..... Sampson County.
JONES, WALTER ..... Hyde County.
JOHNSON, LUREN T. ..... Sampson County.
KINLAW, WADE H. ..... Robeson County.
KUYKENDALL, EDGAR D. ..... Guilford County.
LASSITER, LEROY L. ..... Northampton County
LITTLE, JUDGE E. ..... Union County.
MARTIN, VAN BUREN ..... Northampton County
MOORE, ERNEST V. ..... Alexander County.
NEWBY, MARTIN L. ..... Durham County.
SWINK, WALTER L. ..... Forsyth County.
TILLEY, ARTHUR E. ..... Ashe County.
TOON, EDWARD N. ..... Columbus County.
WAGONER, JOHN M. ..... Alleghany County.
WAGONER, WALTER M. ..... Alleghany County.
WARD, GEORGE R. ..... Duplin County.
WELCH, GILMER B. ..... Swain County.
WIKE, CHARLES B. ..... Jackson County.
WILLIAMS, BUXTON B. ..... Warren County.
WITHERSPOON, DONALD ..... Catawba County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Fall of 1904 and Spring of 1905

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1904.	Spring Term, 1905
First District	August 30	February 7
Second District	September 6	February 14
Third District	September 13	February 21
Fourth District	September 20	February 28
Fifth District	September 27	March 7
Sixth District	October 4	March 14
Seventh District	October 11	March 21
Eighth District	October 18	March 28
Ninth District	October 25	April 4
Tenth District	November 1	April 11
Eleventh District	November 8	April 18
Twelfth District	November 15	April 25
Thirteenth District	November 22	May 2
Fourteenth District	November 29	May 9
Fifteenth District	December 6	May 16
Sixteenth District	December 13	May 23

SUPERIOR COURTS.

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

(The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold).

FIRST JUDICIAL DISTRICT.

FALL TERM, 1904—Judge E. B. Jones.
SPRING TERM, 1905—Judge B. F. Long.

Currituck—Sept. 5 (1); Feb. 27 (1).
Camden—Sept. 12 (1); Mar. 6 (1).
Pasquotank—Sept. 19 (1); Nov. 28 (1); Mar. 13 (2); May 29 (2).
Perquimans—Sept. 26 (1); Mar. 27 (1).
Chowan—Oct. 3 (1); April 3 (1).
Gates—Oct. 10 (1); April 10 (1).
Beaufort—†Oct. 17 (2); Dec. 5 (3); Feb. 13 (2); †April 17 (1); *May 15 (1).
Washington—Oct. 31 (1); April 24 (1).
Tyrrell—Nov. 7 (1); May 1 (1).
Dare—Nov. 14 (1); May 22 (1).
Hyde—Nov. 21 (1); May 8 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. A. Hoke.
SPRING TERM, 1905—Judge E. B. Jones.

Northampton—‡Aug. 1 (1); Oct. 31 (2); ‡Jan. 23 (1); Mar. 27 (2).
Hertford—*Aug. 15 (1); Oct 24 (1); Feb. 27 (1); April 24 (1).
Halifax—Aug. 22 (2); Nov. 28 (2); *Jan. 30 (1); Mar. 6 (2); June 5 (2).
Bertie—‡Sept. 12 (1); Nov. 14 (2) ‡Feb. 20 (1); May 1 (2).
Warren—Sept. 19 (2); Feb. 13 (1); June 19 (1).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. B. Councill.
SPRING TERM, 1905—Judge W. A. Hoke.

Greene—Sept. 5 (1); Dec. 5 (2); Feb. 27 (1).
Pitt—Sept. 19 (1); †Nov. 7 (2); Jan. 16 (2); †Mar. 20 (2); April 24 (2).
Craven—Oct. 3 (2); Nov. 21 (2); †Feb. 13 (1); *April 10 (1); †May 8 (2).
Carteret—Oct. 17 (1); Mar. 13 (1).
Pamlico—Oct. 24 (1); April 17 (1).
Jones—Oct. 31 (1); April 3 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge M. H. Justice.
SPRING TERM, 1905—Judge W. B. Councill.

Nash—Aug. 29 (1); Nov. 28 (2); Mar. 13 (1); May 1 (2).
Wilson—*Sept. 5 (1); †Nov. 14 (2); *Dec. 12 (1); Feb. 6 (2); May 15 (1).
Edgecombe—Sept. 12 (1); †Oct. 31 (2); Mar. 6 (1); †April 3 (2).
Martin Sept. 19 (2); Mar. 20 (2).
Vance—Oct. 3 (2); Feb. 20 (2); May 22 (1).
Franklin—Oct. 17 (2); Jan. 23 (2); April 17 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge Frederick Moore.
SPRING TERM, 1905—Judge M. H. Justice.

Duplin—Aug. 29 (1); Oct. 31 (2); Jan. 16 (1); Mar. 13 (1).
Pender—Sept. 5 (1); Jan. 9 (1); Feb. 27 (1).
Lenoir—Sept. 12 (2); Nov. 14 (2); Mar. 20 (2); June 12 (2).
New Hanover—Sept. 26 (1); Oct 17 (2); Nov. 28 (1); Jan. 23 (1); Jan. 30 (2); April 3 (1); April 10 (2); May 29 (1); June 26 (1).
Sampson—Oct. 3 (2); Feb. 13 (2); May 1 (2).
Onslow—Dec. 5 (2); April 24 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge G. S. Ferguson.
SPRING TERM, 1905—Judge Frederick Moore.

Harnett—Aug. 29 (1); Nov. 14 (2); Feb. 6 (2); May 22 (1).
Johnston—Sept. 5 (1); Nov. 28 (2); Mar. 13 (2).
Wayne—Sept. 12 (2); Jan. 23 (2); April 17 (1).
Wake—July 11 (2); Sept. 26 (2); †Oct, 24 (3); Jan, 9 (2); †Feb. 27 (2); Mar. 27 (2); †April 24 (3).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge G. H. Brown.
SPRING TERM, 1905—Judge G. S. Ferguson.

Robeson—*July 25 (1); †Sept. 12 (2); *Nov. 7 (2); †Dec. 5 (1); *Feb. 6 (2); †April 3 (2); †May 22 (1).
Cumberland—*Aug. 29 (1); †Oct. 24 (2); *Nov. 21 (1); *Jan. 16 (1); ‡Feb. 20 (1); †Mar. 27 (1); May 1 (3).
Columbus—Sept. 5 (1); Nov. 28 (1); Feb. 27 (1); April 17 (2).
Brunswick—Sept. 26 (1); Mar. 20 (1).
Bladen—Oct. 10 (2); Mar. 6 (2).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge R. B. Peebles.
SPRING TERM, 1905—Judge G. H. Brown.

Union—*Aug. 1 (1); †Aug. 22 (2); *Oct. 31 (2); *Jan. 16 (2); †Feb. 20 (2); *Mar. 20 (1).
Chatham—†Aug. 8 (1); Nov. 14 (1); Feb. 6 (1); May 8 (1).
Moore—*Aug. 15 (1); †Sept. 19 (1); *Nov. 21 (1); †Jan. 23 (2); *April 24 (1); †May 15 (2).
Richmond—*Sept. 5 (1); Sept. 26 (2); *Mar. 6 (1); †April 3 (2).
Anson—*Sept. 12 (1); †Oct. 10 (2); *Feb. 13 (1); †April 10 (1); †May 29 (1).
Scotland—†Oct. 24 (1); *Nov. 28 (1); †Mar 13 (1); *May 1 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge H. R. Bryan.
SPRING TERM, 1905—Judge R. B. Peebles.

Granville—Aug. 1 (1); Nov. 21 (2); Feb. 6 (1); April 24 (2).

Orange—Aug. 8 (1); Oct. 17 (1); Mar. 13 (1); †May 22 (1).
Person—Aug. 15 (1); Nov. 14 (1); April 10 (1); †June 5 (1).
Guilford—*Aug. 22 (1); †Sept. 19 (2); *Oct. 24 (1); †Oct. 31 (1); †Dec. 12 (2); *Jan. 16 (1); †Feb. 13 (2); †April 17 (1); *May 8 (1); †June 12 (2).
Durham—*Aug. 29 (1); †Oct. 3 (2); *Dec. 5 (1); *Jan. 9 (1); †Jan. 23 (2); †Mar. 20 (2); *May 15 (1).
Alamance—†Sept. 5 (2); *Nov. 7 (1); Feb. 27 (2); †May 29 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge C. M. Cooke.
SPRING TERM, 1905—Judge H. R. Bryan.

Stanly—*July 18 (1); †Sept. 19 (1); *Dec. 19 (1); †Mar. 13 (1).
Randolph—July 25 (2); Dec. 5 (1); Mar. 20 (2).
Iredell—Aug. 8 (2); Nov. 7 (2); Jan. 30 (2); May 22 (2).
Davidson—Aug. 22 (2); Feb. 27 (2); †April 24 (1).
Rowan—Sept. 5 (2); Nov. 21 (2); Feb. 13 (2); May 8 (2).
Montgomery—Sept. 26 (2); *Jan. 23 (1); †April 17 (1).
Davie—Oct. 10 (2); April 3 (2).
Yadkin—Oct. 24 (2); May 1 (2).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge O. H. Allen.
SPRING TERM, 1905—Judge C. M. Cooke.

Forsyth—*July 25 (1); †Sept. 12 (2); *Oct. 10 (1); †Dec. 5 (2); *Feb. 13 (2); †Mar. 13 (2); May 22 (2).
Rockingham—*Aug. 1 (1); Nov. 7 (2); Feb. 27 (2); †June 12 (1).
Wilkes—Aug. 8 (2); †Oct. 24 (2); *Jan. 30 (1); †June 5 (1).
Alleghany—Aug. 22 (1); Mar. 27 (1).
Surry—†Aug. 29 (2); Nov. 21 (2); April 24 (2).
Stokes—Sept. 26 (2); May 8 (2).
Caswell—Oct. 17 (1); April 17 (1);

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. R. Allen.
SPRING TERM, 1905—Judge O. H. Allen.

Mecklenburg—†July 18 (2); *Aug. 15 (2); Sept. 26 (4); Nov. 28 (2); †Jan. 16 (2); *Feb. 13 (2); †Mar 13 (2); April 24 (2); June 5 (2).
Cleveland—Aug. 1 (2); Nov. 7 (2); Mar. 27 (2).
Cabarrus—Aug. 29 (1); Oct. 24 (2); Jan. 30 (2); May 8 (2).
Lincoln—Sept. 5 (1); Dec. 12 (1); April 10 (2).
Gaston—Sept. 12 (2); Nov. 21 (1); Feb. 27 (2); May 22 (2).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge T. A. McNeill.
SPRING TERM, 1905—Judge W. R. Allen.

Catawba—July 11 (2); Oct. 31 (2); Feb. 6 (2); †May 8 (2).
Ashe—July 25 (2); Oct. 10 (2); April 10 (2).
Watauga—Aug. 8 (2); Mar. 27 (2); June 5 (1).
Caldwell—*Sept. 19 (2); †Nov. 28 (2); Feb. 27 (2).
Mitchell—Nov. 14 (2); May 22 (2).
Alexander—Oct. 3 (1); Feb. 20 (1).

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. H. Neal.
SPRING TERM, 1905—Judge T. A. McNeill.

McDowell—Aug. 8 (2); Oct. 24 (2); Feb. 20 (2).
Rutherford—†Sept. 5 (2); Nov. 21 (2); March 13 (2).
Henderson—*Sept. 19 (2); ‡Nov. 7 (2); *Mar. 6 (1); ‡May 15 (2).
Polk—Oct. 3 (1); Mar. 27 (2).
Burke—†Oct. 10 (2); April 10 (2); †June 5 (2).
Yancey—Dec. 5 (2); April 24 (2).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge T. J. Shaw.
SPRING TERM, 1905—Judge W. H. Neal.

Buncombe—*Aug. 1 (2); †Sept. 12 (6); *Nov. 14 (2); †Dec. 5 (2); *Feb. 6 (3); †Mar. 13 (4); *April 24 (2); †May 29 (4).
Madison—*Aug. 15 (2); †Oct. 24 (2); †Jan. 23 (2); *Feb. 27 (2); †May 8 (2).
Transylvania—Aug. 29 (2); Nov. 28 (1); April 10 (2).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge B. F. Long.
SPRING TERM, 1905—Judge T. J. Shaw.

Swain—†July 25 (2); Oct. 24 (2); Mar. 6 (2).
Cherokee—Aug. 8 (2): Nov. 7 (2); April 3 (2).
Macon—Aug. 22 (2); †Nov. 21 (2); April 24 (2).
Graham—Sept. 5 (2); Mar. 20 (2).
Clay—Sept. 19 (1); April 17 (1).
Haywood—Sept. 26 (1); Feb. 6 (2); May 8 (2).
Jackson—Oct. 10 (2); *Feb. 20 (2); †May 22 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT—Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT—James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
J. A. Giles, Assistant United States District Attorney, Pittsboro.
Henry C. Dockery, United States Marshal, Rockingham.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.

DEPUTY CLERKS.

George L. Tonnoffski, Raleigh.
W. H. Shaw, Deputy Clerk for both Circuit and District Courts, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, W. S. Hyams, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshal, Greensboro.

CASES REPORTED IN THIS VOLUME.

(Mem.) following a case indicates that it was disposed of without a written opinion.

CASES CITED BY THE COURT.

I. Cases from the North Carolina Reports.

A

B

C

H

M

S

T

II. Cases Cited Outside of North Carolina.

A

B

C

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M

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

AUGUST TERM, 1903.

BROCKENBROUGH v. BOARD OF WATER COMMISSIONERS OF CHARLOTTE.

(Filed 1 November, 1903.)

1. MUNICIPAL CORPORATIONS — *Water Companies — Taxation— Bonds—Mortgages—Cities and Towns—Laws (Private)* 1881, *Ch.* 40 — *Laws* 1897, *Ch.* 68 — *Laws (Private)* 1899, *Ch.* 271 — *Laws (Private)* 1903, *Ch.* 196 — *Const. N. C., Art. II, Sec* 14 — *Const. N. C., Art. VII, Sec.* 7.

Laws 1903, ch. 196, authorizing the Board of Water Commissioners of the city of Charlotte to issue bonds for the improvement of its waterworks do not constitute the bonds a debt against the city.

2. MUNICIPAL CORPORATIONS — *Taxation — Bonds — Cities and Towns—Laws* 1903, *Ch.* 196—*Water Companies.*

Under Laws 1903, ch. 196, and Laws 1899, ch. 271, waterworks owned by a board of water commissioners are held by the said board in trust for the use of the city and are not subject to be sold for the indebtedness of the city.

3. MUNICIPAL CORPORATIONS — *Taxation — Bonds — Cities and Towns—Laws (Private)* 1881, *Ch.* 40—*Laws* 1897, *Ch.* 68—*Laws* 1903, *Ch.* 196—*Water Companies.*

Laws 1903, ch. 196, do not impair any rights of the holders of bonds issued pursuant to the provision of Laws 1881, ch. 40, and Laws 1897, ch. 68.

4. MUNICIPAL CORPORATIONS — *Taxation — Bonds — Cities and Towns—Water Companies.*

The Legislature has the power to authorize a board of water commissioners to issue bonds for waterworks and execute a mortgage to secure the same.

5. MUNICIPAL CORPORATIONS — *Taxation — Bonds — Cities and Towns—Water Companies.*

Under Laws 1903, ch. 196, the Board of Water Commissioners of the city of Charlotte is empowered to pledge the rents and tolls accruing from the operation of the waterworks to the purposes specified in the act.

ACTION by G. H. Brockenbrough and others against
(2) the Board of Water Commissioners of the city of Charlotte, heard by *Judge Walter H. Neal,* at October Term, 1903, of the Superior Court of MECKLENBURG. From a judgment for the defendant the plaintiffs appealed.

Clarkson & Duls for the plaintiffs.
Burwell & Cansler for the defendant.

CONNOR, J. This action is prosecuted by the plaintiffs, citizens and taxpayers of the city of Charlotte and members of the board of aldermen of said city, against the defendants, board of water commissioners of said city, for the purpose of restraining and perpetually enjoining a proposed issue of bonds and the execution of a mortgage on the property held and owned by said board, and pledging the rents and tolls derived from
(3) the operation thereof to secure the payment of the said bonds and the interest thereon.

The facts material to the decision of this appeal, as set forth in the complaint and admitted by the demurrer, are: On 13 March, 1897, in pursuance of authority vested in it by chapter 40, Private Laws 1881, and by chapter 68, Public Laws 1897, the board of aldermen purchased the plant, property, franchises, easements, privileges and appurtenances of the Charlotte City Waterworks. Pursuant to authority vested in it by said acts of the General Assembly and by virtue of the approval of a majority of the qualified voters of said city, ascertained at an election duly held for that purpose, it issued and sold two hundred and fifty thousand dollars of the bonds of the city, and applied the funds received therefrom to the payment of the purchase money of said property and in making extensions and improvements thereto.

At the session of 1899, chapter 271, Private Laws, the General Assembly duly passed an act whereby E. T. Cansler, R. J.

Brevard, W. C. Dowd and R. R. Jordan were constituted a board of water commissioners for the city of Charlotte, of which the mayor of said city was made *ex officio* chairman. Provision was made for filling vacancies in said board. Said board was declared to be a corporation under the corporate name of the Board of Water Commissioners of the city of Charlotte, with power to sue and be sued, to hold real estate, and to enjoy the usual privileges of a corporation. That all acts and doings of said board within the scope of their duty or authority are declared to be obligatory upon and be in law considered as if done by the board of aldermen of the city of Charlotte; the said board was empowered for and in the name of the board of aldermen of the city of Charlotte to take and hold the land, real estate, rights, franchises and property of every kind now owned by said board of aldermen, or that may hereafter be purchased for the purpose of operating and maintaining a (4) system of waterworks for the said city, and have power to acquire such additional property and make such additional improvements thereto as should be necessary to supply the city of Charlotte with a sufficient supply of good and wholesome water. Power was given to condemn land and water rights if necessary to extend said system of waterworks. The board was given power to regulate the distribution and use of water and to fix a price for the use thereof, the time of payment, etc. The property held by said board was exempt from taxation. The board was given power to collect all rents, water rates, etc., and required to keep an account thereof, and after paying the expense of operating the plant or system of waterworks under their control, including cost of such improvements as was deemed necessary, the net balance they were required to pay over to the treasurer of said city. It was provided that said board of aldermen out of such net balance should first pay the interest upon such of the bonds of the city of Charlotte as were sold for the purpose of raising money to purchase said system of waterworks, and the balance remaining to constitute a sinking fund to meet the payments of said bonds at maturity.

The members of said board organized under and pursuant to the provisions of said act of 1899, and the board of aldermen, pursuant thereto, turned over to the said board of water commissioners the said waterworks system and plant, improvements and extensions for the purpose and in accordance with the terms and provisions of said act, and in accordance therewith the said board holds the real estate, rights, franchises and property so turned over to them. Said board has since acquired additional property and made additional improvements and are endeavor-

ing to acquire still more property and make further improvements, all of which are necessary to furnish said city
(5) and its inhabitants with a sufficient supply of good, wholesome water. The population of said city was, at the last census, 19,000, and now exceeds 25,000 people. Said city has expended large sums in establishing and maintaining, and now maintains, a paid fire department for the protection of the property of the citizens of said city. It also maintains a system of sewerage made necessary for the proper drainage of its streets and for the preservation of the public health. Said system of fire protection and sewerage require large quantities of water from said waterworks system for their use, operation and efficient maintenance. The city has found it necessary to and has laid many miles of sewer and water pipes, and purchased the necessary implements, tools, etc., for the operation thereof, all of which are necessary for the protection of the property and health of said city and its inhabitants; that the present water supply is inadequate to meet the demands of public and private consumers and an efficient operation of said plans; that one of the watersheds of said city from which it derived a considerable portion of its water supply has become thickly populated and occupied by manufacturing plants, making it advisable to discontinue the use of water from that source for public or domestic purposes; that neither the said city nor the board of water commissioners have any funds on hand which can be used to purchase necessary real estate, machinery and other property to adequately equip its system of waterworks to supply the wants and needs of the city or its inhabitants; that it will require the expenditure of at least one hundred and fifty thousand dollars for said purpose; that to enable the said board of water commissioners to properly equip and maintain said waterworks system, sufficient to supply the city with water necessary for municipal purposes at a moderate cost to said city, it is necessary that the board of water commissioners shall equip and maintain a water system of sufficient capacity
(6) to furnish all the inhabitants of said city desiring to use the same a sufficient quantity of pure, wholesome water for domestic purposes, and to charge therefor certain toll or rental, without which the said commissioners would be unable to maintain said water system for municipal purposes, except at an enormous and unreasonable expense to said city.

The General Assembly at its session of 1903, chapter 196, Private Laws, at the instance and with the approval and pursuant to a resolution of the board of aldermen of said city, duly passed, in accordance with the provisions and requirements of

Article II, section 14, of the Constitution, an act repealing sections 6, 17 and 18, chapter 271, Private Laws 1899, and conferring upon the board of water commissioners power to acquire such additional property and make such additional improvements thereto as may be necessary to at all times furnish the city of Charlotte with a sufficient supply of good, wholesome water. And in order to procure necessary funds for that purpose said board was given full power and authority to issue bonds not to exceed in amount the sum of two hundred thousand dollars, in such form and of such denominations and payable at such time or times and places, and to bear such rate of interest, payable semi-annually, as said board shall determine; said bonds to be signed by the mayor of the city as *ex officio* chairman of said board, sealed with the corporate seal of said city, attested by the *ex officio* clerk of said board, and coupons on said bonds to bear the engraved or lithographed signature of said clerk. "All bonds so issued shall be equally and ratably secured by first mortgage or deed of trust upon all the real estate, rights, franchises and other property of every description owned and held by said board, and which was purchased by the city of Charlotte from the Charlotte City Waterworks Company, as well as all other property, rights and franchises which may hereafter be purchased or acquired by said board (7) for the purpose of extending, maintaining and operating said system of waterworks for said city." Provision is made for the execution of a mortgage or deed of trust on said property for the purpose of securing the payment of said bonds.

It was provided that the said board of water commissioners, out of the moneys derived from the collection of tolls or rents for water, shall pay (1) the cost and expenses of operating said plant or system of waterworks under its control, including the cost of such incidental improvements as the board may deem necessary for that purpose; (2) the semi-annual interest upon the bonds issued by virtue of section six (6) hereof as the same shall become due; (3) the cost and expense of such extensions and additions to the plant of said system as the board may, from time to time, deem advisable; (4) the semi-annual interest upon the bonds heretofore issued by the city of Charlotte for the purchase of said waterworks, as the same shall become due, for a period of fifteen years from the date thereof; (5) after the expiration of which period all moneys so derived (less the cost and expenses of operating said plant, the interest on the bonds authorized to be issued hereunder, and the cost and expenses of additions to the plant as aforesaid) shall be turned over to the treasurer of the city of Charlotte, to be held by him

and invested under the direction of the board of water commissioners for a sinking fund with which to pay off, as they may mature, first, the bonds issued by virtue of section six hereof in full; second, the bonds heretofore issued by the city of Charlotte for the purpose of purchasing said waterworks system: *Provided,* that none of the funds of the city of Charlotte raised by taxation shall ever be applied to the payment of either principal or interest of the bonds issued by virtue of section six (6) hereof."

(8) Prior to the commencement of this action the board of water commissioners, 8 October, 1903, at a regular meeting, unanimously adopted a resolution reciting the several matters and things herein set forth, and further reciting that "Whereas, it has become necessary to relocate and establish new reservoirs, pumping stations, pipe lines, etc., upon and connected with streams drawing their supply from watersheds not so liable to contamination, and sufficient to furnish the necessary water supply for said city for both present and future compensation:

"First. That the board, pursuant to the provisions of chapter 196, Private Laws, ratified 2 March, 1903, hereby authorizes and directs the issuance of one hundred and fifty thousand dollars of its bonds or obligations, payable to bearer thirty years after date of said bonds, and bearing interest at the rate of five per cent per annum, payable semi-annually, etc. The said bonds to be of the denomination of one thousand dollars each, and payable only out of the moneys to be derived by the board from the collection of tolls or rents for water, as provided in the second subsection (17) of section 1 of the act hereinbefore referred to, the terms and provisions of which act are to be considered as if incorporated herein: *Provided,* that neither the bonds authorized to be issued hereunder, the coupons attached thereto, nor the deed of trust securing the same, shall be deemed or held as creating any debt of the city of Charlotte, or as pledging the faith or lending the credit of said city for the payment of the indebtedness hereby authorized, and no action shall be maintained in any court against said city or any of its officers to enforce the payment of said indebtedness evidenced by said bonds, coupons or deed of trust except as to the funds and property herein expressly charged with the payment thereof."

(9) The form of the proposed bond is incorporated in said resolution, conforming to the provisions of said act of 1903 and said resolution.

The second of said resolutions provides for the execution of a mortgage or deed of trust for securing the payment of

said bonds, conveying said plant, and all additions made thereto, with all franchises, etc., appurtenant thereto. The said resolutions in all respects conform to the provisions and requirements of the several acts herein referred to. The complaint alleges that the proposition to issue said bonds and mortgage has not been submitted to or approved by a vote of a majority of the qualified voters of said city, nor has said board any other authority therefor than is conferred by said act of 1903. The board of water commissioners threaten to, and unless enjoined will, issue and sell said bonds and execute said mortgage or deed of trust.

The plaintiffs aver that they are advised:

1. That the title to said waterworks and appurtenances is held by said board in trust for said city of Charlotte upon the terms set forth in said acts, and that said board is bound in law to hold and operate the same upon the trusts aforesaid as such acts provide.

2. That the threatened bond issue and mortgage of said property and pledge of said rents and tolls is violation of the rights of the city of Charlotte and its citizens as secured to them by the law of the land and the several acts referred to, other than chapter 196, Private Laws 1903, and particularly violation of Article VII, section 7, of the Constitution of the State.

3. That chapter 196, Private Laws 1903, in so far as it attempts to authorize said board of water commissioners to issue said bonds and to pledge the water rents, tolls and emoluments of said waterworks plant and system, and to mortgage the said property and franchises, is violation of section 7 of Article VII of the Constitution, and that, therefore, (10) chapter 271, Private Laws 1899, directing the manner in which the rents, etc., arising from said system of waterworks and the operation thereof shall be applied is still in force and effect.

4. That said board has no power to mortgage said property or pledge the rents and tolls derived from the operation thereof, but that it is the duty of said board to hold the same upon the trusts attaching thereto.

5. That the issuance of said bonds and the execution of said mortgage will cast a cloud upon the title to said property.

The defendants demur to the complaint, for that it does not allege facts sufficient to constitute a cause of action, because it appears therefrom:

That the act of 1903 expressly confers upon the said board the several threatened acts sought to be enjoined.

That said acts of the General Assembly were passed at the instance and with the approval of the board of aldermen.

That it is necessary to issue bonds for the purpose of securing funds sufficient to make the extension and improvements referred to and to enable said board to perform the duties and functions imposed upon it by said legislation.

That said proposed bond issue is a necessary expense to be incurred in preserving and maintaining in a state of efficiency municipal property already acquired by the city and held by said board in trust for necessary municipal purposes, and that therefore it is not necessary to be first authorized by a majority of the qualified voters of said city.

That the act and the resolution of the board expressly provides for the payment of the principal and interest of said bonds from and out of the tolls and rents received from the operation of said waterworks; and further provides that neither said bonds nor the coupons attached thereto, nor the deed of trust
(11) securing the payment thereof, shall be deemed or held as creating any debt of the city of Charlotte, or as pledging the faith or lending the credit of said city for the payment of the indebtedness thereby authorized.

That the issuing of said bonds and the pledge of said water rents, etc., will not be contracting any debt or pledging the faith or lending the credit of said city in the sense inhibited by section 7 of Article VII of the Constitution.

His Honor sustained the demurrer, and the plaintiff appealed.

We have been very much aided in our investigation and disposition of this appeal by full and excellent briefs and oral arguments of the learned counsel for the parties to the record.

It will be convenient to dispose of the questions raised by the pleadings in an order somewhat different from that in which they are presented. If, as contended by the defendants, the bonds proposed to be issued are not debts or liabilities of the city, or if the making and issuance of them be not pledging the faith or lending the credit of the city within the meaning of section 7, Article VII, of the Constitution, several important and interesting questions discussed in the briefs will be eliminated. This question has not before been presented to or decided by this Court. The language of the Constitution declares that no county, city, town or other municipal corporation "shall contract any debt, pledge its faith or loan its credit," etc. The plaintiffs insist that the issuing of the bonds in controversy comes within this inhibition. "Debt" is defined to be "that which is due from one person to another; that which one person is bound to pay or perform to another." Black's Law Dict.,

337. *Perrigo v. Milwaukee,* 92 Wis., 236. "An indebtedness within restrictions upon municipal indebtedness is an agreement of some kind by the municipality to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. (12) *Sackett v. New Albany,* 88 Ind., 473; 45 Am. Rep., 467. "A debt is a specified sum of money which is due from one person to another, and denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment." *S. v. Hawes,* 112 Ind., 323. It would not be contended that upon the facts in this case the city lends its credit or pledges its faith in regard to the proposed bonds. It does not endorse or guarantee their payment or assume any obligation in respect to them. Nor can its revenues be applied to the payment of them. The income accruing from the operation of the waterworks is not to be paid into the city treasury for disbursement, nor does the city assume any responsibility in regard to the disbursement of the money by the board of water commissioners. This board collects the rents and applies them to the purposes designated in the act. After the payment of the interest and other objects mentioned in the law the amount remaining on hand shall be turned over to the treasurer of the city of Charlotte, to be held by him and invested under the direction of the board of water commissioners for a sinking fund. The treasurer of the city is made *ex officio* treasurer of said board. His bond, of course, is liable for any default in the discharge of his trust, but the city assumes no responsibility in the matter. The statute is so carefully drawn and guarded that but little is left to construction. There can be no possible doubt as to the legal effect and operation of the language used in the statute and the bond, excluding any power to apply the revenues of the city to the payment of the interest on or principal of the bonds. We find that the courts of other jurisdictions have considered and decided the question arising upon the construction of restrictive provisions similar to ours. The Constitution of the State of Washington prohibits any town or city contracting any debt in excess of a certain percentage of (13) the assessed value of its property. The city of Spokane undertook to borrow money to complete a system of waterworks, and for securing the payment thereof pledged a portion of its rents derived from said waterworks. In an action brought to restrain the city government from making the contract the Court, *Hoyt, C. J.,* said: "And it is claimed on the part of the respondent that the entering into said contract and the issuance of such obligations of the city is the incurring of an indebted-

ness within the meaning of the Constitution, and to do so at the present time is not within the power of the city, for the reason that it is already indebted beyond the constitutional limit. . . . Said ordinance and contract, when construed together, provide that the obligations to be issued in pursuance thereof shall be payable only out of the special fund to be created out of the receipts of the waterworks, as above specified, and that the city shall not be in any manner liable to pay the same except out of the moneys in said special fund. . . . This being so we are of the opinion that neither the ordinance, the contract, nor the obligations to be issued by the city in pursuance thereof, do or will constitute a debt of the city within the constitutional definition. The only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiaries under the contract. The general credit of the city is in no manner pledged except for the performance of its duty in the creation of the special fund." *Winston v. Spokane,* 41 Pac., 888 (Wash.) The Court affirmed and followed this case in *Faulkner v. Seattle,* 53 Pac., 365 (Wash.)

The Supreme Court of Iowa, in *Swanson v. Ottumwa,* 59 L. R. A., 620 (Iowa), thus states the view held in that State, which we think is correct: "The tax required to be levied is clearly authorized by the statute, and such tax, together with
(14) the income of the company derived from other sources, the ordinance expressly provides shall pay all obligations assumed by the city. If it does not, neither the bond-holders nor company have any claim on the city for the deficiency. The obligation of the city is to levy the tax and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city; and it is difficult to conceive how there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there cannot be such an indebtedness. In a constitutional sense the prohibited indebtedness must be a burden and payable from funds which could not be constitutionally appropriated for that purpose." *Waterworks Co. v. Creston,* 101 Iowa, 687.

The Supreme Court of Illinois, in *Springfield v. Edwards,* 84 Ill., 633, thus states the proposition: "When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation, leaving no future obligation, either absolute or contingent, upon it whereby its debt may be increased." It is also held in this case that for a failure to collect and pay

over the "special fund" the remedy must be against the officers and not against the corporation, "otherwise a contingent debt would be incurred."

The case of *U. S. v. Fort Scott,* 99 U. S., 152, presents very clearly the distinction between the status of the city in respect to the bond issue therein and in our case. *Mr. Justice Harlan* says: "The general reference upon the margin of the bonds to the ordinance under which the improvement was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city set forth in the body of the bonds, itself to pay the bonds, with the prescribed interest, at maturity." Again he says: "But the unques- (15) tioned fact remains that the bonds, with some interest, held by the relator were not paid at maturity as the city agreed that they should be."

As we have pointed out, the city of Charlotte makes no such promise. Any inference or suggestion to that effect is expressly negatived by the act, the resolution and the terms of the bonds.

It is said, however, if the rents and tolls accruing from the operation of the waterworks, as provided by the act of 1899, are diverted to the purposes of the act of 1903, the burden on the ordinary revenues will be increased and thereby its debt indefinitely increased. We cannot see how this result can justly be called contracting a debt. The question raised by this suggestion will be discussed in another phase of the controversy. We conclude that the proposed bond issue will not constitute a debt against the city of Charlotte in any legal or constitutional sense. It is immaterial, in this phase of the question, whether we regard the bonds as issued by the board of aldermen or the board of water commissioners. We deem it proper to say this, that it may be seen that we have not overlooked the language of section 6 of the act of 1903: "And the contracts and engagements, acts and doings of said board within the scope of its duty and authority shall be obligatory upon and be in law considered as if done by the board of aldermen of the city of Charlotte." The conclusion which we have reached is not affected by the fact that the bonds are issued by the board of water commissioners, but is based upon the provision for raising the fund out of which they are to be paid, *to the express exclusion of any other fund or revenue of the city.*

Holding, as we do, that the proposed bond issue is not creating a debt against the city, or lending its credit, or pledging its faith, we do not deem it necessary to pass upon the question raised by the demurrer, that the purpose for which (16)

the fund is to be raised is a "necessary expense," within the meaning of Article VII, section 7, of the Constitution. There is much force in the position that upon the admitted facts in the case the bond issue could be sustained as a necessary expense. It is evident that the value and efficiency, if not the preservation, of the present system of waterworks as an essential agency in protecting the property and health of the city and its inhabitants is involved in the proposed action by the board. While the policy indicated by the restrictive constitutional provision upon municipal indebtedness must be kept in view and upheld, we may not disregard the ordinary meaning of words or give to them a strained and unusual construction. Surely no one could well contend that these words, if used in a power of attorney respecting the private business of the citizen, would be construed to prevent the agent from assuming for his principal such obligations as were necessary for the protection of his property and the performance of the duties imposed upon him. The people of Charlotte have by their votes declared that a system of waterworks is essential to their corporate welfare and safety. They have empowered their municipal servants and agents to expend a large sum for securing such a system. Is it not clear that this involves the duty of protecting this property and making it efficient for the very important, may we not say necessary, purpose for which it was originally acquired? If so, the power to contract such obligations as are necessary to discharge the duty must be found. "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, and designated as a chart upon which every man, learned or unlearned, may be able to trace the leading principles of government." Cooley Const. Lim., 59.

That waterworks are held by the city or such *quasi* municipal corporations as may be established by the Legislature for
(17) such purpose for public use and for public purposes is clearly shown by the Supreme Court of the United States in *New Orleans v. Morris,* 105 U. S., 65.

The plaintiffs suggest that the property purchased by the city by the board of aldermen, and by the act of 1899 transferred to the board of water commissioners, is impressed with a trust for the city and for the purposes set out in this act, "and that said board is bound in law to hold and operate the same upon the trusts aforesaid." It is clear that the Legislature may, in aid of municipal government or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards and confer upon them such powers and duties

as in its judgment may seem best. Section 4, Article VIII, of the Constitution, ordains that "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages," etc. It is uniformly held that "municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure," etc. *Lilly v. Taylor,* 88 N. C., 489; *Harris v. Wright,* 121 N. C., 172; *S. v. Beacham,* 125 N. C., 652. The Legislature has frequently exercised the power conferred by the Constitution by establishing boards of health in towns and cities, school boards and such others as may be deemed wise as additional government agencies. We do not understand that this power is questioned, or that the title to the property purchased by the city from the Charlotte City Water Company did not pass to and vest in the board of water commissioners established by the act of 1899.

In *Water District v. Waterville,* 96 Me., 254, it is said: "The Kennebeck Water District is a *quasi* municipal corporation. . . . The powers, the rights and the property (18) of the new corporation rest exclusively in it, and in no degree in the city of Waterville. That the Legislature has authority to create the Water District cannot be successfully questioned."

"There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the Constitution of this State to prevent the Legislature from placing the police department of Chicago or its fire department or its waterworks under the control of an authority which may be constituted for such purpose."

"The Constitution nowhere commits corporate objects or purposes irrevocably to authorities now existing, nor does it prohibit the committal of them to such corporate authority whose appointment may be called into life by the same law which creates the subject and commits it to their jurisdiction." *People v. Solomon,* 51 Ill., 37; *Wilson v. Sanitary Dist.,* 133 Ill., 443; *People v. Draper,* 15 N. Y., 443. A very exhaustive discussion of the subject may be found in *Dovock v. Moore* (Mich.), 28 L. R. A., 783. Plaintiffs contend that, conceding the power of the Legislature to establish the board of water commissioners and to transfer to the said board the property of the city, as

was done by the act of 1899, that the Legislature has not the power to repeal that act and attach other and different trusts to the property, or authorize the board to sell or mortgage it, and for this position they assign two reasons: First, because it is taking the property of the city without due process of law; and second, because by the act of 1899 the net rents and tolls of the waterworks are directed to be applied to the payment of the interest accruing on said bonds, and to create a sink-
(19) ing fund for their payment.

Referring to the liability of waterworks to be sold for debts of the city *Judge Miller* says: "The learned counsel, in the oral argument and in the brief, substantially concede that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens."

"The property owned by the city corporation is held by it as a public corporation and is subject to the law-making power of the State vested in the Legislature." *Darlington v. The Mayor, etc.*, 31 N. Y., 164; 88 Am. Dec., 248, in which the question is exhaustively discussed. *Merriweather v. Garrett*, 102 U. S., 473. In *Waterworks Co. v. Huron* (S. Dak.), 30 L. R. A., 848; 58 Am. St., 817, we find a careful review of the authorities and decisions, the Court saying: "Having, as we think, established the proposition that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore, charged and clothed with a public trust, it would seem to follow that such property cannot be sold and conveyed by the mayor and common council of the city *unless under special authority conferred upon them to sell and convey the same by the legislative power of the State.*"

The Supreme Court of Connecticut, in *West Hartford v. Water Commissioners*, 44 Conn., 360, said: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term; not indeed as the dis-
(20) charge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the Legislature invested the city with a portion of its sovereignty. . . . The city of Hartford, that it might more economically discharge its duty in this behalf, entrusted this mat-

ter of the introduction of water to an agency named the board of water commissioners, and in the name of this agency these lands were purchased and are now held. But they are held merely as a trust; in substance, the land was bought and paid for and is now clearly the property of the city." These and many other cases we have examined establish the doctrine that the waterworks are held for the benefit of the public, and are therefore subject to legislative control. In this case it appears affirmatively that this act of 1903 was passed at the request and with the approval of the board of aldermen of Charlotte. That the Legislature may empower the city by its appointed agencies to dispose of property held upon trusts for the public is settled. Dillon on Municipal Corporations, 575. *Judge Dillon,* after noticing a case holding that the power to take, hold, sell and dispose of property so held confers the power to mortgage, says that he cannot concur with that view, and proceeds to say: "Under charter authority to make all contracts which they may deem necessary for the welfare of the city, a mayor and councilman were considered to have the power to mortgage the city waterworks for the payment of bonds lawfully issued for the construction of the same." Without adopting this view of the law we have no difficulty in holding that by express permission of the Legislature the board may execute a valid mortgage conveying the waterworks, etc., for the purpose of securing the bonds. The plaintiffs suggest that as the act of 1899 applied to rents and tolls of the waterworks, the act of 1903 cannot divert them. Certainly the holders of the bonds of 1897 had no lien upon or contract right to these rents. The bonds were issued two years before the act was passed, therefore (21) the purchasers could not look to any other claim upon the city than its general revenues.

In *Adams v. Rome,* 59 Ga., 765, *Bleckley, C. J.,* says: "With the proceeds of the bonds the waterworks were paid for. The holders of the bonds received them without other express security than those offered by the special act. These provisions were in substance that all the property within the city, real and personal, should be subject to taxation *pro rata* for the payment of the interest and the redemption of the bonds. . . . It is argued in behalf of the city that the means of liquidation thus provided for by law are exclusive, and that for that reason the mayor and council could not devote the waterworks or any other property to the payment of the interest or to the discharge of the principal of the bonds. We think otherwise. The special act was not intended, as it seems to us, to narrow or cut down the charter in respect to the power of disposing of the corporate

property, or of applying the same to the corporate indebtedness by any contract deemed by the mayor and council necessary for the welfare of the city."

The Supreme Court of the United States, speaking of the cases which hold that corporate property pledged to the payment of bonds may not be diverted from that purpose, says: "They simply hold that an act of the Legislature, passed after a contract is made, which withdraws property, then liable to be seized and sold in enforcement of that contract, from the power of the courts to seize and sell it, impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property *not* subject to sale for the enforcement of the contract cannot, in providing for a change in the mode of the title by which the debtor holds it, continue the exemption from forced sale of that which it represents in the hands of the
(22) same owner the property so exempt."

We have not overlooked *Vaughn v. Commissioners*, 118 N. C., 636, in which it is held that the commissioners of a county may not mortgage the courthouse to secure bonds issued for the purpose of building it. There was no legislative authority conferred to do so. There is no suggestion in the opinion of the Court that such power could not be conferred.

The only case to which our attention has been called which militates against the view which we have taken is *Joliet v. Alexander* (Ill.), 62 N. E., 861. Without extending this opinion with a discussion of the facts therein, and the conclusion reached by the Court, we do not regard it as controlling us in the disposition of this case. The power to execute a mortgage does not appear to have been conferred by the statute, the terms of which are not set out.

In *Southport v. Stanly*, 125 N. C., 464, this Court, construing section 3824 of the Code, says: "The reasonable construction of the statute must be that the town or city authorities can sell any personal property, or sell or lease any real estate which belongs to the town or city, as the surplus of the original acreage ceded for the town or city site, or such land as may have been subsequently acquired or purchased. But in no case can the power be extended to the sale or lease of any real estate which . . . is to be held in trust for the use of the town, or any real estate . . . which is devoted to the purpose of government, including town or city hall, market house, houses used for fire departments or for water supply, or for public squares or parks. To enable the town to sell such real estate as is mentioned just above, there must be a special act of the General Assembly authorizing such sale or lease."

It is stated that to enable the commissioners to furnish water for municipal purposes at a reasonable expense, it (23) is necessary that it be furnished to citizens at a fair and reasonable rental. The power of the city to do this was brought into question in *Slocumb v. Fayetteville,* 125 N. C., 362. *Furches, J.,* said: "We see no objection to the town furnishing electric lights and power to its citizens at uniform rates, as this is a means of local assessment according to the special benefits received by such parties over that of the general public, and these assessments may be used for the support of the concern and the general benefit of the whole." We think this language meets the objection to the power of the board, with legislative sanction, to pledge the tolls, rents, etc., of the public waterworks to the purposes prescribed by the act. Such assessments are no part of the revenue of the city derived from taxation. The distinction between the taxing power and the power to levy assessments for special benefits is clearly pointed out by this Court in *Shuford v. Commissioners,* 86 N. C., 552, and other cases in which the question is discussed and decided. 25 A. & E. Enc., 1168. We can see no reason why the Legislature may not, under its general power to provide for the government of cities and towns and legislate in regard to them, authorize the board of water commissioners to apply the rents and tolls, as they accrue, to the purposes set out in the act, and to pledge such application. The contract thus made will be enforcible by appropriate remedies. We therefore hold that the bonds authorized by the act of 1903 to be issued do not constitute a debt against the city of Charlotte; that the waterworks now owned by the board of water commissioners, or hereafter to be purchased, with all rights and franchises appurtenant thereto, are held by the said board in trust for the use of the city, and are not subject to be sold for any indebtedness of the city; that the act of 1903 does not impair any rights of the holders of the bonds issued pursuant to the provisions of the acts of 1881 and 1897; that the (24) Legislature has the power to authorize the issuing of the bonds and execution of the mortgage proposed to be issued and executed pursuant to the act of 1903; that, pursuant to the provisions of said act, the board of water commissioners has the power to pledge the rents and tolls accruing from the operation of said waterworks to the purposes specified in said act.

The judgment of the court below is

Affirmed.

WHITFIELD v. GARRIS.

(Filed 8 December, 1903.)

WILLS—*Construction—Descent and Distribution—Legacies and Devises—Code, Secs.* 2180, 1325.

Where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body.

PETITION to rehear this case, reported in 131 N. C., 148. Petition denied.

W. C. Munroe and *F. A. Woodard* for the petitioner.
F. A. Daniels and *W. T. Dortch* in opposition.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided by this Court at August Term, 1902, and is reported in 131 N. C., 148.

The action was brought to recover real property. The plaintiffs, who are the heirs at law of Franklin Whitfield,
(25) claim the land under the fifteenth item of the will of Lewis Whitfield, grandfather of Franklin, who died in 1850. By that item, the land, which is described in the complaint, is devised "to Franklin Whitfield, son of L. S. Whitfield, and in the event of the death of the said Franklin Whitfield, leaving no heirs of his own body, the land to descend to the three sons of L. S. Whitfield or the survivor of them, and in case the last survivor of the sons of L. S. Whitfield, deceased, should die, leaving no heirs of his own body, the said land to be equally divided between all of the grandsons of the testator." One of the defendants alleges that Franklin Whitfield conveyed a part of the land to him in fee, with warranty, and the other defendants allege that he conveyed the residue in fee, with warranty, to John W. Isler, under whom some of them claim by descent, and others by actual purchase. There was no dispute as to these facts.

It will be seen, therefore, that a determination of the controversy requires a construction of the fifteenth item of Lewis Whitfield's will. The contention of the plaintiffs is that by that item of the will an estate for his life only was given to Franklin Whitfield, and by implication the fee was given to his children in remainder, if he left any. The defendants, on the contrary, contend that by the will Franklin Whitfield was given an estate in

fee, determinable upon his dying without issue of his body, or children, which is the same thing, under our statute; and that, while his deeds did not convey an indefeasible title to the land at the time they were executed, as he afterwards died, leaving heirs of his body, or children, the estate conveyed by the deeds, which was theretofore contingent, thereby became absolute and indefeasible, and this Court so decided at the last hearing. We are not disposed, after a full and careful reconsideration of the question and a thorough examination of all the authorities upon which the plaintiffs rely, to reverse that decision, because we regard it as correct and in strict accordance with former decisions of this Court and the general and well-established principles of law. The cases cited by the plaintiffs when rightly considered, do not, we think, conflict with the conclusion thus reached, with perhaps one or two exceptions, which, if they cannot be explained or distinguished by their special facts or circumstances, are opposed to the great weight of authority. It is not insisted that there is any express provision of the will by virtue of which the plaintiffs can claim the testator intended that if Franklin Whitfield left children they should take the land as purchasers under the will, and not by descent from their father, if he should not dispose of the same, but the argument is that the very terms of the will signify an intention on his part to confine the operation of the devise to the life of Franklin Whitfield and to give a remainder in fee to his children, if he should have any, and if he died without leaving children, then over to the persons named, alternatively, as beneficiaries under the ulterior devise, and that thus a gift by implication, or by construction, as it is sometimes called, is raised in favor of the children by way of remainder or as purchasers under the will. (26)

In order to induce us to adopt their view, the plaintiffs must make out a very strong case. "It is a well-known maxim," says Jarman, in his work on wills, "that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." 2 Jarman on Wills (5 Am. Ed., by R. & T.), 112; *Post v. Hover,* 33 N. Y., 599. It is also said that an estate by devise may pass by implication, without express words to direct its course; but where an implication is allowed, it must be raised by a necessary or at least a highly probable and not merely a possible implication. The general policy of the law and the leaning of the courts are against the doctrine of implied estates under such devises, and have tended rather to limit than to extend it. *Halton v. White,* 23 N. J., 330. *Lord Mansfield,* in referring to (27)

this subject, said that "Necessary implication is that which leaves no room to doubt. It is not an implication upon conjecture. You are not to conjecture what he would have done in an event the testator never thought of; that will not do." In *Jones v. Morton,* reported in 1 Fearne on Rem. (Appendix), 590, *Lord Eldon,* discussing the same proposition, said: "With regard to that expression, 'necessary implication,' I will repeat what I have before stated: that, in construing a will, conjectures must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." *Williamson v. Adams,* 1 V. & B. Ch., 465; *Nickerson v. Bowly,* 8 Metc., 431; *Rathbone v. Dyckman,* 3 Page, 28.

It is provided by our statute that when real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. Code, sec. 2180. By force of this statute, which is the act of 1784, Franklin Whitfield took an estate in fee, unless it was "plainly intended" by the testator that he should have a less estate. It surely cannot be contended by the plaintiffs that it appears "in plain and express words" the testator intended that he should not have an estate in fee simple, or that he should have only a life estate. We have found no expression in the will, nor can we discern therefrom any intention of the testator, which precludes the construction the statute places upon its words, or which prevents the full operation of the statute in vesting a fee when inheritable words are not used. The
(28) plaintiffs encounter not only the strong leaning of the law against their construction, but also the positive requirement of the statute that the devise shall be held to be in fee unless the testator plainly intended by his will that an estate of less dignity should pass to the beneficiary. An intention contrary to that implied by the statute must be gathered from the will, and the burden, of course, is upon the plaintiff to show that it exists. Instead of there being any evidence of such an intention in the will, we think that the terms of the devise plainly evince the purpose of the testator to have been to vest in Franklin Whitfield an estate in fee; or, at all events, the limitation that if he died without heirs of his body the property should go over to the ulterior heirs' devisees, does not rebut the intendment of the statute. The devisor must be presumed to have known the law which was in force at the time his will was written, and,

acting upon this presumption, there must be inserted in the will the provision of the statute, so that it will read, "I devise to my grandson, Franklin Whitfield, and his heirs, that part of my lands," etc. He thereby acquired a fee-simple estate, unless the words, "in the event of his death, leaving no heirs of his body," are sufficient to restrict the estate devised to one of less duration than a fee, or, in other words, to a life estate, and thereby prevent the insertion of inheritable words in the devise. Why should we assume that the testator was ignorant of the law, and therefore intended, by his failure to use words of inheritance, to devise only a life estate? Is not the provision for the estate to go over in the event of his death without heirs of his body fully explained and the intention executed by allowing his surviving children to take as heirs—that is, by descent from him? And is not this construction perfectly consistent and in harmony with the requirement of the statute that inheritable words shall not be necessary to create an estate in fee simple by will? But suppose that, as he has used the words, "in the event of his death, leaving no heirs of his body," he intended to devise (29) the land to his grandson, Franklin Whitfield and the heirs of his body, and that such a devise is to be clearly implied from the very language of this item of the will, then, by virtue of the statute (Laws 1784, ch. 304; Code, sec. 1325), the estate so created must be deemed and held to be a fee simple. *Ward v. Jones,* 40 N. C., 400; *Jones v. Spaight,* 4 N. C., 158; *Bird v. Gilliam,* 121 N. C., 326; *Buchanan v. Buchanan,* 99 N. C., 308. So that, whatever view is taken of it, whether the will is construed with reference to what is said in section 1325 of the Code (Laws 1784, ch. 204, sec. 5), or section 2180 (Laws 1784, ch. 204, sec. 12), we will reach the same result. The idea that Franklin Whitfield took a fee, and that his heirs, but for his conveyance of the land, would have taken, not as purchasers, but by descent from him or as his heirs, explains several of the cases cited by the plaintiffs' counsel in his brief; for where, in the cases, it is said that the reason for using the words, "dying without issue or without having issue or heirs of the body," in devises of land, is "because they are supposed to be inserted in favor of the issue, that they may have it," we think the courts merely meant that the issue shall take as heirs—that is, by descent, and not by purchase; and the cases cited by the plaintiffs' counsel can be reconciled in that way with those which we consider as constituting the great weight of authority upon this question and which hold that a fee-simple estate is devised, subject to be defeated by the happening of the contingency, and in the latter event it will vest in the ulterior devisees under the terms of the will.

We will now examine some of the authorities which, we think, bear directly upon the question as to the true construction of this item of the will.

It is said in Underhill on Wills, sec. 468: "Where real
(30) or personal property is gievn to a person absolutely, but if he should die without leaving children, then over, the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though the children, if he leave any, take no estate, as purchasers under the will, by implication. If the first taker shall die, leaving children him surviving, by which event the remainder is defeated, they will take by descent from their parent, and not as purchasers under the will. He has an estate in fee, with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated."

Hilliard v. Kearney, 45 N. C., 221, is, when properly considered with reference to the facts of that case and the facts of the case now under consideration, an authority for the position that Franklin Whitfield took a fee simple. It is true, as contended by the plaintiffs' counsel, that in *Hilliard v. Kearney* the particular question presented was as to the time when the estate would become absolute in the first taker, but the principle upon which the decision is based is necessarily involved in this case. It would have been idle for the court to have attempted to fix the time when a life estate would become absolute. The very question under discussion necessarily presupposed that the estate was a fee simple, which was defeasible upon the happening of a certain event. In that case the same words substantially were used in the will as were found in the will of Lewis Whitfield, namely, "If either of them should die without an heir," her share to go over. *Pearson, C. J.,* refers to this question, and says it is not for the benefit of the children of any daughter who may die, leaving children, "for there is no limitation over to them." And again: "There are no words showing an intention to give a preference to such of the daughters as died leaving children, except to the extent of making the shares absolute at their death."
(31) He puts this case: "A gift to A, but in case he dies, leaving a child, then to such child, and if he dies without leaving a child, then to B"; and then says that the estate thus devised became absolute at the death of the testator. Why should this have been so, with reference to any estate except a fee? That A was given an absolute life estate—that is, one free from any conditions or contingencies—must be conceded without argument; and the Chief Justice was manifestly referring to the fee

with the view of deciding when the defeasibility of the estate would cease; and upon the policy of the law which favors the unrestricted enjoyment and right to dispose of property, he adopted the earliest time for its vesting absolutely. *Hilliard v. Kearney* would never have been presented for decision except upon the assumption that the daughters, by the very terms of the will, took a fee, although no words of inheritance were used; the fee so taken by them being determinable upon the death of any one of the daughters without leaving issue. To the same effect are *Murchison v. Whitted,* 87 N. C., 465, and *Camp v. Smith,* 68 N. C., 539.

In *Sadler v. Wilson,* 40 N. C., 296, the devise was to the testator's ten children, and if any of them died before having lawful heirs of his or her body, then over to the survivors of them. It was held that each of the children took a fee defeasible upon his or her dying without having a child, and that upon the birth of a child the fee became absolute in its parent. How could this be the law if the plaintiffs' contention in this case is correct? In *Taylor v. Maris,* 90 N. C., 619, where the devise was precisely like the one in the last-stated case, the Court held that "Upon the death of the testator the devisees became seized as tenants in common in fee defeasible upon the death of one of them without issue."

We will now advert to some of the cases in which an estate in common was not devised, but an estate in severalty given to the first taker, and these cases we are utterly unable to (32) distinguish from the one under consideration.

In *Burton v. Conigland,* 82 N. C., 99, the devise was to the testator's nephew, John Ponton, and should he die leaving no issue, then the land to go to his brothers and sisters, William Ponton and others; and should they die leaving no child, then to go to the testator's brother, Henry Doggett. John Ponton conveyed the land in fee, with full covenants of warranty and seizin, to W. B. Pope; and this Court held, affirming the judgment of the court below, that John Ponton took an estate in fee, and that the purchaser acquired a good title. To the same effect is *Price v. Johnson,* 90 N. C., 592. The other questions discussed by the Court in those cases are not material in this connection and do not prevent them from being authorities in this case or weaken the assumption upon which they rest. It is sufficient to say that they could not possibly have been decided as they were unless by the words of the wills which were under construction and which are the same in substance and legal effect as those in the will now being construed, a defeasible fee was devised.

In *Baird v. Winstead,* 123 N. C., 181, we have almost a perfect analogy to this case. It appeared in that case that the land was devised to Thomas Baird, with a limitation that if he died without leaving issue it should go to his brothers, equally, subject to the use of the same by his widow during her life. The widow was not entitled to dower, as a matter of right, because the land was acquired by her husband, Thomas Baird, under the will, before 1868, and was sold under a decree of the bankrupt court and conveyed by the assignee in Thomas Baird's lifetime. The Court held that the estate of Thomas Baird was "absolute, unless defeated by his dying without issue, and only, if thus defeated, did the reservation to the widow take effect." If he died, leaving issue, "it was evidently contemplated that the estate should go in the usual course, unless devised or sold
(33) by him, to his issue, with the right of dower in his wife." The word "issue" is manifestly used here in the sense of the word "heirs"; so that they took by descent, and not by purchase, as the widow could not have had dower if his estate was only for life and his children took the fee in remainder at his death. Thomas Baird having died, leaving children, the Court further held that the purchaser at the sale got a good title, free from any right of dower in the widow, who had brought suit to have the same allotted to her. Again, we say, it is indeed difficult to see why any question as to the right of dower could have been raised and decided if Thomas Baird did not have the fee, which became absolute and indefeasible by his dying and leaving issue, or children. That case and this are, in principle, if not in their essential facts, the same, and the rule of law must therefore apply to both of them.

In *Trexler v. Holler,* 107 N. C., 617, the devise was to Louisa Holler, and if she died without lawful issue the property "to revert to the testator's estate and to be divided equally among the other legatees" named in the will. The action was brought for a construction of the will. Louisa Holler contended that she took an absolute estate in fee at the testator's death, and the administrator that she took an estate in fee simple defeasible upon her dying without issue. Neither party claimed, as do the plaintiffs claim in this case, that by the words of the will a life estate merely was given. The Court held, in accordance with the administrator's contention, that she acquired an estate in fee, which was determinable upon her dying without issue. In *Gibson v. Gibson,* 49 N. C., 425, and *Davis v. Parker,* 69 N. C., 271, this Court gave the same interpretation to devises similarly worded.

The learned counsel for the plaintiffs, in his well-prepared

brief, which was supplemented by an able argument in this Court, referred us to *Carr v. Green,* 11 S. C., 88, and *Wetter v. Cotton Press Co.,* 75 Ga., 540. In the former (34) case the will which was under consideration was given an interpretation by the court of law different from that given by the court of equity, there being at the time the decision was made separate courts of final resort, one having jurisdiction of cases at law and the other jurisdiction of cases in equity. When the Court of appeals was established, this conflict of decision was settled in favor of the construction that no estate was given by implication to the children when the devise was to a person, and if he died, leaving no issue, then over to the others, but that the estate to the first taker was a fee defeasible upon his dying without such issue. *Carr v. Porter,* 6 S. C. (Ch.), 36. The Court, referring to language identical with that we are construing in this case, says: "An estate may be enlarged, controlled and even destroyed by implication, but the principle must be taken, subject to certain other well-established rules, as that where an instrument is reduced to writing, nothing is to be implied which does not arise upon the face of the writing. An estate by implication cannot be raised in direct contradiction to and denial of an express estate. An estate by implication can only arise by a necessary implication, and the necessity must appear on the face of the will. Such implication is inadmissible when the provisions of the will can otherwise be carried into effect." And again: "But it is said it is manifest that his limiting it over upon the failure of issue was intended as a benefit to the issue. And so it was. He had given an estate to their ancestors, descendible to them, and he did not intend to deprive them of that benefit. He limited it over, therefore, upon the condition only that there should be no issue to take. But he intended to leave it in the power of the father to dispose of it as he thought proper for their benefit, and not to give it to them immediately, without leaving him any control over it." This language was used with reference to a devise to the testator's grandson (35) of certain property, to be delivered to him when he attained the age of twenty-one years, but should he die, leaving no lawful issue, then and in that case the property to go to another named in the will.

Carr v. Porter, which overruled *Carr v. Green,* has never since been questioned, but on the contrary has been recognized as containing a correct statement of the law, and has been followed in numerous cases. *Shaw v. Irvin,* 41 S. C., 209.

The second case cited and relied on by the plaintiffs' counsel (75 Ga., 540) came under review in *Matthews v. Hudson,* 81

Ga., 120; 12 Am. St., 315; and the Court said in regard to it that it must stand as authority upon the special facts and circumstances stated in the record and the peculiar state of law at the time the case was decided. The Court distinctly refused to regard it as authority for the position that a devise to one person, and if he died without issue, then over to another, would, by implication, raise an estate in favor of the children of the first taker; and the Court in this connection says: "Independently of the special features of this will, to which we have called attention, there are several cases in our Reports which tend to show that on general principle this devise creates a base or qualified fee, and not an estate for life, with contingent remainders." In the recent case of *Sumter v. Carter,* 115 Ga., 893; 60 L. R. A., 274 (which cites and approves *Fields v. Whitfield,* 101 N. C., 305, to which we will presently refer), the Court says: "The share of the testator's son was subject to be divested, upon the sole contingency of the son dying without leaving issue *in esse* at the life tenant's death, in favor of his sister and other devisees then living. This contingency never happened. Therefore, in consonance with the testator's intention and the soundest reason, there being no devise to the children of the son, the lat-
(36) ter's share became absolute and indefeasible upon his dying before the life tenant, leaving issue *in esse* at the life tenant's death, or upon his surviving the life tenant, with or without children, which supports the immediately preceding principle." And again: "This rule as to estates by implication applies with especial force to the case at bar, as there is no intent whatever on the part of the testator to give his son a lesser estate than a remainder in fee in his whole share, which was only to be divested in favor of the testator's other children and remaindermen, upon the contingency hereinbefore explained, which never happened. The existence of the son's children at the time of the death of the life tenant, he having died before, simply fulfills one of the provisions in the testator's will, whereby the son's remainder share, which was defeasibly vested, would then become indefeasible. If he had made no deed to his remainder interest, his children in life at the time of the death of the life tenant would have taken his then indefeasible remainder share by *inheritance* from him. But his deed, on account of his leaving children *in esse* at the time of the death of the life tenant, which then made his remainder absolute, passed that absolute interest to his grantee."

We will now consider two cases decided in this Court, in which the will of Lewis Whitfield was under construction, and which,

we think, are by the clearest implication authorities for the defendant's contention in this case.

In *Isler v. Whitfield,* 61 N. C., 493, this Court construed the fifteenth item of the will in passing upon a title conveyed by Franklin Whitfield, who was the defendant in that case, with full covenants of title to the plaintiff, Isler. Franklin had purchased the contingent interest of Hazard and Cicero Whitfield, his nephews, who were two of the first class of ulterior devisees; Lewis Whitfield, the other member of that class, having died without issue. At the time of the testator's death, (37) and also at the time of the conveyance from the defendant to the plaintiff, there were grandchildren of the testator, other than Hazard and Cicero Whitfield, who constituted the second class of ulterior devisees. The Court held that the defendant had not conveyed a good and indefeasible title to the plaintiff, and therefore had broken his covenant, because it could not at that time be determined whether the fee would ultimately be vested in the first or second class of devisees, as the determination of that question depended upon the death of Franklin Whitfield without leaving heirs of his body, or children. The Court never once alluded to the fact that Franklin Whitfield had only a life estate in the land devised to him, and that upon his dying leaving children the land would go to them, under the will, as purchasers or remaindermen, and therefore that the title which he had conveyed in fee was defective and there was a consequent breach of the covenant; but the Court confined its decision to the question whether the first or second class of ulterior devisees would take, assuming, of course, that if Franklin died, leaving heirs of his body, or children, the title would be good, and that the only event which could occur to divest his title was his dying without leaving children. It was manifestly in the mind of the Court that if Franklin had acquired not only the interest of the first class of devisees, but also the interest of all persons who could possibly come within the second class at Franklin's death, the title conveyed by his deed would have been an indefeasible one; and yet we know, as matter of law, that it could not have been so if Franklin had only a life estate, and his children, if he had any living at his death, would then take the fee under the will as purchasers or remaindermen. We must come to this conclusion; otherwise we cannot account for the fact that the Court confined its inquiry to the contingent estate of the (38) second class of devisees.

If Franklin died leaving children, the ulterior devises could not take effect, and therefore the estate acquired by his purchase and deed from the first class of ulterior devisees would be de-

fective. His title conveyed by the deed in that event could only be sustained under the devise in the will to him, and not in that way, unless he took a fee. The Court not having referred to the contingency that Franklin might die, leaving children, it must be inferred from its silence in respect to that contingency that it was not thought to have any bearing upon the question involved, or that, in other words, if he died leaving children it would not prevent a good title from passing. It is clear, therefore, the Court thought, if the contingency happened so as to exclude both classes of ulterior devisees, an indefeasible title in fee would have passed by the deed, and this could only be so if Franklin took a fee defeasible under the will, which had become absolute by his dying leaving children. This would exclude any possible right of the children as purchasers under the will. The whole argument in the case must have been based upon the assumption that Franklin took a defeasible fee, as the Court would not have overlooked such a contingency as his dying leaving issue if it could ultimately or eventually have any effect in deciding the question involved. If he had a life estate, why discuss only the contingency of his dying without issue, for in the event of the failure of the ulterior devises his estate could last no longer than his life, and his deed, therefore, did not and could not pass a fee, although it purported to do so. It must surely be that such an important matter affecting the title in question would not have escaped the attention of the Court composed of such able jurists.

In *Fields v. Whitfield,* 101 N. C., 305, the Court passed upon the eighth item of the will, which in our opinion is substantially the same as the fifteenth item, the only difference, if any,
(39) being that by the eighth item land is devised in the first instance to five grandsons, with the limitation that in the event of the death of any one of them without heirs of his body the land should be equally divided among certain granddaughters. We have seen that whether the first devise is made to one or several persons can make no difference in determining as to who will take, but only as to when the estate will vest and become absolute, or as to who will take under the ulterior devises. In *Fields v. Whitfield* one of the first class of devisees, who had acquired the interest of some of the others in that class, conveyed all of his interest in the property to the plaintiffs in fee. There is a provision in the eighth item of the will that each of the said persons should receive his proportionate part of the property when he arrived at the age of twenty-five years. One of the primary devisees who had conveyed his interest to the plaintiff grantor died leaving children. The Court held

that the estate vested absolutely in the grantor under the devise and in those whose interest he had acquired in fee when they became of age, and consequently that the deed conveyed a good title as to those interests. How could this decision have been reached if the children of the grantor or the children of the devisee, who had died, had any interest, contingent or otherwise, in the property, or, to state it differently, how could the decision have been made if the grantor and those whose interest he acquired took only a life estate? The implication that they did not is irresistible. If the grantor in the deed had only a life estate he could not of course convey a fee by his deed—not even a contingent fee.

We have discussed the last two cases at some length, as the suggestion that they are controlling authorities in this case was strenuously combatted by the plaintiffs' counsel.

In *Fairly v. Priest,* 56 N. C., 383, it appeared that the testator by his will gave to each of his children a slave, and the residue, consisting of personal property, he gave to them (40) in common, and provided that if either of them should die intestate and without heirs of his or her body the estate of the deceased child should be inherited by the survivors. The plaintiff's mother, who was one of the daughters of the testator, died leaving the plaintiff, who was illegitimate, as her only child, and the Court held that if the plaintiff had been legitimate his mother's portion would not have been subject to the limitation over to the surviving brother and sister, but would have remained her absolute property, and of course would have devolved upon the personal representative and then have gone to the plaintiff as her next of kin. But the plaintiff being illegitimate, he could not at common law have been regarded as an heir of her body, that is, her issue or child, and she would have been deemed to have died without any such heir or child. The Court then held that as between the plaintiff and his mother under our statute he was legitimate, and took the property as above indicated. It will be seen that by this ruling the mother took the property absolutely, and that the plaintiff acquired the property, not under the will or as purchaser, but by succession as the distributee or next of kin of his mother.

We are, therefore, of the opinion that Franklin's estate under the will was a fee, which was defeasible upon his dying without issue. A fee conditional at common law furnishes an analogy. Upon the birth of issue the tenant had power to alien in fee simple. If he did so the entire estate passed, otherwise it remained subject to the possibility of a reverter. *McDaniel v. McDaniel,* 58 N. C., 351.

The conclusion of the whole matter is that, upon reason and authority, the plaintiffs have never acquired any interest under the will, that being the only source of title claimed by them, and the defendants have a good and indefeasible title as
(41) against the plaintiffs by virtue of the mesne conveyances connecting them with the deed from Franklin Whitfield, under which they claim the title.

The former decision of this Court was right, and the relief prayed for in the petition cannot therefore be granted.

Petition dismissed.

Cited: Hauser v. Craft, post, 322; *Cheek v. Walker,* 138 N. C., 449; *Anderson v. Wilkins,* 142 N. C., 161; *Harrell v. Hagan,* 147 N. C., 113; *Trull v. R. R.,* 151 N. C., 545.

TRUSTEES OF CHARLOTTE TOWNSHIP v. PIEDMONT REALTY COMPANY.

(Filed 15 December, 1903.)

1. CONTRACTS—*Ultra Vires—Corporations—Bridges—Consideration—Public Policy.*

   A promise by a land company to pay a portion of the expense of a public improvement is not void as against public policy, and if it has a peculiar interest in the matter the contract is not void for the want of a consideration.

2. CORPORATIONS—*Contracts—Ultra Vires—Estoppel.*

   Where a corporation is a party to an executed contract and has received the benefits therefrom, it is estopped from pleading that the contract was *ultra vires.*

ACTION by the Board of Trustees of Charlotte Township against the Piedmont Realty Company, heard by *Judge W. H. Neal,* at July Term, 1903, of MECKLENBURG. From a judgment for the plaintiff the defendant appeals.

Burwell & Cansler for the plaintiff.
Jones & Tillett for the defendant.

CONNOR, J. The plaintiff alleged its corporate existence and the power to establish and maintain the public highways and bridges in Charlotte Township, Mecklenburg County, and to do all things necessary and incidental to the exercise of such

power; that the defendant was a corporation, with power (42) and authority to buy, sell, hold and deal in suburban and other real estate in the county aforesaid.

3. That prior to 19 July, 1901, the defendant was and is still the owner of a large tract of land just east of the city of Charlotte, which is divided up into building lots and thrown upon the market to all persons wishing to invest therein for the purpose of erecting thereon suburban residences, the value of which, as such, would be materially enhanced by the extension through it of the city street car line.

4. That it was necessary to erect over Sugar Creek, just beyond the eastern limit of Seventh street, on one of the public highways in Charlotte Township, a bridge of sufficient strength and capacity to permit the street cars to cross the same, in order that said street car line might be extended through the suburban property of the defendant hereinbefore described, and for that purpose the defendant, by its duly authorized agents, urged the plaintiff to erect and construct across said creek at said point a strong and substantial bridge in order that its suburban property might be materially benefited and enhanced in value thereby, and offered to pay as a consideration therefor one-fourth of the cost of erecting said bridge if the plaintiff would undertake the same and defray the balance of the cost thereof.

5. That during the negotiations between the plaintiff and the defendant concerning the erection of said bridge the defendant contracted to sell to divers parties a number of building lots from the property aforesaid by representing to said persons that said bridge would be erected and the street car line extended through said property, and urged upon plaintiff the fact that it had made such contracts and representations as an additional reason why said bridge should be erected by the plaintiff as soon as possible.

6. That thereupon the plaintiff agreed to erect and construct said bridge, in consideration of which the de- (43) fendant agreed to pay to plaintiff one-fourth of the cost thereof when the same should be completed, whereupon the plaintiff undertook to erect and did erect across said Sugar Creek, upon said highway, in accordance with said agreement, a large and substantial bridge of sufficient capacity to permit said street car line to cross the same and to accommodate all public travel, at a total cost to it of $6,178.68, on account of which the defendant's property was materially enhanced in value, in the manner and for the reasons hereinbefore stated.

7. That the cost of said bridge was greatly increased at the defendant's request and in order to make it of sufficient strength

and durability to permit the electric street railway and its cars to cross it in the extension of said railway line to and through the suburban property of defendant as aforesaid.

8. That after the completion of the erection of said bridge by the plaintiff it duly demanded of the defendant, on 19 July, 1902, the payment to it of the sum of $1,544.67, being one-fourth of the cost of said bridge, which the defendant had theretofore agreed to pay, but which it refused and still refuses to pay.

9. That on account of the matters and things hereinbefore stated the defendant is now justly indebted to the plaintiff in the sum of $1,544.67, with 6 per cent interest thereon from 19 July, 1902, until paid.

Wherefore, the plaintiff demands judgment against the defendant for the sum of $1,544.67 and costs.

The defendant, demurring to the complaint herein filed, for grounds of demurrer, says:

1. That the complaint does not state facts sufficient to constitute a cause of action in this:

(1) That it appears from the complaint that the contract alleged to have been made by the defendant company was
(44) one in its nature *ultra vires* and beyond the power of the corporation to make, in that it was a contract to expend money in aid of the construction of a public bridge on a public highway that was not on any part of the land belonging to the defendant company; and further, that it was a contract made with public officers, acting in derogation of their duty, and was against the policy of the law.

(2) That it appears from the complaint that the contract alleged to have been made by the defendant company is one which was beyond its power to make, and, moreover, was against the policy of the law in this, that it being the duty of said officers to erect on the highway of the said township all bridges for public use, it became their duty to erect this bridge at public expense if the same was necessary for the public use, and the contract being one to erect a bridge not necessary for the public use generally, but for the benefit of a private landowner, was unauthorized by law and against its policy.

The demurrer is based upon two propositions: First, that the contract made by the plaintiff whereby it agreed to construct a stronger and more expensive bridge, to be paid for out of the public funds, was *ultra vires;* and second, that said contract was against public policy. It was admitted by defendant's counsel on the argument of this case that the demurrer should be overruled unless the court should not hold that by proper interpretation of the complaint in this action it was alleged therein that

the contract sued upon contemplated an expenditure of public funds for private uses. It was admitted that the court had no right to control the plaintiff in the expenditure of the public funds so long as these funds were being expended for public purposes, but it was urged that the contract set out in the complaint clearly showed that it contemplated an expenditure of public funds in excess of what the plaintiff deemed necessary for public needs, and that this appearing from the (45) face of the complaint the Court should sustain the demurrer, because, in the first place, it was a contract to expend the funds of a municipal corporation for private uses, and in the second place such contract was void, as being against public policy.

Treating the complaint as alleging a contract to expend public funds for private uses, it was contended that the State Constitution forbade such a contract unless it was submitted to a vote of the people, and that in such sense the contract was *ultra vires* of the plaintiff corporation; and again, that a contract contemplating the expenditure of the funds of a municipal corporation for private enterprises was against public policy, and therefore void.

These principles are fundamental. A very different question, however, is presented by the complaint and demurrer in this case. It is admitted by the demurrer that public necessity required the building of the bridge over the creek crossed by a public highway of said township. The defendant urged not the building of the bridge, but that it should be strong and substantial in order that the property of the defendant might be benefited. It was for *this* that the defendant promised to pay one-fourth of the whole cost. It is also admitted that the cost of said bridge was greatly increased at the defendant's request in order to make it of sufficient size and durability to permit the street railway and its cars to cross it in extension of said railway to and through suburban property of the defendant. It being admitted that the bridge was necessary, the strength, durability, width, etc., were questions entirely within the province of the board of trustees to decide. This Court could not have undertaken to pass upon or control the exercise of their judgment in that respect.

In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* says: "Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confided the trust of regulating all county matters. 'Repairing and (46) building bridges' is a part of the necessary expenses of a county, as much so as keeping the roads in order or making new

roads; so the case before us is within the power of the county commissioners. How can this Court undertake to control its exercise? Can we say such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected as heretofore upon posts, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? . . . This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities." It certainly was not violating any constitutional or statutory restriction upon the power of the board to build the bridge of such strength and durability as the commissioners in their judgment thought proper. That being conceded, we are at a loss to perceive how it can be contrary to public policy to enter into a contract with the defendant by which it agreed to share a part of the burden and cost of building the bridge. It does not appear that the cost of the bridge was enhanced to the extent of one-fourth at the request or for the benefit of the defendant. *Judge Dillon,* in his work on Municipal Corporations, sec. ____, says: "A promise by individuals to pay a portion of the expense of public improvements does not fall within this principle, and such promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the matter their promise is not void for want of consideration, and may be enforced against them."

The question seems to have been presented in *Town-*
(47) *send v. Hoile,* 20 Conn., 1, cited in the plaintiff's brief. The Court, in discussing the question, says: "The defendants are not only benefited in common with other citizens, but obviously they had a peculiar and local interest, and well might obligate themselves to indemnify the city for assuming the burdens and responsibilities of a new public highway. . . . We must not be considered as assenting to the proposition that a promise by individuals to pay a part of the expense of public improvements ordered by public authority is of course illegal and void. We think the amount of a public burden or the cost to the public of an improvement may properly enough enter into the question of expediency or necessity. A canal, a railroad, a bridge, a new street, a public square or a sewer is called for. If made in one way or in one place it will be much better for the public, though more expensive; but individuals

especially benefited stand ready by giving their land, their money or their labor to meet the extra expense. Will these promises be void as being without consideration or against public policy? We think not." This language fully meets our approval, and would seem to be decisive of this case. Of course if there was any improper or corrupt motive controlling the commissioners in a public work of this character, or if it were manifest that its real purpose was to promote the private interest of the defendant and not the public necessity, a very different question would be presented. But the complaint negatives any such suggestion, and the demurrer admits the facts to be as stated in the complaint. If the county commissioners, finding it necessary to open a public road from one point to another, should, at the request and in consideration of the payment by a landowner of the additional cost, change its course, keeping in view always the convenience of the public, we cannot see how such contract would be open to the criticism of being against public policy. We think such a contract would come within the principle laid down in the cases cited. (48)

This Court, in *Stratford v. Greensboro,* 124 N. C., 131, says: "There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals and not for public use. If in point of fact the public necessity and convenience require the improvement of a street or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street, when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street, and surely, if nothing else appeared, it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings." The opinion cites *Parks v. Boston,* 8 Pick. (Mass.), 218 (19 Am. Dec., 322), in which it is said: "If the public necessity and convenience require the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public because it accommodates some individuals more than others."

There is no suggestion that the public credit has been pledged to build this bridge. So far as appears from the record the bridge has been paid for. Surely, as was well suggested by the

plaintiff's brief, if the defendant will perform its part of the contract and replace the money thus expended at its request and upon its promise, there will be no injury to the public, assuming that the cost of the bridge was enhanced for the defendant's benefit. It would lead to a singular result if the defend-
(49) ant could induce the plaintiff to expend public money for its benefit, and then, by refusing to repay the money, successfully justify its refusal upon the ground that the public treasury was depleted by the plaintiff. It would seem rather that such depletion is the result of the defendant's conduct rather than the plaintiff's.

If the contract set out in the complaint was *ultra vires* it would seem that after it is executed and the defendant has received the benefit thereof it would be estopped from setting up this defense. The defendant's counsel admitted that if this was an ordinary case of *ultra vires,* where a private corporation had entered into a contract which was not within the express powers granted to it, then a receipt of benefits would estop the corporation; but it was contended that there could be no estoppel where the contract in question was made with a municipal corporation in direct violation of the constitutional restriction or in violation of the law of public policy. The authorities cited fully sustain the position of the plaintiff that if the corporation has performed the contract on its side the other contracting party cannot plead that it was *ultra vires.* We can see no reason in law or in good morals why the defendant should not perform the contract which it admits was made with the plaintiff, which has been performed by the plaintiff, the full benefit of which the defendant has received. We think his Honor correctly overruled the demurrer. The judgment must be

Affirmed.

WALKER, J., did not sit on the hearing of this case.

Cited: Glenn v. Comrs., 139 N. C., 418; *Water Co. v. Trustees,* 151 N. C., 176; *Burgin v. Smith, ib.,* 570.

(50)

TENNESSEE RIVER LAND AND TIMBER COMPANY v. BUTLER.

(Filed 15 December, 1903.)

1. BONDS—*Costs—Defense Bonds—Code, Sec.* 237—*Quieting Title.*

In an action to remove a cloud on title a defense bond is not required.

2. BONDS—*Filing—Extension of Time—Code, Sec.* 274.

A trial judge may at any time extend the time for filing a defense bond.

3. BONDS—*Judgments—By Default—Waiver.*

The failure for three years to move for judgment by default for failure to file a defense bond waives the right thereto.

4. APPEAL—*Judgments—By Default.*

An appeal lies from the refusal of a judgment by default.

5. NONSUIT—*Counterclaim.*

A plaintiff may take a nonsuit as to those defendants who do not set up a counterclaim.

ACTION by the Tennessee River Land and Lumber Company against G. W. Butler and others, heard by *Judge E. B. Jones,* at April Term, 1903, of BURKE. From a judgment for the defendant the plaintiff appealed.

John T. Perkins for the plaintiff.
Avery & Ervin for the defendant.

CLARK, C. J. This is an action to remove a cloud upon title, and asking a restraining order against the defendants trespassing upon the premises, under color of their pretended title, which plaintiff seeks to have declared invalid and canceled. There is no "case on appeal" except the form of a judg- (51) ment offered by the plaintiff, which the judge certifies that he declined to sign "for the reasons set out in the order signed in this cause at this term," and the plaintiff excepted and appealed. This is a very irregular practice, but taking the recitals in said "order signed," together with the statement above made by the judge, as a statement on appeal, it appears that at Fall Term, 1900, the defendants, Butler, Denton and Carswell, were required to file a defense bond within sixty days; that such order was not recorded, and the cause was continued from term to term without any move or effort on the part of plaintiff to

have the order enforced; that at April Term, 1903, though defendants' answers had been on file about three years, the plaintiff moved for judgment by default against them for want of a defense bond, whereupon the court, deeming that such nonaction was a waiver of the default, and in the exercise of its discretion, extended the time to defendants till next term to file defense bond, and declined to sign judgment by default against them.

This not being an action "for the recovery of real property or the possession thereof," a defense bond could not be required under the Code, sec. 237. No judgment of default had been entered up for failure to comply with the order of Fall Term, 1900, and when such default was moved for at April Term, 1903, it was competent for the judge to set aside such order in the cause, both because interlocutory and subject to control, and because irregular, and the plaintiff cannot complain, for instead of doing so the judge merely extended the time. The court, at Fall Term, 1900, had power to extend the time to file bond (if a bond was necessary). *Taylor v. Pope,* 106 N. C., 267; 19 Am. St., 530. Of course it follows that the court, at April Term, 1903, could also extend the time. Code, sec. 274. It is an order in the cause subject to modification by the court (*Mebane v. Mebane,* 80 N. C., 34), and not an erroneous judgment
(52) which can only be set aside after the term for excusable neglect or by an appeal, as in *May v. Lumber Co.,* 119 N. C., 96. Besides, the conduct of plaintiff was a waiver of the bond, if one had been necessary, till required (*McMillan v. Baker,* 92 N. C., 110; *Dempsey v. Rhodes,* 93 N. C., 120), and the court could grant defendants time to file it when it was demanded after such delay.

We do not agree with defendants, however, that because no appeal lies from a refusal to dismiss an action (*Cooper v. Wyman,* 122 N. C., 784; 65 Am. St., 731, and other cases cited in Clark's Code (3 Ed.), p. 738) that therefore no appeal would lie from the refusal of a judgment by default if plaintiff were entitled to it. It is held otherwise; *Kruger v. Bank,* 123 N. C., 16, and cases there cited; *Hall v. Hall,* 131 N. C., 186.

The plaintiff in its brief complains that it was refused leave to take a nonsuit as to certain other defendants who had filed no answer. But this is not stated in the case by the judge, and nowhere appears in the record. It is not a part of the record because it is recited in the proffered judgment which his Honor declined to sign. Of course the plaintiff had a right to take a nonsuit as to defendants who have set up no counterclaim; but

no harm has been done, for if the nonsuit as to them was refused it can be taken at the next term below.

No error.

Cited: Carraway v. Stancill, 137 N. C., 475.

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(53)

McCORD v. ATLANTA & CHARLOTTE AIR LINE RAILROAD COMPANY.

(Filed 15 December, 1903.)

1. NEGLIGENCE—*Carriers—Railroads—Evidence.*

The evidence in this action, by a passenger for an injury to his arm from being struck by a mail pouch on a crane, warrants the instruction submitting the issue of a defect either in the construction of the mail crane or the hanging of the pouch.

2. NEGLIGENCE—*Presumptions—Carriers—Passengers.*

Where a passenger on a train is injured by having his arm struck by a mail pouch on a crane, and the cause is not shown, the presumption is that the injury occurred by the negligence of the carrier.

3. NEGLIGENCE—*Damages—Passengers—Carriers.*

The mere fact that a passenger has his arm extended beyond the line of the car does not bar a recovery if he is injured by an external object.

4. VERDICT—*Setting Aside—New Trial—Trial—Evidence—Appeal.*

The refusal of a trial judge to set aside a verdict because against the weight of evidence is not reviewable on appeal.

ACTION by David J. McCord against the Atlanta and Charlotte Air Line Railway Company, heard by *Judge W. H. Neal* and a jury, at July Term, 1903, of MECKLENBURG. From a judgment for the plaintiff the defendant appealed.

McCall & Nixon for the plaintiff.
George F. Bason for the defendant.

CLARK, C. J. The plaintiff had his arm knocked back against the window frame of the car in which he was traveling as a passenger, and his arm broken in two places by the mail pouch, which had been hung up by the side of the track at a flag station, to be taken off by the succeeding train. (54)

The evidence of the plaintiff was that his hand was not over five inches outside the car, while the evidence for the defendant tended to show that it was much farther. The court charged the jury: "If this mail pouch was hung up in the usual way and the plaintiff's hand was out of the window when the train passed, and the train could have been run by and not injured the person while the pouch was hanging in the usual way and at the proper distance from the passing train, it would not be negligence on the part of the railroad company. If the mail pouch was thirteen inches from the passenger train there would not be negligence on the part of the railroad company. It is not negligence *per se* for a passenger to rest his arm on the window-sill of the car, with his hand like this, placing his arm on the window-sill and letting his forearm extend upward toward the top of the window, and showing his hand exposed about four or five inches outside of the window; but if the plaintiff put his arm out of the window twelve or thirteen inches that of itself would be contributory negligence, and he would not be entitled to recover." This was a statement of the evidence as offered by the respective parties.

The first five exceptions are for instructions given at the request of the plaintiff, and the same point in all of them is substantially stated in the first exception, which is to the following charge given at the request of the plaintiff: "If the jury find that the mail crane at its station was improperly constructed or improperly located, or if they find that the mail pouch was improperly or insecurely hung thereon, so that the passing of the train caused it to vibrate back and forth towards the train or caused it to become unfastened, and by reason thereof it struck the plaintiff's hand and injured him; and if the jury find further that if the said mail pouch had been properly
(55) secured on the said crane that it would not have so vibrated and would not have stricken the plaintiff, they should answer the first issue 'Yes' and the second issue 'No.'"

The defendant's contention is that there was no evidence to justify this hypothesis being submitted to the jury. There was evidence that if the mail pouch had been properly secured on the crane it would not have vibrated and stricken the plaintiff's arm if it had not been more than four or five inches beyond the window-sill. There was no direct evidence that the mail pouch had not been properly hung or secured, but there was evidence that if not properly hung or secured it could be swung to and against the side of the passing car, injuring the plaintiff's arm, though within four or five inches of the car. The judge properly told the jury that there was no evidence of a defective track

or defective curves to cause a vibration of the train. So the question practically is narrowed down to this: If the arm was not more than four or five inches beyond the window it could not have been struck by the mail bag unless it was defectively hung or defectively secured.

When a passenger on a train is injured in this manner and the cause is not shown the presumption is that the injury occurred by the negligence of the carrier. *Clerc v. Morgan* (La.), 90 Am. St. (1902), 319; *Laing v. Colder* (Pa.), 49 Am. Dec., 533. The passenger could not stop and examine the locality; he was in no condition to examine anything, and had been carried by the spot. He could not show how the bag was hung or how it was suspended. That was in the knowledge of the defendant's servants. If they had shown to the satisfaction of the jury that there was no defect in the suspension or fastening of the mail bag, the evidence being uncontradicted that if properly suspended and fastened it could not have broken the plaintiff's arm if not more than four or five inches beyond the window, it follows like the day does the night that his arm was extended more than four or five inches beyond the window. (56) On the other hand, the fact (as found by the jury) that the plaintiff's arm was crushed when not extended more than four or five inches from the line of the car, necessarily finds the bag was defectively hung or fastened, since the evidence is that in such case only could it have swung and struck the plaintiff's arm. The manner of the negligence is not of importance, but whether there was negligence; and the passenger being injured while on the car, the presumption of negligence arises from the breach of the contract of safe carriage. The judge submitted the real point in the case to the jury when he told them that if the plaintiff casually or inadvertently put his hand out of the window not more than four or five inches and it was crushed by the mail bag, the company was negligent; otherwise if he put his arm out twelve or thirteen inches, according to the defendant's contention, it was negligence in the defendant not to have a free space of four or five inches beyond the line of the car, and there being evidence that if the bag was hung thirteen inches from the line of the car it could not have swung in to hit the plaintiff's arm unless the pouch was defectively hung or fastened, it was harmless error, if error, to tell the jury that though the pouch might have been thirteen inches, yet if it was so defectively hung or fastened as to swing in and strike an arm projecting only four or five inches from the car it was negligence.

If the plaintiff had known that the mail pouch was hanging

there, and that the required distance for hanging the mail pouch was thirteen inches from the passing train, then his waiving his hand not more than four or five inches out of the window was not negligence on his part, while it was negligence for the defendant to so defectively hang or fasten the pouch that it could smash the plaintiff's arm back against the car, when it
(57) was extended not more than said four or five inches out of the window.

As to the sixth exception, among the many cases in which it has been held that the mere fact that a passenger had his arm extended beyond the dead-line of the window-sill of the car does not bar a recovery are: *Clerc v. Morgan, supra,* and notes; *Laing v. Colder, supra; Kennard v. R. R.,* 21 Pa. St., 204; *Pondrom v. R. R.* (Ill.), 2 Am. Rep., 306; *Spencer v. R. R.* (Wis.), 84 Am. Dec., 758; Wharton Neg. Par., 362; Thompson Car. Pass. (Ed. 1880), 258; *Farlow v. Kelley,* 108 U. S., 288; *Curtis v. R. R.,* 6 McLean, 401; *Schneider v. R. R.,* 54 Fed., 466; 60 Fed., 210; *Seigel v. Easen,* 41 Cal., 109; *R. R. v. Williams,* 140 Ill., 275; *R. R. v. Gregory,* 58 Ill., 272, in which the plaintiff was stricken by a mail catcher; *Somers v. R. R.* (La.), 44 Am. Rep., 419, quoted and approved in *Kird v. R. R.,* 109 La., 525; 60 L. R. A., 727; *Dahlberg v. R. R.,* 32 Minn., 404; 50 Am. Rep., 585, quoting and approving Wharton Neg. Par., 362; Hutch Car., par. 659; Thompson Carriers, 258; Angel Carriers, par. 559; *Miller v. R. R.,* 5 Mo. App., 471; *Johnston v. R. R.,* 43 Minn., 43; *Barton v. R. R.* (Mo.), 14 Am. Rep., 418; *Francis v. Steam Co.,* 114 N. Y., 380.

In *Cummings v. R. R.,* 166 Mass., 220, it is said: "A passenger riding with a part of his body projecting beyond the line of the car cannot be held as matter of law to be guilty of negligence or to have assumed the risk of contact with things outside the car, and these questions are for the jury," citing *Dahlberg v. R. R.,* 32 Minn., 404; *Miller v. R. R.,* 5 Mo. App., 471; *Somers v. R. R.,* 34 La. Ann., 139; 44 Am. Rep., 419, and *Seigle v. Eisen,* 41 Cal., 109, and there are many others to the same purport.

That eminent lawyer and author, *Judge Seymour D. Thompson,* in his work on Negligence (1902), Vol. III, par. 2972, p. 435, reviewing the few decisions that hold it negligence
(58) *per se* for a passenger to let any part of his body extend beyond the base of an open window, says: "These outrageous decisions are tantamount to a license to railroad companies to construct their bridges and viaducts so as to leave a space of but three inches between them and the outer walls of the cars, notwithstanding the well-known habit of passengers

of putting their elbows out to rest, or even putting their heads out for the purpose of observation. A doctrine so brutal is not deserving the least respect." He further says, Vol. III, par. 2973, p. 476: "The foregoing decision exhibits an obtuse brutality which is disgraceful to civilized jurisprudence. They amount to a license to railway carriers of passengers to erect the trusses of their bridges and the walls of their viaducts, and to leave cars standing upon their side tracks, so near to the outer walls of the passenger coaches when passing on their main tracks as to be brought in contact therewith by the usual oscillations, although by so doing the arms and even the heads of the passengers, who are not more than ordinarily cautious, are taken off."

The defendant moved to set aside the verdict because against the weight of evidence. The judge refused, saying that if he had been a member of the jury he would not have found the issues in favor of the plaintiff, but as the jury had so found them he would let the verdict stand. The defendant excepted, but we think unadvisedly. The wisdom of the Anglo-Saxon race the world over recognizes the superiority of juries over judges as a tribunal for the ascertainment of facts, and it is only when the judge deems that there has been a palpable miscarriage of justice that he is given the power, not to find the facts himself, but to set aside the verdict and send the case to another jury. In *S. v. Kiger,* 115 N. C., at p. 751, the Court, after mentioning that the granting or refusing a new trial because against the weight of evidence is not reviewable, says: "The fact that twelve men have convicted on the (59) evidence will often and properly make him less sure of his own opinion to the contrary. Nor should even he give a new trial merely because, if a juror, he might have voted for acquittal." This principle was cited and approved in *S. v. Green,* 117 N. C., at p. 696. In *Coley v. R. R.,* 129 N. C., at p. 416; 57 L. R. A., 817, it is said: "It may be that if we were jurors we would find the plaintiff guilty of contributory negligence as a matter of fact, and not at all unlikely that the recovery would be less. But we are not jurors and have no right to assume their functions." It is true that this Court cannot set aside a verdict because against the weight of evidence, and that the Superior Court judge who heard the trial has that power, and in the interest of justice should exercise it in proper cases; but it is equally true that his action in that regard is not reviewable, and the reason given in this case is not a refusal

to act for want of power but an exercise of his discretion, warranted by the cases above cited. The judgment below is
Affirmed.

Cited: S. v. Young, 138 N. C., 571.

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(60)
DAVIS v. FARMERS MUTUAL FIRE INSURANCE COMPANY.

(Filed 15 December, 1903.)

INSURANCE—*Fire Insurance—Policy—Transfer—Estoppel.*

A transfer of a policy by the president of an insurance company is binding, though the transfer was not made according to the blank form printed on the back of the policy.

ACTION by J. D. Davis and others against the Farmers Mutual Fire Insurance Company, heard by *Judge W. H. Neal* and a jury, at June Term, 1903, of WILKES. From a judgment for the plaintiffs the defendant appealed.

Glenn, Manly & Hendren for the plaintiffs.
W. H. Barber for the defendant.

CLARK, C. J. J. D. Davis, the *feme* plaintiff, and one W. C. Meadows were equal owners of a mill and insured the same in the defendant company, the policy being issued in their joint names. Afterwards W. C. Meadows sold his interest in the mill to J. D. Davis, and she sent the policy by her husband to C. N. Hunt, the president of the company, to have it properly transferred to her. Said Hunt took the policy, said he could change it right there, erased the words "W. C. Meadows and" from the statement in the face of the policy that it was payable to "W. C. Meadows and J. C. Davis," and wrote at that place "erased by C. N. Hunt, president," and handed the policy back.

There was a blank form printed on the back of the policy to be filled out and signed in case of transfer by the transferrer, and a blank under it for assent of the company to such transfer, to be signed by its president. The president, instead of filling out those blanks, requiring Meadows to sign the transfer
(61) and then signing the assent himself, took the shorthand method above stated, and the company, now that the property has been burned, gravely contends that it is released

from liability by the conduct of its own president. Though Meadows did not sign the transfer it is not denied that at that time the plaintiff had purchased his interest in the property. The plaintiff having sent the president of the company the policy for a proper transfer, had a right to rely upon his having made the change in the proper method. She did not have to look to the scope of his powers, as in the case of a local agent, for he was the president, the general representative of the company. Thereafter the company ratified the assignment by making an assessment on the plaintiff as sole owner of the policy, which assessment she paid.

Even if the printed blank on the back of the policy were a stipulation that transfers could only be made in that mode, "the authorities are numerous that a general agent can waive any stipulation in the policy, notwithstanding a clause in the policy forbidding it, for he can waive that clause as well as any other. A party cannot bind himself not to agree to modifications in a contract, and a corporation acts through its agents in the scope of their agency, and the agency here was a general agency." See the full discussion as to the powers of a general agent, 1 May on Insurance, sec. 151, and other authorities cited in *Gwaltney's case,* 132 N. C., at p. 920, to sustain the proposition above quoted. Certainly the president of the company did not release the company by his action in this case. It in nowise affects the case that Hunt was the agent who issued the policy as well as president, and that this is a mutual insurance company.

No error.

(62)

TEAGUE v. COLLINS.

(Filed 18 December, 1903.)

1. ACTIONS—*Misjoinder—Demurrer—Waiver—Pleadings—Exceptions and Objections.*

An objection to a misjoinder of causes of action must be taken by demurrer, and if the defendants answer, the objection is waived.

2. INDEMNITY BONDS—*Sheriffs—Judgments.*

Where an indemnity bond is given to a sheriff to pay such sums as may be recovered against him, there is a forfeiture when judgment is taken against him.

3. INDEMNITY BOND—*Sheriffs—Levy—Possession.*

Where a sheriff makes a sale of property levied on, though a third person has sued for and taken possession of the property, he is entitled to enforce an indemnity bond given to induce him to sell.

4. ACTIONS—*Indemnity Bonds—Executions—Sheriffs.*

A sheriff may maintain one action on the bonds given to indemnify him on proceedings with a sale of property levied on under execution.

ACTION by J. F. Teague against D. K. Collins and others, heard by *Judge W. B. Councill* and a jury, at March Term, 1903, of SWAIN. From a judgment for the defendants the plaintiff appealed.

A. M. Fry for the plaintiff.
Jones & Johnston for the defendant.

CONNOR, J. During July and August, 1896, a number of executions were placed in the hands of the plaintiff (the sheriff) against Coffin & McDonald which, by direction of the (63) plaintiffs in the executions, were levied upon certain lumber claimed by W. W. Ladd to be his property. After the levy upon the lumber the same was advertised for sale, and Ladd instituted an action against the plaintiff for the recovery thereof, and the coroner, under process issued in said action, took the lumber from the possession of the plaintiff and delivered it to the attorney of Ladd.

The plaintiff testified: "I reported to the attorney of the plaintiff in the executions, and told him I would have to turn the lumber over unless his clients gave me an indemnity bond or bonds. The result was that the bonds sued on were given me. After this I promised to sell the lumber. . . . The lumber was sold twenty minutes after the indemnity bonds were signed.

"The defendants in the action of *Ladd v. Teague* knew at the time of the sale by me, under the executions referred to, that the suit had been brought against me and the papers served on me in the case. They told me to go ahead and not notice anything the coroner did. . . . They said they would give indemnity bonds and make me sell. The bonds were given then and the sales followed."

The bonds contained the following condition: "Now, therefore, this is to indemnify the said sheriff, and the condition of the above obligation is that in case the said sheriff goes on and executes his levy of sale of said lumber, and in the final deter-

mination of the above action of claim and delivery judgment is rendered against him and in favor of W. W. Ladd, then in that case the foregoing parties to this bond shall pay or cause to be paid such sums as he may recover, not, however, to exceed the amount of this bond; then in that case this bond shall be in full force and effect, otherwise to be null and void."

The plaintiff introduced the judgment rendered in the case of *W. W. Ladd v. J. F. Teague,* in which it was adjudged that the plaintiff Ladd was the owner of the lumber, and that he recover of the defendant the sum of $377 as damages (64) for the unlawful and wrongful detention of the aforesaid property. The judgment was rendered 21 December, 1897. The defendant testified that he had not paid the judgment. It was further in evidence that the lumber had been in the sheriff's hands about sixty days, and that after the sale the purchasers delivered it to W. W. Ladd. At the close of the plaintiff's evidence the defendants moved for judgment of nonsuit, for that—

1. There is no evidence that the plaintiff has ever suffered any damage.

2. There is a misjoinder of actions, and the court has no jurisdiction.

3. That the lumber was in the custody of the law and the plaintiff had no authority to sell, and he knew this at the time he received bonds of indemnity and when he attempted to sell; that in fact there was no sale under the executions by the sheriff for the reason that the levy, if such had ever been made, had been released by the sheriff to the coroner, and after such release of levy no consideration passed from the bidder to the sheriff in the way of costs, or otherwise, in settlement of the executions.

The motion was granted and judgment of nonsuit signed, from which the plaintiff appealed.

In regard to the motion for nonsuit for misjoinder of causes of action it is sufficient to say that the objection, if valid, should have been taken by demurrer. When the defendants jointly answered the complaint they waived the objection. *McMillan v. Edwards,* 75 N. C., 81; *Hall v. Turner,* 111 N. C., 181.

"That there is no evidence that the plaintiff has suffered any damage"; the condition of the bond is not confined to an indemnity against loss, damage or harm by reason of making the sale of the timber, but an undertaking to pay such sums as Ladd "may recover," which language we con- (65) strue to be much broader and more extensive than "to indemnify and save harmless from loss, damage or harm," etc. The exact question came before the Court of Appeals of New

York in *Conner v. Reeves,* 103 N. Y., 527, wherein *Andrews, J.,* says: "The undertaking was not against damage merely, but was an indemnity against liability by judgment as well. By the general rule of law a covenant to indemnify against a future judgment, charge or liability is broken by the recovery of a judgment or the fixing of a charge or liability in the matter to which the judgment relates. When the covenant is one of indemnity against the recovery of a judgment the cause of action on the covenant is complete the moment the judgment is recovered, and an action for damages may be immediately maintained thereon, measured by the amount of the judgment, and this although the judgment has not been paid by the covenantee, and although the covenantor was not a party or had no notice of the former action. . . . The recovery of a judgment is the event against which he covenanted."

The plaintiff in that case was a sheriff, and the suit on a bond very similar in its terms to the one upon which this action is brought. The cases are singularly alike, and we concur in the view of the New York Court.

In regard to the third ground of the defendant's motion for nonsuit we do not think that the property was in the custody of the law. By the levy the lumber was in the possession of the sheriff. It was taken from his possession by the coroner, and, the testimony shows, had been delivered to the attorney of Ladd. This action did not affect the lien created by the levy of the executions, it only disturbed the sheriff's possession. If the plaintiff had failed in his action the sale made by the sheriff would have been in all respects valid and passed
(66) title to the purchaser. We do not perceive how the action of Ladd could affect the levy made by the sheriff. The sale was of course only of such interest as Coffin & McDonald had in the lumber. The defendants understood the situation and told the plaintiff "to go ahead and not notice anything the coroner did." The bonds were given to induce the sheriff to proceed with the sale, and by reason of their execution he did so. We think that he is entitled to maintain his action upon the covenant.

We see no reason why the defendants may not be joined in one action, so that the court may apportion the liability of each bond and of the several sureties thereon. This course is in harmony with the Code practice to settle all matters in controversy, so far as may be consistent with the rights of the parties, in one action.

The judgment of nonsuit must be reversed and a new trial had.

New trial.

FEATHERSTONE v. CARR.

(Filed 18 December, 1903.)

INJUNCTIONS—*Landlord and Tenant—Code, Secs.* 1772, 1834.

Where a person has been enjoined from bringing actions on each instalment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease.

ACTION by Clara M. Featherstone and her husband, A. A. Featherstone, against Patrick Carr and others, heard by *Judge E. B. Jones,* at November Term, 1903, of BUNCOMBE. From a judgment for the defendant the plaintiffs appealed.

Locke Craig for the plaintiffs. (67)
Merrick & Barnard for the defendants.

WALKER, J. The *feme* plaintiff leased to Carr & Ward the premises on South Main street in the city of Asheville, which are described in the contract, for two years, with the privilege of renewing the lease upon the same terms and conditions as are contained in the original agreement for three additional years, should they so desire at the termination of the lease, provided that Carr & Ward should give to the lessor "sixty days' notice of their intention prior to the expiration of the lease, should they decide not to take and retain the said property for the additional period of three years." The lessees agreed to pay $900 per annum in equal monthly installments as rent, the installments to be paid in advance on the first day of each and every month.

There are other conditions and stipulations in the lease, and it was specially provided therein that if the lessees failed to pay any installment of rent when it should be due, or should fail to perform any of the conditions or stipulations of the contract for a period of five days after the lessor had given them notice of their omission or neglect, the lessor should have the right to re-enter and take possession of the premises, notice to them and all other formalities being waived in case of any default.

The *feme* plaintiff's husband joined with her in the lease, but the execution of the same was not acknowledged by him though her acknowledgment and privy examination were taken. The defendants, Carr & McIntyre, are occupying the premises under an assignment of the said lease to them by the receiver of the assets of Carr & Ward, and a further agreement between them

and the *feme* plaintiff, made in the latter part of July, 1901, to the effect that they should continue to hold the premises under the lease to Carr & Ward and in accordance with its
(68) terms and conditions, upon the payment of an increased rent of $100 per month. This is the plaintiffs' allegation, the defendants alleging that they were to pay only $900 per annum, as provided in the lease to Carr & Ward, and that they did not contract to pay the increased rent.

In August, 1901, or about that time, the *feme* plaintiff instituted summary proceedings before a justice of the peace, under the statute, for the possession of the premises and the recovery of the rent then due, alleging that the defendants had failed to pay the rent. The justice gave judgment for the plaintiff and the defendants appealed to the Superior Court and executed a bond in the sum of $1,350 to secure one year's rent and the damages, as required by the statute (Code, sec. 1772), in order to stay the execution, and this bond was afterwards increased by the Superior Court by $1,200. The two bonds for $2,550 are apparently sufficient in amount to secure the rent at the increased rate, and the damages for two years from the beginning of the lease, and the costs.

On the first or second day of each succeeding month after the first suit was brought the plaintiff instituted suits before a justice of the peace for the recovery of the installments of the rent which had matured, obtained judgments and issued execution thereon, and further, threatened to continue the institution of similar suits at the beginning of each month thereafter during the continuance of the lease. Thereupon the defendants, their first appeal having been duly docketed, moved in the Superior Court, upon affidavit in that case, to restrain the plaintiff from proceeding under the executions issued upon the judgments already rendered, and from instituting any further proceedings for the recovery of rent alleged to be due under the lease, and the plaintiff, at the hearing of the said motion, was, by order of the court, enjoined "from instituting or prosecuting
(69) any other or further suits against the defendants for or on account of the rents sued for in the action, and from issuing or having issued any execution or executions on the judgments heretofore rendered in the cause now pending on appeal." The plaintiff appealed from said order, and this Court affirmed the decision of the lower court at the last term, upon the grounds stated in the opinion. *Featherstone v. Carr,* 132 N. C., 800.

After the expiration of the two years the plaintiff instituted summary proceedings before a justice of the peace against the

defendants for the possession of the premises. Upon motion of the defendants in the original case, which was pending in the Superior Court, *Judge Moore* ordered that the plaintiff be permitted to prosecute her new action to judgment, but enjoined her until the hearing of the cause then pending in the Superior Court from issuing any execution upon her judgment for the possession of the premises. The plaintiff excepted to this order and appealed.

The question presented by her appeal, therefore, is whether *Judge Moore* should have granted the injunction, and upon this question we are with the plaintiffs.

The first order of injunction—the one which we affirmed (132 N. C., 800)—was issued to protect the defendants from a multiplicity of suits and to prevent vexatious litigation, and our decision was put upon the ground that all of the matters in controversy between the parties arose out of the lease, and that the question which was involved in the first suit was the same in principle as the one presented in the next and all subsequent suits, though the latter were brought to recover different installments of rent. The particular allegation in these suits was that the lease had been forfeited, and the right of the lessor to re-enter had accrued by reason of the failure of the defendants to pay the rent, and therefore the only matters in controversy were the right to the possession of the premises and the right to recover the different installments of rent as they suc- (70) cessively became due and payable. All of these matters, it was held, could be settled in one suit; and, in order to carry out the spirit and purpose of our present system of procedure, it was decided that, as the plaintiff's rights were fully secured by the bond of the defendants, she should be required to desist from proceeding under the judgments and executions already obtained, and from bringing new suits, as such action on her part tended to harass the defendants, without any real benefit to the plaintiff, which upon any principle of equity she was entitled to enjoy, as the rights of the parties could easily be determined in the one action, and as she was in no danger of sustaining loss or damage.

We adhere to this view of the case, as it was then presented to us, but we do not think that the present appeal involves any such question as we then decided, but one that is quite different in fact and in law.

The last suit brought by the plaintiff was for the possession of the premises, and was founded, not upon the fact that there had been a default in the payment of the rent, but upon the allegation that the lease itself had expired by its own limitation, it being a lease for two years only, under the provisions of the statute that

no lease or agreement for a lease by a married woman of her lands and tenements to run for more than three years shall be valid unless the same be executed by her and her husband and proved and acknowledged by them, and her privy examination taken, as required by law in the case of probate of deeds of married women. Code, sec. 1834. We deem it unnecessary to decide the question raised by the plaintiff as to whether the lease had expired, for we are of the opinion that in any view of the case the last suit does not come within the range of the principle upon which the first injunction was granted and sustained by us.

It is based upon an entirely new cause of action, which, in
(71) any possible development of it, could not subject the defendants to a multiplicity of suits or to vexatious litigation. If it is decided in that suit that the lease had expired, the plaintiff surely should be entitled to immediate possession of the premises. The plaintiff by no possibility can recover more than the possession of the premises and the damages accrued since the expiration of the lease. It is an ordinary action to assert and enforce a right which has accrued since the first suits were brought, and does not involve any element such as in those suits entitled the defendants to be protected by the restraining power of the court.

It appears in the record that the plaintiffs have recovered judgment in the last suit for the possession of the leased premises, and, so far as appears, no appeal has been taken by the defendants. There was some dispute between counsel in this Court as to the correctness of the record in this respect, and as to whether the paper containing the recital of facts was properly a part of the record in the case, and for this reason we would not conclude the defendants by any decision upon those facts, as we think it can be avoided. We will say, though, that if it is true there has been no appeal from that judgment, the fact furnishes an additional reason why the injunction should not be continued and the plaintiffs restrained from issuing an execution for the purpose of being put into possession of the property. If the defendants have not appealed and that judgment stands unreversed, it would seem that the fact of the expiration of the lease has been adjudicated and that the defendants are estopped from longer asserting that it still subsists.

If the appeal of the plaintiff from the order of the court affirming the ruling of the clerk upon the plaintiff's motion to modify the injunction of *Judge Moore* and to permit her to issue execution upon her judgment for the possession of
(72) the premises is properly before us (and we think that it is not), we discover no error in the decision of the lower

court upon that question. The clerk had no jurisdiction or power to amend or modify *Judge Moore's* order. The permission to issue execution in that order was manifestly intended to be granted only by the judge of the court, and not by the clerk. The latter is not "the court," in the sense of those words as used in the order.

There was error in the ruling of the judge, by which the plaintiff was enjoined from issuing execution upon the judgment she obtained before F. N. Waddell, justice of the peace, for the possession of the premises in dispute, which judgment is described in the order. It will be so certified, to the end that the injunction may be dissolved and that such other and further proceedings may be had as are in accordance with the law.

Error.

ASHEVILLE v. WEBB.

(Filed 18 December, 1903.)

1. MUNICIPAL CORPORATIONS—*Statutes—Elections.*

   Although a city may refund its bonded debt without submission to popular vote, if it attempts to submit in accordance with special legislative act, it must follow the provision of such act.

2. MUNICIPAL CORPORATIONS—*Notice—Bonds—Code, Sec.* 567—*Laws (Private)* 1895, *Ch.* 352—*Laws* 1899, *Ch.* 507—*Laws (Private)* 1903, *Ch.* 6.

   Under Private Laws 1903, ch. 6, sec. 4, the first election for the issuing of bonds thereunder does not require thirty days' notice of said election.

ACTION by the city of Asheville against C. A. Webb & Co., heard by *Judge E. B. Jones,* at Fall Term, 1903, of BUNCOMBE. From a judgment for the defendants the plain- (73) tiff appealed.

Davidson, Bourne & Parker for the plaintiff.
No counsel for the defendant.

MONTGOMERY, J. This is a controversy submitted without action, under section 567 of the Code, upon an agreed statement of facts. The defendants contracted to buy from the plaintiffs $40,000 of bonds, issued under the provisions of chapter 6, Private Laws 1903, and afterwards refused to receive and pay for the bonds, on the ground that they were illegal, for the reason

that the plaintiff had failed to give thirty days' public notice of the election which had been held upon the question as to whether the bond issue should be "approved" or "not approved."

No notice of the election on the bond issue, held on 5 May, 1903, the regular election day of officers for the city of Asheville, and the time prescribed by law therefor, was published for thirty days prior to the said election. But a resolution was passed by the board of aldermen, a majority being present in regular session, in the following words:

"Ordered by the unanimous vote of the board of aldermen present, that an election be held at the time of the holding of the next regular election of officers of the city of Asheville, in May, 1903, upon the question of issuing $781,500 of refunding bonds, in accordance with terms, conditions and provisions of the act of the Legislature of North Carolina, duly adopted on 24 January, 1903, and entitled 'An act to authorize the city of Asheville to issue bonds to refund its debt.'"

A majority of the qualified electors of the city voted in approval of the bond issue, and the result of the election was duly canvassed by the board of canvassers of the city of Asheville,
(74) and proclamation thereof made by the chief of police of said city, within the time prescribed by law for the same.

Section 4 of the act of 1903 is in the following words:

"Sec. 4. That said bonds shall not be issued nor said taxes levied until authorized by vote of a majority of the qualified voters of the said city, at a public election, to be held in the same manner as elections are or may hereafter be held in said city for the election of mayor and aldermen thereof; and at such election those who favor the issuing of said bonds and levying the taxes herein provided for shall vote ballots with the word 'Approved' written or printed thereon, and those opposed to issuing said bonds shall vote ballots with the words 'Not Approved' written or printed thereon; and if at any such election a majority of the qualified voters of said city shall vote ballots with the word 'Approved' written or printed thereon, then the said mayor and board of aldermen shall, as may be required under the terms of this act, issue said bonds, and after their sale or exchange, or the sale or exchange of any portion thereof, as hereinbefore provided, levy a tax sufficient to meet interest and principal thereof, when due, as hereinbefore specified.

"The first election under this act shall be held whenever the board of aldermen may order same, not less than thirty days after the date of said order; and if at such election a majority of the qualified voters of said city shall not vote in favor of issuing said bonds, then the board of aldermen of said city shall,

at any time and as often thereafter as they deem best, not oftener, however, than once in any one year, order an election to be held under the rules and regulations prescribed by law for the election of mayor and aldermen of said city, and after thirty days' public notice thereof, and at each of such elections the ballots shall be as hereinbefore directed; and if at any such elections the majority of the qualified voters of said city shall cast ballots in favor of the issuing of said bonds, as afore- (75) said, then the said bonds shall be issued as may be required under the terms of this act by said mayor and board of aldermen, to be applied to the purposes and upon the terms and conditions hereinbefore stated in this act."

The plaintiff's contention is that the act authorizing the issue of the bonds does not require a public notice of thirty days of the first election to be given, under section 4 of the act, and that the election, as held, was legally held, and that the bonds are valid; while the defendants contend that the failure to give such notice was a fatal defect and the bonds are invalid and void.

His Honor held that the act had not been complied with in respect to the notice of the election, and that the refunding bonds were invalid and void, and that the defendants were not required to take and pay for the same. Judgment was entered accordingly.

It will be seen, upon the reading of the above-quoted section of the act, that public notice of the holding of the first election is not required. A public notice of thirty days of subsequent elections on the same question, in case the first should be adverse to the bond issue, is made necessary by the act. The order of the board of aldermen seems to have been considered by the General Assembly as a sufficient notice of the first election to be held under the act. The plaintiff, without submitting the question to a vote of its registered voters, had the right to refund its bonded indebtedness, but, as it preferred to submit the question to a vote of the people, under an act of the General Assembly passed for that purpose, the method prescribed by the act must be followed. *Wadsworth v. Concord,* 133 N. C., 587. And the only question, as we have seen, submitted to us in this case is whether the act of Assembly above referred to requires a thirty-days public notice of the first election held under section 4 of the act. (76) His Honor, as we have said, thought it was. We do not concur in that view.

In section 4 of the act of 1903 the election was required to be held in the same manner as elections were or might be hereafter held in that city for the election of mayor and aldermen; and under section 10, chapter 352, Private Laws 1895—"An act to

amend, revise and consolidate the charter of the city of Asheville"—elections for mayor and aldermen were required to be held under the same rules as were prescribed or might be thereafter prescribed for the election of members of the General Assembly (the powers and duties in such rules and regulations conferred upon and directed to be exercised by the sheriffs being conferred upon the marshal of the city, etc.).

Under the general election law (chapter 507, Laws 1899) we find no requirements of any public notice of an election for members of the General Assembly. It is required by section 14 of that act that the county board of elections shall make publication of the names of the persons elected as registrars of voters for townships, wards or precincts, at the courthouse door, immediately after such appointment; and that is the only requirement of any public notice concerning the election for members of the General Assembly that we find in the act.

We are therefore of the opinion that the act of 1903, under which the election was held, did not require any public notice of the election. It does not appear from the facts agreed that there was a publication, at the courthouse door, of the names of the persons who were selected as registrars of voters, and it may not be out of place to add here that if notice of the appointment of the registrars of voters in the several wards of Asheville were not published at the courthouse door immediately after they were appointed, in conformity to section 14 of chapter 507,
(77) Laws 1899, and that omission is known to the defendants, the bonds might be invalid in their hands. *Duke v. Brown,* 96 N. C., 127; *Claybrook v. Commissioners,* 117 N. C., 456; *Debnam v. Chitty,* 131 N. C., 657.

Reversed.

EWBANK v. TURNER.

(Filed 18 December, 1903.)

1. JURISDICTION—*Superior Court—Chambers—Questions for Jury—Summons—Process—Code, Secs,* 256, 255, 623—*Laws* 1887, *Ch.* 276.

Where a summons is returnable before a judge at chambers, if issues of fact appear upon the pleadings, the cause should not be dismissed, but transferred to term for trial.

2. PHYSICIANS AND SURGEONS—*Dentists—Licenses—Mandamus—Laws* 1887, *Ch.* 178—*Laws* 1891, *Ch.* 251—*Const. N. C., Art. I, Secs.* 7, 31—*Code, Secs.* 3148, 3156.

The granting of a certificate to practice dentistry involves matters of judgment and discretion and will not be enforced by *mandamus.*

ACTION by F. W. Ewbank against V. E. Turner and others, composing the Board of Examiners of the North Carolina Dental Association, heard by *Judge B. F. Long,* at chambers, 31 October, 1903, at Marion, N. C. From a judgment for the defendants the plaintiff appealed.

Davidson, Bourne & Parker, Toms & Rector and *E. W. Ewbank* for the plaintiff.

Busbee & Busbee for the defendants.

CLARK, C. J. The complaint alleges that the plaintiff (78) graduated with distinction in the dental department of the Baltimore Medical College, an institution of high and well-recognized standing, after prosecuting his studies in dentistry therein for the prescribed period of three years; that thereafter he made application to the proper authorities for license to practice dentistry in South Carolina, and after examination he was found duly proficient and qualified, and license was issued to him, under which he practiced in that State; that thereafter, on removal to this State, he made application for examination and license under our laws; that the board not being in session, under the provision of the statute, he was examined by a single member of the board, was found duly qualified and proficient, and was given a temporary license, 26 January, 1902, which, for certain reasons, was renewed by a second temporary license till the meeting of the full board, 19 June, 1903; that under these licenses he practiced dentistry for nearly a year and a half, and built up a lucrative practice; that on 19 June, 1903, he was examined by the full board, and, though he, as he avers, showed on such examination that he "possessed the necessary and required proficiency in the knowledge and practice of dentistry, and underwent a satisfactory examination, as required by the statute in such case made and provided, as will abundantly appear from an inspection of his examination papers, the said board and the majority of the defendants composing said board unlawfully, unjustly and arbitrarily, and without just cause or reason, and abusing the discretion with which they were clothed by the laws of North Carolina, refused, and yet refuse, upon the repeated demands of the plaintiff, to issue and grant to him a

certificate of proficiency, to which he was and is entitled, and which it was and is the duty of the defendants to issue and grant."

The above is the gist of the complaint, which further
(79) avers that, by reason of such refusal to issue him a certificate of proficiency upon such examination, the defendants composing the Board of Examiners of the North Carolina Dental Society "thereby wrongfully, arbitrarily, unjustly and unlawfully prevented him from engaging in the practice of dentistry in this State, to his great damage, to-wit, in the sum of five thousand dollars, or more," and prays for a *mandamus* to compel said board to issue to the plaintiff "a certificate of proficiency in the knowledge of dentistry," and that "he have such other and further relief as he may be entitled to in the premises." An answer was filed, denying that the plaintiff had passed a satisfactory examination or was entitled thereon to a certificate of proficiency, and denying that the action of the board could be reviewed by the courts.

The summons was made returnable at chambers. The plaintiff moved (1) that the court submit the issues raised by the pleadings to a jury at the next term, under the proviso in the Code, sec. 623; (2) that the plaintiff be permitted an inspection and to take a copy of his examination papers; (3) that he be permitted to take a copy of the examination papers prepared and submitted by certain parties named, which were submitted to the board, upon their examination to practice dentistry, at the same time and place when the plaintiff was rejected. These motions were each refused, and the plaintiff excepted.

The defendant moved to dismiss for want of jurisdiction, on the ground that this was an action for a money demand, and the summons had been made returnable before the judge at chambers. The plaintiff thereupon moved to strike out the words "to his great damage, to-wit, in the sum of five thousand dollars or more." The court denied this motion, upon the ground that it had no power to allow such amendment, and the plaintiff excepted. The court thereupon dismissed the action, on the
(80) ground that it had no jurisdiction thereof. The plaintiff again excepted and appealed.

When the summons in a case of which the Superior Court has jurisdiction is brought before the clerk to term, or before the judge at chambers, it is equally in the Superior Court, and there is no defect of jurisdiction. If brought before the clerk when it should have been brought to term, it is said in *Elliott v. Tyson,* 117 N. C., at p. 116, when it gets "into the Superior Court by appeal or otherwise, the latter has jurisdiction of the whole

cause, and can make amendment of process to give effectual jurisdiction. Such amendment will be presumed, or the Supreme Court even can amend the process if necessary," quoting *McLean v. Breese,* 113 N. C., 390, citing *Capps v. Capps,* 85 N. C., 408; *Cheatham v. Crews,* 81 N. C., 343; *Robeson v. Hodges,* 105 N. C., 49, and adding: "Unlike the court of the justice of the peace, the clerk is really a part of the Superior Court, and a case wrongfully instituted before him upon appeal only needs an amendment of process to justify the original service." The same principle as to the jurisdiction of the Superior Court is recognized by chapter 276, Laws 1887, amending section 255 of the Code (see Clark's Code, 3 Ed., sec. 255), and cases cited in *Roseman v. Roseman,* 127 N. C., at p. 497, reaffirmed in *In re Hybart,* 129 N. C., at p. 131; *Ury v. Brown,* 129 N. C., 271; *In re Anderson,* 132 N. C., at p. 247; *R. R. v. Siroud,* 132 N. C., at p. 416. For the same reason, if a case is before the judge at chambers, if there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury (Code, sec. 623), just as the clerk might so transfer it. Code, sec. 256. As said in cases above cited, it would be strange to dismiss an action already in the Superior Court because before the clerk or the judge at chambers, and tell the plaintiff to come back into the same court, before the same judge, the same clerk being present, at term, by service of another summons upon the same par- (81) ties. The remedy is not to dismiss, but (the parties being already in court by service of summons) simply to transfer the cause to the proper docket. This does no one any detriment, saves time and costs, and avoids the unseemly countermarching incident to the old practice, when a plaintiff was put out of one court by one door, if he wrongfully brought an action for *assumpsit,* for instance, and was left to guess by which door he should come back into the same room, whether by labeling his action trover, trespass, detinue, or other process, the correctness of which guess he could only prove by a costly process of elimination. Even when an action is brought in the Superior Court, but in the wrong county, there being general jurisdiction, the action is now not dismissed, but is transferred to the court in the proper county.

The court erred in dismissing the action for want of jurisdiction. It was in the court that had jurisdiction. No amendment was necessary, but if it were desirable it was error to hold that the court had no power to allow it. *Piercy v. Watson,* 118 N. C., 976; *Thomas v. Womack,* 64 N. C., 657. Besides, the incidental averment that the plaintiff "was damaged five thou-

sand dollars or more" did not make it an action for a money demand. It was, certainly, in view of the disclaimer of the plaintiff, an action solely for a *mandamus* to obtain the "certificate of proficiency," and hence it presented only matter of which the judge had jurisdiction at chambers.

The defendants move in this Court to dismiss the action because the complaint does not state a cause of action, in view of the plaintiff's averment that he does not seek to recover damages. The requirements as to examination and procurement of a certificate before beginning the practice of dentistry in this State are set out in chapter 178, Laws 1887, amended by
(82) chapter 251, Laws 1891 (which are substituted for the Code, sec. 3148), and the Code, secs. 3149-3156. The power of the Legislature to require examination and certificate as to the competency of persons desiring to practice professions or skilled trades is upheld, after a review of the authorities. *S. v. Call,* 121 N. C., 643. That decision was reaffirmed in *S. v. McKnight,* 131 N. C., 717; 59 L. R. A., 187, the Court calling attention to the fact that the State exercises this police power for the protection of the public from impostors and incompetents, and not to the end of conferring exclusive privileges upon any particular body of men; for to do the latter is prohibited by the State Constitution, secs. 7 and 31, Article I, which forbids exclusive privileges and monopolies. It is a power to be exercised for the public good, and the Legislature is to judge of the method of appointing the examiners, and can prescribe the nature of the examination, unless it appear plainly that the power to regulate is used in reality in violation of the guarantee in the above-cited article of the Constitution and for the purpose of conferring exclusive privileges and not solely for the protection of the public. *S. v. Biggs,* 133 N. C., 729. No such violation of these constitutional guarantees appears or is alleged in this case. The Code, sec. 3149, provides for a board of examiners, to consist of six members of the North Carolina Dental Society, to be selected by said society. The presumption is that this honorable body will elect six of its ablest and most prominent members for the important duty of keeping up the standard of their profession by a just, reasonable and impartial examination of applicants. Should this important duty be neglected and incompetent or unworthy members be chosen, the remedy is by legislative repeal or change of the methods of selecting the board. Section 3151 provides that "Said board shall grant a certificate of proficiency in the knowledge and practice of dentistry
(83) to all applicants who shall undergo a satisfactory exam-

ination and who shall receive a majority of votes of said board upon such proficiency."

The lawmaking power having entrusted such examination to the board thus constituted, and required that the examination shall be satisfactory to them, and such requirements being reasonable and in violation of no constitutional provision, the courts cannot intervene and direct the board to issue a certificate to one whom the majority of the board have held has not passed a satisfactory examination, because upon the examination of experts the court or jury might think the examination of the plaintiff ought to have been satisfactory to the board. That is a matter resting in the consciences and judgment of the board, under the provisions of the law, and the courts cannot by a *mandamus* compel them to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant, upon his compliance with the regulations, the court could by *mandamus* compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. *Burton v. Furman,* 115 N. C., 166; *Loughran v. Hickory,* 129 N. C., 281.

But the plaintiff contends that, supposing his averment to be true that the defendants "wrongfully, unlawfully, unjustly, arbitrarily and without just cause or reason," declined to issue him license, has he no remedy? Certainly he has a remedy, for no one is authorized to discharge a public trust in that manner. But the remedy is not by *mandamus* to compel the board to certify contrary to their consciences and judgment, for no certificate of proficiency can issue, under the statute, except upon a certificate of satisfactory examination by the board. One remedy, if there should ever happen such abuse of trust, is, as already stated, by the Legislature repealing the act or providing a different method of selecting the board, or (84) regulating the method or course of examination, or prescribing a review of the finding of the board by some other body, if the General Assembly should think proper. Another remedy would be to follow the precedent set by applicants for license to practice law, who, when rejected, study their prescribed course over again and stand for examination at the next regular day. This is perhaps the most sensible course, for no man ever knows his profession too well.

Another remedy still: If the applicant avers his rejection was caused by improper motives, his remedy is an action for damages against the individuals composing the board, alleging bad faith or arbitrary disregard of their duties or improper animus against

the plaintiff, or other malversation in their discharge of duty. In such action it might be difficult to prove the charges, unless by declarations made by the defendants themselves, for certainly the examination paper of the plaintiff himself would not be competent in the first place, since, though experts might testify to its sufficiency in their judgment, that does not negative the good faith of the board, whose judgment, if exercised in good faith, is a protection to them. Malicious, illegal or arbitrary action must be shown by direct evidence, and not by inference, to be drawn by the jury from the fact that the opinion of witnesses introduced as experts may differ from the opinion of a legal board of examiners as to the sufficiency of the examination. It is only when there shall be other evidence first introduced laying a sufficient ground, *aliunde,* for a charge of bad faith and misconduct that the examination paper of the plaintiff could possibly be competent, and then only in corroboration of the evidence first introduced. And in no aspect could the papers of other applicants at the same time and place be put in evidence; for even if they had been admitted to practice on insufficient answers, the plaintiff was not hurt thereby, and the introduction of
(85) irrelevant matter would only confuse the issue, which would be whether the plaintiff was refused a certificate, though he was shown to be qualified by his answers, by the arbitrariness, improper animus and misconduct of the examining board. We mention this point, as the refusal of the motions to permit the inspection and copying of the examination papers was discussed before us and ably presented in the argument of counsel.

The granting a certificate to practice involves matters of judgment and discretion on the part of the board, and will not be enforced by *mandamus. S. v. Gregory,* 83 Mo., 123; 53 Am. Rep., 565; *Hart v. Folsom,* 70 N. H., 213.

The complaint, alleging as ground of misconduct merely the fact that the examination should have been found sufficient by the board, does not state a cause of action authorizing the issuing of a *mandamus. People v. Dental Examiners,* 110 Ill., 180; *Dental Examiners v. People,* 123 Ill., 227; *Williams v. Dental Examiners,* 93 Tenn., 619, and cases therein cited at p. 628; *S. v. Colman,* 64 Ohio St., 377; 55 L. R. A., 105. *Mandamus* cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case a board of health), and the Court "will not and cannot look into the evidence of fact upon which the judgment of the board was based for the purpose of determining whether the conclusions drawn from it were cor-

rectly or incorrectly formed." *Kirchegessner v. Board of Health*, 53 N. J. Law, 594. Let it be entered:

Action dismissed.

Cited: Barnes v. Comrs., 135 N. C., 41; *Martin v. Clark, ib.*, 180; *Jones v. Comrs., ib.*, 221; *Glenn v. Comrs.*, 139 N. C., 421, 422; *Buchanan v. Harrington*, 141 N. C., 42; *S. v. Hicks*, 143 N. C., 693; *Coleman v. Coleman*, 148 N. C., 301; *Bd. Education v. Comrs.*, 150 N. C., 123.

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(86)

WHITSON v. WRENN.

(Filed 18 December, 1903.)

1. NEGLIGENCE—*Master and Servant—Personal Injuries.*

Where a servant chooses to do the work, which it is his duty to do, by a method known to him to be dangerous, contrary to the directions of the master, the master is not liable for an injury caused thereby, whether the danger be obvious or not.

2. NEGLIGENCE—*Master and Servant.*

Where a servant was injured by the fall of a truck which it was his duty to move, and which fell by reason of his effort to move it, the master's responsibility does not depend on the "liability" of the truck to fall, since he is only required to provide against what he could reasonably have foreseen would result from any defect in the appliance.

ACTION by Alney Whitson against T. F. Wrenn, heard by *Judge B. F. Long* and a jury, at August Term, 1903, of McDOWELL. From a judgment for the plaintiff the defendant appealed.

E. J. Justice for the plaintiff.
Avery & Ervin for the defendant.

WALKER, J. The plaintiff was an employee of the defendant, in his furniture factory, and while engaged in his work received injuries which he alleges were caused by the defendant's negligence. At the time he was injured he was engaged in loading trucks with lumber, placing the same in the kiln for the purpose of drying the lumber, and moving them from the kiln, when the lumber was dried, to the factory. The evidence tended to show that each of the trucks was made of two pieces of lumber six by ten feet long, fourteen inches wide and two inches thick, which

were nailed together, with four-inch blocks between them
(87) at each end and at the middle, and near each end there were wheels. The trucks were about six feet long by ten inches high, and were eight inches wide, and when placed on the rails they would not stand without being held or supported until they were partly loaded with lumber placed across them. There was no axle or connecting rod between these separate trucks. The trucks held about four thousand feet of lumber, and when they were loaded the kiln was full from side to side and to within eighteen inches of its top. The plaintiff was directed by the foreman, or superintendent, in removing the loaded trucks from the kiln, to go behind or in the rear of them, and instead of doing so on this occasion he went under the truck, which he was attempting to remove, and applied the force or pressure from beneath, and by reason thereof the trucks fell and he was injured.

It is not necessary to state any more of the testimony in order to present the points upon which the case is decided.

The defendant requested the court to give the following instruction: "If the jury find from the evidence that the plaintiff was directed in removing the lumber from the kiln to go behind or in the rear of the trucks and apply pressure from behind or in the rear of the trucks in order to remove the same from the kiln, and you further find that this was a safe way, and that if it had been done the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, went under the truck which was to be removed from the kiln and applied force from under and below the truck, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and you should answer the first issue 'No.'"

The Court refused to give this instruction as it was asked to be given by the defendant's counsel, but gave it with this modi-
fication: That, in order to answer the first issue "No,"
(88) under the instruction prayed for, the jury must, in addition to the facts stated therein, further find that the method of applying the force to the loaded truck as used by the plaintiff—that is, by pushing the truck from beneath—"was obviously dangerous, and that plaintiff knew it or could have known it by the exercise of due care."

We do not think that the modification of the instruction by the court was correct. It can make no difference whether the method employed by the plaintiff for moving the truck was obviously dangerous or not. This is not the case of a servant who is ordered or commanded by his master, or by some one having authority over him, to perform a certain duty when obedi-

ence to the order will be attended with obvious danger. It is the duty of the servant, it is true, to obey the orders given him, unless obedience to them will be obviously dangerous; in which case he has the right, and it is his duty to himself, to disobey them. The law requires that he should do so, or suffer the consequences of his recklessness. Our case is the very converse of the one stated. Here the servant was ordered to do his work in a safe way, and he preferred to do it in another and what proved to be a dangerous way. Why should the master be liable if the servant acted in disobedience to his orders and was thereby hurt? It must be admitted that he was the author of his own injury. If it was necessary that the method adopted by him should have been not only in disobedience of his orders, but in itself dangerous, in order to visit upon him the consequences of his refusal to observe his master's directions, it surely is not required that it should have been obviously dangerous. It is quite sufficient to bar his recovery if he knew that his method was a dangerous one, and chose to do his work in that way rather than in the manner pointed out by his master. Why should the danger be obvious if he had knowledge of it? If it had appeared that obedience to his master's orders as to the manner of moving the truck was obviously dangerous, he had a right to refuse to do (89) the work; but even then he could not select another and dangerous way to do it, and charge his master with the consequence thereof, and especially if the danger of the method which he adopted was known to him at the time.

It is true that in *Lloyd v. Hanes,* 126 N. C., 359, this Court said: "It is only where a machine is so grossly or clearly defective that the employee must know of the extra risk that he can be deemed to have voluntarily and knowingly assumed the risk." It will be observed that the reference to the obviousness of the defect in the machine was made by the present Chief Justice, in speaking for the Court in that case, for the purpose of showing that the servant must be in some way charged with knowledge of the defect. It is the knowledge of the defect and the consequent danger to himself that bars his recovery if the servant chooses a dangerous method of doing the work, instead of a safe one, or the one pointed out by his master; and it makes no difference how that knowledge is acquired, or whether it is actual knowledge or such as must be implied from the obviousness of the defect and the fact that the danger is not only apparent, but manifest. In *Lloyd v. Hanes* the Court was referring to the case of a servant who was acting under instructions from the master to use a dangerous machine or to do a particular act which was in itself dangerous, but which was not obviously so, and not to a case like

ours, where the servant departed from the instructions he received from his master and chose to act upon his own judgment. The question involved in the case of *Lloyd v. Hanes* related to the voluntary assumption of risk which was incident to the service, and the Court distinguished between the mere knowledge of a defect in the machine which made it dangerous and the voluntary assumption of risk by the servant; while the case at bar, so far as this particular instruction of the court is con-
(90) cerned, does not involve the doctrine of the assumption of risk so much as it does the disobedience of orders, which was the proximate cause of the injury to the plaintiff. The two cases depend upon entirely different principles.

The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim, *Volenti non fit injuria.*

No man, by his own voluntary and wrongful act, can impose a liability on another, nor will he be permitted to take advantage of his own wrong and willfulness. The doctrine that a servant is not negligent in undertaking the performance of a dangerous work for his master unless there is obvious danger in it, is a correct principle, and is strikingly illustrated by several cases decided by this Court. *Thomas v. R. R.*, 129 N. C., 392; *Allison v. R. R.*, 129 N. C., 336; *Patton v. R. R.*, 96 N. C., 455. A passenger who has been injured by alighting from a moving train, under the direction of the conductor, may recover for the injuries received, unless the act itself was obviously so dangerous that in its careful performance the inherent probabilities of injury were greater than those of safety. *Hinshaw v. R. R.*, 118 N. C., 1047. But this principle has no place in this case. Instead of the plaintiff having been commanded to do a dangerous act, it is assumed in the instruction, and there was evidence to show, that he was ordered to do the particular work assigned to him in a safe way, but elected to do it in his own way, which turned out to be a dangerous one, and which actually resulted in his injury. The law, under such circumstances, refers the injury to his own fault and not to any wrong on the part of his employer.

The instruction contained in plaintiff's third prayer should not have been given, as it was apt to mislead the jury.
(91) The defendant's responsibility to the plaintiff for any injury received while in the performance of his duty did not and could not depend upon the *liability* of the trucks to fall. Such an instruction as that given by the court in response to plaintiff's third prayer has been disapproved by this Court in *Williams v. R. R.*, 119 N. C., 746. The employer is not only

required to provide against what he could reasonably have foreseen would result from any defect in the machine which he requires his servant to use, and not against the consequences of accidents that may or may not occur. It was therefore held, in *Williams v. R. R., supra,* that where a servant was injured by the falling of a piece of timber which was being raised by a rope fastened to it, it was error to charge the jury that the defendant, the master, was negligent if the rope was so fastened to the timber as to be "liable" to slip off, so that the timber would fall and injure the servant who was at the time assisting in the work of raising it.

There was error in modifying the defendant's prayer and in giving the instruction in response to the plaintiff's third prayer, for which there must be a

New trial.

Cited: Avery v. R. R., 137 N. C., 135; *Stewart v. Carpet Co.,* 138 N. C., 64; *Horne v. Power Co.,* 141 N. C., 56; *Holland v. R. R.,* 143 N. C., 439; *Powers v. R. R.,* 144 N. C., 688; *Patterson v. Lumber Co.,* 145 N. C., 45; *Boney v. R. R., ib.,* 251; *Beck v. R. R.,* 146 N. C., 470; *Dermid v. R. R.,* 148 N. C., 183.

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(92)

MORROW v. ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 18 December, 1903.)

1. CARRIERS—*Passengers—Trespasser.*

A person who goes on a train for the purpose of assisting a passenger is not a trespasser and is entitled to the protection of the company if its conductor has notice of his presence.

2. NEGLIGENCE—*Carriers—Passengers.*

In this action to recover damages for injuries received from alighting from a train in motion there is sufficient evidence of negligence on the part of the defendant company to be submitted to the jury.

3. CONTRIBUTORY NEGLIGENCE—*Carriers—Passengers.*

The general rule is, that a person who alights from a moving train is guilty of contributory negligence.

ACTION by C. R. Morrow, by his next friend, Thomas Carson, against the Atlanta and Charlotte Air Line Railroad Company,

heard by *Judge Walter H. Neal* and a jury, at September Term, 1903, of GASTON. From a judgment for the defendant the plaintiff appealed.

A. G. Mangum for the plaintiff.
G. F. Bason and *F. H. Busbee & Son* for the defendant.

WALKER, J. This action was brought by the plaintiff to recover damages, alleged to have been caused by the defendant's negligence.

On the night of 27 August, 1902, the plaintiff, his wife, Thomas Carson and two other persons, went to the defendant's depot at Gastonia with the plaintiff's sister, Mrs. York, and her six children, the oldest of whom was fifteen years of age
(93) and the youngest four years of age, for the purpose of assisting them in boarding the train, which they intended to take that night for a distant point. When the train arrived, about 11 o'clock P. M., and after the passengers for that station had alighted, the plaintiff and Thomas Carson immediately assisted Mrs. York and her children to get on the train, but before they could find a vacant seat for them the train started, and Carson ran to the door and then to the platform, and jumped off the train, without injury. When the plaintiff, who followed him, was alighting from the steps of the platform, with his hand on the railing, or, to use his own words, when he let his feet down from the steps, there was a sudden jerk of the car upon which he had been standing, which broke his hold; his foot struck a pile of mail sacks which had been left on the ground near the crossing, and about one hundred and fifty feet from the usual place where passengers alighted, and plaintiff was thereby thrown under the cars and severely injured. As he and Carson and Mrs. York and her children boarded the car, an employee of the defendant, who had on a uniform and held a lighted lantern in his hand, was standing near by and could see them as they got on the train. The plaintiff's wife bid Mrs. York and her children good-bye and remained outside, but said nothing to the plaintiff, her husband, or to Carson, her brother-in-law. The latter was wearing his "every-day clothes." None of the defendant's employees offered to help Mrs. York to get on the train. It was usual and customary to give signals before starting the train at that place by ringing the bell or by proclamation of the conductor, namely, "All aboard!" but neither the plaintiff nor Carson heard a signal of any kind that night, though the usual signals might have been given without being heard, as there were eight or nine cars in the train. The train moved off before any

of the passengers who got on at Gastonia could be seated. Plaintiff did not see the conductor, or he would have told him that he intended to board the train in order to help his (94) sister, but he expected that the usual signal would be given and that he would have time to leave the train with safety. When the plaintiff fell from the train it was running at the rate of "not more than three or four miles an hour." It had been customary for persons to be assisted in boarding the train at Gastonia by their friends or escorts, and it had frequently been done. One of the plaintiff's witnesses testified as follows: "I was the hotel porter, and went to the depot that night to meet the train, and saw a railroad man, with a lantern, standing near the steps when the passengers were alighting. I don't know whether or not it was the conductor or who it was. He had a lantern. All the employees have lanterns. I thought he was the conductor, but cannot swear to it."

This is a sufficient recital of the leading or material facts necessary to an understanding of the case.

At the close of the plaintiff's evidence the defendant moved to dismiss the action, or for judgment as in case of nonsuit, under the statute. The motion was allowed, and the plaintiff excepted and appealed. The first question presented is whether there was any sufficient evidence of defendant's negligence which should have been submitted to the jury; for when a plaintiff's action is dismissed or he is nonsuited under the provisions of the statute, the truth of the evidence is thereby admitted, and the plaintiff is entitled to have it considered in the strongest and most favorable light for him, and to have the benefit of every reasonable inference or deduction that can be drawn therefrom for the purpose of sustaining his cause of action.

If the evidence tends to establish any state of facts entitling plaintiff to recover, no matter how the combination of those facts may be made, the plaintiff has a right to have the case submitted to the jury, for they might find just that state of facts. This principle is so well settled that it does not now re- (95) quire the citation of any authority to support it. In some respects this case is like that of *Whitley v. R. R.*, 122 N. C., 987. It was there held that a person who goes upon the train of a railroad company for the purpose of accompanying and assisting one of its passengers is not a trespasser and is entitled to the protection of the company if the company's conductor in charge of the train had notice of his presence. The plaintiff's counsel in that case contended that such a person was a licensee and, under the circumstances, entitled to "the consideration, care and protection of the defendant"; and the defendant's counsel, as the

Court then understood his position, did not seem to deny this contention of the plaintiff's counsel, but insisted that he had no right to receive from the company that same degree of attention and protection that would be due to a passenger. The Court declined to discuss this contention of the defendant, but simply held that, whatever his precise status was, he was in any view entitled to protection and some degree of consideration for his safety. It is certainly not unlawful for one person to assist another to board a train for the purpose of taking passage thereon, when the situation of the passenger and the circumstances make it necessary, and especially so when no such assistance as is required by the passenger is offered by any employee of the company. We need not decide whether it is the duty of carriers of passengers on railways, by their servants, to inform themselves of the presence of such persons on their trains, and to provide rules and regulations for that purpose, for that question is not necessarily involved in this case. It is sufficient, at least, to fix the company with liability that the conductor of its train, or other person in charge of it, has actual notice of the fact that a person who is not a passenger has gone upon its train for the purpose of rendering assistance to one of its passengers.

(96) If a person could ever be justified in giving such assistance, we think the plaintiff was in this case, assuming the truth of the evidence, as we must do, for Mrs. York had with her six children, all of them comparatively young, and was encumbered with several pieces of hand baggage and with some packages. She needed assistance, and the company did not furnish it. The plaintiff, therefore, was rightfully on the train. What, then, was the defendant's duty, if any, towards him? If its conductor had notice of his intention to go upon the train for the purpose of assisting Mrs. York, the plaintiff was entitled to reasonable time to render the necessary assistance to her and to leave the train in safety. It may be that railroad companies are authorized by law to provide by rules and regulations for such cases; but, in the absence of any such provision, the law does not prohibit a person from getting on a car as the plaintiff did on this occasion. The only question, then, for decision is, was there any sufficient evidence to show that the defendant did know that plaintiff had gone upon the train to assist Mrs. York. We think there was. Whether it is sufficient to satisfy the jury and induce them to find the fact is for them and not for us to decide. At the time the plaintiff and Mrs. York boarded the train an employee of the company was standing near by, in full view of them, so that he could see what was done and hear what was said. He must have seen that Mrs. Carson had so conducted

herself towards the other parties as to indicate that Mrs. York and her children were the passengers and that plaintiff and Carson were only assisting them. "Mrs. Carson bid Mrs. York and her children good-bye," but said nothing to the plaintiff and Carson. This may have been slight evidence, when considered by itself, but it was at least some evidence, and, when taken in connection with the other facts and circumstances testified to by the witnesses, was sufficient for the consideration of the jury. Whether the person who stood near the steps of the coach as the plaintiff entered it was the conductor or some (97) other employee of the defendant, charged in law or in fact with the duty of providing for plaintiff's safety while exercising the lawful right of assisting one of the company's passengers, is a proper subject of inquiry for the jury, who in passing upon it will be guided by the facts as they may find them from the evidence and the instructions of the Court upon the law. There being some evidence of notice to the company, if the jury should find from that evidence that the company did in fact have notice that plaintiff had gone upon the train to assist Mrs. York, we do not think that it could be successfully contended that there was no evidence that plaintiff did not have reasonably sufficient time to assist Mrs. York and then leave the train before it started. Indeed, it appears that, without any delay, and certainly without any unnecessary delay, he and Carson assisted Mrs. York and the children to get upon the train, and that before they could find a vacant seat for them the train left the station. This fact as to whether the plaintiff had sufficient time to render the assistance and then to leave the train with safety was one for the jury to pass upon, but we are constrained to say that there was some evidence which tended to establish it.

But even if there was evidence of the defendant's negligence in this case, we do not think there was any error in the ruling of the court below, because the plaintiff, upon his own showing, was guilty of contributory negligence, which was the proximate cause of his injury. When he found that the train was in motion and its speed steadily increasing, he should have notified the conductor of his situation, so that the train could be stopped, or he should have waited until it reached the next station before he attempted to get off. His failure to do so, and his attempt to alight from the train, which was then running at the rate of three or four miles an hour, was such negligence on his part as defeats his right of recovery. The plaintiff, in this respect, is certainly not entitled to any greater considera- (98) tion than a passenger.

In *Burgin v. R. R.*, 115 N. C., 673, *Shepherd, C. J.*, for the

Court, says: "We think there can be no question as to the correctness of the ruling sustaining the demurrer. The general rule is, that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury. If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. In addition to the authorities cited by the Court, there are a great number to be found in other jurisdictions which abundantly sustain the proposition that it is contributory negligence to attempt to alight from a moving vehicle, although in consequence of the refusal of the carrier to stop the passenger will be taken beyond his destination, unless he is invited to alight by some employee of the carrier whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent and the attempt was not obviously dangerous."

In *Johnson v. R. R.*, 130 N. C., 488, *Clark, J.*, speaking for the Court, and approving the charge of the court below, says: "The general rule is, that a person who gets off a train while it is in motion is guilty of contributory negligence. It is the duty of the passenger, when he sees the train in motion, to ask for it to be stopped, and if it is not done he ought not to get off. To this general rule there are some exceptions, one of which is, that if a passenger is commanded or invited by the conductor to get off while the train is in motion, and the train is going so slow that the danger of stopping or jumping off is not apparent to a reasonable man, and he does so, and is injured, it would not be contributory negligence."

(99) The Court, in *Johnson v. R. R.*, held that the evidence did not show conclusively that the plaintiff was guilty of contributory negligence, so as to bring the case within the principle announced in *Neal v. R. R.*, 126 N. C., 634; 49 L. R. A., 684, as there was some evidence from which the jury might infer that the plaintiff had been led by the action of the conductor to believe that it would be safe for him to alight from the train; and if the jury so found, the case would come within the exception to the rule that it is negligence to alight from a moving train.

The principle of the cases cited is affirmed in *Hinshaw v. R. R.*, 118 N. C., 1047. Indeed, all of the cases are based upon what was said by this Court in *Lambeth v. R. R.*, 66 N. C., 494; 8 Am. Rep., 508, which has been conceded for many years to be a leading and controlling authority upon this question. See also

Denny v. R. R., 132 N. C., 340, and *Gordon v. R. R.*, 132 N. C., 565.

Hutchinson on Carriers, sec. 641, states the doctrine to be, that when a person attempts to get upon a railway train while in motion, without the necessity for doing so, induced by the conduct of the employees of the railroad company, and without an invitation to do so by its agent, acting in the line of his duty, such person is guilty of negligence, *per se*, and precluded from the right to recover from the injury which may be thereby occasioned; and even if the company had adopted the practice of receiving its passengers on its trains while in motion, it would be reckless conduct on the part of the company, or of those in charge of its trains, which, though, would not justify or excuse the equally reckless imprudence of the injured party.

We cannot see how the case of a passenger boarding a train while in motion can be distinguished in principle from the case of a passenger or other person lawfully on the train alighting from the train while it is moving. If the one is negligent to the extent of barring his right of recovery, the (100) other must necessarily be negligent to the same extent. *Burgin v. R. R., supra.*

In this case the plaintiff attempted to alight from a moving train, and was in the very act of alighting, when there was a sudden jerk of the train, which might have been expected, under the circumstances, and he was thrown under the cars and injured. The train at the time was running with increasing speed, and the act of alighting from it at such a time was little, if anything, short of recklessness. It is unfortunate, indeed, that the plaintiff was thus injured, but it was due at least to his own misfortune and not to any fault which can be imputed to the defendant as a direct cause of it. The plaintiff's act, according to his own version of the facts, was the proximate cause of the injury. This seems to us to be well settled as the law of such a case. By his evidence the plaintiff shows affirmatively and beyond any dispute or controversy, if his evidence is to be taken as true, and it must be so regarded upon a demurrer to it, that his own negligence was, in law, the cause of the injury he sustained, and the rule laid down in *Neal v. R. R., supra,* and *Bessent v. R. R.*, 132 N. C., 974, applies.

Although our decision that the plaintiff's own negligence was the proximate cause of the injury is in itself sufficient to sustain the ruling of the court below, we have discussed the question of the defendant's negligence, as that of the plaintiff's negligence could not have arisen unless there was negligence on the part of the defendant. It was necessary, therefore, to determine first

whether the defendant had been negligent in causing the injury to the plaintiff. *Gordon v. R. R., supra.*

The ruling of the court below upon the motion to dismiss was right.

No error.

Cited: Graves v. R. R., 136 N. C., 9; *Whitfield v. R. R.,* 147 N. C., 238; *Owens v. R. R., ib.,* 359; *Baker v. R. R.,* 150 N. C., 564; *Fortune v. R. R., ib.,* 698; *Reeves v. R. R.,* 151 N. C., 320.

(101)

GRIFFIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 December, 1903.)

ISSUES—*Carriers—Pleadings—Trial—Code, Sec.* 395.

Where, in an action for injuries to a passenger, he alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint.

CLARK, C. J., dissenting.

ACTION by Hiram Griffin against the Atlantic Coast Line Railroad Company, heard by *Judge Frederick Moore* and a jury, at March Term, 1903, of HALIFAX. From a judgment for the plaintiff the defendant appealed.

Walter E. Daniel, E. L. Travis and *Claude Kitchin* for the plaintiff.

Thomas N. Hill, Day & Bell and *G. B. Elliott* for the defendant.

CONNOR, J. This action was prosecuted by the plaintiff for the recovery of damages, alleged to have been sustained while in the act of alighting from the defendant's train. The plaintiff, at the appearance term, filed his complaint, alleging that on the day therein named he purchased a ticket of defendant's agent at Kelford to Palmyra, both stations being on the defendant's road, and boarded the train, delivering his ticket to the conductor; that when the train stopped at Palmyra plaintiff proceeded to get off, and while in the act of stepping off, without notice or warning to him, the engineer carelessly, negligently and wantonly moved the train suddenly, giving a jerk to the cars,

by which the plaintiff was thrown to the ground, break- (102) ing his wrist and otherwise injuring him; that the defendant's agent in charge of the train negligently and carelessly failed to give him a reasonable time in which to get off the train, and that by reason of his injuries he sustained damage. The defendant denied the material allegations of the complaint, and for a further defense said that when the train was approaching the station at Palmyra, and before it had stopped, the plaintiff negligently jumped and alighted from the train, and in doing so fell and was injured, while the train was still in motion and before it stopped; and that he thereby assumed the risk of being injured, and his negligence was the proximate cause of his injury. The defendant also set up contributory negligence.

At November Term, 1902, the plaintiff, by leave of the court, amended his complaint and alleged that when the train got near Palmyra the porter called said station, and as the train drew near thereto and slowed down, the plaintiff got up from his seat and went to the door of the car, to be ready to get off when it stopped; that when the train got to the station and was moving very slowly, having nearly stopped, the plaintiff believing it had stopped, the porter, who had also come to the door and was standing on the platform, told the plaintiff to get off, and that in obedience to the direction of the porter, and believing by reason thereof that it was the time and place to do so, he stepped off the train and was violently thrown to the ground, sustaining the injuries set forth. The defendant denied the material allegations of the amended complaint.

Without objection, his Honor submitted the following issues: Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Did the plaintiff contribute to his injury? And an inquiry as to damages.

As said by *Mr. Justice Douglas,* in *Tucker v. Satterthwaite,* 120 N. C., 118, "We are not inadvertent to the long (103) line of decisions laying down the rule that the refusal of the court to submit an issue tendered by either party cannot be reviewed by this Court unless exception is taken in apt time; nor do we wish to be understood as reversing or modifying it. . . . What we now say is that section 395 of the Code is mandatory, binding equally upon the court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues or admissions of record equivalent thereto sufficient to reasonably justify, directly or by clear

implication, the judgment rendered therein, this Court will remand the case for a new trial."

In *Pearce v. Fisher,* at this term, 133 N. C., 333, two defendants were sued for injury alleged to have been sustained, one as landlord and the other as a tenant of a part of the hotel in which the plaintiff's goods were stored. The following issue was submitted: "Was the plaintiff injured by the defendants, or either of them, as alleged in the complaint?" The jury answered the issue "Yes." *Mr. Justice Walker* says: "How can this Court decide, from the verdict as thus rendered, whether the jury intended to say that the plaintiff was injured by both of the defendants or only by one of them? To construe the verdict either way would be the merest conjecture. The answer of the jury to the issue would be just as appropriate if only one of the defendants had caused the injury as it would be if by joint action they had caused it. . . . Issues should not be submitted in such a way that when they are answered it will be left doubtful as to what the jury have found with respect to the liability of the parties."

(104) It is true, in the case cited, the defendant excepted to the issue. In this case it will be seen that the allegations in the original complaint and the amended complaint are based upon entirely different if not contradictory statements of the plaintiff's cause of action. The first says that as he was proceeding to alight from the train the engineer gave a sudden jerk, which threw him violently to the ground, etc. If the jury found this to be true, he was clearly entitled to recover. The authorities in this Court are uniform to that effect. The other cause of action consists of the allegation that as the train approached Palmyra he was told by the porter to alight; that the train had slowed down and was moving slowly, having nearly stopped, he believing that it had stopped, and that the porter, standing on the platform, directed him to get off; that in obedience thereto he did step off, and, because of the fact that the train was moving more rapidly than he had supposed, he was thrown to the ground and injured. Now, certainly both of these allegations cannot be true, nor is it so contended. In one view of the case the plaintiff was injured by the negligence of the engineer, the porter taking no part in the transaction; in the other view he was injured by the negligence of the porter, the engineer being entirely free from blame. We have held that the two causes of action may be joined in the complaint and appropriate issues submitted to the jury, presenting each phase of the controversy. *Simpson v. Lumber Co.,* 133 N. C., 95, and cases therein cited.

The exception of the defendant to the amendment must therefore be overruled.

We do not deem it necessary to discuss the exceptions to the charge, because, if the issues had presented each cause of action separately, many of the exceptions to the charge would not have arisen. Such error as may have crept into the charge is attributable to an effort to present the case to the jury in two contradictory aspects under one issue.

The principles governing the rights and duties of passengers on railway trains have been so frequently and (105) recently decided by this Court that it would seem unnecessary to repeat them. If the jury found from the evidence that the facts alleged in the original complaint were true, and further found that there was no contributory negligence, the plaintiff would be entitled to recover. The same may be said in respect to the second cause of action. But surely they could not answer both issues affirmatively.

The plaintiff testifies as follows: "I was sitting in the car, and the porter came through and called out Palmyra station. I got up and walked to the door just as it got to the station. I stood in the door until it about hit the station, and it ran by the station and temporarily stopped. As it ran by the station, the porter, who was standing on the platform of the car, on the other side of me, came back and told me to get off. To the best of my belief, the train had stopped. As I was in the act of stepping off the second step from the bottom, it jerked and threw me out." This testimony, if true, entitles the plaintiff to recover. But it does not correspond with the allegation in the original complaint, in which no suggestion is made that he alighted from the train at the direction of the porter. The gravamen of that allegation is that the defendant's agent carelessly failed to give him a reasonable time in which to get off the train, and that almost immediately after stopping, before the plaintiff could possibly alight, he carelessly and negligently started the train. Nor does the testimony correspond with the allegation in the amended complaint, the gravamen of which is that the porter carelessly and negligently told him to get off the train, and that by reason thereof he believed that it was the time and place to get off, and that he could safely do so. He stepped off and was violently thrown to the ground. The inference which we draw from this allegation is that at the time the porter told him to alight the train was moving too rapidly for him to do so safely, but that he relied upon the porter's judgment, and, believing (106) that he could safely alight, was thrown from the train.

While we recognize the well-settled principle that pleadings

are to be construed liberally with a view to substantial justice between the parties, it is equally well settled that the proof must conform substantially to the allegation. As was said by this Court in *Parsley v. Nicholson,* 65 N. C., 209, "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure. The essential principles still remain, and have only been modified as to technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty."

The cause of action stated in *Simpson v. Lumber Co., supra,* was the negligent conduct of the defendant in the discharge of its contractual duty to the plaintiff. It is allowable for the plaintiff to allege different acts of negligence, or that the negligence was committed in different ways. "It makes no difference, with respect to the plaintiff's right to recover, whether the burning was caused by a defective engine or by setting on fire combustible material carelessly left by the defendant on its right of way." So in this case the same legal result would follow with respect to the plaintiff's right to recover and the measure of damages, whether the injury was caused by the negligence of the engineer or of the porter. But, as we have said, it could not be, in view of the allegations, the negligence of both. The issues should have been so submitted that the attention of the jury would have been directed to the testimony in both aspects of the case, so that, under proper instructions from the court, they would have answered the issues accordingly as they believed the evidence. If they had answered the first issue, in respect to the defendant's negligence, "Yes," and the second issue, in
(107) respect to contributory negligence, "No," that would have ended the controversy. If, however, they had answered the issues in respect to the first allegation in the negative, they would have then proceeded to consider the issues directed to the second allegation.

To the end that the cause may be submitted to a jury, with issues drawn in accordance with this opinion, a new trial must be had.

New trial.

CLARK, C. J., dissenting. Concurring in the view of the Court that "the same legal result would follow with respect to the plaintiff's right to recover and the measure of damages, whether the injury was caused by the negligence of the engineer or of the porter," it seems to me that it is immaterial which it was, and no

detriment was caused by the jury not finding specifically which servant of the company was to blame. The defendant was to blame in either case, and that is all the plaintiff is called upon to prove. The jury have found the fact on which the plaintiff's right to recover depends, to-wit, that he was injured by the negligence of the defendant in alighting from its cars at Palmyra at the time mentioned, and being thrown to the ground. The plaintiff could state the circumstances in his complaint in the different phases to meet the proof that might be offered (*Simpson v. Lumber Co.,* 133 N. C., 95), but that does not require an issue as to each, but the one issue, "whether the plaintiff was injured by the negligence of the defendant, as alleged in the complaint," should be sufficient, especially since the defendant did not ask for another issue nor except to those submitted.

Had the party been killed and his personal representative had alleged, from uncertainty of evidence, the different phases besides the two in this complaint, that he got off on the right-hand side of the car and on the left-hand side, off (108) the front end of the car and off the rear end, and several other variant circumstances, must there be an issue on each? It seems there is but one *issuable* fact—the injury by the negligence of the defendant at the time and place; and the difference in statement of the attendant circumstances is merely evidential matter. I think there was no error committed by the judge below.

Cited: S. c., 137 N. C., 247.

LAMBERTSON v. VANN.

(Filed 18 December, 1903.)

1. EXECUTORS AND ADMINISTRATORS—*Wills.*

Under the provision of the will set out in the opinion, the executor is authorized to carry on farming operations on land of testator during the settlement of the estate.

2. FINDINGS OF COURT—*References—Appeal.*

The findings of fact by a referee, adopted by the trial court over objections, are conclusive on appeal.

3. EXECUTORS AND ADMINISTRATORS—*Wills.*

An executor, authorized to conduct farming operations on testator's land, is properly credited with amounts paid for the pur-

chase of tenants' interest in certain crops bought for the purpose of protecting the interest of the devisees.

4. EXECUTORS AND ADMINISTRATORS—*Commissions—Improvements.*

An executor is entitled to commissions on an expenditure for the erection of permanent improvements on land belonging to testator's children necessary for the proper cultivation thereof.

5. EXECUTORS AND ADMINISTRATORS—*Wills.*

An executor having purchased certain personal property to be used on land of testator's children, which the executor was required to operate pending settlement of the estate, is entitled to credit for the purchase price thereof.

(109) ACTION by Lucy B. Lambertson and others against Albert Vann, executor of the estate of W. A. Lambertson, heard by *Judge F. D. Winston* and a jury, at Fall Term, 1901, of NORTHAMPTON. From a judgment for the plaintiffs the defendant appealed.

Peebles & Harris for the plaintiffs.
T. W. Mason and *Gay & Midgett* for the defendant.

CONNOR, J. This action is prosecuted by the widow and children of W. A. Lambertson, deceased, against the defendant, as executor, for the purpose of having a construction of the will, and for other relief.

Lambertson died in March, 1888, leaving a last will and testament, in which he appointed the defendant Vann as his executor. The material parts of the will are as follows: In item 2 the testator directs that all the cotton now on the home farm and Clark place, and such other personal property as is not specially exempted from sale by the will, be sold and the proceeds applied in the due course of administration to the payment of the debts, and distribution afterwards as provided in said will. The testator directs that the horses and mules now on the House place, where he lived, should be kept on said farm and used in the same manner and for the same purposes as if he were living; said horses and mules not to be sold unless in the discretion of the executor it was deemed best for the children. He directs his executor to rent out the children's portion of the land from year to year, and manage the same for the best interests of the
(110) children, so long as he is engaged in carrying out the provisions of the will. He gives to his wife, for and during the term of her life, the house and all the out-buildings connected therewith on the home place, together with land enough to con-

stitute one-third in value of his land, to be allotted as dower, and after her death he gives the said land to his children now born, or to be thereafter born, in fee. He gives to his children, Brownie A. and Willie V., all the remainder of the home tract and Clark place not assigned as dower to his wife; and to his afflicted sister, for life, all the interest that he owns in the home place of his father, and after her death to his children in fee. The residue of the property he gives to his wife and children in equal portions. The defendant duly qualified as executor and entered upon the discharge of his duties.

The cause was referred to Walter Daniel, Esq., and he filed his report at Fall Term, 1897, of the Superior Court of Northampton. Among other facts found by him are the following: That the defendant continued to act as executor until 1893, when a receiver was appointed, and the defendant turned over to him the management of the estate and such personal property as was then on hand, for which he took the receipt of the receiver; that the defendant, upon assuming the duties as executor, made an agreement with the widow of the testator to carry on the farming operations upon the land belonging to the estate in the same manner that they had been carried on during the life of the testator, dividing the proceeds upon the basis of one-third to the widow and two-thirds for the benefit of the children; that the farm was operated under said agreement from 1888 to 1892, inclusive, at which time the widow and the executor put an end to the said arrangement, and the executor, during 1893, conducted the farming operations on the land belonging to the children in excess of the dower; and that between 10 September, 1892, and 25 February, 1893, the executor built (111) on the land belonging to the children certain farm buildings and out-houses, for which he paid $496.04. The referee finds that this was a necessary expenditure and a permanent improvement, and allows him credit for the same, but allows no commissions thereon. On 28 December, 1892, the executor sold certain personal property, and bid in, for and on account of the children, certain articles, to the amount of $690.74. The referee declined to allow him this amount, but does allow him the amount for which said property was afterwards sold by the receiver, to-wit, $454.88. The executor filed his annual account of the said estate, and also of his farming operations, and the referee, from said account, states an account, which is incorporated in his report. In his account the referee allows no commissions on certain items fully set forth in the report, nor does he allow interest on certain amounts or commission on amounts

paid overseer, nor amount paid for board of overseer, nor interest thereon.

Upon the facts found, the referee finds the following conclusions of law: That the executor was empowered, under the will, to conduct and carry on the farming operations; that the widow was entitled to one-third of the net profits of the said farming operations, and certain payments made to her in excess of said profits are charged against her distributive share of said estate, which is ascertained to be one-fourth thereof; that the amount which she owes the executor is not a lien on the estate in his hands belonging to the children; that the children are entitled to two-thirds of the net profits up to 1893, and to the whole of the profits for that year (1893), and to three-fourths of the estate in the hands of the executor. He thereupon proceeds to state an account of the dealings of the executor with the estate, and of his farming operations, separating the receipts and disbursements from the two sources. He finds a balance due the estate, 25 October, 1897, of $1,963.72; of this amount
(112) Mrs. Lambertson is entitled to $490, leaving due the children $1,472.79. Of the latter amount he has paid $1,253.61, leaving a balance due the children, 25 October, 1897, of $219.18. From the operation of the farms he finds that there was a balance on hand of $1,429.86; of this amount Mrs. Lambertson is entitled to one-third, $426.62, leaving due the children $953.24. This amount, with interest and sales of the crop for 1893, aggregates $2,040, from which he deducts disbursements and commissions, amounting to $677.37, leaving a balance due the children of $1,312.83, of which amount he has paid to the receivers $783.13, leaving $527.70 due the children, 25 October, 1897. The two accounts aggregate an indebtedness to the children of $746.88. To the report the plaintiffs filed a very large number of exceptions, the second, eleventh and fifteenth of which were abandoned before his Honor, who proceeds to overrule the others, from the first to seventy-first, inclusive. It is difficult to distinguish between those exceptions which point to conclusions of fact and those which point to conclusions of law. His Honor states that a large number of the exceptions are pointed to items based upon the contention that the executor was not authorized to cultivate the farms. His Honor adopted the conclusion of law, as found by the referee, that under the provisions of the will the executor was authorized to carry on the farming operations, and we concur with his Honor's ruling in that respect. We think it clear, from the terms of the will, that the testator intended that his executor should carry on the farming operations and manage the same to the best interest of the children, in

the same manner and for the same purposes as if he were living. This is shown by the direction that the horses and mules on his farm were not to be sold unless in the discretion of the executor it was deemed best for the children. The exceptions to the referee's findings of fact, which are adopted by his Honor, are conclusive upon this Court. We have carefully ex- (113) amined the accounts stated by the referee, in the light of the testimony before him, and we see no reason for disturbing his manner of stating the accounts. It is done with great care and intelligence.

The plaintiffs insist that the executor should not be credited with amounts paid out for the purchase of the tenants' interest in the crops. The referee makes no specific finding in respect to this matter. But it appears from his accounts that he has found as a fact that his dealings in that respect were correct. It is impossible for us to say, from the accounts and testimony, whether the purchase made by the executor of the tenants' interest in the crops operated as a loss to the estate. It would seem that the estate suffered no loss by reason of the course pursued by the executor. It appears that during 1889 the tenants threatened to abandon the crops and the executor found it necessary to take charge of them, and for that purpose bought the interest of the tenants. It is in evidence that 1889 was a bad crop year. One witness says: "Never knew a worse." And we cannot fail to take note of the fact, as a part of the history of the State, that 1889 was one of the most disastrous years known among our farmers. It would hardly have been possible to have operated the farm without some loss, and it would have been impossible to have anticipated such disasters as came to the farming operations of the defendant and all other persons in eastern North Carolina. It is difficult, looking backward, to adjust these accounts without danger of doing injustice to the parties. We see no reason for disturbing the conclusions to which the very intelligent referee has come in dealing with this matter. His Honor approved his findings of law and fact in that respect.

The referee found that the expenditure of $496.04 for building on the children's land two barns, nine stables and a two-story frame house for the overseer, a hen house and a (114) tobacco house were necessary and a permanent improvement to the property. He allows the executor for these items, but declines to allow him commissions for this disbursement. The defendant excepted to this ruling, and his Honor sustained the exception, allowing defendant commissions on the disbursement. We concur with his Honor's ruling in that respect.

The referee charged the defendant with the total amount of sales of personal property, made 28 December, 1892, $694.74. This property was delivered to the receiver, and sold by him in January, 1894, for $454.88. The referee credited the defendant with the amount for which the receiver sold the property, and to this the defendant excepted. His Honor sustained the exception and credited him with the amount at which he bought in the property. It seems that in January, 1892, when the widow and the executor put an end to the arrangement by which the lands were cultivated jointly, for the purpose of ascertaining the value of the widow's interest in the personal property, a sale thereof was made, and the defendant bought it in for the children at $694.74, this property consisting of horses and mules, farming implements, forage, etc., necessary for the cultivation of the farms. The same property was delivered to the receiver, except that part which had been consumed in the use. We concur with his Honor's ruling in that respect. We can see no reason why the executor should suffer loss for the depreciation. We therefore adopt his Honor's ruling.

His Honor also sustained certain exceptions to the report of the referee in regard to commissions upon some small amounts, and we see no reason for disturbing his ruling in that respect.

The other exceptions of the defendant were overruled. A large number of the exceptions filed by the plaintiff are (115) to conclusions of fact, and, having been overruled by his Honor, are conclusive upon us.

This litigation began in 1893. It would seem that it is to the interest of all the parties that it come to an end. We have a record on the plaintiffs' appeal of 165 pages and on the defendant's appeal of 120 pages, a large part of which is repetition. We have eighty-six exceptions, addressed to items ranging from thirty cents to $500. We have the assignments of error on the part of the plaintiffs, making no distinction between exceptions to matters of law and matters of fact. We have endeavored, with a great deal of labor, to carefully examine the question in controversy. We see no reason for disturbing the conclusions to which his Honor came. His Honor states that "by consent of both plaintiffs and defendant the court took the papers in this case to consider the same, and this judgment is rendered out of term by consent of all the parties." It is evident that his Honor gave it a careful consideration, and we see no reason for disturbing his conclusions. We think that upon the plaintiffs' appeal the judgment should be

Affirmed.

DEFENDANT'S APPEAL.

The defendant in this case filed a number of exceptions, his Honor sustaining a portion of them and overruling the balance. We have carefully examined the record, and we find no error in the action of the court in respect to the defendant's exceptions. The judgment upon the defendant's appeal must be affirmed.

We cannot refrain from saying that a volume of much smaller size and more clearness of statement would have enabled us to give the case a much more satisfactory investigation, with much less cost to the parties.

Affirmed.

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(116)

BUNCH v. ELIZABETH CITY LUMBER COMPANY.

(Filed 18 December, 1903.)

1. CONTRACTS—*Logs and Logging—Timber.*

Where a contract conveys the timber on land to be removed within a specified time (here five years), the vendee cannot remove it therefrom after the expiration of the time specified, a reasonable time being allowed within which to begin the cutting of the timber after the execution of the contract.

2. PAYMENT—*Contracts—Logs and Logging—Equity.*

Money paid for an option to cut timber during a certain period cannot be recovered back by the purchaser of the option, or his assignee, merely because he fails to take advantage of the option.

PETITION to rehear this case, reported 131 N. C., 830. Petition dismissed.

Pruden & Pruden and *Shepherd & Shepherd* for the petitioner.

W. M. Bond in opposition.

WALKER, J. This is a petition to rehear the above-entitled case which was decided by a *per curiam* order, at August Term, 1902, and is reported in 131 N. C., at p. 830.

This case and *Monds v. Lumber Co.*, 131 N. C., 20, were argued at the same time, with the understanding, as the Court then thought, that the former case should abide the decision in the latter, but counsel inform us now that the two cases were argued together only for the sake of convenience, as the facts and principles of law involved in each of them are substantially

the same, and it was not intended that the plaintiff in this case should be concluded by the decision in the *Monds case,* in which no petition to rehear is filed. We accept this statement
(117) of counsel as to the real understanding of the parties, and will proceed to consider the errors alleged in the petition.

The contention is that the petition should be heard as if an opinion had been filed in the case substantially like the one in the *Monds case,* the necessary changes being made to suit the facts wherein they may differ from those in the latter case, and, this being done, the petitioner assigns as errors that in the *Monds case,* which is based upon the authority of *Mfg. Co. v. Hobbs,* 128 N. C., 46; 83 Am. St., 661, and *Rumbough v. Mfg. Co.,* 129 N. C., 9, the Court construed the contract between the parties as a lease, and therefore void for uncertainty as to the time of its beginning; whereas, in fact and in law, there was a sale outright of the timber, the contract being executory as to the right to cut and remove it, which continued until abandoned in some way by the purchaser.

It is also alleged that the court erred in deciding that the action was not of an equitable nature, and in its essence like a suit in equity to remove a cloud from the plaintiff's title, whereas the court should have held that the plaintiff had come into a court of equity for relief and should be compelled to return the $200 paid to him, at the time the contract was made, by the Gay Manufacturing Company, the defendant having succeeded to all its rights and equities by virtue of the deed of the latter company to it.

It is a mistake to suppose that the Court, in *Mfg. Co. v. Hobbs, supra,* decided that the contract must be construed as a lease of the timber trees or as a term for years. The Court merely stated that it so far partook of the nature of a lease as to require the application of the same rule of law in determining its validity as would apply in the case of leases or terms for years, and that, as in such cases there must be a certain beginning and a certain end, the contract is void, as no definite
(118) time is fixed for the beginning of the term. 2 Blk., 143 and 318. A bare lease does not vest an estate in the lessee, but only gives him a right of entry, which is called his interest in the term (*interesse termini*); but when he has actually entered and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term for years; possession or seizin of the land remaining still in him who has the freehold. 2 Blk., 144. While some of the cases in this and other States liken a contract of this kind we are construing to a lease, it may be true that it

should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that if it is not cut and removed within a given time the interest or estate so conveyed shall revest in or revert to the grantor. While we are inclined to adopt this as the better interpretation, and the one more perhaps in consonance with the intention of the parties, as disclosed by the language employed by them, yet we think that, however the contract may be considered with reference to the interest or estate of the defendant's assignor, the result in this case must be the same; and even if the title in the trees vested the very moment the contract was delivered, and by virtue of it as an executed contract of sale, that title has been lost by inaction or failure to comply with the condition upon which it was conveyed, or, more exactly speaking, by failure to cut the timber within the time limited by the contract. There appears to be some diversity of opinion to be found in the cases as to when the title to the timber passes—whether immediately upon the execution of the conveyance or not until the timber is cut and removed, in a case like this, where the time limit extends not only to the cutting, but to the removal. This distinction, if well taken, can make no practical difference in the construction of the contract under consideration, as we hold that the time for cutting and removing the timber, as fixed by the contract, had expired (119) before this suit was brought, and it is therefore immaterial whether we decide that the title never passed out of the plaintiff, as the timber was not cut within the time, or reverted to him at the end of the allotted time, by reason of the failure to comply with said condition. In neither view of the matter can the defendant succeed in this action.

We are not inadvertent to the fact that some courts, whose decisions are entitled to the highest respect, have held that the title passes to the vendee, if we may so call him, and remains in him, notwithstanding the expiration of the time fixed for the cutting and removal of the timber; so that if he enters upon the land to cut the timber, his vendor may sue him in an action in the nature of trespass *quare clausum fregit* and recover damages for breaking the close, though he cannot recover in an action in the nature of trespass *de bonis asportatis,* or for the value of the timber so cut and removed after the time has run out. We cannot adopt this principle as the one which should determine the rights of parties in such cases, and especially are we unable to do so in this case, in view of the language of the contract under construction, which we think evinces most clearly a contrary intention. We must carry out the declared purpose of the par-

ties if it has been sufficiently disclosed by them in their agreement, and that, in our opinion, has been done in the case at hand.

We cannot conclude, after a careful examination of the terms of the contract, that the parties conveyed the timber with a proviso limiting the time within which it should be cut and removed, and intended thereby that after the expiration of that time the defendant's assignor should still have an interest or title in the timber, but without the right of exercising any control or dominion over it, unless by committing a trespass upon the land. Such a meaning would have to be very clearly expressed before we would feel at liberty to adopt it as the
(120) one contemplated by the parties. We prefer to rest our decision in this case upon that construction of the contract which is in our judgment more in accord with a reasonable view of the rights of the parties under it, rather than upon one which will go beyond what is necessary to effectuate the intention and produce such an anomalous result.

If an estate in the timber was conveyed by the contract, treated for the purpose as a deed, it must be commensurate only with the purpose and object of the conveyance, namely, to enable the defendant's assignor to cut and remove the timber within the five years, and it should endure no longer. At the expiration of that time the estate in so much of the timber as had been cut and removed would revert to the vendor, or, at least, the timber would become his absolute property.

If it is merely an executory contract, whereby title to so much of the timber as should be cut within the time limited would pass to the defendant's assignor, then the title to so much as should not be cut and removed within that time would remain in the vendor. It can make little or no practical difference in this case, as we have virtually said, whether we adopt the former or the latter view of the relation of the parties or of the interest which passes by such contracts. In any view that can be taken of the subject, the defendant's assignor had the right to enter upon the land and cut and remove therefrom the timber then standing, and to continue to do so within the five years, but at the expiration of that time his right to cut and remove the timber ceased, whether by revesting the estate in the remaining timber in the grantor or by a mere cessation of his right or option to cut and remove the timber under and by virtue of the instrument as an executory contract, is of no importance, in view of the special facts of this case. It is more a difference in form than in substance. In no event should we give a construction to the instrument which will confer any greater right or estate than

is commensurate with the object and purpose of the parties, as expressed in it. The spirit and letter of the con- (121) tract exclude the idea that when the time fixed by it expired the defendant's assignor was to have any right, interest or estate in the timber then standing on the land.

The majority of the cases in the other States which we have been able to examine seem to hold that the clause fixing the time within which the timber must be cut and removed was designed to limit the whole grant, and that the object of such a contract or conveyance is the sale of all the timber which should be taken off by the end of the time fixed in the instrument. The contracts are thus held to be executory in their nature. *McIntyre v. Barnard,* 1 Sandf. Ch., 52; *Gilmore v. Wilbur,* 12 Pick. (Mass.), 120; *Strasson v. Montgomery,* 32 Wis., 52; *Reed v. Merryfield,* 10 Metc. (Mass.), 1055; *Howard v. Lincoln,* 13 Me., 122; *Saltonstal v. Little,* 90 Pa. St., 422. And this is held to be the correct interpretation, even where the words of conveyance are *in presenti* and do not refer merely to the time *when* the timber is cut. *Pearce v. Gibson,* 6 Greenleaf, 81; *Fletcher v. Livingstone,* 153 Mass., 118; *Hicks v. Smith,* 77 Wis., 146.

In *Strasson v. Montgomery, supra,* the Court says: "The conveyance is of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises."

In *Fletcher v. Livingstone, supra,* it is said to be well settled that a contract like that relied on by the defendant in this case does not immediately pass the title to property, and is not a sale or a contract for a sale of an interest in land, but (122) an executory agreement for a sale of chattels, to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them.

Many other cases could be cited in which the same doctrine is laid down. By some of the courts it is held that the title to all of the timber passes, but the title to so much as is not cut and removed within the prescribed time reverts to the vendor. *Williams v. Flood,* 63 Mich., 493. In that case the Court says: "It is not very important to discuss the exact nature of the plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract

mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to the plaintiff, unless lost by forfeiture for nonremoval." See, also, *McCumber v. R. R.*, 108 Mich., 491, and cases therein cited.

In *Moring v. Ward,* 50 N. C., 272, this Court, by *Pearson, C. J.,* said that by such a contract it is the intention to create an estate, so as to entitle the vendee to occupy the land and take the trees for the time prescribed in the contract, and that this estate is in its nature a lease for years, and that the contract is not merely personal in its nature. In this case we repeat that it is not so important to determine the exact nature of the right or estate created by the contract as it is to decide whether or not the defendant, after the expiration of the time fixed for entering upon the land and removing the timber, had any interest or estate in the timber. It is our opinion, after a most careful examination of the authorities, that it did not have any interest or estate therein.

The defendant insists that the fixed years did not commence under the terms of the contract until his assignor "began to manufacture the timber into wood or lumber." As no
(123) definite time is fixed for the Gay Manufacturing Company to begin the manufacture of the timber, the law will imply a reasonable time. We do not think it can be successfully contended that thirteen years is not, as matter of law, an unreasonable time for cutting and removing the timber under the terms of the contract. *Mfg. v. Hobbs, supra.* Neither the defendant nor his assignor had ever cut any of the timber until about two months before this suit was brought.

It is admitted that the Gay Manufacturing Company had paid to the plaintiff at the date of the contract, 20 March, 1888, the sum of $200, that being the amount which the defendant alleges was paid to the plaintiff in advance on the purchase of the timber. The defendant now contends that it is entitled to have that amount paid to it as the assignee of the Gay Manufacturing Company, because it would be inequitable to allow the plaintiff to keep the timber or recover damages from the defendant for its conversion without returning the sum so received by it. It is argued that the plaintiff seeks to have a cloud removed from his title, and that he who asks equity must first do equity. We cannot concur in the view thus taken by the defendant. The only issues submitted to the jury related to the plaintiff's damages for cutting the timber and the defendant's counterclaim. It is true that the plaintiff does allege in the eighth paragraph of the complaint that the defendant's assertion of a right to the timber by

virtue of the contract is a cloud upon his title, but this was an unnecessary allegation, and the prayer of the complaint does not correspond with it, nor is the removal of the cloud any part of the relief sought by the plaintiff. Besides, the judgment of the court was simply for the amount of the damages assessed by the jury for the trespass committed by the defendant in cutting the timber, or, rather, to follow closely the language of the verdict to which the judgment refers, for the value of the timber, and nothing else.

This is not an equitable action. The plaintiff does not (124) seek to rescind the contract, in which case the court would put the parties *in statu quo,* but merely alleges in his complaint the facts, and asks that he be declared the owner of the timber cut and converted to the defendant's use; that the contract be declared of no effect, because of the expiration of the time limited in it for cutting the timber, and that he recover of the defendant the damages sustained by reason of its trespass or conversion. The complaint is drawn upon the theory that the contract had expired by its own limitation, and that therefore the defendant, in entering upon the land and cutting the timber, committed a tortious act.

The defendant's assignor paid the $200 practically for the right or privilege of cutting the timber within five years, which right or privilege was never exercised, but the plaintiff was prevented during that time from selling to anyone else. If money is paid for an option to cut timber during a certain period, and the party to whom the option is given does not see fit to avail himself of it, how can any equity arise in his favor to have the money paid back to him? It does not even present a case where money has been paid upon a consideration that has failed. He has simply refused to do what he had a right to do, and to compel the plaintiff to give him back his money would permit the defendant to take advantage of his own default. The plaintiff was certainly put to a disadvantage by the contract in being denied the right to the use of the land, or, as we have said, to dispose of it during the prescribed period, and this is a sufficient consideration to support his legal and equitable right to the money. In no possible view of the case, therefore, has the defendant any equity to have the money refunded.

There is no error in the former decision of this Court.

Petition dismissed.

Cited: Hawkins v. Lumber Co., 139 N. C., 162, 165; *Lumber Co. v. Corey,* 140 N. C., 466; *Woody v. Timber Co.,* 141 N. C., 473; *Winders v. Hill, ib.,* 704; *Mining Co. v. Cotton Mills,* 143

N. C., 308; *Midyette v. Grubbs,* 145 N. C., 88; *Modlin v. R. R., ib.,* 233; *Lumber Co. v. Smith,* 146 N. C., 161; *s. c.,* 150 N. C., 260; *Timber Co. v. Wilson,* 151 N. C., 158.

(125)

FAWCETT v. TOWN OF MT. AIRY.

(Filed 18 December, 1903.)

MUNICIPAL CORPORATIONS—*Water Companies—Electric Light Companies—Towns and Cities—Necessary Expenses—Const. N. C., Art. VII, Sec. 7—Code, Secs.* 3800, 3821.

An expense incurred by a city or town for the purpose of building and operating plants to furnish water and light is a necessary expense and is not such a debt as must be submitted to a popular vote, and such power is one of implication if not specially conferred.*

ACTION by Thomas Fawcett and others against the town of Mount Airy, heard by *Judge T. A. McNeill,* at November Term, 1903, of SURRY. From a judgment for the plaintiffs the defendant appealed.

Carter & Lewellyn for the plaintiffs.
S. P. Graves for the defendant.

MONTGOMERY, J. Whether a city or town has the right to incur an indebtedness for the erection and operation of plants for the supply of water and electric lights for municipal use, and to sell to its inhabitants, is a necessary municipal expense, is the question again presented to us for decision. Indebtedness incurred by a city or town for a supply of water stands on the same footing as indebtedness incurred for lighting purposes; and if such indebtedness be a *necessary expense,* then whether or not a municipality may incur it does not depend upon the approval of the proposition by a majority of the qualified voters of the municipality. It is only in cases where counties, cities or towns undertake to contract debts, or pledge their faith, or loan
(126) their credit, or levy taxes, except for the necessary expenses thereof, that the submission of the proposition must be made to a vote of the qualified voters of such county,

* This overrules, among other cases, *Mayo v. Commissioners,* 122 N. C., 5, and affirms the conclusion arrived at in that case in the dissenting opinion of MR. JUSTICE CLARK.

city or town. *Wilson v. Charlotte,* 74 N. C., 748; *Tucker v. Raleigh,* 75 N. C., 274.

It is almost impossible to define in legal phraseology the meaning of the words "necessary expenses," as applied to the wants of a city or town government. A precise line cannot be drawn between what are and what are not such expenses. The consequence is, that as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things, it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of progressive people, that things deemed necessary in the government of municipal corporations in one age should be so considered for all future time. In the effort of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage.

On this subject this Court in *Wilson v. Charlotte, supra,* uses the following instructive and suggestive language: "The analogy of the law of the necessities for infants is the only one that occurs to us. It is held that, if, considering the means and station of life of the infant, the articles sold to him *may* be necessaries, under any circumstance, they come within a class for which the infant may be liable; and upon his refusal to pay, it is for a jury to determine whether under the actual circumstances they were necessary. If, however, the articles are merely ornamental and such as cannot under any circumstances be (127) necessary to the one of means and station of the infant, the court may, as a matter of law, declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application. But if treated merely as an analogy, in the absence of other guides, it may be of some general use."

It seems strange that it should be declared by some of out courts of highest reputation that the purchase of a town clock or hay scales or a pump is a necessary expense, when the supply of light to enable its citizens to walk its streets in security, or a supply of wholesome water to prevent disease and suffering, should be held as not a necessary expense. It is pretty generally held by the courts that the expense incurred for the *widening* of

streets is a necessary expense, that a market house is a necessary expense; and surely, if that be sound law, the courts ought to hesitate before they would pronounce a debt incurred for the furnishing of light and water not to be a necessary expense. And it seems to us that it may be reasonably considered as certain that the words "necessary expense" do not mean expenses incurred or to be incurred for purposes or objects that are only for the procurement or maintenance of things absolutely essential to the existence of the municipality. The expenditure of money for the widening of streets, the erection of market houses, town clocks and hay scales are all considered as necessary expenses, and those things are not essential to the life of the municipality. A city or town might be fairly well governed and be prosperous without having appointed and fixed particular places for the sale of market produce, or without keeping the time of day or weighing grain and fodder; and certainly expenses incurred for water and light are more necessary than those for a market house, clocks and scales. The words "necessary expenses," then, must mean such expenses as are or (128) may be incurred in the establishing and procuring of those things without which the peace and order of the community, its moral interests and the protection of its property and that of the property and persons of its inhabitants would seriously suffer considerable damage, leaving out of view the matter of the great inconvenience that would be attendant upon our present social life for want of such expenditures. The use of water from wells dug in populous communities is proscribed by the recent progress made in the science of bacteriology, the practical lessons of that science having been learned by the people generally.

It is of common knowledge that the most fearful scourges of certain most dangerous forms of fever arise from the use of water from wells in towns and cities; and it is out of the power of individuals in towns and cities to erect and operate appliances for supply of water. As to the question of lighting the streets and public places, the experience of all who live in towns and cities of any considerable population is that without lights upon the streets and in the public buildings both life and property would be insecure, to say nothing of the almost complete destruction of the conveniences of life and the marring of its social features. The fire department, probably the most important of the municipal departments, would be rendered ineffective, and a considerable part of the commerce—trade of the county—would be destroyed; for under our changed conditions a good deal of the traffic between different communities and a respectable part

of our mail service are conducted at night. It will not do to say that a city or town may expend money or incur a debt for the purchase of lights by the month or the year, but that it may not incur a debt for the construction and operation of a system of waterworks or for the installment of an electric plant for lighting. If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine. (129) The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of "necessary expenses." The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts cannot control the discretion of the commissioners.

Our conclusion, then, is that an expense incurred by a city or town for the purpose of building and operating plants to furnish water and lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred, under section 7 of Article VII of the Constitution; and that, under the general law of North Carolina in respect to cities and towns, the Code, secs. 3800 and 3821, municipal corporations may contract such debts and provide for their payment, unless there is some feature in the charter of such city or town which prohibits it.

The power to light the streets and public buildings and places of a city is one of implication, where it is not specially conferred, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. It is a most important factor, too, in the preservation of the peace and order of the community. Croswell Law of Elect., sec. 190; *Mauldin v. Greenville,* 33 S. C., 1; 8 L. R. A., 291; *Lot v. Waycross,* 84 Ga., 681. In *Crawfordsville v. Braden,* 136 Ind., 157 (14 L. R. A., 268; 30 Am. St., 214), the Court said: "So far as lighting the streets, alleys and public places of a municipal corporation is concerned, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and financial conditions of the corporation." It is well settled that the discretion of municipal corporations within the sphere of their powers (130) is not subject to judicial control, except in cases where fraud is shown, or where the power and discretion are grossly abused, to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, pro-

vide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

The cases on this subject heretofore decided by this Court to the contrary of the present decision, one of which was written for the Court by this writer, are overruled. The conclusion to which the present Chief Justice arrived in *Mayo v. Commissioners,* 122 N. C., 5 (40 L. R. A., 163), is the conclusion at which we have arrived in this case.

In the case before us the defendant, the town of Mount Airy, was authorized by an act of the General Assembly, at its session of 1901 (Private Laws, ch. 216), to submit to the qualified voters of the town the question of issuing $50,000 of town bonds for the purpose of defraying the expenses of constructing a system of waterworks and installing an electric plant to furnish the town with water and light. The question was submitted and carried, and the bonds were issued and sold. The proceeds were applied for the purposes mentioned in the act, but were insufficient to complete the plants. The board of aldermen of the town then passed an ordinance that they do borrow the sum of $15,000 upon pledging repayment by issuing bonds of like amount, with interest.

The plaintiffs commenced this action to enjoin the issuing of the bonds, and the injunction was granted by his Honor, *Judge McNeill,* and the defendant appealed. His Honor followed the decisions of this Court, and the error he committed was not his own, but it was error, nevertheless.

Reversed.

Cited: Robinson v. Goldsboro, 135 N. C., 383; *Davis v. Fremont, ib.,* 539; *Greensboro v. Scott,* 138 N. C., 184; *Wharton v. Greensboro,* 146 N. C., 360; *Swinson v. Mount Olive,* 147 N. C., 612; *Comrs. v. Webb.,* 148 N. C., 122; *Comrs. v. McDonald, ib.,* 131; *Hendersonville v. Jordan,* 150 N. C., 37; *Elizabeth City v. Banks, ib.,* 411; *Hightower v. Raleigh, ib.,* 571; *Water Co. v. Trustees,* 151 N. C., 175, 176; *Bradshaw v. High Point, ib.,* 518; *Burgin v. Smith, ib.,* 569.

(131)

MIAL v. ELLINGTON.

(Filed 1 December, 1903.)

OFFICERS—*Vested Interest—Contracts—General Assembly—Const. N. C., Art. IV., Sec. 33—Code, Sec.* 3872.

An officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the Legislature cannot deprive him. *Hoke v. Henderson*, 15 N. C., 1, overruled.

CLARK, C. J., concurring; MONTGOMERY and DOUGLAS, JJ., dissenting.

ACTION by A. T. Mial against J. C. Ellington and others, heard by *Judge R. B. Peebles,* at July Term, 1903, of WAKE.

This is a civil action in the nature of a *quo warranto,* tried upon the following facts agreed: At the session of 1889, Public Laws, ch. 363, was passed, entitled "An act providing an alternative method of constructing and keeping in repair the public roads of Raleigh Township, Wake County." It was provided by said act that the justices of the peace of Raleigh Township should meet and, if a majority so decided, adopt the method of keeping in repair the public roads of said township in accordance with the provisions of said act; that when they had so adopted the said method, it was by said act made the duty of the county commissioners, at their regular meeting, and biennially thereafter, to appoint a supervisor of roads for said township; that said supervisor should hold his office for two years; that in the event of a vacancy the same should be filled by said board of commissioners. Provision was made for removal for cause and upon notice. Said supervisor was required to qualify by taking the oath of office and giving bond in an amount to be fixed by the board. The duties prescribed for said supervisor were that he should formulate a plan for the permanent improvement of the public roads of said township, outside of the city (132) of Raleigh, by the use of the labor of county convicts and workhouse hands, etc. He was required to disburse all funds paid to him upon the warrant of the county commissioners for the purpose of carrying out the provisions of the said act, and to keep an account thereof, as well as a list of all tools, etc., in his possession, and to make a report thereof to the commissioners. The duties of the said supervisor in all other respects were specifically pointed out in the several sections of said act. His compensation was to be fixed by the board of commissioners, but the same was not to exceed $750 per annum. Pursuant to the provisions of said act, the method prescribed therein for the roads

of Raleigh Township was duly adopted by the justices of the peace and a supervisor duly elected. At the session of 1891 (Public Laws, ch. 218) the maximum limit of the salary of the supervisor was fixed at $1,200. At the session of 1897 (Public Laws, ch. 434) the provisions of said act were extended three miles beyond the present limits of Raleigh Township in each direction.

That at the regular meeting of the Board of Commissioners of Wake County, held in December, 1902, one Bryant Harrison was appointed by the said board to be supervisor of roads of Raleigh Township for a term of two years, commencing 1 January, 1903. That the said board fixed his salary at $70 per month, and that the said Harrison duly qualified and entered upon the discharge of his duties as such officer.

That at the February meeting of said board of commissioners the said Harrison resigned the said office, to take effect on 1 March, 1903, and thereupon the board accepted the said resignation and called a special meeting, to be held on 21 February, 1903, to appoint a successor. That at said special meeting the relator, A. T. Mial, was duly appointed to fill out the said unexpired term, and his salary fixed at $70 per month. That he subsequently gave the required bond, took the oath of
(133) office and was duly inducted therein, and entered upon the discharge of his duties as such officer.

That at the session of 1903 the General Assembly enacted chapter 551, an act entitled "An act to improve the public roads of Wake County." By said act it was provided that the Board of County Commissioners of Wake, in order to provide for the proper construction, improvement and maintenance of the public roads of the county, shall, on or before 1 January, 1904, elect a superintendent of roads for the county, who shall hold office until December, 1904, and until his successor has been elected and qualified; and at their regular meeting in December, 1904, and biennially thereafter, they shall elect a successor to said office. The superintendent of roads shall be paid such compensation as shall be fixed by said board, out of the county road fund, and hold office for two years and until his successor has been elected and qualified. . . . It shall be the duty of said superintendent of roads, subject to the approval of the board of commissioners, to supervise, direct and have charge of the maintenance and building of all public roads in the county, and he shall submit to the county board of commissioners a monthly report concerning the work in progress and the moneys expended, and he shall submit a quarterly report on the condition of the public roads and bridges and plans for their improvement. That the

board of commissioners shall divide the county into three road districts, to be known as the Raleigh, the Northern and the Southern road districts, respectively. The boundary of the Raleigh Road District shall be the circumference of a circle, the radius of which shall extend eight miles from the Capitol building in the city of Raleigh, in every direction; and the boundaries of the other districts shall be fixed by the board of county commissioners, and said board shall have power to create new road districts whenever in their opinion there is necessity for the same, and to alter the boundaries of any district, except the (134) Raleigh Road District, when they may consider it advisable. For each of the road districts the county commissioners shall elect, at the time herein prescribed for the election of the road superintendent, a district supervisor, who shall hold office for the same term and in the same manner that he holds, and until their successors are elected and qualified. Each supervisor shall give bond in the sum of $1,000 for the faithful performance of the duties of his office, the truthful accounting for all moneys coming into his possession and the proper care of all teams, wagons, machinery, tools and implements entrusted to his charge; and they shall furnish inventories of such material, tools, implements, machinery and utensils of every nature that shall come into their hands upon their entrance upon and retirement from office; they shall be paid such compensation as shall be fixed by the board of county commissioners, and may be removed from office in the same manner provided for the road superintendent.

The county commissioners shall furnish each supervisor with a complete outfit of teams, carts, machinery, implements, tools and utensils for use by him upon the roads of his district, and the machinery, tools, implements and property now belonging to the Raleigh Road District shall not be used upon the roads of any other district, but shall be kept for the exclusive use of that district.

The work of the supervisors in each district shall be under the direction and control of the superintendent of roads, and they shall faithfully conform to his directions and the requirements of this act. There shall be kept continuously employed upon the roads of each district a squad of not less than fifteen hired hands, whose compensation shall be fixed by the board of commissioners.

That at the regular meeting of the said board of commissioners, held in April, 1903, the said board caused public notice to be given that at the regular May meeting of the (135) said board a superintendent of roads for Wake County

and three supervisors for the respective road districts of said county would be elected by said board, under said chapter 551, Laws 1903, and, in pursuance of said notice, at said May meeting the board of commissioners elected the defendant J. C. Ellington superintendent of roads for Wake County, and the defendant Alfred Jones supervisor for the Raleigh Road District, and I. N. Bailey and A. R. Holloway supervisors for the Northern and Southern road districts of Wake County, respectively. That the relator, A. T. Mial, was not a candidate or applicant for either of these positions. That the defendants J. C. Ellington and Alfred Jones, prior to the commencing of this action, gave the bond and took the oath of office, and did all other acts required of them by the said act of 6 March, 1903. Thereafter, on 12 May, 1903, acting under the order of the defendants, the Board of Commissioners of Wake County, the said J. C. Ellington took possession of the teams and other property and effects belonging to Raleigh Township and then in the custody of the relator, A. T. Mial, by virtue of his office, aforesaid, in the absence of said Mial and without his consent; and on the said 12th day of May the defendants, the Board of Commissioners of Wake County, withdrew all the convicts, guards and officers in their custody and which worked upon the roads of Raleigh Township, and over whom the relator, A. T. Mial, had supervision, and placed them under the charge and supervision of the defendant J. C. Ellington. That thereafter, on said 12 May, 1903, the relator, A. T. Mial, demanded the return to him of all the said property and effects, also control of the convicts, guards and officers, and that the same was refused by the defendants. That at the said May meeting, 1903, the Board of Commissioners of Wake County, in pursuance of the said act of 6 March, 1903, fixed the boundaries of the Northern and
(136) Southern road districts of Wake County, the boundaries of the Raleigh Road District having been fixed by the said act, and included the territory formerly within Raleigh Township, under the said act of 1899 and all the acts amendatory thereof, and also included certain territory in addition thereto.

The court, upon the foregoing agreed facts, rendered judgment for the defendants, and the relator appealed.

Battle & Mordecai and *Womack & Hayes* for the plaintiff.
B. M. Gatling for the defendants.

CONNOR, J. We have no disposition, in the decision of this case, to place the conclusion to which we have arrived upon the

ground that the position of supervisor of the roads, the title to which is in controversy, is not a public office. Adopting the settled definition of a public officer, we hold that the position comes clearly within such definition. Nor are we disposed to enter into a discussion of the many fine and delicate distinctions which have been made between the validity of an act which distributes the duties of an office and one which abolishes the office. We prefer rather to discuss and decide the question, which is fairly presented by this record, whether an officer appointed for a definite time to a legislative office has any vested property interest or contract right to such office of which the Legislature cannot deprive him. The contention of the relator is based upon the proposition which was decided by this Court in *Hoke v. Henderson,* 15 N. C., 1, which is thus stated by *Ruffin, C. J.*: "The sole inquiry that remains is whether the office of which the act deprives Mr. Henderson is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is *property*—that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; (137) and, in reference to the person, he who has that right, to the exclusion of others, is said to have the property. That an office is the subject of property, thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among *incorporeal hereditaments,* and is defined to be the right to exercise a public or private enjoyment, and to take the fees and emoluments thereunto belonging. A public office has been well described to be this: When one man is specially set by law, and is compellable to do another's business, against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned; to the doing of which business no other person but the officer, or one deputed by him, is legally competent." This proposition was stated by the great Chief Justice and maintained in an elaborate opinion at the December Term, 1833, of this Court. That it has been frequently cited with approval and, with some exceptions, followed by this Court, cannot be denied; nor can it be successfully denied that there has always been a number of the ablest members of the bar in North Carolina who have questioned its soundness.

The contrary view is thus stated by *Sanford, J.,* in *Connor v. New York,* 2 Sanf., 370: "We think it must be assumed that there is no contract, express or implied, between a public officer

and the government whose agent he is. The latter enters into no agreement that he shall receive any particular compensation for the time he shall hold office, nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the Constitution limits the compensation, it is beyond legislative control; but that makes no contract. The people have the control, in their sovereign capacity, as the Legislature has in statutory offices. It is not the question whether fees or salary
(138) earned may be divested. The right to receive such fees may be conceded as perfect, without affecting the present inquiry."

In *Taylor v. Beckham,* 178 U. S., 577, *Fuller, C. J.,* thus states the law as held and enforced by that Court: "The decisions are numerous to the effect that public offices are mere agencies and 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 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."

We have thus presented the two views upon this most important question, and we are confronted with the necessity of either overruling or rejecting the theory upon which *Hoke v. Henderson* is based, or that which is stated in the cases cited, as what may be called the American doctrine in respect to the relation which the public officer bears to the State. It will save any possible confusion or misunderstanding to say that nothing said by us in regard to the power of the Legislature applies to offices provided for by the Constitution. These are beyond the power of the Legislature to affect, either in respect to the term or, except within the limitations fixed, the salary. This, not because there is any property right in the office, but because the people, in their Constitution, have made provision for and regulated their terms and salaries.

The proposition involved in this appeal on behalf of the plaintiff is that neither an office, or the duties thereof, created by an act of the Legislature, fixing the term and compensation,
(139) can be transferred to some other person or affected during the term for which the incumbent has been elected; that such office is property, within the protection of the constitutional

provision that no person shall be deprived of his property except by due process of law, and that no State shall pass any law impairing the obligation of a contract, which, of course, excludes the power of the Legislature to take property from one man and give it to another.

We recognize the gravity of the proposition that we shall reverse a decision of this Court, delivered by *Chief Justice Ruffin,* with the approval of *Justices Daniel* and *Gaston,* which we concede has received the unanimous approval of this Court in a number of cases, and a majority thereof in many others. If this were a question involving the title to property, upon the decision of which property rights have been acquired, settlements have been made, and the security and peace of families was dependent, we should feel it our duty to leave it to the legislative department of the government to bring the law into harmony with sound principle and the best thought and experience of the age in which we live. Being, however, a question of public constitutional law, involving the sovereignty of the State, if it is made to appear that the principle upon which *Hoke v. Henderson* is founded stands without support in reason and is opposed to the uniform, unbroken current of authority in both State and Federal courts, it becomes our duty to overrule it and place our jurisprudence in line with that of the other States and the Federal Government.

It is said by *Douglas, J.,* in *Caldwell v. Wilson,* 121 N. C., 467, that, "With the exception of this State, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of (140) its rights or privileges before the end of the term, or to alter or abridge the term, or to abolish the office itself. . . . 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 a public office be regarded as the property of the incumbent."

We deem it proper, in view of the conclusion to which we have arrived, to review at some length the elementary principles involved and the authorities in the United States.

It is stated by Mr. Freeman, in his note to *Hoke v. Henderson,* 25 Am. Dec., 704, that, "With all deference to the North Carolina courts, the conclusion may yet be drawn, with Mr. Pomeroy, that 'It may therefore be considered as a settled point of constitutional law, settled by both the national and State courts, that

a public office bears no resemblance to a contract, and that the legislatures have full power over the public offices of a Commonwealth, except so far as they may be restrained by 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.'"

Chief Justice Marshall, in *Woodard v. Dartmouth College,* 4 Wheat., 627, said: "Public offices are not within the inhibition of the Constitution of the United States against laws impairing the obligation of contracts; that the inhibition does not extend to offices within a State for State purposes; that the Legislature must necessarily control such offices, and may change and modify the laws concerning them as circumstances may require; that grants of political power to be employed in the administration of the government are to be regulated by the Legislature of each State according to its own judgment, unrestrained by any limitations of its power imposed by the Constitution of the United States." In the same case *Mr. Justice Story* said: "The
(141) State Legislature have power to enlarge, repeal or limit the authority of public officers, in their official capacity, in all cases when the Constitution of the States, respectively, do not prohibit them; and this, among others, for the very good reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the Legislature."

In *Butler v. Pennsylvania,* 10 How. (U. S.), 402, *Mr. Justice Daniel* says: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights—certain, definite, fixed, private rights of property—are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State Government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them after the measures which brought them into being shall have been found useless, shall have fulfilled or shall have been abrogated as even detrimental to the well-being of the public. . . . We have already shown that the appointment to and tenure of an office created for the public

use, and the regulation of the salary fixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error—do not come within the import of the term *contracts,* or, in other words, the vested private personal rights thereby intended to be protected."

Mr. Justice Lamar, in *Crenshaw v. United States,* 134 U. S., 99, 104, says: "The question is whether an officer (142) appointed for a definite time, or during good behavior, had any vested interest or contract right in his office, of which Congress could deprive him. The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right."

In *Newton v. Commissioners,* 100 U. S., 559, *Mr. Justice Swayne* says: "The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all officers within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. . . . In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. . . . A different result would be fraught with evil."

We do not find a suggestion from the Federal judiciary which in the slightest degree questions the authority of the cases cited. The only case to which our attention has been directed, in which *Hoke v. Henderson* is referred to by the Supreme Court of the United States in connection with an office, is *Ex parte Hennen,* 13 Peters (38 U. S.), 230. That was a rule upon a district judge to show cause why he should not reinstate a clerk who had been removed by him. There was no constitutional principle involved. It was simply a question whether the judge, under the statute, had the power of removal. The Court said: "The tenure of ancient common-law offices, and the rules and principles by which they are governed, have no application to this case. The tenure in those cases depends in a great measure upon ancient usage. But with us there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws. They are of recent origin and must depend entirely upon a just construction of our Constitution (143) and laws." The Court proceeds to say: "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; and by the

express terms of the law the tenure was during good behavior, and was, of course, governed by very different considerations from those which apply to the case now before the Court." The rule was discharged. There was no suggestion of a property right in the office.

Returning to the State courts, we find in *Conner v. New York, supra,* after discussing the opinion in *Hoke v. Henderson,* the learned Justice says: "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 more respect unlike ours than in this very subject, the source and nature of the rights and interests acquired by public officers. In enumerating the qualities of an office, considered as property, the Court admitted that it was inalienable, and in many instances incapable of being managed by a substitute, and, in the only point giving it the semblance of value, subject entirely to legislative control. If to those be added the consideration that it is a political agency, and not like a private contract of hiring for a definite period, we think there will remain no incident of *property* in its correct signification." This cause being before the Court of Appeals, in 5 Selden, 301, *Ruggles, C. J.,* concludes the opinion of the Court as follows: "*Mr. Justice Sanford* has referred to so fully, and reviewed so judiciously, the authorities on the proposition under consideration, that it appears unnecessary to re-examine them. My judgment accords with his conclusion, viz., that 'These au-
(144) thorities, with the nature of the duties and employment of a public officer, seem conclusively to show that such an officer has no *property* in the prospective compensation attached to his office, whether it be in the shape of a salary or fees.'"

In 1834, *Nicholl, J.,* in *S. v. Dews,* R. M. Charlton (Ga.), 397, in discussing the same question, uses the following language: "That a public office is the property of him to whom the execution of its duties is entrusted, is repugnant to the institutions of our country, and is at issue with that universal understanding of the community which is the result of those institutions. Public officers are, in this country, but the agents of the body politic, constituted to discharge services for the benefit of the people, under laws which the people have prescribed. So far from holding a proprietary interest in their offices, they are but naked agents, without an interest. As public agents, they are entrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*—which is not the subject of a grant, and can be neither alienated or annihilated, and it would be a repugnant

absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty. Unlike those officers in England, whose offices are treated as property, they do not hold under *grant,* but their authority or function to discharge the duties of their offices is *delegated* to them by *commission.* In those instances in which in England the right to offices has been regarded as property, the instrument of conveyance has been technically a grant, a conveyance by which an estate is passed or purchased, and employing the technical terms of a grant, *dedi et concessi.* But, from the organization of the first republican government of this State, officers have been appointed by *commission,* a term which, whether regarded according to its ordinary meaning or its legal sense, imports a delegation of authority. And our earliest books draw a distinction between a (145) grant of an office and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is. The title exhibited by the defendant himself in his return, and by which only he can vindicate his possession, is that he has been duly elected sheriff and has been duly *commissioned* and qualified. He claims, therefore, not by grant, but under commission, and that commission commits to him only an authority, without an interest. The title of the defendant is not by a grant, which passes an estate, but by a commission, which is a delegation or warrant of authority, and which, so far from passing an estate, is founded upon and is an affirmance of the fact that the estate is not in him, but in those from whom the power proceeds. It confers upon him the title to exercise the authority, but the subject of that authority is in the principal and under his control, and the very authority of the agent is evidence of it. Every authority implies a perfect right in the grantor to the extent of that authority, at least as between him and the agent, and it is perfectly insensible that because of such agency the agent becomes armed with a control over the exercise of that right."

It will be observed that *Judge Ruffin* says: "An office is enumerated by commentators on the law among *incorporeal hereditaments.*" *Judge Nicholl,* dealing with that phase of the question, says: "As property, offices are classed under the head of incorporeal hereditaments, and must be held under a conveyance to a man and his heirs, or, at least, a freehold interest must be held in them. Nor can an action be maintained for an injury resulting from a disturbance or interference with an office, unless it be an incorporeal hereditament or a freehold."

It is well settled that in the United States a public office is not and cannot, in the very nature of our gov- (146)

ernment, be an incorporeal hereditament. 3 Kent (13 Ed.), 454.

This question came before the Supreme Court of South Carolina, in *Alexander v. McKenzie,* 2 S. C., 81, when *Willard, J.,* delivered an exhaustive opinion. He says: *"Hoke v. Henderson,* 15 N. C., 1, holds the contrary doctrine, but is without support of reason or authority. Misapprehension of the English doctrine on this subject has frequently given rise to erroneous views of the powers of political bodies." The Court adopted the view of the New York Court in *Conner v. New York, supra.*

In *Standeford v. Wingate,* 63 Ky., 440, the Supreme Court of Kentucky thus states the conclusion reached upon the question: "An office established and held for the public good is not a contract, nor is its tenure secured by any binding contract." *Roberson, J.,* in the opinion of the Court, at p. 448, says: "Within the range of our researches, the only adjudged case which would give any countenance to such an unreasonable doctrine is that of *Hoke v. Henderson,* 15 N. C., 1, in which the Supreme Court of North Carolina decided that the term of a legislative office could not be reduced below that which was prescribed when the incumbent was elected. That anomalous decision, on a constitution not in all respects identical with ours, as bearing on the same question, is not, in our opinion, sustained by consistent argument."

The Supreme Court of Maine, in *Prince v. Skillin,* 71 Me., 361 (36 Am. Rep., 325), says: "All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the Legislature. There is, with this exception, no vested right in an office or its salary."

In *Kendall v. Canton,* 53 Miss., 526, *Chalmers, J.,* in the opinion of the Court, says: "Counsel for the plaintiff are correct in saying that while an election or appointment to
(147) office is not a contract, in its broadest sense, it does so far partake of the attributes of a contract as to entitle the incumbent to recover all salary accruing during his incumbency; but there is no demand here for salary earned and in arrear. The action sounds wholly in damages, and proceeds upon the idea of a vested right to hold for the full term for which the plaintiff had been elected. Nothing is better settled than the legislative power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office itself *or by a change in the tenure or the mode of appointment."*

Cole, J., in *S. v. Douglas,* 26 Wis., 428 (7 Am. Rep., 87), says: "It was not claimed that the plaintiff had any vested right in his office which the Legislature could not abrogate or destroy.

Such a position would be clearly untenable upon the authorities, and as a principle utterly inadmissible under our form of government."

In *S. v. Davis,* 44 Mo., 129, the Court, speaking of the plaintiff's case, says: "It proceeds upon the theory that a person in the possession of a public office created by the Legislature has a vested interest, a private right of property, in it. This is not true of offices of this description in this country; they are held neither by *grant* nor by *contract.* A mere legislative office is always subject to be controlled, modified or repealed by the body creating it. In England offices are considered *incorporeal hereditaments,* grantable by the crown, and a subject of vested or private interests. Not so in the American States; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the lawmaking power may deem it advisable to enact."

In *Robinson v. White,* 26 Ark., 139, the Supreme Court of that State has decided that "The office of an assessor is a statutory office, and the Legislature has absolute control over all statutory offices, and may abolish them at pleasure, (148) and in so doing no vested right is invaded."

In *People v. Van Gaskin,* 5 Mont., 352, the conclusion to which the Court arrived is stated to be that, "In the absence of constitutional restrictions, a legislature, having power to create a particular office and to regulate the manner in which it should be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, *or to declare the office vacant and appoint another to fill the vacancy.* The exercise of such power by the Legislature would not be in violation of section 10, Article I of the United States Constitution, prohibiting a State from passing any law impairing the obligations of contracts, or of the Fifth Amendment thereof, providing that no one shall be deprived of property without due process of law."

The Supreme Court of Nevada, in *Denver v. Hobart,* 10 Nev., 28, says: "The Legislature having by act of 4 March, 1865, vested certain duties upon the lieutenant-governor, and allowed him a salary for his services, *it was within the power of the Legislature to take those duties and the salary away from him before the expiration of his term of office and confer them upon another.*"

Shaw, C. J., in *Taft v. Adams,* 3 Gray (Mass.), 126, says: "When an office is created by law, and one not contemplated nor its tenure declared by the Constitution, but created by the law solely for the public benefit, it may be regulated, limited, en-

larged or terminated by law as public exigency or policy may require."

In *Wyandotte v. Drennan,* 46 Mich., 478, *Cooley, J.,* says: "This is a position that has frequently been taken, and almost as often overruled. Nothing seems better settled than that an appointment or election to public office does not establish contract relations between the person appointed or elected and the State. Offices are created for the public good, at the will
(149) of the legislative power, with such powers, privileges and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But, except as it may be restrained by the Constitution, the Legislature has the same inherent authority to modify or abolish that it has to create, and it will exercise it with the like considerations in view."

In *Attorney-General v. Jochim,* 99 Mich., 358 (23 L. R. A., 699; 41 Am. St., 606), the Court uses the following language: "The Legislature may remove officers, not only by abolishing the office, but by declaring it vacant. . . . And it may lodge the power to remove from statutory offices in boards or other officers subject to statutory regulations. And, while it cannot remove the incumbent of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of the government. There is the same lack of the ingredients of contract and the same power to abolish the office or remove the officer by amendment of the Constitution." In this case the Fourteenth Amendment was invoked and expressly held not applicable. "A public office cannot be called 'property,' within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purpose of government." *Ib.*

Andrew, J., in *Nichols v. McLean,* 101 N. Y., 526 (54 Am. Rep., 730), says: "It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office and to receive the emoluments thereof belonging to it does not grow out of any contract with the State, nor is an office property, in the same sense that cattle or land are the property of the owner." *Kreitz v. Behrensmeyer,* 149 Ill., 496 (24 L. R. A., 59); *Jones v. Shaw,* 15 Tex., 577.

(150) "An appointment is neither a contract nor is the office or its prospective emoluments the property of the incumbent. Upon general principles of law, the office itself and its

emoluments are within the control of the government; and the legislative branch of the government, whenever in its judgment public policy requires it, may declare the office vacant or *transfer its duties* to another officer before the expiration of the term for which he was appointed." *Kenny v. Hudspeth,* 59 N. J. Law, 320.

In *Foster v. Jones,* 29 Va., 642 (52 Am. Rep., 637), the Court uses the following language: "We think it may be fairly assumed in the outset to be an undeniable proposition that the two branches of the Legislature, as the direct representative of the people, have the right, where no restrictions have been imposed upon them, either in express terms or by necessary implication, by the Constitution, to create and abolish offices accordingly as they may regard them as necessary or superfluous. And they may also, under like circumstances, deprive the officers of their salaries, either directly by removing them from office, or indirectly by so changing the organization of the department to which they are attached as to leave them without a place." Mechem on Pub. Officers, sec. 463, *et seq.;* Throop on Pub. Officers, sec. 1719; 23 Am. & Eng. Enc. of Law, 328.

In *S. v. Hawkins,* 44 Ohio St., 109, *Minshall, J.,* says: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him by the public trust, to be exercised for the benefit of the public. Such salary as may be attached to it is not given him because of any duty on the part of the public to do so, but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of time thereto."

In *Donahue v. Will Co.,* 100 Ill., 94, it is said: "It is (151) impossible to conceive how, under our form of government, a person can own or have title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it."

"Some of the decisions have adopted the theory that an office is property, under a mistaken view that the common-law doctrine that an office is an hereditament applied to offices of this country, which is undoubtedly fallacious. . . . Public offices belong to the people, and are to be both conferred and taken away according to their will and appointment, and a person who accepts a public office does so subject to all the constitutional

and legislative provisions in relation thereto." *Moore v. Strickland,* 46 W. Va., 515; 50 L. R. A., 279. The Court, in this case, refers to *Hoke v. Henderson,* and expressly rejects the doctrine enunciated therein. A careful research fully sustains the remarks of *Mr. Justice Douglas, supra.*

Mr. Irving Browne, in his note to *Grant v. Secretary of State for India,* 8 Eng. Rul. Cas., 266, states the doctrine as held in the cases cited by us with this conclusion: "Both the office itself and the compensation, upon general principles of law, are naturally within the control of the government to diminish, increase or abolish. This is the general doctrine as to statutory offices in this country. An appointment to an office is not a contract, the impairment of the obligation of which is forbidden by the Federal Constitution." *He notes the single exception in the North Carolina Court, and says: "In all the other States* the Legislature may do what it pleases with such offices, unless it is expressly restrained by the Constitution, an office not being (152) regarded as property nor the subject of contract in any sense."

It will be observed that *Chief Justice Ruffin* cites no authority for the proposition maintained by him. He contents himself with the statement that "An office is enumerated by commentators on the law among the *incorporeal hereditaments.*" And, while, therefore, they are property, he says that "Most of the rules regulating them have reference to the discharge of the duties and the promotion of the public convenience. They are *pro commodo populi,* hence they are not the subject of property, in the sense of that full and absolute dominion which is recognized in many other things. They are only the subject of property, so far as they can be so in safety to the general interest involved in the discharge of their duties."

He concedes that the office may be abolished. "With these limitations, and the like," says he, "a public office is the subject of property, as everything *corporeal* and *incorporeal* from which man can earn a livelihood and make a gain. And to the extent of his salary it is private property, as much as the land which he tills, or the horse which he rides, or the debt that is owing to him."

We must confess our inability to see how the right to the salary can have any higher or stronger ground upon which to rest than the right to the office. The salary is but an incident to the office. The Chief Justice does not express himself with his usual force and clearness when he says that offices "are not the subject of property, in the sense of that absolute dominion which is recognized in many other things," and yet, "to the extent of

his salary, it is private property, as much as the land he tills, or the horse which he rides, or the debt which is owing to him." When he concedes that the office may be abolished, such concession very greatly weakens the force of his conclusion.

In *Mills v. Williams,* 33 N. C., 558, *Pearson, J.,* in his usual clear and concise style, thus states the distinction (153) between legislation which is contractual and that which is not. In discussing the power of the Legislature to repeal an act establishing a county, he says: "The substantial distinction is this: some corporations are created by the mere will of the Legislature, there being no other party interested or concerned. To this body a portion of the power of the Legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed or annulled. Other corporations are the result of contract," referring to private corporations. The same distinction was made and the same principle clearly enunciated by *Ruffin, C. J.,* in *University v. Maultsby,* 43 N. C., 257. He says: "But the Court is further of the opinion that the University is a public institution and body politic, and hence subject to legislative control. . . . And therefore the corporation was not originally the creature of the Legislature, but is dependent on its will for its continuing existence."

"A grant of land by a State is a contract, because in making it the State deals with the purchaser precisely as any other vendor might; and if its mode of conveyance is any different it is only because by virtue of its sovereignty it has power to convey by other modes than those which the general law opens to individuals. But many things done by the State may seem to hold out promises to individuals which, after all, cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions. The State creates offices and appoints persons to fill them; it establishes municipal corporations with large and valuable privileges for its citizens; by its general laws it holds out inducements to immigration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens expect to derive profit and emoluments. But can these laws be regarded as contracts between the State and (154) the officers and corporations who are, or the citizens of the State who expect to be, benefited by their passage, so as to preclude their being repealed? On these points it would seem that there could be no difficulty. When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency when-

ever it comes to be regarded as no longer important. 'The framers of the Constitution did not intend to restrain the State in the regulation of their civil institutions adopted for internal government.' They may therefore discontinue offices, or change the salary or other compensation, or abolish or change the organization of municipal corporations at any time, according to the existing legislative view of State policy, unless forbidden by their own Constitution from doing so." Cooley Const. Lim. (7 Ed.), 387.

We do not think it would be profitable to enter into a discussion of the various phases in which the question has come before this Court. It is a part of the judicial history of the State. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which and to what extent the word "property" applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another or distributed among other governmental agencies. We have no disposition to review these cases, but prefer to adopt what may appropriately be called the American doctrine upon the subject, so clearly set forth in a number of the many decisions which we have quoted.

Certainly in one eventful period of the history of the State it did not occur to anyone to carry the doctrine of *Hoke v. Henderson* to its logical conclusion. Without entering into any
(155) discussion of the subject, we may, for the purpose of this argument, assume that the State of North Carolina has never at any time from its earliest existence lost or forfeited its statehood, its political integrity, nor has the allegiance of its citizens or the officers of the State been changed to any other government, except in so far as the State occupied relations to other governments. The tenure of judicial offices in North Carolina prior to 1868 was for life or good behavior. At the end of the Civil War a convention was held and certain amendments made to the Constitution, retaining, however, this provision. The Constitution, thus amended, was ratified by the people, and a State government duly organized thereunder. Judges were elected and qualified, and were thereby entitled to hold such offices for life. In 1868 a second convention was held, the mode of election changed the tenure from life to a term of eight years, and this Court, then composed of *Pearson, C. J.*, and *Justices Reade* and *Battle*, and the Superior Court bench, upon which were several of the ablest lawyers in the State, without question recognized the right of the people by constitutional amendment to deprive them of their offices. It did not occur to

either of these judges that they held their offices under any contract, or that they had any property interest therein. So far as the record of our judicial history shows, no question was made of the right of the people by amendment of their Constitution to change the tenure and mode of election of their judges without in any respect abolishing or changing the duties of the office. The Supreme Court and Superior Courts of North Carolina, with few exceptions, were given the same jurisdiction by the Constitution of 1868 which they had under the old Constitution. Whatever status the State may have occupied in its Federal relations from 1861 to 1868, its judges held their offices for life or good behavior, and never by any action on their part forfeited such office to the State; hence, when the State resumed its Federal relations with the United States Government, (156) it did so in respect to its original statehood, and not by virtue of any new source of political life; and if *Hoke v. Henderson* had been the controlling principle, they were entitled and it was their duty to continue to hold their office and discharge its duties in accordance with the tenure by which they were originally conferred. Of course, we refer to this portion of our history without reference to the actual conditions existing, and upon the theory that the State, in its sovereign capacity, having withdrawn its allegiance from, in the same capacity resumed it to the Federal Government. *Texas v. White,* 7 Wall., 700; *s. c.,* 6 Rose Notes, 1066. It has never been seriously contended that the judges in North Carolina were not, from 1866 to 1868, rightfully in the discharge of their duties, or that the title to their offices were in any respects invalidated. It is a part of the history of this country that in a large majority of the original thirteen States forming the Union the judicial tenure was, as in North Carolina, for life or good behavior. A large number of these States have, since the adoption of the Federal Constitution, amended their constitutions, making the judicial tenure for a term of years, and in no instance, so far as our research informs us, was the contention made that the offices were the property of the judges, held by grant. The only reference to the question which we find (and that was a mere suggestion) is in *Com. v. Mann,* 5 W. & S. (61 Pa.), 418, and it is disposed of by the Court in the following language: "The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination."

While we are not insensible to the responsibility which we assume in overruling a case which has been recognized as a controlling authority upon this subject for more than half a century, we feel that we are discharging a duty which the Court of last

resort owes when it has become apparent that the case
(157) brought into question is not supported by sound reason, and is in conflict with the uniform and unbroken current of authority in the Federal and State jurisdictions. In so far as *Hoke v. Henderson* is based upon a construction of the Federal Constitution, it is our duty to recognize and enforce the construction put upon that Constitution by the Supreme Court of the United States. We assume that if by any lawful procedure the question could come before the Supreme Court of the United States whether an office created by the Legislature of North Carolina was property, within section 10, Article I, and the Fourteenth Amendment to that Constitution, that Court would not hesitate to follow its decisions rather than those of this State. But it is said that we should not disturb a decision so long acquiesced in and so often followed. "If a decision is based upon reasoning that can be shown to be erroneous—that is to say, contrary to the spirit and analogies of the law—it will be disregarded in other jurisdictions, and may even be overruled in the same jurisdiction." Wambaugh's Study of Cases, 53.

In *Myers v. Craig,* 44 N. C., 169, this Court, referring to a well-considered opinion theretofore rendered, speaking through *Pearson, J.,* says: "It is clear *Spruill v. Leary* is not sustained by *Flynn v. Williams,* and, after much research, no authority has been found to support 'the artificial and hard rule, the practical operation of which at this day would be to enable one man to sell another man's land without compensation.'" This was regarded as sufficient reason for overruling a well-settled authority in this State in respect to the title to land.

In speaking of the sanctity of judicial precedents, a great jurist uses the following language: "On the other hand, I hold it to be the duty of this Court, as well as every other, to revise its own decisions, and, when satisfied that it has fallen into a mistake, to correct the error by overruling its own de-
(158) cisions." Another Justice says: "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle that an erroneous decision is not bad law; it is no law at all. It may be final upon the parties before the court, but it does not conclude other parties having rights depending upon the same question.

"It is no doubt true that even a single adjudication of this Court, upon a question properly before it, is not to be questioned or disregarded, except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis,* like almost every other

legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is contrary to reason. The authorities are abundant to show that in such cases it is the duty of the courts to re-examine the question. Chancellor Kent, commenting upon the rule of *stare decisis,* said that more than a thousand cases could then be pointed out in the English and American courts which had been overruled, doubted or limited in their application." *Rumsey v. R. R.,* 133 N. Y., 79; 15 L. R. A., 618; 28 Am. St., 600.

If it is true that a public office is private property, the State, instead of being sovereign, finds herself in her effort, to perform her governmental functions, bereft of her sovereignty, her hands tied, her progress obstructed, for that those whom she has *commissioned* to be her servants have, by grants of parts and parcels of her sovereignty, become her masters, and, converting her commissions into grants, forbid her to proceed or go forward. That this is not fancy, or an imaginary result of enforcing the principle which we are asked to perpetuate, the reports of decided cases in this Court amply show. When it was sought to change the modes of governing the asylums and other State institutions, as the General Assembly deemed best for the (159) public good, it was claimed and held that the State was powerless, because the directors had a grant, based upon contract, by which they were entitled to manage its institutions for a number of years. *Wood v. Bellamy,* 120 N. C., 212; *Lusk v. Sawyer,* 120 N. C., 122. It was held in *Prison v. Day,* 124 N. C., 369 (46 L. R. A., 295), that, "Although a new method of distributing the powers and duties of the government and conduct of the State's Prison may be desirable, and the method undertaken to be adopted by the act of 1899 may be best, yet such changes cannot be made until the expiration of the contract with the incumbent." The system of criminal courts created by legislative enactment could not be changed, or the counties in the districts adjusted to suit the needs of the people, because the solicitors had contracts with the State, and held under grants public offices. *Wilson v. Jordan,* 124 N. C., 683; *McCall v. Webb.,* 125 N. C., 243. The right of the State to control, as in the judgment of the representatives of the people it thought best, its property interest in a railroad, was perverted, because the directors had by grant property in the office for a term of two years. *Bryan v. Patrick,* 124 N. C., 651. The power to repeal an act, abolish the office of railroad commissioner and establish a new commission—an agency of purely legislative creation—was denied for the same reason. *Abbott v. Beddingfield,* 125 N. C., 256. What

the representatives of the people deemed an improvement in the public system was prevented, because, with the grant of a public office in his hand, a school committeeman asserted his property right to the office. *Greene v. Owen,* 125 N. C., 212; *Dalby v. Hancock,* 125 N. C., 325; *Gattis v. Griffin,* 125 N. C., 333.

We do not cite the cases for the purpose of criticising them. For the purpose of the discussion, we regard them as the logical deduction to be drawn from the principle that a person
(160) may have a contractual right to or property in public office.

The facts in this case strikingly illustrate the wisdom of holding that public office is not private property, thus preventing the State and its agencies from performing its functions in respect to its internal government. It became evident to the Legislature that it would be wise to inaugurate a system of working the public roads of Raleigh Township by the use of the convicts. For the purpose of doing so, a scheme was devised and enacted into law. Officers were provided for, and their mode of election and term of office fixed. In the process of time it became necessary to enlarge the operations to other parts of the county. The plan which had been adopted was found to be wise, and it was desired to enlarge its sphere. It thus became necessary to have other officers, to distribute the duties and subdivide the work. For this purpose the law of 1903 was enacted. The whole scheme looked to and had for its object the public good, the improvement of the public roads, not the creation of offices, to be granted to the mere agents employed for this purpose. The relator finds no place in the new scheme for working the roads; he has no duties or powers, and no salary is provided for him. If his contention be correct, the working of the public roads must be stopped until his term of office expires. This is the logical result of his contention that he has a property right in the office; that he has risen above his source; that instead of being a mere servant or agent, commissioned to discharge certain public duties, he has become the owner of a part of the sovereignty of the State, and at his will a great work of public improvement must stop. This does violence to our conception of the relation which public servants bear to the people of their government.

The following language, used by *Judge Nicholl* in *S. v. Dews, supra,* so clearly sets forth the reason upon which the true
(161) principle is founded that we quote at some length: "The appointment of him, as well as other officers, is not a grant in derogation of the rights of the public, but the constituting by the people, in the exercise of their sovereignty, of an agent to carry their sovereignty into effect. In creating an

office the body politic does not restrict its sovereignty or the power of the Legislature through whom that sovereignty is expressed and exercised. The purpose is to extend the sphere of its action, or at least to give it operation. But if it be true that the officer has a property in his office, that that property embraces its duties as they were prescribed by law at the moment he was commissioned and qualified, and that those duties cannot be changed without a forbidden disturbance of private property, the consequence is that by his appointment the officer becomes placed above the sovereignty of the people during the term for which he is elected."

While it is our duty to search for, and, if haply we find the law, apply it to the case, we think it not improper, in view of the range which the discussion of the principle involved in this case has taken in our Reports, to say, in response to the argument that if the Legislature be permitted to change, modify, abolish or otherwise deal with public office and its incumbents, uncertainty in security and constant disturbance in the administration of the domestic affairs of the State will follow; that ours is a government "of the people, by the people and for the people"; that, except in so far as they have in their organic law limited their power to speak and act through their representatives, sovereignty rests with them. We, who are commissioned to perform judicial functions, may not claim to be wiser than they, or find any other guide for our conduct than the Constitution which they have ordained. If the people have not authorized the legislative department to parcel out their sovereignty by grants of public offices as private property, we dare not do so. The Legislature, having been entrusted with the power of either electing or providing for the election of officers of (162) legislative creation, must, as the representatives of the people, be entrusted to make such changes in the tenure, duties and emoluments of such offices as in its judgment the public interest demands. This power having been vested in that department of the government, it is our duty to obey and enforce the law as the "State's collected will."

To conclude the matter, the doctrine of *Hoke v. Henderson* is based upon the proposition that public office is private property, with all the results that logically flow therefrom. In so far as that case holds this proposition to be law, we expressly overrule it and declare that no officer can have a property in the sovereignty of the State; that in respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties or emoluments, or abolish them; that in respect to legislative offices, it is en-

tirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand.

The judgment of the court below is

Affirmed.

CLARK, C. J., concurring. The Court that decided *Hoke v. Henderson* did not deem themselves infallible, for they overruled divers of their own opinions as erroneous, and succeeding Courts have overruled other opinions of that Court. There is no peculiar sacredness attached to *Hoke v. Henderson*. No other court whatever, anywhere or at any time, has followed it as authority. All have concurred in disregarding it, and not a few have sharply criticised it, a few of which criticisms have been collected (127 N. C., at pp. 252, 253). If Mr. Reverdy Johnson paid the decision the scant compliment of mentioning it in his argument in *Ex parte Garland*, 4 Wallace, 333, the opinion of the
(163) Court did not treat it with as much consideration. It is not even referred to therein.

Nor has the case always been followed even by this Court. It owes its prominence, not to the original decision in 1833, which was not followed for nearly forty years, but to its revival and wider application after the political changes in 1870 and 1898. Its fundamental doctrine that office is not an agency, but property obtained by contract, and therefore protected by the contract clause of the Federal Constitution, was most effectually denied by every judge when he took his seat on the Supreme or the Superior Court bench in 1868, since he did so in disregard of that holding. The Convention of 1868 could no more abrogate a contract (if office was a contract) than it could any other contract made in 1865-'68. The Court has often ignored it, notably in *Mills v. Williams*, 33 N. C., 558; *Bunting v. Gales*, 77 N. C., 283, and *Winslow v. Morton*, 118 N. C., 486, and there are other cases in which it has been only partially upheld. Having discussed these cases in numerous dissenting opinions, from *Day's case*, 124 N. C., 362, down to *Taylor v. Vann*, 127 N. C., at pp. 240-253, in which last many of the opinions sustaining the legislative power over offices created by legislation are collected, it is not necessary that I should cite them again.

As the essence of the decision in *Hoke v. Henderson* is that office is property based on contract, and hence protected by the United States Constitution (for there is no such clause in the State Constitution), the General Assembly could not, if that view was correct, make any rule nor pass any law to disregard it. If they could, then all future contracts of any kind whatsoever could be taken out of the protection of the Federal Constitution

by a simple statute that all future contracts shall not have that protection. So far from the Legislature acquiescing, every case, from *Hoke v. Henderson* itself down to *Mial v. Ellington,* the present case, was necessarily presented by legislative (164) action, taken in disregard of *Hoke v. Henderson.* As long as the Court held to the doctrine of that case, the Legislature could make no rule to the contrary, beyond persistently disregarding it as it has often done, as evidenced by numerous decisions. There is no way to get rid of the decision, except by the Court which made it repudiating it, for the reasons given in the very able opinion in this case by *Mr. Justice Connor.*

The Legislature shapes the administrative and political policy of the State, and its members are elected at short intervals for the purpose of conforming the direction of public affairs to the changing sentiment of the people and the progress of events. This policy must be put into operation through officers, who are simply agents of the government. If a legislature, elected for two years, can put in its agents for life or long terms, and keep them in by the court's holding that office is a contract and incumbents are irremovable, such temporary legislature can dominate the people for any period it may see fit to fix for the duration of offices filled or created by it. This is a denial of the foundation principle of all American government—the sovereignty of the people. The fact that the Constitution fixes the term of certain officers and forbids a diminution of their salaries is of itself conclusive that all other officers and their salaries are not thus protected, but are subject to change and control by the people, acting through subsequent legislatures.

It must be remembered that when *Hoke v. Henderson* was decided, the United States Supreme Court had not then held, as it soon afterwards did, in *Butler v. Pennsylvania,* 10 Howard, 402, 416, that an office was not a contract and not protected by the contract clause of the Federal Constitution. This doctrine that Court has uniformly maintained ever since, notably in *Newton v. Commissioners,* 100 U. S., 548; *Blake v. U. S.,* 103 U. S., 227; *Crenshaw v. U. S.,* 134 U. S., 99, and many (165) other cases, including the late decision in *Taylor v. Beckham,* 178 U. S., 577. Had those decisions, or any one of them, been rendered in 1833, it is quite certain *Hoke v. Henderson* would have been decided the other way, for the construction placed by the United States Supreme Court upon any clause of the Federal Constitution is conclusive upon all other courts.

For well-nigh forty years *Hoke v. Henderson* was applied to no controversy over an office. In *Mills v. Williams,* 33 N. C., 358 (1851), it was not cited, but disregarded and practically

overruled, both in the reasoning of the opinion and its effect, which was to hold that all the duties and emoluments of the office of Sheriff of Polk County were transferred intact to the Sheriff of Rutherford County. In *Cotten v. Ellis,* 52 N. C., 548, it is true, *Hoke v. Henderson* was cited, but the decision rested on a different point—that the State could not vacate a Federal office. The Legislature of 1865 disregarded *Hoke v. Henderson* by vacating legislative offices and even filling such judgeships as it saw fit with new men. In 1868 the convention again did the same thing by the judges which *Hoke v. Henderson* held could not be done as to clerks, *i. e.,* changed the appointive life tenure into an elective term of years. This could not have been done if office were a contract, for the Federal Constitution forbids any "*State* to pass any law to impair the obligation of a contract." The restriction was upon the State, not merely upon its Legislature. The prohibition applies to a convention as well as to the Legislature. *Louisiana v. Taylor,* 105 U. S., 445, and other cases cited, 125 N. C., at p. 285. As already stated, every judge who took his seat upon the bench in 1868 took it in defiance to *Hoke v. Henderson.* The officers turned out in 1868 held, not by virtue of any authority recognized in 1861-'65,
(166) but they had all been inducted in 1865, after the war closed, or later.

After being thus silent and practically disregarded, without a single application of it for near forty years, *Hoke v. Henderson* was resurrected after the change in the political majority in the General Assembly in consequence of the elections of 1870 and 1872. Its invocation and somewhat more extended application thwarted the effort of the people, through their new representatives, to control the policy of the State, in changing the incumbents of offices created by former legislatures with men of views in accord with the change expressed at the ballot box. Later on, however, *Hoke v. Henderson* was practically ignored, or much limited, in *Bunting v. Gales,* 77 N. C., 283; *Winslow v. Morton,* 118 N. C., 486, and other cases.

In *Wood v. Bellamy* there was an application of *Hoke v. Henderson* in a case where new incumbents were placed in offices as to which there had been no change of duties, but a change of names only. This decision was within the limits of the original decision. It was the subsequent cases, beginning with *Day's case,* 124 N. C., 362, which carried it further, causing it to be denied and its ultimate and inevitable overthrow. In *Ward v. Elizabeth City,* 120 N. C., 1, attention was for the first time called by the writer to the fact that the decision in *Hoke v. Henderson* had been denied in all other States; and while admitting

that it had been recognized in this State, it was held that Ward was not protected by it. In *Caldwell v. Wilson,* 121 N. C., 425, in a very able opinion by *Douglas, J.,* it was again shown at pp. 467 and 468) that *Hoke v. Henderson* was contraray to all precedents elsewhere, and the opinion was expressed that the doctrine had been "carried to its fullest legitimate extent" here, and Wilson, like Ward, was held not protected by it in his office.

With the subsequent expansion of the doctrine to new (167) territory and wider fields, it can serve no purpose now to deal. Those matters have been fully discussed in the opinions and dissenting and concurring opinions filed in the various "officeholding cases," from *Day's case, supra,* in which the Legislature was denied power to control the penitentiary, down through various offices, to *Taylor v. Vann,* 127 N. C., 249, which was as to the costs in an action to recover a $2-per-annum office (member of county board of education), when the term of the officer had expired before judgment.

Thus explained, the doctrine necessarily destroyed itself. The people of the State could not and would not be prohibited and controlled in the management of their own institutions and their public policies by judge-made law, which was denied by all other courts, including the highest at Washington. The doctrine has existed nowhere else. The conflict between the court and the General Assembly could not continue. No act of the Legislature could terminate it. Every time the question has been presented in all these years it has been raised upon an act of the Legislature which has been passed in disregard of *Hoke v. Henderson.* Its assertion could be renounced only by the Court. This it has now done, explicitly, clearly, and the doctrine of private property in public office, started on its course by the decision in *Hoke v. Henderson,* will, like the ghost in Hamlet, "no longer walk the earth" to disquiet the peace.

MONTGOMERY, J., dissenting. *Mr. Justice Connor,* in writing for the Court its opinion in this case, states clearly and forcibly what is called the American doctrine in reference to the nature and tenure of public office, and makes copious extracts from the decisions of the courts of many of the States of the Union, and from two of the Supreme Courts of the United States, in affirmation of the view of the majority of the Court; and it may be taken as true that the Supreme Court of North Caro- (168) lina is the only court, State or Federal, which has held that a legislative office is property; that it is held by contract between the State and the officer, and that the officer can be deprived of his office by judicial determination only. I was aware

of this particular isolation of the North Carolina Court when I wrote for the Court, at its February Term, 1897, the opinion in *Wood v. Bellamy.* Why then did I not at that time take the opposite view and use my voice to ally the decisions of this Court on the subject under discussion with the universal judicial sentiment of the country?

There were two reasons why I could not do so. The first was that for almost three-score and ten years the law as it was written in *Wood v. Bellamy, supra,* had been the law under decisions of this Court, and those decisions made by judges holding personally different political views, and many of them known to be of marked judicial temperament and ranking in the very highest order of legal learning and general scholarship; and second, those decisions, and especially the one of *Hoke v. Henderson,* 15 N. C., 1, delivered in 1833, and written by *Chief Justice Ruffin,* seemed to me to be conclusive on the subject. The judges at that time were *Ruffin (Chief Justice), Daniel* and *Gaston,* a court of which any nation in any age might be proud. The opinion is a model of judicial style, notable for its strong and pure English and for the vigor and force of its reasoning. No synopsis of it can do the author justice. Among the conclusions was this: That an office was property, a vested right, existing under contract between the State and the officer, and that an act of the Legislature which sought to deprive the officer of his property in the office was unconstitutional and void. And that proposition was not doubted by this Court until sixty-six years had elapsed, when the dissenting opinion in *Prison v. Day,*
(169) 124 N. C., 362, was filed by *Justice Clark,* the present Chief Justice.

Within less than two years before the dissenting opinion in *Day's case* was filed the same justice had written the unanimous opinion of this Court in *Ward v. Elizabeth City,* upholding the doctrine of *Hoke v. Henderson* in the following language: "The only restriction upon the legislative power is that after the officer has accepted office upon the terms specified in the act creating the office, this being a contract between him and the State, the Legislature cannot turn him out by an act purporting to abolish the office, but which in effect continues the same office in existence. This is on the ground that an office is a contract between the officer and the State, as was held in *Hoke v. Henderson,* 15 N. C., 1, and has ever since been followed in North Carolina down to and including *Wood v. Bellamy, supra,* though this is the only one of the forty-five States of the Union which sustains that doctrine."

In writing that celebrated opinion (*Hoke v. Henderson*)

nearly forty years afterwards *Pearson, C. J.,* in *Clark v. Stanley,* 66 N. C., 67; 8 Am. Rep., 488, referred to it as "that mine from which so much rich ore has been dug." I cannot think it out of place to quote from the address of the late Honorable William A. Graham on the life of *Chief Justice Ruffin,* his remarks in reference to that great case—*Hoke v. Henderson.* The speaker said: "Judge Ruffin's conversancy with political ethics, public law and English and American history seems to have assigned to him the task of delivering the opinions on 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 encomium of Kent and other authorities on constitutional law, and I happened (170) 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 practice in the Supreme Court of the United States for having participated in civil war against the government, and in which its reasoning on the negative side of the question was sustained by that august tribunal."

The same question was before this Court again in the case of *Cotten v. Ellis,* 52 N. C., 545. The Court there said, through *Pearson, C. J.:* "The legal effect of the appointment was to give the office to the applicant, and he became entitled to it as a 'vested right' for the term of three years, from which he could only be removed in the manner prescribed by law, and of which the Legislature had no power to deprive him. This is settled. *Hoke v. Henderson,* 15 N. C., 1."

And again the question was presented for decision in *King v. Hunter,* 65 N. C., 603; 6 Am. Rep., 754. The opinion in the case was delivered by *Judge Reade,* who said: "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the State that he will discharge the duties of the office, and he is pledged by his bond and his oath; and that he shall have the emoluments, and the State is pledged by its honor. When the contract is struck it is as complete and binding as a contract with individuals, and it cannot be abrogated or impaired except by the consent of both parties."

Again the question was presented in *Bailey v. Caldwell,* 68 N. C., 472, and decided in the same way. Upon the reasoning and the authority of the foregoing cases the numerous decisions

involving the same question and heard in this Court, be-
(171) ginning with *Wood v. Bellamy,* down to this time, have been made.

It may not be inappropriate to say that the thorough and elaborate arguments of counsel and the dissenting opinions in the cases that followed *Wood v. Bellamy* very much weakened my view of the correctness of the decision in *Hoke v. Henderson* as applicable to the genius of our institutions and the thought of the age, and I am free to say that if it had been a new question I would have *adopted* what is called by the Court "the American doctrine." But I cannot get my consent to join in overruling the decisions of this Court, beginning with *Hoke v. Henderson* and at intervals down almost to the present day—first, because the law as settled in those decisions has been too long the law of this State to be overthrown by the judicial decree of judges who may not see the law more clearly than did that great Court which made the decision in that celebrated case of *Hoke v. Henderson,* not to mention succeeding judges who followed the precedent.

And again, the General Assembly has met in session more than thirty times since the decision of *Hoke v. Henderson.* Its members knew, at any and all of its sessions, that so far as legislative offices, that is, offices not ordained by the Constitution with fixed terms, were concerned, they could alter the effect of the rule laid down in that case by the enactment of a statute, not *"retrospective"* in its action, thereby interfering with vested rights, but prescribing a rule of property in said office and modifying the extent of interest and tenure therein *"prospectively." Caldwell v. Wilson,* 121 N. C., at p. 469. By that means such officers elected or appointed after the going into effect of the act would hold under the statute and subject to its provisions. No such statute has been enacted.

The legislative department has acquiesced in *Hoke v. Henderson* with full knowledge that it had the power to change the effect of the doctrine announced in *Hoke v. Henderson*
(172) in the manner and to the extent above specified. A bill for that purpose was introduced at the session of 1901 and received the unanimous report of the committee which had it in charge, but for reasons satisfactory to them it was not enacted into law.

Under such an act the officer would take his office with the knowledge and understanding when he accepted it that he held it subject to removal under the terms of the act, and no such question could arise as was decided in *Hoke v. Henderson,* where the right to the office was unqualified. In case of removal of

any such officer no constitutional provision, either Federal or State, could be invoked to protect his rights of property in case of his removal from office, as he agreed that might be done when he accepted it. It was the Constitution of North Carolina of 1776, adopted at Halifax, which was referred to in the case of *Hoke v. Henderson* as the instrument which was violated by the act of Assembly, and the provision was section 12 in the Declaration of Rights, which was in these words: "That no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land." That section is now section 17 of Article I of the Constitution of North Carolina.

There was some discussion in the opinion of the Court, and also in the concurring opinion, of the views and conduct of the judges elected under the State Constitution of 1868. There had never been a decision of the United States Supreme Court holding that an office was property resting in contract. Those judges must have known that fact. In *Hoke v. Henderson* such a holding had been made by our own Court, and no doubt the judges elected under the State Constitution of 1868 believed that a convention of the people had the full right to abolish offices or remove officers, and that in the exercise (173) of that power they had changed the terms of the judges' offices and also removed the incumbents. The doctrine of *Hoke v. Henderson* was that the *Legislature* could not deprive one of his office because it was property and rested in contract, but there is not a hint in the case that the people in convention did not have that power.

I am pleased with the spirit and language of *Mr. Justice Connor* manifested throughout the decision of the case, and especially to that part of it in which reference to the decisions of this Court, which are said by some to be an extension of the doctrine of *Hoke v. Henderson,* is made. I quote it: "We do not think it will be profitable to enter into the discussion of the various phases in which the question has come before this Court. It is a part of the judicial history of the State. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which and to what extent the word property applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another or distributed among other governmental agencies. We have no disposition to review these cases, but prefer to adopt what may be appropriately called the American

doctrine upon the subject, so clearly set forth in a number of the many decisions which we have quoted."

As to the correctness of the decisions referred to in the above quotation, with the premise admitted that the law of *Hoke v. Henderson* was the recognized law at that time in North Carolina, I am content, as indeed I must be, to abide the judgment of the profession with the hope and in the belief that the judgment of future and of calmer times, if an adverse one, may be expressed more charitably than was that of the opponents of the decisions at the time they were made.

(174) DOUGLAS, J., dissenting. When the opinion of the Court was filed in this case I was so seriously ill as to be helpless, and hence I take advantage of the kindly consent of my associates to now file my dissenting opinion. I would gladly drop the matter but for the feeling that such action on my part might be misunderstood. In the light of an unforgotten past it seems proper that I should briefly state the facts that constitute my justification in consistently following in my judicial career the principle laid down in *Hoke v. Henderson.* Excuse or apology I have none to offer. I understand that the opinion of the Court goes to the extent of deciding that no one can have any property in the tenure of an office, and "that in respect to legislative offices it is entirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand." This cuts up by the roots the dominating principle of *Hoke v. Henderson* and of all subsequent cases based thereon. No distinction whatever is made between the different cases involving the application of the principle. It is the principle itself that is denounced as intrinsically vicious, and therefore calling for judicial extirpation. It necessarily follows that in the light of this decision we were just as wrong in 1897 in rendering our unanimous decision in *Wood v. Bellamy, Lusk v. Sawyer* and *Person v. Southerland* (120 N. C., 212, *et seq.*), as we were in any of those subsequent decisions which became the subject of so much controversy.

There has been no change in the law; and if the Court is right now it was wrong then in refusing to the dominant power in the Legislature the disposition of the offices to which they were legally entitled. It irresistibly follows that if the Court in 1897 had been constituted as it is now, in the light of its present decision it would have offered no bar to the will of the Legislature,

(175) and would have turned over the asylums and other State institutions to those whom we excluded. This seems the very irony of fate.

I will not undertake to defend the principle underlying the decision in *Hoke v. Henderson,* as I can add nothing to what has already been said. My personal views have been fully expressed when speaking for the Court in *Greene v. Owen,* 125 N. C., 212, and *Taylor v. Vann,* 127 N. C., 243, and in my concurring opinion in *Wilson v. Jordan,* 124 N. C., 707. I will now confine myself to the reasons actuating me in accepting the principle as settled law when I came upon the bench, and consistently following it thereafter. The Court quotes with approval from my opinion speaking for the Court in *Caldwell v. Wilson,* 121 N. C., 467, as follows: "With the exception of this State it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract within the general constitutional provision protecting contracts; but unless the Constitution otherwise expressly provides the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges before the end of the term, or to alter or abridge the term, or to abolish the office itself. . . .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 a public office be regarded as the property of the incumbent." That is true, but the same opinion went on to say: "But our decision in the case at bar does not conflict with that in *Hoke v. Henderson.* The statute now under consideration is not retrospective and does not interfere with any vested right. Being a part of the act originally creating the office of railroad commissioner, it 'prescribed' a rule of property in said office, and modifies the extent of interest and tenure therein 'prospectively.' The defendant, taking under the act, holds subject to the act, and, relying upon his contract, is bound by all its provisions. One of its ex- (176) press provisions was the reserved right of the Legislature to remove and the power and duty of the governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office; . . . that the only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the created act written across its face by the hand of the law."

In that case I also said for a unanimous Court: "We realize the responsibilities of this Court in settling the line of demarcation between the legislative, executive and supreme judicial

powers, which by constitutional obligation must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion but of law; a matter not of expediency but of right."

From the course of judicial conduct thus explicitly declared I have never knowingly departed. At the same term it was said by a unanimous Court in *Ward v. Elizabeth City,* 121 N. C., 1, that "This is on the ground that an office is a contract between the officer and the State, as was held in *Hoke v. Henderson,* 15 N. C., 1, *and has ever since been followed in North Carolina down to and including Wood v. Bellamy, supra,* though this State is the only one of the forty-five States of the Union which sustains that doctrine." (The italics are mine.) This (177) language is quoted to show that, whatever differences of opinion may subsequently have arisen as to its *application,* the existence of the principle itself as the settled law of North Carolina was universally admitted. It was so recognized by the Supreme Court of the United States in *In re Hennen,* 13 Pet., 230, where the Court says, on page 261: "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."

The only argument in the opinion of the Court that had not been previously advanced and considered is the change in the personnel of the Supreme and Superior Courts following the adoption of the Constitution of 1868 and the relation of the seceding States to the Federal Union.

I will not reopen the questions involved in the Civil War and the tangled web of reconstruction. The issues of the war were settled by embattled freemen, who on both sides, believing that their cause was sacred, freely gave to it the last tribute of a loyal heart. All that we need do is to cherish the memory of their heroic deeds and guard their last resting place, feeling that every flower growing on a soldier's grave nestles its roots in a hero's breast and expands its fairest flowers in the glad sunshine of liberty and peace in a reunited land.

When I first came upon this bench, its only new member and in every way its junior, I was at once confronted with the class of cases represented by *Wood v. Bellamy.* After the most care-

ful consideration, and certainly with no possible personal bias in that direction, I concurred with a unanimous Court in the decision of those cases, thus giving to the greatest principle enunciated in *Hoke v. Henderson* the deliberate assent of my judgment and my conscience. Even if I had not approved of the decision in principle, I would have hesitated to place (178) myself upon the lonely pedestal of solitary infallibility, assuming that I was wiser than the aggregated wisdom of the Court for more than sixty years.

I do not look upon the system of jurisprudence as a mere heterogeneous conglomeration of disjointed opinions, but as a harmonious whole, in which every case fits accurately upon those that have preceded it, and in turn becomes the foundation for others. Thus is reared the noble structure with all the beauty, simplicity and grandeur of a Grecian temple. So feeling I did not seek to signalize my advent upon the bench by prising out the foundation stones of the law, but rather by building up, satisfied if I could add to the structure but one stone, small and rough-hewn though it be.

The opinion in *Hoke v. Henderson* was delivered at the December Term, 1833, of this Court, by *Chief Justice Ruffin,* and concurred in by his associates, *Judges Daniel* and *Gaston.* This great Court sat together unchanged for more than ten years, and has no superior here or elsewhere, either in the ability and integrity of judicial conduct or the purity of private life. No finer combination of judicial and individual character has ever existed upon any bench. *Chief Justice Ruffin* stands at the head of the profession in this State, with no possible rival, unless it be *Chief Justice Pearson,* who paid him the high compliment of saying that while *Chief Justice Taylor* was the most learned man that had ever been upon this bench and *Chief Justice Henderson* its most reflective mind, *Ruffin* combined both qualities in a higher degree than any one else. *Judge Daniel's* opinions are models of brevity, strength and clearness. *Judge Gaston* was the *beau ideal* of North Carolinians, whose character contained the flower and fragrance of every virtue. I have often thought that the splendor of his intellectual qualities was overshadowed by the sublimity of his moral character. It may well be said of him that among the great men of his generation few have left a more splendid and none a more stainless (179) name. It is the deliberate judgment of his countrymen that throughout a long and distinguished life he ever bore the trenchant blade of heroic manhood with the spotless shield of Christian chivalry.

But it has been intimated that that opinion was not carefully

considered, and that those eminent judges, like Homer, might sometimes nod. The opinion itself shows no evidence of haste or want of deliberation. On the contrary it is regarded as a model by the best of judges, and has repeatedly received the warmest commendation from the highest sources.

I know it is said that even Homer sometimes nods, but I never heard of his going to sleep and continuing in a profound slumber for seventy years. It remained for the courts of North Carolina to take this more than Rip Van Winkle nap, and as we wake up we may well ask where are Ruffin and Daniel and Gaston and Pearson? Gone! And we who sit in the ever-widening shadow of their fame are asked to say that they knew not whereof they spoke! Let this be said by those who may—it shall not come from me.

Having given to the principles of that opinion the deliberate assent of my judgment and my conscience in *Wood v. Bellamy* and the kindred cases decided at that term, I deemed it my duty to carry them to their legitimate conclusion. If it was the law when *Wood v. Bellamy* was decided in 1897, it remained the law in the absence of constitutional or statutory provisions; and those who subsequently invoked those identical principles were entitled to their equal protection. If they were sacred enough in 1897 to keep Bellamy in office, they retained equal sanctity in 1899, when invoked in favor of Day. It may be that the application of those principles was carried too far in some subsequent cases, but I did the best I knew. I admit that sometimes my opinions when once formed may be too firmly fixed. Be that as it may, they are the result of reflection and conviction,

(180) and take their texture more from the granite of my native hills than the shifting sand dunes of a storm-swept coast.

In these cases I but followed the injunction of this Court in *Sutton v. Phillips,* 116 N. C., 502, wherein it says, on page 508, that "It is best to stand *super antiquas vias.*" I am painfully aware of the frequent appearance of the personal pronoun in this opinion and deeply regret its apparent necessity.

An examination of the constitutional history of the State, I think, will clearly show that the principles so clearly enunciated in *Hoke v. Henderson* have not only received the practically unanimous approval of succeeding judges, but have by direct implication been repeatedly ratified by the people themselves. This decision was rendered at the December Term, 1833, reported in 15 N. C., 1. Since that time there have been five separate and distinct constitutional conventions, all of which might, but none of which have, abrogated or modified the principles of that opinion.

In 1835 a constitutional convention met on 4 June and framed amendments to the Constitution of 1776, which were ratified by the people. In 1861 a convention met and on 20 May passed the Ordinance of Secession, with some other amendments, none of which were submitted to the people. In 1865 a convention met on 9 October, repealed the Ordinance of Secession and passed an ordinance prohibiting slavery. This convention reassembled in May, 1866, and further amended the Constitution; but with the exception of the above ordinances relating to secession and slavery the amendments were rejected upon submission to the people.

A convention called by General Canby under the Reconstruction Act of Congress assembled on 14 January, 1868, and framed the "Constitution of 1868," which was ratified by the people. In 1875 a convention assembled on 6 September and amended the Constitution in several particulars, their action being ratified by the people at the election in 1876. In addition (181) to these conventions, several amendments have been made by legislative action and popular ratification, such as the celebrated "free suffrage" amendment of 1854, and those prohibiting the payment of the special tax bonds relating to the election of trustees of the University, increasing the number of justices of the Supreme Court, and some relating to other particulars set out principally in chapters 81, 82, 83, 84, 85, 86, 87 and 88, Laws 1872-'73. To these may be added the recent amendment restricting the suffrage. The various amendments made many changes of far-reaching importance, including the successive repudiation of the governments of the United States and of the Confederate States and the enfranchisement and practical disfranchisement of the negro, but the underlying principle of *Hoke v. Henderson* remained unchanged.

Moreover, in the seventy years that have elapsed, thirty-five different Legislatures have met in the aggregate more than forty times, and yet no bill to do away with the effect of these decisions has ever got beyond the calendar. Under the decisions of this Court have I not a right to assume that this long and unbroken legislative acquiescence in this decision is an endorsement of its essential principles? The Supreme Court of the United States in *R. R. v. Baugh,* 149 U. S., 368, says, on p. 372: "Notwithstanding the interpretation placed by this decision on the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction and acceptable to the legislative as well as to the judicial branch of the government."

In *S. v. Cole,* 132 N. C., 1069, in an able and learned opinion, this Court says, on p. 1079: "To the suggestion that the construction put upon the statute in *S. v. Fuller,* 114 N. C., 885, decided in 1894, is 'unfortunate,' we note that the *per-*
(182) *sonnel* of this Court has since that time undergone many changes, and the case has at almost every term been cited with approval and conceded to be the controlling authority for this Court. It is also worthy of note that the Legislature has met at five different sessions and the law in this respect has not been changed. We have no other means of ascertaining what the law is."

In *Harvey v. Johnson,* 133 N. C., 352, another well-considered opinion, this Court says, on page 360: "We have seen that no change has been made by legislation in the law as repeatedly stated by this Court, and it may safely be inferred that the Legislature has accepted our construction of the statute as the proper one, and has acquiesced in it as being in accordance with what the law should be."

In addition to this long and uniform legislative acquiescence we have its express approval by legislative as well as constitutional action. The convention of 1875, in amending the Constitution, provided in what is now section 33, Article IV, of the Constitution that "the amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State and filled or held by virtue of any election or appointment under the said Constitution and the laws of the State made in pursuance thereof."

Section 3872 of the Code also provides that "All persons who shall hold any office under any of the acts hereby repealed shall continue to hold the same according to the tenure thereof." Moreover a bill entitled "A bill to be entitled an act to restore to the General Assembly the power to prescribe and regulate the tenure of public offices and the duties and emoluments thereof" was introduced into the Legislature of 1901. This bill provided that every office, place or position created by the General Assembly should be held and deemed a mere agency or trust
(183) and not a contract, and that no person thereafter appointed should be deemed to have any property right or vested interest in any such office, but that any such office, place or position might be abolished, changed, vacated or transferred at the pleasure of the General Assembly. This bill was carefully and elaborately drawn by a most skillful draftsman, and was well calculated to effect its purpose. It was valid under the decision of this Court in *Caldwell v. Wilson,* and if then passed

would by this time have practically controlled nearly every legislative office in the State. Its sole purpose, openly avowed and fully understood, was to abolish the office-holding rule enunciated in *Hoke v. Henderson.* What was its fate? It was introduced into the House on 18 February, 1901, and was at once referred to the judiciary committee. On the following day it was reported back favorably by that committee, and later, on the same day, was recommitted to the same committee. On 15 March it was indefinitely postponed, without division, and apparently by a unanimous vote. Conceding to the Legislature that devotion to duty and integrity of purpose which they are entitled to claim, we must assume that if they had thought the purposes of the bill were in furtherance of the public interests they would have passed it unanimously. As it is we are equally forced to assume that their unanimous defeat of the bill was a unanimous approval of the principles of judicial decision which the bill was intended to abrogate.

In view of this long and unbroken acquiescence of the people in constitutional conventions, as well as in the General Assembly, I see neither reason nor authority for overruling the uniform decisions of seventy years. Whether this decision, now rendered by a mere majority of the Court, will be permanently accepted as the law of the land remains to be seen. It may be that in the dawn of another day this Court may return to "the teachings of the elders."

In the meantime I must rest in my ignorance, if such it be, in union with the deathless dead, content to be no (184) wiser than *Ruffin* nor purer than *Gaston.*

Cited: Jones v. Comrs., 135 N. C., 228; *S. c.,* 137 N. C., 597; *Fortune v. Comrs.,* 140 N. C., 331; *Comrs. v. Stedman,* 141 N. C., 451; *Wilmington v. Bryan, ib.,* 672, 690, 693; *S. v. Fulton,* 149 N. C., 500.

STATE v. MARSH.

(Filed 20 October, 1903.)

CERTIORARI—*Supreme Court—Rape—Appeal.*

Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a *certiorari* issued to correct the record.

DOUGLAS and WALKER, JJ., dissenting.

STATE *v.* MARSH.

THIS was a motion by the State to restore this case to the docket and for a writ of *certiorari* herein.

Robert D. Gilmer, Attorney-General, and *Adams & Jerome* for the State.

Armfield & Williams, Redwine & Stack for the defendant.

CLARK, C. J. This case was before us at last term, *S. v. Marsh,* 132 N. C., 1000. There were numerous exceptions, none of which were considered because a motion in arrest of judgment was made and allowed for the absence from the indictment (for rape), as sent up in the record, of the words "against her will." This objection was not taken below. It now appears by the inspection of the indictment by the judge below, and his finding of fact thereon, that those words were in fact in the indictment as found by the grand jury and upon which the prisoner was tried, and were omitted by the clerk in making up the record. This case has heretofore not been before us, and the State asks for the correction of the indictment by a *certiorari* to
(185) insert the words omitted by the clerk, and that the case may be argued upon the record and the exceptions taken at the trial.

If this were an application to rehear a criminal cause the Court would not entertain it. *S. v. Council,* 129 N. C., 511, and cases there cited. A rehearing is based on an allegation that the Court committed an error of law in the previous opinion and asks the reconsideration of that opinion. It is an appeal from the Court to itself on the ground of error in its rulings of law, just as an appeal is taken from the Superior Court. Here there was no error of law. The decision at last term is correct as the record stood. This is a motion to correct the record to speak the truth and to place the true record before us for the first time, and to consider the exceptions taken, they not having been passed on.

The same point, after similar action upon an untrue record caused by the false certificate of the clerk of the lower court, has been passed upon by the Supreme Court of Florida and the motion to restore the cause to the docket allowed. *Lovett v. State,* 29 Fla., 384, in an able and well-considered opinion by *Chief Justice Rainey.* In that case a new trial had been granted on the ground that the record in a trial for murder did not show that the prisoner was personally present at the trial. Subsequently, it being made to appear to the Court that the record did show such fact, but that such paragraph had been omitted in the transcript by the clerk, the Court ordered *certiorari* to

correct the omission and restored the cause to the docket for argument upon the exceptions taken at the trial, and it was so heard upon the true record. 30 Fla., 142. The same power is vested in this Court by section 8, Article IV, of the Constitution, which gives it power to issue any remedial writ necessary for a general supervision and control of the lower courts. Instances of supervision to insure justice are *Biggs, ex parte,* 64 N. C., 202, and *S. v. Jefferson,* 66 N. C., 311. (186)

In *Lovett v. State,* 29 Fla., 384, above cited, the Court said, pp. 404, 405, 407: "No advantage can be gained from any action of this tribunal upon an untruthful representation of that record however ignorant the convict or the counsel may be of the real status of the record, or the incorrectness of the transcript, and however free from blame the clerk may have been in the mistake characterizing his transcript and certificate. . . . The fact still remains that a false record has been brought here on behalf of the convict and the reversal has been obtained in his behalf upon it, such reversal being based solely upon its false feature; and this fact is not changed nor its result modified by the innocence of the prisoner, his counsel and the Attorney-General, but the extent of the imposition and of the mistake is only made the greater. . . . We have been misled into reversing a judgment on a false record, into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. . . . The State is not prohibited by any principle of law known to us from arresting the reversal which has been made of her judgment upon such false representation. She is entitled to require the party seeking relief from such judgment to bring to the appellate court the record of the cause in which it was obtained, for without this that cause is not before the appellate tribunal for consideration. Any other doctrine than this must result in the frequent consummation of fraud upon the courts and its constant encouragement"; and at page 395 the Chief Justice says that when the judgment has been granted "upon a false suggestion or under a mistake as to the facts the Court will afford relief after adjournment of the term, and if necessary recall the *remittitur* and stay proceedings in the court below."

Mistakes of this Court or of its clerk, not mistakes of law but of fact, have often been corrected after the mandate has gone down, and even at subsequent terms. *Scott v. Queen,* (187) 95 N. C., 340; *Cook v. Moore,* 100 N. C., 294; 6 Am. St., 587; *Summerlin v. Cowles,* 107 N. C., 459; *Scroggs v. Stevenson,* 108 N. C., 260; *Barnhardt v. Brown,* 118 N. C., 710; 36 L. R. A., 402. For as strong a reason this Court can order a correc-

tion of a record below, when by reason of the false or erroneous certificate of the clerk the record, as it was, has never been before us. This is not new practice. "Upon a judgment of the King's Bench, if there be *error in the process or through defaults of the clerks,* it may be reversed in the same court, for error in *fact* is not error of the judges, and reversing it is not reversing their own judgment." 2 Tidd's Prac., 1137. Also *Ins. Co. v. McCormick,* 20 Wis., at p. 284, where it is said that "the errors are not errors in the judgment itself. The Court in rendering judgment never passed upon them."

In this case the Court, through error for which the appellant is responsible (for it was his duty to bring up a true record), has taken action on a bill of indictment on which the prisoner was not tried, and on nothing whatever that took place at that trial. We are not asked to reverse our judgment but to correct an *error of fact.* The prisoner brought up the record. He presented us, as an alleged error, a statement of a matter which was false. The record he presented stated that the indictment on which he was tried omitted the words "against her will." He relied upon that omission and asked an arrest of judgment on that account. We allowed it *solely on that account.* He has no ground to ask to benefit by that untrue statement in the record he presented to us, and it is immaterial that it does not appear how the omission came to be made. The case has never been before us.

In civil cases counsel on both sides have opportunity to scan the whole record carefully, and if there is omission or other error ordinarily a *certiorari* can and should be applied for be-
(188) fore the cause is called for argument. But in criminal actions the rotating solicitor has no opportunity to see the record proper nor any part of the transcript except "the case on appeal" served on him, and does not see even that after the clerk copies the case "as settled." When as here there was no point made below on the bill of indictment, the indictment made no part even of the "case on appeal" served on the solicitor. There is no provision of law nor any practice requiring solicitors to go back to the county seats, nor to have full transcripts of the record sent them before coming up to this Court. The Attorney-General is bound to rely upon the correctness of the record laid before him. He was not at the trial below. If, therefore, a clerk can omit material parts of the indictment and the defendant, notwithstanding the duty is on him to bring up a true record, can profit by this error of fact (whether intentional or unintentional could rarely if ever be shown), new trials will depend not upon the correct rulings of the judge below, but upon

the greater or less carefulness of the clerk or of the copyist, often furnished him by the appellant. It is not sufficient to say that the appellant can be again put on trial. There is the expense to the public of another trial, and witnesses may have moved away or died. The State is entitled, in the interest of justice, to have the cause presented here on the record as the matter was presented below, and it is the duty of the appellant to bring up such true record. When there is a fatal mis-statement of fact therein appellants must understand that their negligence in presenting a false record (to put it in the mildest form) cannot avail them any more than if they had made the omission fraudulently, which can never be shown. In *S. v. Daniel,* 121 N. C., 575, the Court said that the defendant "was derelict in not sending up a proper transcript, and the Court would not permit him a continuance of the cause for his own neglect, but would send down *ex mero motu* an *instanter certiorari* to cure (189) the defect in the transcript." If the Court will not allow an appellant a continuance, even for omissions or error in the record, it will certainly not permit him to enjoy a new trial by reason of such default by him.

In England a defendant in criminal cases is allowed no appeal. We allow an appeal, but the burden is on the appellant to assign his errors and bring up a true record. When he fails to do either he cannot take profit from his omission of duty.

The judge below having from inspection of the record found that the indictment on which the appellant was tried in fact contains the words "against her will," and that being already certified to this Court, the record here can be amended to include them, as upon *certiorari,* and the cause will be restored to the docket to be heard in its order upon the exceptions taken below when the district to which it belongs is called, unless for cause shown it is placed at the end of the district or at the end of the docket for this term.

It does not appear that the words were omitted by the fraud of the appellant or of any one for him. If it did the appeal should properly be dismissed. The motion to restore the cause to the docket is allowed.

Motion allowed.

WALKER, J., dissenting. The defendant was indicted in the court below for the crime of rape, and having been convicted appealed to this Court. At the last term we arrested the judgment upon the ground that there was no allegation in the indictment that the offense had been committed "against the will of the prosecutrix." 132 N. C., 1000.

The opinion of this Court was filed on 31 March, 1903, and the certificate was sent to the Superior Court on 1 May, 1903, so that the case was retained in this Court under the (190) rule, for the purpose of correction, a full month before it was returned to the lower court. This Court adjourned for the term on 11 June, 1903, and it appears therefore that the State had ample opportunity after the filing of the opinion, and before the adjournment at the last term, to have called the alleged error or defect in the transcript to our attention. But it failed to do so. The State is not entitled to any more consideration or indulgence in this Court in respect to the trial of cases in which it is concerned than other litigants, except that the causes in which it is a party may be advanced sometimes when they affect the public interest and a speedy hearing is desired. It is bound, however, by the same rules of practice and procedure and must give the same attention to its cases and exercise the same degree of diligence as other parties. *S. v. Price,* 110 N. C., 599. In *S. v. Cameron,* 121 N. C., 572, we held that "the law which regulates the matter of appeals is the same in both civil and criminal cases," and that "in criminal appeals the respondent is the State represented by the solicitor of the district in which the case is tried," and that he is as much the representative of the State in all matters pertaining to the preparation of cases in all respects for transmission to this Court as is an attorney of record the representative of his client in a civil case. There is no duty imposed upon an attorney in a civil suit with respect to the settlement of the case on appeal and transmission of a transcript of the record to this Court that does not equally rest upon the solicitor in an appeal taken in a criminal case. The only difference between the two classes of cases is one which does not materially affect the question we are now discussing, and that difference is that in a civil case the appellant must pay the fees of the clerk for making out the transcript in advance, if he demands it, while the State is not required to do so when it appeals; but the appellant in a civil case is (191) no more bound to see that the record is correctly copied and transmitted to this Court than is the State in a criminal case. The duty of copying and transmitting the record is one which, as this Court has frequently decided, appertains to the office of the clerk. It is his official duty to send up a perfect transcript, and not in any sense the duty of the appellant, except as hereinafter stated, in any kind of case. This is made perfectly clear in *S. v. Butts,* 91 N. C., 524-526. In that case it is said by the Court that while "it would be well for counsel to see that transcripts are properly made up before they come to this

Court, in order to protect the interests of their clients, yet it is the official duty of the clerk to see that a true and perfect transcript is sent to this Court. It may be conceded that if the record is defective the appellant in a civil case will not be allowed a continuance in order to have it perfected, or indulged in any other way with respect to it, and if the defect is one that will injure his client if not corrected he must abide the consequences of his neglect or omission in not having the record made perfect. He must apply for the necessary process for that purpose in apt time. While this is the rule in civil cases, it also obtains in criminal cases as to both parties to the record, the State and the defendant. When it is said to be the duty of the appellant to see that the record is correctly certified to this Court nothing more is or can be meant than that if the record is not here at the proper time his appeal will be dismissed, or if the record is defective and he does not move in apt time to have it corrected the case must be heard just as if the record was perfect in form, and the party in default must take the consequences of his neglect. Surely the appellee cannot avail himself of a defect which defeated him in the case and then apply for and obtain a writ of *certiorari* after the adjournment of the term upon the ground that the appellant failed himself to apply for the writ. That would be to permit the appellee (192) to take advantage of the laches of his adversary where he unreasonably relied upon him to look after and care for his interests in this Court. If in a civil case a plaintiff (appellee) should permit his case to be argued and decided in this Court without having called our attention to a defect in the record, for example, the careless or inadvertent insertion of a material allegation in his complaint so that it would appear he has no cause of action, and by reason thereof the judgment is arrested or the action dismissed, would he be heard at the next term to allege the defect and be granted a writ of *certiorari* so that the case could be reheard? The mere statement of the proposition carries with it its own sufficient refutation. How then can the State, who occupies substantially the same position in this Court as the plaintiff (appellee) in a civil case, and is subject to the same rules, be allowed to do so when the indictment as certified to this Court is defective? If it is allowed in the latter case there is no sound reason why it should not be in the former, unless there is something in the mere sovereignty of the State or her peculiar prerogative which gives her rights and privileges in this Court not enjoyed by a citizen, and no such claim was made by our learned and able Attorney-General, who lets no point escape him, and it is not even suggested in the opinion of

the Court. The Supreme Court of the United States has ruled that the government, when it comes to the Federal Courts to litigate with one of its citizens, must submit to the rules of practice and procedure of its courts, and its rights and privileges at every stage in the trial of the cause are substantially in every respect the same as those of the citizen, and it cannot have any superior advantages. *Fink v. O'Neill,* 106 U. S., 272; *U. S. v. R. R.,* 105 U. S., 263; *U. S. v. Thompson,* 93 U. S., 586; *Carr v. U. S.,* 98 U. S., 433; *Sibbald v. U. S.,* 12 Pet., 489.

When it is conceded, as it must needs be, that the State
(193) and its citizens stand before this Court on terms of perfect equality, and that right and justice under the law must be administered in the same way to each of them, the fallacy of the reasoning by which the conclusion of the Court is reached and its insufficiency to justify that conclusion is clearly seen, unless we propose to overrule many cases heretofore decided in this Court in which it has been held that parties must be diligent in applying for remedial writs for the purpose of perfecting the transcript, and that an application for a *certiorari,* upon the suggestion of a diminution of the record, cannot be made after the term to which the appeal is taken and at which the case is decided, and not even at that term unless it is made before the argument commences. A complete reversal of this wise and safe rule is the logical result of the decision in this case; but a consequence more dangerous in its tendency may follow, for no limit of time is set by the ruling of the Court for such an application to be made. If it can be made at the first term after the one at which the case is decided, why not at the second term, and so on, without limit? It will not answer the argument to say that in the court below the State is represented by one officer, the solicitor, and in this court by another, the Attorney-General, for the duty of looking after the interest of the State in the lower court, where the transcript is prepared and from which it is transmitted, devolves solely upon the solicitor, as we have seen, unless he is assisted by private counsel, as in this case, or unless he specially appoints some other member of the bar to represent him, which appointment must be made in the manner pointed out by this Court. *S. v. Cameron, supra; S. v. Clenny,* 133 N. C., 662. In the case last cited *Montgomery, J.,* for the Court, says: "The solicitor, as we have said in *S. v. Cameron,* represents the State in criminal prosecutions, and the statement of the case on appeal in such cases should be submitted to him
(194) for acceptance or objection." It appears, therefore, that he is as fully invested with plenary power and authority in all matters affecting the State's interests, with the correspond-

ing duty of taking care of those interests, as the attorney of a party in a civil case. If there is a duty resting upon the latter to examine the transcript of the record before it leaves the hands of the clerk the same duty rests upon the solicitor, and the consequence to the State must be the same if this duty has not been performed in a criminal case as it would be to a party in a civil case if the duty is neglected by him. There is no greater obligation imposed upon an appellant to examine a transcript than there is upon an appellee, in so far as the party in default may be injuriously affected in this Court. The same diligence is required of the appellee as of the appellant in discovering defects and having the record perfected. If there is an omission of matter material to his case, and the appellee fails at the proper time to seek the remedy for supplying it, he must suffer the consequences just in the same way and in the same degree as the appellant. I must deny the correctness of the proposition impliedly asserted in the opinion of the Court that any positive legal duty is devolved upon an appellant or an appellee to see that a true and perfect transcript is sent to this Court, and that his failure to do so will be imputed to him as a fraudulent or even a false representation to this Court, if the transcript is defective or is other than a perfect copy of the record below. He makes no representation to this Court, but simply relies, as he has a perfect right to do, upon the clerk, whose duty it is to certify the transcript. The appellant's duty is fully performed when he has caused the case on appeal to be settled and filed with the clerk and paid the latter his fee for sending up the transcript to this Court. There his duty ends and that of the clerk begins, with this possible qualification, if it is a qualification, that if the record as certified by the clerk happens to be (195) defective and the appellant fails to have it corrected in due time, so that he loses in this Court, he must bear the loss just as the appellant must do if the defect causes him to be cast in the suit and he has not taken the proper means to have it remedied. It follows from what I have already said that neither the defendant's counsel nor the solicitor was in the least derelict in his duty, as both had the right, if they chose to do so, to rely upon the clerk, who is the custodian of the record and the officer appointed by the law for the purpose of preparing and transmitting a perfect transcript of it to this Court, and it is not infrequently the case that counsel and the solicitor thus rely, as they each have a perfect right to do, upon the clerk to perform his duty in the premises. But if the clerk fails by mere inadvertence or oversight to make a true copy the defect may be cured by applying to this Court for the proper writ in apt time,

that is, at the term to which the appeal is taken, and the consequence of the failure to make this application will fall upon him who is prejudiced by it and who fails to take the necessary steps to protect his interests. This must be so in all cases. I am not denying or questioning the power of this Court to correct its own records in order to make them speak the truth. That power is fully conceded, but it is not the one which is being exercised in this case. This Court may not only amend its own records at any time, but it may supply any defects in the transcript sent to it from the lower courts by issuing the proper remedial writ, provided it is done upon seasonable application of a party or of its own motion within the time allotted by law. It has been uniformly decided by the Court that an application for a writ of *certiorari* for the purpose of correcting a record must be made, except in rare cases, before the cause is submitted for argument (*McDaniel v. Pollock,* 87 N. C., 503), and in no case can the writ issue after the expiration of the first term; and es-
(196) pecially is this so when the case has been decided and not merely continued at that term. *S. v. Blackburn,* 80 N. C., 477; *S. v. Harris,* 114 N. C., 830; *S. v. Rhodes,* 112 N. C., 857. In the cases cited it is held that if a party has good ground for a *certiorari* he must move for it at least before the argument upon the merits, and if he fails to do so he must abide the consequences of his own neglect, although he may be able afterwards to show by proof ever so conclusive that there is a material defect in the record, and one too which would reverse the decision of the Court. There must be an end to litigation somewhere. No man should be permitted to prolong it by his own neglect, and thus to profit by his own wrong. But I think the precise question has been decided by the Court in *Wilson v. Lineberger,* 84 N. C., 836. In that case the plaintiff's counsel moved to correct the record at the term next after the case was heard and decided, with the intention of asking for a rehearing. *Smith, C. J.,* for the Court, said: "The motion is a novel one and without precedent in the practice of the courts. If the evidence shall change the aspect of the case and make it materially different from what it was when heard, we should be required not to *rehear and correct an error of law but to try a new case.* If there is an error in the former decision it must be discovered in the case then presented without modification of facts." And again: "It was the duty of counsel to suggest the diminution before the cause was heard and then ask for this remedial process, not to wait till the decision and then demand it. It would be productive of much mischief to relax the salutary rule which requires counsel to see that their cause is properly before the

Court in the record, and to abide the consequences if it is not." The Court did not confine its decision in that case to the particular character of the amendment required, but simply applied the general principle that no amendment of any kind can be made at a subsequent term so as to present a question (197) different from that appearing in the original record. The Court well said that it would introduce a novelty into the practice and procedure of the Court which would be productive of untold mischief and incalculable harm.

When this Court has decided a case and the opinion and judgment have been certified to the court below, its jurisdiction with respect to the case is at an end, at least when the Court has adjourned for the term at which the decision was made. The terms of this Court are fixed by law (Constitution, Art. IV, sec. 7; Code, ch. 24, sec. 953; Laws 1887, ch. 49; Laws 1901, ch. 660) in the same manner as are the terms of the Superior Court, and when, under the statute, this Court has finished the business of any one term and adjourned its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it except by petition to rehear under the established rule of the Court, or by a new appeal. In discussing this question the Court, in *White v. Butcher,* 97 N. C., 7, says: "The remand arrested further action here at this point. . . . The practical result to be secured was the conveyance of the title to the property, as would have been the case here had the jurisdiction over the cause been retained. But it was no longer in this Court for any further order unless, perhaps, the transmission of the papers and transcript; but the neglect to transmit them did not retain the cause itself after the order, nor impair the efficiency of the order."

In *Ruffin v. Harrison,* 91 N. C., 398, the Court, after stating the general proposition that a rehearing will not be granted upon a summary motion to modify a final judgment of this Court, proceeds: "The Court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment the Court cannot disturb it unless upon an application to rehear or for fraud, acci- (198) dent or mistake alleged in an independent action, or perhaps, in some cases, a party might be relieved against a 'judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect' within a year after the entry of the same. . . . This of course does not imply that the Court has not power to correct the entry of its orders, judgments and decrees so as to make them conform to the truth or what the Court did in granting them, or to set

aside an irregular judgment in a proper case. The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing upon a summary application to change the final decree at a term of the Court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action. The application must be denied and the petition in this respect dismissed." In regard to this subject the Court, in *Cook v. Moore,* 100 N. C., 294; 6 Am. St., 587, says in this emphatic language: "It is not contended that this Court can reverse, set aside or modify in any material respect a regular final judgment at a term thereof subsequent to that at which it was entered. It is clear and well settled that it has no such authority except upon an application to rehear, or because of 'mistake, inadvertence, surprise or excusable neglect, as may be allowed by statute.'" It will not of course be contended in the case at bar that this Court has the power to correct the judgment at the last term because of "mistake, inadvertence, surprise or excusable neglect." In *Moore v. Hinnant,* 90 N. C., 163, it is said: "But the Court has not the power at a subsequent term to revoke, set aside, alter or amend a final judgment entered at a former term except upon application to rehear or because of 'mistake, inadvertence, surprise or excusable neglect,' as allowed by law. The exercise of such a power is forbidden by principle and the overwhelming weight of
(199) authority, if indeed there can be any well-considered case that sustains it. . . . It is a fundamental principle of the common law, as the authorities ancient and modern show, that the Court cannot change and modify its final judgments at a term subsequent to the term at which they were entered. During the term the record, including the judgment, is *in fieri,* and may be amended or set aside as to the Court may seem proper; but after the term the power to interfere with it no longer exists. This Court has seldom had occasion to refer to the subject of the power of a court of record to change its judgments after the term at which they were entered, but it has repeatedly incidentally recognized the doctrine that such power does not exist." It is also stated in *Moore v. Hinnant, supra,* that a judgment regularly entered, if not erroneous, can in no case be altered at a subsequent term otherwise than by a petition to rehear, except for the purpose of making the record express the intention of the Court at that time upon the record as then before it, so that it may speak the truth as to that record. In that case, from which I have made only a few brief extracts, *Merrimon, J.,* for the Court, goes fully into the question we have under consideration, and denies the existence of the power or jurisdiction now about

to be exercised in this case, and concludes that it would give rise to "universal distrust, endless strife and confusion, and would violate the cardinal maxim that it is to the interest of the State that there should be an end to litigation." He quotes freely from Coke and Blackstone, and supports the doctrine by the citation of numerous and weighty authorities. His quotation from Coke is an apt one: "During the terme wherein any judicial act is done the record remaineth in the breast of the judges of the Court and in their remembrance, and therefore the roll is alterable during that terme as the judges shall direct; but when the terme is past then the record is in the roll and admitteth no alteration, averment or proof to the contrarie." Other and numerous authorities in support of the position will (200) be found collected in *Moore v. Hinnant* and *Cook v. Moore, supra.*

Rice v. R. R., 21 How. (U. S.), 82, it seems to me, is directly in point. In that case the record upon which the appeal was heard and decided failed to show that there had been a final judgment in the court below, which was required as a basis of a writ of error to the lower court. It was sought, at the term next after the decision, by writ of *certiorari* to bring up and file a new record showing that there had been a final judgment, and to have the former judgment annulled and a rehearing granted. *Taney, C. J.*, for the Court, says: "We think the motion to annul the judgment of the last term and reinstate the case cannot be granted. The suit is a common law action for a trespass on real property, and the judgment of the court below can be brought here for revision by writ of error only. That writ was issued by the plaintiff in error, returnable to the last term of this Court, and it brought the transcript before us at that term. It was judiciously acted on and decided by this Court, and when the term closed that decision was final, so far as concerned the authority and jurisdiction of this Court under that writ. The writ was *functus officio;* and if the parties desire to bring the record of the case again before this Court, it must be done by another writ of error." He then refers to the case of *The Palmyra,* 12 Wheaton, 1, which was cited in support of the petition to rehear, and says that it is not in point, as the appellate jurisdiction of the Supreme Court in admiralty cases is quite different from that in cases at common law, it being allowable in admiralty cases to amend the pleadings and take new evidence in the Supreme Court, "so as in effect to make it a different case from that decided by the court below."

In *Sibbald v. U. S.*, 12 Peters, 492, the Court says: "No principle is better settled or of more universal appli- (201)

cation than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (in the appellate court), or to reinstate a cause dismissed by mistake, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing."

The doctrine is very strongly stated by the Court in *Bronson v. Schulten,* 104 U. S., 415, thus: "But it is a rule equally well established, that after the term has ended, all final judgments and decrees of the Court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this Court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the Court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the Court."

In *Bank v. Moss,* 6 How., 38, the Court said: "The action was not regularly on the docket at the new term following the one at which the judgment had been rendered when the Court undertook to set the judgment aside. The power of the Court over the original action itself, or its merits, under the proceedings then existing, had been exhausted, ended. This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term, is never a sufficient justifi-
(202) cation for revising and annulling it at a subsequent term in this summary way, on motion. We would not be understood by this to deprive a court, at a subsequent term, of power to set right mere forms in its judgment, or of power to correct mistakes of its clerks. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains."

A case directly in point is that of *S. v. Dickson,* 97 Ind., 125, where it appeared from the record, as sent to the appellate court, that the indictment had not been returned into open court by the grand jury, and the judgment was arrested. A motion was made for leave to amend the record by showing that the indictment had been returned into open court, and then for a rehearing of the case upon the record as thus amended. This is like

our case in all respects. The court said: "Counsel for the State accompany their petition for rehearing with a motion to have the clerk of the court below certify to this Court certain portions of the record alleged to be omitted in the transcript. No objection, so far as the record before us is concerned, is made to our decision. The settled practice of this Court forbids the correction of the record after a case has been decided." So, in *Garner v. State,* 36 Tex., 693, after the judgment was arrested for lack of an essential averment in the bill, a motion similar to the one in this case was made and refused, because the court had lost its jurisdiction. In each of the following cases a motion was made, at a term subsequent to that at which the judgment of the appellate court was entered, to amend the record and rehear the case. In *Cruiser v. State,* 18 N. J. L., 209, the Court says: "These, it is true, are mere mistakes in form; they are clerical errors only; but I have searched in vain for any authority in this Court to amend or order amendment below after a writ of error in a criminal case. I cannot find a single case in which it has been done." It was said in *S. v. Daugherty,* 59 Mo., 104: "If the record was incomplete or defective when the case was here on a former occasion, diminution should have been (203) suggested and a rule obtained for sending up a perfect transcript. But the party submitted his case upon the record filed in the court, and the judgment rendered thereon is final; and, whilst it remains unreversed, it conclusively bars any further proceedings. If parties were permitted, after a final judgment in this Court, to go back to the Circuit Court and there get an amended transcript and bring the case again here at their mere will and pleasure, there would be no final disposition of cases." So, in *Fielden v. People,* 128 Ill., 599, it was said by the Court: "Amendments not in affirmance, but in derogation, of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered." And, again, it is said: "This motion, not having been made at the same term at which final judgment was rendered, not until the case had passed beyond the power of this Court to stay by its order the execution of the judgment, clearly comes too late." A strong case, and one also directly in point, is *Cory v. State,* 55 Ga., 239, in which the Court uses this language: "It is said that the clerk, in copying the bill of indictment, made a mistake and wrote *'with'* when he should have written 'without the consent of the owner.' This may or may not be true. It has not been verified to us in the only way it can legally be done, by a suggestion of a diminution of the record on or before the calling of the case. The Code, sec. 4282, Rule 9. Our only recourse is to adhere to the law and to

rule on principle. It may sometimes work seeming injustice; a departure from it would open the flood-gates of speculation and unsettle the entire practice of the Court. In this case any wrong can be but temporary; the party can be tried again, and if found guilty on the second count, properly framed, he can be punished according to law." See, also, *U. S. v. Adams,* 9 Wall., 557; *Christopher v. Searcy,* 12 Bush. (Ky.); 3 Cyc. Law and
(204) Pro., p. 214, and note 16, where many cases are collected.

The Court, in its opinion, relies very much on *Lovett v. State,* 29 Fla., 384; 16 L. R. A., 313, but the case is not, in my opinion, an authority for its decision. In the first place, the motion in that case for a *certiorari* for the purpose of correcting the record, so that there could be a rehearing of the case upon the amended transcript, was made at the same term at which the case was first heard and decided. This is sufficient to distinguish it from the case at bar. The court merely recalled its *remittitur* while the case was, as it said, in its possession and within its control, under the rules of practice, but even in doing that it went beyond what this Court had repeatedly decided to be the law in such cases, under its rules. If the facts of that case were like those of the case we are considering, and the same point had been presented, the authorities cited in support of the decision would not, I think, sustain it. They are, in the main, cases in which the courts asserted the right to amend their *own* records so that they could be made to speak the truth. The case of *The Palmyra,* 12 Wheat., 1, on which that court relied, was, as we have already said, a case in admiralty, and the Court gave its decision in it under the rules of the admiralty courts in such cases. But those rules do not apply to cases at common law. The Court, in *Lovett v. State,* concedes the general doctrine that after the appellate court has sent down its certificate or *remittitur* and adjourned for the term it has lost its jurisdiction of the case, but not so if the motion for a *certiorari* is submitted during the term at which the decision is made. "Where a case has been heard," the Court says, "upon its merits in an appellate court according to its rules of practice, and the judgment of the Court has been correctly entered, and the time, if any, allowed by the statute or its rules for a rehearing having passed, and no application for a rehearing having been made, the *remittitur* issues and is lodged in the lower court, it
(205) may well be said that the appellate court has lost its jurisdiction of the cause, and has not power to recall or reconsider it. Under these circumstances it has fairly and duly exercised its appellate functions and exhausted its powers as to the cause. There must be an end of litigation; public policy as

well as the interest of individual litigants demands it, and the rule just announced is indispensable to such a consummation." The Court also says: "It is apparent that the State's motion is made during the term of court at which the judgment which it is sought to have revoked was pronounced and entered, and it is a general rule of the common law that courts have power either to modify or vacate their judgments and decrees during the term at which they were rendered or while they are *in fieri.*" Even in that case the Court relied largely upon decisions in civil cases in which the error or mistake occurred in the appellate court. The case of *The Palmyra,* which was also cited by the Court and much relied on in support of its decision, has been fully explained and shown not to be an authority in support of the Court's ruling.

No suggestion of fraud upon the Court has been made in this case. Indeed the Attorney-General admitted there was no fraud but a mere inadvertence of the clerk in copying the indictment.

My conclusion is that, on principle and authority, the Court is without jurisdiction to grant the relief prayed for by the State. The decision of the Court, in my opinion, is in conflict with those cases in which it is held that a petition to rehear will not be entertained in a criminal case, and further establishes a new doctrine that a criminal case cannot only be reheard in this Court, but that the record may be amended for the purpose of a rehearing. The remedy of the State is to send another bill. To a new indictment the plea of former conviction cannot avail the defendant, though some doubt as to this seems to have been entertained in the court below. In order to sustain (206) the plea of former acquittal or former conviction it must appear that the former judgment "still remains in full force and effect and not in the least reversed or made void." *S. v. Williams,* 94 N. C., 891.

It is said in the opinion that by section 8, Article IV, of the Constitution, this Court may issue remedial writs necessary for a general supervision and control of the inferior courts. This is admitted, but it does not follow by any means that they may be issued contrary to the well-established course and practice of the Court. In the two cases cited by the Court as illustrations of the proper exercise of this power, namely, *Biggs, ex parte,* and *S. v. Jefferson,* the writs were applied for in apt time and issued regularly and in strict accordance with the well-settled rules of procedure in this Court.

Again the Court says, "That mistakes of this Court or of its clerk, not mistakes of law but of fact, have been often corrected after the mandate had gone down, and even at a subsequent

term," and numerous cases are cited to sustain the proposition. Citations are not necessary for that purpose. The proposition is also admitted, but the deduction made from it by the Court I do not think is either logical or warranted. The citation from Tidd's Practice is, I think, a complete refutation of it. The correction, as Mr. Tidd said, must be made in the same court where the mistake occurred. All the authorities cited by the Court in this connection simply refer to the familiar principle that a court may correct its own records so as to make them speak the truth. I venture to assert, with all deference, that there is not a single authority cited by the Court which, when properly considered and restricted to its peculiar facts, sustains its conclusion or which conflicts with the numerous cases decided by this Court and which I have already cited in support
(207) of the view I have taken of this case.

My deliberate conviction is that the ruling of the Court introduces a new and dangerous precedent into its practice and procedure, and unsettles those decisions in which the right to rehear in criminal cases is said not to exist.

The motion of the State, in my opinion, should be denied.

DOUGLAS, J., dissenting. I fully concur in the able dissenting opinion of *Justice Walker,* which leaves but little for me to say; but there are some parts of the opinion of the Court on which I will briefly comment.

The Court says: "We are not asked to reverse our judgment but to correct an *error of fact.*" I do not so understand it. In the first place we have no power at any time to correct a fact found in the court below, and even if we give the clerk of the court below any opportunity to correct the record sent up by him it would do the State no good as long as our judgment remains arresting the judgment in the court below, which in this case would be equivalent to granting the defendant a new trial, as a new bill of indictment could have been sent against him. The motion of the Attorney-General to correct the "error of fact" is simply preliminary to his further motion to *rehear* the case on the record as so amended. If the Attorney-General had simply asked to have the error of fact corrected in the record without disturbing our judgment I would not have dissented so strenuously. But when he asks us, after the expiration of the term at which the defendant has been granted an arrest of judgment, to take him back, reverse our judgment and hang him under an old sentence legally set aside at a former term, I must emphatically dissent. It is true upon the rehearing of the case this Court granted the defendant another new trial

upon a different ground, but that does not cure the invalidity in the rehearing itself. Suppose that the prisoner had been again tried and acquitted upon a new bill pending the (208) rehearing, and upon the rehearing this Court had found no other ground of error, would it have been our duty to have affirmed the judgment and sentence of death? This would have been a greater violation of the letter of the law than the execution of Sir Walter Raleigh, who was executed fifteen years after sentence upon a judgment which had, however, never been formally reversed. The opinion does not call it a rehearing, but what else is it? Taking the facts as they are, what other name can we apply to it? The case is taken back and reconsidered and a new judgment rendered. I do not mean to say that this case could properly be reheard. On the contrary not a single requisite exists for a rehearing, even if this Court had not decided in *S. v. Council,* 129 N. C., 511, that petitions to rehear are not allowable in criminal actions. It may be asked why, having dissented in *Council's case,* I should also dissent in the case at bar, which practically overrules every principle underlying the decision in *Council's case.* I do so for the sufficient reason that, even admitting that the State is entitled to a rehearing, it has complied with none of the requisites prescribed by the rules of this Court. Moreover, the opinion of the Court cites *Council's case* with approval; and it is impossible for both decisions to be right under the same system of jurisprudence. If we cannot rehear a case to do justice to the prisoner by correcting our own error we surely cannot rehear it simply to hang him.

Cited: Lassiter v. R. R., 136 N. C., 97; *Durham v. Cotton Mills,* 144 N. C., 715.

(209)

STATE v. PARKER.

(Filed 19 December, 1903.)

CORROBORATION OF WITNESSES—*Witnesses—Rule 27—Evidence—Instructions—Trial—Rape.*

Where corroborative evidence is introduced it is the duty of the trial judge, without any request, to instruct the jury fully as to the use they are permitted to make of such evidence.*

* Changed by Rule 27, 140 N. C., 662.

STATE *v.* PARKER.

INDICTMENT against John Parker, heard by *Judge W. R. Allen* and a jury, at May Term, 1903, of DURHAM. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Jones Fuller for the defendant.

MONTGOMERY, J. The crime of which the prisoner has been convicted—rape upon a little girl of less than ten years of age—is a most unusual one and most revolting. The evidence is not before us. It would be difficult to imagine a case in which the rules (1) that the evidence should be such as to satisfy the jury beyond a reasonable doubt of the defendant's guilt; (2) that none but competent evidence should be received by the court, and (3) that evidence competent for a special or restricted purpose should be confined to that end and clearly explained by the court to the jury than the present case. The only exception that appears in the record is one directed to the alleged failure of his Honor to properly instruct the jury in respect to certain evidence that was offered and received as corroborative in its nature. The prosecutrix had been examined as a witness for the State. The solicitor then put in evidence the examination of the prosecutrix, taken by the justice of the peace, D. C. (210) Gunter, when the matter was being investigated by him, "for the purpose of corroborating the prosecutrix." The solicitor then introduced W. A. Cobb "for the purpose of corroborating Lilly Lyon," who testified substantially that he was a policeman of the city of Durham, and that on the evening of February 22, 1902, about ten days after the crime was said to have been committed, at the home of the mother of the prosecutrix, the prosecutrix told him that the prisoner came to her home and hired her to go with him to his home to wait on his wife, who was then sick; that he started with her and took her out of the way into the woods and then violently and against her will ravished her; that he then carried her to his home and on the next day took her with him to the same woods and did the same thing to her." If the above was all that there is in the case there would be no error in the proceeding, for we must presume, nothing to the contrary appearing in the record, that the prosecutrix when on the witness stand had been assailed on her cross-examination to such a degree as to amount to an attempt to impeach her credibility, or that witnesses had been introduced by the defendant for that purpose. But after the case was made out and agreed upon by the solicitor and the counsel of the prisoner counsel applied to the judge who tried the case for an amendment to the statement of the case on ap-

peal, so that it might appear that his Honor did not explain to the jury in the charge that the statement referred to in the evidence of Gunter and the evidence of Cobb was to be considered as corroborative evidence only. His Honor stated that he could not say with certainty whether he did so or not, but that he was willing for Mr. Foushee (acting solicitor) to make the amendment, if he thought proper to do so, provided the statement was made as follows: "Upon objection being made to the statement referred to in the evidence of Gunter and to the evidence of Cobb, the court stated in the presence of the jury that the evidence would be admitted only as corroborative of (211) the evidence of the prosecutrix. In the charge to the jury the court recited the evidence of the prosecutrix and said substantially: 'The State contends that the jury ought to believe her, etc., and that she is corroborated.' The State says that she made the same statement before to Gunter and to Cobb, and that these statements corroborate her evidence upon the stand. In other words the State argues that she made the same statement before, and that this should lead the jury to believe what she now testified to." We are of the opinion that upon the amendment made to the case on appeal, in the language required by his Honor, the jury was not properly instructed upon the matter of the corroborative evidence of Gunter and Cobb. Of course when the evidence was introduced and when it was received as corroborative evidence it was in the presence of the jury, for it was for their consideration, but that did not satisfy the demands of the law. In *Sprague v. Bond,* 113 N. C., 551, the evidence there introduced was only competent for the purpose of corroboration, and that was conceded when it was offered, and for that purpose alone did his Honor admit it. The Court there, discussing the same question which had been decided in *Bullinger v. Marshall,* 70 N. C., 520, said: "The learned justice who delivered the opinion of the Court in that case was evidently loth to yield to this innovation, as he considered it, foreseeing, as he no doubt did, that it would be most difficult to restrain the effect of such evidence and prevent it from operating on the minds of the jury as substantive proof of the facts in dispute. Because there is this danger of its exercising an improper influence on the jury it is incumbent on the judge presiding at the trial, where such corroborative evidence is introduced, to see to it, even without any request for special instructions, that the jury fully understand the use they are permitted to make of it, and we must hold that the failure (212) to caution them in this particular when such a request is made, as was done by the defendants here, entitled them to a new

trial." It is true that in the case before us there was no exception taken in the trial below to his Honor's failure to further instruct the jury on the matter under discussion; and it was not called to the attention of the court at the time he was delivering the charge nor in the motion for a new trial. It was, however, incumbent on him to do so without any special request at the hands of counsel, as we have seen in *Sprague v. Bond, supra;* and if it was incumbent on him to have done so without a special request to that end, then his failure to do so, that fact appearing before us, was error. This is a life and death matter, and we cannot agree that evidence which was purely corroborative should have been received on the trial as corroborative evidence, and then submitted to the jury without a sufficient explanation of the nature and character of that kind of evidence, simply because counsel omitted to make a special request for that purpose. But again, upon the amendment as allowed by his Honor it is apparent that the *evidence* of the prosecutrix was the matter corroborated and not the witness. The evidence of a witness cannot be strengthened, cannot be corroborated by the repetition of the same statement made to others at different times. A falsehood may be as often repeated as the truth; and corroborative evidence of this kind has no force as substantive evidence to prove the facts, but only to remove the imputation which has been cast upon the witness upon his cross-examination, or by an attack upon his credibility by other witnesses. *Associate Justice Reade,* in the case of *S. v. Parish,* 79 N. C., 610, said: "It is like the evidence of character which only affects the *witness.*" That judge further said in the same case: "The rule is that when the witness is impeached (observe that when the *witness* is impeached) it is competent to sup-
(213) port the witness by proving consistent statements at other times, just as a witness is supported by proving his character, but it must not be considered as substantive evidence of the truth of the facts any more than any other hearsay evidence. The fact that supporting a *witness* who testifies does indirectly support the facts to which he testifies does not alter the case. That is incidental. He is supported not by putting a prop under him, but by removing a burden from him, if any has been put on him. How far proving consistent statements will do that must depend upon the circumstances of the case. It may amount to much or very little." It appears further upon the amendment that his Honor did not say one word himself to the jury as to the nature and meaning of corroborative evidence. He only called attention to the *argument* and the *contention* of the counsel for the State, without instructing them as to whether that

argument and contention embraced the law as it should have been given. The jury never got his explanation of corroborative evidence. They got only the contention of the State, that contention being, as we have seen, not the law. It made no difference that counsel for the prisoner and the solicitor for the State argued the evidence of Cobb and Gunter as corroborative evidence. His Honor not having explained what such evidence meant, the jury had to choose between the strength and soundness of the arguments and contentions of the respective counsel. They should have had the guidance, under the law, of his Honor.

New trial.

CLARK, C. J., dissenting. The prisoner was convicted of a most revolting crime, but this Court felt compelled to grant a new trial, upon a technical ground that could hardly be conceived to have affected the verdict. *S. v. Parker,* 132 N. C., 1014. Again convicted, the prisoner again asks a new trial, upon the purely technical ground that the judge, in (214) his charge to the jury, did not tell them that certain evidence was offered as corroborative and not as substantive testimony, though the solicitor had so stated when the testimony was offered, and the judge stated in the presence of the jury that he admitted it only as corroborative and not substantive testimony, and in his charge to the jury told them that the State relied on such evidence as corroborative of the testimony of the prosecutrix. Every presumption is in favor of the correctness of the proceedings below, and appellate courts should not be astute to find reasons for a new trial. It should plainly appear that the appellant was prejudiced by the alleged error, and that but for such error in all reasonable probability the conviction would not have occurred. There have been decisions, it is true, of recent origin that the judge in his charge to the jury should single out the corroborative testimony and tell the jury that it is corroborative and not substantive, but certainly failure to do so should not be held reversible error, unless the attention of the Court was called to it by a prayer to so instruct, especially when, as in this case, the judge and solicitor both stated, when the evidence was introduced, that it was merely corroborative, and the judge, in his charge to the jury, stated that the State relied upon such evidence as corroborative of the evidence of the prosecutrix. By virtue of an amendment to Rule 27, this Court will henceforward hold it not reversible error to fail to repeat in the charge that the evidence is merely corroborative when it is so stated on its admission, unless specifically prayed to so charge. The rule heretofore held is not a vested right, and a failure to observe it

should not, in the absence of all other ground of exception, authorize us to set aside this second time the solemn verdict and judgment of the trial court.

Besides, no exception of this kind was taken at the time, or appeared in the case as first settled by the judge. Finally
(215) yielding to the importunity of counsel for the prisoner, the judge admitted an amendment, saying, after a lapse of months, "I cannot say with certainty whether I did so or not," *i. e.,* charge that the evidence was to be considered as corroborative only. As he could not recollect, he certainly could not authorize an amendment that he did not so charge. If it was error, and even prejudicial error, to fail to charge upon the corroborative evidence more explicitly, such failure should have positively and affirmatively appeared; and the failure of the judge merely to recollect, after a great lapse of time, "whether I did so (charge) or not," should not be taken as proof that he did not. A trial is too solemn and expensive a matter to have a conviction, especially a second conviction, set aside because the judge could not recollect whether a certain phrase, which would not have affected the verdict, in all human probability, was positively and certainly used by him.

In *S. v. Powell,* 106 N. C., 635, it was held that, while the court should instruct the jury that corroborative evidence should not be considered in any other light, yet, unless it affirmatively appeared that this was not done, it will be presumed that it was. This was reiterated and reaffirmed. *S. v. Brabham,* 108 N. C., 796; *Byrd v. Hudson,* 113 N. C., 211. Here no exception for failure to so charge was made till after the case on appeal had been settled. It should have been called to the attention of the court by a prayer to charge. Even if an exception for failure to so charge had been set out in the prisoner's case on appeal, the recollection of the judge would have been fresh. But if the mere fact that after the lapse of months he cannot recollect positively "whether he did so charge or not" should be allowed hereafter, as in this case, as valid ground for a new trial, few verdicts, especially in State cases, will stand. It is too much to expect trial judges to carry such details in their memories.

Cited: Westfeldt v. Adams, 135 N. C., 600.

NOTE.—*A request to charge is now necessary.* Rule 27, 140 N. C., 662.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

SPRING TERM, 1904.

MEEKINS v. RAILWAY COMPANY.

(Filed 16 February, 1904.)

1. DAMAGES—*Negligence—Death.*

Damages are recoverable where death is hastened or accelerated by injuries resulting from negligence.

2. EVIDENCE—*Damages—Negligence—Death.*

In an action for death, evidence that the decedent would have died in a short time from natural causes is competent on an issue of damages, but not of negligence.

ACTION by J. C. Meekins, administrator of John Jones, against the Norfolk and Southern Railroad Company, heard by *Judge W. B. Councill* and a jury, at Fall Term, 1903, of TYRRELL. From a judgment for the defendant the plaintiff appealed.

E. F. Aydlett and *I. M. Meekins* for the plaintiff.
Pruden & Pruden and *Shepherd & Shepherd* for the defendant.

DOUGLAS, J. This is an action to recover damages for (218) the death of the intestate from injuries alleged to have been received through the negligence of the defendant. The first issue was as follows: "Was the death of the intestate, John Jones, caused by the negligence of the defendant, as alleged in

the complaint?" This issue was answered "No," which rendered the remaining issues immaterial.

There are several exceptions, nearly all to the charge or failure to charge; but as they are so connected with the evidence that they may not arise upon a new trial, we will confine ourselves to the exception which alone seems necessary for the determination of this appeal. The court charged as follows: "If the jury shall find that the intestate's death was caused by disease, and would have occurred from disease which he had at the time of the accident to him, even if the accident had not befallen him, then they shall answer the first issue 'No,' even if they shall further find that the fall aggravated his disease and hastened his death." In this instruction there was substantial error, for which a new trial must be granted. The first part of the instruction would, of course, be correct if taken by itself, as the defendant would not be liable for the death of the intestate if a pre-existing disease were its proximate cause; but in contemplation of law the cause of death is that which produces death at the time it happens. The unlawful killing of a human being would be none the less murder or manslaughter, as the case might be, even if the innocent victim were in the last stages of a fatal disease. We see no reason why the defendant should not be held civilly liable for negligently doing an act, the intentional commission of which might subject an individual to the punishment of death. Any other construction of law would be liable to the gravest consequences.

It has been repeatedly held by this Court that substan-
(219) tial damages are recoverable where the death of the intestate was hastened or accelerated by injuries resulting from the negligence of the defendant. In *Lewis v. Raleigh*, 77 N. C., 229, where the jury found that "the death of John Godwin was accelerated by the noxious atmosphere of said guardhouse," it was held in a well-considered opinion that his administrator could recover. In *Gray v. Little*, 126 N. C., 385, this Court says, on p. 387: "His Honor, in charging the jury, substantially followed the charge approved in *Benton v. R. R.*, 122 N. C., 1007, and, in addition thereto, instructed the jury in these words: 'But in considering the second issue, as to the cause of the death of the plaintiff's intestate, if you find that the death of the intestate was only hastened or accelerated by the acts or omissions of the defendant, as alleged, then you are instructed that, in answering the third issue, as to damages, you cannot award the plaintiff more than nominal damages—that is, such small sum as, for instance, five cents, or other small sum, because in such state of the case, if the death of the intestate was only

hastened or accelerated by the defendant, you could only respond to this issue in nominal damages.' (Exception.) The error in that part of the charge lies in considering the act expediting death as a mere technical injury. This is not the language of the law, nor of the text books on criminal matters. There are instances in the common-law reports where the accelerator paid the severest penalty known to the law. We know of no decision of a final appellate court in this country declaring otherwise." In view of the uniform decisions of our own State, it is needless to cite outside authorities; but a further discussion of the question may be found in *R. R. v. Northington,* 91 Tenn., 56; 16 L. R. A., 268, and in 1 Thompson Neg., sec. 149.

The evidence, tending to show that the intestate would in any event have died in a short time from natural causes, was competent, upon the issue of damages, but was utterly (220) immaterial upon that of negligence. For this erroneous instruction of his Honor a new trial is ordered.

New trial.

DICKENS v. PERKINS.

(Filed 16 February, 1904.)

1. ISSUES—*Contracts—Allegation and Proof—Variance—Code, Secs.* 273, 391.

   It is error to submit an issue as to a contract different from that alleged in the complaint.

2. ISSUES—*Instructions—Contracts—Variance—Pleadings.*

   Where a contract alleged in the complaint is different from that submitted in the issue, an instruction that if the contract was as alleged, the issue should be answered in the affirmative, is error.

ACTION by Mary A. Dickens and others against Helen Perkins and others, heard by *Judge G. A. Jones* and a jury, at November Term, 1902, of HALIFAX. From a judgment for the plaintiffs the defendants appealed.

Day & Bell, W. E. Daniel and *Battle & Mordecai* for the plaintiffs.

Thomas N. Hill and *E. L. Travis* for the defendants.

WALKER, J. This action was brought to enforce a parol trust. The plaintiffs allege in their complaint that in 1871 W. M. Per-

kins entered into a parol contract with Melissa J. Dickens, whereby he promised and agreed that if she would pay
(221) him the sum of $200 he would buy a tract of land, which is known as the Emsley Dickens home tract, at the judicial sale then about to be made by the administrator of Emsley Dickens, for the use and benefit of Mary Jane Dickens during her life, and at her death the remainder in fee for the use and benefit of the children of said Melissa J. Dickens, and that he would have a deed for the land made to himself, and would then convey the land as above indicated. That the money was paid to him, and at the sale made by the administrator he bought the land and took a deed therefor in his own name, and that instead of complying with his agreement to execute the deed to Mary Jane Dickens for life, with remainder to the children of Melissa J. Dickens, he, by his will, devised the land to the said Mary J. Dickens for life and remainder in fee to the defendants, Helen, Bettie and Nellie Perkins, in utter disregard of the rights and equities therein of the plaintiffs, who are the children of Melissa J. Dickens. It is further alleged that W. M. Perkins has died, having left a will, which has been duly admitted to probate. There are other allegations in the complaint which it is unnecessary to set out, for it is not material that they should be considered, in the view we take of the case as it is now presented.

The defendants, who are the heirs, devisees and executor of W. M. Perkins, in their answer, deny that he entered into the agreement with Melissa J. Dickens which is described in the complaint; and, while they admit that he bought the land and took the deed for the same in his own name, they deny that it was done under any parol agreement that he would hold it in trust, as alleged by the plaintiffs, but, on the contrary, they aver that he bought the land for himself and took the deed in his own name, without any trust attached thereto in favor of any of the plaintiffs, and that he thereby became the owner of the land in fee and in his own right. It is admitted that the land
(222) was devised by him in his will in the manner alleged in the complaint. They further aver that at the administrator's sale the said W. M. Perkins purchased the land at the price of $468, which amount he paid to the administrator, and they insist that, if the plaintiffs are entitled to a conveyance of the land, and the $200 was paid by Melissa J. Dickens to W. M. Perkins, then and in that case the plaintiffs should be required to pay to the executor of W. M. Perkins the sum of $268, it being the difference between the $200 alleged to have been paid by Melissa J. Dickens and the amount paid by W. M. Perkins to the administrator of Emsley Dickens for the land; and they fur-

ther insist that the said sum of $268 should be declared by the court to be a charge upon the land.

At the trial the court submitted to the jury the following issue: "Did W. M. Perkins buy the land described in the complaint under the parol agreement and with the understanding that he would take a deed for the same, and, when he was paid the money advanced for said purpose, would convey a life estate in the same to Mary J. Dickens, with the remainder in fee to the children of Melissa J. Dickens?" The defendants duly excepted to the submission of the issue.

An issue of fact, as defined by the Code, arises upon the pleadings when a material fact is alleged or maintained by the one party and controverted by the other. The Code, sec. 391. Issues do not arise upon the evidence, nor should they be so framed as to require the jury to find facts which are merely evidential. There is no allegation in the complaint that the parties entered into any such contract as the one set out in the issue. The contract alleged by the plaintiffs to have been made, and denied by the defendants in their answer, instead of being the one described in the issue, is quite different in its essential features and involves different rights and liabilities. If the plaintiffs were unable to show by their proof that the (223) contract was made as alleged, and by the evidence established a different agreement, they could have availed themselves of the latter and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed. The Code, sec. 273. The plaintiffs alleged that W. M. Perkins had agreed that, upon the payment to him of $200, he would buy the land at the sale and hold the same for the uses already mentioned and conveyed afterwards to the same uses, and that the $200 had been paid, which entitled the plaintiff to a conveyance when W. M. Perkins bought the land, while there was proof tending to show that it was agreed between the parties that Melissa J. Dickens should pay to W. M. Perkins $200, which she did, and that he should advance whatever additional amount might be necessary to pay for the land, and that, with this understanding, he would purchase the land at the sale, and, upon being repaid the amount advanced by him, he would convey the same to Mary J. Dickens for life, with the remainder to the children of Melissa J. Dickens. This must at least be taken as the plaintiff's understanding of the testimony, because they did not except to the issue, and must therefore have thought that there was evidence to warrant an affirmative answer to it by the jury. But the proof, in this view of it, did not sustain the allegation, and there was therefore a substantial variance, if not a

failure, of proof. Clark's Code, sec. 271, and notes; *Faulk v. Thornton,* 108 N. C., 314, and cases cited. As there was no other allegation in the pleadings, either in the complaint or the answer, which could raise the issue framed by the court and duly excepted to by the defendants, it was error to submit it to the jury. *Fortescue v. Crawford,* 105 N. C., 29; *Sprague v. Bond,* 113 N. C., 551; *Wright v. Cain,* 93 N. C., 296; *Miller v. Miller,* 89 N. C., 209. As we have already stated, this defect may
(224) be cured by proper amendment if the plaintiffs intend to rely upon the contract as set out in the issue.

If the proof should be construed as tending to show only that Melissa J. Dickens paid the $200 upon the agreement that W. M. Perkins should buy the land and take a deed therefor to himself, and then convey it to the parties above named, according to the uses declared in the contract, and that any additional amount advanced by him should be paid by Mary J. Dickens, the payment of the same not to be a condition precedent to the conveyance, but he to rely for reimbursement solely upon the personal promise or obligation of Mary J. Dickens, it would not warrant an affirmative finding upon the issue submitted; and this brings us to the only remaining exception of the defendant which we deem it necessary to consider.

However the case may stand upon the pleadings and proof, or upon the issue submitted, and any reasonable interpretation of the testimony, we find that his Honor's charge, in one respect, cannot be sustained. The court charged the jury, substantially, that if they found the contract was made as alleged in the complaint—that is, that W. M. Perkins was paid the $200 upon his promise to buy the land and hold it in trust, and to convey it to Mary J. Dickens for life, with remainder to the children of Melissa J. Dickens—they should answer the issue "Yes." The issue did not embrace only the facts recited in the charge, and the jury were therefore in effect instructed that if they were satisfied that W. M. Perkins made the contract, as stated in the charge, they should answer the issue "Yes," which, of course, required them to find that he made another and different contract. This was error. There was no correspondence between the allegation of the complaint and the issue in respect to the terms of the contract, and none between the issue and the charge of the court.

(225) At the next trial the defendants may, by tendering proper issues and by prayers for instructions, present the other questions argued in this Court as to the illegality of the consideration of the contract and the statute of limitations, if it becomes material that they should be passed upon. The ques-

tion relating to the validity of the parol trust can better be considered when the terms of the contract are ascertained.

For the reasons already given, we do not think the case was correctly tried in the court below.

New trial.

CHEEK v. LUMBER CO.

(Filed 16 February 1904.)

1. EVIDENCE—*Pleadings—Waiver.*

A party, by introducing in evidence the whole of a paragraph of the answer, waives his exception to the refusal to allow him to introduce part only of it.

2. EVIDENCE—*Fires—Railroads.*

In an action for the burning of plaintiff's timber by sparks from defendant's engine evidence that a year later, at another place, it set fire to timber is not competent.

3. EVIDENCE—*Harmless Error—Fires—Railroads.*

The admission of evidence, in an action for damages caused by fire, of the condition of the engine is harmless, the court having instructed that the defendant was liable if the engine set the fire.

4. EVIDENCE—*Estoppel—Admissions—Railroads.*

Though prior to the action for the burning of timber by sparks from an engine defendant's president and general manager, who did not see the fire set, stated that the engine set it, defendant is not estopped to show he was mistaken.

5. NEGLIGENCE—*Burden of Proof—Proximate Cause—Railroads.*

The fact that the defendant's engine was not equipped with a spark arrester, though negligence, does not make it liable for a fire without proof that it set it.

Discussion of spark arresters by CLARK, C. J.

ACTION by Agnes R. Cheek against the Oak Grove (226) Lumber Company, heard by *Judge Fred. Moore* and a jury, at June Term, 1903, of HALIFAX. From a judgment for the defendant the plaintiff appealed.

Day & Bell and *T. C. Harrison* for the plaintiff.

W. E. Daniel, E. L. Travis and *Claude Kitchin* for the defendant.

CONNOR, J. This action is prosecuted by the plaintiff to recover damages alleged to have been sustained by the negligence of the defendant, in that it negligently and carelessly failed and neglected to equip its engine with spark arresters and other appliances to prevent the escape of fire and sparks when passing over the lands of the plaintiff, whereby much valuable timber standing on her land was destroyed, etc. The defendant denied the material allegations in the complaint, and thereupon the following issue was submitted to the jury: "Did the defendant negligently and wrongfully burn the plaintiff's timber, as alleged in the complaint?"

After the introduction of other testimony, the plaintiff offered to read in evidence a portion of the fourth paragraph of defendant's answer, to-wit, "That it admits the engine used by it for hauling logs was not equipped with a spark arrester."

The defendant objected, and to the court's ruling sustaining the objection the plaintiff excepted. The plaintiff thereupon introduced the whole of said paragraph, to-wit, "That the
(227) fourth section thereof is untrue, save and except that it admits that the engine used by it in hauling logs was not equipped with a spark arrester; but it avers there was no necessity therefor, and the failure to so equip it was not negligence."

Without passing upon his Honor's ruling, we have no hesitation in coming to the conclusion that the exception was waived by the action of the plaintiff in reading to the jury the entire paragraph of the answer. If the plaintiff had relied upon the exception, and thereby lost the benefit of the admission in the answer, she would be in a position to have this Court decide whether there was reversible error in the ruling of his Honor. She abandoned the exception, and by reading the entire paragraph got the benefit of the admission. The learned counsel, in their brief, complain that the portion of the paragraph which they desired to exclude "was a statement of bad law, which could not explain or modify the admission." His Honor so instructed the jury. We cannot perceive how the plaintiff has any cause to complain in this respect.

The plaintiff proposed to show by the president and general manager of the defendant corporation that the same engine, one year after the fire in question, at another place, some miles distant from the defendant's farm, set fire to timber. The exclusion of this evidence forms the basis of the plaintiff's second exception. We concur in his Honor's ruling. The proposed evidence involved too many collateral inquiries—was calculated to mislead and confuse the jury in respect to the fact in issue. It is often difficult to accurately trace the line which separates evi-

dence which is relevant—that is, has a visible, reasonable connection with the fact in issue—from that which is too remote and constitutes no evidence. The fact that the engine which was charged with the injury to the plaintiff's timber, twelve months after, and at another place, fired timber, (228) gave no aid to the jury in answering the issue, unless it was followed by a mass of other testimony showing similarity of conditions, etc.

Pearson, C. J., in *Bottoms v. Kent,* 48 N. C., 154, thus states the rule: "As a condition precedent to the admissibility of evidence, the law requires an open and *visible* connection between the principal and the evidentiary facts. This does not mean a necessary connection which would exclude all presumptive evidence, but such as is *reasonable* and not latent or conjectural." In *S. v. Vinson,* 63 N. C., 335, *Rodman, J.,* says: "If the fact offered to be proved be equally consistent with the existence or non-existence of the fact sought to be inferred from it, the evidence can furnish no presumption either way, and should not be admitted." *S. v. Brantley,* 84 N. C., 766; *Grant v. R. R.,* 108 N. C., 462; *Ice Co. v. R. R.,* 126 N. C., 797.

The president and general manager of the defendant was permitted to testify, after objection, that his engine had no spark arrester. "It was a cog-gear locomotive engine—kind usually used on such roads; that it at one time had a spark arrester; did not steam well, and it was taken off. The results were poor; could not get any steam; took it off; got good results; steamed all right." Plaintiff's counsel insist that this testimony was incompetent, and excepted to its admission. We can perceive no valid objection to it, and, in the light of his Honor's charge, it was entirely harmless. The defendant was certainly entitled to describe to the jury the construction, equipment and operation of its engine. The value of the testimony, as relieving the defendant of liability, was for the jury, under proper instructions from the court. The exception cannot be sustained.

Plaintiff introduced a witness who testified that the president and general manager of defendant said to him, in response to the question, "Did your engine set it afire?" "Yes, my engine set it afire, but fire had been there before." There (229) was other testimony tending to show that defendant's engine set fire to the timber. No eye-witness testified to the fact. The defendant introduced testimony tending to show that the timber was set on fire from other causes. His Honor instructed the jury that, although they should find that the engineer of the defendant told the plaintiff's witnesses that the defendant's engine set fire to the plaintiff's timber, that did not

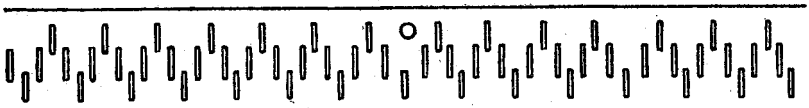
necessarily render the defendant liable, unless the jury find that the defendant's engine did actually set fire to the timber, but that the jury were at liberty to consider all the evidence, the facts and circumstances testified to by the witnesses, and find whether defendant's engine did actually set fire to plaintiff's land or woods, or not. Plaintiff excepted. It was not claimed that the defendant's general manager saw the engine set fire to the timber. The plaintiff insists that, if the jury believe that the president made the admission, the burden was shifted, and put upon the defendant the labor of showing that the fire was not the result of negligence. We cannot concur in this view. The testimony, if believed, did not estop the defendant from showing that its general manager was mistaken in saying that the engine set fire to the timber. The admission does not come within the rule which binds a party to a "solemn admission" made in the pleading. It may well be that the general manager, from the facts and circumstances known to him, honestly believed that the engine set fire to the timber. This was competent testimony, but did not work an estoppel upon the defendant to show the fact to be otherwise. In the light of his Honor's charge, it is evident that the jury found that the defendant's engine did not set fire to the timber. His Honor told the jury that, if they found the defendant's engine was not equipped with a spark arrester, and that the fire was caused by the failure of the defendant to equip his engine with a spark arrester, (230) they should answer the first issue "Yes." This was equivalent to telling the jury that the failure to have a spark arrester was negligence, and that if by reason thereof the plaintiff sustained the injury complained of, the defendant was liable. This instruction was strictly in accordance with the rulings of this Court. It being conceded that the engine had no spark arrester, the only question under his Honor's instructions for the jury to answer was whether the engine set fire to the timber and the failure to have the spark arrester was the proximate cause thereof. These questions were peculiarly within the province of the jury. We concur in the plaintiff's contention that the failure to furnish the engine with a spark arrester was negligence, and his Honor so instructed the jury, leaving to them the question whether the engine set fire to the timber, and whether the failure to have a spark arrester was the cause thereof. The proposition maintained by the plaintiff is, that the defendant's engine set fire to her timber; that it had no spark arrester; that the failure to have a spark arrester was negligence *per se*. If we concede this proposition, the plaintiff must, before she can maintain her action, show that the failure

to have a spark arrester was the proximate cause of the fire. "Negligence, no matter in what it may consist, cannot result in a right of action, unless it is the proximate cause of the injury complained of by the plaintiff." Elliott on Railroads, sec. 711; *Henderson v. Traction Co.*, 132 N. C., 779; *Butts v. R. R.*, 133 N. C., 82; *Edwards v. R. R.*, 129 N. C., 78.

We think that his Honor's instructions fully cover every phase of the controversy, and that plaintiff's exceptions cannot be sustained. Upon a careful examination of the entire record, we find no reversible error, and the judgment must be

Affirmed.

CLARK, C. J., concurring. Fires set by locomotives are (231) so disastrous that all reasonable means should be used to prevent them. The cut of a locomotive used in *Williams v. R. R.*, 130 N. C., at p. 125, has been very useful to the profession and the Court in the trial of actions for damages for fires alleged to have been caused by sparks thrown out by locomotive engines. It may be useful and therefore not inappropriate in a concurring opinion in this case (in which the spark arrester was taken off because with it the engine did not steam well), to add to the cut used in 130 N. C., *ut supra,* the following description and cut of a successful device used on several European railroads to prevent fires being caused from locomotive sparks, taken from an official government publication. U. S. Consular Reports, 1904, p. 702.



"The device consists of a series of three grates, set one above another, in a square iron or steel frame, of such size and form as to fit into the smoke chamber of the locomotive. The arrangement of the three tiers of grate bars is shown by the illustration below. Each bar is about two inches wide by one-tenth of an inch thick, and is ingeniously set into the frame, so as to be held in place against any shock or pressure and at the same time to be free to expand or contract with changing temperatures. As shown by the diagram, the middle tier or grate contains twice as many bars as the top and bottom tiers, and the arrangement of bars and spaces is such that while a free passage is secured for the gases of combustion, no spark or ember more than one-

sixteenth of an inch in thickness can escape, and these are so small that they are self-extinguished within a few feet after escaping into the open air, and cause no danger. This (232) ingenious arrangement of the bars, together with the readiness with which they expand and contract under varying temperatures, acts to dislodge the adhering particles and prevents the arrester from becoming clogged, at the same time permitting a draft so open and free that the steaming capacity of the engine is said to be visibly greater than with any other type of spark arrester heretofore used."

It is there said that this design has solved the problem which "has been to devise a metallic network fine enough in mesh to effectively sift the glowing sparks from the blast of a locomotive without so obstructing the draft as to compromise its steaming capacity. Hitherto the bars or filaments of network spark arresters have been mainly round and fixed in place—conditions which always entail more or less danger of choking and clogging whenever the space between bars or meshes is small enough to really prevent the escape of sparks and glowing embers of dangerous size."

This device occupies the space E E E in the cut in 130 N. C., at p. 125, but instead of being a flat mesh, as there used, it consists of three tiers or sets of bars, each two inches deep by one-tenth of an inch thick, making a total thickness of six inches through which the sparks must pass, with such distance between the bars as prevent, but without clogging, the passage of any cinders more than one-sixteenth of an inch in thickness.

MONTGOMERY, J., did not sit on the hearing of this case.

Cited: Trust Co. v. Benbow, 135 N. C., 305; *West v. Grocery Co.,* 138 N. C., 168; *Johnson v. R. R.,* 140 N. C., 583, 587; *Williams v. R. R., ib.,* 626; *Hemphill v. Lumber Co.,* 141 N. C., 490; *Whitehurst v. R. R.,* 146 N. C., 591.

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(233)

SUMNER v. EARLY.

(Filed 16 February, 1904.)

SPECIFIC PERFORMANCE—*Partition—Tenancy in Common—Jurisdiction—Superior Courts—Clerks of Courts.*

Where tenants in common of one tract of land and tenants in common of another mutually agreed that all the lands should be partitioned "as if they held the said lands as tenants in com-

mon," the remedy on the refusal of the tenants in common of one of the tracts to carry out the agreement is by suit for specific performance and not by a special proceeding for partition, the agreement being executory only.

ACTION by J. B. Sumner and others against B. F. Early and others, heard by *Judge M. H. Justice,* at October Term, 1903, of HERTFORD.

This is a civil action, in which the plaintiffs aver that on 4 March, 1890, the plaintiffs and defendants entered into a written contract, set out in the complaint, whereby the plaintiffs, being the owners as tenants in common of certain lands described therein, and the defendants, being the owners of other lands, mutually agreed that all of said lands should be partitioned, and that they would select three disinterested men to make the partition, "as if they held said lands as tenants in common." The terms and provisions of said contract are set forth in detail in the paper writing, which is made a part of the complaint. The plaintiffs allege that the defendants refused to carry out and perform their part of the contract, whereas the plaintiffs have always been ready and willing to perform the contract on their part. They demand judgment that the contract be specifically performed, and that partition be made in accordance with the terms thereof. The defendants, in their answer, admit the execution of the contract, and aver matters in avoidance of the plaintiffs' right to have specific performance and par- (234) tition. At October Term, 1903, of the Superior Court of Hertford a jury was duly impaneled to try the issues raised by the pleadings. Whereupon the defendants moved to dismiss the action, for that the court had no jurisdiction. The motion was allowed, and the plaintiffs appealed.

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

CONNOR, J., after stating the case. The motion of the defendants is based upon the position that the plaintiffs' remedy for the refusal of the defendants to perform their contract was a special proceeding, of which the clerk had original jurisdiction. If the contract had contained appropriate words of conveyance, whereby the parties conveyed to each other the title to the lands described therein as tenants in common—that is, if it were an executed contract—the position of the defendants would have been correct. The contract is, however, executory, and the remedy upon it is for specific performance. If the court shall, upon a trial of the issues raised by the pleadings, adjudge that the plaintiffs are entitled to a decree, it will, in furtherance of the

remedy, appoint commissioners to make partition, and thus give complete relief.

"When the title of a co-tenant is equitable merely, and he is entitled to a conveyance of the legal title, he may, by proper pleadings, assert his rights and obtain a decree of the court, compelling those in whom the legal title rests to convey according to the partition awarded. But when the sole purpose of the bill is to procure a partition, it will not be granted on the ground that the plaintiff is entitled to a conveyance. He must, first, in the same or an independent suit, obtain a decree declaring the right to a conveyance." Freeman on Co-tenants and Partition,
(235) sec. 513. "A partition of lands among several joint owners will not be made unless those by whom the partition is sought have a legal title to the portions claimed by them. A party who has a mere equitable right to a conveyance of an undivided interest is not in a position to ask for a partition." *Williams v. Wiggand,* 53 Ill., 233. In that case it is said that in a bill for specific performance a prayer may be joined for partition, but when the sole purpose of the bill is for partition it will not be allowed merely on proof that the complainant is entitled to a conveyance.

No partition can be ordered until the equitable rights are determined and adjudged. It is well settled that the clerk, in the exercise of his statutory jurisdiction in special proceedings, may not administer equities or equitable relief. This jurisdiction is vested solely in the Superior Court in term. The language of *Mr. Justice Davis,* in *Efland v. Efland,* 96 N. C., 488, is appropriate to and decisive of this appeal: "Equitable elements exist in this case and involve questions of law and fact which could not be adjudicated before the clerk, and which, under the old practice, would have been cognizable in a court of equity, and is properly a 'civil action,' within the definition of *Pearson, C. J.,* in *Tate v. Powe,* 64 N. C., 644." *Pollard v. Slaughter,* 92 N. C., 72; 53 Am. Rep., 402; *Parton v. Allison,* 109 N. C., 674.

We therefore conclude that the action is properly brought. The defendants' motion to dismiss should have been denied. Judgment dismissing the action will be reversed, and the court will proceed to hear and determine the cause upon the pleadings.

Reversed.

(236)

FIDELITY CO. v. JORDAN.

(Filed 16 February 1904.)

1. JURISDICTION—*Exceptions and Objections—Waiver—Appeal—Demurrer.*

An objection to the jurisdiction, though waived in the court below, may be taken in the Supreme Court.

2. JURISDICTION—*Superior Court—Subrogation—Equity.*

The Superior Court has jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor, whose claims he had paid.

3. SUBROGATION—*Principal and Surety.*

Where a surety prays a judgment against his principal he may recover any funds wrongfully converted or misapplied by the principal.

4. SUBROGATION—*Pleadings—Principal and Surety.*

The complaint in this action for subrogation does not sufficiently locate the funds sought to be recovered.

5. AMENDMENT—*Pleadings—Demurrer—The Code, sec.* 273.

Where a demurrer to a complaint is sustained the trial judge may allow an amendment to the complaint.

ACTION by the Fidelity and Deposit Company against William Jordan and another, heard by *Judge M. H. Justice,* at Fall Term, 1903, of HERTFORD. From a judgment for the plaintiff the defendant appealed.

Pruden & Pruden and *Shepherd & Shepherd* for the plaintiff.
Winborne & Lawrence and *George Cowper* for the defendant.

WALKER, J. This action was brought by the plaintiff (237) in the court below for the recovery of $197.86, and was tried upon demurrer to the complaint. The plaintiff, a corporation, alleged that, at the request of John F. Newsome, Clerk of the Superior Court of Hertford County, it became surety on his official bond, as it was authorized by law to do, in the sum of $15,000, with the usual conditions; that said Newsome, as clerk and receiver, by virtue of his office, received large sums of money to be held by him for several parties, and a large part thereof he deposited in bank to his credit as "clerk and receiver." That he defaulted and misapplied the trust funds so held by him to the amount of nearly $18,000, and thereafter, he having died, a judg-

ment was recovered against his administratrix and the plaintiff, his surety, for $909.80, which amount and the further sum of $507.75, which he had also converted or misapplied, the plaintiff was compelled to pay as surety. That prior to his death the said Newsome, being individually indebted to the defendants, gave them a check, drawn by him as "clerk and receiver," to their order, on the bank in which the trust funds had been deposited, for the sum of $197.86 in payment of said indebtedness, and the check was afterwards paid to them out of the trust funds. The defendants had no claim upon the said funds, and knew at the time they received the check and the money paid thereon that the giving of the check was a misappropriation of the trust funds by Newsome. It is then alleged "that the plaintiff is advised and believes, and so avers, that it is subrogated to the rights of those whose debts against the said clerk and receiver it has paid, and is entitled to recover in this action of the defendants the sum received by them as aforesaid of John F. Newsome, deceased." The plaintiff demands judgment for the sum of $197.86 and the costs.

(238) The defendants demurred substantially upon the following grounds:

1. That the court has no jurisdiction of the action.

2. It appears from the complaint that the plaintiff paid the alleged fiduciary claims for money wrongfully converted by his principal, without having the same assigned to it, and thereby discharged the same, and for this reason it has no legal or equitable demand against the defendant, by subrogation or otherwise.

3. That the plaintiff, in its complaint, does not state a cause of action, because, first, it does not appear that plaintiff is subrogated to the rights of any person or persons having any cause of action against the defendants; second, it is not stated to whom the plaintiff paid the said money or how much he paid to any one person, nor does it appear by proper averment to whose right the plaintiff seeks to be subrogated.

The demurrer was overruled and judgment rendered for the plaintiff, to which the defendants excepted and appealed.

The objection to the jurisdiction was waived in the court below, but the defendants' counsel insisted upon it in this Court, as he had the right to do. We think, however, that it is without any merit. The cause of action attempted to be set up by the plaintiff is equitable in its nature, and can be enforced only in the Superior Court. The court of a justice of the peace has no jurisdiction by which it can affirmatively administer an equity. This has been repeatedly decided. *Berry v. Henderson,* 102

N. C., 525, and cases cited. While it is a court for the enforcement of remedies merely legal, it may so far recognize an equity involved in any action pending before it as to permit it to be pleaded as a defense. *Bell v. Howerton,* 111 N. C., 69; *McAdoo v. Callum,* 86 N. C., 419.

The defendants next contend that the plaintiff, having paid the judgment recovered against it, and the other part of the debt due by its principal, without having taken an (239) assignment to itself for the same from the creditors, has thereby discharged the indebtedness and deprived itself not only of the right to enforce payment of the particular judgment and claim thus discharged by it, but has also lost all right to be substituted in the creditors' place to all collateral rights and securities to which the creditors were entitled or which they held at the time of the payment, and that by the payment it became merely a simple contract creditor of its principal, without any security for its debt, and its only remedy is by personal action against the administrator to recover the amount so paid by it. It is very true that, in order to enforce the payment of a judgment obtained upon the debt, or to recover upon a debt in its original form, if it has not been reduced to judgment, it is necessary that the surety, when he pays the debt, however it may be evidenced, should have it assigned to a third person in trust for his benefit, and, if such an assignment is taken, the debt is kept on foot, although the money be paid to the creditor by the surety, and its vitality is preserved, even at law, and much more in equity, and he may enforce payment of it, just as the creditor could have done before the payment was made. *Hanner v. Douglass,* 57 N. C., 262. But it is not required that this should be done in order to preserve the collateral remedies or securities of the creditor. It is only the debt or security upon which the judgment has been taken, or the note or other instrument given to the creditor as evidence of the indebtedness, that is discharged by the payment, and in such a case an equity arises at once in favor of the surety making the payment to have all the securities held by the creditor, and which have not been extinguished by the payment of the debt, such as the bond securing the principal debt, transferred to him, and he is entitled to be subrogated to all the rights and remedies which the creditor has against the debtor, and to avail himself of them as fully in every par- (240) ticular as the creditor could have done. This principle of equity we consider as well settled by the authorities. *Liles v. Rogers,* 113 N. C., 197; 37 Am. St., 627. The distinction we have drawn is clearly and tersely stated by *Rodman, J.,* for the Court, in *McCoy v. Wood,* 70 N. C., 125, as follows: "The law

is, that if a surety pays the bond of his principal, for which there is no collateral security, the bond is thereby extinguished, unless he takes an assignment to a trustee. But in equity it is held that if the creditor has taken a collateral security for the debt, the surety, on payment, is subrogated to the rights of the creditor in the security without an express assignment." While the original debt, whether in the form of a judgment or a bond, is discharged by the payment, the surety becomes a simple contract creditor of his debtor, and to this new relation equity attaches what is called the right of subrogation, which is defined to be the substitution of one person in the place of another, whether as a creditor or the possessor of any other rightful claim, and the substitute is put in all respects in the place of the party to whose rights he is subrogated, the principle having been adopted from the civil law by courts of equity. It is treated as a creature of equity, and is so administered as to secure real and essential justice, without regard to form and independent of any contractual relations between the parties to be affected by it. It is broad enough to include instances in which one party pays the debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." Sheldon on Subrogation, p. 2. By another, the doctrine of subrogation is said to be distinctly a creature of equity, having its basis in natural justice, irrespective and independent of rules and forms of law. But in equity no contract is necessary upon which to base the right; it is a remedy which a court of equity seizes upon in order to accomplish what is (241) just and fair between the parties, where a party who is seeking the aid of the court and the benefit of the rule has been no mere volunteer, and where his action has been based upon general equitable rules which it is the particular province of a court of equity to enforce. "Subrogation is the substitution of one who, under the compulsion of necessity for the protection of his own interest, has discharged a debt for which another is primarily liable, in the place of the creditor, with all the security, benefits and advantages held by the latter with respect to the debt. One of the prerequisites to the exercise of the right is the complete discharge of the debt." 2 Beach Eq. Jur., secs. 797 and 798.

In conformity to this established doctrine it has been held that the sureties of an insolvent clerk of the court, upon a breach of trust by their principal, will in equity be entitled to all the remedies and securities that belong to a *cestui que trust*, or creditor, against one who co-operated in the breach of trust. *Bunting v.*

Ricks, 22 N. C., 130; 32 Am. Dec., 699; cited and approved in *Powell v. Jones,* 36 N. C., 337.

Fox v. Alexander, 36 N. C., 340, seems to be directly in point as an authority in support of the doctrine that when a surety has paid a judgment against his principal (in that case a guardian), he may by action follow and recover any of the fund which has been wrongfully converted or misapplied by the principal, and which has been received from him by a third person with notice of its fiduciary character in payment of a debt due him from the surety's principal, even though the judgment, which was obtained against the surety and his principal on account of the breach of trust, has been paid and discharged. In that case the guardian transferred to the defendant in payment of the debt due to him a note payable to himself as guardian. The ward recovered judgment against his guardian for the amount of his de-
(242) falcation, the bond transferred to the defendant being a part of the trust property which was misapplied by the guardian and for which misapplication the judgment was given. This judgment the sureties paid without having any assignment made to a third person for their benefit. It was held that, as the sureties had thus been compelled to pay the ward the amount due to him, they had the right in a court of equity to stand in his place and follow the trust fund in the hands of the defendant, and to have satisfaction of him to the amount thereof. This case, it would seem, is a full and complete answer to the contention of the defendants' counsel, and sustains the plaintiff's right to a recovery if it has made the necessary allegations to raise this equity of subrogation in its behalf. While it may be needless for us to cite authorities to show that the defendant is liable to account for the money received by him on the check, upon the ground that he is constructively a trustee of the same, having received it with full notice that it was part of the trust fund, the principle upon which such a liability rests is fully discussed in the following cases: *Edwards v. Culberson,* 111 N. C., 342; 18 L. R. A., 204; *Powell v. Jones,* 36 N. C., 337; *Liles v. Rogers, supra; Bunting v. Ricks, supra.* Having received the fund with notice of the breach of trust, he is held to have participated therein, and becomes himself, by construction of a court of equity, a trustee of the fund for the benefit of the party entitled to the same, and the latter may pursue and recover it for the purpose of "indemnity and recompense," and a court of equity will not stop the pursuit until the means of ascertainment and identification of the fund fail, or the rights of *bona fide* purchasers for value without notice of the trust, or of some person having a superior equity, have intervened. *Edwards v. Culber-*

son, supra. While this right of subrogation exists, and will always be enforced when a case is presented, to the facts and circumstances of which it is adapted, we do not find in (243) the plaintiff's complaint sufficient allegations to bring its cause of action within the application of the rule; and this requires us now to consider the defendant's last contention, that the plaintiff has not alleged facts sufficient to show that he is entitled to represent and stand in the place of any person entitled to the money which was paid by the bank to the defendants on the check.

The plaintiff alleges that Newsome received large sums of money as clerk, "a large part of which he deposited in the bank, and that he misappropriated the trust funds so received by him to the amount of nearly eighteen hundred dollars, which has been paid by the plaintiff as surety, and that the defendants received a check from Newsome for $197.86 on the bank, and that amount out of the trust funds in the bank was paid to him on the check." It does not appear from this allegation with sufficient distinctness, even under the liberal provisions of the Code, that the money which the defendants received was any part of that which was converted or misappropriated by Newsome, and which plaintiff was compelled to pay. It will be observed that the plaintiff does not allege that the trust fund misapplied by Newsome, the amount of which it was required to pay, was the same which had been deposited in the bank. The fund in the bank did not constitute all of the trust funds which had been received by Newsome as clerk. It is alleged that he had received large sums of money, a part of which he placed in the bank. It appears, therefore, that the fund converted by Newsome, and for which plaintiff was held liable, and the amount of which it afterwards paid, may have been that part of the "large sum of money" alleged to have been held by Newsome, which was not deposited in the bank by him. Thus the matter is involved in the greatest doubt and uncertainty, and we are left entirely to conjecture as to what are the real facts. If the fund, for the conver- (244) sion of which by Newsome the plaintiff was made liable, was not deposited in the bank, then it is very clear that the plaintiff is not entitled to recover in this action, as he seeks to recover upon the theory that the defendants have received a part of the trust fund which was deposited in the bank. The defect in the pleadings is to be found in the fifth section of the complaint, where it is alleged that Newsome misapplied the trust fund so received by him, not the fund so received by him and deposited in the bank. Newsome having received other funds than those which he placed in the bank, we must assume, in the

absence of more specific allegation, that they were the funds misapplied by him, and for which misapplication or conversion the plaintiff was held liable. If this be true, the defendants cannot be liable to the plaintiff, as they received no part of the fund which was not deposited in the bank. The rule of pleading is, that every intendment is to be made against the pleader. In *Wright v. McCormick,* 67 N. C., 27, *Rodman, J.,* says: "It is a rule of construction, of which no pleader has a right to complain, that all uncertainties and ambiguities in his pleadings shall be taken in the sense most unfavorable to him, for he has at all times the power and it is his duty to make them plain." But, however this may be, and while we are sure that the failure to make the necessary allegation was a mere inadvertence, we cannot ascertain and pass upon the rights of the parties by mere conjecture.

The demurrer in this respect must be sustained; but, as the plaintiff may have a good cause of action which is defectively stated in the complaint, the court below may, upon proper application, and in the exercise of its discretion, allow the pleading to be amended. The Code, sec. 273; *Proctor v. Ins. Co.,* 124 N. C., 265. The judgment overruling the demurrer is

Reversed.

(245)

CHEESBOROUGH v. SANATORIUM.

(Filed 16 February, 1904.)

MECHANICS' LIENS—*Corporations—Mortgages—The Code, secs.* 1255, 1781—*Laws* 1897, *ch.* 334.

A judgment for materials furnished for a corporation in building is not a prior lien to a mortgage executed and registered prior to the furnishing of the material.

ACTION by T. P. Cheesborough and others against the Asheville Sanatorium, heard by *Judge W. A. Hoke,* at May Term, 1903, of BUNCOMBE.

This action was brought by the plaintiffs for the purpose of enforcing the execution of the trusts declared in a certain deed executed by the defendant corporation to J. S. Adams. Charles McNamee was appointed receiver. At August Term, 1899, the plaintiffs were allowed to make themselves parties to such action, and filed their complaint therein. The cause was submitted to his Honor upon an agreed state of facts.

The defendant was, on and before 30 September, 1897, a corporation, created and organized under the laws of this State. On said day the said corporation executed to the Board of Home Missions of the Presbyterian Church certain bonds, aggregating the sum of $30,000, and, for the purpose of securing the payment thereof, executed a deed in trust upon its land and buildings in the city of Asheville, which was duly registered in Buncombe County on 3 January, 1898; that between 9 February, 1898, and 15 July, 1899, the plaintiffs, McPherson & Clark, pursuant to a contract made with said corporation, "performed labor" and "furnished materials" for it, and in doing said work used said materials, which said materials were used and furnished by them on the buildings situate on the land and
(246) premises of the defendant corporation, particularly described in the notice of lien filed by said plaintiffs; that said work and material were reasonably worth the prices set out and charged therefor; that by the terms of said contract the said corporation became indebted to the plaintiffs, McPherson & Clark, in the sum of $646 for said labor and work and materials so furnished; that of said sum $115.60 is for items marked "work" in the bill of particulars filed with the notice of lien, the remainder of said sum being for "materials furnished"; that the plaintiffs filed their notice of lien, in compliance with the provisions of section 1781 of the Code, on 16 August, 1899, and on 19 October, 1899, filed their complaint in this action; that the Board of Home Missions filed its answer to said complaint, alleging the execution of the said deed in trust and denying the plaintiffs' right to any lien on said property or priority in the proceeds of the sale thereof over the payment of the bonds held by said board of missions and secured by said deed in trust.

His Honor adjudged that the defendant corporation was indebted to the plaintiffs, McPherson & Clark, in the sum of $646.15, with interest, and of this amount the sum of $115.61, being for "work and labor," constituted a lien upon said property, and had priority over all other liens whatsoever, and over all mortgages and deeds in trust thereon, and that said sum be paid out of the proceeds of the sale of the property of the defendant corporation in preference to all other claims, etc. The plaintiffs excepted to the refusal of his Honor to declare the entire amount of their claim entitled to priority, and appealed.

F. A. Sondley for the plaintiffs McPherson & Clark.

Merrimon & Merrimon and *J. D. Murphy* for the plaintiff board of missions.

CONNOR, J., after stating the case. The exception to (247) the judgment of his Honor involves the construction of section 1255 of the Code, as amended by chapter 334, Public Laws 1897. The section of the Code as originally enacted declared that "Mortgages of incorporated companies . . . shall not have power to exempt the property of such incorporations from execution for labor performed, nor for material furnished, nor for torts committed." This section was construed by this Court in *Coal Co. v. Electric Light Co.,* 118 N. C., 232 (1896). The General Assembly, at the session of 1897, amended the section by striking therefrom the words "for material furnished such corporation" (chapter 334).

The sole question presented by this appeal, therefore, is whether the plaintiffs are entitled to priority over the deed in trust executed prior to the commencement of the work or the furnishing of the materials. There can be no doubt that, as against the defendant corporation, the plaintiffs have a lien pursuant to the provisions of section 1781 of the Code, providing for liens "for work done . . . or materials furnished." This lien, however, is subordinate to the registered deed in trust, attaching as it does at the time of the beginning of the work of furnishing materials. *Burr v. Maultsby,* 99 N. C., 263; 6 Am. St., 517; 20 Am. & Eng. Enc. (2 Ed.), 479. While, therefore, as was said by the Court in *Coal Co. v. Electric Light Co., supra,* the right of priority asserted by the plaintiffs is not based upon the idea of a lien, we may resort to the construction put upon statutes providing for mechanics' liens to aid us in ascertaining and giving expression to the legislative intent. It is significant that the amendment of 1897 to section 1255 follows the decision of this Court in *Coal Co. v. Electric Light Co., supra,* being enacted at the next succeeding session of the General Assembly. "Whether mechanics' liens should be construed strictly or literally is a question upon which there is a hopeless division of opinion." Boisot on Mechanics' Liens, sec. 34. The (248) author cites a large number of cases, in which various opinions are expressed. Upon this question we prefer to adopt the following principles thus stated by him: "There is a line of decisions that seems to take a middle ground, holding that the statute should be reasonably construed, so as to ascertain the intent of the Legislature and to require a substantial compliance with the requirements of the statute, without extending its provisions beyond the plain language of the act." *Ib.,* sec. 37.

This Court, in *Cumming v. Bloodworth,* 87 N. C., 83, drew a clear distinction between a lien for labor performed and one for material furnished, holding that in respect to the former the

Legislature had the power, pursuant to Article X, section 4, of the Constitution, to provide for a lien for "work done" having priority over the right to homestead, but had no such power in respect to "materials furnished." The current of authority tends to sustain the distinction made by this Court. Boisot, *supra,* secs. 235 and 241. This Court, in *Broyhill v. Gaither,* 119 N. C., 443, says: "The laborer's lien is solely for 'labor performed.' The mechanic's lien is broader and includes the 'work done'—*i. e.,* the building built, or superstructure on the premises." This language would seem to be decisive of this appeal, as, since the amendment of 1897, the right of priority secured by section 1255 is confined to "labor performed," and the amendment expressly excludes "materials furnished," thus narrowing the class of persons and claims entitled to its protection within a much smaller compass than the language of section 1781.

His Honor having separated the items in the bill of particulars for "work done" from those for "materials furnished," we are not called upon to decide the question discussed by counsel as to the rights of the laborers who, in the performance
(249) of the contract, and as an essential part of their work, used materials.

It is difficult to reconcile the large number of the decisions found in the reports of the different States concerning lien laws, and we carefully refrain from announcing any principle of construction further than is necessary to dispose of this appeal.

Upon the facts found by his Honor we are of the opinion that he correctly construed the statute as amended.

Affirmed.

WILLIAMS v. SMITH.

(Filed 23 February, 1904.)

1. PLEADINGS—*Libel and Slander—Notice—Laws* 1901, *ch.* 557—*The Code, secs.* 757, 1287.

   Under Laws 1901, ch. 557, a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements therein alleged to be false.

2. LIBEL AND SLANDER.

   An article signed "Smith" is not an anonymous publication under Laws 1901, ch. 557.

3. AMENDMENT—*Pleadings—Demurrer.*

Where a demurrer to a complaint is sustained the plaintiff is entitled to amend his complaint.

ACTION by J. H. Williams against I. H. Smith, heard by *Judge Fred. Moore,* at November Term, 1903, of CRAVEN. From a judgment for the plaintiff the defendant appealed.

H. C. Whitehurst for the plaintiff. (250)
D. L. Ward for the defendant.

CONNOR, J. The plaintiff alleged that the defendant wrote and published in the *New Bern Daily,* a newspaper published in the city of New Bern, of and concerning him, a certain article, entitled "An Honorable Man"; that said article was a malicious libel, etc. The article was signed "Smith," and refers to the defendant as "one Williams." The defendant demurred to the complaint, and, among other grounds for demurrer, says: "That the plaintiff should allege that before bringing this suit he gave the defendant five days' notice, in writing, specifying the article and the statement therein which he alleges to be false, as required by chapter 557 of the Laws of 1901," etc.

From a judgment overruling the demurrer the defendant appealed.

The appeal presents for construction sections 1 and 3 of chapter 557, Public Laws 1901, known as the "London Libel Law," in the first section of which it is enacted: "That before any proceedings, either civil or criminal, shall be brought for the publication in a newspaper or periodical in this State of a libel, the plaintiff or prosecutor shall, at least five days before instituting such proceedings, serve notice, in writing, on the defendant or defendants, specifying the article and the statement therein which he alleges to be false and defamatory. If it shall appear upon the trial that said article was published in good faith, etc., . . . only nominal damages shall be recovered," etc.

Neither our own nor the researches of the learned and diligent counsel have enabled us to discover any case in which this or any similar statute is construed in regard to an action for libel. We are compelled, therefore, to resort to an examination of the question upon general principles and the construction put upon statutes relating to other actions in which the same (251) or similar provisions are found. "Under the rule, both of the common law and under the codes, when the statute gives a new remedy and prescribes conditions, or if an action of a certain class or against certain parties be authorized only after the performance of similar conditions, the performance of these con-

ditions, whether the right of action exists at common law or is created by statute, must be alleged in the complaint and proved at the trial." 4 Enc. Pl. and Prac., 655. The principle is clearly stated and well illustrated in *Reining v. Buffalow,* 102 N. Y., 308. The Legislature of New York enacted that "No action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented," etc. *Ruger, C. J.,* said: "The inquiry is whether this provision was intended as a condition precedent to the commencement of an action or simply to furnish a defense to the city in case of an omission to make such demand. We think the plain language of the statute excludes any doubt on the subject. It absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purpose to give the city a defense dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. . . . It is competent for the Legislature to attach a condition to the maintenance of a common-law action, as well as one created by statute, and when this is done its averment and proof cannot safely be omitted."

This Court has given to a similar statute the same construction. Section 757 of the Code provides: "That no person shall sue any city, county or other municipal corporation for
(252) any debt or demand whatsoever, unless the claimant shall have made a demand upon the proper municipal authorities." The section expressly requires the demand to be alleged in the complaint. This Court has uniformly held that a failure to allege the demand may be taken advantage of by the demurrer. *Love v. Comrs.,* 64 N. C., 706. *Bynum, J.,* in *Jones v. Comrs.,* 73 N. C., 182, says: "That a demand was necessary before action begun is well settled. If, therefore, it had appeared from the complaint that no demand had been made, that would have been good cause of demurrer." *School Directors v. Greenville,* 130 N. C., 87. In *Nichols v. Nichols,* 128 N. C., 108, it is held that the provision in the statute (The Code, sec. 1287) that in an action for divorce the complaint should be accompanied by an affidavit setting forth that the facts relied upon as ground for divorce had existed to plaintiff's knowledge six months, was mandatory, and that filing such affidavit was essential to give the court jurisdiction of the action. *Hopkins v. Hopkins,* 132 N. C., 22.

This construction has been put upon statutes imposing upon

plaintiffs the duty of making demand or giving notice prior to bringing actions by all of the courts whose reports we have examined. It will be observed that in the clause of the act immediately following that under discussion the language is materially changed: "If it shall appear on the trial," etc. The first clause imposes upon the plaintiffs, before instituting the action, the duty of making the demand and giving the defendant opportunity to take the steps by which he may not defeat the right of action, but protect himself against the recovery of punitive damages. The plaintiff, however, says that this provision of the Code does not apply to this case. Section 3: "This shall not apply to anonymous communications and publications."

We find that the word "anonymous" is defined in the Century Dictionary as "of unknown name, one whose name is withheld, as an anonymous author or as an anonymous pam- (253) phlet, or without any name, wanting a name, without the real name of the author, nameless."

The article is signed "Smith." The defendant's name is Isaac H. Smith. He refers to the plaintiff as "one Williams," and speaks of him as having been party to the suit for the recovery of usury. We are of the opinion that this article does not come within the definition of an anonymous publication.

Without passing upon the other grounds, we conclude that his Honor should have sustained the second ground of demurrer. Of course, the plaintiff will be entitled to amend his complaint in the Superior Court and make the necessary allegation. It is a defective statement of a cause of action and may be cured by amendment. *Johnson v. Finch,* 93 N. C., 205. The judgment overruling the demurrer is

Reversed.

WALKER, J., took no part in the decision of this case.

Cited: Osborne v. Leach, 135 N. C., 640.

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(254)

DISOSWAY v. EDWARDS.

(Filed 23 February, 1904.)

1. BONDS—*Penalty—Contracts—Damages.*

Where a bond is given conditioned upon an agreement not to engage in a certain business such sum should be treated as a penalty, and only actual damages can be recovered.

2. BONDS—*Penalty—Judgments—Pleadings—Damages.*

In an action on a bond conditioned for the performance of an agreement not to engage in a certain business it is error to enter judgment for the penalty of the bond, there being no allegation or proof as to the amount of damages.

ACTION by Mark Disosway against A. M. Edwards, heard by *Judge Fred. Moore,* at November Term, 1903, of CRAVEN.

This is an action upon a bond executed by the defendant, in the following words: "Know all men by these presents, that I, A. M. Edwards, of Craven County, N. C., acknowledge myself indebted to Mark Disosway in the sum of one thousand dollars. The condition of this bond is such that if the said A. M. Edwards shall at any time within the next twenty years from date hereof engage in the sale of spirituous liquors, either directly or indirectly, within the limits of the city of New Bern, N. C., then this bond to be in full force and effect; and the said Mark Disosway, his heirs or assigns, in that case, is fully authorized hereby to at once take steps for the enforcement of this obligation; otherwise this bond to become null and void. A. M. Edwards. (Seal.) Witness, R. B. Nixon."

The complaint alleges a breach in the bond, inasmuch as the defendant continues to engage in the sale of spirituous liquors in said city of New Bern; and further alleges in separate (255) paragraphs that he is thereby "endamaged to the amount of one thousand dollars," and that "the defendant is *indebted* to him in the sum of one thousand dollars."

The defendant demurred upon the following grounds:

"1. That the bond set out in the fourth paragraph of the complaint is in restraint of trade, tending to create a monopoly, contrary to public policy, null and void.

"2. For that in any event such a bond could only be good to the extent of securing actual damage sustained, and the complaint does not set forth any fact from which the court can see that the plaintiff has sustained any damage whatever."

Whereupon judgment was rendered as follows: "This cause coming on to be heard upon the complaint of plaintiff, and demurrer thereto filed by the defendant, and upon argument of counsel said demurrer being overruled and the defendant allowed to answer over, but, declining to answer, excepts to the order of the court overruling said demurrer and appeals to the Supreme Court; it is thereupon ordered and adjudged that the plaintiff recover of the defendant the sum of one thousand dollars, upon the verified complaint of the plaintiff, no answer being filed by the defendant, with interest until paid, and the costs of action."

O. H. Guion for the plaintiff.
W. D. McIver for the defendant.

DOUGLAS, J., after stating the case. We think the demurrer was properly overruled on both grounds, but that there is error in the judgment in allowing the full amount of the bond, in the absence of sufficient allegations in the complaint to enable the court to hold as matter of law that the penalty of the bond is in the nature of stipulated or liquidated damages.

The plaintiff alleges that he is *endamaged* in the sum of one thousand dollars, and, while this is not such a spe- (256) cific allegation of fact as is deemed admitted by demurrer, yet it is sufficient to entitle him to an inquiry as to his actual damages, in view of the admission of his cause of action. It is not stated in the bond that it is intended to cover stipulated or liquidated damages, and, while such an inference might be drawn from some of the attending circumstances, it is not sufficiently strong to overcome the general rule of interpretation. As the primary object of the allowance of damages is to recompense the plaintiff for the actual loss sustained from the injury—that is, to make him whole—courts are always inclined to construe a bond as penal in its nature, unless such a construction would tend to defeat its essential object. This is true even when it is expressly stated that the amount of the bond is intended as stipulated damages. There are cases where the full amount so stipulated is allowed, as, for instance, where it is extremely difficult or practically impossible to ascertain the actual damage; but even then we think that to entitle the plaintiff to more than nominal damages sufficient facts should appear, either by proof or admitted allegations, that some actual loss has been sustained, and that the amount of the bond is not unreasonable. These questions are fully discussed by this Court in *Lindsay v. Anesley,* 28 N. C., 186; *Thoroughgood v. Walker,* 47 N. C., 15; *Burrage v. Crump,* 48 N. C., 330; *Wheedon v. Trust Co.,* 128 N. C., 69.

The general rule is thus stated by *Chief Justice Marshall,* in *Tayloe v. Sandiford,* 7 Wheat., 13, 17: "In general, a sum of money in gross to be paid for the performance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered (257) by the contracting parties." This principle is further

discussed in 4 Am. & Eng. Enc., 699; 19 *ib.*, 397, 402; 5 Cyc., 848.

We are not inadvertent to the line of decisions distinguishing between ordinary contracts and those stipulating against carrying on a trade or business; but, while in such cases the courts are more inclined to allow liquidated damages, yet in *all* cases the clear intention of the parties and the reasonableness of the amount must affirmatively appear to withdraw the case from the operation of the general rule.

We are deciding the case as it is presented to us; but upon a trial on the merits it may be made to appear that liquidated damages were reasonably intended. We would suggest that both the plaintiff and the defendant be allowed to amend their pleadings, so as fully to present the question at issue.

The defendant strenuously contends that the contract is against public policy, as being in restraint of trade. We are not prepared to say that the contract is so unreasonable as to be void under our line of decisions, and we are not disposed to extend the rule in favor of the multiplication of saloons. The following cases from our own Reports may be taken as exemplifications of the general rule: *Baker v. Cordon,* 86 N. C., 116; 41 Am. Rep., 448; *Cowen v. Fairbrother,* 118 N. C., 406; 32 L. R. A., 829; 54 Am. St., 733; *Kramer v. Old,* 119 N. C., 1; 56 Am. St., 650; 34 L. R. A., 389; *King v. Fountain,* 126 N. C., 196; *Hauser v. Harding,* 126 N. C., 295; *Jolly v. Brady,* 127 N. C., 142. We think that this is a case which must be finally determined upon all the facts as they may be made to appear upon the trial of the issues.

Error.

Cited: S. c., 137 N. C., 490.

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(258)

EARLY v. EARLY.

(Filed 23 February, 1904.)

1. PLEADINGS—*Waiver—Answer—Findings of Court—The Code, sec.* 253.

Where the parties to an action agree that the facts may be found by the trial judge and judgment rendered thereon all defects in the pleadings are thereby waived.

2. ESTATES—*Remainders—Descent and Distribution—The Code, sec.* 1281.

Where a remainderman dies before the life tenant, upon the death of the life tenant the remainder descends to the heirs at law of the original remainderman.

ACTION by Josiah Early and others against Ella Early, heard by *Judge C. M. Cooke,* at November Term, 1903, of BERTIE. From a judgment for the defendant the plaintiff appealed.

Francis D. Winston for the plaintiffs.
J. B. Martin, Day & Bell and *Shepherd & Shepherd* for the defendant.

WALKER, J. This is an action for the recovery of real property. A jury having been waived, the court found the following facts:

1. Andrew Early, late of Bertie County, owned in fee simple, at his death, a tract of land, on which he lived, called his home place, in said county, lying on both sides of the public road from Hexlena to Conaritsa Church.

2. That on 27 December, 1895, said Early made his will, which was thereafter duly admitted to probate, and which is made part hereof, in which he devised his said lands as follows: "Sixth. I give and bequeath to my sons, Andrew Early and Tobias Early, after the death of my wife, Mary (259) Early, to be equally divided in acreage, giving my youngest son, Tobias Early, the piece on which my dwelling and outhouse now stand."

3. Mary Early, the life tenant, survived her husband, Andrew; her son, Tobias, and the child, Tobias, named hereafter, and died before this action began.

4. Tobias died intestate before this action commenced and before the said Mary, leaving him surviving his widow, the defendant, Ella Early, and his infant child by said Ella, and also his brothers and sisters of the whole blood, the plaintiffs above named, except T. T. Wynns, the husband of Annetta.

5. That the said infant child of Tobias and Ella died intestate without issue, and without brother or sister, or issue of such capable of inheriting, leaving his mother, the said Ella, him surviving.

Upon the foregoing facts the court rendered judgment against the plaintiffs, to which they excepted and appealed.

The plaintiffs' counsel moved in this Court for judgment on the pleadings, because it is alleged in sections 5 and 7 of the complaint that the plaintiffs are the owners of the land and that the

defendant has no interest therein, to which allegation the defendant answers "That, as in plaintiffs' complaint alleged, sections 1, 2, 5 and 7 are not true." No such motion was made in the court below. Admitting for the purpose of the argument that the answer is defective, in that it does not contain a sufficient denial of the material allegations of the complaint, under section 253 of the Code, as construed in *Rumbough v. Improvement Co.*, 106 N. C., 461, cited by the plaintiffs' counsel in support of his motion, we are yet of the opinion that the plaintiffs cannot now take advantage of the formal defect, as their motion comes too late. If they were entitled to judgment upon the pleadings, they should have asserted their right to it before the case was
(260) submitted to the judge below to find the facts and declare the law arising thereon. When the plaintiffs agreed that the facts of the case should be found by the judge and a judgment rendered thereon, any and all defects in the answer were thereby waived and all irregularities cured. *Foreman v. Hough*, 98 N. C., 386; *Greensboro v. Scott*, 84 N. C., 184; *Robbins v. Killebrew*, 95 N. C., 19; *Hines v. R. R.*, 95 N. C., 434; 59 Am. Rep., 250.

The plaintiffs contend that they are the owners of the land, because there was a failure of lineal descendants of Tobias Early, Sr., and therefore the inheritance descended to them as the next collateral relations of the person last seized, who are of the blood of Andrew Early, the ancestor of Tobias Early, Sr., and from whom the latter, who would have been one of the heirs of Andrew Early, received the inheritance by devise. The Code, ch. 28, rule 4.

The plaintiffs' right to recover turns, therefore, upon the question whether Tobias Early, Sr., or Tobias Early, Jr., was the person last seized at the time of the death of the latter. If Tobias Early, Jr., was the person seized at the time of his death, the inheritance vested in his mother, who survived him and who is defendant in this action, as we will presently show; but if he was not thus seized, then his father, Tobias Early, Sr., was the person last seized of the inheritance, and the plaintiffs as his next collateral relations are entitled to the land, for the recovery of which this action is brought.

The plaintiffs' counsel relied upon the case of *King v. Scoggin*, 92 N. C., 99 (53 Am. Rep., 410), in support of the position that Tobias Early, Sr., was, at the time of the death of Tobias Early, Jr., the person last seized, and not the latter, as Tobias Early, Sr., was the first purchaser of the remainder and the only one of the two who could have had any seizin; and as Tobias Early, Jr., acquired the inheritance by descent from his father

during the continuance of the particular estate—that is, (261) the life estate of Mary Early—and the remainder thus descended created no seizin in Tobias Early, Jr., and consequently no new stock of descent. The case, abstractly considered, is full authority for the contention of the plaintiff, and seems to have established the following rules to determine who will take, when the remainder or the reversion, during the continuance of the particular estate, descends to an heir who dies without issue, namely:

1. When the reversion or remainder expectant upon a freehold estate comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, he who would claim the estate by inheritance must make himself heir to the original donor who erected the particular estate, for it is the old inheritance.

2. When the reversion or remainder comes by descent, and before the determination of the particular estate, it is conveyed by deed or devise to a stranger, the donee takes by purchase; he becomes a new stock of descent and the estate will descend to his heirs.

3. Where the remainder or reversion is acquired by purchase, he who would claim the estate must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession; for the remainderman or reversioner, by such purchase, has become a new *stirps* of descent.

Under the third of the rules stated by the court, the plaintiffs claim that they are entitled to the land, as there was no seizin in Tobias Early, Jr.; and the defendant Ella Early, though heir to him, could not make herself heir to the first purchaser or person last seized, Tobias Early, Sr., at the time the remainder vested in possession by the death of Mary Early, the life tenant.

The question as to what will constitute sufficient seizin to make a new stock or *stirps* of inheritance (*sesina facit* (262) *stipitem*) is exhaustively and learnedly discussed by *Ashe, J.*, in *King v. Scoggin*, and the rules and principles applicable to the special facts of that case, and to the particular matter then under investigation, were correctly stated by him. It will be observed that he was endeavoring to show that the plaintiffs in that case, who could recover only upon the strength of their own title and not upon the weakness of their adversary's, had failed to show any title as the heirs of George Hay, Jr., who was held to be the new stock of inheritance, or the person last seized, within the meaning of the rules of descent then in force. He expressly says that it was not necessary to investigate the defendant's title, and the court was therefore not even called

upon to decide whether, under the law of descent in this State, as it then existed, George Wesson, under whom the defendant claimed, did not have such actual seizin or its equivalent in law as to constitute a new stock of inheritance. The case was decided upon the old law, which has been greatly modified by the amendments to be found in the Revised Code, ch. 38, and the present Code, ch. 28.

The plaintiffs also relied upon *Lawrence v. Pitt,* 46 N. C., 344, which presented the very question we now have under consideration. The inheritance there was claimed by the father from his son, who in his turn had inherited it from his mother, and she in her turn from her mother, the estate being a reversion in land expectant on the termination of a life estate. The son died before the expiration of the life estate, and it was held that the inheritance did not vest in the parent or father under the sixth canon of descent. That case, like *King v. Scoggin,* is not in point, as both of them were decided upon descents which occurred before 1851, and to the facts of those cases, there-
(263) fore, the law, as first amended by the enactment of the Revised Code of 1854, did not apply.

In *Lawrence v. Pitt* the Court laid down the following principle: "Where the estate descended is a present estate in fee, no person can inherit it who cannot, at the time of the descent cast, make himself heir of the person last in the actual seizin thereof. But of estates in expectancy, as reversions and remainders, there can be no actual seizin during the existence of the particular estate of freehold, and consequently there cannot be any *mesne* actual seizin which of itself shall turn the descent so as to make any *mesne* reversioner or remainderman a new stock of descent, whereby his heir, who is not the heir of the person last actually seized of the estate, may inherit. The rule, therefore, as to reversions and remainders expectant upon estates in freehold is that, unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seized in fee and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may in the intermediate period have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser." And this is the law as stated by Blackstone, who says: "So, also, even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium,* or full and complete ownership, till he has made an

actual corporal entry into the lands; for if he dies before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seized. It is not, therefore, only a mere right to enter, but the actual entry, that makes a man complete owner, so as to transmit the in- (264) heritance to his own heirs; *non jus, sed sesina, facit stirpitem.*"

The Court, in applying this rule to the facts in that case, held that, as descent was cast upon the son during the continuance of the particular estate of freehold, the father could not take as his heir, nor could the inheritance vest in him under the sixth canon of descent, as he could not make himself heir to him who was the first purchaser or person last seized of the reversion.

It would be vain and useless now to discuss at any length the principles of the common law in regard to seizin, as applied to the canons of descent in force prior to the enactment of the Revised Code, for by the latter the law in that respect has been so radically changed as to require almost a reversal of these principles in ascertaining who is entitled to the inheritance when descent is to be traced from the person last seized; but a brief review of the old law in regard to seizin will not be out of place and may enable us the better to understand and construe the law as amended by the Revised Code. At the common law, seizin signified the possession or occupation of the soil by a freeholder, one who has at least a life estate in the land. This seizin was of two kinds—seizin in deed or in fact, which was when the person had the actual seizin or possession or occupation of the land with the intent, as is sometimes said, to claim a freehold interest and seizin in law, which was a bare right to possess or occupy the land or freehold, or, as otherwise defined, a right of immediate possession according to the nature of the estate. 2 Blk., 104-127; 1 Washburn R. P., 33, 34. The difference between the two is thus illustrated: "Where a freehold estate is conveyed to a person by feoffment, with livery of seizin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seizin in deed and a freehold in deed. But where a freehold estate comes to a person by act of law, as by descent, he only acquires a seizin in law—that is, a right to (265) the possession—and his estate is called a freehold in law; for he must make an actual entry on the land to acquire a seizin or a freehold in deed." 1 Cru. Digest, title I, sec. 24; Coke Lit., 266b, and sec. 448, H. & B.'s Notes, 1.

The essential principle of the ancient law of inheritance was that the stock of descent could not be established except by actual seizin of the freehold of inheritance, and the rule is thus com-

prehensively stated by Blackstone: "We must also remember that no person can be properly such an ancestor as that an inheritance of lands or tenements can be derived from him unless he hath the *actual seizin* of such lands, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold, or unless he hath had what is equivalent to corporal seizin in hereditaments that are incorporated, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor who hath only a bare right or title to enter or be otherwise seized. And therefore all the cases which will be mentioned in the present charter are upon the supposition that the *deceased* (whose inheritance is now claimed) was the last person *actually seized* thereof. For the law requires this notoriety of possession as evidence that the ancestor had that property in himself which is now to be transmitted to his heir, which notoriety had succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formally admitted in the Lord's Court (as is still the practice in Scotland) and there received his seizin in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers, until at length, when the right of succession became indefeasible, an entry on any part of the
(266) lands within the country (which, if disputed, was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of seizin, and made the tenant capable of transmitting his estate by descent. The seizin, therefore, of any person, thus understood, makes him the root or stock from which all future inheritance by right of blood must be derived, which is very briefly expressed in this maxim, *Seisina facit stirpitem.*"

We must conclude, after carefully reading *Lawrence v. Pitt,* 46 N. C., 344, which was decided in 1854, that it was thought the then existing law as declared by the Court, which had its origin in the feudal system and which was applied in that case, should be changed and brought more into harmony with modern conditions and requirements. It was manifestly in consequence of that decision that the amendments to the Revised Statutes of 1836 were made in the Revised Code of 1854, which amendments are as follows: Rule 1 of chapter 38 of the Revised Statutes provides that "Inheritances shall lineally descend to the issue of the person who died last, actually or legally seized, forever, but shall not lineally ascend, except as is hereinafter provided for"; while section 1 of chapter 38 of the Revised Code provides that "When any person shall die seized of any inheritance, or of any right

thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rule: Rule 1. Every inheritance shall lineally descend forever to the issue of the person who dies last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided."

By the proviso to rule 6 of the Revised Statutes, where the person last seized left no issue, nor brother, nor sister, nor the issue of such, the inheritance vested for life only in the parents of the intestate, or either of them, or the survivor of them, while in the corresponding rule in the Revised Code and the present Code it vests in the father, if living, and if not, (267) then in the mother, if living, in fee. But in order that the meaning of the Legislature, as expressed in section 1 of the Revised Code, might be made plain and unmistakable, it was enacted by rule 13 of chapter 38 that "Every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance."

We therefore see that the seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while the latter requires that there need be only a right to or interest in the inheritance, with or without actual possession or the present right of possession, in order to establish a stock sufficient as a source of descent.

It is therefore perfectly clear that, under the law applicable to our case—that is, the law of the Revised Code, as brought forward in the present Code—all that is required to constitute a sufficient seizin for the creation of a new stock of inheritance or *stirps* of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested in possession or not; for the language of the statute is explicit that a person having any such right, title or interest shall be deemed to have been seized thereof. We are not entirely without what we regard as an authoritative interpretation of this new provision of the law. In *Sears v. McBride*, 70 N. C., 152, the plaintiff, Thomas Sears, claimed title to the land as heir of his son. The original owner of the land, or *propositus*, was Eliza McPherson, who intermarried with Isaac Fanshaw and died leaving issue by him, a son, William Sears, who died in 1852, leaving his father surviving him. In 1871, Isaac Fanshaw, who had a life estate in the land as tenant by the curtesy, died, the plaintiff surviving him. The defendants were (268)

the next collateral relations of Eliza McPherson, from whom the estate descended. This case, in its facts, is substantially like *Lawrence v. Pitt, supra.* The Court held that, as the law stood in 1852, and by which the case must be governed, the defendants were entitled to recover, and, in discussing the question involved, uses this language, *Settle, J.,* speaking for the Court: "If this case were governed by the rules of descent to be found in the Revised Code, ch. 38, the plaintiff would be entitled to the land in controversy in fee simple; but since it is governed by the rules as found in the Revised Statutes, ch. 38, he can take nothing. The learning on this subject is so fully and satisfactorily stated in *Lawrence v. Pitt,* 46 N. C., 344, that we shall not discuss the subject further than to apply the law to the facts before us."

"But the law has been materially changed, as will be seen by reference to the Revised Code, which enacts: 'Rule 1. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein,'" etc. And, further, as if to remove all doubt, rule 13 is enacted, which declares: "Every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized if he may have had any right, title or interest in the inheritance." So that, now, neither actual nor legal seizin is necessary to make the stock in the devolution of the estates.

"And it will be observed that, while the proviso to rule 6 in the Revised Statutes gives in certain contingencies only a life estate to the parents, etc., yet in the Revised Code, under the same contingencies, an estate in fee simple is given to the father, if living, and if not, then to the mother, if living."

While the precise point we are considering was not presented in that case, so as to impart to the judgment of the Court
(269) controlling authority as a precedent, the emphatic language of the Court, which we have quoted, and which is singularly applicable to our case, induces us to regard it as if it had the force and effect of an actual decision, even if the language of the law was not in itself plain or unambiguous. In addition to this, it will be observed that in *Lawrence v. Pitt, Battle, J.,* referring to the contention of the plaintiff's counsel, that in pleadings and other proceedings at the common law a person is often said to be seized of the reversion, and that therefore the term "seized" may well be applied to reversion under our statute of descents, says that if our statute used only the word "seized" or "seizin," the argument would be a strong one, but that it used the words "actually or legally seized," and those words must be construed as they were used at common law in the case of dower, curtesy and descent. It is clear that the Court

would have regarded the use of the term "seized," without the other words, "actually" and "legally," as sufficient to describe the right, title or interest which a person even, at common law, had in a reversion or a remainder expectant upon an estate of freehold. The words "actually and legally" were omitted from the Revised Code, ch. 38, and the present Code, ch. 28, and we cannot avoid the inference that this was done designedly in deference to the intimation of the Court in *Lawrence v. Pitt,* for the purpose of conforming the statute in this respect to the other amendments of it, so that "there will be left no hinge or loop to hang a doubt on" as to the true intent and meaning of the Legislature.

Our conclusion must be that in this case the infant son of the defendant Ella Early, at the time of his death, though it occurred when the particular estate of freehold was still outstanding, had that right, title or interest in the inheritance, remainder as it was, which in law is deemed to be a sufficient seizin to create a stock of inheritance in him, and, he having died, as stated in the facts found by the court, without any issue capable (270) of inheriting, nor brother, nor sister, nor the issue of such, the inheritance, under rule 6, chapter 28 of the Code, vested in the defendant Ella Early, and she is the owner of the land as between herself and the plaintiffs, the life tenant, Mary Early, having died before this action was commenced. For this reason the judgment of the court below was right, and must therefore stand.

Affirmed.

DOUGLAS, J., *dubitante.*

Cited: Weeks v. Quinn, 135 N. C., 426; *Redding v. Vogt,* 140 N. C., 566.

MILLER v. STATE.

(Filed 1 March, 1904.)

1. JURISDICTION—*Supreme Court—Costs—Const. N. C., Art.* IV, *sec.* 9.

The Supreme Court has not original jurisdiction of an action against the State by a clerk of the Superior Court for fees in an action instituted by the State and for which it has been adjudged liable.

2. JURISDICTION—*Supreme Court—Costs.*

The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved.

ORIGINAL PROCEEDING in the Supreme Court, by Mollie A. Miller, administratrix of Festus Miller, against the State.

Busbee & Busbee and *Womack & Hayes* for the plaintiff.
Robert D. Gilmer, Attorney-General, for the State.

MONTGOMERY, J. Under the terms and provisions of chapter 119, Public Laws 1887, several hundred persons made entries of certain oyster lands, subjected to entry by that act, and (271) received grants therefor. By the provisions of chapter 287, Public Laws 1893, the Solicitor of the First Judicial District was directed to institute proceedings in ejectment against such persons as had received grants for natural oyster or clam beds; and, under the directions of that statute, the solicitor commenced suit against six hundred and ninety-four of those persons who had received grants under the provisions of the act of 1887. One of the suits was tried and the plaintiff's action was not sustained, and nonsuits were taken in all of the other actions. In *Blount v. Simmons,* 119 N. C., 50, this Court held that the State, under section 536 of the Code, was liable for the costs. Afterwards the plaintiff in this action, in a certain judgment rendered in the Superior Court of Pamlico County against the State for the sum of $4,096.60, on account of fees due the officers in the above-mentioned actions, was adjudged entitled to $3,872.20 thereof for fees due to Festus Miller, Clerk of the Superior Court of Pamlico County, her intestate. Before that judgment was rendered, Festus Miller, the plaintiff's intestate, received an Auditor's warrant, to the amount of $4,851.41, for fees due him in these cases, but the Treasurer declined to pay the same or any part of it. The plaintiff's intestate, at the session of the General Assembly of 1899, presented her claim against the State for these fees, and the matter received a full and careful investigation of that body. The whole proceedings were laid before this Court; and if this was a case where the Court had jurisdiction under Article IV, section 9, of the State Constitution, we could not conscientiously recommend to the General Assembly a settlement of this matter different from the one which was made. We are of the opinion, however, that we have no jurisdiction in the premises. In the first place, the demand of the plaintiff is not such a claim against the State as is in contemplation of Article IV, section 9, of the Constitution.

In *Blount v. Simmons,* 119 N. C., 50, this Court said: (272) "The costs in this case are not strictly a claim against the State, as contemplated by Article IV, section 9, but only an incident of an action by the State, for which its agent has assumed that it will be liable to the same extent as private persons." In the next place, there is no question of law involved in this matter. Only matters of fact were in dispute, and they have been passed upon by the General Assembly; and where such a condition of things exists we are not called upon to recommend any line of conduct to the legislative body. In *Reynolds v. State,* 64 N. C., 460, this Court said: "We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in *Bledsoe v. State,* 64 N. C., 392, to-wit, that our 'recommendatory jurisdiction' in regard to claims against the State does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the Court the labor of the trial of facts, and that the jurisdiction is confined to claims where, the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law would aid the General Assembly to dispose of such cases, it having been, before, a question whether the Judges could, consistently with their constitutional duties, communicate an opinion to the Legislature." In *Horne v. State,* 82 N. C., 382, the Court said: "This provision of the Code is very broad in its terms—'any person having *any* claim'—and, regarded in the light of a cotemporaneous exposition of the Constitution, would seem to embrace all claims against the State; but this Court, in construing the section of the Constitution referred to (section 9 of Article IV), held that it was intended to apply only to cases wherein questions of law were involved, and that the jurisdiction of this Court ought not to be exercised in small matters of small value, particularly when there is no doubt about the law." In *Reeves v. State,* 93 N. C., (273) 257, the same view was expressed, and the Court added: "If the claim is a plain one, only involving questions of fact, it ought to be taken at once before the Legislature, unless its nature be such as that it may be presented to the Auditor, or some other appropriate authority, for adjustment and allowance." This case, as we have said, does not involve any question of law, for this Court had, at its February Term, 1897, in *Blount v. Simmons,* 120 N. C., 19, not only reaffirmed a former ruling that the State was liable for the costs involved in the oyster-bed suits, but had particularly specified the amount of fees which each officer was entitled to for his services; and the Legislature therefore could not stand in need of any recommendation from us as to its

duty under the law, and the facts they had already passed upon. Counsel for the plaintiff took this view of their duty in connection with their client's claim, knowing that there was no grave question of law involved, and went directly before the Legislature, as they should have done, under the intimation of the Court in *Reeves v. State,* 93 N. C., 257, to have the facts ascertained, and an act passed, making an appropriation to their client. We do not feel called upon, therefore, to make any recommendation to the General Assembly in the premises. If we should do so, the members of that body would have the right to feel justly offended that we should seek to point out their duty to them in a matter where there was no law question involved and where they had already investigated and passed upon the facts.

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(274)

WOODARD v. SAULS.

(Filed 1 March, 1904.)

VENUE—*Claim and Delivery—Removal of Causes—Personal Property—The Code, secs.* 190, 195—*Laws* 1889, *ch.* 219.

Where the recovery of personal property is not the sole or chief relief demanded an action need not necessarily be brought in the county in which the property is located.

ACTION by S. A. Woodard against J. R. Sauls, heard by *Judge G. S. Ferguson,* at December Term, 1903, of WILSON. From a judgment for the plaintiff the defendant appealed.

F. A. & S. A. Woodard and *Shepherd & Shepherd* for the plaintiff.

Pou & Brooks, W. A. Finch and *Pou & Fuller* for the defendant.

CLARK, C. J. This action was brought in Wilson Superior Court by plaintiff, who resided in that county, and summons was served on the defendant by the sheriff of Johnston. The complaint avers that the defendant is indebted to the plaintiff by promissory note, and for further large sums, in which the plaintiff is liable as surety for defendant, and that to secure such indebtedness the defendant had turned over to the plaintiff sundry notes, a large portion of which were due by residents of Wilson County and secured by property in said county; that the defendant afterwards got possession of a portion of said notes,

to be collected by him as agent of plaintiff and applied on said indebtedness, which defendant has not done, and that defendant got possession of another portion of said collaterals surreptitiously, without the knowledge or consent of the plaintiff, and retains the same, to recover which notes the plaintiff (275) sued out the ancillary proceeding of claim and delivery. Further, the complaint avers that the defendant transferred to him a debt against one Lee Sauls, which the latter refused to pay, on the ground that the defendant has notified him not to pay the same, and that the defendant is a resident of Wilson, but temporarily in Johnston County, and asks judgment for the recovery of the sum due by said promissory note and for liability on the other indebtedness as to which plaintiff is surety; also for the recovery of the Lee Sauls debt, and for recovery of said collateral notes by claim and delivery and judgment upon the replevin bond given by defendant in said claim and delivery proceedings. The defendant filed an affidavit averring that he is a resident of Johnston County and the notes sought to be recovered are situated in that county, and asking a removal of the cause.

The judge did not find the fact whether defendant was a resident of Johnston County or not, and refused to remove the cause. Had he found that the defendant was in fact a resident of Wilson, the finding would have been final, and the cause might well be sent back, to the end that this fact might be passed upon, as the Court does not pass upon questions of law upon a hypothetical state of facts. It is also clear, though no objection has been made on that ground, that Lee Sauls is a necessary party to the action, unless a nonsuit is entered as to that part of the complaint, or by amendment he be now made a party.

But, passing by these matters, the only point presented by the appeal is the refusal to remove, the defendant contending that by the Code, sec. 190 (4), as amended by chapter 219, Laws 1889, this being an action for "recovery of personal property," should be brought in the county of Johnston, and hence is removable thither, the defendant having demanded a removal in apt time, under the Code, sec. 195.

This would be true if it had been found as a fact that (276) the defendant was a resident of Johnston County and the notes were there, and the recovery of the personalty was the sole relief demanded, or even the chief relief, the other being incidental, as in *Mfg. Co. v. Brower,* 105 N. C., 440; *Connor v. Dillard,* 129 N. C., 50. But here the obtaining personal judgment for the amount due and the determination of the liability incurred by the plaintiff as surety and adjudging the collaterals

named should be applied thereto were the chief causes of action. The recovery of possession of the collateral notes was incidental.

Action for the recovery of the debt against Lee Sauls was necessarily brought in Wilson.

No error.

Cited: Brown v. Cogdell, 136 N. C., 33; *Edgerton v. Games,* 142 N. C., 224.

WETHERINGTON v. WILLIAMS.

(Filed 1 March, 1904.)

1. TENANCY IN COMMON — *Possession — Jurisdiction—Laws* 1893, *ch.* 6.

A tenant in common cannot bring an action against a co-tenant if a third party is in possession.

2. WITNESSES—*Competency—Evidence—The Code, sec.* 590.

To be incompetent, under section 590 of the Code, a witness must be either a party to the action or interested in the event thereof.

3. DEEDS—*Recordation—Delivery.*

A recorded deed is *prima facie* evidence of its delivery and that the maker meant to part with the title.

4. DEEDS—*Delivery—Evidence.*

The evidence in this case, if believed, is sufficient to prove an actual delivery of the deed.

(277) ACTION by M. C. Wetherington and others against Mary Williams and others, heard by *Judge Fred. Moore* and a jury, at November Term, 1903, of CRAVEN. From a judgment for the defendants the plaintiffs appealed.

W. D. McIver for the plaintiffs.
D. L. Ward for the defendants.

WALKER, J. This is an action by the plaintiffs to recover their interest as tenants in common with the *feme* defendants in a tract of land which was formerly owned by Lewis Wetherington. The latter was married twice. The plaintiffs M. C. and G. L. Wetherington are children of the first marriage, and the plaintiff Stephen Oliver, who has died since the action was com-

menced, without issue, was a grandchild. The *feme* defendants Cornie Wetherington and Mary Williams are children of the second marriage, and the plaintiff Hyman Stubbs is a grandchild, he being the child of Leah Wetherington, who intermarried with Levi Stubbs. The plaintiffs allege that M. C. and G. L. Wetherington and Hyman Stubbs and the *feme* defendants are tenants in common of the tract of land described in the complaint, in equal shares, and that the defendants are in possession of the land, claiming title to the whole thereof. These allegations are denied by the defendants in their answer. There was no evidence introduced by the plaintiffs to show that the defendants were in possession of the land at the time the action was brought. On the contrary, their own witness, Gaston Wetherington, testified that Mary Wetherington, the widow of Lewis Wetherington, was in possession. Before a tenant in common can bring an action against his co-tenant to recover his share in the lands, he must allege and prove that he has been ousted by the latter. If the co-tenant is shown to be in possession of the land, and in his answer denies the plaintiff's title, (278) he thereby admits an ouster, at least for the purpose of the action. *Halford v. Tetherow,* 47 N. C., 393; *Day v. Howard,* 73 N. C., 1; *Withrow v. Biggerstaff,* 82 N. C., 82. The plaintiffs brought this suit, not only for the purpose of establishing their title to the shares in the land which they alleged are owned by them, but also for the purpose of being let into possession with the defendants. This relief cannot, of course, be granted, unless the defendants are in the possession, and certainly not when a third person, who is not a party to the action, is shown to be in possession of the land. But perhaps the case, as it was tried below, comes within the provisions of chapter 6 of the Laws of 1893, which is entitled "An act to determine conflicting claims to real property," and we may therefore consider the case, so far as it is necessary to decide whether the plaintiffs have any interest in the land, or whether by any erroneous ruling of the court they have been prevented from showing that they have an interest. The court submitted to the jury the following issue: "Are the plaintiffs and defendants tenants in common of the lands described in the complaint, as alleged in said complaint?"

The plaintiffs alleged that Lewis Wetherington died seized and possessed of the land in dispute, and that it descended to his children, who are his heirs, as tenants in common. The defendants introduced in evidence a deed from Lewis Wetherington and wife, Mary Wetherington, to the defendants, Cornie Wetherington and Mary Williams. The execution of this deed was ac-

knowledged by the wife, Mary Wetherington, on 29 January, 1898, which was after the death of her husband, and was proven as to Lewis Wetherington by G. S. Wilcox, the subscribing witness, on 11 October, 1902, and was registered on that day. The said G. S. Wilcox, who was a witness of the plaintiffs, testified that he wrote the deed, and his recollection was that the names of the three daughters of Lewis Wetherington by his
(279) second marriage, namely, Mary, Leah and Cornie, were in it; that the deed was signed by Lewis Wetherington and then witnessed by him and returned to Lewis Wetherington, or to his wife, or to some member of his family, but that he did not remember who took it from his hands or who kept it. He did not see the deed again until after the death of Lewis Wetherington, when it was handed to him by some member of the family to be registered. The name of Leah had been erased. He proved the execution of the deed, as subscribing witness, before the clerk of the court, and it was registered. The name of Leah Wetherington, afterwards Leah Stubbs, was not in the deed when he proved it. The certificate of probate annexed to the deed shows that the execution of the deed was proven before the clerk by the oath and examination of G. S. Wilcox, the subscribing witness thereto.

The defendants introduced as a witness Mary Wetherington, the widow of Lewis Wetherington, who testified that her husband, who had the deed in his possession, handed it to his daughter, Mary Wetherington, now Mary Williams, one of the defendants, and "told her to take Leah's name off, and she did so. He said Stubbs was a dissipated man and he did not wish him to handle anything he had. Leah was dead at that time. After he had Leah's name erased he gave the deed to Mary and told her to have it registered." The plaintiffs objected to this evidence, upon the ground that Mary Wetherington was not a competent witness, under section 590 of the Code, to testify concerning the matters stated by her. The witness is not a party to the action, and we do not see how she is interested in its event. If the deed is effectual as to her, she has conveyed away all of her interest—that is, her dower or right of dower. If it is not valid as to her, she is entitled to dower in the land, but this will be in no way affected by the result of this suit. If the defend-
(280) ants recover, they will become the sole owners in fee of the land, and the witness will acquire no interest whatever in it that she does not already possess, nor will any interest that she now has be in the slightest degree impaired. The witness, whose competency is in question, must be either a party to the action or interested in the event of the action, and must tes-

tify in behalf of himself or herself or in behalf of the person succeeding to his or her title or interest. *Bunn v. Todd,* 107 N. C., 266. We do not think the witness is disqualified by the statute. While it is not necessary to decide the question, if we concede that the witness is interested in the result, we doubt very much whether her testimony relates to a personal transaction or communication between herself and her husband. She testified only to what she saw and heard, and, so far as appears in the case, she took no part whatever in the transaction or communication between her husband and his daughter, Mary Wetherington. *Norris v. Stewart,* 105 N. C., 455; 18 Am. St., 917; *McCall v. Wilson,* 101 N. C., 598; *Dobbins v. Osborne,* 67 N. C., 259.

We come now to the question as to the state of the proof in the case, the court having charged the jury that if they believed the evidence they should answer the issue "No." *Gaither v. Ferebee,* 60 N. C., 310; *McQuay v. R. R.* 109 N. C., 588; *Nelson v. Ins. Co.,* 120 N. C., 302.

The defendants introduced in evidence the original deed, which appeared by the certificates annexed thereto to have been duly proved and registered. The fact of registration is not conclusive as to either the execution or the probate of the deed. The *factum* of the instrument may be disputed after its registration, and the party who assails the deed may show, if he can, that it was not in fact delivered. But so long as the probate and registration stand unimpeached and unimpaired, they furnish sufficient *prima facie* evidence of the execution of the deed, which, of course, always includes delivery. He who would avoid this presumption, arising from registration, must do so by (281) proof sufficient to rebut it or to repel its legal force and effect. *Redman v. Graham,* 80 N. C., 231; *Love v. Harbin,* 87 N. C., 249; *Helms v. Austin,* 116 N. C., 751. In the case last cited this Court referred with approval to *Mitchell v. Ryan,* 3 Ohio St., 377, and said "that a recorded deed is *prima facie* evidence of delivery, and it is to be presumed that the maker meant to part with the title, and clear proof ought to be required to warrant the court in holding otherwise."

The question in controversy in our case is whether the deed had been delivered to Leah Stubbs before her name was erased therefrom, and, if not, then whether it was delivered to her two sisters after her death. If the deed had not been delivered to Leah, or to anyone for her use or benefit, which is the same thing, the grantor had the right to erase her name, for it was not her deed until it was delivered, and he still retained full power and control over it, with the right to change it as he might see fit. The witness Wilcox did not testify that it was delivered to

Leah, nor did he testify to any facts from which delivery could be inferred. His testimony did not tend to show delivery. *Baldwin v. Maultsby,* 27 N. C., 505; *Bailey v. Bailey,* 52 N. C., 44. He merely said that when the deed left his hands it had the name of Leah in it, and that he did not know to whom he gave it, whether to Lewis Wetherington, who signed the deed, or to some member of his family. This tends to prove only that the paper he witnessed was not the one he produced before the clerk and which was afterwards registered. It must follow, therefore, as there was no other proof bearing on this point, that the deed had not been delivered to Leah when her name was erased, and the only question remaining in the case is, did the testimony of Mrs. Wetherington, if believed, or if the jury found the facts in accordance therewith, establish the delivery of the deed (282) to Cornie Wetherington and Mary Williams, the defendants? It appears from this testimony that Lewis Wetherington, who had possession of the deed, and who, so far as appears, kept it continuously from the time it was written, told Mary Wetherington, his daughter, to erase Leah's name, for the reason then given by him, and to have the deed registered, which was done. This was surely a sufficient delivery, whether the deed was afterwards registered or not. *Phillips v. Houston,* 50 N. C., 302; *Helms v. Austin, supra.* If we eliminate from the case the force and effect of the probate and registration as creating a presumption of delivery, the evidence of the defendants, which was uncontradicted, was sufficient to prove an actual delivery of the deed by the maker to Cornie and Mary, his two daughters. The jury believed this evidence, because, under the instructions of the court, they answered the issue in favor of the defendants. This conclusion makes it necessary to pass upon the other exceptions of the plaintiffs.

No error.

Cited: Lemly v. Ellis, 143 N. C., 212.

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(283)

HOOKER v. WORTHINGTON.

(Filed 1 March, 1904.)

1. LIMITATIONS OF ACTIONS—*Burden of Proof—Pleadings—Fraudulent Conveyances—Laws* 1897, *ch.* 109.

In an action to set aside a conveyance on account of fraud, the statute of limitations being pleaded thereto, the burden is on

the plaintiff to show that the fraud was not discovered until within three years of the commencement of the action.

2. PLEADINGS—*Answer—The Code, sec.* 243.

An answer adopting each and every section of another answer filed in the case is sufficient if the adopted answer is sufficient.

ACTION by Oscar Hooker against Alfred and S. F. Worthington, heard by *Judge Fred. Moore* and a jury, at November Term, 1903, of PITT. From a judgment for the defendants the plaintiff appealed.

J. L. Fleming for the plaintiff.
Jarvis & Blow, Skinner & Whedbee and *L. I. Moore* for the defendants.

MONTGOMERY, J. The original complaint in this action does not clearly show upon what ground the plaintiff seeks relief. Upon a cursory reading of that pleading it would appear to be the purpose of the pleader to have the defendant S. A. Worthington, the wife of the other defendant, A. Worthington, declared a trustee, by way of resulting trust, of the property mentioned in the complaint, for the benefit of the plaintiff. Such a position could not be maintained, because enough appears in the complaint to show that there were no contractual relations between the plaintiff and either of the defendants, and that the very purpose of Mrs. Worthington was to hold the prop- (284) erty adversely to all claimants. The amendment to the complaint, however, together with section 33 of the complaint, makes it certain that the plaintiff's purpose in the action is to charge fraud upon Mrs. Worthington and her husband, the fraud being alleged to be that Worthington procured the sale of the property for the purpose of having it brought in by his wife, thereby hindering, delaying and defrauding his creditors. It seems, taking the whole evidence into consideration, that the husband, being very much indebted, executed several mortgages or deeds of trust to secure certain of his creditors, and that the property conveyed by him was afterwards sold and purchased by his wife. Between the times of the execution of the mortgage deeds and the sale of the property under the same, and after the last-mentioned date, various unsecured creditors of Worthington procured judgments against him, some of them in courts of justices of the peace and some in the Superior Court of Pitt County. The plaintiff bought up a large number of these judgments, his purchases embracing some of the justice of the peace's court and some of the Superior Court, and brought this

action to have Mrs. Worthington declared a trustee for the benefit of the plaintiff, and for such other relief as the plaintiff might be entitled to. The defendants, in their answer, set up a defense on the merits of the case, and also plead the statute of limitations—that is, subdivision 9, section 155 of the Code—treating the complaint as an action to have the deeds made by the mortgagees to Mrs. Worthington set aside for fraud, and the property applied, under the order of the court, to the payment of the plaintiff's debts. We are of the opinion that that was the true nature of the cause of action, as set out in the complaint, notwithstanding the prayer of the plaintiff for a technically different judgment. And, the defendant having pleaded the statute of limitations, it became necessary for the plaintiff to
(285) show that a discovery of the fraud alleged in the complaint had not been made by the plaintiff or his assignors more than three years before the commencement of the action. That requirement on the part of the plaintiff is analogous to the several rulings which have been made by this Court, viz., that where the statute of limitations has been pleaded the burden is on the other party to show that the cause of action accrued within the time limited. *House v. Arnold,* 122 N. C., 220; *Houston v. Thornton,* 122 N. C., 365; 65 Am. St., 699. The plaintiff offered no evidence upon the issue tending to show when the discoveries of fraud were made by the plaintiff's assignors. It is true that he, as a witness for himself, stated that all he had ever learned on the subject of the frauds charged in the complaint he learned about thirty days before he bought the judgments, the date of which was within three years from the commencement of the action. But nearly ten years had elapsed since the matters complained of occurred, and the plaintiff's assignors transferred their rights to the plaintiff in the judgments more than three years after the dates of the badges of fraud set out in the complaint; and he can occupy no better position than his assignors would have if they had brought the action. It was incumbent on him to show that his assignors had not discovered the fraud earlier than three years before the action commenced. The burden was on the plaintiff, as we have said, to repel the plea of the statute of limitations, and, as the plaintiff failed to offer any evidence on that issue, the judge could either direct a verdict against him or dismiss the action, under chapter 109, Laws 1897. *House v. Arnold, supra,* and cases there cited. This view of the case, on the defendant's plea of the statute of limitations, renders it unnecessary to discuss the questions of law argued here by the counsel on the merits of the case.

In her answer the defendant S. A. Worthington pleaded the statute of limitations as a defense against the justice's (286) judgment against her husband, and the plaintiff admitted that the plea was sufficient in form and substance. The defendant's husband, for answer, said simply "that he adopts each and every section of the answer of S. F. Worthington, herein filed, as his own," and signed it. His Honor was asked by the plaintiff's counsel to sign a judgment for the plaintiff's debt against the defendant's husband, including the justice's judgments which he had bought, on the ground that the defendant's answer was not a sufficient denial of each section of the complaint, and he declined to sign such judgment. We think there was no error in the refusal to sign the judgment, as requested. We think the defendant's answer was a sufficient compliance with section 243 of the Code. The answer of his co-defendant was sufficient in form and substance, admittedly so, and A. Worthington's answer adopted each and every section of his wife's answer.

It follows, as a matter of course, from what we have said, that the plaintiff was not entitled to have his judgment against A. Worthington declared a lien upon the defendant's homestead, as it was sold under the deeds of trust and purchased by Mrs. Worthington; and his Honor was right in refusing to adjudge it a lien on any of the lands described in the complaint. His Honor, on motion of the defendant, dismissed, as of nonsuit, the plaintiff's action, and in doing so there was

No error.

(287)

AVERY v. STEWART.

(Filed 1 March, 1904.)

1. SECONDARY EVIDENCE—*Evidence—Findings of Court—Parol Evidence.*

   A statement by a witness that a letter is lost and cannot be found is not sufficient to admit secondary evidence as to its contents.

2. SECONDARY EVIDENCE—*Questions for Court—Appeal.*

   The decision of the trial judge as to whether certain facts are sufficient to admit secondary evidence of the contents of an instrument is not within his discretion, but is a question of law reviewable on appeal.

3. PLEADINGS—*Issues—Answer—The Code, sec.* 243.

   Where an allegation in a complaint is within the personal

knowledge of the defendant a denial of the same upon information and belief is not sufficient to raise an issue.

ACTION by A. W. Avery against J. W. Stewart, heard by *Judge Fred. Moore* and a jury, at November Term, 1903, of CRAVEN. From a judgment for the plaintiff the defendant appealed.

D. L. Ward and *W. D. McIver* for the plaintiff.
O. H. Guion for the defendant.

WALKER, J. This action is brought to establish and enforce a parol trust. The plaintiff alleges that John Humphrey and his wife, being the owners of a tract of land in Craven County containing about ninety acres, contracted to sell the same to him at the price of $500, and that he, not then being able to pay the stipulated price, informed the defendant Stewart of his contract with the Humphreys, and requested the defendant to buy the land for him and allow him three years to pay him the
(288) purchase money; that the defendant agreed to this proposal, with the proviso that the plaintiff should pay him $100 for the "accommodation," and the plaintiff assented to this proviso, and thereupon promised and agreed to pay the defendant the $100 and the purchase money within three years, at six per cent interest; that afterwards, on 28 October, 1901, Humphrey and his wife conveyed the land to the defendant, and on 10 December of the same year the defendant, in violation of his agreement with the plaintiff, and of the trust assumed by him, conveyed the land to one W. J. Arnold, who has taken possession of the premises under his deed; that Arnold agreed to pay for the land much more than the defendant paid the Humphreys for the same, and more than the plaintiff was required to pay the defendant under their contract; and that Arnold has made certain payments upon the purchase money which he agreed to pay to the defendant, the amount of which payments is not set forth. The plaintiff prayed judgment that the defendant be required to account for the profit which he has realized from the sale to Arnold.

The material allegations of the complaint were denied in the answer of the defendant. The court submitted to the jury two issues, as follows: 1. Did John Humphrey and wife contract with the plaintiff to sell him the land, as alleged in the complaint? 2. Did the defendant, prior to the conveyance of the land to him by Humphrey and wife, contract with the plaintiff to buy the land described in the complaint for him?

There was evidence tending to sustain the plaintiff's allega-

tions, and there was also evidence tending to show that the defendant bought the land from Humphrey without any understanding or agreement that the purchase was made for the plaintiff, though the allegation of the complaint, which is supported by proof that the defendant bought the land from Humphrey with the knowledge of the latter's prior contract (289) with the plaintiff, is not distinctly and positively denied by the defendant in his testimony.

The jury, under the instructions of the court, returned a verdict in favor of the plaintiff, answering both issues "Yes," and upon the verdict, judgment was rendered in favor of the plaintiff, to which the defendant excepted and appealed.

At the close of the testimony the defendant moved to nonsuit the plaintiff, and, the motion being denied, he excepted. He also excepted to the refusal of the court to submit certain issues which were tendered by him, and to certain instructions given by the court to the jury, but these exceptions we do not deem it necessary to consider.

In order to prove that he made a contract with Humphrey to buy the land before the latter conveyed it to the defendant the plaintiff proposed to show by his own testimony the contents of a letter or postal card which he had received from Humphrey, and which he alleged had been lost. This letter or postal card contained evidence of the fact that the plaintiff had an agreement with Humphrey to buy the land. The defendant objected to this testimony upon the ground, among others, that it had not been shown and did not appear that the plaintiff had made any search for the letter. In regard to the loss of the letter the plaintiff testified: "I received a letter from Humphrey which is lost; I cannot find it." This was all the testimony relating to the loss of the letter or postal card. The defendant's objection was overruled, and he excepted.

This ruling was erroneous. There must be at least some evidence of a search for the paper alleged to be lost before parol evidence of its contents can become competent. The rule of the law is: "If the instrument is lost the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a (290) *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined

by the court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." 1 Greenleaf Ev., sec. 558 (16 Ed., sec. 563b).

In Bradner on Evidence, p. 130, sec. 18, the rule is thus stated: "The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence. He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the degree of diligence necessary to be shown must depend upon the value and importance of the lost document. But it is sufficient if he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest. If the instrument was executed in duplicate due diligence must be shown to ascertain whether any counterpart exists, and if so, to obtain it to be used upon the trial. Where it may be in either of two or more places all the places should be searched; and if it be in the custody of either of two or more persons inquiry should be made of all of them. The search should have been made as recent as possible."

Wharton says: "The production of proof, satisfactory to the court, that it is out of the power of the party to produce the document alleged to be lost, and of its prior existence (291) and genuineness, is a prerequisite condition of the admission of secondary evidence of its contents. The question of such admissibility is for the court. Loss, like all evidential facts, can be only inferentially proved. In one sense no instrument can be spoken of as lost that is not destroyed or irrevocably out of the power of the party desiring to produce it. A check or promissory note may be carefully put away in a book and the place of deposit forgotten. Every effort may be honestly made to find it; it is all the time in the seeker's library, in the very place where he put it; yet after all it may be hopelessly lost. It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof shows such diligence as is usual with good business men under the circumstances." Wharton on Evidence, secs. 141, 142.

The principle upon which secondary evidence is admitted to prove the contents of a lost document, though stated by the text-writers with some difference in phraseology, is not substantially changed thereby, and it has frequently been recognized, approved

and applied by this Court. In one of the earliest cases relating to the question this Court said: "It is a rule of evidence that the best which the nature of the case will admit of must be produced. When that cannot be produced nonproduction of it is accounted for, the next best evidence in the party's power is required. It is that rule of evidence which required the production of the bond upon the trial. In order to dispense with the production of it it was incumbent on the plaintiff to give all the evidence reasonably in his power to prove the loss of it." *Dumas v. Powell,* 14 N. C., 104. See also *Harven v. Hunter,* 30 N. C., 464; *Governor v. Barkley,* 11 N. C., 20; *McFarland v. Patterson,* 4 N. C., 618; *Harper v. Hancock,* 28 N. C., 124; *Smith v. R. R.,* 68 N. C., 107; *Gillis v. R. R.,* 108 N. C., 441; *Murphy v. McNeill,* 19 N. C., 244; *Threadgill v. White,* 33 N. C., (292) 591; *McCracken v. McCrary,* 50 N. C., 399.

The difficulty is not so much in determining or stating what the rule is as in deciding how it should be applied. It is undeniably true that questions as to the existence of facts rendering secondary evidence of the contents of written instruments admissible are to be decided in the first instance by the court, unless in deciding such a question the judge would in effect decide the very matter in issue. Stephens's Dig. Ev. (May Ed.), 118; *Hendon v. R. R.,* 125 N. C., 124. But while it is a preliminary question for the judge to pass upon, it is not one for him to decide according to his discretion, but according to the law. Important legal rights may depend upon the correct decision of such a question, and it cannot be that the law has left it to the irreviewable discretion of the presiding judge to say when parol evidence shall be competent in such cases. We think the law is the other way, and it has been held to be so in numerous cases decided by this Court. In those cases where the court must decide preliminary questions as to the admissibility of evidence, such as whether a confession was voluntary or whether a conspiracy or combination has been shown sufficiently to let in the declarations of the alleged conspirators, or whether a witness is competent as an expert, or whether the loss of a written instrument has been sufficiently shown to render competent parol evidence of its contents, this Court, by *Pearson, C. J.,* in all cases like those just mentioned, has thus clearly stated the rule: "It is the duty of the judge to decide the facts upon which depends the admissibility of testimony. *S. v. Dick,* 60 N. C., 45; 86 Am. Dec., 439. What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court. So what evidence

(293) the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence is true and proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and in case of a conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the judge, and his decision cannot be reviewed in this Court, which is confined to questions of law." *S. v. Andrews,* 61 N. C., 205; *S. v. Dula,* 61 N. C., 211.

It is the duty of the judge to state the facts found by him from the evidence, if requested to do so by the party excepting to his ruling (*Holden v. Purefoy,* 108 N. C., 163; *Millhiser v. Balsley,* 106 N. C., 433), and his findings of fact cannot be reviewed in this Court; but if he does state the facts, either of his own motion or at the request of a party, this Court can review his conclusion, which is based upon the finding, for this presents necessarily a question of law. We are of course aware of the decision of this Court in *Gillis v. R. R.,* 108 N. C., 441, that "It is within the sound discretion of the court to determine what is sufficient evidence of the loss or destruction of an original paper to make testimony as to its contents competent," but to this statement of the law we are unable to give our assent, as we think it is not correct on principle or authority. It is true, stated by the Court in that case, that we will always assume, when nothing appears to the contrary, that the court, in admitting secondary evidence of the contents of a document, acted upon plenary proof that a sufficiently diligent but fruitless search had been made. This is so, not because the law does not require sufficient or plenary proof of the loss of the document, nor because the court's decision upon the matter is not

(294) the subject of review, but because, as neither the evidence nor the finding of facts is stated in the record, this Court must necessarily affirm the ruling, not for the reason that it is right, but because we are unable to see that it is wrong; and for the further reason, perhaps a correlative of the other, that error in the rulings of the court is never presumed, and he who alleges error must show it. The party excepting has the right to require the facts to be found by the court and stated in the record (*Holden v. Purefoy, supra*); and if he fails to insist upon this right he of course waives it and must abide the consequences. For these reasons we do not think, because it was decided in *Mauney v. Crowell,* 84 N. C., 314 (cited by the Court in *Gillis v. R. R., supra*), that where there is no finding of the facts the

ruling of the court is conclusive, it thereby recognized "the discretionary power of the Court to pass finally upon the question as to whether proper search had been made." If there is sent with the record the evidence of the loss instead of the judge's finding of facts, this Court will consider the evidence in the most favorable light for the appellee (*Holden v. Purefoy, supra*), but will of course pass upon the sufficiency of the evidence to show that proper search has been made.

While the Court in *Gillis v. R. R., supra,* says, "Where the facts upon which the *nisi prius* judge acted are found, it is competent for this Court to review his ruling and determine whether the testimony was sufficient in law to justify his conclusion," the general trend of the decision in that case is that the matter lies solely within the discretion of the presiding judge, and it was so understood and construed by one, at least, of the dissenting justices, whose view is sustained by the reference of the Court to the case of *Bonds v. Smith,* 106 N. C., 565, in which it is said that "It is always within the sound discretion of the judge who tries a case to determine what is sufficient proof of the loss or destruction of an original paper to make evidence of its contents competent." There are some ex- (295) pressions in the opinion which we think may lead to misapprehension of what we conceive to be the true rule, unless they are limited somewhat in their scope and effect. If it was intended to decide that when the facts are found by a judge and stated in the record his ruling is the subject of review, but when no evidence or finding of facts appear in the case this Court will assume either that sufficient facts were found or that there was plenary evidence of the essential facts, we fully concur in the decision, and thus restricted we believe that it is correct and sustained by authority; but if it was intended to lay down the rule, as the dissenting justices seemed to understand that it did, that the question is one that is addressed solely to the discretion of the court, we are unable to adopt that view of the law, and to that extent the case is disapproved. It appears in that case that the Court actually passed upon the sufficiency of the testimony to establish the loss of the letters as matter of law, and ruled that it was sufficient for the purpose of letting in parol evidence of their contents. There was evidence that the plaintiff generally kept the letters in his trunk, but sometimes in his wife's trunk. He had made search only in his own trunk; and it was held, as we have said, to be a sufficient search. We cannot assent to this ruling, as we think the law requires that search should have been made in both places, for the party who proposes to produce the parol evidence of the contents of the instruments

alleged to be lost must have exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. 1 Greenleaf Ev., sec. 558; *Blair v. Brown,* 116 N. C., 631; *Simpson v. Dall,* 3 Wallace, 460; *Johnson v. Arnwine,* 42 N. J. Law, 451; 36 Am. Rep., 527; *Richards v. Lewis,* 5 Eng. Law and Eq., 400; *Cook v. Hunt,* 24 Ill., 550. Some of those cases are, in respect to their facts, like the case of
(296) *Gillis v. R. R., supra.* We are of the opinion that the decision in the latter case, so far as the Court held that the judge merely exercises his discretion in passing upon the sufficiency of the search for the lost paper, is opposed to the rule as stated and applied in the cases decided by this Court, and which we have already cited. *Gillis v. R. R.,* cannot be distinguished in principle from the case of *Dumas v. Powell* and *Harven v. Hunter, supra.* See also *Bligh v. Wellesly,* 2 C. and P., 400.

In our case the witness testified that the paper was lost and he could not find it. This was all the evidence, and we must pass upon its sufficiency as matter of law to show that a proper search was made for the original, and we have concluded, after a careful review of the authorities, that it was not sufficient for that purpose. The witness does not testify distinctly or positively that he ever made any search. If there was a search the fact is not stated but left merely to inference, and it does not, therefore, appear what kind of search was made. As to this important matter we can do nothing but conjecture.

There is another objection to the proof of loss. The fact to be found by the court is that the paper is lost and cannot be found or produced, and the witness, instead of testifying as to what kind of search he had made, so that the court could find the ultimate fact of loss, testified directly to the fact itself, and thereby substitutes his opinion or judgment upon the question for that of the court. This certainly is not a compliance with the rule. In order to show the loss of the paper it was necessary that a diligent search should have been made for it where it was most likely to be found (*Simpson v. Dall, supra*), and this must be shown by evidence and not by the mere opinion of the witness, nor by his deduction from the facts as they may
(297) have appeared to him, but which were not disclosed to the court.

In *Parker v. Dunkel,* 3 Watts & Serg., 59 Pa., 294, the Court said: "It is indispensable that the legal proof required to warrant secondary evidence should be satisfactorily made out. Here all that the defendant produced afterwards was the oath of

Dunkel that he received the letter spoken of by Messrs. Smith, and it was lost. This we think was not sufficient. The party relying on secondary evidence must go further and show what became of the original, and that due diligence was made to find it, at all events, ought to furnish reasons for believing that the document is irretrievably lost and not merely mislaid, and still within the power of the party to recover by an exertion of proper diligence. A thing is often in common parlance lost and yet found on a search. More especially is this incumbent on the party when he has himself had the document in his custody and is called on to show that it cannot be produced."

In *Justice v. Luther,* 94 N. C., 793, the defendant proposed to prove the declaration of a party who was shown to have had the custody of the paper in question that it was lost, in order to introduce secondary evidence of its contents. The evidence was excluded, not only because it was hearsay, but for the further reason that it was not in its nature reasonably sufficient to account for the absence of the original. *Blair v. Brown, supra.* In *Harven v. Hunter, supra,* the Court says: "The case does not profess to set forth the affidavit itself but its contents. It states, not that he did not have the deeds in his possession but simply that the affiant did not know where they were, and that he had made due inquiry for them and was unable to procure them. It may be that his possession is substantially and sufficiently denied, but the affidavit ought to have set out what inquiries he had made, where and of whom, that the Court might judge whether they were sufficient. (298)

In *Lyon v. Washburn,* 3 Col., 204, the Court says: "To show in general terms that a writing is lost, without showing search or inquiry for it, has never been regarded as sufficient to admit secondary evidence of its contents." In *McFarland v. Patterson,* 4 N. C., 618, it is said: "The case now before the Court stands upon the long-established rule that parol evidence cannot be admitted to prove the contents of the written contract unless it shall be clearly made to appear that the written contract is lost by time or accident. The plaintiff not having shown that the written contract was lost in either of the above ways he should not have been permitted to prove the same by parol." The counsel for the plaintiff contended that the ruling upon this evidence was immaterial, as the finding upon the second issue was sufficient to entitle the plaintiff to a judgment. This may not be so, but however it may be the issue certainly does not embrace all of the facts upon which the plaintiff originally relied for a recovery, and we deem it best not to decide

what the rights of plaintiff are, if he has any, until his case has been fully developed.

As the case must go back for a new trial we would suggest that the second issue be amended so as to read substantially as follows: "Did the defendant, knowing that Humphrey and wife had contracted to sell the land to the plaintiff, and before contracting with Humphrey for the purchase of the land, and before receiving a deed therefor, agree with the plaintiff to buy the land for him, as alleged in the complaint?" This issue, it seems to us, more clearly conforms to the particular allegations of the complaint than the one submitted at the last trial, and there was evidence to support an affirmative finding upon it.

It may be well to call attention to the fact that the allegations of the third section of the complaint are not sufficiently denied in the answer. The plaintiff alleges in the third section (299) of his complaint that he informed the defendant of his agreement with Humphrey to buy the land from him, and then contracted with the defendant that the latter should buy the land from Humphrey for the plaintiff, and allow him, the plaintiff, three years to pay for it, and also to pay the additional sum of one hundred dollars, which the defendant was to receive as the consideration for his undertaking. In the answer the defendant merely states that "he is informed and believes that the allegations of the third article are not true, and therefore denies the same." Whether he had been informed by the plaintiff of the Humphrey contract was a matter which was necessarily within his personal knowledge, and the allegation in regard to it should have been met by a direct denial, or at least the statement of a "want of recollection" of it, if he intended to raise an issue in regard to it. *Gas Co. v. Mfg. Co.,* 91 N. C., 74. The answer in this respect was not sufficient under the Code, sec. 243 (1) to raise an issue. It may be amended in the discretion of the court upon proper application, if the defendant wishes to contest the matters alleged by the plaintiff.

There was error in the ruling of the court below upon the evidence, for which there must be another trial.

New trial.

Cited: S. c., 136 N. C., 430; *Mitchell v. Garrett,* 140 N. C., 401; *Streator v. Streator,* 145 N. C., 338.

(300)

DAVIS v. RAILROAD COMPANY.

(Filed 1 March, 1904.)

1. GIFTS—*Questions for Jury—Railroads.*

In this action against a railroad for killing a cow, whether the title to the cow was in the wife of plaintiff, under a gift from plaintiff to her, is a question for the jury.

2. RAILROADS— *Negligence— Presumptions— Evidence— Instructions—The Code, sec.* 2326—*Nonsuit.*

Where a plaintiff makes a *prima facie* case by suing for the killing of a cow within six months, the defendant is not entitled to nonsuit the plaintiff on the ground that such *prima facie* case is rebutted by the evidence of the defendant.

MONTGOMERY, J., dissenting.

ACTION by H. C. Davis against the Seaboard Air Line Railroad Company, heard by *Judge M. H. Justice* and a jury, at September Term, 1903, of BERTIE.

This is an action for damages for killing a cow. As the action was brought within six months after the cow was killed a *prima facie* case of negligence arose under section 2326 of the Code. Both sides introduced testimony, and the issues and answers thereto were as follows: 1. Was the plaintiff the owner of the cow in question? "Yes." 2. Did the defendant company negligently and wrongfully kill said cow? "Yes." 3. If so, what damage has the plaintiff sustained thereby? "$40."

All the exceptions before us relate to the refusal to nonsuit, the charge and the refusal to charge. Upon these questions the following proceedings appear from the record:

After the testimony was closed the defendant renewed its motion to nonsuit upon the grounds, first, that the title to the cow was not in the plaintiff, but in his wife, Cora; second, because the defendant had rebutted the *prima facie* case (301) of negligence made out by the statute. Motion refused, and defendant excepted. Exception No. 2.

The defendant in apt time requested the judge to charge the jury that if they believed the evidence they should answer the first issue "No."

Refused, and defendant excepted. Exception No. 3.

That upon the whole evidence they should answer the second issue "No."

Refused, and defendant excepted. Exception No. 4.

That if they believed the evidence the defendant had rebutted

the *prima facie* case of negligence made out by the statute, and they should answer the second issue "No."

The court did not give the charge in the language requested, but charged the jury as hereinafter stated, and the defendant excepted. Exception No. 5.

The court charged the jury that they should pass upon the title to the cow, and they should determine from the testimony as to whether the cow was the property of the plaintiff or of his wife.

The court charged the jury upon the second issue that the question of negligence would be left to them upon all of the testimony. That when the plaintiff showed to their satisfaction that the defendant had killed the cow in question, if they found the plaintiff owned her, that was *prima facie* evidence under the statute, and nothing else appearing the plaintiff was entitled to recover, and they should answer the second issue "Yes." But if the defendant had satisfied them that the killing was without negligence and unavoidable, as testified to by the defendant's witness, then they should answer the second issue "No."

To this charge the defendant excepted, and assigned as error, first, the refusal to charge as requested, and second, for (302) error in the charge as given.

The following testimony given by the plaintiff is the only evidence relating to the ownership of the cow: "The railroad runs across my land. The cow was killed on 18 December, 1902; the defendant's train was two hours behind time. I went home from Lewiston, N. C., and saw my cow. She was dead, lying in a ditch. I saw tracks of the cow upon the defendant's road; looked like it had struck and knocked her off. The cow was more gentle than my driving horse. I bought the cow and gave her to my wife. I told my wife she could take her, and my wife *accepted* the gift." The witness was asked: "Why are you bringing suit for your wife's cow?" He replied: "The cow belonged to both of us; what is my wife's is mine. I told my wife she could have the cow. There was no separation of the cow from the other cattle. I bought the cow and paid for her with my own money. My wife claimed her. The cow ran in the woods and on the farm. The farm belongs to my wife. I bought the land upon which we live, using part of the money received from the sale of my wife's land and about $200 of my own money, and took the title in her name. I placed metallic tags in the cow's ears; the name of my wife was stamped on the tags. I had the tags on hand. I did not wish to change the marks of cattle I had bought, and put the tags on most of the cattle. I listed the cattle in my name, including this cow, for

taxation." The only direct testimony as to the manner in which the cow was killed was given by the engineman, a witness for the defendant.

In a judgment for the plaintiff the defendant appealed.

Francis D. Winston for the plaintiff.
Day & Bell and *Murray Allen* for the defendant.

DOUGLAS, J., after stating the case. We see no error (303) in the action of his Honor. The questions raised by the defendant have been so recently decided and fully discussed that but little more can be said. The defendant insists that the court should have found, as matter of law, that the plaintiff was not the owner of the cow. It is clear that the plaintiff, having bought the cow with his own money, became the owner thereof, and remained such owner unless there was a completed gift to his wife, which was a mixed question of law and fact for the determination of the jury. This question is directly decided in *Gross v. Smith,* 132 N. C., 604, where the Court says: "We think there was evidence sufficient to be submitted to the jury upon the question of the parol gift. There can be no doubt that delivery of possession is essential to constitute a valid gift. 'The necessity of delivery,' says *Chancellor Kent,* 'has been maintained in every period of English law.' 2 Kent Com., 438; 2 Blk., 441. But the question in this case is whether there was a delivery in fact. The declarations or admissions of the intestate and the other testimony are not conclusive upon that question, but the jury must find the fact of delivery from all of the evidence. . . . All courts hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the acts, conduct and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct and declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony." The defendant further contends that the court should have held as matter of law that the *prima facie* case created by the statute had been rebutted by the testimony of the defendant's witness. This question is directly decided in *Baker v. R. R.,* 133 N. C., 31, wherein the Court says: "This was an action for negligently (304) killing a horse. At the close of the evidence the defendant moved to nonsuit the plaintiff. The action was brought within six months, and the killing having been shown, the statute raised a presumption of negligence, and the burden

to rebut such presumption being upon the defendant, the judge could not find affirmatively that the defendant's evidence had been sufficient to do this. This was a matter for the jury. The judge could instruct the jury, as he did in this case, that a certain state of facts, if believed by them, would rebut the presumption, but not that certain evidence, though uncontradicted, would do so. The burden is on the defendant to rebut the presumption, and the jury alone can pass on its credibility; otherwise, if the only eyewitness is witness for the defendant, the plaintiff will be at his mercy and would be deprived altogether of the benefit of the statute because he did not happen to see the killing. It would be a novelty to nonsuit the plaintiff on the defendant's evidence." We gave careful consideration to both of the above-cited cases, and see no reason now to reverse our ruling.

The wife of the plaintiff was permitted to become a party to the action after verdict. This was proper to the extent of binding her by the verdict to the future exoneration of the defendant, but it would not relate back to the bringing of the action so as to have the effect of raising in her favor the *prima facie* case created by the statute. As she disclaims any interest in the subject-matter of the action we do not see how the defendant can be injured in any way, especially in the view we take of the case.

The judgment is affirmed.

MONTGOMERY, J., dissenting. This action was brought in the name of H. C. Davis. On the trial he testified for himself that he had given the cow to his wife; that he had placed metallic tags in the cow's ears with the name of his wife stamped (305) on the tags; that the cow ran in the woods and on the farm, and that the farm belonged to his wife, and that there was no separation of the cow from the other cattle. That evidence in my opinion constituted a gift, and the court should have dismissed the action upon the motion of the defendant.

Cited: Martin v. Knight, 147 N. C., 578.

SKINNER v. TERRY.

(Filed 1 March, 1904.)

1. JUDGMENTS — *Specific Performance — Recordation—Laws* 1885, *ch.* 147.

A decree in a suit for specific performance, directing a conveyance and reciting that its effect should be to convey the title, need not be recorded.

2. EJECTMENT—*Trespass—Estates—Specific Performance.*

The holder of an equitable title under a decree for specific performance is entitled to maintain ejectment or trespass for injury to his possession.

3. JUDGMENTS—*Specific Performance—Estates—The Code, sec.* 426.

It is not necessary that a decree in favor of the plaintiff in a suit for specific performance should declare that it should operate as a conveyance in order to constitute a complete adjudication on the rights of the holder of the naked legal title.

ACTION by T. G. Skinner against Harvey Terry, heard by *Judge W. B. Councill* and a jury, at Fall Term, 1903, of PERQUIMANS.

The *locus in quo* being a large tract of land situate in the counties of Perquimans and Pasquotank, known as the "Great Park Estate," was, on 1 April, 1884, the property of Timothy Ely. On 24 April, 1884, said Ely and wife (306) entered into a contract with John F. Davis, whereby they bound themselves upon the payment of a certain amount of money and the performance of certain stipulations to convey the land to said Davis. At Fall Term, 1892, of the Superior Court of Pasquotank County the said Davis instituted an action against Ely and wife and Harvey Terry and wife for the purpose of enforcing specific performance of said contract. In the complaint therein it was alleged that the plaintiff Davis had paid the amount of the purchase money and in all other respects performed the stipulations in the contract. The plaintiff further alleged that since the execution of the contract the said Ely had conveyed said land to the defendant Terry, who had notice of the plaintiff's equities and rights. The defendant Terry, answering, denied the execution of a deed by Ely to him. The cause came on for trial at January Special Term of Pasquotank Superior Court, 1894, when upon appropriate issues the jury found that the defendant Ely and wife had executed the contract as alleged; that the plaintiff Davis had on his part complied with said contract; that Ely had not complied with his part thereof,

and that "the defendant Terry and wife were not seized of any title or interest in said land"; that the plaintiff Davis was the equitable owner of the land and entitled to a conveyance thereof from the defendant Ely and wife. Thereupon it was adjudged "That the plaintiff John F. Davis is the equitable owner in fee of the land (describing it), and that he is entitled to the present possession thereof and to a deed of conveyance in fee therefor from the defendant Ely and wife, and that they are hereby ordered and commanded to execute, prove and deliver to the said John F. Davis a good and sufficient deed of conveyance in fee. . . . And it was further ordered, adjudged and decreed that the force and effect of this order, judgment and decree is and shall be to transfer to the said John F. Davis and his (307) heirs the legal title of the land aforesaid, "And to that end it doth decree that from now and henceforth the said John F. Davis doth and shall have and hold that portion of the 'Great Park Estate' above described, unto him and his heirs in fee simple." The court directed that the decree be recorded in the office of the register of deeds of Pasquotank County. The decree was recorded in Pasquotank County on 23 January, 1900, and in Perquimans County on 7 January, 1902. Thereafter the said John F. Davis died intestate, and his administrator duly filed a petition for the sale of said land for the purpose of making assets to pay debts. Pursuant to orders duly made in the cause the said land was sold and purchased by the plaintiff T. G. Skinner, and a deed therefor executed on 11 December, 1900, and duly recorded in Pasquotank County on 13 December, 1900, and in Perquimans County on 7 January, 1902. On 15 August, 1900, the defendant, pursuant to a purchase made by him at a sale made by the marshal of the Eastern District of North Carolina, under an execution issued upon a judgment recovered by Harvey Terry against Timothy Ely, obtained a deed for said land from said marshal. It was duly recorded in Pasquotank County on 10 December, 1900, and in Perquimans County on 10 October, 1900. There was evidence tending to show that the land was situate in both Pasquotank and Perquimans Counties.

The plaintiff requested the court to instruct the jury that upon the entire evidence they should answer the first and second issues, involving title and possession of the plaintiff and trespass by the defendant, in the affirmative. The court so charged the jury, and the defendant excepted. The defendant submitted a number of prayers for instructions, all of which were declined. The defendant excepted and appealed.

W. M. Bond and *E. F. Aydlett* for the plaintiff. (308)
Rodman & Rodman, G. W. Ward and *B. G. Watson* for the defendant.

CONNOR, J. The exception to the instructions given in response to the plaintiff's prayer presents the questions raised by the defendant's prayers. The defendant says that the plaintiff cannot maintain this action for a trespass committed upon that portion of the "Great Park Estate" lying in Perquimans County for that the decree in the case of John F. Davis against Timothy Ely and others was not recorded in said county until 7 January, 1902; whereas his deed from the marshal was recorded 10 October, 1900. This contention is based upon the theory that the judgment of the Superior Court of Pasquotank County of January, 1894, operated as a deed from Ely to Davis, and came within the provisions of chapter 147, Laws 1885, regarding registration of deeds. The act provided that "No conveyance of land nor contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration." . . . This language does not include a decree or judgment of the court which declares the rights of the parties and adjudges that by virtue of the facts found by the court the prevailing party is the owner of the land. The effect of the decree was to declare Davis the equitable owner of the land and leave in Ely the naked legal title. It was not necessary to a complete adjudication of Ely's rights that the further provision in regard to the operation of the decree as a deed should have been added. This Court, in *Farmer v. Daniel,* 82 N. C., 152, through *Dillard, J.,* says: "In this case it appears as a fact in the case agreed that the purchaser specifically performed the contract on his part by paying into the office of the clerk and master the purchase money, and thereupon the right arose to have performance on the part of the heirs acting through the agency (309) of the court. And the court of equity, on report of full payment by the master, in recognition of this right ordered that the title of the heirs be conveyed by the master to the purchaser." It was further held in that case that the decree vested in the purchaser a perfect equitable title upon which he could defend against one holding the naked legal title. That the owner of the perfect equitable title may maintain ejectment or other possessory action under our system of procedure may be regarded as settled beyond controversy. *Taylor v. Eatman,* 92 N. C., 601; *Condry v. Cheshire,* 88 N. C., 375.

If, as we have seen, the effect of the decree was to vest a per-

fect equitable title in Davis, and that the defendant Terry was bound by said decree, it is immaterial whether the provision that it should operate as a deed, as provided by section 426 of the Code, be complied with. It will be observed that the provision of that section is that after the court shall have declared the rights of the parties "It shall have power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made the legal title of the said property." . . . We think that the failure to insert this clause or to comply with the directions that the decree be recorded, in no manner affects the equitable title which the plaintiff Davis acquired by the decree declaring him to be the equitable owner in fee.

We would not feel authorized to extend the language of chapter 147, Laws 1885, to include a decree of the character before us in this record. But that point is not before us. The effect of this decree is to vest all of the equitable title in Davis which was outstanding in Ely or in the defendant Terry. Certainly the rights of Davis could not be affected by deed executed (310) thereafter by Ely to Terry, or, as in this case, by the marshal undertaking to sell the naked legal title outstanding in Ely to his co-defendant Terry. Taken in the strongest light for the defendant the decree of January, 1894, declared the equitable title in Davis, leaving a naked legal title outstanding in Ely. Terry could acquire no other or better title than was in Ely at the time of his purchase, and, as we have seen, Davis could have maintained an action against Ely for possession of the land or for trespass thereon; so the plaintiff who has succeeded to his title may maintain an action against Terry for injury to his possession. *Stith v. Lookabill,* 76 N. C., 465.

Whether we place the plaintiff's right to maintain the action upon the theory of an estoppel against Terry or upon the view above suggested that Ely had but a naked legal title, and that the purchaser under such sale took subject to all outstanding equities, we would be brought to the same result. In either aspect of the case his Honor's charge to the jury was correct, and the judgment must be

Affirmed.

(311)

CRESLER v. ASHEVILLE.

(Filed 8 March, 1904.)

1. NEGLIGENCE—*Towns and Cities—Municipal Corporations—Sidewalks.*

   A town or city is not liable in damages for an injury caused through the slipping of a person on its sidewalk on account of ice formed there at a season of the year when such formation of ice might be reasonably anticipated.

2. NEGLIGENCE—*Towns and Cities—Municipal Corporations—Ice—Sidewalks.*

   It is error to instruct that the formation of ice on a sidewalk from a hydrant during the course of a night, in a few hours, is, as a matter of law, negligence on the part of the city.

3. MUNICIPAL CORPORATIONS—*Towns and Cities—Notice—Laws (Private)* 1895, *ch.* 100, *secs.* 96, 97.

   Where the charter of a city requires notice within a specified time of a claim before action can be brought a claimant must allege and prove that the notice was given.

ACTION by Jane H. Cresler against the city of Asheville, heard by *Judge E. B. Jones* and a jury, at September Term, 1903, of BUNCOMBE. From a judgment for the plaintiff the defendant appealed.

Locke Craig for the plaintiff.
Davidson, Bourne & Parker for the defendant.

MONTGOMERY, J. It is the positive duty of the governing authorities of cities and towns to keep the streets, including the sidewalks, in proper repair, that is, as was said in *Bunch v. Edenton,* 90 N. C., 131, and *Russell v. Monroe,* 116 N. C., 720, 47 Am. St., 823, "The streets must be kept in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety; and proper repair implies that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and (312) things, very near and adjoining the streets, shall be guarded against by proper railings and barriers." It was also decided in those cases that all persons using the streets, including sidewalks, must do so in an "orderly manner," but that they have a right to assume that the town authorities have properly discharged their duties under their powers and that the streets are in good repair, that the sidewalks are in safe condition, and

that nuisances near to and adjoining them have been properly guarded.

In the case before us the plaintiff's claim for damages against defendant city is based on the alleged negligence that the city allowed water to escape from a hydrant, to flow over the sidewalk and to freeze thereon during a spell of cold weather, whereby the plaintiff, in going to her work early in the morning before it was light, was caused to slip and fall into a washout or gully by the side of the sidewalk, and thereby became seriously injured. The alleged negligence then was not that the sidewalk was *per se* dangerous, that is, built or erected or kept in bad condition, but that the *icy condition* of the sidewalk was the only negligence, or rather that it was the negligent failure of the defendant to remove the ice that lies at the foundation of the action. The defendant requested his Honor to instruct the jury that "The slippery condition of a sidewalk, resulting from ordinary accumulation of ice in winter, is not an actionable defect if such accumulations are smooth; and if you find in this case that the alleged injury of the plaintiff was due to such cause you will answer the first issue 'No,' and not consider the other issues." His Honor gave the instruction with the modification added after the word "winter" "not from neglect of city." We think the modification was certainly misleading to the jury, and was therefore erroneous. The instruction as originally prayed for simply meant that the law would not hold liable in
(313) damages a town or city for an injury caused through the slipping of a person on its sidewalk on account of ice formed there at a season of the year when such formation of ice might be reasonably anticipated, and not through an unusual accumulation, and after being allowed to remain there for an unreasonable length of time. Putting that interpretation upon the prayer for instruction we think it ought to have been substantially given.

It will never do to lay down the rule that in the cities and towns of North Carolina, covering as they do in many instances large areas not built upon, but provided with sidewalks, the municipalities should be liable in damages in cases of injury to persons caused by slipping from the natural formation of ice and sleet and fall of snow during our winter season. It would be an impossibility to keep these streets free from such obstructions. The true rule seems to us to be that unless ice or snow or sleet has been allowed to fall in such quantities as are unusual and to remain unremoved for a longer period than was necessary, or could not have been removed at a greater ex-

pense than could reasonably be incurred, that the municipality would not be liable.

Again, his Honor was requested to instruct the jury: "6. If you find as a fact in this case that the ice which formed on the sidewalk and caused the plaintiff's injury came from a hydrant situated on private property, and which the city of Asheville did not control, then the defendant would not be liable, and you will answer the first issue 'No.'" He gave the instruction, but added: "But if you find the hydrant was located on private property and the city had control of the same, and the city was negligent in allowing water to escape and accumulate and form ice on the street, and by reason of this the plaintiff fell and was injured, then the city would be negligent, and you should answer the first issue 'Yes.'" That instruction was erroneous, and for the same reason that it was the province of the jury to find the facts about the accumulation of the ice, and that (314) of his Honor to instruct them as a matter of law upon those facts, whether the defendant was negligent or not; and for the further reason that under that instruction the formation of ice from the hydrant during the course of a night or a few hours was made as a matter of law negligence on the part of the city. It is but just to add that in his charge in chief his Honor instructed the jury pretty fully and in the main accurately on these questions. But where instructions are contradictory and on serious phases of the case a new trial must be granted for the reasons we have often pointed out, that we cannot tell which instruction the jury followed.

The defendant further requested the court to instruct the jury that the plaintiff could not recover in this action because there was no evidence that she had given the board of aldermen the notice required in sections 96 and 97, chapter 100, Private Laws 1895 (the amended and consolidated charter of the city of Asheville): "Section 96. No action shall be instituted or maintained against said city upon any claim or demand whatsoever of any kind or character until the claimant shall have first presented his or her claim or demand in writing to said board of aldermen and said board shall have declined to pay or settle the same as presented, or for ten days after such presentation neglected to enter or cause to be entered upon its minutes its determination in regard thereto; but nothing herein contained shall be construed to prevent any statute of limitation from commencing to run at the time such claim accrued or demand arose, or in any manner interfered with its running.

"Section 97. No action for damages against said city of any character whatever, to either person or property, shall be insti-

tuted against said city unless within ninety days after the happening or infliction of the injury complained of the complainant, his executors or administrators, shall have given notice (315) to the board of aldermen of said city of such injury in writing, stating in such notice the date and place of the happening or infliction of such injury, the manner of such infliction, the character of the injury and the amount of damages claimed therefor; but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of the happening or infliction of such injury, or in any manner interfere with its running."

In the complaint as originally filed there was no allegation of notice to the defendant of the plaintiff's injury as required by the statute, but an amendment was made to the complaint in which notice was alleged, and the defendant made no answer to the amendment. The plaintiff contends that notwithstanding the requirements of sections 96 and 97 of the act of 1895, proof of notice to the city by the plaintiff of her injury was not necessary, because of the Code rule that matters of fact alleged in the complaint, not denied in the answer, are to be taken as true. The defendant, however, contends that those sections of the act of 1895 are in effect a bar to the plaintiff's right of action unless she both alleges and proves by evidence that she gave to the defendant such notice as is required by law, and that the act is not a statute of limitations but a bar to the plaintiff's action unless it is shown on the trial that the notice was given. His Honor did not deem the failure on the part of the defendant to answer the amendment of the plaintiff as of sufficient consequence to allow the plaintiff to recover without proof of the notice required, and the plaintiff introduced three witnesses to show that the notice was given. That evidence was not even a scintilla going to show that the notice had been given by the plaintiff to the defendant as required by the statute.

Error.

DOUGLAS, J., dissents.

(316)

RILEY v. PELLETIER.

(Filed 8 March, 1904.)

1. VENUE—*Removal of Causes—The Code, secs.* 177, 179, 192.

Under the Code, sec. 195, providing for change of venue when the convenience of witnesses and the ends of justice demand, such motion may be made at any time in the progress of the cause.

2. VENUE—*Removal of Causes—Affidavits.*

The filing of an affidavit and motion for change of venue in vacation before the clerk is invalid. The motion must be made before the trial judge.

3. VENUE—*Removal of Causes—The Code, sec.* 195.

Under the Code, sec. 195, a motion for change of venue because of action brought in the wrong county must be made before the time allowed to answer expires.

ACTION by J. T. Riley and others against J. W. Pelletier, heard by *Judge R. B. Peebles* at November Term, 1903, of LENOIR. From an order of removal of the action the plaintiffs appealed.

N. J. Rouse for the plaintiffs.
Simmons & Ward for the defendant.

CLARK, C. J. Plaintiffs, other than Lovett Hines, are non-residents of the State. The defendant resides in Carteret County. The summons was returnable to April Term, 1902, of Lenoir Superior Court; complaint was filed at that term and entry made "time to answer." The next term began 11 November, at which term the answer was filed. In the meantime, on 17 October, 1902, the defendant filed an affidavit and motion to remove the cause to Carteret County, but it (317) does not appear that notice of this motion was served on any of the plaintiffs or their attorneys. At November Term, 1902, and succeeding term, the motion and cause was continued. At March Term, 1903, the motion to remove was granted.

"Lovett Hines, agent," who resides in Lenoir County, was joined as party plaintiff. It is alleged in the complaint that he was the agent of his co-plaintiffs, and as such rented out the lands and was authorized to collect the stipulated rent thereon, for the conversion of which this action was brought.

The answer, while denying information upon the above alle-

gation, admits that said Hines was agent for his co-plaintiffs in taking possession of the crop, and sets up as a defense that he took more of the crop than was due. Code, section 177, requires that the real party in interest should be plaintiff "except as otherwise provided," and section 179 authorizes, among others, "a trustee of an expressed trust" to sue, and defines him to be "a person with whom or in whose name a contract is made for the benefit of another." It is suggested that Hines, upon the averments in the complaint, was the "trustee of an expressed trust, the *alter ego* of the landowners to rent the land and collect the rents, and hence that he was *prima facie* a proper party, and being a resident of Lenoir County it was therefore error to remove the cause on the ground assigned in the motion under the Code, section 192, for residence of defendant in Carteret. We do not find it necessary to pass upon this point.

The court in its discretion may remove the trial "when the convenience of witnesses and the ends of justice would be promoted by the change," Code, 195 (2), and such motion may be made at any time in the progress of the cause. The restriction that the motion to remove must be made "before the time of answering expires," applies only when "the county desig-
(318) nated in the summons and complaint is not the proper county," Code, sec. 195, and the defendant seeks to remove as a matter of right.

We may note further that filing the affidavit and motion to remove in vacation, before the clerk, was invalid. Such motion must be made before the judge (*Howard v. R. R.*, 122 N. C., 144), and notice given. *S. v. Johnson,* 109 N. C., 855; *Stith v. Jones,* 119 N. C., 430. Even if valid the filing of the answer, without suggestion or demand for removal, and before action had upon the motion, was a waiver of the motion. *McMinn v. Hamilton,* 77 N. C., 301; *County Board v. State Board,* 106 N. C., 81; *Cherry v. Lilly,* 113 N. C., 27.

Besides the Code requires that the motion to remove should be made "before the time for answering expires." While this language is slightly different from the Federal statute regulating motions to remove to the Federal Court, which specifies that said motion must be made "at the time or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff," we think the tenor and object of the two statutes are the same, *i. e.*, to require the defendant to object to the jurisdiction *in limine* by moving to remove as soon as he is afforded opportunity from filing the complaint to know definitely the scope of the action. The lan-

guage of the statute in both cases has reference to the time at which the answer should be filed under the statute or the general rules of court, and not the special order granting extension of time to answer, which is of itself, if asked or accepted by the defendant, an acceptance of the jurisdiction, and therefore a waiver of the right to remove. *Howard v. R. R., supra.* In *County Board v. State Board, supra,* the motion to remove was made before the expiration of the extension of time to answer, but after the answer was filed, and it was held too late.
The only case which seems to militate against our ruling (319) in this case is *Shaver v. Huntley,* 107 N. C., 623, but there time was given to file the complaint, and when it was filed in vacation, disclosing the nature of the action, the defendant before answering made a demand for removal and gave notice of the motion to the opposite party. In that case the Court repeats that the motion must be made *in limine.* The question here decided was raised in *Roberts v. Connor,* 125 N. C., 45, but not passed upon, as the order of removal was reversed upon another ground. If the defendant seeks to remove, as a right, because the action is brought in the wrong county, the motion must be made at the return term if the complaint be then filed, and if it is not, then as soon as the complaint is filed and before answering.

Error.

Cited: Garrett v. Bear, 144 N. C., 25.

HAUSER v. CRAFT.

(Filed 8 March, 1904.)

1. WILLS—*Legacies and Devises— Remainders— Estates— Life Estates.*

   Where a devise of property is to the devisee for life and should she die without leaving any children the property to be divided among the rest of her heirs, the devisee gets a life estate and her children the remainder.

2. COVENANTS— *Deeds— Estates— Remainders— The Code, secs.* 1325, 1334.

   Where land is devised to a person for life, and at her death to her children, the children are not estopped by a deed with covenant of warranty executed by the life tenant.

3. ADVERSE POSSESSION.

Possession by the grantees of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant.

(320) ACTION by W. H. Hauser and others against W. W. Craft and others, heard by *Judge W. H. Neal,* at May Term, 1903, of FORSYTH.

This is an action for the recovery of real property which was tried in the court below upon the following case agreed:

"1. Isaiah Coe died some time in 1836, leaving a last will and testament dated 5 February, 1836, in which are these words and figures: 'Item 3. I give unto my granddaughter Katherine Scott a tract of land called the Elder tract, being 166 acres, which adjoins Janus Fletcher. Also one negro woman named Bett and one boy named Lawson, one girl named Alley, and their increase from this time forward. Also one horse, bridle and saddle, to be of the value of $100; two cows and calves, five head of sheep, two beds and furniture, a walnut chest or bureau; also two acres of meadow land out of the river tract, adjoining her grandmother Pierce, with the privilege of a cartway to and from the same, which is to be hers during her natural life only; and should the said Katherine Scott die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs.'

"2. Katherine Scott was a granddaughter of Isaiah Coe (her mother, a daughter of Isaiah Coe, having died prior to 5 February, 1836), and living with her grandfather, and on 22 May, 1840, the said Katherine Scott, for and in consideration of $275, deeded to George Newman in fee simple the Elder tract containing 166 acres, more or less, which is the land in dispute, with the following clause of warranty: 'The said party of the first part, for the consideration aforesaid, does hereby covenant and agree to warrant and defend the premises aforesaid to the said party of the second part, his executors, administrators and assigns, against the claims and entries of all persons whatsoever, and she further covenants that she is seized of the premises in fee simple and has power to make and convey such an
(321) estate by this indenture, and has done the same by these presents.'

"3. That Katherine Scott intermarried with Adam Hauser in 1842, and by him had the following children: W. H. Hauser, C. S. Hauser, M. E. Fleming, wife of J. C. Fleming; Louisa Scott, wife of S. W. Scott, and Sarah Chaplain, wife of J. M. Chaplain, who are the plaintiffs in this action.

"4. That subsequent to 22 May, 1840, George Newman sold

the above-described land to W. F. Shore, who in 1874 conveyed said land to the defendants, and the defendants in said action have, since their purchase, put upon said land valuable improvements.

"5. That the defendants are now in possession of said land and deny the right of the plaintiffs to recover; that the defendants and those under whom they claim have been in possession of said land under known and visible lines and boundaries since 1840, as shown in their deeds.

"6. That Katherine Hauser, *nee* Scott, died during 1899, and this action was commenced on 10 April, 1900.

"7. That said Isaiah Coe has descendants now living other than the plaintiffs in this action."

The plaintiffs claim the land as the children of Katherine Hauser, formerly Katherine Scott, under the third item of the will of Isaiah Coe, and their contention is that by a proper construction of that item their mother acquired only a life estate in the land, and at her death, by implication or construction of law, they took a remainder in fee. Their counsel also contended at the bar that if they did not take under the will as the children of Katherine Hauser then they took as heirs of Isaiah Coe under the ulterior limitation; and while they are not all of his heirs they can recover as tenants in common of their co-heirs the entire estate in the land as against the defendants, who have no share or interest therein.

The defendants, on the contrary, insist that by the proper construction of the third item of the will Katherine Scott took a fee contingent upon her dying without leaving (322) children, and as children born of her marriage with Adam Hauser have survived her the contingent estate became absolute and indefeasible, and this estate they have acquired by *mesne* conveyances from her. They also contend that the claim of the plaintiffs, who are heirs of Katherine Hauser, is rebutted by the warranty in their ancestor's deed, which is relied on as a defense in bar of their recovery, and if not, that it is barred by long continued adverse possession under the statute of limitations. There was judgment for the plaintiffs, and the defendants excepted and appealed.

Glenn, Manly & Hendren for the plaintiffs.

J. E. Alexander, A. E. Holton and *Benbow & Hall* for the defendants.

WALKER, J., after stating the case. We decided at the last term in *Whitfield v. Garris*, 134 N. C., 24, that when property is

given to a person absolutely, and if he should die without leaving children or heirs of his body then over, the primary devisee takes a fee defeasible on his dying without leaving children, and that the children, if he leave any, take no estate as purchasers under the will by implication. If the first taker dies leaving children and without having disposed of his defeasible estate, the children take from him by descent, and they cannot take it by implication as purchasers unless that was the intention of the testator expressed in the will or to be clearly inferred therefrom. 1 Underhill on Wills, sec. 468. We could discover no such intention of the testator in that case. The rule thus stated also applies where the devise is in the first instance to the parent for life and then over to ulterior devisees if the parent dies without leaving children. But in the latter case it is said that (323) the law will raise an estate in remainder by implication in favor of surviving children upon slight indication of an intention to that effect, and one reason for the rule is that it would be absurd to assume the testator intended that the death of the first taker, leaving no children, should entitle the devisee who is to take in remainder or by way of executory devise, while the converse—that is, his death, leaving a child—will defeat the limitation over without benefiting either parent or child. 1 Underhill on Wills, sec. 468, p. 623; *Kinsella v. Caffery,* 11 Irish Ch., 154; *Ex parte Rogers,* 2 Maddox Ch., 1 Am. Ed., 576. Whether this be the correct principle or not, it is certainly true that if it sufficiently appears from the will the testator so intended, the law will raise an estate by implication in favor of the children in such a case, notwithstanding the estate is not expressly limited to them in the will. We must therefore determine in our case whether Katherine Hauser took only a life estate in the Elder tract of land, which is the property in dispute, or an estate in fee; and if she took only a life estate, whether the plaintiffs took an estate in remainder by implication, or, if not, whether, lastly, they took as heirs of the testator under the ulterior limitation. It is admitted that Katherine Hauser took only a life estate, if the words in the third item, namely, "which is to be hers during her natural life only," should not be confined to the gift of the "meadow land and cartway," but should be extended to the limitation of the Elder tract. The defendants contend that if the third item of the will is construed as it is punctuated, the qualifying words apply only to the meadow tract and cartway and not to the Elder tract. That a will is couched in ungrammatical language and is incorrectly punctuated are facts of little importance in construing it. The punctuation may in certain cases have some effect in ascertaining the true meaning,

and it is said to be a guide, though not a very reliable one, to aid us in seeking for the testator's intention, but the (324) latter must always be determined exclusively from the words employed by the testator, viewed in the light afforded by the context. The punctuation, or the lack of it, is not material and may not be omitted or supplied by the court. Commas may be inserted for periods, or *vice versa,* in order to accomplish the paramount object, which is the ascertainment of the testator's will or meaning. 1 Underhill, *supra,* sec. 369. But while this may be done when necessary to effectuate the intention of the testator, we do not think that the punctuation of the third item of the will evinces a purpose to separate the qualifying clause from that part of the devise which precedes the reference to the meadow land and cartway, and to restrict its operation entirely to the latter. It is evident from the entire structure of that item of the will that the testator intended to limit the interest of Katherine Hauser in all the property described in it to a life estate. If he had intended differently he would in some way have indicated his purpose to give a fee in the property other than the meadow land and cartway in more explicit language. There is just as much reason for holding that the restrictive words apply to the Elder tract of land as there is for construing the will so that they may be confined in their operation to the meadow land and cartway. The relative pronoun "which" must be understood to refer to all that precedes in that item of the will, and especially is this so when the clause which it introduces is placed in immediate connection with the last provision of the item, namely, "and should the said Katherine Scott die without leaving any child or children, the *property* which I have given to her to be divided among the rest of my heirs." This provision follows the clause, "which is to be hers during her natural life only," and is joined to it by the conjunction "and," which shows that the testator intended that the two should be (325) taken and construed together; and if this is done, it is perfectly clear that the testator intended to give his granddaughter, Katherine Scott, a life estate in the Elder tract. The interpretation we have thus placed upon the item seems to us to be the only natural and reasonable one; and, besides, we are utterly unable to see any good reason why the testator should have given his grandchild an estate for life in the two acres of meadow land and the cartway, and a fee in the other property. A careful reading of the item shows that his purpose was to make ample provision for this grandchild, who lived with him and who was dependent upon him, by giving her a farm, with slaves to cultivate it, and other necessary personal property for its better and

more convenient enjoyment, and the meadow land, "with the privilege of the cartway to and from it," as a means of ingress and egress, was given as an appurtenance to the larger tract, and as being necessary also for its advantageous enjoyment. It is all one devise and bequest, and the use of periods and capitals was not intended to disassociate the different clauses so as to constitute each one of them as the expression of a separate and distinct gift of the property therein described. The defendant's counsel contended that, because of the peculiar punctuation and the use of capitals, the restricted clause applied only to the meadow land and cartway; but if we consider the method of punctuation as indicating the intention, there is no reason why that clause should not be as well applied to the horse, bridle and other species of personal property mentioned and described immediately before the meadow land and cartway. They are separated only by semicolons, and the grammatical construction would require the restriction to be extended to them.

In construing wills, as exactly the same language or form of expression is rarely used, each case must, generally speak-
(326) ing, be decided upon its own facts, and the intention of the testator is to be diligently sought for, and when found is to be carried out, if not contrary to law, but the intention must be gathered from the whole will. We can derive little aid from merely technical rules. In this case it appears that at the time the will was executed Katherine Scott was living with her grandfather and was unmarried. It is manifest he intended that in the distribution of his estate she should represent her mother, who was his daughter (which is admitted in the defendant's brief), and doubtless he would have given the property to Katherine in fee, as he did to all his daughters, but for the fact that the latter were married, or had been, and were of sufficient age and experience to manage what he should give them with judgment and discretion. They were practically settled in life. With his grandchild, who must have been the object of his most anxious care and solicitude, it was quite different. He knew full well that she might not, as she did not, attain her majority until long after his demise, and that, inexperienced as she was, she perhaps would not have anyone to advise her in the management of her estate. It was for the purpose of providing against ultimate loss by reason of her own improvidence, or that of her husband, if she should marry, that he did what seemed to him best to safeguard what may be called her patrimony, so that she could enjoy the use and income of it during her life, and so that the remainder would be preserved for her children, if she had any. No other reason can be assigned for his making the dis-

tinction which he did between her and his daughters. We could not for a moment yield to the suggestion that his affection for her was not as strong as it was for them, and that he wished to discriminate against her. Her peculiar and dependent situation was calculated to arouse in him a very tender and anxious regard for her future condition in life, and, though not abating any of his affectionate interest in her, nor desiring less to (327) see her as well placed as the others, he no doubt felt that, as her future course in life was uncertain and her ability to prudently manage what she would receive from him was unknown, it was best she should not have the absolute ownership of the property; but, whatever may have been his motive, we are unable to look at this will from any standpoint which does not reveal the clear intention of the testator to give the property, and all of it, to Katherine Scott for life. This conclusion takes the title out of the defendants, but it does not alone entitle the plaintiffs to succeed in this action, because they are suing for the recovery of real property, and, according to the invariable rule, they must recover upon the strength of their own title and not upon the weakness of the title of their adversaries. The defendants are not required to show that they have any title in the land, but the plaintiffs must show affirmatively that they have a title which is good against the world, or good against the defendants by estoppel. So that, we must go further and decide whether the children of Katherine, who are the plaintiffs in this action, took an estate in remainder, at her death, by implication. There is no express gift to them, and if they took at all it must have been by construction of law. We are clearly of the opinion that they did so take. The limitation is, "Should the said Katherine Scott die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs." It will be observed that Katherine had only a life estate, and therefore at her death all of her interest ceased and determined. The heirs of the testator could not take unless she died without children, because it is expressly provided by the will that they should take only upon the contingency of her dying without leaving children, and the fact that she died leaving children completely divested the testator's heirs of all right or title in the land. The presumption is that he did not intend to (328) die intestate as to any of his property, and this presumption is strengthened by the very language of the will, which on its face shows that he intended to dispose of all of it. If the estate of Katherine expired at her death, and the heirs cannot take because she left children, who, then, can take, unless it be the children? *Holton v. White,* 23 N. J. L., 330; Theobold on

Wills, p. 569. The implication is not only necessary, but irresistible, that in the situation of the parties, as now presented to us, and giving to the will of the testator a natural and reasonable construction, it was intended by him that the plaintiffs should be the objects of his bounty and should take the property in remainder after the death of their mother. In this respect the case is not at all like that of *Whitfield v. Garris.* There was nothing in the will under construction in that case to raise any such an implication, as the estate was limited to Franklin Whitfield in fee; and, besides, the presumption was that the testator did not intend to disinherit his own heirs. There were others than the children who could take, and the children could take only by descent from their parent. In the case at bar we must hold either that it was intended the children should take a remainder at the expiration of their mother's life estate, or that the fee should be in abeyance, or we must disregard the plainly expressed intention and direction of the testator and hold that he intended that at the death of the tenant for life the estate should go to his heirs. The adoption of either of the last two alternatives would be opposed to every known principle of the law applicable to such cases. We must abide by the rule as established by the authorities we have cited, and give our decision upon this point in favor of the plaintiffs.

It was suggested by counsel at the bar that Katherine Scott, under the rule in *Shelly's case,* took an estate tail, which, by the statute of 1874 (Code, sec. 1325), was converted into a
(329) fee simple. The rule does not apply to this devise. The words of limitation are not such as bring our case within the principle of that rule, and we do not think it can be shown by any of the authorities to have the slightest bearing upon the question involved. There are no words used which indicate any intention on the part of the testator that Katherine Scott should take an estate of inheritance, either in fee simple or in fee tail, as the only word uesd is "children," and that word, by all of the authorities, is not sufficient for the purpose of creating such an estate. *Moore v. Parker,* 34 N. C., 123; *Ward v. Jones,* 40 N. C., 400; *Howell v. Knight,* 100 N. C., 254; *Mills v. Thorne,* 95 N. C., 362; *Starnes v. Hill,* 112 N. C., 1; 22 L. R. A., 598; *Leathers v. Gray,* 101 N. C., 162; 9 Am. St., 39. The estate of the children could not become absolute and indefeasible until the determination of the life estate, as the remainder was contingent, and this prevented the operation of the rule. *Starnes v. Hill, supra.* Besides, the application of the rule would defeat the well-defined intention of the testator, and there are not sufficient

technical words in the will to override this intention. In such a case the rule can have no place.

Counsel further contended that the plaintiffs, as the children of Katherine Hauser, formerly Katherine Scott, are rebutted by the warranty in her deed, under and through which the defendants claim the land. This position is equally untenable. All collateral warranties are abolished, and all warranties made by any tenant, for life, of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties as aforesaid shall be deemed covenants only and bind the covenantor in like manner as other obligations. This is the language of the statute (Code, sec. 1334), and is too clear and explicit to admit of any doubt as to its true meaning. It covers the case completely, and is a full and conclusive answer to the contention; and, be- (330) sides, the authorities are all against the defendants upon this point. The warranty of Katherine Scott, who had only a life estate, does not bar or rebut the plaintiffs, who are her children, because the latter claim as remaindermen, and therefore not by descent, but by purchase. This is the construction of our statute, it being a re-enactment of 4 Anne, ch. 16, sec. 21, which has received the same interpretation. *Moore v. Parker* and *Starnes v. Hill, supra.* The matter is fully and ably discussed by *Pearson, C. J.,* in *Southerland v. Stout,* 68 N. C., 446. The warranty in our case has the force and effect only of a personal covenant, the difference between which and a warranty, which operates as a bar by way of rebutter, is explained in *Wiggins v. Pender,* 132 N. C., 628; 61 L. R. A., 772.

The last defense is that the defendants have had adverse possession for a sufficient length of time to bar the right of the plaintiffs; but this position is clearly untenable, as it is agreed in the case that Katherine Hauser did not die until 1899, and this action was commenced in 1900. The statute was not set in motion until her death, as the plaintiff had no right to the possession before she died or during the continuance of her life estate.

It was agreed in the court below that certain questions as to rents, profits, improvements and betterments should be reserved, to be considered and decided hereafter in that court.

We find no error in the judgment of the Superior Court, and further proceedings below may be had in accordance with the agreement of the parties and the law. No error.

Cited: Wilkinson v. Boyd, 136 N. C., 47; *Anderson v. Wilkins,* 142 N. C., 161; *Faison v. Odom,* 144 N. C., 109.

(331)

DUVAL v. RAILROAD COMPANY.

(Filed 8 March, 1904.)

1. NEGLIGENCE—*Contracts—Carriers—Ordinances.*

Where a railroad company contracts with a town not to run its trains through the street above a certain speed, a breach of the contract is some evidence of negligence in an action for personal injury.

2. NEGLIGENCE—*Imputable Negligence—Contributory Negligence.*

The negligence of a driver of a conveyance is not imputable to a passenger therein.

ACTION by Della Duval against the Atlantic Coast Line Railroad Company, heard by *Judge Frederick Moore* and a jury, at November Term, 1903, of JONES. From a judgment for the defendant the plaintiff appealed.

D. L. Ward and *M. DeW. Stevenson* for the plaintiff.
Simmons & Ward and *N. J. Rouse* for the defendant.

DOUGLAS, J. This is an action for damages for personal injuries. The jury found that the plaintiff was injured by the negligence of the defendant, and that she contributed to her injury by her own negligence. There are but two exceptions that we think it necessary to pass upon in this appeal, both to the charge of the court. Among other things, the court charged as follows: "The plaintiff introduced a contract, wherein it is provided that the East Carolina Land and Railroad Company shall not run its locomotive through the streets of New Bern at a speed greater than three miles an hour; that the whistle shall be sounded before entering upon said streets, and the bell upon the
(332) engine tolled while passing through the streets, etc. And it is admitted that the defendant has succeeded to the rights and liabilities of the East Carolina Land and Lumber Company. The court charges you that this is a contract between the city and the defendant company, and that there is no evidence that its provisions have been enacted into an ordinance by the city, and the jury cannot consider the provisions of the same as bearing upon the question of the negligence of the defendant."

In this we think there was error. The only object the city could have had in limiting the rate of speed at which a train was permitted to run through its streets was the protection of the traveling public. It was similar to an ordinance, in purpose and

legal effect at least, in civil actions. We do not feel compelled in this case to go to the extent of saying that the violation of such a provision in a contract gives rise to a cause of action; but we hold that, equally with the violation of an ordinance, it is evidence of negligence on the part of the defendant. If the defendant obtained the grant of its right of way by virtue of such a contract, it has no right to complain at the reasonable enforcement of its conditions and limitations. *Gorrell v. Water Co.*, 124 N. C., 328; 70 Am. St., 598; 46 L. R. A., 513.

The court further charged the jury as follows: "If you find from the evidence, by the greater weight or preponderance thereof, that the plaintiff was riding in a buggy, driven and controlled by her father; that the plaintiff's father was negligent in approaching the crossing, and that such negligence contributed to the injury of which the plaintiff complains, as a proximate cause thereof, then such negligence of the plaintiff's father is imputable to the plaintiff as her own negligence."

This also was error. Imputable negligence, or identification, as it is sometimes called, from analogy to the Roman law, has never been recognized in this State, and has received but scant recognition in any part of this country. The ques- (333) tion was directly presented and expressly decided in *Crampton v. Ivie*, 126 N. C., 894, in which this Court says: "We may regard it as settled law that the negligence of a driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered as practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being the possession of the owner to the extent of making the driver the temporary servant of the passenger."

In the case at bar it appears that the plaintiff was not traveling in a *public* conveyance, but in a buggy driven by her father. We will assume that she was not a passenger for hire, but was riding in her father's buggy, as his guest. We do not think this makes any difference, either in principle or in legal liability. She was certainly not in exclusive control of the vehicle, nor could her father be considered in any sense as her servant. We are aware that in a few instances it has been held that while contributory negligence cannot be imputed to one riding in a hired vehicle, it may be imputed to him if he is a mere guest. The overwhelming weight of authority is against any such distinction, and, in common with nearly all the courts of final jurisdiction, we are utterly unable to see any reasonable basis for such a conclusion.

The only ground for the doctrine of imputable negligence in any of its phases is the assumed identity of the passenger and driver arising out of an implied agency. It is contended, as he selected his own driver, he made him his agent, not only for the general purposes of his employment, but for all possible contingencies that might happen. Under this doctrine it would seem that if the driver broke the passenger's neck he would be acting within the scope of his agency. This may be so, but it
(334) does not seem so to us. Of course, if the passenger were injured through the negligence of the driver alone, he must look alone to him, or to his master, for his recovery; but if he is injured through the concurring negligence of the driver and some one else, he may sue either. This is equally true, whether the plaintiff is a passenger for hire or a mere guest. We see no reason why the latter should be placed at any legal disadvantage. In fact, it would seem that if there were any difference, the passenger for hire, having the legal right to the services of his driver, would be in a position to exercise a greater degree of control than one whose presence was merely permissive. An examination of the origin, growth and decadence of the doctrine seems to us to show the correctness of our conclusions, aside even from the weight of authority. The doctrine that the negligence of a driver was imputable to the passenger is considered to have originated in the English case of *Thorogood v. Bryan*, decided in 1849, and reported in 8 C. B., 115. The action was brought against the owner of an omnibus, by which the deceased was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road, instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be stopped in time to prevent the injury. The court directed the jury that "If they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself had been conducive to the injury, in either of those cases, notwithstanding the defendant by her servant had been guilty of negligence, their verdict must be for the defendant." This case, after being much criticized, was expressly overruled in 1888 by the House of Lords in the case of *The Bernina*, 13 App. Cas., 1, in which opinions were delivered by *Lords Herchel, Brumwell* and *Watson*.
(335) Among other things in his opinion *Lord Herchel* says: "In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan* (1), which undoubtedly does support their contention. This case was de-

cided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism it has never come for revision before a court of appeals until the present occasion. . . . It is necessary to examine carefully the reasoning by which this conclusion was arrived at. *Coltman, J.*, said: "It appears to me that having trusted the party by selecting the particular conveyance the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words the passenger is so far identified with the carriage in which he is traveling that want of care of the driver will be a defense of the driver of the carriage which directly caused the injury." *Maule* and *Vaughan Williams, JJ.*, also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expresses himself: "I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." *Vaughan Williams, J.*, said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with the (336) driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, so far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against

the passenger when suing another wrongdoer. To say that it is a defense because the passenger is identified with the driver appears to be the question, when it is not suggested that this identification results from any recognized principle of law or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in *Thorogood v. Bryan*. *Maule, J.*, says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no
(337) control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. . . . But as regards the present plaintiff he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust." I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways the unreasonableness of such doctrine is even more glaring.

The only other reason given is contained in the judgment of *Creswell, J.*, in these words: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the col-

lision he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master (338) of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory."

In his opinion *Lord Watson* says: "It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance when he is doing or threatens to do something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine driver."

We have quoted at length from this case because it is the distinct and final repudiation of the doctrine by the highest judicial tribunal in England, where it originated, as well as from the further fact that the reasoning upon which the learned and able opinions are founded apply equally to cases where the plaintiff is a mere guest. The same may be said of *Little v. Hackett,* 116 U. S., 336, which is cited with approval by *Lord Herchel* in *The Bernina.* Hackett, the plaintiff, was injured by the collision of a railroad train with the carriage in which he was riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage: of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the (339) horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that

the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving his negligence could not be imputed to the plaintiff. Upon appeal the judgment was affirmed. *Justice Field,* speaking for a unanimous Court, says, on page 374: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver or between the passenger and the owner. In the absence of this relation the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled them to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. (340) The parties are not in the same position. The owner of a public conveyance is a carrier and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." Again the Court says, on page 379: "There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them, to prevent their recovery against a third party he must be their agent in all respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already said, responsibility cannot within any recognized rules of law be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the

injury complained of before he incurs any liability for it. 'If the law was otherwise,' as said by *Mr. Justice Depue* in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though (341) the passengers were ignorant of the character of the driver and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.' "

The Court further cites with approval the case of *Dyer v. R. R.*, 71 N. Y., 228, in which the facts are very similar to those in the case at bar, in the following words: "The plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity became unmanageable, and the plaintiff was thrown or jumped from the wagon and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he traveled voluntarily, he was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses."

In *Transfer Co. v. Kelly*, 36 Ohio St., 86, 38 Am. Rep., 558, the plaintiff below (Kelly) was injured while riding on a street car in collision with a car of the transfer company, and was permitted to recover although it appeared that the servants of both companies were negligent. The Chief Justice, in delivering the opinion of the Court, said: "It seems to us therefore that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company or its servants was the sole cause of the injury." "Indeed," the Chief Justice added, "it seems as incredible (342) to my mind that the right of a passenger to redress against a stranger for an injury caused directly and proximately by the

latter's negligence, should be denied on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In *Robinson v. R. R.*, 66 N. Y., 11; 23 Am. Rep., 1, *Church, C. J.*, a distinguished jurist, speaking for an able Court, says: "It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person she would not be liable. She was not responsible for his acts and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable she was not negligent in doing so. Can she be held by consenting to ride with him to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her." Again the Court says, on page 13: "I am unable to find any legal principle upon
(343) which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily entrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she would be precluded from recovering if he thereby contributed to her injury.' If this argument is sound why should it not apply in all cases to public conveyances as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury for whose acts the

plaintiff was not responsible. The rule of contributory negligence is very strict in this State and should not be extended, nor should the rule of imputable negligence be extended to new cases where the reason for its adoption is not apparent."

In *R. R. v. Lapsley,* 51 Fed., 174; 16 L. R. A., 800, *Sanborn, C. J.,* speaking for the Court, says: "But where the owner and driver of a team and carriage invites another to ride in his carriage no relation of principal and agent is created, no relation of master and servant is established, the owner and driver of the team are not controlled by and are not in any sense the agents of the invited guest, and to hold him responsible for the negligence of the former, by whose permission alone he rides, is unauthorized by the law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable in the ad- (344) ministration of justice to divide and apportion the compensation in proportion to the varying degrees of concurring negligence is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who upon every consideration of justice and reason ought to make compensation for it, shall be permitted to escape because a third person over whom the injured person had no control and whose only relation to him was that of a guest to his host has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury a loss of $1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed by any act or omission of hers to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realms of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based we have been unable to discover it."

In *Dean v. R. R.,* 129 Pa. St., 514; 6 L. R. A., 143; 15 Am. St., 733, *Clark, J.,* delivering the opinion of the Court, says, on page 524: "Quotations might be given from many cases in the

different States illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England and the great current of authorities of this country are against it. Nor can I see why, upon
(345) any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held and the other released from liability. As to this I speak only for myself. In my opinion there is no principle consonant with common sense, common honesty or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another imputed to him under such circumstances. Although in *Carlisle v. Brisbane,* 113 Pa., 544, I may appear to have accepted that doctrine, I mean merely to state that the ground upon which this Court had rested that rule was better than that taken by the English courts. But if this were not so Fields was not a common carrier; Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Fields's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane, supra,* and to the case of *Follman v. Mankato,* 29 N. West, 317; 59 Am. Rep., 340. We are clearly of opinion that if Dean himself was guilty of no negligence the negligence of Fields cannot be imputed to him."

This case was expressly approved in *Bunting v. Hogsett,* 139 Pa., 363; 12 L. R. A., 268; 23 Am. St., 192, where the Court uses the following language on page 376: "But *Thorogood v. Bryan, supra,* which is the leading case, has been recently overruled in the English Court of Appeals. *The Bernina* (*Mills v. Armstrong*), 2 Prob. & D., 58, and the doctrine, although formerly accepted in many of the States, is now generally disapproved. The authorities in England and the great current of authority in this country are against it. The cases are collected in *Dean v. R. R., supra.* They are numerous, and it is
(346) unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was to some extent, perhaps, *obiter dictum,* but we are now unanimously of opinion that the views there expressed, somewhat in advance, contain the proper exposition of the law. The identification of the passenger with the negligent driver or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As *Mr. Justice Field* said in *Little v. Hackett,* 116 U. S., 366: 'There is no

such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant; neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.' The *rationale* of the rule of *Thorogood v. Bryan* is expressly disavowed in our own case of *Lockhart v. Litchtenthaler,* and it is now rejected as untenable and wholly indefensible. Nor is there any rule or principle of public policy which will support such a doctrine. If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which should release one of them and hold the other. It is true the carrier may be subjected to a higher degree of care than his *co-tort feasor,* but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem in principle to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care required nor the comparative degrees of (347) culpability established can affect the liability of either."

It is unnecessary as well as impracticable to cite all the other cases we have examined on this subject, and so we will confine ourselves to a few in which the precise question under consideration is directly presented. That one who is injured by the joint or concurring negligenee of a private person with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, is held in the following cases: *Masterson v. R. R.,* 84 N. Y., 247; 38 Am. Rep., 510; *Strouse v. R. R.,* 39 N. Y. Supp., 998; *Kessler v. R. R.,* 38 N. Y. Supp., 799; *R. R. v. Powell,* 89 Ga., 601; *Leavenworth v. Hatch,* 57 Kan., 57; 57 Am. Rep., 309; *Cahill v. R. R.,* 92 Ky., 345; *Noies v. Boscawen,* 64 N. H., 631; 10 Am. St., 410; *Owerson v. Grafton,* 5 N. D., 281; *R. R. v. Eadie,* 43 Ohio, 91; *Carlisle v. Brisbane,* 113 Pa., 544; 57 Am. Rep., 483; *R. R. v. Hogeland,* 66 Md., 149; 59 Am. Rep., 159; *R. R. v. State,* 79 Md., 335; 47 Am. St., 415; *R. R. v. Davis,* 69 Miss., 444; *Follman v. Mankato,* 35 Minn., 522; *Commissioners v. Mutchler,* 137 Ind., 140; 2 Jaggard Torts, sec. 276, p. 982; Bishop Non-cont. Law, sec. 1070.

The rule is thus stated in 7 A. and E. Enc., 447: "Occupants

of private conveyances: In the second class of cases there has been and still is much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while on the other hand it may be imputable when the injured person is in a position to exercise authority or control over the driver." *Judge Thompson,* in his Commentary on the
(348) Law of Negligence, Vol. I, sec. 502, thus lays down the rule: "Negligence of the driver is not imputed to the passenger on a private conveyance riding by invitation. While there are a few untenable decisions to the contrary nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver or the owner, or the custodian of the vehicle, and having no authority or control over the driver and being under no duty to control his conduct, and having no reason to suspect any want of care, skill or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him so as to prevent him from recovering damages from the other *tort feasor.*"

We cannot better close this discussion than by the following quotation from 1 Shearman & Redfield on Negligence, sec. 66, and in doing so we deem it proper to say that, while we fully approve of the legal conclusions arrived at by the distinguished authors, we do not wish to be held entirely responsible for the vigor of their language: "Doctrine of identification: As already stated the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defense. But in the famous case of *Thorogood v. Bryan* an English court invented a new application of the old Roman doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions we devoted much space to the refutation of this doctrine of 'identification.' But it is needless to do so any longer since the entire doctrine has, since our first edition, been exploded in every court, beginning
(349) with New York and ending with Pennsylvania. It was finally overruled in England a few years ago. The only remnant of this doctrine which remains in sight anywhere is the

theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan,* was invented in Wisconsin and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana; and in Nebraska, without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another who has not the smallest right to control or even advise him is difficult to support by any sensible argument. This theory is universally rejected except in the three States mentioned, and it must soon be abandoned even there."

The doctrine of imputable negligence, as far as it relates to a child, has been fully discussed and expressly repudiated by this Court in *Bottoms v. R. R.,* 114 N. C., 699; 41 Am. St., 799; 25 L. R. A., 784. Even if this phase of the question was now before us we could add but little to what was there so fully and ably said. There must be a

New trial.

Cited: Davis v. R. R., 136 N. C., 117; *Wilson v. R. R.,* 142 N. C., 338; *Baker v. R. R.,* 144 N. C., 44.

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(350)

OUTLAND v. RAILROAD COMPANY.

(Filed 8 March, 1904.)

1. CONTRACTS—*Carriers.*

The correspondence set out in the opinion constitutes a contract of a carrier to furnish cars to transport freight.

2. CONTRACTS—*Carriers—Agency—Railroads.*

The general freight agent of a division of a railroad has authority to contract to furnish cars for moving freight.

3. CONTRACTS—*Carriers—Reasonable Time—Questions for Court.*

Whether a railroad company furnished cars to transport freight within a reasonable time is a question of law, and a failure to tender them for seventy-five or eighty days was not within a reasonable time.

4. CONTRACTS—*Carriers.*

A railroad company is not relieved of liability for breach of its contract to furnish cars to transport freight because it used reasonable effort to procure foreign cars.

5. CONTRACTS—*Carriers—Notice.*

A railroad company, after a breach of its contract to furnish cars to transport a certain amount of timber cut and to be cut, is liable for damages for timber cut before the contract and that cut after notice that carrier could not furnish cars.

ACTION by W. F. Outland against the Seaboard Air Line Railway Company and others, heard by *Judge Frederick Moore* and a jury, at March Term, 1903, of NORTHAMPTON. From a judgment for the plaintiff the defendant appealed.

Peebles & Harris for the plaintiff.

Day & Bell, T. W. Mason and *Murray Allen* for the defendant.

(351) MONTGOMERY, J. This action was brought by the plaintiff to recover damages for an alleged breach of a contract which was made between the plaintiff and the defendant in November, 1901. The contract is in writing, and is embraced in a written correspondence between the plaintiff and the agents of the defendant. On 22 October, 1901, the plaintiff wrote to C. R. Capps, the general freight agent of the first division of the defendant's road, at Portsmouth, Va., and also on 31 October, 1901, to C. H. Hix, division superintendent, in the same words, as follows:

"DEAR SIR:—I am cutting and expect to cut fifty car loads of mining props, twenty-seven feet long, near Roxobel, N. C. There is absolutely no accommodation for loading the same at Roxobel siding, as it is all taken up with cord wood, Brown and Bundy's place, where they have to pile their lumber prior to shipping, and C. T. Harrell's ginhouse and site. Also, S. T. Hedgepeth tells me that he has fifty or sixty thousand feet, which he expects to begin to cut and load now soon at Roxobel, if he has not already started; and, further, were it possible for me to load at Roxobel, your company has not any place for me to drop the props on prior to loading; and Liverman, the party who owns the land adjoining the depot, will not allow anyone to drop props on his premises without paying him one cent per log for use of same, which charges I am not willing to pay. Consequently, under the many existing circumstances, I respectfully ask you to grant me train to load my props on the main line. I think that there is no doubt but what I could load a train in one day."

The letter to Hix was sent by him to Capps, and on 18 November, 1901, Capps wrote to the plaintiff, at Woodland, in Bertie County, N. C., along the line of the first division of the defendant company, a letter in the following words:

"DEAR SIR:—Referring to your letter of 31 October, to Mr. Hix, we have considered your application to be permitted to load a train of mine props on the main line, near Roxo- (352) bel, N. C., and are prepared to permit this, subject to the rules governing the loading of cord wood on the main line, with which you are familiar. These rules, of course, provide that you will be allowed from sunrise to sunset for loading, and that the special train must make way at all times for other trains. The rates to be charged you will be the full local rates from Roxobel to destination. Please let us know when you desire a train, and we will take up with Superintendent Hix the question of when it can be furnished."

There was evidence tending to show that before 18 November, 1901, the date of the contract, the plaintiff had already cut a large number of the mine props, and that after 22 November, 1901, when Capps notified the plaintiff that he feared he would be unable to furnish him the train if the props were to be shipped to some point in Pennsylvania or beyond the defendant's line, the plaintiff cut other props. There was further evidence that the plaintiff hauled a large number of the props to the defendant's railroad, and was ready and able to load as many as 350,000 feet. The defendant did not offer to furnish the cars or a train until about the last of February, 1902, when the plaintiff refused to use them.

The chief contention in the case of the defendant is that there was no contract between the plaintiff and the defendant to furnish cars for the transportation of the props, for that the letter from Capps to the plaintiff of 18 November, upon its face, was but a conditional contract, dependent upon the ratification or approval by Hix, the division superintendent, and that the condition is found in the last three lines of the letter, which is in these words: "Please let me know when you desire a train, and we will take up with Superintendent Hix the question when it can be furnished." It is clear to us that the letter of 18 November, in its entirety, read in connection with the (353) plaintiff's letter of 22 November to Capps, furnishes an unconditional and a complete contract to furnish the plaintiff with the cars to transport the props. The day when Hix, the division superintendent, should send the cars to the place of ship-

ment was a mere matter of detail, and, in law, to be done within a reasonable time after the plaintiff should make known his readiness for the cars.

But the defendant insists further that if the contract was a complete one, the general freight agent, Capps, had no power or authority to bind the defendant by his act. The defendant introduced two witnesses who testified that the power to make contracts for furnishing trains on the first division actually reposed in Hix. Capps had no such power. We think that that testimony, in a case like this, is in effect a conclusion of law on the part of the witnesses, and that it was not a correct conclusion. The defendant held Capps out as its general freight agent of its first division, and that designation carries with it, in law, the power to do all acts connected with the handling of freight and fixing special rates, the furnishing of trains for the movement of freight under special contract, and all matters pertaining to the subject of freights which the company itself could do. It could not be that Hix, the superintendent of transportation, could have the power to decline to furnish cars to a customer at certain times and places, in cases where the general freight agent had made especial contract with customers to furnish them. But if that were not so, the contract is a complete one, because Hix sent the plaintiff's letter in reference to the transportation of these props to Capps, and Capps, after that time, in his letter to the plaintiff, stated that he had knowledge of the plaintiff's letter to Hix, "and that we have considered your application to be
(354) permitted to load the train of mine props on the main line, near Roxobel, and are prepared to permit this, subject," etc. So the correspondence discloses the joint consideration of this contract by both Capps and Hix, even if Hix's approval is necessary. His Honor was therefore right when he refused to charge the jury, at the request of the defendant, that there was no contract between the plaintiff and the defendant in respect to furnishing the cars, and also in his refusal to instruct the jury "that if they believed the evidence that Capps, the general freight agent, had no authority to make a contract."

The next in importance of the defendant's contentions is that the evidence on the fourth issue did not warrant his Honor in instructing the jury that if they believed the evidence they should answer the issue in the affirmative. The language of the fourth issue was as follows: "Did the defendant, on or about 18 November, 1901, contract and agree with the plaintiff to furnish the plaintiff with trains of cars upon which to load mine props, and to allow him to load the same at his log yard on the main line of the defendant's road, as alleged in the second cause of action

stated in the complaint?" The allegation on that subject in the complaint was that the defendant was to furnish the plaintiff, at such time as he might need the same, trains of cars upon which to load the mine props. The contract, as we have seen, in its entirety, was based upon the letter of the plaintiff to Capps and Hix, which is set out above. In those letters the plaintiff said he was cutting and expected to cut fifty car loads of props, and asked the defendant "to grant me train to load my props on the main line." The letter of Capps of 18 November refers to the letter from the plaintiff to him, and in that letter Capps writes of furnishing *a* train (italics ours). That is the ground on which the defendant rests his contention that the evidence did not fit the issue. His Honor no doubt considered that the defandant had notice that the plaintiff would require ac- (355) commodations in the way of train service to transport the fifty car loads of props mentioned in the contract, and he instructed the jury, upon the evidence (the contract), that they should allow the plaintiff such damages as he sustained by reason of the failure of the defendant to furnish the plaintiff *trains* of cars (italics ours), at his log yard on the defendant's main line, sufficient to transport fifty car loads of mine props, within a reasonable time. We think the construction his Honor put upon the contract was a correct one, and, that being so, no fault can be found with the instruction which he gave.

But the defendant further says that it nowhere appears in the evidence that the cars were to be furnished at such time as he (the plaintiff) might need the same, as was declared in the complaint. That is true, but the charge was not harmful, because his Honor said that the defendant was required to furnish the cars within a reasonable time. On the question of the reasonableness of time within which the defendant was to have furnished the cars, raised by the fifth issue, his Honor told the jury that if they believed the evidence they should say that the defendant had failed to perform its part of the contract within a reasonable time. His Honor then decided that that question was a question of law, and in that view we concur. "What is a reasonable time within which a contract must be performed is a matter of law for the court, when it depends upon the construction of a contract in writing or upon undisputed extrinsic facts." 9 Cyc., 615, and cases there cited. Seventy-five or eighty days had passed between the date of the contract and the time when the defendant tendered the cars. That, in law, was an unreasonable delay, and is not palliated by the fact that the defendant used reasonable efforts to procure foreign cars upon which the

props might be loaded. That was a matter which the
(356) defendant should have looked to before making the contract.

The defendant further contends that the plaintiff ought not to recover damages for any loss he may have sustained by reason of the defendant's not having furnished cars to ship such props as were cut by the plaintiff before the contract was made. There is no force in that contention, for the defendant knew from the letters of the plaintiff that a large number of props had been cut before the day of the date of the contract, and that he wanted to ship them. The agreement to pay the freight for such shipment was a sufficient consideration to support the contract.

Then, again, the defendant insists that such props as were cut after the defendant had said that it might not be able to furnish the cars could not be made the subject of damages. The contract being a valid one, as we have said, the plaintiff had a right to proceed under it, and it was not in the power of the defendant to put an end to its obligation to perform its part of the contract simply because it could not carry it out. If that were the law, no person who may have been aggrieved by a breach of contract could have redress against one who had violated his part of it because he could not specifically perform what he had agreed to do.

But the defendant says that the plaintiff should have stopped his operations when he found that the defendant could not furnish cars to transport the props to Northern points. Under the contract, there was nothing said about the point of destination of the shipment of the props, and it was the defendant's duty to have furnished the cars to have transported the props to any point on its own line.

The question of the measure of damages does not arise, for it was agreed on both sides that if the plaintiff was entitled to recover anything, he was entitled to recover $2 per thou-
(357) sand feet, or a total of $350, and the sixth issue was answered accordingly.

Upon a full examination of the case, we are satisfied that there is

No error.

BROWN v. STEWART.

(Filed 8 March, 1904.)

STATUTES—*General Assembly—Journals—Const. N. C., Art II, Sec. 14; Laws (Private) 1903, Ch. 48.*

The statute herein set out was passed in accordance with Art. II, sec. 14, of the Constitution, requiring certain bills to be read three times in each house.

ACTION by George H. Brown and others against E. T. Stewart, as mayor of the town of Washington, and others, heard by *Judge W. A. Hoke,* at February Term, 1904, of BEAUFORT.

This is a controversy submitted to the court without action, pursuant to section 567 of the Code. The facts upon which the parties desire the decision of the Court are set forth with care and clearness. The affidavit is in strict conformity with the statute.

The plaintiffs are creditors of the defendant, the city of Washington, and hold the bonds and other evidences of indebtedness referred to in the act of the General Assembly (chapter 48, Private Laws 1903). Said bonds, etc., were issued for money borrowed for necessary expenses incurred in repairing streets, public buildings, etc. It is admitted that said bonds, etc., constitute valid and binding obligations of said city. The General Assembly, at its session of 1903, enacted chapter 48, Private Laws 1903, said act being ratified 9 February. The said (358) act recites that the city is indebted in the sum of $32,000, said debt being contracted for the purposes therein set forth, and evidenced as aforesaid, and is entitled "An act to authorize the board of commissioners of the town of Washington, North Carolina, to issue bonds to pay its existing indebtedness." The board of commissioners of said town are by said act authorized to issue bonds to the amount of $32,000, bearing interest at the rate of five per cent, and payable semiannually. The denomination of the bonds, the mode of authentication and manner of sale, etc., are fully set forth therein. It is provided that the proceeds of the said bonds shall be applied exclusively to the payment of the aforesaid indebtedness. Section 2 of the act provides that "The principal of all said bonds shall be due and payable on 1 May, 1933, but it shall be the duty of the board of commissioners of said town to pay $2,000 of the principal of said entire bond issue on 1 May, 1918, and $2,000 on 1 May of each year thereafter, until the entire principal of each bond is paid." Provision is made for selecting by lot the bonds to be paid at the

end of each year. By section 4 it is provided that the board of commissioners shall levy an annual special tax sufficient to pay the interest on said bonds, and "shall also levy during 1917, and each year thereafter, a special tax to produce an annual sum sufficient to pay and discharge $2,000 of the principal of said bond as each installment falls due under the provision of this act." Said act was passed in strict conformity to the provisions of Article II, section 14, of the Constitution. The General Assembly, at the same session, enacted chapter 170, Private Laws 1903, being entitled "An act to incorporate the city of Washington." Said act was introduced into the House of Repre-
(359) sentatives and read on three several days, passing its several readings; upon each reading the yeas and nays were called and entered on the Journal in strict accordance with section 14, Article II of the Constitution. The bill, after having passed the House, was sent to the Senate, duly read and passed upon its first reading without amendment. On a subsequent day sections 84, 85 and 86 were offered as an amendment, adopted by the Senate and made a part of the bill. After being so amended, the bill passed upon its second and third readings, upon two several days, upon a call of the yeas and nays, and recorded on the Journal in accordance with the constitutional requirement. Section 85, chapter 170, Private Laws 1903, is as follows: "The several sections and provisions of an act of the General Assembly ratified 9 February, 1903, entitled 'An act to authorize the board of commissioners of the town of Washington, North Carolina, to issue bonds to pay its existing indebtedness,' are hereby made a part of this act, with the following amendments, viz.: Where figures or words occur in section 2 of said act of 9 February, 1903, they shall be changed to 1938, and where words or figures 1918 occur in said section of said act they shall be changed so as to read 1923, and where words or figures 1917 occur in the fourth section of said act of 9 February, 1903, they shall be changed so as to read 1922. All the bonds issued in pursuance of this act or the act ratified 9 February, 1903, shall be exempt from municipal taxation by said city, and all shall be payable in the gold coin of the United States, and all the coupons receivable in payment of taxes by said city, and the interest upon all shall be payable semiannually upon 1 November and 1 May of each year, at such place as the board of aldermen may designate." The said bill, after being passed by the Senate, as aforesaid, was returned to the House. The Senate amendment was concurred in, and the bill, as amended, duly read and
(360) passed on two several days, the yeas and nays being taken and recorded in accordance with the Constitution, sec. 14,

Art. II. Both of said acts were duly enrolled, ratified and published by the Secretary of State, as provided by law.

It is admitted that the indebtedness, for the payment of which said bonds were directed to be issued, is past due and unpaid.

The defendants duly advertised said bonds for sale, in accordance with chapter 48, Private Laws 1903, as amended by section 85, chapter 170. They were bid off by one Stafford, who declined to take and pay for them, assigning as reason therefor that section 85 of chapter 170 was not read three times in the Senate. The plaintiffs insist that it is the duty of the defendants to again offer said bonds for sale, as required by said acts of the General Assembly. His Honor, upon the foregoing agreed state of facts, was of the opinion that chapter 170, Private Laws 1903, was duly and regularly enacted into law and ratified on 27 February, 1903, in accordance with Article II, section 14, of the Constitution. That the amendment thereto, adopted on and before the second reading of the bill, and the bill so amended having passed its several readings in accordance with the Constitution, said amendments constituted a part of said act as passed and ratified. That the effect of the enactment of section 85, chapter 170, was to amend chapter 48, Private Laws 1903. It was thereupon adjudged that the defendants proceed to again offer the bonds for sale and issue same in manner and form as set out in chapter 48, as amended by section 85, chapter 170, and apply the proceeds as therein directed. From this judgment defendants appealed.

S. B. Shepherd for the plaintiffs.
S. G. Bragaw for the defendants.

CONNOR, J. We do not entertain any doubt of the cor- (361) rectness of the conclusion reached and the judgment rendered by his Honor. The board of commissioners of the town of Washington were empowered by chapter 48, Private Laws 1903, to issue the bonds for the purpose of paying a valid outstanding and past-due indebtedness of said town, as therein stated. This act is full and complete in its provisions. Having been enacted in strict conformity to the constitutional requirement, as uniformly construed by this Court, there can be no possible doubt of its validity. We are unable to perceive how by any rule of construction the provisions of section 85, chapter 170, can be said to "pledge the faith" of the town or "impose any tax." It will be observed that by chapter 48, section 2, the bonds were to mature 1 May, 1933. This date is changed to 1988. Two thousand dollars of the bonds were to be paid in 1918; the date is changed to 1923. The first annual tax to pay the first install-

ment is directed to be levied in 1917; the date is changed to 1922. The effect of the amendment is to postpone the date of maturity five years, and the other dates are so changed that the harmony of the original scheme is preserved. Upon the principle announced in *Glenn v. Wray,* 126 N. C., 730, we can see no reason why the bill as amended was not passed in the Senate in conformity with the Constitution and the well-known rules of procedure in both houses of the General Assembly of this State. We can see no reason why the amendment, imposing no tax, creating no debt nor increasing the amount of the bonds or the rate of interest thereon, could not be adopted by the Senate and incorporated into the original bill, on and before its second reading. Certainly this ruling in no manner conflicts with what is said in *Glenn v. Wray, supra.* His Honor was of the opinion that the effect of section 85, chapter 170, was to amend chapter 48. Much could be said in support of the view that
(362) chapter 48, as amended, was incorporated into and made a part of chapter 170. It is not very material which view we take, as the result will be the same. The judgment of his Honor is affirmed. To prevent any possible misconception, we think it proper to say that we have decided this case upon "an agreed state of facts" in a controversy without action. We do not pass upon the admissibility of the Journals, or other evidence, for the purpose of invalidating or affecting the integrity of the certificates of the presiding officers that said act was "In the General Assembly read three times." It does not appear that there was any objection made to the evidence in *Glenn v. Wray, supra.* The Court has held in *Bank v. Commissioners,* 119 N. C., 214, and several recent cases, that the Journal is competent evidence to show whether the provisions of section 14, Article II of the Constitution, have been complied with. The writer of this opinion thinks it is not improper to say, speaking for himself, that, unless compelled by overwhelming and controlling authority, he would hold that the principle announced in *Brodnax v. Groom,* 64 N. C., 244, is to be rigidly adhered to, save in the clearly defined exception made in *Bank v. Commissioners, supra.* The judgment of his Honor is

Affirmed.

Cited: Comrs. v. Stafford, 138 N. C., 455; *Bank v. Lacy,* 151 N. C.

(363)

PAUL v. WASHINGTON.

(Filed 8 March, 1904.)

1. ORDINANCES—*Injunctions—Municipal Corporations.*

The validity of an ordinance cannot be tested by an injunction.

2. ORDINANCES—*Intoxicating Liquors—Police Power—Code, Sec.* 3800.

Ordinances which provide that saloons shall keep windows and doors so as not to conceal the interior; that no partitions shall be used; that no liquors shall be delivered through any window or door; that no sales shall be made between 8 o'clock p. m. and 6 o'clock a. m.; that the saloon shall be kept well lighted; that no billiard, pool or gaming table shall be kept therein, and that no restaurant or eating-house shall be kept therewith, are reasonable and, therefore, valid when the charter allows the regulation or prohibition of spirituous liquors by the municipality.

3. ORDINANCES — *Intoxicating Liquors — Police Power — Trial — Licenses.*

Where a town charter allows the regulation and sale of spirituous liquors, an ordinance allowing the revocation of licenses upon the breach of certain ordinances regulating the sale, the licensee agreeing thereto upon receiving his license, is valid.

DOUGLAS, J., dissenting in part.

ACTION by Smith Paul against the city of Washington, heard by *Judge W. A. Hoke,* at chambers, at Elizabeth City, N. C., 23 January, 1904.

This is an appeal of the plaintiff from an order made by *Judge Hoke,* in which he dissolved a restraining order theretofore made in the case. The plaintiff was, before 1 January, 1904, and at the time this action was commenced (18 January, 1904), engaged in retailing liquor in the city of Washington, N. C., in a large two-story brick building, situated at the corner of Main Street and Whitecar Alley. There is a (364) front door upon Main Street and a side door upon Whitecar Alley, and also a door from the rear of the building, into the lot upon which the building stands; and there has been, and still is, a cellar beneath the building, with a trap door leading to the cellar, and the cellar has been used and could be used for storage purposes. Prior to 1 January, 1904, the plaintiff rented out the second story of the building as a general restaurant, and a part of the time conducted the same on his own account.

On 4 November, 1903, the board of aldermen of the city of Washington enacted and adopted (to go into effect on 1 January, 1904) the following ordinances:

"1. That it shall be unlawful for any person, firm or corporation carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation, to have, use, permit or allow in their saloon, salesroom or place of business any storm doors, partitions, screens, blinds, stained glass or any contrivance which shall in any manner obstruct the view of the interior of his or their saloon, salesroom or place of business, or any part thereof, or which shall in any manner conceal or cut off any view of any person or persons in such saloon, salesroom or place of business from and through the front door and windows thereof. All front doors shall be glass-paneled, one glass to the shutter; the bottom of said panel shall not be more than four feet in height from the level of the sidewalk; the bottom of glass in all front windows shall not be more than four feet in height from the level of the sidewalk; all glass in front windows and front doors shall be kept clean of dirt, specks or anything that will dim or obstruct the view of the interior of such saloon, salesroom or place of business. No counters shall extend more than fifty feet from the front door or doors of said saloon or saloons. (365) All liquor shall be served at the counter, and all liquors drank in said saloon or saloons shall be drunk at the said counter or counters; and any person violating this ordinance shall, upon conviction thereof, be fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"2. That it shall be unlawful for any person, firm or corporation carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation, to use, permit or allow any side door or rear door, trap-door, elevators or stairways for entrance to or exit from his or their saloon, salesroom or place of business by side or rear door or place of entrance or exit; nor shall any spirituous, vinous or malt liquors be sold or delivered through any window or other opening, and any person violating this ordinance shall, upon conviction thereof, be fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense: *Provided,* nothing herein contained shall prevent the use of such back or side doors by the person or persons carrying on said business, his or their agents, servants or employees, for purposes other than the sale or delivery of liquors.

"3. That it shall be unlawful for any person, firm or corporation to whom shall be granted a license to sell spirituous, vinous or malt liquors by the board of aldermen of Washington, or for

any agent, servant or employee of such person, firm or corporation to sell, give away or in any manner part with, directly or indirectly, any liquor or drinks in his or their saloon, salesroom or place of business between the hours of 8 o'clock in the evening and 6 o'clock in the morning, or permit or allow the doors of his or their saloon, salesroom or place of business to be opened or remain open between said hours; and every person violating this ordinance shall, upon conviction thereof, be (366) fined fifty dollars. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"4. That in every saloon or room where the business of selling spirituous, vinous or malt liquors shall be carried on under a license from the board of aldermen of Washington, the person, firm or corporation holding such license shall keep burning throughout the period of darkness, each and every night, a gas or electric light, of such brightness that objects in the rear of said room may be plainly seen; and no such room shall be entered, opened, kept open or occupied by any person whomsoever between the hours of closing on Saturday night at 8 o'clock and the hours for opening on the next Monday morning at 6 o'clock. Any person, firm or corporation, or his or their servant, agent or employee who shall violate this ordinance shall, upon conviction thereof, be fined fifty dollars.

"5. That it shall be unlawful for any person, firm or corporation carrying on the business of selling spirituous, vinous or malt liquors in Washington, or for any agent, servant or employee of such person, firm or corporation, to have, use, permit or allow in his or their saloon, salesroom or place of business, or in any room connected therewith, any billiard table or pool table, tenpin alley, gaming tables or any games or gaming devices whatsoever, whether the same be played or used or played for amusement and exercise or for anything of value; and it shall also be unlawful to have, use, permit or allow in his or their saloon, salesroom or place of business, or in any room connected therewith, any restaurant, eating house, room or table, or any means or contrivance whatever for providing, supplying or furnishing food, whether the same is to be provided, supplied or furnished for giving away or for selling to customers; and it shall be unlawful to permit or allow in his or their saloon, (367) salesroom or place of business obscene pictures, the printing to be exposed to view on the walls thereof or elsewhere in the room. Any person, firm or corporation, his or their agents, servants or employees who shall violate this section shall, upon conviction, be fined fifty dollars.

"6. No saloon shall be conducted nor shall any spirituous, vinous or malt liquors be sold or disposed of in any building in which there is a restaurant, eating house, room, table or any means or contrivance whatever for providing, supplying or furnishing food, whether the same be provided, supplied or furnished free or for pay: *Provided,* this shall not apply where the saloon or place wherein liquor is disposed of and the room or place where food is furnished or supplied shall be separated by one or more solid, upright, perpendicular walls, with no doors nor openings of any kind therein. Any person, firm or corporation, his or their agents, servants or employees who shall violate this section shall, upon conviction, be fined fifty dollars.

"7. That any and all licenses hereafter granted by the Board of Aldermen of Washington for the sale of liquors shall be issued by the said board and accepted by the applicant therefor, upon the express condition that a violation of any of the foregoing provisions of any statute or ordinance regulating the sale of liquors in or at the saloon, salesroom or place of business for which the license has been granted shall work a forfeiture of said license, and that the said board of aldermen, upon satisfactory evidence of such violation, shall have the power of declaring such license revoked, and such condition shall be incorporated in the license when granted. Upon complaint made to the mayor that any person, company or firm has violated any of the said ordinances or statutes, he shall forthwith summon such person, company or firm to appear before the board of aldermen
(368) at a given time, not less than three days' notice being given, to show cause why such license should not be revoked."

On 2 January, 1904, the ordinances being in full force, a license to retail liquor was granted to the plaintiff by the board of aldermen, upon a condition inserted in the license that a violation of any of the ordinances should work a forfeiture of the license.

Charles F. Warren for the plaintiff.
Bragaw & Ward for the defendant.

MONTGOMERY, J., after stating the facts. The plaintiff commenced this action for relief by injunction, his object being to avail himself of the benefits of his license and at the same time to restrain and enjoin the defendant from enforcing the ordinances, on the ground that they were oppressive, vexatious and unreasonable. He is met *in limine* by the contention on the part of the defendants that he cannot try the validity of an ordinance

of a municipal corporation by injunction, and that he can have no relief in equity, because he can have full relief in a court of law if the ordinance be unlawful. *Cohen v. Comrs.,* 77 N. C., 2; *Wardens v. Washington,* 109 N. C., 21; *Scott v. Smith,* 121 N. C., 94, were cited in the argument of the defendant's counsel here in support of the contention.

In answer to that position, the counsel of the appellant, while questioning the correctness of the law of those cases, yet insists that the facts there can be distinguished from those in the present case; that the reason assigned in those cases by the Court for denying redress in equity is, that the plaintiff could have complete redress in an action at law for damages; that the Court certainly could not have meant that damages could be recovered against the municipal corporations, for the reason that municipal corporations are not liable for torts in the (369) nature of trespass committed by their officers (policemen) when they undertake to enforce unconstitutional and void ordinances enacted in the attempted exercise of police powers or public or governmental functions; nor could it have intended to say that damages could be recovered against the members of the boards of aldermen of cities and towns, individually or personally, for municipal officers who enact ordinances under a claim of power from the legislative branch of the government are vested with the immunities and privileges of government, and consequently are exempt from liability if they have made a mistaken use of their powers, and that the Court must have meant, therefore, that the policemen who actually made the arrests under an unconstitutional municipal ordinance are liable in damages to the person aggrieved. And the counsel of the appellant further insisted that, as in the present case the policemen are and were insolvent, and on that account a recovery against them would be worthless and afford no redress to the appellant for injuries he may have sustained if the ordinances are void, the case was easily to be distinguished from *Cohen v. Comrs., supra,* and the other similar cases mentioned, where it did not appear that the officers making the arrests were insolvent.

The counsel further contended that the suggestion made in *Wardens v. Washington, supra,* that one who doubts the validity of a municipal ordinance might raise the question by a defense of himself when he might be arraigned upon a criminal charge for an alleged violation of a town ordinance, places the complainant at a disadvantage; that it would be a hard law to compel a citizen who has no redress in the way of damages against the municipal corporation or its aldermen personally, or from the constable or policeman (on account of his insolvency) who makes

an arrest under an unlawful ordinance, to compel him to
(370) violate the law (the ordinance), at his peril, in order to test its validity.

The writer of this opinion is in sympathy with the argument of the counsel of the appellant, but the majority of the Court are of the opinion that the law as laid down in the cases above cited is correct in principle and applies to the facts of this case and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction. That view of the case by the Court will relieve us of the consideration of the question of the alleged unlawfulness of the ordinance; but as a decision upon that branch of the case would be of so much importance to the public, we will now take up that question for discussion and decision.

No question can be raised in this case as to the power of the board of aldermen to pass reasonable ordinances to restrict and regulate the liquor traffic in Washington, and even to prohibit it if they see fit to do so. In section 18 of chapter 170, Private Laws 1903, entitled "An act to incorporate the city of Washington," it is enacted "That among the powers conferred on the board of aldermen are these: they may . . . regulate, control, tax, license or prevent the establishment of junk and pawn shops, their keepers or brokers, and the sale of spirituous, vinous or malt liquors; . . . provide for the proper observance of the Sabbath, and the preservation of the peace, order and tranquillity of the city." It was argued in this Court for the defendant that, as the board of aldermen were given the power to prevent the sale of intoxicating liquors within the city limits, therefore, under the maxim that "The greater includes the less," ordinances regulating and restricting the traffic, if the aldermen should see fit not to prevent, but to license, whether reasonable or unreasonable, were matters in their discretion, and not reviewable by the courts. We think that that is not a proper view of the powers of the aldermen or of the rights of those
(371) who may be licensed to sell liquor by the board. They, as we have said, had the right to prevent or prohibit entirely the sale of liquor. They had also the power to license the traffic and to regulate it, and, having adopted as a choice the plan of licensing and then regulating, it must follow that regulations and restrictions must be such as are reasonable, and their reasonableness must be, in case of contest, finally decided by the courts. *S. v. Taft,* 118 N. C., 1190; 32 L. R. A., 122; 54 Am. St., 768; *S. v. Yopp,* 97 N. C., 477; 2 Am. St., 305.

In the consideration of the reasonableness of these ordinances it must be understood that they are to be discussed from the

point of view of our State legislation on the subject of the liquor traffic and the decisions of our courts upon that legislation. The restrictions and limitations with which the legislative branch of our government for many years past, at the demand of a strong and aggressive sentiment, individual and public, against the evils of intemperance have environed this traffic, and the firm support of this legislation by the courts afford unmistakable evidence that the traffic is dangerous to society in its moral effects, and injurious to the material welfare of the commonwealth. The police power, directly through the Legislature and indirectly through municipal corporations, is being more and more exercised in the regulation and suppression of the sale of liquor on the theory that it is evil in its nature, until such legislation has grown into a system of temperance legislation. Each encroachment, however, has been stubbornly resisted by those engaged in the trade. This Court has in no uncertain language approved of the legislation on this subject. In *Bailey v. Raleigh,* 130 N. C., 209; 58 L. R. A., 178, the Court said, referring to the restrictions in the prohibition act for Raleigh: "This is done under the exercise of the police power, owing to the evil tendency of the business"; and in *S. v. Ray,* 131 N. (372) C., 814; 60 L. R. A., 634; 92 Am. St., 795, "liquor itself is regarded as an evil; an enemy of civilization and good government."

From the standpoint of the statute law on the subject and the decisions of the Court the rule with reference to what the law would regard as undue restrictions upon a useful business cannot be the same as that applicable to the liquor traffic. What would be a deprivation of the use of property without due process of law, or an infringement of personal liberty against one engaged in a useful trade, would not be such when considered in connection with the property or person with one engaged in the sale of intoxicating liquors, as is pointed out in *S. v. Ray, supra,* where the Court said: "It must be understood that they (saloons) stand on a very different footing to the sale of dry goods and family groceries. Liquor itself is regarded as an evil, an enemy of civilization and good government. Its sale without a license is condemned and prohibited by law, and the regulations closing at certain hours such shops might well be put upon the implied power as being for the public good."

In looking at the ordinances as a whole it is readily seen that the aldermen in enacting them had in view the purpose to cause the licensee to give publicness to whatever might go on inside of the place in which liquors might be sold instead of allowing secrecy about the matter; to break up, as far as possible, loafing

and loitering in saloons; to prohibit the young or those who might not be permitted to enter the front doors to come in by means of side and rear doors in a clandestine manner, or to get liquor from rear and side doors, or to do indirectly the same thing by means of having eating houses connected with the drinking places; to take from the saloons enticements and allurements which have a tendency to attract the senses and develop and foster the susceptibility of vice and immorality; to
(373) close the saloon at hours when general work is over for the day, to the end that the inexperienced, the young and impressionable and the unfortunate of those who have been at work in useful occupations may not be induced to spend their evenings and their money in the barroom; and to have lights kept burning and doors closed during prohibited hours, that the officials may more easily preserve the public peace and order, and that the public may know that the laws in respect to the retailing of intoxicating liquors are being obeyed.

In respect to the first ordinance it is insisted for the plaintiff that that part forbidding the use of partitions was not only enacted without authority and is unreasonable, but that it is positively mischievous, in that it prevents the separation of the white and negro races while they are drinking in the saloon. The law has no requirement for race separation in barrooms, and if their keepers think it necessary to make the separation there is really nothing in the ordinance that prevents them from so doing. The partition can be run from the front toward the counter, and one side can be allotted to one race and the other to the other, and the ordinance will not be violated, for it only provides that the partitions or screens shall not "conceal or cut off any view of any person or persons in such saloon, salesroom or place of business from and through the front doors and windows thereof." We have no decisions of this Court on the subject of the power of municipal corporations, or even of the General Assembly, to prohibit the use in saloons of storm doors, screens, stained glass or any contrivances which obstruct the view of the interior of saloons, or as to what kind of doors and windows, whether of glass or of other material, shall be used; but the decisions from other States fully sustain the requirements of the first ordinance in all these respects, and we
(374) are of the opinion that the ordinance is a reasonable one.

We think further that that part of the ordinance which requires that all liquors shall be served at the counter and shall be drunk at the counter is also a reasonable requirement, being calculated to prevent loafing and loitering, and also to diminish the quantity that might be drunk. Drinking to excess would

certainly be more apt to take place where guests could be seated around tables or on lounges with other attractions that might be offered.

In regard to the second ordinance the contention of the plaintiff is that it is "arbitrary, oppressive, vexatious, unreasonable and void," in that it deprives the plaintiff of the use and convenience of his property without due process of law. By that ordinance saloon keepers and their servants and employees are not permitted to use any side or rear doors, or trap-doors, elevators or stairways for the purpose of selling or delivering liquor through such communications, but the ordinance does not prohibit the use of such entrances and exits for any other purposes than the sale and delivery of liquors. That certainly is a restriction upon the plaintiff's property, but in our opinion it is not an unreasonable restriction; certainly not one so unreasonable as to warrant us to declare it void. As was said in the case of *S. v. Yopp,* 97 N. C., 477, "Such statutes (police regulations) are valid unless the purpose or necessary effect is not to regulate the use of property but to destroy it. As we have said, it is the province of the Legislature to decide upon the wisdom and expediency of such regulations and restraints, and the courts cannot declare them void or interfere with their operations unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence are not within the proper exercise of the police power of the government. Courts cannot regulate the exercise of this power, they can only declare the invalidity of statutes that transcend its limits. The (375) exercise of this power does not extend to the destruction of property under the form of regulating the use of it, unless in cases where the property or the use of it constitutes a nuisance." The plaintiff's property is not destroyed by this ordinance. It is true the regulations concerning its use by the aldermen are stringent, but we cannot say they are too much so when the purposes for which the building is being used are taken into consideration. The board of aldermen have said that that part of the plaintiff's building which he uses for the sale of liquor is a suitable place and sufficient for that purpose, and that the use of the forbidden parts of that building in connection with the sale of liquor are not necessary and would prevent, if so used, the proper regulation of the sale of spirituous liquors. We have no doubt that the defendants, under the power given in the charter, had a right to confine the sale of liquor to a particular room in that building, and to prohibit the use of side and rear doors, trap-doors, elevators and stairways leading to and out of that room for the purpose of selling or delivering liquors.

It is contended that the third ordinance is unlawful for the reason that it prohibits the selling or giving away liquors between the hours of 8 o'clock in the evening and 6 o'clock in the morning, and also that it prohibits the saloon keeper or his employees to open the doors or allow them to remain open between said hours. In *S. v. Thomas,* 118 N. C., 1221, the hours prescribed by the ordinance were 10 o'clock p. m. and 4 o'clock a. m., and there was no question made in that case on the reasonableness of such hours. It seems to us that the hours of closing and opening in the case before us are not unreasonable. For a few months in the year there might be, in the mornings, a couple of hours of daylight in which the retailing of liquor (376) might be carried on, but it does seem that those hours—hours in which the greater number in each community is engaged in preparing for the day's duties and living—might be spent in some useful way without injury to the saloon keeper. He would then have nearly fourteen hours in which to supply the demand for his wares. That ought to be ample time for all legitimate needs and necessities.

So far as the requirement in the fourth ordinance—that places for the retailing of liquor shall be kept reasonably lighted—it seems to us there can be no just objection, for on its face it seems a very fair and proper police regulation; but in respect to that requirement which makes it unlawful for the owners of saloons to enter their buildings between the hours of closing on Saturday night at 8 o'clock and the hour for opening next Monday morning at 6 o'clock, we have some doubt. In *S. v. Thomas,* 118 N. C., 1221, the charge was that the defendant remained in his barroom after the hour prescribed for closing. In that case the ordinance made "it unlawful for any barkeeper, clerk or agent or any person whatsoever to keep open or be or remain in a barroom or other place where spirituous or intoxicating liquors are sold between 10 o'clock p. m. and 4 o'clock a. m. The Court there held that the charter of Marion did not empower the town to pass the ordinance, and that under the general law (Code, sec. 3800) the power did not exist to pass the ordinance. Under the charter of the city of Washington the board of aldermen, as we have seen, had the power either to prohibit the sale of liquor or to regulate and control its sale, and the only question is whether this part of the fourth ordinance, preventing the owners of saloons from entering their saloons during Sundays, is reasonable. As we have said we have our doubts about this matter, but as that part of the ordi- (377) nance is not clearly unreasonable, and remembering that the board of aldermen have full opportunity to judge of

such a necessity, we do not feel called upon to set aside their judgment by declaring the ordinance invalid on the ground that it is unreasonable. We cannot see that the objections to the fifth ordinance are reasonable objections. Billiard tables, pool tables, gaming tables, ten-pin alleys and other gaming devices, whether played for amusement and exercise or for anything of value, are such attractions as ought not to be used in saloons where liquor is sold. They entice and allure men into the temptation to drink, and encourage loafing and lounging. It is true that in the Revenue Laws of 1903 a tax is levied on billiard and pool tables and bowling alleys connected with any place where liquor is sold or allowed to be drunk, whether kept under the same roof or not, but it does not follow from this that it is not in the power of a municipal government that is authorized by its charter to prohibit the sale of liquor, or to license its sale and then regulate it and declare that billiard and pool tables shall not be used in connection with barrooms. It is only where they are not prohibited from being used by the lawful authority that they can be taxed. Under the fifth ordinance there is no prohibition against the use of restaurants or eating houses, rooms or tables for providing or furnishing food, being kept in the same building in which liquor is sold, but the prohibition is against having such restaurants or eating houses connected with the barroom. We cannot say that that prohibition is unreasonable. The sixth ordinance enacts that no place where spirituous, malt or vinous liquors are sold or disposed of shall be in any building in which there is a restaurant, eating house, room, or any means or contrivance for providing or furnishing food, unless the two places shall be separated by one or more solid upright perpendicular walls with no doors nor openings of any kind therein. That seems to us a very proper regulation. Such a con- (378) dition of affairs we can see would be most conclusive to the bringing together of elements of society whose conduct in many instances would tend to produce disorder. We may take judicial notice of a fact so well known, that these joint eating houses and drinking saloons afford opportunities for carousals and lawlessness, and are sore spots in many communities.

It is provided in the seventh ordinance that in case of a violation of any of the ordinances of the town regulating the sale of liquor by one licensed to sell liquor, the board of aldermen may have the power to investigate the matter and to revoke the license in case it should be found that the ordinance had been violated. We see no objection to the ordinance as applicable to this case, especially as the plaintiff in this case had agreed to that method of trial. But if that ordinance was invalid yet the others would

not be affected, and the plaintiff or any licensee of the board of aldermen of Washington might be made to pay the fines mentioned in the ordinances by the proper tribunal, upon its being made to appear that the ordinance had been violated.

Chapter 233, Laws 1903, has no application to the city of Washington for, as we have seen, the charter of that city confers on the aldermen the power to regulate or to prevent the sale of intoxicating liquors, and section 19, of chapter 233, of the Laws of 1903, particularly declares the purpose of the act to be not to interfere with such municipalities or territories as are given the power to regulate or to prohibit the sale of intoxicating liquors.

No error.

(379) WALKER, J., concurring. This action was brought to enjoin the defendant from enforcing certain ordinances regulating the liquor traffic within its corporate limits, and from revoking and canceling the plaintiff's license to sell liquor, and to declare the said ordinances null and void upon the ground that they impose unreasonable, vexatious and oppressive restrictions upon the business of selling liquors by those who are licensed to do so by the town authorities. The motion for the injunction was denied, and the plaintiff appealed. It is sufficient, I think, for the purpose of deciding the case in the view I take of it, to state that it is provided by the several ordinances in question that the business of retailing liquors shall be conducted under certain rules and regulations specified in the ordinances, and that a failure to comply with the said rules and regulations or the violation of any of the ordinances subjects the offender, upon conviction, to a fine of fifty dollars for each day on which a violation occurs. It is not necessary to set forth the terms of the several ordinances more particularly than I have done as the Court, in my opinion, is not at liberty to consider the general question of their validity, because of an objection of the defendant *in limine,* which is fatal to the plaintiff's action, namely, that if we concede for the sake of the argument the ordinances are invalid, the plaintiff is not, upon the facts stated in his affidavit, entitled to any relief by injunction.

The plaintiff, upon affidavit, obtained a restraining order and an order to show cause why an injunction to the hearing should not be issued, and on the return day of the order the motion for a continuance of the injunction was heard upon the affidavits, as is stated in the order, no complaint having been filed, though it is recited in the original restraining order that it was granted upon the complaint and affidavits. Regularly the motion to continue the injunction should not have been

heard until the complaint was filed, and it may be that (380) the law contemplates in a case like this one that the complaint shall be filed in the beginning, so that the court may see clearly and distinctly that the plaintiff is entitled to the relief demanded, "where it consists in restraining the commission or continuance of an act" (Code, sec. 338); but, however this may be, it would seem to be good practice to require the complaint to be filed when the motion to continue is heard, for it is the allegations of the complaint, and not of affidavits merely, that ascertain and determine what is the cause of action out of which arises the right or equity that requires protection pending the litigation. But I will consider the case without reference to the question of pleading and practice, as I desire to state my views upon the legal merits involved.

There are two objections to the plaintiff's right to maintain this action: *first,* the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penalties; and *second,* the defendant under its charter had the power "to prevent, control, tax, license or regulate the sale of spirituous, vinous or malt liquors," and the defendant, having applied for and accepted his license with full knowledge of the terms of the ordinances is not in a position to question their validity, but must exercise the right and privilege of selling conferred by that license in strict compliance with the conditions and restrictions imposed.

In regard to the first objection we must bear in mind that if the Court should issue an injunction against the institution of a criminal prosecution it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the State in whose sovereign name and capacity all criminal cases are commenced and prosecuted, and the State is not even a party to this action, (381) and her rights cannot be prejudiced without notice and a hearing, even if we could entertain for a moment with any seriousness the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by statute a misdemeanor. Code, sec. 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the right of the complaining party, or in this par-

ticular case, the validity of the ordinance has been first determined in an action at law.

The true principle governing such a case is well stated in *Wallace v. Society,* 67 N. Y., 28: "The general rule is that the Court will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the Court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the Chancellor, in *West v. Mayor,* 10 Paige, 539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a corporation ordinance claimed to be invalid. The unconstitutionality of the act of 1872 would be a perfect defense to a prosecution for the penalties given by it, and the question as to the constitutionality of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the Court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties.
(382) But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage rather than restrain litigation." Further the Court thus states the law: "The question as to the validity of a corporation ordinance does not properly belong to this Court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants or those in their employ liable for the penalty. And it would be an usurpation of jurisdiction by this Court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the Court. . . . This Court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits." In 16 Enc. of Law, p. 370, we find the following succinct statement of the principle: "It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the

jurisdiction of the court and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void or that the party seeking the injunction has not committed a violation of the ordinance, or that the complainant in the prosecution under the ordinance states no cause of action." In *Burnett v. Craig,* 30 Ala., 138, the plaintiff sought to enjoin (383) the enforcement of an ordinance against the sale of liquor, and the Court said: "We have found no case, however, where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits or to avert irreparable mischief. . . . The judgment and sentences of the town council, of which the appellant complains, were *quasi* criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. . . . We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or *quasi criminal,* or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case, simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant; they will be considered when properly presented." In *Moses v. Mayor,* 52 Ala., 198, it is said: "Courts of equity will not interfere to stay proceedings in criminal matters or in any cases not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone. . . . A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel (384) impression, and there is neither principle nor authority to support it. . . . Municipal authorities would be paralyzed in discharging the public duties entrusted to them if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the inference of a court of equity. . . . The counsel

for the appellant have sought to withdraw the case presented in the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the Court." And to the same effect are the following authorities: *Devron v. First Municipality,* 4 La. Ann., 11; Beach on Injunction, sec. 520; *Eldridge v. Hill,* 2 Johns. Ch., 281; *Field v. Western Springs,* 181 Ill., 186; 1 Spelling Inj. and Extr. Rem., sec. 694. In *Burch v. Cavanagh,* 12 Abb. Pr., 410, it was held that an injunction will not lie to restrain an illegal arrest, and that several persons who were threatened with arrest could not unite in the same action to prevent it; and further, that the insolvency of a person who threatens to make the arrest cannot be ground for an injunction to restrain him. *Hottinger v. New Orleans,* 42 La. Ann., 629, in its essential facts, is very much like the case at bar. The plaintiff alleged that the defendant, by the attempted enforcement of an illegal and void municipal ordinance, was interfering with her dairy business, and by its unauthorized acts was injuring her property and impairing the value thereof. The Court, after stating that as a court of equity it had no power by in-
(385) junction to prevent a municipal corporation from enforcing penal ordinances in the interest of public order and health, said: "The ordinance was enacted in pursuance of the police power vested in the city, whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot therefore be considered in determining the question of jurisdiction. The enforcement of the ordinance vested by the Constitution and law of the State upon the recorder's court of the city of New Orleans. If the ordinance is unconstitutional as alleged, the plaintiff can suffer no injury, as she has her remedy and can urge her defense in the recorder's court. Failing there she has her remedy by appeal to this Court." In *Cohen v. Commissioners,* 77 N. C., 3, this Court said: "If the defendants have an unlawful ordinance and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages. And as often as the arrest may be repeated they have the like redress; but we are aware of no principle or precedent for the interposition of a court of equity in such cases." The principle has been expressly affirmed

in *Wardens v. Washington,* 109 N. C., 21; *Scott v. Smith,* 121 N. C., 94, and recognized and applied in *Vickers v. Durham,* 132 N. C., 880; *Busbee v. Lewis,* 85 N. C., 332; *Busbee v. Macy,* 85 N. C., 329, and *Pearson v. Boyden,* 86 N. C., 585. While, as we have said, the fact that the police officers of the town are insolvent does not take this case out of the general rule, it may be added that process can be issued by the mayor, who is made by statute a magistrate and custodian of the peace, with a jurisdiction of a justice of the peace, to any lawful officer, such as a sheriff, town constable, etc. Code, secs. 2079, 3808, 3811 and 3818; *S. v. Cainan,* 94 N. C., 880, and the execution of such process is not confined to the policemen of the (386) town. But if an injunction is the proper remedy the plaintiff must fail in this suit, as his case presents no equity to be protected by the restraining process of the court. The ordinances in question were adopted by the defendant before the plaintiff applied for and obtained his license to retail liquor, and he knew of their existence and accepted the license subject to the conditions and regulations imposed by them. Under these circumstances what moral or legal right has he to question their validity? The Legislature may prohibit or restrict the sale of liquor in any manner its wisdom or discretion may dictate, and no one has any natural or absolute right to sell liquor. If he sells at all it must be on such terms as the law may impose. The law in this respect is thus stated in *Crowley v. Christinsen,* 137 U. S., 91: "The police power of the State is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authorities." The same doctrine is thus stated by this Court in *Bailey v. Raleigh,* 130 N. C., 214, as follows: "It (the Legislature) had the right to have absolutely prohibited the intestate or any one else from selling liquor within one mile of the corporate limits of the city. *This it did unless* the party selling obtained a license or permission to do so from the city authorities. Instead of this right to do so with the permission of the city authorities being a restriction, its effect was to relax the prohibitory rule and to grant him a right he did not otherwise have. The law (387) allowing him to get a license from the city took nothing from him and imposed no duty upon him; it only gave him an

option, a right to take the license and pay the tax or not. How he was damaged by having this privilege, this option, which he chose to accept, we are unable to see." When, therefore, the law conferred upon the defendant the power to "prevent, regulate, control, tax or license the sale of spirituous, vinous and malt liquors," as they had the power to prevent or, what is the same thing, to prohibit the sale, this necessarily implied that they could grant license upon any terms or conditions they saw fit, in the exercise of their judgment or discretion, to impose or to annex to the grant. "A grant of entire control or of power to suppress and restrain would enable the corporation to adopt any mode of regulation within the limit of those powers, license included." Horr and Bemis Mun. Pol. Ord., p. 250. "Regulating a thing is the prohibition of it, except in accordance with certain rules. This act prohibits the sale and manufacture of intoxicating liquor, except under certain regulations therein provided." *Cantine v. Tillman,* 54 Fed., 975.

I confess my inability to understand how a person, who upon his own application has received a license in which is stated that it was issued "subject to all ordinances of the city of Washington now in force and hereafter enacted, and upon the condition that a violation of any ordinance of the city shall work a forfeiture of said license," can continue to enjoy the right and privilege conferred by the license and repudiate the conditions upon which it was granted. He must take the burden with the benefit or privilege he has sought and accepted. If the plaintiff is about to suffer any injury to his property it is one which he has voluntarily and deliberately brought upon himself by accepting a license so worded, and he has no good reason to
(388) complain. He is the author of his own misfortunes, if any are about to overtake him, and I am not aware of any principle of law or morals upon which he can justly appeal to a court of equity for relief.

Having concluded that the Court has no jurisdiction to grant the relief demanded it is unnecessary to consider the question argued by counsel as to the reasonableness and validity of the ordinances. That matter is not before the Court, and anything I might say would be the expression of my individual opinion upon an abstract and hypothetical question. I agree with the majority of the Court that the ruling below by which the injunction was dissolved was right.

CLARK, C. J., and CONNOR, J., concur with WALKER, J., that an injunction does not lie against the enforcement of a municipal ordinance the violation of which is a misdemeanor, for the

reason that the State cannot be enjoined from the execution of its criminal laws, and concur with MONTGOMERY, J., that the ordinances are not void.

DOUGLAS, J., dissenting in part. With the utmost respect I am constrained to express the difficulty I have had in arriving at the real opinion of the Court. Having held that the action would not lie, it seems to me that there the opinion of the Court ended, and that all that is said in the numerous opinions as to what might have been the law, if there were any question of law before us, is *obiter dicta.* Still as it is the opinion of the Court, and as the judgment of the Court is that there is "no error," I must take things as I find them, regardless of their legal relation. I am inclined to think that the weight of authority is against the right of the plaintiff to injunctive relief. This in my opinion ends the case, and my only excuse for proceeding further is that I am following the Court. We (389) are now in the last hours of the term, and it is impossible to write this opinion, which has been delayed for various reasons, with the fullness and care that I would desire. Many of the ordinances are reasonable while others are utterly indefensible. No ordinances should go beyond a reasonable regulation of the traffic, remembering always its dangerous character. But we must also remember that it is not an unlawful business as long as the State sees fit to license it, and that when the people vote for license they are entitled to have their will carried out in good faith by their public servants. When a man accepts a public office he should give to all classes of men the equal protection of the law no matter what may be his personal convictions, or resign the office. Under the pretense of regulating a business he should not seek to destroy it. Time will permit me to cite one of the several ordinances I deem unreasonable. It is made unlawful for the owner of a saloon to enter his own building between 8 o'clock on Saturday night and 6 o'clock on Monday morning, a period of two nights and a day, and yet he is required to have a bright light burning in his saloon during the entire night. Should the light go out during that thirty-four hours he is liable to heavy penalties if he fails to relight it, also liable to a heavy penalty if he goes into his building for the purpose of lighting it. Is this reasonable? It certainly is not law. *S. v. Thomas,* 118 N. C., 1221.

Much is said in the opinion of the Court as to the moral features of the case that may justify a personal allusion on my part. All my life I have voted consistently and persistently for temperance in whatever form it was presented, and in the sunset

of life I see no reason to change my course; but others are entitled to the same freedom of suffrage and opinion. I (390) am constrained to say that I have sometimes had occasion to doubt the wisdom of my vote, and I am sure that the cause has frequently been injured by the intemperate language of some of the most zealous and brilliant of temperance advocates. My experience convinces me that extremists on either side are the evangelists of opposition.

Cited: Hargett v. Bell, post, 395; *Lumber Co. v. Cedar Co.,* 142 N. C., 416; *S. v. R. R.,* 145 N. C., 517; *S. v. Williams,* 146 N. C., 626.

JONES v. WARREN.

(Filed 8 March, 1904.)

1. CORROBORATION OF WITNESSES—*Evidence—Witnesses.*

In an action to correct a mutual mistake as to the amount of certain mortgage notes, declarations by the plaintiff, before the papers were drawn, are competent to corroborate his testimony as to the same.

2. NONSUIT—*Trial—Waiver—Exceptions and Objections.*

The introduction of evidence by the defendant after a motion to nonsuit at close of the evidence of plaintiff waives the exception.

3. EVIDENCE—*Questions for Court—Questions for Jury—Reformation of Instructions.*

In an action to reform a mortgage, the trial judge should not instruct the jury that the evidence is not strong, clear and convincing, there being sufficient evidence to submit to the jury.

4. SUFFICIENCY OF EVIDENCE—*Evidence—Reformation of Instruments.*

In this action to reform a mortgage on account of the mutual mistake of the parties thereto, the evidence is sufficient to be submitted to the jury.

(391) ACTION by Martin Jones against J. C. and T. D. Warren, heard by *Judge W. B. Councill* and a jury at Fall Term, 1903, of CHOWAN. From a judgment for the plaintiff the defendants appealed.

W. M. Bond for the plaintiff.

Pruden & Pruden and *Shepherd & Shepherd* for the defendants.

CLARK, C. J. This is an action to ascertain the balance due upon a mortgage executed by the plaintiff to the defendant to secure the balance of the purchase money upon the land which had been conveyed to the plaintiff by the defendant, and an injunction pending the action. The complaint alleged that the purchase price was $8 per acre; that the deed recites a consideration of $1, but that the mortgage notes were written upon the basis of $10 per acre, allowing credit for amounts paid before the execution of the mortgage; that the plaintiff is an ignorant man, unable to read or write, and that the defendant wrote all the papers. The jury found that the plaintiff was entitled to the credits claimed, and that the agreed price was $8 per acre, and there was judgment in favor of the defendant for the balance due upon such findings and a decree of foreclosure if such balance was not paid by a day named. The defendant appealed.

The plaintiff was allowed to state that after he had contracted with the defendant and before the papers were drawn up he (the plaintiff) stated to one Byrum that the agreement to buy was for the price of $8 per acre; and further, Byrum testified that the plaintiff did make such statement to him at that time. The first and second exceptions were to the above evidence, but it was competent to corroborate the plaintiff, who had testified that $8 per acre was the agreed price. *Burnett v. R. R.*, 120 N. C., 517, and cases there cited; *Ratliff v. Ratliff*, (392) 131 N. C., 431.

The third exception, for refusing to nonsuit the plaintiff at the close of his evidence, was waived by the defendant introducing evidence. *Ratliff v. Ratliff*, 131 N. C., 428; *McCall v. R. R.*, 129 N. C., 298; *Means v. R. R.*, 126 N. C., 424.

The fifth exception is that the court refused to tell the jury that the evidence was not strong, clear and convincing. In *Cobb v. Edwards*, 117 N. C., at p. 253, the Court said: "The judge has no more right when the testimony, if believed, is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing, than he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt." This has been cited and approved, *Lehew v. Hewitt*, 130 N. C., 22, and by *Douglas, J.*, in *Ray v. Long*, 132 N. C., at p. 891.

The fourth exception, for refusal to nonsuit the plaintiff at the close of the evidence, and the fifth and sixth exceptions, for

refusal to charge that there was not sufficient evidence, and that upon all the evidence the jury should answer the first issue "No," present substantially the same question, and should be considered together. Fraud is not charged, and the case in its general features resembles *Day v. Day,* 84 N. C., 408, and *Lehew v. Hewitt,* above cited. The action is in the nature of a proceeding to reform the mortgage notes, on the ground that by mutual mistake or the misapprehension or imposition of the draftsman (the defendant) the contract was not correctly reduced to writing. The plaintiff testified that the contract price was $8 per acre; that the defendant made the calculations and wrote all the papers; that these were not read over to the plaintiff, who could neither read nor write; that he signed them because the defendant told him they were written accord-
(393) ing to the contract, and that he believed him. The plaintiff is corroborated by Byrum, who says the plaintiff told him at the time that the contract price was $8 per acre; also by Charles Jones and William Jones, who testified that they were present when the contract was made and that the bargain was $8 per acre. The plaintiff further testifies that he did not know, till just before bringing this action, that the notes were drawn upon the basis of $10 per acre, and that he had tried to find out from the defendant what was the amount due on the notes, but he had put him off; that he did not see the notes till after this action was begun, and that the only paper he had, the deed, drawn also by the defendant, did not set out the purchase price, but recited a consideration of $1 only. The only testimony that the contract price was $10 per acre is that of the defendant, who had himself drawn the papers.

If this evidence might tend to sustain a charge of fraud the defendant certainly cannot complain that such charge is not made, and that the action is restricted by the complaint and issue (submitted without objection) to an inquiry whether there was a mutual mistake in drawing up the notes. It is not prejudice to the defendant, the draftsman, that his error in drawing up the notes is claimed to be due to mistake and not to fraud on his part. *Moffitt v. Maness,* 102 N. C., 457, and *Taylor v. Hunt,* 118 N. C., 171, relied on by the defendant, seem to us not to be in point. Those were cases in which it was attempted to vary or contradict a written instrument by a cotemporaneous parol agreement. Here the contention is that the agreement made was incorrectly put into writing by the mutual mistake of the defendant, who drew the papers, and of the plaintiff, who, being unable to read and write, was unable to correct the error, the papers not being read over to him.

A mistake of one party will not entitle him to correc- (394) tion of a written instrument, but when there is mutual mistake or mistake on one side, and either fraud, surprise, undue influence, misapprehension, imposition or like cause on the other, giving rise to the plaintiff's mistake, the Court will give relief. *White v. R. R.*, 110 N. C., at p. 460; *Day v. Day, supra;* 20 Am. and Eng. Ency. (2 Ed.), 823.

No error.

Cited: Earnhardt v. Clement, 137 N. C., 93; *Blalock v. Clark, ib.,* 142; *Lassiter v. R. R., ib.,* 151.

HARGETT v. BELL.

(Filed 16 March, 1904.)

INJUNCTION—*Licenses—Intoxicating Liquors—Const. N. C., Art. I, Sec.* 13—*Laws* 1903, *Ch.* 233—*Code, Secs.* 607, 2788.

The question whether a liquor dealer has violated the local option law involving the validity of a license issued to him cannot be tested by injunction.

ACTION by F. W. Hargett against J. F. Bell, heard by *Judge G. S. Ferguson,* at chambers, at Morganton, N. C., 1 February, 1903. From an order dissolving a restraining order the plaintiff appealed.

Frank Thompson, A. D. Ward and *Busbee & Busbee* for the plaintiff.

W. D. McIver and *E. M. Koonce* for the defendant.

CLARK, C. J. This is an action in the nature of a *quo warranto* and for an injunction to restrain the defendant from further selling spirituous liquors in the town of Jacksonville, alleging that an election was held for said town under the provisions of chapter 233, Laws 1903, on 10 Decem- (395) ber, 1903, whereat the majority of qualified voters cast their ballots "against saloons," and the result of said election was duly canvassed and declared accordingly; that after said election there was, notwithstanding, a license issued by both the county and town commissioners to defendant to sell liquor from 1 January, 1904, to 1 July, 1904.

The sole question is as to validity of this license, which the

relator claims to be void. That matter can properly be determined as to defendant only by a criminal prosecution. When the license is set up as a defense the Court will pass upon its validity. The defendant, if he is selling liquor without a valid license, is entitled to a trial by jury, and cannot be deprived of it by a proceeding for contempt for violation of an injunction commanding him not to commit the crime. An injunction was held invalid to test the validity of a town ordinance in *Paul v. Washington, ante,* 363; *Scott v. Smith,* 121 N. C., 94; *Wardens v. Washington,* 109 N. C., 21; *Cohen v. Comrs.,* 77 N. C., 2, in which *Reade, J.,* says: "We are aware of no principle or precedent for the interposition of a court of equity in such cases."

There is no equitable jurisdiction to enjoin the commission of crime. 1 High Inj. (3 Ed.), sec. 20. The court of equity cannot enjoin the judge and solicitor from the enforcement of the criminal law, and an adjudication between the parties to this action would be a vain thing, for the solicitor could, notwithstanding, proceed in the criminal action in which the validity of the alleged license must still be determined. On this ground an injunction against an alleged illegal sale of liquor was denied. *Attorney-General v. Schrveickhard,* 109 Mo., 515. In *Patterson v. Hubbs,* 65 N. C., 119, *Pearson, C. J.,* says that an injunction is "confined to cases where some private right is a subject of controversy." As is above said, if an injunction to prevent the commission of crime could issue the violation
(396) of the order, the crime, could be punished by proceedings for contempt by the judge without a jury, but the Constitution guarantees to one charged with crime the right of trial by jury. Article I, section 13. The method here attempted, if sustained, would be "government by injunction."

Nor are we prepared to say that "a license to keep a dramshop comes within the definition of a franchise." *People v. Matthews,* 53 Ill. App., 305, and *R. R. v. People,* 73 Ill., 541, are directly in point, and hold that such license is not a franchise. Such business is not an office so that the defendant's right to it shall be tested by a *quo warranto* under the Code, sec. 607, nor is the license letters patent to be vacated by a *quo warranto* under the Code, 2788.

By proper proceedings the declaration of the result of the election might be examined into, but the complaint does not impeach its validity, and on the contrary asserts it. Besides, such action would not be brought against the defendant.

The court below properly dissolved the restraining order, and

there being no cause of action stated, the Court here will *ex mero* dismiss the action.

Action dismissed.

WALKER, J., concurs only in result.

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(397)

LAND COMPANY v. HOTEL.

(Filed 16 March, 1904.)

CONTRACTS—*Navigable Waters—Constitutional Law—Const. U. S., Art. I, Sec.* 10—*Code, Sec.* 2757.

The judgment in this case heretofore rendered by the Supreme Court is but the construction of a contract, and the violation of the Constitution of the United States relative to the impairment of the obligation of a contract.

ACTION by Shepherd's Point Land Company against the Atlantic Hotel, heard by *Judge Frederick Moore,* at October Term, 1903, of CARTERET. From a judgment for the defendant the plaintiff appealed.

Lindsay Patterson and *W. W. Clark* for the plaintiff.
Simmons & Ward and *C. L. Abernethy* for the defendant.

CONNOR, J. When this cause was called for trial at the October Term of the Superior Court of CARTERET, pursuant to the judgment of this Court, rendered at the February Term, 1903, the plaintiff company obtained leave of court and pursuant thereto amended its complaint, alleging "That the decision of the Supreme Court of North Carolina rendered in this cause at February Term, 1903, impairs the obligation of the contract entered into between the State of North Carolina and its grantees, John M. Morehead and W. H. Arendell, in the grant from the State to said Morehead and Arendell, of date 24 May, 1856, and the obligation of the contract entered into between said grantees and the plaintiff by their deed to the plaintiff of date 2 July, 1857. That said decision of the Supreme Court is in violation of the provisions of section 10, Article I, of the Constitution of the United States." (398)

The defendants, by way of answer, denied the averment contained in the amendment to the complaint. The parties thereupon entered into a written agreement of record that the court should determine the rights of the parties and direct the

jury to answer the issues upon the same evidence, oral and documentary, set out in the case on appeal in this cause upon the trial before *Judge Brown*. It was further admitted by defendant that the conveyances introduced by the plaintiff cover lot No. 1 in the plot, and that defendant obtained title thereto through intermediate conveyances from the plaintiff. His Honor instructed the jury to answer the issues as set out in the record, and rendered judgment against the plaintiff, to which exception was duly entered and appeal taken to this Court. The plaintiff insists that the grant of 24 May, 1856, was a contract between the State and the grantees, and for this contention relies on the case of *Fletcher v. Peck*, 6 Cranch, 88. There can be no doubt, we think, that this is true. This Court, in the decision of this cause, certainly did not question it. Conceding the truth of the proposition we endeavored to ascertain and declare the rights of the grantees under the grant. We stated the question presented thus: "A correct decision of this case involves an inquiry as to the extent to which the State has parted with the title to the land described in the grant under which the plaintiff claims, and what effect will be given to the words 'for the purpose of erecting wharves on the side of the deep waters next to their lands.'" The conclusion to which we arrived after a careful consideration of the authorities and upon "the reason of the thing" is thus stated: "We are of the opinion that the grant to Morehead and Arendell of square 83 operated to give them an exclusive right or easement therein as riparian owners and proprietors to erect wharves, etc.; that when they ceased (399) to be the owners of the land by conveyance to the Shepherd's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to lot No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable waters as entitles it to maintain this action. "That we may determine whether a statute or decision of a court violates the obligation of a contract we must first determine what are the relative contractual rights and obligations under the contract. This we have endeavored to do. If we have arrived at a correct conclusion in that respect it is difficult to perceive how it can be said that we have violated the obligation of the contract. The proposition advanced by the plaintiff assumes that its construction of the contract is correct, and from this assumption concludes that the obligation of the contract has been violated. The assumed promise constitutes the very question to be decided. This process of reasoning would always, when the rights of parties to a contract are

controverted, place the court in the dilemma of violating the contract clause of the Federal Constitution. We simply construed the contract in the light of the statute. Section 2751 of the Code. For the reasons set forth in the opinion filed in this cause and reported in 132 N. C., 517; 61 L. R. A., 937, we find there is

No error.

(400)

WILSON v. BROWN.

(Filed 16 March, 1904.)

1. EXECUTORS AND ADMINISTRATORS—*Evidence—Execution.*

   The evidence in this case to sell land for assets, in which the defendant pleaded a judgment lien and execution from a certain county, is sufficient to show that the execution was issued as claimed.

2. ADVERSE POSSESSION—*Execution—Deeds—Color of Title.*

   The possession of a person whose land is sold under execution and deed made to the purchaser, is adverse to the purchaser, but the original deed is not color of title after the sale.

3. EVIDENCE—*Trusts—Parol—Execution—Code, Secs.* 248, 260, 268, 504.

   The proof to establish that the purchase of property at sheriff's sale on execution was for the use of the judgment debtor continuing in possession must be strong, clear and convincing.

4. ADVERSE POSSESSION—*Remainders—Estates.*

   Adverse possession cannot be predicated of possession of real property by grantees of the life tenant as against the remaindermen, during the life of the life tenant.

WALKER and DOUGLAS, JJ., dissenting in part.

ACTION by H. H. Wilson against J. W. Brown and others, heard by *Judge Frederick Moore* and a jury, at November Term, 1903, of PITT. From a judgment for the defendants the plaintiff appealed.

Skinner & Whedbee and *Fleming & Moore* for the plaintiff.
Y. T. Ormond for the defendants.

CONNOR, J. The plaintiff, administrator of B. J. Wil- (401) son, filed his petition against the defendants, heirs at law, etc., for the purpose of procuring license to sell certain real estate, of which he alleged his intestate was the owner at the time of his death, to make assets, etc. The petition includes

two tracts of land: one "known as the homestead of B. J. Wilson," etc.; the other "known as a part of the John S. Brown land, lying on the east side of the Greenville and Washington road," etc. The petition contained the necessary averments to entitle the plaintiff to relief.

The defendant, G. C. Edwards, filed an answer admitting the material averments, and further alleged that he and his wife had recovered in the Superior Court of Greene County, on 1 October, 1889, a judgment against the plaintiff's intestate, which was duly docketed in Pitt County. That an execution thereon had issued from the Superior Court of Greene County, and the homestead of the defendant therein duly allotted. That said judgment remained unsatisfied and constituted a lien upon that portion of the land described in the complaint known as the "homestead." To this answer the plaintiff filed a reply admitting the recovery of the judgment.

The second paragraph of the reply is as follows: "That it is denied on information and belief that execution on said judgment was properly and lawfully issued from the Superior Court of Greene County, and the homestead legally and regularly allotted under the same, and it is specifically averred that said execution was irregular and void." The plaintiff pleaded the bar of the statute.

The defendants, B. W. Brown and others, by their guardian, filed an answer denying that the plaintiff's intestate was, at the time of his death, the owner of the tract of land on the east side of the road, etc. They further alleged that they were the owners in fee of said land.

To this answer the plaintiff filed a reply, denying the
(402) affirmative allegations and pleading the twenty and seven-years statutes of limitation in bar of their claim, etc. The plaintiff further alleged that at a sale of said land made by the sheriff, F. W. Brown, the father of the defendants, purchased the same upon a parol trust to hold the title to the use of plaintiff's intestate. That he remained in possession, paying taxes and receiving the rents of said land, for more than twenty years and until his death. The cause was, upon issues made by the pleadings, transferred to the civil issue docket for trial.

In regard to the defendant Edwards the court submitted the issue upon the statute of limitations. The defendant introduced the clerk of the Superior Court of Pitt, who produced the record showing transcript of judgment from Greene, docketed in Pitt, 5 October, 1889. The docket showed the entry, "*Fi. fa. issued* October, 1889. Homestead appraised and set off and return made 14 October, 1889." He next introduced the record of the

return of the sheriff showing allotment of homestead and personal property exemption, under execution on judgment of *G. C. Edwards and wife v. B. J. Wilson,* dated 14 October, 1889. (It did not appear from said return from what county the execution was issued). The defendants introduced a deed from the sheriff of Pitt County to F. W. Brown, in which a sale under two executions issued from the Superior Court of Greene County, upon judgments in favor of *G. C. Edwards and wife v. B. F. Wilson, Julia C. Dixon, Executrix, v. B. F. Wilson* is recited. The levy is recited as made on 14 October, 1889. This was all the evidence in regard to the controversy upon the lien of the Edwards judgment. His Honor instructed the jury that if they believed the evidence they should answer the issue "No." Plaintiff excepted.

We concur with the opinion of his Honor. There was (403) uncontradicted evidence amply sufficient to show that the execution issued on the Edwards judgment from the Superior Court of Greene. It is very doubtful whether the answer sufficiently denied the averment. We think that upon a proper construction of the paragraph in the answer it may well be said that it was not denied. From any point of view, his Honor correctly instructed the jury. The court submitted the following issue to the jury: "Did Frank W. Brown take the legal title to the tract of land described in the sheriff's deed, introduced for the use and benefit of B. J. Wilson?"

The plaintiff tendered, in addition, an issue directed to the inquiry whether plaintiff's intestate had been in the open and adverse possession of the land in controversy for more than twenty years; also in regard to adverse possession under color of title for more than seven years. His Honor declined to submit either of these issues, and the plaintiff excepted. His Honor's ruling was correct. The possession of plaintiff's intestate could not possibly have been adverse to Dr. Brown for twenty years, for the manifest reason that the sheriff's deed was executed 7 March, 1890, before which time Dr. Brown had no right of action or right of entry. The plaintiff's intestate, prior to that time, had a perfect title to the land.

In regard to the second issue tendered, there was no evidence that the plaintiff's intestate had possession of the land after 17 March, 1890, the date of the sheriff's deed, under color of title. We have no difficulty in holding, upon the authorities, that, in the absence of any explanation, the possession of plaintiff's intestate after the right of action accrued to Dr. Brown was adverse to him, and if continued for twenty years would have ripened into perfect title. *Scarborough v. Scarborough,*

122 N. C., 234. The deed under which plaintiff's intes-
(404) tate became the owner of the land could not constitute color of title after the execution of the sheriff's deed.

In *Johnson v. Farlow,* 35 N. C., 84, *Pearson, J.,* says: "McCracken, after his deed to the lessor, had no color of title, and the adverse possession which he held was naked. It is absurd to suppose that the deed under which he had originally acquired the land could serve his purpose as color of title, after he had passed all of his estate, interest and claim under it to the lessor. Color of title is *something* which purports to give title, but he had nothing of the kind. The deed to him was *functus officio,* except as one of the *mesne* conveyances of the lessor. If McCracken had taken a deed from a third person, that would have been color of title, and seven years' adverse possession under it would, in the language of the cases, 'have ripened it into a perfect title,' thus originating that which did not exist at the date of his deed, for the averment of this new title would not be inconsistent with the admission which he was bound to make, that his deed passed the title to the lessor."

Brown's legal title was but a continuance of the title of the plaintiff's intestate, the defendant in the execution. After the sale and execution of the sheriff's deed, the character of the possession retained by plaintiff's intestate was open to explanation. *Ruffin v. Overby,* 88 N. C., 369; *Bryan v. Spivey,* 109 N. C., 57; *Baomer v. Gibbs,* 114 N. C., 76.

His Honor properly refused to submit either of the plaintiff's issues tendered. His Honor instructed the jury in regard to the issue tendered: "That if the plaintiff had satisfied them by strong, clear and convincing evidence that Dr. F. W. Brown took the legal title to the tract of land described in the sheriff's deed introduced, for the use and benefit of B. J. Wilson, they should answer the third issue 'Yes,' and that unless the plaintiff had satisfied them by strong, clear and convincing evidence
(405) that Dr. F. W. Brown took the legal title to said tract of land for the use and benefit of B. J. Wilson, they should answer the third issue 'No.'" The instruction was in accordance with the decisions of this Court. *Smith, C. J.,* in *McNair v. Pope,* 100 N. C., 404, says: "But to engraft such a trust upon a legal estate, the proof of its formation should be strong and convincing." In *Summerlin v. Cowles,* 101 N. C., 473, it is said: "To attach a trust to a legal estate by parol, or to convert a deed absolute in form into a security merely, and perhaps in other cases invoking the exercise of equitable judicial functions for relief, more proof is required than that which preponderates and governs in the trial of ordinary questions of fact." In *Cobb v.*

Edwards, 117 N. C., 244, *Avery, J.,* says: "Where the judge is not at liberty to say that there is no evidence of the kind required by the rule of law prescribed in such cases, it is his duty to tell the jury that the law requires clear, strong and convincing proof to show the agreement, as well as the subsequent acts or admissions, and that it is their province to say whether that offered does so convince them of its truth."

This and other cases in our Reports sustain his Honor's charge to the jury. While the testimony in regard to the inadequate price paid for the land, the continued possession of the judgment debtor, payment of taxes, the reduction of the mortgage indebtedness upon the land, the relation between himself and the purchaser might well have justified the jury in finding that Dr. Brown held the title upon some trust or understanding between himself and the judgment debtor, these questions are peculiarly within their province, and, in the absence of any error in the instructions by which they were guided, we are not permitted to question their verdict. Upon careful examination of the entire record, we find

No error.

WALKER, J., dissenting as to homestead tract. The case (406) shows that the defendant G. C. Edwards and his wife recovered a judgment in the Superior Court of Greene County on 1 October, 1889, against B. J. Wilson, the intestate of the plaintiff, and the said judgment was docketed in the Superior Court of Pitt County on the same day. The plaintiff brought this proceeding for the purpose of selling the land of his intestate to pay debts, and in his petition he asks for the sale of the land known as the "homestead" tract, which is on the west side of the road and contains about 100 acres, and also of the land known as the "Brown" tract, lying on the east side of the road, it being the excess of the homestead and containing about 220 acres. An execution was issued to the Sheriff of Pitt County and levied on the said 320 acres of land. The homestead was set apart on 14 October, 1889, and the excess, described in the pleadings as containing 220 acres and in the sheriff's deed as containing about 100 acres, was sold, and bought by F. W. Brown, father of the defendant B. W. Brown, and others. The plaintiff alleges that this particular purchase was made by Brown at the nominal sum of $5, for the use and benefit of his uncle, B. J. Wilson, defendant in the execution, and upon the parol promise or trust that he would hold the same for his use and benefit, and upon the repayment of the sum disbursed by him that he would convey the land to his said uncle, the plaintiff's intestate.

I fully concur in the opinion of the Court, so far as it relates to this part of the case, but I do not concur in its decision as to the disposition of the fund arising out of the sale of the homestead tract. The defendant G. C. Edwards, who answers for himself and as administrator of his deceased wife, alleges that execution issued on his judgment from the Superior Court of Greene County to the Sheriff of Pitt County, and that the homestead was regularly allotted; and the plaintiff, in his
(407) reply, avers that no execution was ever lawfully and properly issued from the Superior Court of Greene County, nor was the homestead ever regularly or legally allotted under the same, and he therefore further avers that the Edwards judgment is barred by the statute of limitations, as the attempted allotment of the homestead was void and of no effect, and did not therefore suspend the operation of the statute and prevent the bar. I think, though my brethren do not, that the allegation of the answer that execution had issue from Greene County is sufficiently met and denied by the reply. In the construction of a pleading, for the purpose of determining its legal effect, its allegations shall be liberally construed, with a view to substantial justice between the parties. Code, sec. 260. We should remember that the subtle science of pleading heretofore in use is not merely relaxed, but in a large measure abolished by the Code, and the rule of common law that every pleading must be construed against the pleader has been reversed by the present system, and we must try to ascertain the intention of the pleader, however it may be expressed, and without putting a too strained and technical construction upon his words. *Moore v. Edmiston,* 70 N. C., 510; *Stokes v. Taylor,* 104 N. C., 394. As said by *Clark, J.,* in the last-cited case, "When the defect is in the form, rather than in the substance, the proper method of correction is not by demurrer, nor yet by excluding evidence at the trial, but by motion, before the trial, to make the averment more definite." *Buie v. Brown,* 104 N. C., 335; *Purcell v. R. R.,* 108 N. C., 414; 12 L. R. A., 113. The denial in this case was quite as sufficient to raise an issue as were the allegations and averments in *Moore v. Edmiston* and the other cases cited. But it was not necessary that the plaintiff should reply to this allegation, as the new matter in the answer, not being a counterclaim, "is to be
(408) deemed controverted by the plaintiff as upon a direct denial or evidence, as the case may require" (Code, sec. 268), the court not having ordered the plaintiff to reply thereto (section 248). An issue having been raised, how stood the proof? It may be conceded that the recitals in the sheriff's deed are *prima facie* evidence, not merely of the sale, but also of the

judgment and execution, and of all facts necessary to be recited, in order to show his power and the correct execution of it, with reference to the sale, and that this is so even when the party claiming under the deed is the plaintiff in the judgment. *Rollins v. Henry,* 78 N. C., 342; *Curlee v. Smith,* 91 N. C., 172. And yet the fact in this case is, that, as to the homestead tract, there was no sale by the sheriff, and therefore the recital could not be evidence of an allotment, nor even of the issuing of the execution under which it is alleged the allotment was made. The authorities do not fit the case. The recitals are *prima facie* evidence for the purpose of supporting the sale only, and there was no sale of this tract. To permit the execution to be evidence of the issuing of the execution in this case would violate the well-settled rule that a party upon whom rests the burden of proving a fact must offer the best attainable evidence of it. In *Rollins v. Henry, supra,* the Court, by *Rodman, J.,* says: "The 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 lost or destroyed, *and it is proved otherwise than from the recitals that there was a judgment and execution* (italics mine), the recital in a sheriff's deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not a recent one." But assuming, for the sake of the argument, that the recitals were evidence of the issuing of the execution, they were only *prima facie* evidence and open to (409) rebuttal. I think there was sufficient testimony to be submitted to the jury for that purpose. There is this entry on the execution docket of the Superior Court of Pitt County: "*Fi. fa.* issued October, 1889. Homestead appraised and set off and return made 14 October, 1889." It is not the duty of the clerk of the court of the county, whose sheriff has received an execution issued from another county, to note on his docket the fact that the execution has issued. He is required to make an entry in regard to the homestead allotment when it is returned to him. Code, sec. 504. If there are any payments on the judgment, they are certified to him by the clerk of the court where the judgment was taken, and must be entered on his docket. The execution goes directly from the clerk of the court in which the judgment was rendered, to the sheriff of the county where the defendant's land is situated and where the judgment has been docketed, and the clerk of the latter county has nothing to do with it. His judgment roll and docket are not required to show anything in connection with it, except the credits on the judgment and the return of the homestead allotment, and the latter is required

also to be returned by the officer having the execution to the clerk of the court where the judgment was rendered. Laws 1887, p. 515. The entry, therefore, of the Clerk of Pitt Superior Court was some evidence that the execution had been issued from that court; for, if it had been, his duty would have been to make just such an entry as he did make. Whether this was sufficient to rebut any evidence introduced by the defendant was a question for the jury to decide, and not for the judge. All such matters should be left to the triers of the facts appointed for the purpose of deciding such issues between the parties, and should not be decided as matters of law. The entry on the docket in
(410) Pitt County was certainly as reliable as the recitals in the sheriff's deed, and those recitals constituted all of the defendant's evidence. I do not understand why the defendant did not introduce the original execution, if one ever issued from the Superior Court of Greene County; if it had been lost, he could have proved it had been issued by the entries on the clerk's docket in Greene County or by the sheriff who acted under it. The fact that no such evidence was offered tended greatly to weaken the defendant's case and to strengthen that of the plaintiff.

DOUGLAS, J., concurs in the dissenting opinion.

Cited: Call v. Dancy, 144 N. C., 497.

LEE v. BAIRD.

(Filed 22 March, 1904.)

1. WILLS—*Appeal—Findings of Court.*

Where parties to an action agree that the court may find the facts, and the court adopts the findings of fact in a certain deposition, the Supreme Court will consider the evidence incorporated in the deposition.

2. APPEAL—*References—Wills.*

The refusal of the trial court to order a reference before construing a will is appealable.

3. REFERENCES—*Wills—Findings of Court.*

A referee is not bound by the findings of fact of a trial court when such findings were, by agreement of parties, only for the purpose of construing the will.

LEE *v.* BAIRD.

PETITION to rehear this case, reported 132 N. C., 755.

Merrimon & Merrimon and *Shepherd & Shepherd* for the petitioners.

F. A. Sondley and *T. A. Cobb* in opposition.

CONNOR, J. We have given to the petition to rehear (411) this case a careful consideration. We have not "glanced over," but carefully read the well-prepared and well-considered briefs of the learned counsel for the petitioners and the authorities cited. As we stated in our former opinion (132 N. C., 755), the construction of the will presents serious and difficult questions, to which we then gave our best consideration and investigation. To the suggestion that "there is not the least ambiguity upon the face of Mrs. Baird's will, nor any ambiguity arising out of extrinsic facts which call for explanation by parol evidence," it would seem a sufficient answer that counsel of great learning and equal candor have at every stage of this litigation contested every point, and advanced arguments to sustain their contentions, which were entitled to and which have received most respectful consideration. We are met at the very threshold with the contention that in disposing of the Forest Hill property the testatrix used the word "children" when she intended to include "grandchildren"; that she not only meant grandchildren, but that she intended by the word "children" to include the children of one daughter and exclude her other grandchildren. It is further contended that when she used the word "heirs," in the fifth item, she meant "children."

The learned counsel for the plaintiffs, in their brief upon the first hearing, say: "But we think that this case presents an instance where the Court, to reconcile an apparent repugnancy, will give the words 'all my children' a sense beyond their natural import, and, construing items 2, 4, 5 and 7 together, will hold that 'grandchildren' are included." With the greatest possible deference to the learned counsel, we think that it would be difficult to find a will of the same length in which there are more ambiguities and difficulties. Counsel, in vigorous but entirely respectful language, urged that in examining the parol evidence sent to us to enable us "to place ourselves in the (412) place of the testatrix at the time of making her will," we are "indulging in forbidden fruit." The record shows that when the deposition of John R. Baird was opened, the plaintiffs filed certain objections thereto, for that the certificate was irregular. The objection was overruled by the clerk, and his ruling, upon appeal, was affirmed by the judge. It is stated that no objec-

tions were made before the commissioner to the competency of the testimony, but the judge at the trial permitted the plaintiffs to file objections, which was objected to by the defendants as not being made in apt time. The record does not show any ruling of his Honor upon these objections, but the case on appeal has this statement: "It having been agreed by counsel for the plaintiffs and defendants that the judge should find the facts, his Honor announced that he found the facts as stated in the foregoing deposition of John R. Baird, and adopted it as his findings of fact, in so far as the construction of the will was concerned, and no further." There was no suggestion that we were to disregard the deposition. We considered it for the same purpose and to the same extent as did his Honor. It did not occur to us that the estimate of values or other statements were conclusive upon the parties upon taking the account before the referee, but that for *the purpose of construing the will* the facts therein stated were taken as true.

In the appellant's brief on the first hearing we found "a brief statement of the case" in accordance with Rule 34, which was followed by these words: "All the foregoing facts are found by the judge who tried this case in the Superior Court, by consent of all parties, as set out in the record." The plaintiff's brief made no issue with the defendant's in regard to the facts, but expressly stated on the first page that "The court found
(413) the facts to be as stated in the deposition, . . . and adopted it as his findings of fact, *in so far as the construction of the will was concerned, and no further.*" (Italics in the brief.) The brief states that the plaintiffs objected to the introduction of the deposition. There was no exception to the action of the court in admitting it. The only further reference to the deposition is (page 5): "We think that the evidence offered by the plaintiffs to aid the court in construing the will was incompetent and unnecessary, yet, when duly considered, it confirms the view we have taken." We notice at length these facts, because of the language contained in the petition to rehear and the brief filed regarding the action of this Court in considering "extrinsic facts." We can decide cases only upon the record sent us, with the aid of briefs and arguments of learned counsel.

If it was intended to insist that Mrs. Baird's will was free from difficulty, and that "there was not the slightest ambiguity in the description of those who are to take in item 7 of the will," it was not so suggested in the brief or argument before us upon the first hearing.

After a careful re-examination of the grounds upon which our opinion at the last term was based, we see no reason for changing

the conclusion to which we then came. We fully recognize the principle of law contended for and relied on by the plaintiffs, that where a testator directs his property, whether real or personal, to be equally divided among his heirs, the division must be *per capita* and not *per stirpes,* unless there be something in the will showing a contrary intention. For the reasons given in the former opinion, we think there was evidence in the will, as well as the extrinsic facts, of the intention to take the case out of the general rule, and this upon the principle stated by *Lord Langsdale,* cited in *Bivens v. Phifer,* 47 N. C., 436. The plaintiffs urge that the appeal was premature. In the light of the record before us, in respect to the way by which (414) the case was tried below, we cannot concur with the plaintiffs in this contention. If it was desired to have a reference before the will was construed, it should have been so insisted upon before his Honor, and, upon the refusal to order a reference, an exception noted or probably an appeal taken. This appeal being by the defendants, that question is not presented for review, but the plaintiffs could have brought it before this Court by exception and appeal, upon the refusal of his Honor to order a reference before construing the will. To prevent possible misconception, we desire to say that we concur with the plaintiff's contention that his Honor's findings of fact are to be confined strictly to the construction of the will, and that the referee is in no sense bound thereby in taking the account of the testator's estate as ordered by the judgment below. We do not deem it necessary to repeat the views which we expressed at the last term, or the authorities upon which they were based. That we do not do so should not be construed as a failure on our part to carefully examine and consider the arguments and briefs of the learned counsel for the petitioners.

Let the petition be dismissed.

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(415)

COWAN v. ROBERTS.

(Filed 22 March, 1904.)

1. GUARANTY.

In this case the guaranty is an unconditioned promise to answer for the default of the principal.

2. GUARANTY—*Notice.*

Where a guaranty is unconditional, no notice of acceptance on the part of the guarantee is required.

3. GUARANTY—*Consideration.*

A promise by a guarantee to deliver goods to the principal is a sufficient consideration to support the contract of guaranty.

4. GUARANTY—*Fraud.*

Where a principal agrees to secure a second guarantor before delivering the contract of guaranty, without the knowledge of the guarantee, and delivers the contract without securing the same, the guarantor is bound by the contract.

MONTGOMERY, J., dissenting in part.

ACTION by Cowan, McClung & Co. against W. S. Roberts, heard by *Judge W. A. Hoke* and a jury, at May Term, 1903, of BUNCOMBE.

This action was brought to recover the sum of $2,000, alleged to be due by the defendant on a guaranty. The firm of Roberts Bros., on 9 April, 1899, was indebted to the plaintiffs, who were merchants, in the sum of $1,742.60, for goods theretofore sold and delivered, and were desirous of making further purchases, but the plaintiffs refused to sell any other goods to them unless they would secure by a guaranty their then existing indebtedness and any other amount that might become due for future sales.

Roberts Bros. then requested the defendant to give the (416) required guaranty for them, so that they could purchase more goods. The defendant complied with this request by executing a paper writing, of which the following is a copy:

"KNOXVILLE, TENN., 8 April, 1899.

"I hereby guarantee to Cowan, McClung & Co. any debts which Roberts Bros. now owe, or may owe in the future, to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing.

W. S. ROBERTS."

The original paper is in the handwriting of one of the plaintiffs, and was delivered to the plaintiffs by Roberts Bros. On the faith of this guaranty, the plaintiffs afterwards sold and delivered to Roberts Bros. several bills of goods, amounting in all to $475.45, which amount they failed to pay at maturity; whereupon the plaintiffs notified the defendant of their default, and when, after demand, he refused to pay the amount specified in the guaranty, he brought this action, in September, 1899. The firm of Roberts Bros. became insolvent, and in August, 1899, were adjudicated bankrupts. No assets were left after allotting the exemptions and paying the costs and charges of administering their estate.

There was evidence tending to establish the foregoing facts, and also to show that one of the plaintiffs' salesmen demanded of the defendant the payment of the amount of the guaranty, and the latter stated to him that he had seen the guaranty and wished to have it adjusted, and expressed surprise that he was "in for so much." He also stated to the salesman that he had signed the guaranty with the understanding that the members of the firm of Roberts Bros. would have their father, J. J. Roberts, sign the same with him. The defendant and (417) J. J. Roberts agreed to give notes for the amount of the guaranty, but at the last moment J. J. Roberts refused to sign them. It was also in evidence that on the day after the guaranty was signed the defendant asked Roberts Bros. if J. J. Roberts had signed, to which they answered that he had not, as they had concluded not to go to him, but to get Robinson & Baird to sign it, and the defendant then told them to write to the plaintiffs and have his name taken off the paper. The defendant inquired every week if they had received any answer from the plaintiffs, and, not being able to get a satisfactory answer, wrote himself to the plaintiffs, on 7 July, and requested them to erase his name, as he would not endorse for them any longer, because they had deceived him. All the goods had then been sold. The plaintiffs introduced in evidence the following letter from the defendant to them, dated 24 July, 1899: "Please send me by return mail a copy of that paper with my name attached to it, sent by Roberts Bros., of this place; also amount purchased by them since the date of that paper, and oblige." . . . And also a letter from them to the defendant, dated 8 July, 1899, in reply to his letter of 7 July, 1899, as follows: "Your favor of 7 July, 1899, is at hand. The credit extended to Roberts Bros. was based on your guaranty to the extent of two thousand dollars, and we cannot relinquish this guaranty of yours until the debt made under said guaranty is paid. They owe us at this time upwards of two thousand dollars, and we will thank you to see to it that our debt is paid, as we are very sorely pressed for money at this time." The defendant, who was introduced as a witness in his own behalf, testified that he signed the guaranty upon the condition that J. J. Roberts would sign it with him. He was told by Roberts Bros. that they needed the guaranty in order to get more goods to renew their stock. He further stated that Rob- (418) erts Bros. had told him that they had written to the plaintiffs to erase his name, but that he mistrusted them, and wrote himself, after waiting three months.

At the close of the testimony the court intimated that it would charge the jury to find the issue for the defendant, in deference

to which intimation the plaintiffs, after excepting, submitted to a nonsuit and appealed.

Merrimon & Merrimon for the plaintiff.
F. A. Sondley for the defendant.

WALKER, J., after stating the case. The defendant's counsel, in his able argument before us, relied upon three grounds of defense: (1) That there was no evidence that the plaintiffs had accepted the guaranty and notified the defendant of their acceptance. (2) That there was no consideration to support the guaranty as to the debt already due by Roberts Bros. to the plaintiffs, amounting to $1,742.50. (3) That the guaranty was given upon a condition which was never performed, and that it is therefore void, even in the hands of the plaintiffs.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Carpenter v. Wall,* 20 N. C., 144. There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt, the former being an absolute promise to pay the debt at maturity, if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor, and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecuted the principal debtor for the recovery of
(419) the debt, without success. *Jones v. Ashford,* 79 N. C., 172; *Jenkins v. Wilkinson,* 107 N. C., 707; 22 Am. St., 911. The guaranty may also be absolute in form, or one which binds the guarantor to pay unconditionally, or, at all events, upon the default of the principal, or it may be in the form merely of an offer to become bound upon the default of the principal. In the former case—that is, where there is an absolute guaranty or an unconditional promise to indemnify against loss by the principal's default—no notice of acceptance by the guarantee is required, the liability of the guarantor being fixed and determined by the ordinary rules in the law of contracts. In the latter case, when the transaction takes the form of an offer merely to become responsible for the principal, notice of acceptance of the offer is, of course, necessary in order to charge the party, who makes the offer, as guarantor, and this is so because the minds of the parties have not met; there is no *aggregatio mentum* until the offer is accepted. There is a well-recognized distinction, therefore, between an offer or proposal to guarantee and a direct promise of guarantee. The former requires in

some cases notice of acceptance, while the latter does not. When the offer to guarantee is absolute and contains in itself no intimation of a desire for or expectation of specific notice of acceptance, it may be supposed that the offerer has a reasonable knowledge that his guaranty will be accepted and acted upon, unless he is informed to the contrary. 2 Parsons Cont. (8 Ed.), ch. 2, sec. 4, and notes, where the subject is fully discussed. It is said that if the party distinctly and absolutely guarantees a certain line of credit, it presupposes some sort of a request for a guaranty, emanating from the guarantee, and for this reason no formal acceptance by the guarantee is necessary; but if it be only a proposition to guaranty the credits, and not a positive promise to guaranty them, the acceptance of the proposition must, in some way and within a reasonable time, be communi- (420) cated before the guarantor can be held liable on it. Tiedeman Com. Paper, sec. 420.

In our case the guaranty is a direct and unconditional promise to answer for the default of the principal to the amount of $2,000. The words of the contract are *in presenti,* "I do hereby guaranty," and superadded are the words, "This obligation to remain in full force." . . . Language could not be stronger to express the intention to become liable at once, without any expectation of notice that the plaintiffs will accept the guaranty. It was not an offer, nor did it imply an offer merely, but it was in itself a complete and binding promise to guaranty, and needed only the sale of the goods by the plaintiffs to make it otherwise effectual. 1 Parsons, *supra,* pp. 466, 467.

We cannot distinguish this case from *Straus v. Beardsley,* 79 N. C., 59, where the Court says: "If the undertaking be to *guaranty* the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional, and no notice is necessary. . . . The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only when the goods have been delivered under its provisions, by *actual payment* of the purchase price. If the goods are delivered, the contract is to pay for them, and a compliance with this condition is the only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished the goods and that they were paid for, and no notice or demand was necessary to charge them with the debt." See, also, *Walker v. Brinkley,* 131 N. C., 17.

In *Williams v. Collins,* 4 N. C., 382, this Court drew the distinction between a guaranty that a certain person will be able to comply with the proposed contract and one wherein the

(421) promise is that he shall comply. In the latter case, which is ours, the Court held that the guarantor, "to all legal consequences, became pledged absolutely to the same extent as the principal debtor was bound, as soon as the guarantee parted with his property." In *Shewell v. Knox,* 12 N. C., 404, all the Judges agreed that, if the guaranty is absolute and addressed to an individual, no notice of acceptance is necessary, and one of the Judges held that it was not even necessary when a letter of credit was given, under the circumstances of that case. The general principle as to when notice of acceptance of an offer to contract becomes necessary is considered in *Crook v. Cowan,* 64 N. C., 743, and *Ober v. Smith,* 78 N. C., 313. The question as to notice of acceptance in cases of guaranty is very ably and exhaustively discussed, with a full review of the English and American authorities, in *Wilcox v. Draper,* 12 Neb., 138; 41 Am. Rep., 763, and the conclusion is reached that when there is a direct promise of guaranty no notice of acceptance is required. *Allen v. Peck,* 3 Cush., at p. 242; *Powers v. Bumcratz,* 12 Ohio St., 273; *Bank v. Costner,* 3 N. Y., 212; 53 Am. Dec., 280; *Bank v. Phelps,* 86 N. Y., 484; 2 Addison Cont. (8 Ed.), p. 84 (star page 651). *Gregory v. Bullock,* 120 N. C., 260, does not apply, as the Court held that there was no contract at all in that case, and what is said about the guaranty was with reference to the particular facts under consideration, from which it appeared that there was only "a proposal based upon an uncertain event." The guaranty in this case, as to both the past and future indebtedness, is evidenced by one and the same instrument, and is supported by one and the same consideration, and we do not therefore see why the law applicable to the one should not also determine the liability in the case of the other.

(422) We are of the opinion that the testimony of the defendant as to his interviews and communications with the principals, Roberts Bros., and his subsequent promise to pay for the goods after the guaranty had been executed by him, furnishes some evidence to show that he knew the guaranty had been delivered to the plaintiffs, and that they were acting upon it, or intended to do so.

There was a sufficient consideration to support the guaranty as to the debt already due. The agreement as to the existing and the future indebtedness was indivisible, and was based upon one and the same consideration, which was that the plaintiffs should sell more goods to the principals to enable them to replenish their stock, which he did. It is not necessary that the consideration should be full or adequate, as in the case of *bona fide* purchasers for value. If there were any legal consideration, it is sufficient.

The promise of the guarantee to furnish the goods was such a consideration and supports the contract of guaranty. 1 Parsons, *supra,* pp. 466, 467.

The third ground of defense is not tenable. If the written guaranty was given to the principals upon condition that it should not be delivered to the plaintiffs until it was signed by J. J. Roberts, and they delivered it in violation of the condition, and thus, as is said in the case, practiced a fraud upon the defendant, the defendant is bound, as the plaintiffs did not participate in this alleged fraud, nor is it shown that they had notice of it. The liability of the defendant is founded upon the principle that where one of two persons must suffer loss by the misconduct or fraud of a third person, or by his breach of confidence, as in our case, the loss should fall upon him who first reposed the confidence, or who, by his negligence, made it possible for the loss to occur, rather than on an innocent third person. The liability of the defendant in this respect is fully established by *Vass v. Riddick,* 89 N. C., 6. See, also, *Bank v. Hunt,* 124 N. C., 171; *Barnes v. Lewis,* 73 N. C., 141; 21 Am. (423) Rep., 461.

The plaintiffs agreed to sell the goods to the principals, not upon the single consideration that the defendant would guaranty the payment of the price, but upon the further and additional consideration that he would guaranty also the payment of the existing indebtedness. He would not have sold but for the last consideration, and therefore by reason of the guaranty he has been induced to change his position; and should the guaranty as to that indebtedness be declared invalid, he will be prejudiced, as he no doubt would have taken immediate steps to collect his claim if the guaranty had not been given. It will be impossible for him now to save himself, for the reason that the principals have become insolvent and have been adjudged bankrupts. We have said this much, though we do not concede that, in order to charge the defendant on the guaranty, it is necessary to show a change in the guarantee's position by which he may be prejudiced if the guaranty is held to be void.

We have not commented upon the evidence in this case, from which it appears that the defendant knew, on the day after the guaranty was given, that it had been sent to the plaintiffs and had not been signed by J. J. Roberts, and, knowing this fact, and "mistrusting" the principals, as he did, according to his own testimony, he delayed for nearly three months to notify the plaintiffs of the alleged condition annexed to the guaranty, and in the meantime they had sold the goods. When they refused to surrender their security, he finally agreed to pay the bill for the

goods sold after the date of the guaranty. This was a clear case of negligence on his part, and the consequences of this negligence must be visited upon him and must not be borne by the plaintiffs, who are innocent parties. As said in *Barnes v. Lewis,* (424) *supra,* the defendant acted upon the assurance that another would do an act which he knew might be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. He confided in the principals, Roberts Bros., and the condition that J. J. Roberts should sign with him was communicated to them alone. He failed to use ordinary precaution, either to protect himself or to protect the guarantee. If the defendant, in any phase of the testimony, can be regarded as an innocent person in this transaction, it yet remains as an inflexible rule of the law that where one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it. This is said to be a doctrine of general application, and is a most just and reasonable one. *Barnes v. Lewis, supra.* To permit the defendant to avail himself of his defense to this action would also contravene that other just and inflexible maxim of the law that no man shall take any advantage of his own wrong.

No question arises in this case as to diligence on the part of the guarantee in collecting the debt from the principal, as this is a guaranty of payment and not for collection, and, besides, the burden of proof in this respect would be on the defendant. The case shows that notice of the default of the principal was given, and demand made upon the guarantor before the suit was commenced.

Our conclusion is that there was error in the intimation of opinion by the court adverse to the plaintiffs, by which they were driven to a nonsuit. The judgment must therefore be set aside and a new trial awarded.

New trial.

MONTGOMERY, J., dissenting, in part. Roberts Bros., of Buncombe County, N. C., were in 1899 indebted to the plaintiffs, of Knoxville, Tenn., in the sum of $1,742.62, for goods sold (425) to them, and, being unable to make further purchases on credit without security, procured their uncle, the defendant, to sign and deliver a guaranty, in the following words: "Knoxville, Tenn., 8 April, 1899. I hereby guarantee to Cowan, McClung & Co. any debts which Roberts Bros. now owe or may owe in the future, to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled

in writing." Afterwards the plaintiffs sold and delivered to Roberts Bros., at different times, goods and wares to the value of $475.45.

This action was brought to recover the $2,000, the amount named in the guaranty. No notice was given by the plaintiffs to the defendant of their acceptance of the guaranty.

The guaranty, upon its face, is divisible into two parts: one branch seems to be an obligation for the payment of a debt already existing and due by the principals to the guarantees, the plaintiffs, and the other branch is in the nature of a security for a debt to be contracted in the future by the principals with the plaintiffs. By the terms of the guaranty in respect to the debt already due, the obligation appears to be an absolute guaranty; and if there was a consideration to support it, the defendant is liable for its payment.

There was, in fact, such a consideration; for the plaintiffs, after the execution of the guaranty, sold and delivered to the principals goods and merchandise of the value of $475.45, and the defendant testified on the trial that the guaranty was made in order that the debt already due might be secured, and that further fresh purchases of goods might be added to the stock of the principals then on hand. It was not necessary that the defendant should have been benefited in order to raise a consideration for the guaranty on the part of the guaran- (426) tor. Any advantage accruing to, or any consideration moving toward the principals from the plaintiffs, was sufficient in law to make the defendant liable on the first branch of his guaranty.

As to the second branch of the guaranty—that is, the guaranty of the amount of the debt to be contracted in the future by the principals—a notice of acceptance by the guarantees, the plaintiffs, was necessary. That branch of the guaranty was not absolute, and in *Gregory v. Bullock,* 120 N. C., 260, the Court said: "The answer is, that the alleged guarantee gave no notice of his acceptance within a reasonable time." In *Adams v. Jones,* 12 Peters, 213, *Mr. Justice Story* said: "Notice is necessary to be given the guarantor that the person giving credit has accepted or acted upon the guaranty and given credit on the faith of it. This is no longer an open question in this Court."

In *Clune v. Ford,* 62 N. Y., 479, cited in the argument here, the guaranty was in these words: "Dear Sir: We hereby agree to guaranty the expenses of the members of the Gælic Athletic Association to the sum of $650 (six hundred and fifty dollars), or the amount due under that figure." The guarantee was the proprietor of a hotel in New York City, at which the members

of the association were boarding, and were in arrears for board for the sum of $475. After the delivery of the guaranty they incurred the further expense of $175. The question of notice of acceptance by the guarantee was not raised, the matter of consideration was the only point in the case, and the Court held that the incurring of the $175 expense for the board, after the guaranty was given, was a sufficient consideration for the amount due in the past. In *Paige v. Parker,* 74 Mass., 211, cited on the argument here, the Court held that the guaranty was an
(427) absolute one, and therefore that notice was not necessary.

The paper writing in that case guaranteed the prompt *payment at maturity* of any amount that might be due by the principal for goods, wares and merchandise to be sold by the guarantee to the amount of $500. The Court, in that case, said that "However this may be, we are of opinion that the defendant in this case had notice that his guaranty was accepted. An absolute guaranty was written by Blodgett & Co. in their store and for their benefit. The defendant signed it there, and left it with them as a complete contract, and they retained it. This was an acceptance by them, for which he must be held to have notice."

In the case before us the plaintiffs contended that the guaranty was made at the request of the guarantee, and therefore that no notice of acceptance was necessary. But there was no evidence of that fact. The guaranty, it is true, was in the handwriting of the plaintiffs, but it was brought to the defendant by one of the firm of Roberts Bros., but he made no statement at the time, or at any other time, that the plaintiffs expected that the defendant singly and particularly would sign it. And, besides, the defendant did not deliver it to the plaintiffs in person and leave it in their possession as a contract completed, as was the case in *Paige v. Parker, supra.* There was evidence offered on the trial going to show that the defendant executed the guaranty through a fraud practiced on him by one of the principals. But it was not shown that the plaintiffs had any notice of the fraud. Notwithstanding the fraud practiced on the defendant, he is liable on the first branch of the guaranty, for the reason that the plaintiffs did not participate in the fraud or have knowledge of it. Bailes on Surety and Guarantor, p. 215.

Cited: Voorhees v. Porter, post, 601; *Mudge v. Varner,* 146 N. C., 149.

(428)

ISLER v. BROCK.

(Filed 22 March, 1904.)

1. TRUSTS—*Judgments—Orders—Notice.*

The judgment set out in this case was final and would not permit *ex parte* orders as to the expenditure of the principal of the trust fund.

2. TRUSTS—*Commissions—Interest.*

The trustee in this case was properly chargeable with interest on the trust funds in his hands.

ACTION by S. W. Isler against O. Brock and others, heard by *Judge R. B. Peebles,* at September Term, 1903, of WAYNE. From a judgment for the defendants the plaintiff appealed.

Battle & Mordecai for the plaintiff.
Stevens, Beasley & Weeks for the defendants.

MONTGOMERY, J. This action was brought by the plaintiff for an account and settlement between himself, as trustee, and the defendants, *cestuis que trust,* for a division of the personal property and proceeds of sale of real property belonging to the *cestuis que trust* and for a sale of certain land also belonging to them. At September Term, 1895, of Wayne, in a regularly constituted action, wherein Everett Joyner, Jr., and the defendants in this action were plaintiffs, and A. U. Kornegay, executor of W. F. Kornegay, and others, were defendants, the plaintiff was substituted as trustee in place of James F. Kornegay, the latter having been appointed trustee under the will of Everett Joyner, deceased. Under that decree the plaintiff received from James F. Kornegay, former trustee, the sum of $3,960. At November Term, 1901, of said court, it appeared in the pres- (429) ent action that a long and complicated account would have to be taken, and it was, by consent of the parties, ordered that F. R. Cooper be appointed referee to find the facts and make his conclusions of law, under the Code, and the plaintiff was directed to proceed with the sale of the land described in the complaint. The referee heard the matters in dispute, and made a report of his findings of fact and conclusions of law to the September Term, 1903, of the Superior Court. Exceptions were filed by both parties to the report of the referee. A judgment was rendered at September Term, 1903, from which the plaintiff appealed.

The principal contention on the part of the plaintiff is that

he should have been allowed certain credits, which were admittedly encroachments on the trust fund, on the grounds, first, that the terms of the decree of the court under which he was made trustee gave him the right to encroach upon the principal fund; and, second, because he was empowered specially by the Superior Court of Wayne, at various terms, to expend part of the principal fund. In the third item of the will of Everett Joyner the testator said:

"I give, devise and bequeath all the balance of my estate—real, personal, mixed, or in action—to my friend, James F. Kornegay, in trust, to receive the rents, profits and interest thereof, and to pay in his discretion such parts thereof to my son Everett and his children as he may think proper, during the life of said Everett, and after the death of said Everett to hold the same for the use of such children as said Everett may have, and to the issue of such as may be dead, such issue to represent the parent and to take such share as the parent would if living."

Kornegay, as we have seen, acted for a while as trustee, but afterwards, as we have seen, the plaintiff was substituted
(430) in his place as trustee, and in the decree of the court in which the substitution was made, the nature of the trust under the will of Everett Joyner was set forth. In that judgment the court said: "It is further adjudged that S. W. Isler is hereby appointed trustee in place of James F. Kornegay and W. F. Kornegay, under the will of Everett Joyner, Sr., and that the title to said land and money is hereby vested in said S. W. Isler in as full and ample a manner as the same was vested in James F. Kornegay by said will; and he is hereby directed and empowered to lend the money which shall come into his hands upon first mortgage security upon land as he shall have opportunity, and to pay such interest as he may obtain upon the same, together with the rents from said real estate, to the plaintiff Everett Joyner, Jr., son of said Everett, Sr., during his life, and after the death of the said Everett, Jr., to hold the balance in trust for such child or children as said Everett, Jr., may leave, and to the issue of such as may be dead, such issue to represent the parent and to take such share as the parent would if living; and said trustee is authorized to deposit any funds which may come into his hands in the Bank of Wayne, of Goldsboro, N. C., while in the judgment of said trustee the said bank is a safe place of deposit, until such time as he shall be able to lend the same upon satisfactory mortgage security as herein directed, or until the court shall appoint some other trustee."

It will be seen from the plain language of the judgment of September Term, 1895, that the plaintiff, as trustee, could only

disburse to the *cestuis que trust* the interest arising from a loan of the money on hand and the rents and profits of the real estate. It is true that orders were made in the Superior Court of Wayne, at several terms thereof, either authorizing the expenditure by the plaintiff of such amounts as were encroachments upon the principal fund, or approving such expenditures after (431) they had been made. Those orders, however, were made on the *ex parte* application of the plaintiff and without notice to the defendants.

Counsel of plaintiff contend that no notice to the defendants was necessary, for the reason that the judgment of September Term, 1895, was of such a nature as to keep the action open for further orders in reference to the administration of the trust. That is a mistaken view of the character of the judgment. It was not interlocutory, but final. In the judgment in the present action the plaintiff was held liable for the principal fund which he received, to-wit, $3,960, and from that amount he was allowed to deduct five per cent commissions for his services. Upon the balance, to-wit, $3,762, the plaintiff was charged with interest from 14 June, 1891, the date of the death of the life tenant, Everett Joyner, Jr., less five per cent commissions on the interest up to the date of the judgment, September Term, 1903.

Three thousand three hundred dollars was to be credited on the judgment by reason of that amount having been paid into the clerk's office by the plaintiff on 14 September, 1903. The judgment further provided that that amount, $3,300, should bear interest from 14 September, 1903.

The plaintiff excepted also to that part of the judgment on the ground that in the decree of September, 1895, in which he was made trustee, he was held liable for only such interest as he might obtain or that might come into his hands. We are not called upon to decide what that language in the decree means. But under the will of Everett Joyner, deceased, and also under the decree of September, 1895, the money and the property in the hands of the trustee were to be paid to those in remainder at the death of the life tenant, and it was certainly proper that in the judgment it should be required that the trus- (432) tee pay interest on whatever sums he may have in his hands from the time of the death of the life tenant, he not having shown to the referee or to the court that he was not able to lend the money out at interest or that he kept it separate and apart from his own funds. The judgment embraced also the amount for which the real estate had been sold by the plaintiff, and the manner of distribution of the money, and also of the

proceeds of the sale of the land amongst the defendants, to which there was no exception.

After a careful consideration of the record, we find that there is no error in the judgment, and the same is

Affirmed.

HUMPHREY v. ROBINSON.

(Filed 22 March, 1904.)

BROKERS—*Commissions—Contracts—Damages.*

A real estate broker who fails to communicate to his principal facts known to him material to the transaction is not entitled to damages for failure of the principal to comply with the contract entered into by the broker.

ACTION by the Humphrey-Gibson Company against M. E. Robinson and another, heard by *Judge R. B. Peebles* and a jury, at September Term, 1903, of WAYNE.

This action was brought by the plaintiffs, who are real estate brokers, to recover damages arising out of an alleged breach of contract by the defendants. The complaint is as follows:

1. That the plaintiffs, E. A. Humphrey and W. J. Gibson, constitute a partnership as brokers, middlemen and
(433) agents in negotiating trades for the sale, exchange and purchase of real estate and other properties, and were such partners and so negotiating at the times hereafter mentioned.

2. That during the early part of 1902 the defendant Mary C. G. Kirby was the holder of six notes of the East Goldsboro Land and Investment Company for $2,000 each with accrued interest.

3. That during the early part of said year of 1902 the defendant Mary C. G. Kirby asked the plaintiffs if they could not negotiate some trade for her by which she could reduce said notes to cash, or invest said notes in real estate that would bring her in a larger income monthly; said notes running one, two, three, four, five and six years, and only the interest on each note payable as it fell due.

4. That in compliance with such request the plaintiffs saw J. F. Southerland, the owner of the real estate hereinafter described, and told him of the desire of the defendant Kirby to invest her notes in real estate, and thereupon said Southerland authorized the plaintiffs to sell to defendant Kirby the following

described property (description of land) for the sum of $10,155 in said notes, including interest, clear of all commissions, attorney's fees and expenses.

5. That during the negotiation as aforesaid the defendant Kirby knew that the plaintiffs were representing Southerland in the sale of his said real estate, and Southerland knew that the plaintiffs were representing said defendant in the effort to invest her said notes, and it was understood and agreed with the said defendant that the plaintiffs were to look to Southerland for their commissions and compensation for negotiating said transaction.

6. That in said transaction the plaintiffs had no authority to close the trade for either party except upon terms that were agreeable to said parties, which had to be made known to the parties respectively for their approval, and their agency consisted merely in bringing the parties together in order (434) that they might consummate such trade as was acceptable to each party respectively.

7. That the defendant M. E. Robinson acted as agent of the defendant Kirby in said negotiation, and as such agent agreed with the plaintiffs to pay Southerland the sum of $12,300 for the above-described real estate, which payment was to be made by delivery of said notes to Southerland with accrued interest, amounting to $13,440, and the plaintiffs were to pay to the defendant Kirby $1,140 in cash; all of which notes, with the exception of $10,155, which was to be paid to Southerland as the purchase price, were to belong to the plaintiffs as their compensation for negotiating said transaction in lieu of commissions.

8. That in compliance with said agreement the plaintiffs had executed by Southerland and wife and duly proved and acknowledged, with the privy examination of Addie Southerland, wife of J. F. Southerland, properly taken, a good and indefeasible deed in fee simple, with covenants of warranty to said land, and tendered the same to the defendant Kirby, and offered to pay the $1,140 difference in value between the notes and the purchase price of said land to said Kirby, and she, through her agent Robinson refused to comply with said contract and deliver said notes and accept said deed and money, and repudiated and refused to carry out said contract, to the plaintiffs' damage $2,045.

9. That said Robinson stated to the plaintiffs that he would not carry out said contract, and that they might bring a suit and that he would pay any damage for which defendant Kirby might be held liable for the breach of said contract. Where-

fore, the plaintiffs demand judgment for $2,045 and costs, etc. The defendants in their answer denied the material allegations of the complaint, and specifically denied that the
(435) contract for the purchase of the land had been made.

After the pleadings were read it was admitted that neither of the defendants signed any writing touching the purchase of the land mentioned in the pleadings; and it being further admitted that the plaintiffs did not disclose to either of the defendants that Southerland was getting only $10,155 for the land, and that the plaintiffs were to get the balance of the purchase money, to-wit, $2,145, the court intimated that it would charge the jury that under such circumstances the plaintiffs could not recover of the defendants. Thereupon the plaintiffs submitted to a nonsuit and appealed.

I. F. Dortch, W. C. Munroe and *W. T. Dortch* for the plaintiffs.

F. A. Daniels and *F. A. & S. A. Woodard* for the defendants.

WALKER, J., after stating the case. The court below was right in the opinion it expressed that the plaintiffs cannot recover in this action. We know of no legal or equitable principle upon which the plaintiffs can base their right to recover damages of the defendants. It is alleged that the defendant Mrs Kirby owned certain notes which she wished to invest in real estate or with which she intended to purchase real estate as an investment, and she asked the plaintiffs to negotiate with some one in her behalf so that the notes could be thus invested. The plaintiffs thereupon applied to Southerland for the purchase of the land described in the complaint, and he authorized them to sell the land to Mrs. Kirby for $10,155 in notes, clear of all commissions, attorney's fees and expenses. The plaintiffs had no authority to close the trade for either party except upon terms agreeable to both, their agency consisting merely in bring-
(436) ing the parties together so that they might consummate such a trade as they could be able to agree upon.

We do not attach any importance to what is alleged in the seventh paragraph of the complaint, as we think Mrs. Kirby was not in any way bound under the circumstances of the case by what the defendant Robinson did. Southerland had agreed to sell the land to Mrs. Kirby for $10,155 clear of commissions and other expenses, and Mrs. Kirby was entitled to have the land at this price. To compel her to comply with the terms of the contract alleged to have been made by the defendant Robinson for her, but without her knowledge and consent, would be

virtually to make her pay the plaintiffs' commissions in violation of the previous express understanding and agreement. The plaintiffs were representing Mrs. Kirby, even if the defendant Robinson was also acting for her, and they knew that Southerland had agreed to sell at the price of $10,155 clear of commissions and expenses. If the amount had been increased to $12,300 in order that the obligation to pay the commissions might fall on Mrs. Kirby, or if any material change had been made in the transaction, she was clearly entitled to a full disclosure of the facts, and the law will not hold her to be bound by a contract or agreement so vitally affecting her interests of which she had no notice and to which she did not assent. It was the duty of the plaintiffs as her agents to communicate to their principal all the facts known to them and which were material to the transaction, and they will not be permitted to benefit either directly or indirectly by any dealing conducted in her name in which this was not done. The principal reposes trust and confidence in the agent, and the latter owes in return the duty to his principal of being faithful in all things, and he must at all times and in all circumstances put his principal's advantage above his own. This relation involves the duty of carefully guarding the interests of the principal and report- (437) ing to him all material matters which may come to the agent's knowledge. The principle is of universal application that an agent or trustee undertaking a special business for another cannot, on the subject of that trust, act for his benefit to the injury of the principal. *Dodd v. Wakeman,* 26 N. J. Eq., 484. We think it is well settled that a broker cannot recover his commissions, and certainly not damages in the place of them, if he has failed in any respect to make a full disclosure of the material facts to his principal, nor if the latter is prejudiced thereby. *Lamb v. Baxter,* 130 N. C., 67; *Haffner v. Herron,* 165 Ill., 242; *Young v. Hughes,* 32 N. J. Eq., 372; *Wadsworth v. Adams,* 138 U. S., 380; *Phinney v. Hall,* 101 Mich., 451; *Halsey v. Monteiro,* 92 Va., 581; *Jansen v. Williams,* 36 Neb., 869; 20 L. R. A., 207; *Humphrey v. E. T. Co.,* 107 Mich., 163. The general principle established by the authorities cited is clearly applicable to our case and requires us to hold that the plaintiffs are not entitled to recover, for the reason that the defendant Mrs. Kirby was not informed of the change in the terms, nor did she assent, in contemplation of the law or in fact, to the alleged contract. She now declines to accede to the alleged stipulations which the parties made for her without her knowledge, and it is clear if what was done by them had been communicated to her at the time she would have re-

jected the proposed terms of the agreement. The plaintiffs had been authorized by Southerland, the owner of the land, to sell it to Mrs. Kirby at $10,155 to him, that is, free of commissions and the expenses as above stated. A new arrangement is attempted to be made by which she is required to pay the commissions—about twenty per cent of the original purchase price. An agent cannot thus impose an obligation upon his principal in his own favor unless the principal is first made fully
(438) aware of all the facts and circumstances, and after consideration assents thereto. When we refer to a change having been made in the contract or in the terms of the contract, we mean to say that by the enhancement of the price to $12,300 Mrs. Kirby would virtually be required to pay the commissions, contrary to the spirit, if not the very letter, of the original agreement.

The defendant also contended that as the contract between Southerland and Mrs. Kirby had not been reduced to writing the latter could not be held liable to the plaintiff in damages for refusing to comply with the contract, assuming that one had been made between the parties. This presents a very interesting question and one, too, not free from difficulty. It is not necessary that we should decide it as we have already disposed of the appeal upon the other point presented. We will add, though, that it was contemplated by the parties that they should agree upon the terms of their contract before any commissions should be due to the plaintiffs, which it appears that they have not done, and it was not the fault of the defendant Mrs. Kirby that they did not agree. There may have been some misunderstanding between the parties, but even in that case Mrs. Kirby would not be liable to the plaintiffs. The ruling below upon the allegations of the complaint and the admissions was right, and the judgment of nonsuit must stand.

No error.

Cited: Trust Co. v. Adams, 145 N. C., 165.

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(439)

NEWTON v. BROWN.

(Filed 22 March, 1904.)

INJUNCTION—*Trespass.*

Where plaintiffs, suing to restrain defendants from cutting timber on certain lands, showed possession under color of title for

thirty years, defendants claiming merely under an entry on the land as vacant, entitling them to a grant from the State, were not entitled to an injunction *pendente lite* restraining plaintiffs from cutting timber.

ACTION by H. B. Newton and others against H. A. Brown and others, heard by *Judge George H. Brown,* at chambers, 21 December, 1903. From a judgment for the defendants the plaintiffs appealed.

Rountree & Carr, J. D. Bellamy and *R. G. Grady* for the plaintiffs.

Iredell Meares and *Frank D. Winston* for the defendants.

CONNOR, J. The plaintiff H. B. Newton alleges that he is the owner of a tract of land in Pender County containing more than 8,000 acres; that the plaintiff W. L. Parsley is the owner of all the timber twelve inches and upwards in diameter standing upon said land; that they and those under whom they claim have been for more than twenty-one years, and are now, in the open, notorious, adverse and exclusive possession of said land under known and visible boundaries; that the defendants have entered upon said lands "without any color of title, and unlawfully, willfully, wantonly and maliciously cut around or belted several hundred cypress trees and left them in such a condition that they will die, etc., and that they threaten to continue and are continuing to cut, injure and destroy the timber standing on said land and to commit other trespasses thereupon, etc. They ask that the defendants be enjoined from (440) continuing further trespasses, etc.; for damages and other relief. The defendants deny the material allegations of the complaint, and for a further defense aver that the lands claimed by plaintiff, or the portion thereof in controversy, was, prior to 1 January, 1903, vacant lands, and title thereto was in the State; that on 6 January, 1903, and on other dates named in the answer, certain entries were made which are fully set out in the answer, one of said entries being by J. W. Rowe, afterwards transferred to H. A. Brown, Jr.; another entry being made by H. A. Brown, Jr., and the third by defendant A. W. Taylor. They allege that in respect to the first entry the defendant H. A. Brown has perfected the same and is entitled to a grant therefor, and having paid the money to the Secretary of State for said grant is the equitable owner of the land described in said entry. With respect to the second entry he has acquired an equitable interest therein. The same allegation is made in respect to the entry of A. W. Taylor. The defendants

further say that in respect to the last two entries named the plaintiffs, H. B. Newton and W. L. Parsley, filed a protest, all of which is fully set forth in the record. They deny that the plaintiffs are the owners of the land because the same was public land prior to said entries. They allege that the plaintiffs are cutting timber and otherwise injuring the land to their damage. They further allege that the plaintiffs claim title to the land under a deed from L. A. Hart and E. D. Hall to Jacob Roberts and C. L. Woodworth, dated 30 November, 1870, and by intermediate deeds to plaintiffs. Defendants allege that the plaintiffs have had no possession under such general description, and that their possession is limited, if they have had any possession thereto, under certain deeds from one Willey and others to said Hall, bearing date of 12 December, 1850, and that said (441) deed only conveys portions of said land. That the said Hart and others undertook to convey by the description set out in the complaint, and in doing so included some 9,000 acres of land, although by the conveyances to them they only acquired about 2,000 acres of that land, which has never been reduced to actual possession by the plaintiffs. In accordance with the prayer in the complaint the judge, on 12 October, 1903, made an order enjoining and restraining the defendants from cutting timber or otherwise trespassing upon the said lands. This order was made upon the complaint, certain deeds and affidavits introduced in evidence. From this order no appeal was taken. On 9 November, 1903, his Honor, *Judge Brown,* issued notice to the plaintiffs to show cause why they should not be enjoined from committing trespass on the land, and upon the return of the notice and on reading the affidavits introduced by the plaintiffs and defendants he made an order on 21 December, 1903, continuing said injunction against the plaintiffs until the hearing of said order. His Honor recites as follows: "The defendants have already been enjoined from cutting or removing timber from said lands at instance of the plaintiffs in this action. The cause was submitted on written brief, affidavits and plats. Having considered the same I am of opinion that the plaintiffs should be restrained pending this action. It is true that a considerable part of the land is claimed by defendants under entries. I am of opinion that they have acquired thereby—and by payment of the money to the State—such an equitable interest in the lands in controversy as should induce a court of equity to prevent the lands being denuded until the title is settled, and this may be done independent of Laws 1901, ch. 666. The spirit and purpose of that act covers, I think, this case also. Let the defendants give bond in the sum of $1,000,

with usual conditions, to indemnify plaintiffs, to be approved by the clerk of Pender County Superior Court, (442) and then let the injunction be continued until the final hearing."

From this order the plaintiffs appealed. The order made by his Honor continuing the injunction against the defendants is based upon the finding that the plaintiffs have made out a *prima facie* title to the land in controversy. We think his Honor is fully sustained by the deeds, affidavits and other exhibits filed before him. The only question presented by the appeal from the order restraining the plaintiffs from proceeding is whether the defendants have made out such a *prima facie* case as entitles them to the order made by his Honor. Without discussing the conflicting affidavits in regard to the boundaries of the several tracts of land in controversy, we think there is sufficient evidence if believed to show that the plaintiffs and those under whom they claim have been in possession of the land in controversy since 1870. If that be true the State had thereby become divested of its title by such possession, and the land was not subject to entry. While it is true that an entry made in accordance with the statute confers upon the party making it an equity to call for a grant upon paying the amount prescribed by the statute and otherwise conforming with the law, we do not think that he has such an interest in the land as of itself entitles him to interfere with the possession and use of the land by those who show a possession for thirty years. The entry is not based upon any declaration by the State or its officers that the land is vacant. It is, on the contrary, the simple statement by the person making the entry that such land is vacant. He pays no money and assumes no obligation by making the entry. He acquires nothing more than an option to complete his entry and call for a grant. At the time that this action was brought and the pleadings filed no grants were issued for either of the tracts of land in controversy. On 18 November, 1903, a grant was issued by the State for the tract of land entered (443) on 6 January, 1903, containing 500 acres. In *S. v. Bevers*, 86 N. C., 588, *Ruffin, C. J.*, says: "It is notorious that grants are always issued at the instance of the grantee and upon his suggestion that the land is vacant. The State does not warrant it to be so or the liability of the land to entry. Nor is it any fraud in the State to grant land that is not so liable." We cannot think that one who simply declares that a body of land is vacant, and thereupon proceeds to lay an entry, acquires such an interest as entitles him to interfere by injunction with the possession of one who is found to be in possession. If he shall

follow his entry by taking out a grant and paying his money he has an adequate remedy to sue the person in possession upon his grant.

It will be observed that his Honor does not base his order upon a finding of facts required by chapter 666 of the Laws of 1901, but says expressly that independent of the statute the defendant is entitled to the injunction. It will be well to consider the case as if the defendants had brought the action asking the court to restrain the plaintiffs from cutting the timber from the land until they could perfect the entries by obtaining grants from the State and prosecuting their action for the recovery of the land. Their asserted right to affirmative relief is brought forward in the nature of a cross-bill or, in the language of the Code, a counterclaim. Their right to do so is recognized in *Lumber Co. v. Wallace,* 93 N. C., 22. When the defendant relies upon a counterclaim and demands affirmative relief he becomes in that respect an actor, and takes upon himself the burden of proof as if he were the plaintiff. Viewed from this standpoint, in the light of all the testimony, the plaintiffs are in the possession of certain lands, the boundaries of which are uncertain and in controversy; the defendants alleging that they are (444) cutting timber beyond the boundaries covered by their deeds on lands belonging to the State; that they have made entries upon a portion of the lands, and thereby acquired an equity to call upon the State for grants by complying with the statute. The plaintiffs set up deeds which they claim cover the lands in controversy, and assert possession since 1870. We do not think that the defendants would, in this view, be entitled to an injunction to restrain Newton and Parsley from cutting the timber. It is settled by the uniform decisions of this Court that an entry of lands creates an "inchoate equity" in them, which entitles the enterer, upon payment of the amount fixed by the statute, to a grant. No case is cited in the defendants' well-prepared brief in which an action for any purpose has been sustained before the issuance of the grant. This Court has expressly held in *Hall v. Hollifield,* 76 N. C., 476, that "The public lands of the State are open to entry by any of its citizens, and the first declaration of intention is made on the books of the entry taker in the county where the land lies, and this gives priority, called a pre-emption right. No estate or interest in the land is thereby acquired. No consideration is paid and none of the requisites for that purpose are performed, but simply the right to be preferred when the money is paid and the other formalities required by the statute are complied with." That the court will by injunction protect the owner of an equitable

estate from waste cannot be questioned. Whether one having "an inchoate equity," or a bare right to call for a grant from the State, will be permitted to enjoin the person in possession from using the land for the purpose for which it is fit is an entirely different question. We find no case in this State in which the Court recognized the right of an enterer to maintain an action for any purpose. *Brem v. Houck,* 101 N. C., 627, is an express authority that he cannot have injunc- (445) tive relief against the issuing of a grant to another person. Courts of equity prior to 1855 were very slow to interfere by injunction with the use and enjoyment of land by those in possession, and declined to do so unless the plaintiff had established, or was seeking in the law courts to establish, his legal title. It was necessary to allege and show that irreparable injury was threatened. Usually it was necessary to show insolvency. *Lyerly v. Wheeler,* 45 N. C., 267; 59 Am. Dec., 596; *Thompson v. Williams,* 54 N. C., 176; *Bogey v. Shute,* 54 N. C., 180 (S. C., 57 N. C., 174); *Thompson v. McNair,* 62 N. C., 121. At the session of 1885 (chapter 401) an act was passed declaring that "It shall not be necessary to allege the insolvency of the defendant," etc. The language of *Merrimon, J.,* in *Lumber Co. v. Wallace, supra,* is peculiarly appropriate to this case: "While we are of the opinion that the defendants are entitled to relief, we think that the plaintiffs ought not to be restrained from cutting, using or selling timber until the action shall be heard upon its merits. No special or peculiar cause is alleged why the timber may not be cut and sold. This is not a case wherein a party aggrieved alleged irreparable injury. We can see no adequate reason why the defendants, if they succeed in this action, may not be fully compensated in damages if adequate means shall be afforded them for ascertaining the reasonable value of the timber. This may be done. It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done unless in extreme cases, and this is not one." *Lewis v. Lumber Co.,* 99 N. C., 11, in which it is said: "It appears that the defendant is cutting and carrying away from the land ordinary forest timber suited to the purpose of marketing lumber for the markets. Obviously the plaintiffs may be compensated in damages for this timber." To the suggestion (446) that the land covered by the defendants' entries is included in the Wheaton grant of 1795, and that the deed of the sheriff to the State under a tax sale vests the title in the board of education, and is therefore not subject of entry, it is sufficient to say that it is not necessary that we should express any opin-

ion. It is worthy of consideration, at the proper time, whether lands thus granted by the State and purchased for delinquent taxes come within the terms "vacant and unappropriated lands belonging to the State." *Ruffin, J.*, in *S. v. Bevers, supra,* says that they were subject to entry, but that by the act of 1872 they were ceded to the board of education. The affidavits tend to show that the lands in controversy are covered by the Wheaton grant. Upon the whole record we think that his Honor should not have restrained the plaintiffs. Because the court will enjoin at the instance of one in possession a continuous and highly injurious trespass by one having an "inchoate equity," not based upon anything more than his "laying an entry," it does not follow that it will at his instance interfere with the use and possession of one who has made out a *prima facie* case of a possession under color of title for more than thirty years. If the defendants are so advised they may move the court to require the plaintiffs to file a bond to indemnify them against loss by cutting the timber if they shall finally make good their intention. It will be within the sound discretion of the judge to make such orders in that respect as he may deem to be proper. The injunction order appealed from should be vacated.

Error.

Cited: Janney v. Blackwell, 138 N. C., 439; *Frasier v. Gibson,* 140 N. C., 277; *Lumber Co. v. Cedar Co.,* 142 N. C., 418; *Fisher v. Owen,* 144 N. C., 652.

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(477)

PORTER v. ARMSTRONG.

(Filed 22 March, 1904.)

1. JURY — *Special Proceedings — Drains — Code, Secs.* 1297, 1324— *Code, Secs.* 1992, 1946.

In a proceeding to drain lowlands, where the questions raised by the answer are such as would be passed upon by commissioners, the parties are not entitled to a jury trial, and the clerk of the Superior Court should appoint the commissioners.

2. ESTOPPEL—*Judgment—Pleadings.*

An estoppel should be pleaded with such certainty that it may be seen from the pleadings what facts are relied on.

PORTER *v.* ARMSTRONG.

3. APPEAL—*Orders—Code, Sec.* 548.

An order in a drainage proceeding directing matters which are properly for the determination of the commissioners to be referred to a jury is appealable.

DOUGLAS, J., dissenting.

ACTION by Elisha Porter against T. J. Armstrong, heard by *Judge G. S. Ferguson,* at January Term, 1904, of PENDER.

The plaintiff instituted this proceeding against the defendant by filing his petition in the office of the clerk of the Superior Court and issuing a summons in accordance with the provisions of chapter 30, section 1297, of the Code, alleging ownership of a tract of "swamp, flat or low land"—particularly described—known as the "Pigford farm." That the defendants were the owners of said land adjoining and "below the said Pigford farm"; that a portion of his land was ditched, cleared and under cultivation and was subject to inundation and sog. It could not be drained except by clearing or cutting out a canal known as the Strawberry Canal, etc., which was cut through the defendant's land, etc., and constitutes the (448) only natural outlet to the waters of Pigford farm. The plaintiff prayed that commissioners be appointed pursuant to chapter 30 of the Code.

The defendants Armstrong and Mrs. Durham's answer, admitting the ownership of the land by the plaintiff and defendants, denies that the plaintiff's land is "swamp, flat and low land." They deny that the plaintiff's land is subject to inundation, and that it cannot be conveniently drained except in the manner pointed out by the petitioner. They also deny certain averments in regard to the use of the canal. They aver that the canal is not cut through their land; that it stops some distance before it reaches the plaintiff's land. They allege that the plaintiff has diverted his water and has violated certain contracts, and they say that the plaintiff "has been harassing these defendants with suit after suit in court, and the said suits have been appealed to the Supreme Court of North Carolina, and it has been decided more than once that the petitioner has no right to drain into the Strawberry Canal, and these defendants plead the same as an estoppel against the petitioner having any relief herein."

They further say that the petition is not filed in good faith and for the *bona fide* purposes as alleged in said petition, but for the purpose of obtaining for the petitioner the right to drain the Strawberry Canal water which the plaintiff has diverted from its natural course, and thereby injured the defendant,

and that the petition is filed for no other purpose than to harass and annoy the defendants, etc.; that the plaintiff has other means of draining his land than through the defendant's land.

When the cause came on for hearing upon the petition and answer, the defendants made a motion that the cause be sent to the Superior Court and placed upon the trial docket to
(449) try the issues of fact raised by the answer. They also insisted that a plea in bar had been set up in the answer which was to be passed upon before any commissioners could be appointed. The clerk allowed the motion and transferred the cause to the civil issue docket of the court, and the plaintiff excepted and appealed to the judge.

At January Term, 1904, of the Superior Court, the judge presiding affirmed the judgment of the clerk, denied the plaintiff's motion that commissioners be appointed, and ordered certain issues to be submitted to the jury. The plaintiff excepted and appealed.

John D. Bellamy, Stevens, Beasley & Weeks and *Shepherd & Shepherd* for the plaintiffs.

E. K. Bryan and *J. T. Bland* for the defendants.

CONNOR, J. It is a source of regret and surprise that the procedure prescribed by the drainage laws (the first of which was enacted at the session of the General Assembly of 1795, chapter 436) should continue to be in doubt and uncertainty, resulting in delay and expense. The difficulty has doubtless arisen from the changes wrought in our judicial system and mode of procedure. The substantial features of the law have been retained in the several Codes of the statute law of the State. Chapter 40, Revised Statutes, was brought forward in the Revised Code; no change in the procedure was made until 1868. The original statute required the petition to be filed in the county court, and provided for the appointment of twelve jurors who were required to make their report to the county court, "which shall be recorded in said court." The construction of the act in regard to the power and duty of the court, and the right of the party dissatisfied to appeal, came before this Court in *Collins v. Houghton,* 26 N. C., 420. The Court, adopting the
(450) principle announced in *R. R. v. Jones,* 23 N. C., 24, regarding the construction of statutes providing for the condemnation of land for railroads, says that the county court could "only direct the verdict to be recorded or order a new jury, and from its action no appeal could be taken." *Nash, J.,* said: "The jury thus constituted is the special tribunal to whom

by the act the power exclusively belongs to say whether the land does need to be drained, and if so, what ditches shall be dug, and the amount of the damage to be paid to the owners of the land through which they may pass." The Court held in *R. R. v. Jones, supra,* that the general law in regard to appeals had no application. It was, however, in that case said: "In denying the parties the right of appeal in cases of this kind we do not deny them the privilege of having their cases heard before a superior tribunal. Any error which may be committed by the county court in its action may be revised and corrected in the Superior Court through the instrumentality of a writ of error or a *certiorari* in the nature of a writ of error." The practice under the provisions of the act permitting the condemnation of land for the site of a public mill (Code, ch. 43, Laws 1777, ch. 122) was considered by the Court in *Brooks v. Morgan,* 27 N. C., 481. It was held that the general provisions for appeals did not apply to "summary and peculiar proceedings not according to the course of the common law, but prescribed by statute under peculiar circumstances." The language of *Gaston, J.,* in *R. R. v. Jones, supra,* is: "The mode of procedure was intended to be cheap and expeditious, all which purposes would be frustrated by allowing either party the unlimited right of appeal."

This construction of the drainage act was uniformly followed by this Court prior to the change in our judicial system in 1868. Upon the filing of the petition the county court appointed the jury. They went upon the land, decided (451) upon personal inspection the necessity of the ditch, located it and assessed the damage to be paid by the petitioner. They made their report, and after the adoption of the amendment made by the Revised Code, ch. 140, the court "confirmed the report unless good cause be shown to the contrary." *Stanly v. Watson,* 33 N. C., 124.

In *Skinner v. Nixon,* 52 N. C., 342, *Pearson, C. J.,* examines the provisions of the act and discusses them at length, saying that the action of the county court was subject to be reviewed in the Superior and Supreme Courts, "not by way of *unlimited appeal,* which would vacate as well the report of the commissioners as the judgment of the county court, and make it necessary for the Superior Court to proceed *de novo,* but by way of writ of *certiorari* in the nature of a writ of error, which would be in effect a limited appeal—in other words, an appeal restricted to the questions which the county court was authorized to pass upon—leaving the report of the commissioners open to be confirmed or set aside according to the decision reviewing the

action of the county court." In *Shaw v. Burfoot,* 53 N. C., 344, the petition was dismissed because it did not conform to the provisions of the statute. In *Brooks v. Tucker,* 61 N. C., 309, the report was set aside because it failed to conform to the statute. These cases were reviewed for error apparent on the record. They were brought up to the appellate court by a *limited appeal,* as pointed out by *Pearson, C. J.,* in *Skinner v. Nixon, supra. Norfleet v. Cromwell,* 70 N. C., 634; 16 Am. Rep., 787, was a "civil action upon a covenant," and not under the drainage law. The able and interesting discussion of *Mr. Justice Rodman* is upon the rights of the parties in regard to the easement. In *Gamble v. McCrady,* 75 N. C., 509, the proceeding was brought under the provisions of chapter 39,
(452) Battle's Revisal, being chapter 137, Laws 1869-'70. *Rodman, J.,* noted that chapter 40, Revised Code, had been omitted from the revisal and the act of 1869-'70 substituted therefor. This, however, did not operate to repeal chapter 40 of the Revised Code. This chapter, with all its amendments and other drainage laws, is re-enacted in chapter 30 of the Code of 1883. The petition, with the same averments required by Laws 1795, ch. 436, must now be filed in the "Superior Court," that is, before the clerk, and a summons issued and served. Upon the hearing of the petition the court shall appoint commissioners. Sections 1298 and 1299 prescribe the duties and method of the procedure of the commissioners. Section 1324 enacts that "the proceeding is made the same as prescribed in other special proceedings." This Court undertook to harmonize the several statutes relating to the practice in these cases in *Durden v. Simmons,* 84 N. C., 555. While it was there held that the answer did not raise any issue as to title, it is said that if it had done so such issue should be tried before proceeding to the appointment of commissioners. The reason is obvious, as pointed out by *Smith, C. J.* It would seem that if in cases of this kind the answer raised an issue of fact, the decision of which in favor of the plaintiff was essential to the further prosecution of the petition, the clerk would stay proceedings until such issue was decided in accordance with the practice in other special proceedings. If questions of law are presented and decided by the clerk before the appointment of the commissioners, an appeal directly to the judge may be taken, and his decision will be certified to the clerk, who will proceed in the cause as directed. This course harmonizes the language of the statutes with the construction put upon section 1892 of the Code regarding petitions for partition. This practice should be strictly confined to defenses which lie at the threshold of the

cause and *pleas in bar*. In respect to questions, the de- (453) cision of which are committed to the "special tribunal" provided by the statute, the clerk should proceed to appoint commissioners. When the report of the commissioners comes in exceptions to it may be filed and heard by the clerk. An appeal may be taken from his judgment and his rulings reviewed, as was said by *Pearson, C. J.*, in *Skinner v. Nixon, supra,* being an appeal restricted to questions which the (clerk) county court was authorized to pass upon, leaving the report of the commissioners open to be confirmed or set aside according to the decision reviewing the action of the court (clerk). In this way, while the rights of the parties to have the action of the clerk reviewed are secured, useless and expensive delays are avoided, and effect is given to section 1324 of the Code. We do not find in chapter 30 the language contained in section 1946, construed in *R. R. v. Newton,* 133 N. C., 132, prescribing the procedure in petitions for condemning rights of way for railroads. It is there expressly enacted that "upon the coming in of the report exceptions may be filed, and upon the determination of the same either party may appeal." This Court has uniformly held that in proceedings under that statute no appeal can be taken until the coming in of the report. *Telegraph Co. v. R. R.,* 83 N. C., 420; *R. R. v. Newton, supra.*

The defendant contends that the cases decided by the Court in regard to the right of the defendant to have a jury trial should not be followed, because the present Constitution expressly secures to him the right to trial by jury. We do not perceive any difference between the language of section 14 of the Declaration of Rights of 1776 and section 19 of our present Constitution. They are in identically the same words. It is true that the Court has held that controversies at law include all civil actions, "suits in equity" having been abolished by the Constitution. This principle has never been (454) understood to extend to proceedings "not according to the course of the common law" or to summary statutory proceedings.

Guided by the principles and procedure which we think correspond to the provisions of the statute and the decisions of this Court, we proceed to consider the defendant's answer to ascertain whether any issues of fact are raised which must be determined by a jury at a regular term of the court. Referring to matters set up in the answer in *Durden v. Simmons, supra,* of a character similar to much of the answer in this case, *Smith, C. J.*, says: "We give all the effect to which the answer is fairly entitled in construing it as a denial of the relations between

the lands and the necessity and propriety of burdening the one for the other, and this under the statute is the appropriate function of the commissioners from the words of the act." We gather from this language that the allegations regarding the necessity for the ditches to drain the plaintiff's land were proper to be submitted to the commissioners when appointed, and was the basis for issues to be tried by a jury.

In *Winslow v. Winslow,* 95 N. C., 24, no objection was made to the issues submitted. *Merrimon, J.,* said: "No question is made as to the regularity and propriety of submitting to the jury the issues set out in the record, and we advert to them for the purpose of saying that it may be questionable whether it is proper to submit such as they are." In *R. R. v. Ely,* 101 N. C., 8, no objection was made to the issues submitted. In *R. R. v. Parker,* 105 N. C., 246, the appeal was taken after the coming in of the report. The Court held that the party filing exceptions was not entitled to a jury trial. We are therefore of the opinion that the questions involved in the first, second, fifth, sixth and seventh issues submitted by his Honor should be passed upon by the commissioners when appointed, and do not present *issues* of fact to be tried by the jury.

(455)

The third and fourth issues are directed to an alleged estoppel growing out of an agreement made by one Levin Lane, a former owner of the defendant's land, and one Berry, formerly owning the plaintiff's land; also a plea of *res judicata* based upon suits heard and determined between the parties. We are not quite sure that we correctly interpret the language of the answer in respect to these matters. If, as we understand, it is sought to estop the plaintiff by the agreement referred to, the terms and extent of the agreement should have been fully set forth. If it was a personal license to drain through the defendant's land it was not enforceable, and therefore could not work an estoppel to prosecute this petition. In regard to the suggestion that the matter set up in the petition is *res judicata,* we cannot see how, in the uncertainty of the reference to the alleged suits, an issue can be drawn. No reference is made to any particular suit. An estoppel which "shutteth a man's mouth to speak the truth" should be pleaded with certainty and particularity. 8 Enc., Pl. & Pr., 11. The court should be able to see from the pleadings what facts are relied upon to work the estoppel. The defendant's counsel in their well-considered brief make no reference to this part of their answer. If the defendant desires to set up the estoppel as a *plea in bar,* it is within the power of the clerk, if he shall think it in furtherance of justice, to permit him to do so by way of an amendment to his answer.

We do not find anything in the decisions of this Court, in the several cases which have come before us between the parties, which would estop the plaintiff from prosecuting his petition. *Douglas, J.*, in *Porter v. Armstrong,* 129 N. C., 101, says: "While the question is not now before us, we see no reason, as at present advised, why the petitioner cannot proceed under chapter 30 of the Code." This petition is based (456) upon the theory that the plaintiff has no easement or other right to drain through the defendant's land. If this is not true he cannot maintain his petition.

We conclude upon the record that no plea in bar has been sufficiently pleaded; that the matters set up in the answer other than those relied upon for the plea are properly triable by the commissioners to be appointed by the clerk. We think the order of the court appealable under section 548 of the Code. It would be an idle and expensive thing to try this cause before a jury only to have the same questions submitted to the commissioners after verdict. It is one of the anomalies in the practical working of our laws that a statute passed more than a century since for the promotion of agriculture, the opening of swamp lands, and increasing the capacity of the earth to bring forth bread for the people, should be a subject of expensive litigation and almost hopeless delay. Without expressing any opinion in regard to the merits of this long-standing controversy, we are struck with the fact, as appears from the records of this Court, that for nearly thirty years the owners of these lands have been in litigation in regard to their drainage. We cannot but indulge the hope that when three disinterested, intelligent freeholders shall view the premises and find the facts both parties may find it consistent with their sense of justice and their own interests to abide the judgment.

Error.

DOUGLAS, J., dissents.

Cited: R. R. v. R. R., 148 N. C., 64; *Staton v. Staton, ib.,* 491; *Abernathy v. R. R.,* 150 N. C., 103.

(457)

HUGHES v. CLARK.

(Filed 22 March, 1904.)

1. DEDICATION—*Streets—Specific Performance.*

Where lots are sold by reference to a map on plat representing a division of a tract of land into streets and lots, such streets are dedicated thereby, and the purchaser of lots acquires the right to have the streets kept open.

2. DEDICATION—*Streets.*

The acceptance or non-acceptance by a town of streets dedicated by a platted tract does not affect the title thereto.

ACTION by J. E. Hughes and others against W. T. Clark, heard by *Judge Frederick Moore* and a jury, at November Term, 1903, of PITT. From a judgment of nonsuit the plaintiffs appealed.

Jarvis & Blow and *F. S. Spruill* for the plaintiffs.
Connor & Connor and *Fleming & Moore* for the defendant.

MONTGOMERY, J. The purpose of this action is to compel specific performance on the part of the defendant of a contract entered into in February, 1902, for the sale by the plaintiffs and the purchase by the defendant of a parcel or lot of land and its improvements situated in the town of Greenville. In conformity with the written agreement between the parties the plaintiff executed in due form a deed to the property and tendered it to the defendant, who declined to accept it and pay the agreed purchase price on the ground that the plaintiff had no good and sufficient title to that part of the lot of land described in the deed upon which was located a leaf tobacco factory and machinery necessary for its operation. The
(458) only question in the case then is this, "Did the plaintiffs have at the time they tendered the deed to the defendant a good and sufficient title to that part of the lot on which was situated the factory and machinery and equipment?"

In 1892 the Greenville Land and Improvement Company, being the owner of a tract of land known as the "Moore land," lying to the southeast of Greenville and adjoining the town, had the same laid out by P. Matthews, a surveyor, into building lots and streets, Matthews at the same time furnishing a map on which the streets were designated by names and the lots by numbers. Numerous deeds, in each of which one or more of the lots was embraced, to various purchasers, were executed

by the Greenville Land and Improvement Company, its successor, the Greenville Lumber Company, and Lovitt Hines, receiver of the last-named company, and duly registered prior to the sales made by said Hines, receiver, of lots numbers twenty-one, thirty-four and thirty-five, and in all those deeds reference was made, as to the description of the property conveyed, to the names of streets and numbers of lots as shown on the *map* of Matthews. The *habendum* was in these words: "To have and to hold the above-described parcel or lot of land, together with the rights of ingress and egress on all the streets leading to the same, and all other rights and privileges thereto belonging." The lots numbers twenty-one and thirty-five with several others were conveyed by Hines, receiver, to L. C. Harper, and lot thirty-four was conveyed by Hines, receiver, to Strause, who in turn conveyed it to Arthur. In the deed from Hines to Arthur is also conveyed all the right, title and interest which the Greenville Lumber Company might have in and to any or all of the streets included in the lands or dividing the lots therein conveyed. Arthur and wife, in 1901, conveyed lots twenty-one, thirty-four and thirty-five to the plaintiffs, together with a strip of land ten feet wide and running along the southern side of the above-mentioned lots, the said (459) ten feet being at the time a part of Eleventh street on the map of Matthews. The property mentioned and described in the deed which the plaintiffs tendered to the defendant embraced lots twenty-one, thirty-four and thirty-five and also the ten-foot strip of Eleventh street, upon a part of which the plaintiffs afterwards built one end of their tobacco factory. Eleventh street at the time of the Matthews survey was set apart and staked off with iron stakes, but that part of the street which was between Clark and Pitt streets, upon which lots thirty-four and thirty-five abutted, was not actually put in a condition for general use at the time of the sale of lots thirty-four and thirty-five, although people could and did pass over the same.

Did Arthur's deed to the plaintiffs have the effect of vesting the title to the ten-foot strip of Eleventh street in the plaintiffs? Or, to state the question in another form, could Hines, the receiver of the Greenville Lumber Company, by his deed to Arthur, enable Arthur or his grantees, the plaintiffs, to obstruct Eleventh street by building on a part of it a tobacco factory, as against purchasers of lots according to the plan of the Matthews' survey? The decisions of this Court are to the contrary. In *Rives v. Dudley,* 56 N. C., 126; 67 Am. Dec., 230, *Judge Pearson,* in illustrating the question decided in that case, said for the Court: "What is the principle? It is this: If the

owner does an act whereby he signifies his intention to appropriate land to the use of the public as a highway or street or square, to be used by the public as a pleasure ground or the like, and *individuals in consequence of this act purchase property or build houses with reference to its being so used by the public, and become interested to have it so continue,* he is precluded from resuming his private rights of property over the land, because it would be fraudulent in him to do so. (460) When individuals have become interested in reference to the use of the land by the public the dedication takes effect *immediately.*" And again, in *Moore v. Carson,* 104 N. C., 431; 17 Am. St., 681; 7 L. R. A., 548, the Court declared it to be a well-settled principle that where a corporation or an individual, by laying off streets, has induced third persons to buy lots adjacent to them, the dedication to the public use of the streets was irrevocable, and that even in cases where they have not been formally accepted by the authorities of a town in which they lie. In *Conrad v. Land Co.,* 126 N. C., 776, the Court said: "If the owner of land lays it off into squares, lots and streets with a view to forming a town or city, or as a suburb to a town or city, certainly if he causes the same (the map) to be registered in the county where the land is situate and sells any part of the lots and squares, and in the deed refers in the description thereof to a plat, such reference will constitute an irrevocable dedication to the public of the streets marked on the plat. *Meier v. Portland,* 16 Ore., 500; 1 L. R. A., 856. We think the same principle would apply to the piece of land which was marked on a plat as squares or courts, or parks, and that streets and public grounds designed on said map should forever be opened to the purchaser and the public." It is true that in *Moore v. Carson, supra,* the defense of the defendants was that their ancestor had bought lots abutting the *particular* street in Taylorsville in Alexander County, and which street the commissioners had afterwards attempted to sell and convey to the plaintiffs; and in *Conrad v. Land Co.* the action for a perpetual injunction to restrain the defendant from selling for private purposes a part of "Grace Court" was brought by persons who had bought lots abutting Fourth street as it ran alongside the court. Nevertheless in the last-mentioned case the Court held, as we have seen, that all the streets marked on the (461) plat were irrevocably dedicated to the public. And in *Collins v. Land Co.,* 128 N. C., 563; 83 Am. St., 720, although the streets which the defendants were obstructing and closing were in a remote and sparsely settled and comparatively less valuable section of the lands which had been laid off into

streets and lots, the Court held that the scheme of sale as indicated by the map was a unity, and that there was a presumption that all the public ways had added value to all the lots embraced in the scheme. In that case the Court, after having referred to the lack of uniformity in the decisions of the courts of the several States upon the matter under consideration, some of them holding that the purchaser had a right of way over all the streets designated on the map, and that each and all of them must be kept open, while in other jurisdictions it was held that a purchaser could only require the public way adjoining the purchaser's lot to the highway in one direction and to the next side street in the other, declared that after a careful consideration it would not alter the decision on that question made in *Conrad v. Land Co.* It will not be superfluous to quote from the last-mentioned case what was said there on this point: "The principle of law involved in this case is, we think, the same as that in *Conrad v. Land Co.,* 126 N. C., 776. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than in that case, but that argument would not be allowed to influence us in our decision. The courts of the States in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that where lots have been sold by reference to a plat representing a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down on the plat. *Pearson v. Allen,* 151 Mass., 79; 21 Am. St., 426. In other courts it is held that a map or plat re- (462) ferred to in a deed becomes a part of the deed as if written therein, and that therefore the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat or map kept open. This view is so well and clearly stated in Elliott on Roads, sec. 120, that we quote it: 'It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the general plan or scheme disclosed by the plat or map, acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the plat or map is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those with-

out, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not therefore to be permitted to take it from them by revoking a part of his dedications.' "

The effect of the foregoing decisions therefore is that where lots are sold and conveyed by reference to a map or plat which represent a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations.

There is a dedication, and if they are not actually opened
(463) at the time of the sale they must be at all times free to be opened as occasion may require. If such streets be obstructed there is created thereby a public nuisance, and each purchaser can, by injunction or other proper proceedings, have the nuisance abated, as there is in all such cases an irrebutable presumption of law that any complaining purchaser of a lot or lots has suffered peculiar loss and injury.

The plaintiffs, however, insist that they acquired a good title to the property through the action of the board of aldermen of the town of Greenville. At the time of the Matthews survey and the sale of the lots by the Greenville Land and Improvement Company and Hines, the receiver of the company, the property was outside the corporate limits of the town; but in 1899 the limits of the town were extended so as to take the entire tract of land, including Eleventh street, within them.

On 14 March, 1902, the board of aldermen of the town, after declaring in meeting that they had not accepted that part of Eleventh street between Clark and Pitt streets, as it appeared on the map of Matthews, as a street of the town, in consideration of an attempted donation of Arthur to the town of the land on which Eleventh street runs, presumably under his deed from Hines, receiver, and which did not pass the easement, and the further agreement of Arthur to donate the land between Pitt and Greene streets to the town and to open Eleventh street between those points, and the proposition of the plaintiffs to open Eleventh street forty feet wide between Clark and Pitt streets if the board would agree to accept Eleventh street forty feet wide in place of fifty feet (Eleventh street being fifty feet wide in fact and also on the Matthews survey) agreed that the plaintiffs might continue to use and occupy the factory building on that part of Eleventh street lying alongside the southern end

of lot thirty-five, and they also relinquished to the plaintiffs and their assigns all right or claim the town might (464) have acquired, if any, to said ten feet of Eleventh street between Clark and Pitt streets where the factory of the plaintiffs is located. We cannot see how that action of the board of aldermen helped the title of the plaintiffs. There are most respectable authorities which hold that if a city or town accepts, in an amended charter, additional territory previously laid off and platted into streets and lots, the acceptance amounts to an acceptance of such an addition and the streets and alleys therein. If we should adopt that view it might be in the power of the board of aldermen, under section 3803 of the Code, to narrow the street, but the only effect of that would be to restrict the town's liability to keep in repair the street so narrowed. They would have no right to relinquish or give away the remainder of the former street to a private individual for private purposes. *Pence v. Bryant,* 54 W. Va., 263; *Moore v. Carson, supra.*

On the other hand the acceptance of the additional territory under the amended charter did not have the effect in law of an acceptance by the board of aldermen of Eleventh street fifty feet in width, as it appears on the map of Matthews, and that the only acceptance by the town of Eleventh street was that of March, 1902, as being forty feet in width, leaving ten feet thereof at the southern side of lots thirty-four and thirty-five, then the town authorities had nothing to do with the ten feet of the street which they declined to accept. It remained exactly as it did before it became a part of the town, dedicated to the public use, though not to be kept in repair by the town, and not to be obstructed because of the reasons already given in this opinion.

We find no error in the judgment of his Honor in dismissing the plaintiff's action as of nonsuit, and the judgment is

Affirmed. (465)

DOUGLAS, J., concurring in result only. I am compelled to concur in the judgment of the Court, since, however erroneous the opinion of the Court may be, it would be manifestly inequitable to compel the defendant to specific performance of a contract for the purchase of land, the use of which this Court will not permit him to enjoy. I do not think that the case of *Collins v. Land Co.,* 128 N. C., 563, has any application to the case at bar, but in any event my views have been so fully expressed in my dissenting opinion in that case that it is needless to repeat them here.

As to the other question in the case, the solution seems very

simple. The plaintiff owns the ten feet in controversy in fee simple, subject only to whatever rights of easement the public or adjacent proprietors may have therein. When the easement ceases to exist by abandonment or otherwise, the owner retains the fee and recovers the unrestricted use of his property. I freely admit that the town cannot entirely close up the street, or to sell or give any part of it to anyone; but I am not aware of any law by which a private donor or donee can compel the town to accept a street of any specified width. If the town keeps open a street of suitable width, I see no reason why it cannot refuse to accept or subsequently abandon such part as may be neither necessary nor convenient for public use. This is simply an abandonment of the public easement *pro tanto* and in no sense a gift, concession or conveyance to anyone.

We all know that a well-paved street of forty feet would be much more useful than fifty feet of mud holes, and that it would cost proportionately more to pave a wider street than one of less width. It is common knowledge that the city of Wash-
(466) ington, in spite of the national aid it constantly receives, found it impossible to bear the expense of paving its residence streets at their original width, and permitted a certain number of feet to be enclosed by the adjacent owners. As there, the fee never was in the adjacent owners, they acquired only such permissive use as the city might give them. In the case at bar the fee was already in the plaintiff, and the abandonment of the public use simply relieved that much of his land of the burden of the pre-existing easement.

Connor, J., having been of counsel, did not sit on the hearing of this case.

Cited: Milliken v. Denny, 135 N. C., 22; *Waynesville v. Satterthwaite,* 136 N. C., 230; *Milliken v. Denny,* 141 N. C., 227; *S. v. Godwin,* 145 N. C., 465; *Staton v. R. R.,* 147 N. C., 440; *Bailliere v. Shingle Co.,* 150 N. C., 637.

CARTER v. WHITE.

(Filed 22 March, 1904.)

1. FORMER ADJUDICATION—*Trespass — Injunction—Judgment—Code, Sec.* 548.

The decision on appeal from an order continuing to the hearing in an action for trespass an injunction restraining trespass,

as to the effect of a judgment and decree in another action and subsequent partition proceedings, is not the law of the case, so as to be conclusive on appeal from the final judgment in the trespass suit.

2. ESTOPPEL—*Judgment—Partition.*

A judgment in a partition proceeding determining the respective interests of parties thereto is binding on said parties as against an after-acquired title.

CLARK, C. J., dissenting.

ACTION by J. C. Carter and others against L. R. White, heard by *Judge W. B. Councill,* and a jury, at September Term, 1903, of CURRITUCK.

The plaintiffs, trustees of Swan Island Club, prosecute (467) this action against the defendant for an alleged trespass upon the land described in the complaint. They demand judgment for damages and other relief. The defendant in his answer denies the ownership as alleged, admits an entry upon the land, and sets up title to an undivided interest therein. Appropriate issues were framed and submitted to the jury. The plaintiffs introduced the record of a civil action lately pending and determined in the Superior Court of Currituck County, wherein the present plaintiffs, James C. Carter and William Minot, Jr., together with W. H. Forbes, trustees of Swan Island Club, were parties plaintiff and the present defendant was party defendant. It appears from an inspection of said record that the plaintiffs alleged that they were the owners in fee and in possession of the land described in the complaint, and that the defendant had committed acts of trespass thereon.

The defendant in his answer denied that the plaintiffs were owners and alleged that he was the owner in fee of an undivided interest in the land. He admitted the entry and alleged that the same was lawful.

The cause came on for trial at Fall Term, 1896, and the following issue was submitted to the jury: "To what part of the land described in the complaint are the plaintiffs, trustees, and the defendant respectively entitled?" and the jury responded, "The defendant to one fifty-fourth part of the whole and the plaintiffs to the balance thereof." Judgment was rendered in accordance with the verdict, "that the defendant owns in fee simple one undivided fifty-fourth part of said land and the plaintiffs, trustees, the balance of the same." A full description of the land is set out in the judgment. Thereafter the plaintiffs in said action instituted a special proceeding in which the defendant therein, being the defendant herein, was

party defendant for the purpose of having partition of
(468) the land. In the petition in said proceedings the plaintiffs alleged that they were tenants in common with the defendant of the land described therein, being the same land described in the complaint in the civil action, and setting forth the interest of the parties. The defendant filed no answer and the court rendered judgment directing partition, appointing commissioners for that purpose. The commissioners made partition, allotting to the defendant by metes and bounds one fifty-fourth part in value of the land and to the plaintiffs the balance thereof; and on 23 September, 1898, their report was duly confirmed by the court and the parties adjudged to hold the portions allotted to them by the commissioners. Thereupon the defendant introduced a grant for the *locus in quo* from the State to John Williams, Thomas Williams and Jeremiah Land, also a deed from Thomas Land to himself, bearing date 1 February, 1899. The defendant showed that Thomas was one of the heirs at law of Jeremiah Land, one of the persons named in the grant.

The record also states "that it is admitted the defendant is a tenant in common with them to the extent of the interest conveyed to him under the deed from Thomas Land of 1 February, 1899, unless the defendant is estopped by the proceedings set up in this action." It was conceded that the present plaintiffs succeeded to the title of the plaintiffs in said action and proceeding. The plaintiffs moved for judgment; the motion was denied, and the plaintiffs excepted.

The court instructed the jury that if they found from the evidence that Jeremiah Land was one of the original grantees from the State to the land in controversy; that he died seized of the same, and that Thomas Land, from whom the defendant bought 1 February, 1899, was not a party to the proceedings introduced in evidence, the defendant was not estopped.
(469) The plaintiffs excepted, and from a judgment for the defendant appealed.

Pruden & Pruden and *Shepherd & Shepherd* for the plaintiffs.

E. F. Aydlett for the defendant.

CONNOR, J., after stating the case. The plaintiffs contend that the defendant is estopped from asserting title to any portion of or interest in the land in controversy, first, by the verdict and judgment in the civil action rendered at Fall Term, 1896; and

second, by the final judgment in the special proceedings for partition of 23 September, 1898.

The defendant admits that he is estopped to assert any title which he owned at the time of the institution of said action and of said special proceeding, or which he has derived from the parties to said action, or any person claiming under said parties, but insists that he is not estopped to assert title derived from Thomas Land, who claims under Jeremiah Land, neither of whom were parties to or in any manner bound by the judgment in said action or proceeding. This is the sole question presented upon this record.

Before proceeding to discuss the authorities relied on by counsel it will be well to note the disposition of this case made by this Court at August Term, 1902 (131 N. C., 14). The case as then presented was an appeal from an order continuing to the hearing an injunction restraining the defendant from trespassing upon the land pending litigation. The Court decided that the judge was in error in making said order. It is not contended that the judgment then rendered was final or worked an estoppel upon the plaintiffs to further prosecute this action. The appeal was not from any "judgment" but from a "judicial order," as provided in section 548 of the Code. The term "order" is sometimes applied to an interlocutory judgment or decree. Indeed, under the Codes of the several States, (470) interlocutory judgments and decrees are no longer recognized, and "orders" have been substituted therefor. 17 Am. and Eng. Ency., 763. The defendant, however, says that this Court in the opinion rendered decided the question now presented, and that the decision became the "law of the case" and binding upon us in all other and future steps herein. It is well settled that the decision of a question presented by the record and necessary to be decided in the final disposition of the case is conclusive upon the parties.

We will not entertain a proposition to "rehear" a case by means of a second appeal. *Fretzfelder v. Ins. Co.,* 123 N. C., 164; 44 L. R. A., 424; *Setzer v. Setzer,* 129 N. C., 296. This principle, however, cannot be so extended as to include such a case as this. The only question presented by the former appeal was whether his Honor should have made the interlocutory order continuing the injunction to the hearing, and in no manner involved the final determination of the case or the rights of the parties upon the trial thereof. We therefore conclude that it is our duty to decide this appeal as if presented for the first time, giving to the views expressed by this Court such weight as in our opinion they are entitled. The learned justice,

writing for the Court, says: "In the action of ejectment the only title in issue was that of the defendants; the plaintiffs' title was not in controversy. It was there found and adjudged that the defendant was a tenant in common with the plaintiffs." The record shows "that the action was in trespass and not ejectment." The plaintiffs expressly put their *title* in issue by alleging that "they were the owners in fee simple and in the possession of the land." The defendant not only joined issue by denying the allegation of ownership, but by affirmative averment put his title in issue, alleging that he was the owner of
(471) an undivided interest, stating the extent thereof. It is difficult to see how the title of the parties could have been more clearly put in issue. Under the practice prevailing prior to the adoption of the Code the defendant's answer would have constituted a general denial or plea of "not guilty" and a special plea of *liberum tenementum*. The cause would have been tried upon the general issue and the special plea. A verdict upon the general issue would not have worked an estoppel for the reason set forth by *Pearson, J.*, in *Rogers v. Ratcliff*, 48 N. C., 225; *Stokes v. Fraley*, 50 N. C., 377.

In the last case he said: "If the defendant had relied on his special plea there would have been an estoppel in respect of his title." The effect of a verdict and judgment in actions involving title to land under the Code system is discussed by *Pearson, C. J.*, in *Falls v. Gamble*, 66 N. C., 455, where he says: "Had Gamble brought his action against Falls for trespass on the land, and Falls in his answer had admitted the possession of Gamble and the committing of the alleged trespass by his orders and put the defense on his title, . . . a verdict and judgment would have worked an estoppel in the same way that it would have done in the old action, trespass *quære clausum* under the plea of *liberum tenementum*. Indeed, under the Code of Civil Procedure, in an action for land, when the complaint avers title in the plaintiff, the answer admits possession, denies the title of the plaintiff and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title. . . . In an action for land the plaintiff, if he does not wish the action to try title, should merely allege that he is entitled to the possession and that the defendant withholds it to his damage; and the defendant, if he does not wish the action to conclude the title, should in his answer merely deny the allegation of the complaint so as to make it in
(472) effect a plea of 'not guilty' or the 'general issue.'"

We therefore conclude that the defendant is estopped by the judgment to deny the facts found by the jury, to-wit,

"That the plaintiffs are entitled to fifty-three fifty-fourths of the land." The effect of the judgment was to leave the parties in possession as tenants in common, each having, as between themselves, the interests adjudged by the court upon the verdict.

In the view which we take of the effect of the partition proceeding it is not necessary to decide the effect of this estoppel upon an after-acquired outstanding title, and we forbear to express any opinion thereon.

The question next arises as to the effect of the final judgment in the partition proceeding which was put in evidence. It is therein settled that the plaintiffs and the defendants are the owners and entitled to the possession of the several portions of the land allotted to them by the commissioners. The defendant admits that he has entered upon that portion of the land allotted to the plaintiffs and committed acts of trespass thereon. He seeks to justify such entry by alleging that since said partition he has become the owner of *one-ninth* undivided interest in said land by virtue of a deed from one Thomas Land who was at the time of said partition by title paramount the owner of such interest; that neither said Land nor those under whom he claimed were parties to said proceeding. Is the defendant estopped to assert such title against the plaintiffs? The plaintiffs say that he may not do so for that, first, the final judgment in the proceedings in partition settled the rights of the parties to the entire tract of land; that the *quantity* to which each party was entitled was fixed by the judgment, and that neither party shall be heard to bring into question the fact so settled and determined, either by showing that he then owned a larger interest or that he has acquired an outstanding title; and (473) second, that there is an implied warranty arising upon the partition which estops, by way of rebutter, the defendant from setting up such title.

In regard to the first question, it is interesting to trace the development of the law on this subject. We are thereby enabled to better understand and distinguish the conflicting decisions. It was held at one time "That a writ of partition or a petition for partition, which is but a substitute for the former, is a mere possessory action," and that judgment therein did not bar or estop the parties in an action of higher dignity involving title. Freeman on Co-tenancy, sec. 529. Mr. Freeman says: "In the greater portion of the United States actions for partition, like actions in ejectment, have ceased to be merely possessory actions and have come to involve the *right* as well as the possession." He has collected in the note (*Nicely v. Boyles,* 40 Am. Dec., 638) an interesting history of the law and a number of decided

cases upon the subject. It is not necessary, however, that we go beyond our own reports to find a strong, able and exhaustive discussion of this question. *Judge Pearson,* writing for the Court in *Armfield v. Moore,* 44 N. C., 157, not only vindicates the wisdom in which the law of estoppel is founded, "without which it would be impossible to administer law as a system," but applies it to proceedings for partition. This case is one of the landmarks of our jurisprudence, familiar to every lawyer in the State. It is there settled beyond controversy that a final decree or a petition for partition works an estoppel of record upon the parties thereto, and that neither shall be heard to say that any of the facts therein settled were not true. He says: "Here we have facts agreed on by the parties, entered on the record, partition and decree in pursuance thereof, possession in severalty." . . . Mr. Freeman says: "At the present time there can be no doubt that a judgment in a proceeding (474) for the partition of land is as conclusive upon the matter put in issue and tried as a judgment in any other proceeding, and may be set up as a bar to a writ of entry involving the same question of title. And a suit for partition is perhaps the only proceeding known to the law in which every possible question affecting the title to real estate may be made an issue and determined." Freeman on Judgments, sec. 304. This principle is in no manner affected by what is said by this Court in *Harrison v. Ray,* 108 N. C., 215; 11 L. R. A., 722; 23 Am. St., 57. That was an action to correct one of the deeds of partition.

The defendant's counsel in his well-considered brief insists that the estoppel operates only upon the title which the parties to the record then owned, and does not affect his right to buy in and assert an existing and outstanding title not affected by the judgment. We have found but one case in our reports in which this question is presented and decided. In *Mills v. Witherington,* 19 N. C., 433, it appeared that partition had been made upon petition of the defendant against the lessor of the plaintiff in the county court; that the report of the commissioners was duly confirmed and final judgment rendered; and the lessor of the plaintiff afterwards obtained a grant from the State for the land which had been assigned to the defendant in severalty, alleging that the same was vacant. In the action of ejectment against the defendant she rested her right to recover on the grant. The defendant set up the judgment in the partition proceeding as an estoppel. *Daniel, J.,* said: "If the land sought to be recovered by the plaintiff was embraced in the report of the commissioners, which report had been confirmed and final judgment rendered thereon, then we think the lessor

of the plaintiff, who had been a party to that judgment, was concluded, bound and estopped to controvert anything contained in it. The Legislature, by the act of 1789, gave to tenants in common of real estate the petition for partition (475) in the place of the ancient writ of partition. The final judgment at common law in a writ of partition runs thus, *ideo consideratum est quod partitio praedicta firma et stabilis in perpetuum teneatur.* Thomas Coke, 700. And it was conclusive on the parties and all claiming under them. In *Clapp v. Bronagham,* 9 Cow., 569, the Court says that the judgment in partition, it is true, does not change the possession but it establishes the title, and in an ejectment must be conclusive. The judgment of the court adjudging a share to belong to one of the parties, and allotting it to him to hold in severalty, must be sufficient to authorize him to recover it as to all the parties to the record—the judgment is as to them an estoppel. The act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares that the division, when made, shall be good and effectual in law to bind the parties, their heirs and assigns." *Battle, J.,* in his note to this case, says: "The doctrine of estoppel as laid down in this case is clearly established." Chapter 47 of the Code is practically a re-enactment of the act of 1789. Mr. Freeman, in his work on Cotenancy, cites this case in support of the proposition that one of several heirs may be bound by a decree of partition, not only as to rights held by him at the time of partition, but also to the rights subsequently purchased of other heirs who were not parties to the partition, citing the case of *Short v. Prettyman,* 1 Houst., 334, in which it was expressly held by the Delaware Court that "The decree is binding and conclusive, not only as to the rights which the parties had in the premises at the time of the partition, but also as to the rights which they had subsequently acquired from other heirs of the premises who were not parties to the partition, and were not bound by the admissions or the decree establishing it." (476)

The Supreme Court of Missouri, in *Forder v. Davis,* 38 Mo., 107, says: "We decide nothing here now concerning the rights of any stranger to the partition or of any person not a party thereto. But in reference to this plaintiff we think this judgment operates as a bar against him at law, not only in respect of the estate and title which he then had, but in respect of any title which he might thereafter acquire. There is here no covenant of warranty by deed; but there is such a thing as an *estoppel in pais* and by matter of record, which, like an estoppel by deed, may have the effect to pass an after-acquired title by

operation of law. The partition establishes the title, severs the unity of possession and gives to each party an absolute possession of his portion. A partition is sometimes altogether the act of the parties rather than the act of the law. The binding and conclusive judgment is, in its very nature, very much like the old livery of seizin under a feoffment, which was matter *in pais*, or like a fine or a common recovery, which was matter of record; and these ancient assurances were of that solemnity and high character that they not only passed an actual estate and divested what title the party then had, that operated by way of estoppel to pass all future estate and possibility of right which he might thereafter acquire. Shep. Touchstone, 2-6; 204-6; Rawle on Cov. Title, 402. And we see no good reason why this solemn judgment in partition, which the statute declares shall be firm and effectual forever, should not be allowed to have the same operation against all parties to the record." See also *Rich v. Holmes*, 5 Rich. Eq., 540. These authorities would seem to establish the law as laid down in *Mills v. Witherington, supra.*

There is another view, however, of the case which we think equally conclusive. Mr. Freeman says that "The preponderance of the authorities is probably in favor of the theory that (477) as each co-tenant who has been evicted after compulsory partition may call upon his co-tenants to contribute their proportions of his loss, each of them is, by his obligation of warranty, estopped from asserting any independent adverse title to the properties assigned to the others." Freeman on Co-tenancy, sec. 533. *Mr. Washburn* thus states the doctrine: "Where partition has been made by law each partitioner becomes a warrantor to all the others, to the extent of his share, so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty no tenant, after partition made, can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been parted off to him. When partition has been made the tenant, to whom a part has been set out, is regarded in law as a purchaser for value of the same." Wash. R. P., 723. In *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec., 74, the question is discussed by *Marshall, J.*, and a valuable note is attached by Mr. Freeman. The learned justice says: "But a further and, as we think, a conclusive evidence of the relation subsisting after partition is furnished by the universal acknowledgment and assertion of the principle that to every partition the law annexes an implied warranty. The implied warranty which the law annexes to the partition is, it is true, in many respects special. It is so not only with regard to the person or persons who may

take advantage of it, but also with regard to the amount of the recompense. . . . The principle being that the loss shall be equally borne by the parties making the partition, and the effect that the losing party may have a re-partition. But although the effect of the warranty is limited as to the extent of the recompense and the manner in which it is to be made, it is not limited as to the land warranted. It embraces the whole of the land allotted to the warrantee in the par- (478) tition. As the law makes each partitioner the warrantor of the other as to the extent of the portion allotted to him, whether there be an express warranty in the deed or not, and as no principle is better settled at common law than that a warrantor is barred or estopped to claim against his own warranty, it seems clearly to follow that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion, allotted to him by the same partition, though there be no express warranty in the deed." We quote this language at length as it meets the very ingenious suggestion of the defendant's counsel that the implied warranty should not operate as an estoppel, because in the event of the eviction by a stranger the defendant will only be liable to the plaintiffs for one fifty-fourth of the value of the whole land, therefore he should be estopped only to that extent. The effect of a warranty as an estoppel upon the warrantor is so fully and ably discussed by *Mr. Justice Walker* in *Hallyburton v. Slagle,* 132 N. C., 957, that we deem it unnecessary to do more than to refer to his opinion in that case.

We have examined with care every case cited by the defendant's counsel, and while some of them do lay down the law as contended by him they are based upon constructions of statutes, as in Massachusetts. Those not thus distinguished are not in harmony with the best considered authorities and decided cases. We therefore conclude that by the judgment in the special proceeding for partition the defendant is estopped to assert his after-acquired title against the plaintiffs. It is immaterial whether this conclusion is based upon the first proposition or the last, as they bring us to the same result and are consistent with each other. His Honor should have instructed the jury in accordance with the plaintiff's prayer, and for error in failing to do so, there must be a (479)

New trial.

CLARK, C. J., dissenting. The identical point now presented was passed upon in the former appeal in this case (131 N. C., 14) and the decision then made by a unanimous Court should

be the law of this case. It was there said: "In partition proceedings between tenants in common no title passes, only the unity of possession is dissolved and the title vests in severalty, the common source of title resting undisturbed." *Lindsay v. Beaman*, 128 N. C., 189. Land's interest never passed to plaintiffs and was not represented, nor was he a party; therefore he was not bound by the action or special proceeding. As to him they were void, and he had a right of entry and possession equally with the other tenants in common, whomsoever they might be. By his deed passed all the right of Land to the defendant, who then stood in Land's shoes, and had all the rights and remedies of Land, *independent of and notwithstanding the judgment in said action and decree of partition.*"

Thus the identical point now presented has been decided, and in this action the matter is *res judicata*. It cannot be presented by a second appeal. The remedy, if error was committed by this Court, would have been by a petition to rehear. *Holly v. Smith*, 132 N. C., 36; *Perry v. R. R.*, 129 N. C., 333, and cases there cited. Nor does it vary this rule that the former decision was upon an appeal from the continuance of the restraining order in this cause, and this appeal comes up on appeal from a final judgment. The present appeal is solely upon exceptions that the judge charged in exact accordance with the former ruling of this Court and his refusal to charge contrary thereto. *Setzer v. Setzer*, 129 N. C., 296.

Besides, the former decision was correct. *Richardson*
(480) *v. Cambridge*, 79 Am. Dec., 767, is a case on all-fours and sustains our former ruling. See also *Christy v. Waterworks*, 68 Cal., 73.

In 17 A. and E. Enc., 819 (1 Ed.), it is said: "A party to a partition who subsequently acquires a new and independent title, which was in no way represented by any of the parties to the suit, may be permitted to assert it." *Henderson v. Wallace*, 72 N. C., 451, holds that one not a party or privy to partition proceedings is in no way affected by the decree. To same effect 21 A. and E. Enc. (2 Ed.), 1186: "The familiar principle that judgments and decrees bind only parties and privies is as applicable to judicial proceedings in partition as to other litigation," and cases there cited. Land not having been a party to the partition decree in 1895, his interest was not affected by it. He could recover it or sell it to another, and the defendant could acquire and assert it as well as another. This is not the case of "feeding an estoppel."

In *Harrison v. Ray*, 108 N. C., 215; 11 L. R. A., 722; 23 Am. St., 57, it is held that in voluntary actual partition the

deeds convey no title, but simply ascertain by metes and bounds the interest of each. This has been cited and affirmed by *Douglas, J.*, in *Carson v. Carson,* 122 N. C., at p. 648; by *Shepherd, J.*, in *Fort v. Allen,* 110 N. C., at p. 192, and again as recently as *Harrington v. Rawls,* 131 N. C., 40, and was stated also in *Lindsay v. Beaman,* 128 N. C., 189. In 21 Am. and Eng., 1193, it is said that "Both in voluntary and judicial partition the decree does not create or divest any title to or other right in the property, but merely severs the unity of possession and determines the share which each tenant is entitled to possess in severalty."

The title of Land could not be divested by the proceeding to which he was not a party, and the purchase of it by White after the decree was not the purchase of an outstanding encumbrance or title, but the purchase of an intact interest (481) in the property which was not the subject of the litigation and decree to which White had been a party in 1895. In that proceeding he only set up the title to the interest he then had. The interest of Land would be good if now held by him, and White cannot be affected by that decree as assignee of Land's interest any more than would be any other purchaser from Land.

Cited: Buchanan v. Harrington, 141 N. C., 41; *Soloman v. Sewerage Co.,* 142 N. C., 443; *Hill v. Brown,* 144 N. C., 118; *Durham v. Cotton Mills, ib.,* 714; *McCollum v. Chisholm,* 146 N. C., 24; *Burns v. McFarland, ib.,* 384.

ATTORNEY-GENERAL v. RAILROAD.

(Filed 22 March, 1904.)

CORPORATIONS—*Charter—Code, Secs.* 603, 605—*Code, Sec.* 2788—*Attorney-General.*

The attorney-general cannot of his own motion bring an action to vacate the charter of a corporation.

ACTION by Robert D. Gilmer, Attorney-General, against the Holly Shelter Railroad Company, heard by *Judge George H. Brown, Jr.*, at chambers, in Wilmington, on 2 December, 1903. From a judgment for the defendant the plaintiff appealed.

Rountree & Carr and *John D. Bellamy* for the plaintiff.
Iredell Meares and *Francis D. Winston* for the defendant.

MONTGOMERY, J. This action is prosecuted in the name of the State of North Carolina on relation of Robert D. Gilmer, Attorney-General, against the defendant, the Holly Shelter Railroad Company, for the purposes of having the charter
(482) of the company declared null and void and canceled, and the defendant corporation restrained and prohibited from exercising and attempting to exercise the rights of a railroad company pending the action. A restraining order was granted by *Brown, J.*, with an order that the defendant should thereafter on a day named appear before him and show cause, if any it might have, why the restraining order should not be continued until the final hearing. Afterwards, on 2 December, 1903, the matter was heard and the restraining order dissolved, from which order the plaintiff appealed.

The complaint embraces two causes of action. In the first it was alleged that the charter of the defendant company was organized for the purpose of operating a merely private logging road and not a railroad for the benefit of the public in carrying passengers and freight, and that the articles of incorporation of the defendant were obtained from the Secretary of State by falsely representing to him that the defendant company was to be organized and chartered for the purpose of constructing and operating a railroad company for public use in the conveyance of freight and passengers. In the second cause of action it was alleged that the defendant was exceeding the authority granted to it in its charter, and was exercising and threatening to exercise franchises and privileges not conferred upon it by law. The specific charge of exceeding chartered rights was that the defendant had changed one of the termini of its road and had extended or was extending its roadbed beyond the limit mentioned in the charter.

Upon the complaint and answer and the affidavits filed by the plaintiff and the defendant his Honor was of the opinion (1) that the action to set aside the charter of the defendant upon the ground of fraud in obtaining it could not be brought by the Attorney-General without the express direction of the
(483) General Assembly, section 604 of the Code being a legislative limitation upon such power; and (2) that as to the second cause of action, under section 605 of the Code, the allegations were not supported by the proofs and were fully denied in the answer.

The contentions of the plaintiff in this Court were that at

common law and also under section 2788 of the Code the Attorney-General was at liberty in his discretion to bring the action. The argument was to the effect that as the Attorney-General in England was authorized and empowered to institute proceedings of his own motion to compel the dissolution of corporations, so the Attorney-General of the State might exercise the same powers, as the common law is in force in North Carolina, except where it is in conflict with the genius of our institutions; and that there would be no inconsistency between the laws of England on this subject and those of our own State. On the contention that the Attorney-General could proceed under section 2788 of the Code it was insisted that that section was, through mistake or inadvertence of the Code Commissioners, taken from the Code of Civil Procedure (section 367) and placed in the Code, under the chapter entitled "Entries and Grants," and that in so doing the words "letters patent" were made to assume a restricted meaning, one applicable to grants alone; and further, that if section 367 of the Code of Civil Procedure (now section 2788 of the Code) had been inserted in its proper place in title fifteen, chapter 1, of the Code ("Actions in place of *Scire Facias, Quo Warranto,*" etc., the words "letters patent" would be broad enough to include the charters of incorporated companies, and that section 604 of the Code (C. C. P., 368) might be construed as a direction from the General Assembly to the Attorney-General to proceed in cases which they had examined into, in addition to the general power given in section 2788 (section 363, C. C. P.). Neither one of the contentions, in our opinion, can be sustained. (484)

The whole subject of this controversy is now of legislative authority, for section 603 of the Code declares that "The writ of *scire facias,* the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished, and the remedies obtainable in those forms may be obtained by civil actions under this subchapter." The next section of the Code (604) provides that "An action may be brought by the Attorney-General in the name of the State, whenever the Legislature shall so direct, against a corporation for the purpose of vacating or annulling the act of incorporation or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge and consent." That section of the Code on its face has reference to corporations chartered by the General Assembly, but the Legislature at its session of 1889 (chapter 533) amended it by adding after the

words "the act of incorporation or an act renewing its corporate existence" the words "or its letters of incorporation." That amendment, in our opinion, referred to the manner of chartering corporations, not by the General Assembly, but under chapter 16 of the Code. If the contentions of the plaintiff were true the amendment of 1889 would have been made to section 2788 of the Code. Then, too, if the Attorney-General has the right to institute proceedings in the nature of *quo warranto* against corporations in cases where the charters were obtained and granted through fraudulent representations or suggestions under section 2788, then why should it be thought necessary by the General Assembly that that body should provide for such a proceeding by special enactment, section 604 of the Code? And further, the Attorney-General cannot bring an action (485) in the nature of *quo warranto* for the purpose of vacating the charters of corporations in the cases mentioned in section 605 of the Code, unless and until he gets the leave of the Supreme Court or one of the justices for that purpose. The clear meaning of section 604, before the amendment of 1889, chapter 533, was that whenever the General Assembly had chartered a corporation that charter should not be annulled or vacated on the Attorney-General's own motion on the alleged ground that the charter had been procured by fraud. The investigation of such a charge is reserved for the future action of the Legislature itself. The amendment of 1889 to section 604 of the Code had the effect and was intended to put the charters of incorporated companies procured under chapter 16 of the Code on the same footing with charters granted by the General Assembly.

The ruling of his Honor, therefore, that the Attorney-General was not authorized to bring this action on the allegation that the defendant's charter was procured through a fraudulent suggestion or representation, was correct.

As to the second cause of action, founded on section 605 of the Code, the Attorney-General had the leave of the Chief Justice of this Court to commence such action. But we see enough from a reading of the record and evidence that his Honor was correct in holding that the allegations of the second cause of action were not supported by the evidence, and that they were fully denied in the answer.

No error.

(486)

MILLSAPS v. ESTES.

(Filed 29 March, 1904.)

1. INFANTS—*Arbitration and Award—Minors—Judgments.*

The submission to arbitration of the cause of an infant by himself, his next friend or his attorney is void, and a judgment founded thereon is void.

2. ESTATES—*Life Estates—Wills—Code, Sec.* 1325.

A will giving to a devisee certain real estate to be and enure to the use of the devisee "during his natural life, not subject to be sold and conveyed by him, but in case he should have legitimate children it is to belong to them," gives to the devisee only a life estate therein.

ACTION by Orphia Millsaps and others against G. D. Estes, heard by *Judge W. A. Hoke* and a jury, at July Term, 1903, of SWAIN. From a judgment for the defendants the plaintiffs appealed.

Shepherd & Shepherd and *F. C. Fisher* for the plaintiffs.
A. M. Fry for the defendants.

MONTGOMERY, J. This action was brought by the plaintiff against the defendant to recover possession of a certain tract of land situated in Swain County, and also to have annulled a certain decree and judgment in an action between the plaintiff and certain of the defendants made at Spring Term, 1892, of Swain Superior Court, on the ground that the decree was procured through fraud on the part of the defendants and because of its invalidity, appearing on its face. The defendants admit in their answer that they hold the land under and by virtue of the decree above mentioned, but they deny that the same was procured through their fraudulent conduct, and in- (487) sist that the decree is regular in form, valid and binding in law. In order that a clear understanding may be had of this controversy it is necessary to set out the particulars of the decree, the main point of contention in the case, and also the nature of the action in which it was rendered.

In 1872 John A. Millsaps died, leaving a last will and testament in which he devised the land described in the complaint to his brother William Millsaps, the father of the plaintiff. The language of that part of the will is as follows:

"I will and bequeath to William Millsaps, my half-brother, all that part of real estate in the following boundary, to-wit, . . . to be and enure to use of said William Millsaps during

his natural life, not subject to be sold and conveyed by him, but in case he should have legitimate children it is to belong to them in like manner as the other devisees above named."

The devisee William Millsaps sold and conveyed the land in fee simple to certain of the defendants (the other defendants claiming title to parts of it by deeds from original purchasers from William Millsaps), and delivered possession of the same to the purchasers. Afterwards and before the death of their father the plaintiffs, all being infants (and five of whom were infants at the commencement of the present action), commenced an action in Swain Superior Court in October, 1888, for the purpose of having the deeds aforesaid, which had been executed by their father, canceled, and the life estate of their father in the land be declared forfeited because of waste which had been committed on the same by those who had purchased from him, and for damages on account of such waste.

In the action commenced in 1888 the plaintiffs, in their first allegation in the complaint, declared that they were infants under the age of twenty-one years, and that they brought (488) the action in the name of their next friend, Joseph Shuler. The defendants in their answer denied that allegation. In the second allegation of the complaint the death of John A. Millsaps was set out, and the item of the will which we have quoted above was declared, and the defendants admitted the same. In the third allegation of the complaint it was alleged that the devisee, William Millsaps, went into possession of the land, and that was admitted by the defendants in their answer. In the fourth allegation of the complaint it was declared that the plaintiffs were the children of William Millsaps, born in lawful wedlock, and owners in fee of the land. The whole of that allegation was denied by the defendants. The fifth allegation of the complaint was in these words: "That after the said William Millsaps entered into possession and took charge of said land, regardless of the rights of the plaintiffs, he made some kind of conveyances to the defendants in this action, purporting to convey to them the land in fee; that the defendants took said conveyances for said land with full knowledge of the rights of the plaintiffs and for a consideration, and with full notice of the fact that the said William Millsaps had only a life estate in said land." The defendants denied the whole of that allegation, although they afterwards on the trial showed those deeds as evidence of ownership of the land. In the sixth allegation the waste and destruction of timber and soil are alleged, and the same is denied.

We have already said that the judgment demanded in that

action was that the deeds and conveyances made by William Millsaps, the father of the plaintiffs, to the defendants be canceled; that the life estate of William Millsaps be forfeited, and for damages for the waste committed on the premises. The complaint and answer in that action were filed at Spring Term, 1888, but no progress seems to have been made until Fall Term, 1891, when an order in the following words (489) was made:

"By consent of all parties this case is referred to S. R. Gibson and A. H. Hayes, as arbitrators, with power to choose an umpire in case they cannot agree, to go upon the premises of the land in controversy in the action and value the land claimed by each of the defendants, and make report of the said values so ascertained by them to the next term of this court; and also ascertain and report the amount of money which has been heretofore paid to W. R. Millsaps by each of the said defendants or those under whom they claim, which shall be embraced in said report as a part of their award; and it is ordered upon the coming in of said report or award, if there shall be a balance found due the plaintiffs upon said land over and above what shall have been found by said arbitrators to have been paid to said W. R. Millsaps, a judgment of this court shall be entered for said balance against each of said defendants for such amounts as shall then be ascertained to be due from them, and retained for further orders."

That judgment or order was signed by one of the numerous counsel on each side. Under it the arbitrators acted and made report to the court. In that report they set forth that there had been paid by the several purchasers, defendants and those who claim under them, to W. R. Millsaps and wife the sum of $1,194.60; that the land was worth at a fair cash valuation $1,550, "leaving a balance due the plaintiffs of $355.40, to be paid by the defendants as follows: We consider that Franks has paid full value of the land held by those claiming under said Franks; we consider that G. D. Estes should pay $255, and W. R. Randall should pay $45.40, and John Long should pay $55, making a total of $355.40."

At Spring Term, 1892, that award was made a judgment of the court. In the judgment it was decreed that the deeds for that part of the land bought by Franks be declared (490) valid, passing all the interest of all the heirs at law of W. R. Millsaps in the land described. It was further adjudged that title be made by the clerk of the Superior Court as commissioner to G. D. Estes, John Long and W. R. Randall, separately, when they shall have paid the amounts found to be due

by them into the office of the clerk of the Superior Court, and that the clerk's deed shall pass all the interest of the said parties and all the interest of all the heirs at law of the said W. R. Millsaps."

Upon the trial of the present action his Honor submitted the issues in the following words to the jury:

1. Are the proceedings and decree in the Superior Court of Swain County, declaring titles to land now claimed by the plaintiffs to be in the defendants on payment of certain sums of money, and have the terms of said decree been complied with by the defendants and money paid according to the terms of said decree?

2. Was money so paid taken and received by the plaintiffs in former actions and who are now plaintiffs in the present action?

3. Was such proceeding regular in form?

4. Were such proceedings and decree instigated and procured by fraud?

5. Were said proceedings and decree within the scope and purpose of the suit and within the power and jurisdiction of the court?

6. Are said proceedings and judgment a valid estoppel of record against the plaintiffs, barring the plaintiffs from maintaining the present action against the defendant?

7. Did the defendants or either of them buy for full value and take their titles for land held by them without notice
(491) or knowledge of any charge of fraud or claim of invalidity of said decree?

8. Are the plaintiffs owners of the land sued for and described in the complaint?

9. Are the defendants in wrongful possession of said land?

10. What damages are the plaintiffs entitled to recover?

His Honor instructed the jury that if they believed the evidence they would answer the first two issues "Yes," the fourth "No," the fifth "Yes," the sixth "Yes," the seventh "Yes," the eighth and ninth "No," and the tenth "Nothing."

The whole record of the action commenced in 1888 was introduced as evidence in the present action, and it appeared that Estes, Long and Randall paid into the clerk's office the amounts found to be due by them respectively by the arbitrators, and that the clerk of the court as commissioner made deeds to them according to the judgment and award. There was also undisputed evidence that the clerk disposed of that fund, the total being $389.95, as follows: To the attorneys of the plaintiffs $178.12, and to the guardian of the plaintiffs $193.13.

It is not necessary for us to discuss whether or not his Honor

should have submitted certain of the evidence in this case on the issue of fraud in the matter of the procuring of the order of arbitration and the proceedings under the same. It is enough for us to say that the order or judgment of the court in the action of 1888, referring the case to arbitrators, and the judgment which followed on the report of the arbitrators, were *coram non judice,* and on that account totally void. The infants in this action were the real parties to the suit, and not Shuler, who appeared as their next friend; and an infant cannot give his consent to a submission of his cause to arbitration, and any attempt to do so for him is absolutely void. *Rudston v. Yates,* March N. R., 141; *S. c.,* 82 Eng. Reprints, 448; 1 Rolle Abr. Arb., A., 268; *Britton v. Williams,* 3 Munf. (Va.), 453; *Tucker v. Dabbs,* 12 Heiskell, 18; *Jones v. Payne,* 41 Ga., (492) 23. There can be cases found in which it is held that an attorney can submit his client's cause, *pendente lite,* without the consent of his client, but it will be found on examination that the clients are of full age, as in the case of *Morris v. Grier,* 76 N. C., 410. We have found no case in our researches where an infant's cause of action has been submitted to arbitration.

We have said that this order of arbitration and the judgment founded upon it were not voidable but were void; and it follows therefore that all that was done under them and all titles to any part of the plaintiff's land procured by any person through them are invalid and of no force; and his Honor was in error in instructing the jury to answer the third, fifth, sixth and seventh issues "Yes." And he was also wrong in instructing the jury to answer the eighth and ninth issues "No" and the tenth issue "Nothing."

Such of the plaintiff's special prayers for instruction as were of like effect with the opinion we have expressed ought to have been granted. It was argued before this Court by the counsel of the defendants, appellee, that outside of the award and judgment upon the award the defendants' deeds from W. R. Millsaps were valid and passed the title to the land to the defendants, because the language of that item of the will of John A. Millsaps, in which the land described in the complaint was devised, constituted William Millsaps tenant in tail, and under our statute (Code, sec. 1325) estates in tail are converted into fee simple estates. We can see no likeness between the estate created in William Millsaps by the will of his brother to that of an estate in tail under the statute *de bonis.* In estates tail the tenements were given to a man and the heirs of his body, for instance, and not to a man for his natural life and then to the heirs of his body or to his children. And the incidents

(493) of an estate in tail were that the tenant in tail could commit waste without being called to account for the same; that the wife of the tenant in tail could have her dower in the estate tail; that the husband of the female tenant in tail might be tenant by the curtesy of the estate tail. In our case the language of the will is that the property is to be and enure to the use of the said William Millsaps during his natural life, not subject to be sold and conveyed by him. His estate under the will is but a life estate, and has none of the incidents of an estate in tail.

Error.

Cited: S. c., 137 N. C., 536.

TEW v. YOUNG.

(Filed 29 March, 1904.)

ISSUES—*Verdict—Trial—Judgment—New Trial.*

A new trial will be granted where the issues answered by the jury are immaterial and the material issues under the pleadings are not answered.

ACTION by L. J. Tew against E. F. Young and J. D. Butler, heard by *Judge H. R. Bryan* and a jury, at October Term, 1903, of CUMBERLAND. From a judgment for the plaintiff the defendants appealed.

T. H. Sutton and *N. A. Sinclair* for the plaintiff.

D. T. Oates, W. A. Stewart and *J. C. Clifford* for the defendants.

MONTGOMERY, J. The theory upon which the case appears from the record to have been tried was inconsistent with the cause of action set out in the complaint, and the jury (494) failing to respond to the particular issues raised by the pleadings, answered certain others which seem to us immaterial. The allegations in the complaint upon which the plaintiff founds his action are that the defendants sold to him an interest in a certain machine or cabinet for the preservation of fruit, which the defendants represented to him at the time of the sale was protected by a patent; that connected with the model of the patented machine exhibited to the plaintiff there

was represented as included in the patent a crank or handle to be used in connection with a cylinder attached to the cabinet, and that this crank was not in fact included in the patent. No damage was alleged by the plaintiff to have been sustained by him because of the alleged fraudulent statement that the crank was covered and protected by the patent; but the plaintiff alleges that his damages grew out of his inability to sell the machine within the territory in which he was allowed to operate by virtue of his purchase, on account of a threat made of legal prosecutions by the owner of an older and superior patent of a like machine, *including the crank,* and that believing that there was an older and superior patent he abandoned the sale of his machine after spending a good deal of time and money in preparation for its sale.

The defendants deny that there was any fraudulent representation made by them to the plaintiff at the time of the sale of the patent to the plaintiff, and denied that there was any older and superior patent of the machine. His Honor submitted several issues to the jury, one upon the question of fraud in the sale of the patent, one as to whether the patent covered the crank or not, one as to whether the patented device was worthless without the crank or handle, all of which the jury answered in favor of the plaintiff. But the two material issues, to-wit, "Was the fruit preserver, cabinet or casket, as exhibited, in its essential parts covered by older or superior letters patent?" and "Was the plaintiff prevented from selling (495) the fruit preserver, cabinet or casket by reason of an older and superior patent right covering the crank or cylinder?" were both answered "Cannot answer." Upon the trial not one word of an older or superior patent was said in the evidence. There was no attempt to show that there was an older or superior patent, or that any person had claimed such patent, or had interfered with the plaintiff in his attempt to make sales of his property.

The defendant's exception, then, to the judgment pronounced on the verdict was well taken.

New trial.

SMITH EX PARTE.

(Filed 29 March, 1904.)

1. PARTITION—*Limitations of Actions—Owelty—Execution—Code, Secs.* 136, 168, 152, 158.

   The issuing of an execution on a decree charging owelty in partition is barred within ten years.

2. PARTITION—*Limitations of Actions—Owelty—Actions.*

   A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations.

AN ACTION *ex parte* by J. R. Smith and others, heard by *Judge R. B. Peebles* and a jury, at September Term, 1903, of WAYNE. From a judgment against the petitioner, John S. Hamilton, he appealed.

H. L. Stevens for the petitioner.

F. A. Daniels and *W. C. Munroe* for the respondent, Asher Edwards.

(496) WALKER, J. This is a motion in a partition proceeding, formerly pending in the court of pleas and quarter sessions, to docket the same, and for leave to issue execution upon a judgment therein rendered, which charged one of the tracts of land with a sum of money to be paid to another tract for the purpose of effecting equality of partition.

At the November Term, 1861, partition was decreed and lot No. 6 was assigned by the commissioners to Amelia Smith, subject, however, to a charge of $150.66 in favor of lot No. 1, which was assigned to John S. Hamilton, who now makes this motion. In the allotment the commissioners, in awarding the sum to be paid by lot No. 6 to lot No. 1, used this language: "We do assess the boot before named to be paid or due whenever said dower right of Martha Hamilton shall cease upon the said land." The report of the commissioners was confirmed by decree of the court at February Term, 1862. Martha Hamilton died in 1878. Asher Edwards, who is the respondent in this proceeding, has acquired the title to lot No. 1 by *mesne* conveyances from Amelia Smith, and is now in possession of it. He has answered the petition of Hamilton by pleading, among other things not necessary to be stated, that the charge upon the land has been paid and that the right to enforce the same is barred by the statute of limitations. So far as it appears he does not

allege actual payment, but simply pleads payment, and relies upon the lapse of time to sustain the plea, that is, he relies both upon the statute of presumptions and the statute of limitations. The pleas are in proper form, and the question is again presented whether the judgment or decree of a court charging one lot with a sum of money to be paid to the owner of another lot, in order to equalize the division of land or for "owelty of partition," can be affected either by the statute of presumptions or the statute of limitations.

The judgment in this case was rendered in 1862, and, but for the provision inserted by the commissioners in (497) their report, which we have quoted, and which, of course, was made a part of the decree when the report was in all respects confirmed (*Bull v. Pyle,* 41 Md., 421), the right of action to enforce payment of the charge would have been deemed to have accrued prior to August, 1868, if section 168 of the Code had not been repealed by the act of 1891, ch. 113, as to actions begun after 1 January, 1893. This proceeding was begun in 1903. If the right of action had accrued prior to August, 1868, and section 136 of the Code had not been repealed, we think the statute of presumptions would have applied to any proceeding instituted to enforce payment of such a charge upon the land by issuing execution on the judgment. In *Ruffin v. Cox,* 71 N. C., 253, it is said that certain authorities, which are cited in the opinion, hold that there is no bar, either by the statute of presumptions or the statute of limitations, in such cases, but this is not correct, as a reference to the cases cited will show, and it was not necessary to the decision of that case to pass upon the point. None of the cases cited in *Ruffin v. Cox* refer to the question in regard to the statute of limitations or statute of presumptions except the case of *Sutton v. Edwards,* 40 N. C., 425, which case has been erroneously cited several times since it was referred to in *Ruffin v. Cox* for the proposition that the statute of limitations is not a good plea in such cases. In *Dobbin v. Rex,* 106 N. C., 444, the statute did not apply, because the land had already been sold under an execution, and the plea was not available to the party who relied on it, because it came too late. The question was not presented in *Wilson v. Lumber Co.,* 131 N. C., 163, as is stated by *Clark, J.,* on page 167; nor did it become necessary to decide it in the case of *In re Ausborn,* 122 N. C., 42, because in that case, as was said by *Montgomery, J.,* for the Court, there had been no decree of confirmation and the statute could not bar, as the right to issue (498) execution, or, in other words, to enforce the payment of the charge, had not accrued, and the statute therefore had not

commenced to run. Those cases were rightly decided and we approve them.

It has been supposed by some that because it was said in one or two of the older cases decided before 1868 that "there is no statutory limitation as a bar by which proceedings of the kind are governed," it followed that lapse of time could not affect the right to issue execution upon such a judgment. This expression was used by *Nash, J.*, in the leading case of *Sutton v. Edwards,* 40 N. C., 425, at p. 428, but immediately afterwards he explains what is meant, namely, that there was no statute of limitations applicable to judgments at that time, as they were subject only to the statute of presumptions, under and by virtue of which there was a presumption of payment or satisfaction of all judgments and decrees within ten years after the right to enforce them accrued. Rev. Code, ch. 65, sec. 18. He discusses the case with reference to the statute of presumptions, and strongly intimates that it would have defeated the plaintiff's suit but for the fact that the charge rested upon the lot of an infant, and by the provision of the statute the sum charged was not due and payable until he attained his majority.

We must infer from the language of the Court in *Sutton v. Edwards* that if the sum charged upon the lot of greater value had been due at the time the judgment was rendered, the plea of payment or satisfaction would have been sustained under the statute of presumptions in force at that time. The failure to distinguish clearly between the old law and the new in this respect, or between the statute of presumptions and the statute of limitations, has caused some apparent confusion in the
(499) cases upon this important subject, but we think they can all be easily explained and reconciled when this distinction is kept steadily in view, and when each decision is restricted to the particular facts upon which it was based. In *In re Walker,* 107 N. C., 340, the question was discussed by *Merrimon, C. J.,* who wrote the opinion of the Court, and, while the Court held that prior to 1868 there was no statute of limitations that could operate as a bar in such cases, it strongly intimated that the statute of presumptions applied, though in that case it was found as a fact that the charge upon the land had not been paid or satisfied, and the point therefore was only incidentally presented. But in *Herman v. Watts,* 107 N. C., 646, the question under discussion was directly involved, and the Court held that, as the partition had been made and the charge imposed upon the land prior to 1868, the decree was subject to the statute of presumptions, and that as the plaintiff in the case had failed to rebut the presumption raised by the law, the Court should have instructed

the jury to find in favor of the party who pleaded the payment. It was also held that the proper remedy for enforcing such charges is by execution, formerly by *venditioni exponas,* to be granted upon motion or petition in the original proceedings. *Waring v. Wadsworth,* 80 N. C., 345; *Turpin v. Kelly,* 85 N. C., 399; *Halso v. Cole,* 82 N. C., 161. It was intimated in *Rice v. Rice,* 115 N. C., 43, and decided in *Allen v. Allen,* 121 N. C., 328, that the statute of limitations will bar an action or proceeding to enforce payment of a charge by will upon land devised, if sufficient time has elapsed for the purpose.

It having been decided in *Herman v. Watts, supra,* that the statute of presumptions applied when the decree was made prior to 1868, it necessarily follows that the statute of limitations, which is but a substitute for the statute of presumptions, must now be a valid plea; and if the time fixed by the (500) statute has elapsed, it will be a good and effectual bar to the motion for execution. The two statutes are couched in substantially the same language, the only difference being that one raises a presumption merely of payment or satisfaction, while the other furnishes a complete bar.

We have already seen that the right to move for execution in this case accrued in 1878, according to the terms of the report and decree, as the sum charged upon the land was not due until the death of Mrs. Martha Hamilton (*Terrell v. Cunningham,* 70 Ala., 100); and even if this provision had not been inserted in the report, the result would not have been different, as the act of 1891 (chapter 113) repealed section 136 of the Code; so that, while the statute of presumptions formerly applied, the statute of limitations now takes its place (*Nunnery v. Averitt,* 111 N. C., 394), provided the action or proceeding was commenced since 1 January, 1893, which is the fact in this case. If either statute therefore applies, it must be the statute of limitations.

We cannot see why the statute should not apply. It is true that the charge rests upon the land alone, and it has been said that the land is the debtor and that there is no personal liability of its owner. But how can this affect the question, one way or another? The statute, whether of presumptions or limitations, operates against the actor or the party who must seek to apply the remedy, and it affects only the remedy. If, therefore, he who has the right to enforce the charge against the land delays in doing so for the time limited by the statute, the bar operates, without regard to the particular nature of the charge or lien which is to be enforced, or even to the form of the remedy. It is a familiar principle that the statute of limitations affects not the right, but the remedy. Besides, so far as the nature of the

lien or charge is concerned, if we consider the matter with
(501) reference to that alone, and without regard to the remedy, the case comes not only within the spirit, but within the letter of the statute, which provides that an action on a judgment or decree shall be barred if it is not brought within ten years from the date of the rendition of the same, and this is a motion that an execution be issued upon a judgment or decree. The words of the statute are broad enough to include judgments or decrees *in rem,* as well as those *in personam.* The charge or lien is created by the judgment, and when the judgment is barred or satisfied, in fact or by presumption, from lapse of time, it is gone, and the charge for owelty, which is merely an incident of it, ceases also to exist.

One question remains to be considered: Does the word "action," which is used in the statute, include a proceeding of this kind, which is a motion for leave to issue execution upon a judgment charging land with the payment of money for equality of partition? We think it does, and it has been so decided. In *McDonald v. Dickson,* 85 N. C., 248, the question was directly presented, and the Court held that the motion for leave to issue execution was a substitute for the ancient writ of *scire facias,* and that while the latter in the main was regarded as a continuation of the old suit, it was for some purposes a *new action.* The defendant is bound by the judgment, of course, as to all matters determined thereby, and as to which he is finally concluded, but to the motion for an execution upon it he can set up any defense which has arisen since the judgment was rendered, and among the defenses so available is the statute of limitations, if a sufficient time has elapsed since the rendition of the judgment to create a bar. In *Lilly v. West,* 97 N. C., 279, the Court says: "But not less fatal is the objection founded upon the limitation put upon the remedy. The bar is as effectual when it can be interposed by plea or answer to a motion to revive a dormant judgment that execution may issue, as to an independent
(502) action upon the judgment itself." This principle has been repeatedly recognized and enforced by this Court. *Berry v. Corpening,* 90 N. C., 395; *Williams v. Mullis,* 87 N. C., 159; *Johnston v. Jones,* 87 N. C., 393; *McLeod v. Williams,* 122 N. C., 451; *Bank v. Swink,* 129 N. C., 255. It can make no difference whether section 152 (subsection 1) or section 158 of the Code applies. The result will be the same in either case. The provisions of section 158 are very broad and comprehensive and embrace any and all actions for relief not otherwise provided for in the Code.

The views we have expressed are sustained by decisions in

other States upon statutes similar to ours. *R. R. v. Trimble,* 51 Md., 99; *McQueen v. Fletcher,* 22 S. C., 152; *Seibert's Appeal,* 119 Pa., 517; *Terrell v. Cunningham,* 70 Ala., 100. *Jameson v. Rixey,* 94 Va., 342 (64 Am. St., 726), is, in its facts, very much like the one under review, and the Court, in discussing the question involved, reached the same conclusion that we have in this case, and correctly, as we think, differentiated the cases heretofore decided in this Court, and which were cited in the opinion delivered in that case.

The decision of the court below was, in our judgment, free from any error.

No error.

(503)

RODMAN v. ROBINSON.

(Filed 29 March, 1904.)

1. SPECIFIC PERFORMANCE — *Husband and Wife — Contracts — Dower.*

   Where a wife is not a party to an action for specific performance of a contract to convey land executed by the husband, he cannot avoid a decree for the conveyance by asserting that his wife was entitled to dower in the land.

2. SUNDAY — *Contracts — Specific Performance — Code, Sec.* 3782— *Const. U. S., First Amendment—Const. N. C., Art. I, Sec.* 26— *Code, Secs.* 2103, 2106.

   A contract for the conveyance of land entered into on Sunday is not invalid as against public policy.

3. SPECIFIC PERFORMANCE—*Election of Remedies.*

   A purchaser of land, on breach of the contract of sale, may sue for specific performance and is not bound to bring an action at law for damages.

4. VENDOR AND PURCHASER—*Consideration—Contracts.*

   A promise to pay a certain sum as purchase money is a sufficient consideration for a contract to convey land.

5. SPECIFIC PERFORMANCE—*Contracts—Fraud.*

   Where no fraud or mistake is averred, an allegation that the vendor made a bad trade does not exempt him from specific performance of a contract to convey land.

6. SPECIFIC PERFORMANCE—*Boundaries—Contracts.*

   In a suit for specific performance of a contract to convey land, describing the land by metes and bounds is sufficient.

7. VENDOR AND PURCHASER—*Specific Performance.*

A promise to pay a certain sum as purchase money is a sufficient consideration for a contract to convey land.

(504) ACTION by J. F. Rodman and others against J. W. S. Robinson, heard by *Judge W. R. Allen,* at September Term, 1903, of PENDER. From a judgment for the plaintiffs the defendant appealed.

Connor & Connor and *E. K. Bryan* for the plaintiffs.

J. D. Kerr, F. R. Cooper and *Shepherd & Shepherd* for the defendant.

CLARK, C. J. On Sunday, 14 September, 1902, the defendant, who then was, and still is, the owner in fee and in possession of the land described in the complaint, contracted, in writing, dated 13 September, 1902, with plaintiff Rodman to sell him said land, possession to be given 1 January, 1903, and deed to be delivered 1 April, 1903, at which time the purchase money was to be paid. In December, 1902, defendant informed Rodman that he would not deliver possession nor accept the purchase money, and repudiated the contract; nevertheless, Rodman did tender the $4,200, the agreed price, in money, on 1 April, 1903, or as soon thereafter as defendant could be found, and demanded the deed, but defendant refused to accept the money or deliver the deed. The contract is admitted in the answer, and judgment for specific performance was rendered upon the pleadings, and defendant appealed.

The first assignment of error is "because it appears from the answer that defendant was, at the time of signing said alleged contract to convey, a married man, and his wife is still living and entitled to dower and homestead right in said land, and the judgment does not sufficiently guard and protect such right." The wife has an inchoate right of dower, but she has no present right to the property nor to its possession, nor any dominion over it; she has only a right therein, contingent upon surviving (505) her husband, which may not happen. *Gatewood v. Tomlinson,* 113 N. C., 312. The Code, sec. 2103, expressly provides that *upon the death of the husband* the widow shall be entitled to dower. Besides, this is an objection which the plaintiff alone could make. The wife is not a party to this action, and the decree in nowise affects her contingent interest. Having taken the contract without the wife's signature, the plaintiff could not obtain a decree compelling her to join in the deed. *Farthing v. Rochelle,* 131 N. C., 563; *Fortune v. Watkins,* 94 N. C., 304. The Code, sec. 2106, recognizes the right of the hus-

band to alien without the joinder of the wife, the conveyance having no effect upon the wife's contingent right of dower. *Fleming v. Graham,* 110 N. C., 374; *Scott v. Lane,* 109 N. C., 154; *Hughes v. Hodges,* 102 N. C., 236; *Mayho v. Cotten,* 69 N. C., 289. As to the homestead right, it was not necessary for the wife to join in the contract, because the answer admits that no homestead had been allotted in this land. *Mayho v. Cotten, supra,* approved *Joyner v. Sugg,* 132 N. C., at p. 589. Besides, the answer further admits the solvency of the defendant, that there is no judgment docketed against him, and that he owns other lands, more than sufficient in value for the allotment of the homestead. *Hughes v. Hodges, supra.* The conveyance or contract is valid, subject to the contingent right of dower. *Gatewood v. Tomlinson* and *Scott v. Lane, supra.* The wife is not a party to this action, and not estopped by the judgment, if the above admissions should prove untrue. The wife not being a party, the exception that her "rights are not protected by the decree" has no place here.

The second assignment of error is "because the contract to convey was entered into and signed upon Sunday; and, no consideration being passed, and the defendant having repudiated the contract the week following, said contract is not enforcible, and the judgment should have declared said contract to be void." (506) The promise to pay $4,200 purchase money was a sufficient consideration. *Puffer v. Lucas,* 101 N. C., at p. 284; *Worthy v. Brady,* 91 N. C., 265; *s. c.,* 108 N. C., 440; Clark on Contracts, pp. 149, 169; 9 Cyc., 323. The contract having been accepted by plaintiff, the attempted repudiation thereof by the defendant without the consent of the plaintiff has no effect. *Paddock v. Davenport,* 107 N. C., 710; *Ryan v. U. S.,* 136 U. S., 68. So this exception hinges upon the question whether the contract is invalid because entered into and signed on Sunday.

This point has been settled in this State by repeated decisions. A contract entered into on Sunday is not invalid at common law. Clark on Cont., p. 393; *Drury v. De Fontaine,* 1 Taunton, 131 (in which it was held that a vendor could recover the price of a horse sold on Sunday); Benjamin on Sales, sec. 552. Our statute first enacted, chapter 7, Laws 1715 (23 State Records), and re-enacted chapter 14, Laws 1741 (23 State Records, 173), and which is now the Code, sec. 3782, is copied almost *verbatim* from the first part of the statute, 29 Car. II, ch. 17 (1678). The other part, forbidding service of process on Sunday, is omitted from our statute, which merely provides that "On the Lord's Day, commonly called Sunday, no tradesman, artificer, planter,

laborer or other person shall . . . do or exercise any labor, business or work of his ordinary calling, . . . upon pain that every person so offending . . . shall forfeit and pay one dollar." This part was construed by *Lord Mansfield,* in *Drury v. De Fontaine, supra,* not to invalidate a sale of a horse on Sunday, when the sale was not a part of the vendor's ordinary calling. This statute is the foundation of nearly all the Sunday legislation in this country.

It is not alleged in the answer that this contract was made and entered into by either the plaintiff Rodman or the defend-
(507) ant Robinson, in pursuance by either of his ordinary calling.

In *Melvin v. Easley,* 52 N. C., 356, the Court said: "The statute, in its operation, is confined to manual, visible or noisy labor, such as is calculated to disturb other people; for example, keeping open shop or working at a blacksmith's anvil. The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency. . . . But when it goes further and . . . prohibits labor which is done in private, the power is exceeded and the statute is void." In that case it was held that selling a horse on Sunday was not forbidden by the statute, as dealing in horses was not Melvin's "ordinary calling." Again, it is said in *S. v. Ricketts,* 74 N. C., 192: "In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." This has been cited and approved, *White v. Morris,* 107 N. C., at p. 99 (in which *Davis, J.,* calls attention to the fact that, prior to the Code, civil process could not legally be served on Sunday, but now the restriction applies only to forbid arrests in civil actions on that day); approved also in *S. v. Penley,* 107 N. C., 808; *Ashe, J.,* in *S. v. McGimsey,* 80 N. C., 377; 30 Am. Rep., 90; and *S. v. Howard,* 82 N. C., at p. 626; *Merrimon, C. J.,* in *S. v. Moore,* 104 N. C., 749; *Taylor v. Ervin,* 119 N. C., 276, all these last holding that it was not illegal to hold court on Sunday if the judge deemed it necessary, though out of considerations of propriety it ought not to be done unless necessary.

In *S. v. Brooksbanks,* 28 N. C., 73, *Ruffin, C. J.,* held that it was not indictable to sell goods in open shop on Sunday, and in *S. v. Williams,* 26 N. C., 400, the Court, through the same Judge, held it not indictable to work on Sunday, it not being indictable either at common law (citing *Rex v. Brother-*
(508) *ton,* 1 Str., 702; *Rex v. Cox,* Bur., 785) or by our statute, adding (p. 400): "It is clear that the making of bargains on Sunday was not a crime against the State, for contracts made

on that date are binding. It has often been so ruled in this State, and after elaborate argument and time to advise." *Covington v. Threadgill,* 88 N. C., 189, is *obiter* merely, and *Waters v. R. R.,* 108 N. C., 349, is a construction of section 1632, General Statutes of South Carolina, which is a part of the statute 29 Car. II, which has been omitted in our statute.

Counsel for defendant contend that Christianity is a part of the law of the land; and hence, independent of any statute, the contract is invalid. If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be absolutely forbidden. The founder of the Christian religion said that His "kingdom was not of this world"; and, under our Constitution, both State and Federal, no act can be required or forbidden by statute because such act may be in accordance with or against the religious views of anyone. The First Amendment to the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"; and the Constitution of this State, Art. I, sec. 26, reads: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should *in any case whatever* control or interfere with the right of conscience." If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained. The Seventh-Day Baptists and some others, as well as the Hebrews, keep Saturday, and the Mohammedans observe Friday. To compel them or anyone else to observe Sunday for religious reasons would be contrary to our fundamental law. The only ground upon which "Sunday laws" can be sustained (509) is that, in pursuance of the police power, the State can and ought to require a cessation of labor upon specified days, to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection, but a convenience. Yet such statute cannot be construed beyond its terms, so as to make the signing of a contract on Sunday invalid, when the words prohibit only "labor, business or work of one's ordinary calling."

It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England, where there is union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and

shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision or control of secular affairs. As a cotemporary construction of the Federal Constitution, it may be well to recall that one of the first treaties of peace made by the United States—that with Tripoli—which was sent to the Senate with the signature of George Washington, who had been president of the convention which adopted the United States Constitution, began with these words: "As the Government of the United States is not in any sense founded on the Christian religion." This treaty was ratified by the Senate. If it was presumption in Uzza to put forth his hand to stay the tottering ark of God at the threshing floor of Chidon, it is equally forbidden, under our severance of church and state, for the civil power to enforce cessation of work upon the Lord's Day (510) in maintenance of any religious views in regard to its proper observance. That must be left to the consciences of men, as they are severally influenced by their religious instruction. Churches differ widely, as is well known, on this subject; the views of Roman Catholics and Presbyterians, for instance, being divergent, and the views of other churches differing from both.

Even if Christianity could be deemed the basis of our government, its own organic law must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or, indeed, any day. The Master's references to the Sabbath were not in support, but in derogation, of the extreme observance of the Mosaic day of rest indulged in by the Pharisees. The Old Testament commanded the observance of the Sabbath, but that was an injunction laid upon the Hebrews, and it designated Saturday, not Sunday, as the day of rest, prescribing a thoroughness of abstention from labor which few observe, even of the people to whom the command was given.

Sunday was first adopted by Christians in lieu of Saturday long years after Christ, in commemoration of the Resurrection. The first "Sunday law" was enacted in the year 321 after Christ, soon after the Emperor Constantine had abjured paganism, and apparently for a different reason than the Christian observance of the day. It is as follows: "Let all judges and city people and all tradesmen rest upon the *venerable day of the Sun.* But let those dweling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence the favorable time should not be allowed to pass, lest the provisions of heaven be lost." Codex, Justin, lib. III,

tit. XII, lex 3. Evidently Constantine was still something of a heathen. As late as the year 409 two rescripts of the emperors Honorius and Theodosius indicate that Christians then still generally observed the Sabbath (Saturday, *not* Sun- (511) day). The curious may find these set out in full, Codex Just., lib. I, tit. IX, lex 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the Emperor Leo (Leo Cons., 54). The subsequent development of Sunday laws will be found in Lewis' "Sunday Legislation." This legislation has differed in different Christian countries, and still differs, and the divergence is very great, even in the legislation of the States of this Union.

The Saxon laws, under Ine (about A. D. 700), forbade working on Sunday, but under Alfred (A. D. 900) and Athelstane (A. D. 924) the prohibition was merely against marketing on Sunday, and there seems to have been no statute against working on Sunday (whatever the church may have enjoined) until the above-cited statute, 29 Car. II, ch. 7 (1678), the first part of which is almost *verbatim* our statute, Code, sec. 3782. See 4 Blk. Com., 63. Indeed, it appears from the records of Merton College, Oxford, that at its manor of Ibstone, in the latter part of the thirteenth century, contracts with laborers provided for cessation from work on Saturdays and holidays, but it was stipulated that work should be done in regular course on Sunday. Thorold Rogers' "Work and Wages," ch. 1. Indeed, it seems that this was usual in England till the time of the Commonwealth and the rise of the Puritans to power, but the change was not enacted into law till the above-cited statute of Charles II, in 1678.

The first Sunday law in this country was enacted in Virginia in 1617 (three years before the landing at Plymouth), and punished a failure to attend church on Sunday with a fine, payable in tobacco. This was re-enacted in 1623. 1 Henning's Statutes at Large, Va., 1619-1660, 123. 11 Plymouth Colony Records, 214, made it punishable by imprisonment in the stocks to go to sleep in church; and on 10 June, 1650, (512) the same colony made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's Day. "So any sin committed with an high hand, as the gathering of sticks on the Sabbath, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need." 2 Records of Massachusetts Bay, p. 93. Publicity did not then have the virtue attributed to it as now, but the reverse. 1 Hutchinson's History of Massachusetts, 390, says: "Divers other offenses were made capital, viz., profaning the Lord's

Day in a careless or scornful neglect or contempt thereof (Numbers 15: 30-36)." The New Haven Colony Records, 1653-1655, p. 605, contain a similar provision that profaning the Lord's Day by "sinful servile work or unlawful sport, recreation or otherwise, whether willfully or in a careless neglect, shall be duly punished by fine, imprisonment or corporally, according to the nature and measure of such an offense"; providing further that if "the sin was proudly, presumptuously and with a high hand committed," such person "shall be put to death." On 19 May, 1668, after the union of New Haven and Connecticut in one colony, unnecessary travel or playing on Sunday, or keeping out of the meeting house, was made punishable by imprisonment in the stocks, adding, "and the constables in the several plantations are hereby required to make search for all offenders against this law, and make return thereof." Colonial Records of Connecticut, 1665-1667, p. 88. Similar laws, but of less severity, were enacted in some other provinces. While the statutes of the several States still differ on the subject of Sunday legislation, all of these enactments are now based upon the police power, that some rest may be guaranteed to the workers and to avoid offense by the noise and tumult of traffic and labor to the great majority who desire a day
(513) of quiet and peace for their devotional services. Bishop on Contracts, sec. 536, says: "It is abundantly settled that a Sunday contract is good when it does not come in conflict with any statute." We do not deny the constitutionality of a Sunday law based on the police power, which is well settled. *Judefind v. State,* 22 L. R. A., 721, and notes. We hold that our statute does not make void the contract here sued on. In the language of *Caldwell, J.,* in *Swann v. Swann,* 21 Fed., at p. 305, "It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day." And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday.

Among the authorities elsewhere which hold in accordance with our decisions that a note or contract made on Sunday is valid are *Barrett v. Aplington,* Fed Cases, No. 1045; *More v. Clymer,* 12 Mo. App., 11; *Glover v. Cheatham,* 19 Mo. App., 656; *Sanders v. Johnson,* 29 Ga., 526; *Dorough v. Mort. Co.,* 118 Ga., 178; *Ray v. Cattel,* 51 Ky., 532; *Hazard v. Day,* 14 Allen (Mass.), 487; 92 Am. Dec., 790; *Geer v. Putnam,* 10 Mass., 312; *Kaufmann v. Hamm,* 30 Mo., 388 (which held valid a promissory note made on Sunday); *Foster v. Wooten,*

67 Miss., 540; *Horacek v. Keebler,* 5 Neb., 355; *Fitzgerald v. Andrews,* 15 Neb., 52; *Swisher v. Williams,* Wright (Ohio), 754; *Bloom v. Richards,* 2 Ohio St., 387; *Hellams v. Abercrombie,* 15 S. C., 110; 40 Am. Rep., 684 (which holds a mortgage executed on Sunday to be valid); *Mills v. Williams,* 16 S. C., 593; 40 Am. Rep., 684; *Lucas v. Larkin,* 85 Tenn., 355 (privy examination on Sunday valid); *Gibbs v. Brucker,* 111 U. S., 597; *Allen v. Gardiner,* 7 R. I., 22; *Moore v. Murdock,* 26 Cal., 514; *Johnson v. Brown,* 13 Kan., 529; *Birks v. French,* 21 Kan., 238; *Boynton v. Page,* 13 (514) Wend., 425; *Miller v. Roessler,* 4 E. D. Smith, 234; *Batsford v. Every,* 44 Barb., 618; *Merritt v. Earle,* 29 N. Y., 515; 86 Am. Dec., 292; *Eberle v. Mehrbach,* 55 N. Y., 682; *Amis v. Kyle,* 2 Yerg. (Tenn.), 31; 24 Am. Dec., 463; *Beham v. Ghio,* 75 Tex., 87; *Schneider v. Sansom,* 62 Tex., 201; 50 Am. Rep., 521; *Richmond v. Moore,* 107 Ill., 429; 47 Am. Rep., 445; *Main v. Johnson,* 7 Wash., 321; *Raines v. Watson,* 2 West Va., 371; Clark Contracts, 395, and there are others to same purport. There are decisions to the contrary, but they will be found almost entirely in States where the statute, unlike ours, is not restricted to "labor, business or work done in one's ordinary calling," but is extended in its terms so as to embrace the prohibition of contracts of all kinds on Sunday. In such cases, as is said in *Swan v. Swan* (U. S. C. C.), 21 Fed., 299, "Contracts made on the Lord's Day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act, no matter what that act may be, a court of justice will not enforce a contract made in violation of such statute." The execution of a will on Sunday seems to be held valid everywhere. The Pennsylvania Court, in 1850, was evenly divided on the question whether "a marriage contract executed on Sunday was such worldly employment or business as was forbidden on that day." *In re Gangwere's Estate,* 14 Pa. St., 417; 53 Am. Dec., 554. But, better advised later, in 1882 they held that a contract of marriage entered into on Sunday was valid. *Markley v. Kessering,* 2 Pa., 187.

To sum up the whole matter, the validity, in the courts, of any act done on Sunday depends not upon religious views, but upon the statute of each particular State; our statute, which only forbids "labor, work or business of one's ordinary calling," does not invalidate a contract, as here, which was not an act done as a part of the plaintiff's usual business or calling. (515) Bishop on Contracts, sec. 538, and cases cited. As was said in *S. v. Ricketts, supra,* "What religion and morality per-

mit or forbid to be done on Sunday is not within our province to decide."

The third exception is that the agreement to convey was void because without consideration and against public policy. Both these points have been disposed of. See, also, *Dowdy v. White,* 128 N. C., 17, as to mutual promises being sufficient consideration; and on public policy, see note at end of opinion in *Swan v. Swan,* 21 Fed., 308.

The fourth and last exception is that the decree is "for specific performance, while the plaintiff, at most, is entitled only to damages for breach of contract." In *Bryson v. Teak,* 43 N. C., 310, it is held: "In case of breach of contract of sale, the injured party is entitled at his election to a bill for specific performance, and is not bound to bring an action at law for damages." To same purport, *Springs v. Sanders,* 62 N. C., 67; *Young v. Griffith,* 84 N. C., 715; *Hargrove v. Adcock,* 111 N. C., 166; *Stamper v. Stamper,* 121 N. C., 251; *Whitted v. Fuquay,* 127 N. C., 68; *Hennessy v. Wolworth,* 128 U. S., 138.

The allegation that the defendant made a bad trade, there being no fraud or mistake alleged, does not exempt him from specific performance. *Stamper v. Stamper* and *Whitted v. Fuquay, supra; Moore v. Reed,* 37 N. C., 580. If, as the defendant admits, he is liable to damages for the difference between the contract price and the value of the land, then he is not hurt because he would have to pay the difference, and there would be no reason for a refusal to decree specific performance.

There is no fraud or mistake, as alleged. The land is described by metes and bounds, and that is sufficient. Laws 1891, ch. 465; *Carson v. Ray,* 52 N. C., 609; 78 Am. Dec., 267;
(516) *Fortescue v. Crawford,* 105 N. C., 29; *Farthing v. Rochelle,* 131 N. C., 563.

The decree should have directed the defendant to make reasonable effort to get his wife to sign the deed. *Swepson v. Johnston,* 84 N. C., 449; *Welborn v. Sechrist,* 88 N. C., at p. 292. But that was error against the plaintiffs, who are not appealing.

No error.

WALKER, J., concurs in result.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

Cited: LeRoy v. Jacobosky, 136 N. C., 459; *Soloman v. Sewerage Co.,* 142 N. C., 447; *Tuttle v. Tuttle,* 146 N. C., 493.

WEEKS v. WILKINS.

(Filed 29 March, 1904.)

1. GRANTS—*Recordation—Public Lands.*

The registration of a grant from the State, which described the land by metes and bounds and stated that the grant was in the same form as another named registered grant, was not defective because of the failure to copy the entire grant.

2. INFANTS—*Contracts—Limitations of Actions—Deeds.*

Three years after majority is a reasonable time within which an infant must disaffirm a deed, and this is true though the deed passes only a remainder and the life tenant is in possession.

ACTION by S. M. Weeks against J. T. Wilkins and others, heard by *Judge R. B. Peebles* and a jury, at April Term, 1903, of SAMPSON. From a judgment for the plaintiff the defendants appealed.

F. R. Cooper for the plaintiff.
J. D. Kerr and *J. L. Stewart* for the defendants.

CONNOR, J. This action is prosecuted by the plaintiff (517) against the defendants for the recovery of the land described in the complaint. The defendants, in their answer, denied the plaintiff's title. The plaintiff introduced the original entry book of Sampson County, containing the following entries: "12 May, 1791. No. 256. Arch Carraway enters 200 acres of land on Rye Branch, adjoining Elizabeth Bass line." Grant from the State to Arch Carraway, Grant Book "B," p. 27, reading as follows: "No. 417. Arch Carraway, 200 acres. This grant to Arch Carraway for 200 acres of land are in same form as the aforesaid registered grant in this book, pages 1 and 2, only the persons named and the various courses of the same, to-wit" (then follows a description of the land by metes and bounds). "At New Bern, 1 January, in the seventeenth year of our independence and in the year of our Lord one thousand seven hundred and ninety-three. (Then follows the signature of the Governor and Secretary of State. This grant is registered 10 March, 1798)." Defendants objected, upon the ground that the registration was imperfect, that the registrar should have copied the entire grant instead of a part of it, and referring to the registry of other grants for the evidence. Plaintiff then offered in evidence the grant referred to in the Carraway grant, which is the first grant in said book and registered in full; the others are

registered like the Carraway grant, by reference to said first grant. Said first grant was admitted to be correct in form and correctly registered. The objection was overruled, and the defendants excepted. We think the objection was properly overruled and that the registration was sufficient.

The plaintiffs then introduced deeds showing a chain of title from Carraway to Richard Warren, and the will of Richard Warren devising the land to Hester Weeks and her children.

It was in evidence that Hester Weeks and her children
(518) resided on the land in controversy until the execution of the deed to Brittain A. Edwards, 1 June, 1863. The plaintiff, by way of estoppel, and for the purpose of attacking the same, offered in evidence a deed from Hester Weeks and her children to Brittain A. Edwards, dated 1 June, 1863. This deed is signed by Hester Weeks and all of her children, except Betsy Ann Raynor. At the time of executing said deed, Susan Catherine Williford, Phœbe Williford and Mary J. Jones were married women; they were not privily examined touching their execution of the deed. Minta Tew was a widow and more than twenty-one years of age. The jury found upon the issues submitted to them that Martha Weeks and Hester C. Weeks were also minors at the time of executing said deed. It was admitted that the plaintiff Sampson Weeks was a minor at the time he signed said deed. This deed was probated and registered upon the oath and examination of the subscribing witnesses thereto. There was evidence tending to show that the defendants claimed portions of said land under Brittain A. Edwards. The complaint does not set out what portions of said land were claimed by the several defendants, nor does their answer throw any light upon this question. Much confusion grows out of the indefinite allegations in the pleadings. The complaint should have set out in full the tracts of land of which the several defendants were in possession. We are not sure that in the confused condition in which this record is sent to us we have been able to fully understand and pass upon the large number of exceptions. As the case must be sent back for a new trial, we think, upon the pleadings being properly amended, many of the exceptions now in the record will not again be presented. For the purpose of deciding such questions as are fairly presented, we understand the condition of the title to be as follows: The land in
(519) controversy belonged to Hester Weeks for life, with remainder to her eight children, by virtue of the will of Richard Warren, as construed by the court in partition proceedings. On 1 June, 1863, Hester Weeks and seven of her eight children executed a deed for said land to Brittain A. Edwards,

one daughter, Betsy Ann Raynor, not joining therein. At the time of the execution of this deed three of her daughters were married women, and as to them, no privy examination being taken, the deed is void. Two of the daughters were minors; one daughter, Minta Tew, a widow, more than twenty-one years of age. Her interest therefore passed under the deed and need not be considered. The plaintiff Sampson Weeks was a minor. The three undivided shares of the married women are eliminated, the deed being, as to them, void.

It appears from the record that Hester C. Weeks has, since the date of the deed, intermarried with Asher McCullen. Her age at the time of her marriage does not appear. Martha Weeks is still a *feme sole.* Upon these facts Brittain A. Edwards took the life estate of Hester Weeks and the one-eighth undivided interest of Minta M. Tew. As to the married women, the deed was void. In respect to the shares of Sampson Weeks, Martha Weeks and Hester C. McCullen, the deed was voidable upon their arriving at full age. Hester Weeks, the life tenant, died 10 July, 1896. On 1 June, 1899, all of the living children, together with the heirs of Susan Williford, deceased, executed a deed conveying the land to plaintiff Sampson Weeks. We find in said deed the following language: "And the parties of the first part do hereby disaffirm and repudiate a certain paper writing, purporting to be a conveyance of a portion of the land described in said will to one Brittain Edwards, dated 1 June, 1863, and registered in Book 35, p. 398, in the registry of Sampson County."

The plaintiff testified that he was thirty-five years old (520) at the date of the deed made to the defendant J. T. Wilkins, 1 October, 1891. He was asked if he knew about that and other trades in regard to the land, and whether he ever objected or warned purchasers. These questions were asked with a view to showing that plaintiff's disaffirmance of the deed of 1863 to Edwards was not in a reasonable time and with a due regard to the rights of purchasers. The court intimated that it would hold that mere silence on the part of those in remainder during the continuance of the life estate did not amount to an affirmance. The plaintiff was asked if he knew of any acts done on the land in the nature of waste. He replied that he thought McPhail cut some sawmill logs and that he hauled some of these logs by team, and that Daughtry cleared some of the land, but that clearing up the land improved it; that he never objected to such acts. The defendants contended that the deed from the children of Hester Weeks to the plaintiff was void as to two of them, upon the ground of *fraud in the factum.* His Honor ruled that, upon all of the testimony, there was no evidence, competent to be con-

sidered by the jury, to sustain this allegation, and we concur with him therein. The only question which we are unable to decide from this record is presented by his Honor's instruction, as follows: "As to the share of Sampson M. Weeks, the plaintiff, it being admitted that he was not twenty-one years old at the time he signed said deed, the plaintiff's right to recover that share depends upon his affirmance of said deed after becoming of full age. If the plaintiff, by acts, conduct or words, affirmed or ratified said deed after becoming of full age, then, of course, he cannot recover; but mere silence on the part of a remainderman, unaccompanied by acts or words tending to show affirmance during the continuance of a life estate, will not of itself amount to an affirmance; and failure to bring suit against parties in
(521) possession during the continuance of a life estate is not an affirmance, and the court charges you that a delay of less than three years, as in this case, after the termination of the life estate, unaccompanied by acts, conduct or words, is not an affirmance. . . . An act of disaffirmance must be clear, positive and unequivocal, and must indicate clearly their intention to disaffirm and repudiate said deed. The commencement of an action to recover the land, as in this case, is such an act of disaffirmance, and the subsequent conveyance of the land described in the original deed, with knowledge of its purpose and effect, is likewise such an act of disaffirmance."

We take it to be well settled in this State that the deed of an infant, operating as it does under our registration laws by transmutation of possession, is voidable, and not void. *Hogan v. Strayhorn,* 65 N. C., 279; *McCormic v. Leggett,* 53 N. C., 425; *Ward v. Anderson,* 111 N. C., 115; *Cox v. McGowan,* 116 N. C., 131; Kent Com., 236; 1 Devlin on Deeds, 86. We do not find in the record any evidence of acts on the part of Sampson Weeks amounting to an affirmance, and his Honor would have been justified in so saying to the jury. The institution of this action is a clear disaffirmance, as his Honor told the jury. The defendants, however, asked the court to instruct the jury that such disaffirmance must be within a reasonable time after the plaintiff reached his majority. He was of the opinion, and so instructed the jury, that in view of the existence of the outstanding life estate of Hester Weeks, the action brought within three years after her death was within the time prescribed by law. The defendants excepted, and this exception presents the question which must be decided by us.

This Court has not, so far as the brief and argument of
(522) counsel and our own investigation show, decided the question as to when an infant, after arriving at his majority,

must disaffirm his deed. The only case approaching it is *Dewey v. Burbank,* 77 N. C., 260, in which it is said that after his reaching his majority he may avoid or confirm it, and that continuing to reside on the land and paying a part of the purchase money (he being in that case the purchaser) amounts to an election to ratify. The author of Devlin on Deeds, Vol. I, sec. 91, after discussing the authorities, says: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one, on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance, executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it." We think this is a just and reasonable rule. It is sustained by a large number of well-considered cases. *Cline v. Bebee,* 6 Conn., 494, in which *Hosmer, C. J.,* says: "A ratification of the contract has often been inferred from the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration or availing himself in any manner of his conveyance. . . . The omission to disaffirm a contract within a reasonable time has been held sufficient evidence of a ratification." *Bigelow v. Kenny,* 3 Vt., 353; 21 Am. Dec., 589; *Searcy v. Hunter,* 81 Tex., 644; 26 (523) Am. Rep., 837. In *Blankenship v. Stout,* 25 Ill., 132, it is held that a conveyance of real estate by an infant must be disaffirmed within three years after his arrival of full age; *Caton, C. J.,* saying: "It is of the greatest importance that the common assurance of the country be rendered as certain as possible. Purchasers should be able to know, after ascertaining the facts, whether they can purchase a good title or not. . . . This end is essentially promoted by fixing a definite limit within which a conveyance made by an infant shall be repudiated after he attains his majority. Although the tenth section of the statute . . . does not in terms apply to such cases, yet we are disposed to adopt the limitation there prescribed for the bringing of an action by an infant after he attains his majority, as a reasonable time within which he should repudiate a conveyance of

real estate executed by him while an infant." Tyler on Infancy, 70. In *Bigelow v. Kinney, supra,* it was held that disaffirmance eleven years after majority was not within a reasonable time. *Drake v. Ramsey,* 5 Ohio, 252.

While we have no statute fixing the time within which an infant is required to disaffirm his conveyance, we think that, upon the reason of the thing and in consonance with the policy of the law which seeks to quiet titles and encourage improvement of real estate, the infant should exercise his election within a reasonable time. The statute gives him three years after arrival at majority within which to bring his action against a disseisor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed.

But it is said that Mrs. Hester Weeks owned the life estate, and that, pending such estate, he had no right of action to sue for the possession of the land. We do not think this (524) material. His right to disaffirm his deed was entirely independent of his right to the possession of the land. He could easily have disaffirmed by returning the purchase money or by some other unequivocal act which would have put innocent purchasers on notice. He could have brought his action to remove a cloud from his title, under Laws 1893, ch. 6. He was, according to his testimony, thirty-four years of age in 1894, and therefore reached his majority in 1879. At the time of the institution of this action he was thirty-nine years of age. He should, we think, have disaffirmed his deed within three years after he arrived at his majority.

The record before us illustrates the injustice which may be done by permitting an infant to remain quiescent for an unlimited time before doing some act which puts innocent purchasers on notice of a defect in their title. This land has been divided into five parcels, and as many persons have purchased, paid for, and, it seems, some of them, with the knowledge of the plaintiff, have cleared and improved it. Eighteen years after his majority, the plaintiff, for a nominal consideration, buys the interests of his brothers and sisters, and brings this action, thus disturbing the rights of innocent purchasers and recovering not only the land, but the rents and profits in excess of the amount paid by him for it. A stronger illustration of the wisdom of the law which seeks to quiet titles can hardly be found. His Honor should have charged the jury that the plaintiff Sampson Weeks could not recover in respect to his one-eighth undivided interest.

There is no evidence in the record in regard to the age of Martha Weeks. Her conveyance to Sampson is a clear disaffirm-

ance. Whether it was made within the three years after reaching her majority we are unable to see. It does not appear when Hester Weeks was born or when she married. Whether her disaffirmance is in time will depend upon these facts. (525) If she became covert before reaching her majority, she is not barred of her right.

The record contains a number of admissions which should be incorporated in the judgment. As a new trial must be had, we think that the complaint should be reformed so as to contain "a plain and concise statement of the facts constituting the cause of action," and the defendants be permitted to answer. It would seem that, in view of the number of parties and interests involved, and the complicated questions of fact to be settled, a reference would expedite the final determination of the controversy.

We have not noted and decided many of the exceptions, because upon a new trial they may not and should not arise. There seems to be no doubt that the title vested in Mrs. Weeks for life, remainder to her children, and that all of the defendants claim under them through Brittain Edwards. It seems equally clear that the defendants own the share of Minta M. Tew, and, under our decision, of Sampson Weeks, and that the plaintiff owns the shares of Betsy Raynor and the married sisters who signed the Edwards deed, but of whom no privy examination was had. This leaves the shares of Martha Weeks and Hester McCullen open for adjustment, upon the facts as they may be shown, according to the principles we have attempted to lay down. We think that the judgment against the defendant for rents and profits should be reversed. The facts are not found upon which the amount of their liability depends. The case, it would seem, should go to a referee to settle these questions. When the rights of the parties are ascertained, a decree should be so drawn that it will quiet the title. *Weeks v. McPhail,* 128 N. C., 131.

Error.

Cited: Gaskins v. Allen, 137 N. C., 430; *Weeks v. Wilkins,* 139 N. C., 215.

(526)

McGOWAN v. DAVENPORT.

(Filed 29 March, 1904.)

1. HEARSAY EVIDENCE—*Evidence—Mortgages.*

Where a *feme covert* gives a mortgage on her separate estate to secure the debt of her husband and the husband dies, in an action to foreclose the mortgage a statement of the husband that the debt had not been paid is not competent.

2. WITNESSES—*Evidence—Code, Sec.* 590—*Mortgages.*

In an action to foreclose a mortgage given by a *feme covert* to secure a debt of her husband, the mortgagee is not competent to testify that the debt has not been paid, the husband being dead.

3. PARTIES—*Mortgages—Foreclosure of Mortgages.*

The representative of a deceased mortgagor who joined with his wife in giving a mortgage on the wife's separate property is a necessary party to a suit against the widow and trustee for foreclosure of the mortgage.

ACTION by E. L. McGowan against J. R. Davenport and others, heard by *Judge Frederick Moore* and a jury, at November Term, 1903, of PITT. From a judgment for the plaintiff the defendants appealed.

No counsel for the plaintiff.
Skinner & Whedbee for the defendants.

WALKER, J. This action was brought for the purpose of recovering a debt of $156 alleged to be due by G. A. McGowan to the plaintiff by open account, and of foreclosing a deed of trust given by G. A. McGowan and his wife, the defendant L. A. McGowan, to secure the payment of the same, the defend-
(527) ant J. R. Davenport being named in the deed as trustee. The deed of trust had been cancelled on the margin of the registry by the trustee in accordance with the statute. The plaintiff demanded judgment against Mrs. L. A. McGowan for the amount of the debt, that the cancellation of the deed of trust be set aside, that a foreclosure of the trust be ordered and the property sold for the payment of the debt. The defendants pleaded that the debt had been fully paid and satisfied, and that therefore the cancellation had been properly entered, and they introduced evidence to establish their plea.

The jury, under the evidence and instructions of the court, found (1) that the debt was contracted by G. A. McGowan and not by L. A. McGowan; (2) that it had not been paid; (3) that

L. A. McGowan, at the time of the execution of the deed, was the wife of G. A. McGowan, and (4) that the land conveyed by the deed was her separate property. The defendants moved for a new trial upon exceptions stated. The motion was overruled, and the defendants excepted.

Upon the verdict the court adjudged that G. A. McGowan owed the debt, and that the cancellation of the deed was wrongfully made, and is not valid as against the plaintiff, and that the land be sold by a commissioner of the court for the purpose of paying the debt. The court further adjudged that the costs of the action be taxed against the defendants. To this judgment the defendants excepted and appealed.

In order to prove that the debt had not been paid the plaintiffs introduced as a witness John C. McGowan, who was permitted, over the defendant's objection, to testify that G. A. McGowan, who was then dead, had told him that he had not paid the debt. The testimony of the witness, to which exception was duly taken, was hearsay and nothing else, and its admission was error. *Lawrence v. Hyman,* 79 N. C., 209; *Gid-* (528) *ney v. Moore,* 86 N. C., 491; *Henry v. Willard,* 73 N. C., 35. This entitles the defendant to a new trial, but as the case goes back, and as the other questions discussed before us upon the exceptions may again be presented, we will consider and pass upon them.

The plaintiff was permitted to testify that the debt had not been paid. It must be conceded that this testimony necessarily related to a personal transaction with the deceased, who was principal in the note, as it involved the idea that the deceased had not paid the debt to the plaintiff (*Simpson v. Simpson,* 107 N. C., 552); but it is said that the representative of G. A. McGowan, who was the principal, is not a party to the action, and the other defendants do not derive any title or interest from, through or under him. While G. A. McGowan had no title to the land the defendant Davenport, who is the trustee in the deed, could not have acquired any right, title or interest unless G. A. McGowan had executed the deed with his wife. His execution of the deed, in other words, was required in order to convey the title to Davenport. The latter therefore, within the spirit and meaning if not within the letter of section 590 of the Code, derived his interest from, through or under him. But this Court has decided that testimony like this is incompetent for another reason closely allied to the one we have just stated. The defendant L. A. McGowan, wife of G. A. McGowan, was but a surety for her husband (*Shinn v. Smith,* 79 N. C., 310), and if a recovery is had against her she will have her action over

against her husband's estate for exoneration. *Lewis v. Fort,* 75 N. C., 251. Any testimony therefore which makes against her will, in a material respect and in the same degree, though indirectly, affect her husband's estate. The plaintiff being a party and directly interested in the result, was incompetent to give this testimony. This has been expressly decided. In (529) *Bryant v. Morris,* 69 N. C., 444, the plaintiff sued the surety of a deceased constable on his official bond, and proposed himself to testify as to communications and transactions between himself and the constable, whose representative was not a party to the action, for the purpose of charging the defendant, the surety. He was held to be incompetent under section 343 of C. C. P., now section 590 of the Code, on account of the relation of the parties. The Court said: "If the plaintiff had sued the administrator of the dead constable he could not have testified as to any transaction between him and the deceased so as to affect his estate. C. C. P., sec. 343. But the defendant is not sued as administrator but as surety to the dead constable, and the question is whether the plaintiff can testify as to transactions between himself and the deceased which affect the defendant as his surety. It is said that he ought not to be allowed to do this because whatever he recovers of the defendant as surety the defendant can recover of the estate of the deceased constable. This would seem to be so, and therefore to allow the evidence against the surety is to allow it indirectly against the principal, which is the evil meant to be guarded against by the exception in the statute. So that while the objection to the evidence is not within the *letter* it is within the *spirit* of the statute." No two cases could be more alike in their essential features than the one we have cited and the case at bar. The principle underlying the decision in *Bryant v. Morris, supra,* was recognized and applied in *Lewis v. Fort, supra,* where it is held that a judgment against the surety is at least evidence against the principal for the surety.

The rule to be deduced from these authorities is that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and is entitled to the same protection under section 590 of the Code as the (530) representative of his deceased principal when sued. *Hawkins v. Carpenter,* 85 N. C., 484.

The case of *Bryant v. Morris* had careful consideration by a court of exceptional ability, one of the justices having been a member of the commission which prepared and framed the Code of Civil Procedure. It was decided some time after section 343 (now 590) became a law, and at a time when that section had

frequently been under consideration by this Court, and when it was, as we are inclined to think, quite as well understood as it is now. The case has never been overruled nor questioned as a precedent, but on the contrary has been cited with approval, as we will presently show. The principle it lays down being a just and reasonable one, we do not see why the case should not continue to be accepted as an authority.

It is well settled, we are told, that a party to an action is a competent witness under section 590 of the Code as to a transaction or communication with a deceased person when the personal representative of the deceased, or any person who derives a title or an interest through or under him, is not a party to the action. This is true in some cases, but not in a case like the one at bar, and the authorities cited do not sustain the proposition as to such a case. In *Shields v. Smith,* 79 N. C., 517, which is much relied on, Hyman, the deceased, was not the principal of any of the defendants, and his estate was not liable over to them or any of them. There was no such privity or connection between them and Hyman as would affect his estate by the judgment in the action. Besides, *Mr. Justice Reade* wrote the opinion of the Court in *Shields v. Smith* and also in *Bryant v. Morris,* and we can hardly presume that he was inadvertent to the decision in the latter case, and intended to overrule it without even referring to it in *Shields v. Smith.*

In *Hawkins v. Carpenter,* 85 N. C., 482 (decided some time after *Shields v. Smith*), the Court expressly recog- (531) nizes the decision in *Bryant v. Morris* as authority upon the facts therein disclosed, and distinguishes it from the case then under consideration by the fact that the transaction was not with the person since deceased but with an heir at law. Besides, the case of *Hawkins v. Carpenter* is clearly not in point for the purpose of sustaining the proposition, because the defendants had opened the door by proving a transaction with Durham, and the plaintiff was merely permitted to reply in regard to the *same* transaction. This came within the exception in the statute. The case is really an authority for the view we have taken of the testimony of the plaintiff McGowan, and has already been cited in this opinion as sustaining it. In *Gidney v. Moore,* 86 N. C., 484, the defendants proved a transaction, not with the person since deceased, but with his agent; and in *Morgan v. Bunting,* 86 N. C., 66, the defendant proved a transaction, not with the intestate of the plaintiff, but with her father, who was in no way connected with the action and had no interest near or remote therein. In *Bunn v. Todd,* 107 N. C., 266, the witness, by whom it was proposed to prove the transac-

tion with the person since deceased, was not a party to the suit nor interested in the event of it, nor did she ever have any such interest. The facts of *Ledbetter v. Graham,* 122 N. C., 753, are substantially like those in this suit, but that case was disposed of by a *per curiam* order, without a written opinion, upon the authority of *Shields v. Smith* and *Bunn v. Todd,* neither of which, as we have seen, sustains the ruling, as the facts in the last two cases were materially different from those in *Ledbetter v. Graham.* We have never regarded a decision by *per curiam* order as a binding precedent. It merely declares the law of the particular case, and surely it should not have the effect of overruling a previous decision based on a well-considered
(532) opinion, and especially when the latter was not commented on or even cited by the Court.

We are of the opinion that the witness John C. McGowan was disqualified under section 590 to testify that the principal in the debt (G. A. McGowan), then deceased, had admitted to him that the same had not been paid. The witness was a surety on the prosecution bond in this case, and was, by every authority upon the subject, interested in the event of the action. One who is a surety for the prosecution has a certain legal interest which might be affected by the event or result of the action, being liable for costs if the plaintiff fails to recover, and this interest renders him incompetent to testify as to any transaction or communication with the party deceased, the same as if he were himself a party to the action. This principle was settled in *Mason v. McCormick,* 75 N. C., 263, which has repeatedly been affirmed. *Peebles v. Stanley,* 77 N. C., 243; *Mason v. McCormick,* 80 N. C., 244. In *Peebles v. Stanley* the witness was a co-obligor and testified against his own interest. It is suggested that the witness was not incompetent because, as surety on the prosecution bond, he could in no event be liable to the estate of the deceased for the costs of the action. This is a misconception of the true reason for the disqualification of the witness. The question is not whether he is liable to the representative of the deceased, who is not a party, or to any particular person, but whether the suit may so eventuate as to make him liable for the costs to anybody who is a party and against whose interests he testifies. If the plaintiff fails, the witness will be liable as surety to the defendant for the costs, and is for that reason interested, and he testifies against the defendant, and consequently in favor of his own interest. It is further suggested that the defendant L. A. McGowan was permitted to testify as to the payment, and
(533) it would be unfair not to let the plaintiff do likewise. But the question must be decided according to the law

and without regard to any principle of fairness, and in the statute it is plainly and explicitly provided that when one party testifies to a transaction or communication with the deceased the other party may also testify, but only concerning the *same* transaction or communication. To permit the witness to go beyond this would be a distinct violation of the statute. *Kesler v. Mauney,* 89 N. C., 369; *Sumner v. Candler,* 92 N. C., 634; *Burnett v. Savage,* 92 N. C., 10; *Bunn v. Todd,* 107 N. C., 266; Clark's Code (3 Ed.), sec. 590, p. 850, and cases cited.

It may be well to refer to the other question mentioned in the case, namely, whether the representative of a deceased mortgagor or trustor is a necessary party to a suit for foreclosure. It would seem on reason and principle, if not on authority, that he is. In *Avirett v. Ward,* 45 N. C., 192, it was held that he was a proper but not a necessary party. A case precisely like this in its facts is *Mebane v. Mebane,* 80 N. C., 34, in which it appeared that the wife had joined with her husband in conveying her land in trust to pay his debt. The husband died and a suit to foreclose the mortgage was brought by the creditor against the widow. The Court referred to and criticized the case of *Avirett v. Ward,* and practically overruled it by holding that the representative of the deceased husband was a necessary party. In the later case of *Fraser v. Bean,* 96 N. C., 327, it is said that the administrator of the mortgagor is not a necessary party, but the Court simply refers to *Avirett v. Ward* without noticing the case of *Mebane v. Mebane.* In the face of the decision in *Fraser v. Bean* the case of *Mebane v. Mebane* may yet be sustained upon its peculiar facts, namely, that the wife, as in our case, was but a surety for the husband, and if her property should be taken to pay his debt she would be entitled to recover over against his estate and to have his property (534) first subjected to its payment, and upon these facts the Court laid much stress in *Mebane v. Mebane,* though it also stated broadly and as a general principle that the representative of the mortgagor is a necessary party. The facts in *Avirett v. Ward* and *Fraser v. Bean* were not the same as in *Mebane v. Mebane* and the case at bar. There was error in the rulings of the court as herein stated, for which there must be another trial.

New trial.

CLARK, C. J., concurring in result. G. A. McGowan and wife, L. A. McGowan, 6 October, 1897, executed a deed in trust to J. R. Davenport upon the land in question, the property of L. A. McGowan, to secure certain indebtedness therein recited to be owing by G. A. McGowan and L. A. McGowan, among them

this indebtedness to the plaintiff by open account for $156.60 for borrowed money, as stated in said deed and trust. G. A. McGowan has died and all the other indebtedness secured in the trust deed has been paid. This is an action alleging nonpayment of this debt, that the trustee has refused to foreclose the said trust but has canceled the deed in trust on the margin of the registration thereof, and asks for a judgment against L. A. McGowan and to set aside the attempted cancellation, and for foreclosure and payment of the debt out of the proceeds. The jury having found that the indebtedness was owing by G. A. McGowan, and that it had not been paid, the court gave no personal judgment against L. A. McGowan, but ordered a foreclosure of the trust deed and payment of the sum therein secured to the plaintiff out of the proceeds of sale.

It is well said in the opinion of *Mr. Justice Walker,* "The question must be decided according to the law and without regard to any principle of fairness," or, as *Judge Daniel* (535) said long ago, "We cannot be wiser than the law." The law is explicit. It provides (Code, sec. 589), *"No person* offered as a witness shall be excluded by reason of his interest *in the event of the action."* Section 590 excludes a party, etc., to the action, in his own behalf, etc., only when testifying as to a personal transaction with a person deceased, and then only "against the personal representative of the deceased person" or against the person succeeding to the title of the deceased.

Here the personal representative of the deceased is not a party to the action nor does the defendant succeed to his title. *Q. E. D.* The deceased never had any title to be conveyed. Had he survived his wife he might have been tenant by the curtesy if she had not devised the property away. It was barely a possibility, certainly not a vested interest. The deceased was expressly inhibited by the Constitution from having *ex jure mariti* any interest in the property of his wife, which "shall be and remain the *sole* and separate estate and property of such female . . . as if she were unmarried." The joinder of the husband was not to convey his title and estate, for he had none, but was merely the "written assent" required to authorize the wife's conveyance. In *Bryant v. Morris,* 69 N. C., 444, it is stated that the Court read into the statute what was not there, for it says that it was "not within the letter" of the law. Accordingly that opinion has been distinguished and never cited and affirmed as a precedent, and the law for the last twenty-six years has been uniformly held in accordance with the plain letter of the statute. *Shields v. Smith,* 79 N. C., 517, affirmed since in *Ledbetter v. Graham,* 122 N. C., 754, which is "on all-fours" with this case,

and *Bunn v. Todd,* 107 N. C., 266, which last analyzes the statute and points out that no person is disqualified unless he is a party to the action, and then only as to a personal transaction with the deceased, and in such cases only (536) when the other party is a personal representative of the deceased or holds his title, neither of which is the case here. *Shields v. Smith,* 79 N. C., 517, is also cited with approval on this point in *Morgan v. Bunting,* 86 N. C., at p. 69, citing several cases; *Gidney v. Moore,* 86 N. C., at p. 491, also citing numerous cases. *Hawkins v. Carpenter,* 85 N. C., 484. No point in section 590 has been better settled. *Morris v. Bryant* was a decision made when the Code was new, and which stated therein that it was contrary "to the letter of the law." As above stated it has not been directly affirmed since in any case, but has been disregarded and effectually overruled by above decisions.

If, however, the express provision of the law is not to govern us, but our own conceptions of fairness, we must remember that the defendant L. A. McGowan testified at length as to the whole matter, and there is no provision of law disqualifying her. The burden was upon her to prove payment, and it would be manifestly unfair were she to be competent and the plaintiff incompetent against her, the real defendant, and against Davenport, her co-defendant, when the plaintiff is seeking no relief against the estate of the deceased and the estate is not a party to the action.

What effect the judgment may have against the estate of the deceased in any future action against it by the defendant is not before us. The plaintiff has no interest in that matter which can be served by his testimony here, and it is *his* interest only in this action which can disqualify him, and then only in the cases prescribed by the statute. The execution of the deed in trust and its registration are admitted in the answer, and, besides, those acts were not a "personal transaction" between the plaintiff and the deceased. *McCall v. Wilson,* 101 N. C., 598; *Thompson v. Onley,* 96 N. C., 9.

John C. McGowan, surety on the prosecution bond, was a competent witness for the same reasons above given (537) as to the plaintiff. There was error, however, in permitting him to prove the declaration of G. A. McGowan, for the very reason that his personal representative not being a party such declarations were mere hearsay. For this reason there should be a new trial.

There was no offer to make the personal representative of G. A. McGowan a party, and no exception that he was not a necessary party to this action, and that point is not before us. In

Fraser v. Bean, 96 N. C., 327, it was held that the administrator is not a necessary party, even when the land on which the mortgage is to be foreclosed belonged to the intestate, affirming *Avirett v. Ward,* 45 N. C., 192. Here the intestate had never had any interest in it, but merely gave his marital assent to the mortgage by his wife, as above stated. It would seem, however, that as a surety may be sued without joining the principal, the property put up as security may be subjected without such joinder, especially when, as here, the surety does not ask that the principal be made a party.

Cited: Stocks v. Cannon, 139 N. C., 63.

(538)

BRYAN v. RAILROAD COMPANY.

(Filed 29 March, 1904.)

INSTRUCTIONS—*Evidence—Trial.*

The trial judge should not give instructions not supported by evidence.

DOUGLAS, J., dissenting.

ACTION by W. B. Bryan against the Southern Railroad Company, heard by *Judge B. F. Long* and a jury, at May Term, 1903, of CATAWBA. From a judgment for the plaintiff the defendant appealed.

Thos. M. Hufham and *Self & Whitener* for the plaintiff.
S. J. Ervin and *A. B. Andrews, Jr.,* for the defendant.

MONTGOMERY, J. The plaintiff, an employee of the defendant company at the time when he was hurt, was engaged with a squad of hands under a boss in loading a box car with heavy timber. In his complaint, as it was first drawn, the negligence alleged was that the defendant was engaged in the work with an insufficient force of hands. The complaint was amended, after the answer was put in, as follows: "That the defendant company was negligent in that said Whitley, foreman and boss of defendant's force of laborers as aforesaid, negligently ordered said Sigman to hold said stringer or piece of timber on said car in an unsafe manner with a stick slanting downward from the car to his (said Sigman's) shoulder, which was dangerous to plaintiff and done without notice to him. The defendant ex-

cepted to one of his Honor's instructions to the jury, which was as follows: "If the jury should find that Whitley and one of the hands, without notice to plaintiff, quit the work at a critical juncture in the lifting and placing, and thus prevented the completion of the lifting, and left the plain- (539) tiff and his associates at the work in a perilous position, from which plaintiff could not by reasonable care extricate himself, and you find that this negligence of Whitley was the proximate cause of the injury you will answer the first issue (as to the defendant's negligence) "Yes."

There was no evidence to support such an instruction.

The exception to the rule as to the measure of damages laid down by his Honor must also be sustained. His Honor instructed the jury: "If the plaintiff is entitled to recover he is entitled to have a reasonable satisfaction for the loss of both bodily and mental powers." The exception was upon the ground that there was no evidence of any loss of mental power. Upon a careful inspection of the evidence we find that there is none to that effect. *Smith v. R. R.*, 126 N. C., 712; *Wilkie v. R. R.*, 128 N. C., 113.

New trial.

DOUGLAS, J., dissents.

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(540)

BURWELL v. BRODIE.

(Filed 5 April, 1904.)

1. LANDLORD AND TENANT—*Damages—Code, Sec.* 1776.

Under the Code, sec. 1776, a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action.

2. LANDLORD AND TENANT—*Damages—Pleadings.*

A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops.

3. JUDGMENT—*Estoppel—Landlord and Tenant—Advancements.*

A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from

showing in a subsequent action advancements made prior to eviction to which he was entitled.

4. LANDLORD AND TENANT—*Advancements.*

Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction.

WALKER, J., dissenting.

ACTION by Matthew Burwell against B. T. Brodie, heard by *Judge G. S. Ferguson* and a jury, at October Term, 1903, of VANCE.

The present plaintiff was the tenant or cropper on the present defendant's land during 1901 and 1902, under a farming contract by the terms of which he was to have one-half of the crop made on the land. In May the present defendant instituted summary proceedings before a justice of the peace to eject the
(541) present plaintiff. From a judgment against him he, the present plaintiff, appealed to the Superior Court. He gave no undertaking to stay execution and was, by the constable acting under an execution issued upon said judgment, evicted and the present defendant put in possession. At October Term, 1902, the cause came on for trial upon the appeal, and the court held upon the plaintiff's (present defendant) own showing that he was not entitled to recover, and adjudged that a writ of restitution issue to put the present plaintiff in possession. The court also adjudged that the present plaintiff recover one-half of all crops raised on the land. The present defendant appealed, and had time allowed to give bond and perfect his appeal. He failed to give the bond or perfect his appeal, but remained in possession, gathered and sold the crop, receiving therefor $366.79.

The present plaintiff thereupon brought this action, alleging the foregoing facts, and alleging that the defendant's conduct in the premises was unlawful, wrongful and tortious and amounted to an abuse of legal process, and that by reason thereof the plaintiff "was deprived of his house and garden for shelter and support of his family; that he was greatly distressed, agitated and troubled, both in body and mind, thereby, and specifically and more so on account of the condition of his wife, which was known to the defendant, and was put to great mortification and shame thereby, as well as loss of employment," etc. For all of which he demands damages. His Honor rendered judgment "That the plaintiff has not alleged in his complaint matters sufficient to constitute a cause of action for damages other than the value of the crop." He thereupon proceeded to adjudge that the plaintiff recover one-half the value of the crop,

ascertained to be $183.39. The court held that, in respect to the crop, the defendant was bound by the judgment rendered at Fall Term, 1902, and refused to allow the defendant to show the amount expended by him in making and (542) saving the crop. From this judgment the plaintiff and defendant appealed.

T. T. Hicks and *R. S. McCoin* for the plaintiff.
W. B. Shaw and *A. C. Zollicoffer* for the defendant.

CONNOR, J., after stating the facts. We are of opinion that his Honor was in error in holding that the plaintiff did not state facts sufficient to enable him to submit an issue to the jury in regard to the alleged damage sustained by him for the eviction. While he could have demanded such an issue upon the rendition of the judgment of October Term, 1902, he was not compelled to do so. Section 1776 of the Code expressly secures to him the right to "recover damages of the plaintiff for his removal in such cases as the present." The question is settled by this Court in *Woody v. Jordan,* 69 N. C., 189. It is there said that the defendant who successfully resists an action of replevin may have his damages assessed in the original action, but that he is not compelled to do so, and may have his separate action on the bond or on the case for damages sustained by the wrongful suing out of the writ and eviction. *Mr. Justice Rodman* says: "It must be, then, that the common law gave him full indemnity by means of a separate action for the damages for the taking and detention." It seems from the statement of the case on appeal that his Honor was asked by the defendant to hold that the complaint did not state facts sufficient to constitute a cause of action against the defendant "for damages, for abuse of legal process, mental or physical anguish or malicious prosecution, and that the said complaint does not allege malice or want of probable cause, or special damages because of his eviction," and moved the court to dismiss the action as to any and all such alleged causes. The motion was sus- (543) tained. As we have seen, the judgment, which is the record, and controls in respect to what is decided, simply states that his Honor ruled that the complaint did not allege any damage other than the loss of his crop. We cannot concur with this construction of the complaint. We think it is sufficiently alleged that he suffered damages incident to his wrongful eviction, *i. e.,* "a shelter and support for his family, etc." We do not express any opinion in regard to the character and nature of the damages which he may recover upon the allegations. He

alleges a wrongful eviction, and for this injury he may recover such damages as proximately resulted from such injury. His Honor should have submitted an issue involving this inquiry, and instructed the jury in regard to the measure and kind of damages which might be recovered. This Court has, in *Remington v. Kirby,* 120 N. C., 322, announced the principle upon which punitive damages may be recovered.

We simply decide that upon the complaint the plaintiff was entitled to have an issue as to his actual damages. To this end there must be a new trial.

IN DEFENDANT'S APPEAL.

CONNOR, J. His Honor, *Judge Winston,* at the October Term, 1902, rendered judgment that the plaintiff be restored to the possession of the land from which he had been wrongfully evicted, and recover one-half the crops made. The execution of this judgment was prevented by the appeal of the defendant, who remained in possession until the expiration of the plaintiff's term, gathered and sold the crops. While it may be that the present plaintiff may have had the value of the crops ascertained and judgment therefor at the next succeeding term of court, the present defendant having failed to perfect or prosecute
(544) his appeal, he was not compelled to do so. In this action he relies upon the judgment as an estoppel upon the defendant. It is an estoppel to the extent of what was decided or should have been decided. It does not operate to prevent the present defendant from showing the value of the crop and what portion of it he is entitled to retain for advancements made before the eviction under the terms of the contract. By his wrongful act in evicting the plaintiff he does not forfeit his rights under the contract and the statute as landlord which had accrued to him. The record shows that the plaintiff was evicted about 1 May; that the defendant furnished guano, cotton seed meal and cotton seed used upon the crops. The date at which these articles were furnished is not given, but we may take notice of the season for planting and find that they must have been purchased or furnished at or about the time of the eviction. We infer from the record that the crop was not planted, as the controversy grew out of a difference between them as to what crop should be planted. However this may be, the defendant should be allowed a credit for the guano, cotton seed meal and cotton seed used in planting and making the crop, as the use of them was necessary to the planting and making the crop and in no way affected by the eviction. In regard to the amount paid for labor the defendant may not have credit. Having, as

the record shows, and for the purpose of disposing of this appeal, conclusively so, wrongfully evicted the plaintiff and prevented him from doing the work, he cannot charge him for having it done by some other person. This would be to take advantage of his own wrong.

We are not sure that we understand the last two items on the account for corn and hay furnished to feed the mules "over amount furnished." It does not appear when or under what circumstances these articles were furnished. It is possible that these questions may be adjusted under the advice (545) of the intelligent counsel representing the parties. There are few controversies more difficult to adjust than those arising out of farming contracts. It is a subject of congratulation that they are usually settled by mutual concessions. This case would, as it seems to us, seem to offer an opportunity to do so. There must be a

New trial.

WALKER, J., in defendant's appeal. I dissent in this case from the opinion and judgment of the Court in the defendant's appeal. I cannot agree with the Court as to the legal force and effect of the judgment awarding to the plaintiff in this case, who was the defendant in the other suit, one-half of all the crops grown on the land. The defendant Brodie, who was the plaintiff in that suit, had his day in court and full opportunity to show that Burwell was not entitled to one-half of the crop, but to one-half less the part to be retained by him for advancements made before the eviction. If Brodie was entitled to any deduction on account of advancements, then Burwell was not entitled to one-half of the crop, and yet that is precisely what the court decided when the parties were at issue as to what were their respective rights in the crop. The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined, and as to every other matter which the parties by the exercise of reasonable diligence might have litigated in the cause and which might have been decided or determined therein. *Clark, J.*, in *Wagon Co. v. Byrd*, 119 N. C., 460, thus states the rule: "The plea of *res judicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought for- (546) ward at the time and determined respecting it," citing 1 Herman on Estoppel, secs. 122 and 123. I do not think it can

be successfully contended that the defendant Brodie did not have full time and opportunity to bring forward the matter of advancements, now claimed to have been made by him to Burwell, and to have his right to so much of Burwell's half of the crop as was necessary to pay them adjudicated. The point was directly presented in that action. *Tylor v. Capehart,* 125 N. C., 64. The judgment declares that Burwell is entitled to one-half of the crop, and that finding and determination preclude the other question now attempted to be raised. *Bryan v. Alexander,* 111 N. C., 142.

TAPP v. DIBRELL.

(Filed 5 April, 1904.)

1. EVIDENCE—*Admissions—Partnership.*

Where there is evidence of a partnership, admissions by one partner are competent in an action against the partners for a partnership debt.

2. EVIDENCE—*Admissions—Compromise and Settlement.*

An offer to pay a part of a claim, contending that the other part had been paid, is competent to establish the debt and is not objectionable as an offer of compromise.

3. GARNISHMENT—*Parties—Corporations—Partnerships.*

Where tobacco was sold by a corporation to a firm, garnishment levied against the buyer as a corporation on a debt alleged to be due to the seller as a partnership is no defense to an action for the price of the goods sold.

(547) ACTION by L. P. Tapp and another against R. L. Dibrell and another, heard by *Judge W. R. Allen* and a jury, at September Term, 1903, of LENOIR. From a judgment for the plaintiffs the defendants appealed.

N. J. Rouse and *Y. T. Ormond* for the plaintiffs.
Loftin & Varser for the defendants.

CONNOR, J. The plaintiffs, L. P. Tapp and J. W. Grainger, as assignees, sued to recover of the defendants, R. L. Dibrell and A. B. Carrington, trading under the firm name and style of Dibrell Brothers, an account of $1,120.80 for certain tobacco sold and delivered by their consignor to W. C. Thomas Tobacco

Company, a corporation duly incorporated and organized under and pursuant to the laws of this State.

The defendants deny that they, as partners, purchased any tobacco of the W. C. Thomas Tobacco Company, but aver that a corporation duly incorporated and organized pursuant to the laws of Virginia as Dibrell Brothers purchased certain tobacco of a co-partnership composed of W. C. Thomas and the plaintiffs Tapp and Grainger, the price of which was $1,111.44. They deny the assignment of the account. They further say that the Hoge-Irvin Tobacco Company, a corporation chartered and organized in the State of Virginia, attached $215.50 of the proceeds of said tobacco in the hands of Dibrell Brothers, and has obtained judgment in said attachment; that one R. R. Traxton also attached of said proceeds $20.50, and has obtained judgment for said amount; that Dibrell Brothers have tendered to W. C. Thomas & Company a check for the balance of the proceeds of said tobacco. The defendants also set up a counterclaim for $400 damages for loss suffered in defending said attachment proceedings.

In response to issues submitted the jury find that Dibrell Brothers was a corporation at the time of the (548) purchase of the tobacco; that the tobacco was not purchased for Dibrell Brothers as a corporation; that both the defendants were indebted to the plaintiffs in the amount named in the complaint.

The plaintiffs introduced the articles of incorporation of the W. C. Thomas Company, to which there was no objection. The plaintiff Tapp testified that he never knew of any such firm as W. C. Thomas & Company; that the tobacco represented by the account sued on was sold by the W. C. Thomas Company to the defendants through A. B. Carrington, one of the defendants, and delivered to the Hoge-Irvin Tobacco Company for the defendants; that he had known Dibrell Brothers since 1895. A. B. Carrington and R. L. Dibrell were members of the firm, and that Carrington was served with summons here; that he talked with Carrington in August, 1902, and said that he wanted to settle the claim but he would be liable on garnishment. This was objected to by the defendants, and to the admission of the testimony exception was taken.

We cannot see any valid objection to this testimony. It was the declaration of one of the defendants. It was certainly admissible against him, and if there was a partnership, against his co-partner. It was not offered to prove a partnership. The witness had testified to the partnership. While this was not conclusive it was a sufficient basis to admit the declaration of

Carrington. Of course if the jury did not find that Carrington and Dibrell were partners in this transaction the declaration was admissible only as against Carrington. The learned counsel in their brief do not rest their exception upon this ground, but say that it is not admissible as an offer to compromise. It was not offered for that purpose and was not capable of that construction. In view of the answer we cannot see that it (549) was of any importance in any point of view.

The witness further testified that he had about the same conversation with the defendant Dibrell; that neither of them denied that "Dibrell Brothers," partners, owed the claim. The plaintiffs introduced the following:

"Cable Address: Dibrell, Danville. DIBRELL BROS., Leaf Tobacco Brokers.

"DANVILLE, VA., U. S. A., 12 May, 1902.

"MESSRS. W. C. THOMAS TOBACCO CO., *Kinston, N. C.:*

"Your valued favor of the 10th inst., returning our check for $774.94 tendered W. C. Thomas & Company, is to hand. We note carefully your remarks as to the position you take in regard to the matter. We regret very much that we are not at liberty to accede to the demands of the W. C. Thomas Company for the money claimed to be due them by us, and we wish to assure you that it is in no spirit of vindictiveness that we refuse the demand, but only for our protection and by the advice of our attorneys. We believe we have made our position very clear to you, but we repeat that we do not know the W. C. Thomas Tobacco Company in this transaction, but only W. C. Thomas & Company. We will be compelled to pay the amount of garnishments when ordered to do so by the court, and we hope that you will see fit to have some one to represent you when the case comes up in July corporation court.

"Very truly yours,

"DIBRELL BROS."

Objection was made to the manner of proving the assignment of the account. We concur with his Honor's ruling in this respect.

The defendants introduced a copy of articles of incorporation of Dibrell Brothers, duly certified, and a certified copy of the proceedings in attachment in the case of the Hoge-Irvin Tobacco Company, issuing out of the corporation court (550) of Danville, against W. C. Thomas, L. P. Tapp and J. W. Grainger, co-partners, trading under the firm name and style of W. C. Thomas & Company. Notice of attachment

was served on "Dibrell Brothers, a corporation, as being indebted to the defendant partners." The defendants also introduced the proceedings in attachment sued out by L. P. Morgan & Company against W. C. Thomas for $25.50, containing this endorsement: "The plaintiff herein designated R. L. Dibrell and A. B. Carrington, partners in business as Dibrell Brothers, as being indebted to or having in their possession effects of the defendant W. C. Thomas." Also a proceeding against W. C. Thomas & Company by R. A. Craxton, upon which is the same endorsement; also a similar proceeding by Reagan, Walton & Davis, with the same endorsement. The witness Tapp said that he received notice of the attachment through the mail. His Honor held that the attachment proceedings should not be introduced and used to decrease the amount of the plaintiff's claim. To this ruling the defendants excepted. The value of this exception is dependent upon the correctness of his Honor's charge and the finding of the jury upon the second issue. He told the jury that the burden was upon the plaintiffs to satisfy them by the greater weight of the evidence that the defendants were a partnership at the time of the purchase of the tobacco referred to in the complaint; that if they found that Dibrell Brothers was a corporation they might consider further whether the tobacco was bought for the corporation. The jury having answered the second issue as set out in the record, it was entirely immaterial whether the attachment proceedings in Virginia were valid or not. They were against W. C. Thomas & Company, and there was not a scintilla of evidence tending to show that the plaintiffs were ever members of such a co-partnership or that any such ever existed. All the evidence was to the effect that the tobacco was purchased of the corporation, the W. C. Thomas Tobacco Company. (551)

The defendants except to his Honor's charge, for that there was no evidence that there was any such partnership as Dibrell Brothers. This exception presents the vital question in the case. We do not think it can be sustained. The plaintiff Tapp swore that they were partners. The letter introduced by the plaintiffs was competent to be considered by the jury upon the question. The record in three of the attachment suits shows that they were garnisheed as partners. In their answer they say that they have suffered loss, and set up a counterclaim. Of course this must be as partners, because the corporation was not sued. We think there was evidence, competent and sufficient to be considered by the jury, tending to show a partnership. This having been found, the attachment proceedings against W. C. Thomas & Company could not affect the right

of the plaintiff. It is singular, in the light of the testimony of Rouse, that the defendants permitted judgment to be entered against them as garnishees when they could so easily have defended themselves. It may be that some light is thrown upon the matter by reference to the fact that "A. B. Carrington, agent for and a stockholder in the Hoge-Irvin Company," made the affidavit in the attachment proceeding. This record presents the singular spectacle of both parties supposing that they were dealing with partnerships, whereas, as the jury find, the defendants were trading as a partnership with a corporation. The confusion and litigation show the wisdom of our Corporation Act requiring the names of all corporations to end with the word "Company." It would safeguard persons dealing with trading or mercantile corporations to require by statute that all stationery, advertisements and contracts should contain the word "Incorporated."

We do not find any error in his Honor's rulings or instructions. If the defendants have suffered loss by the attach-
(552) ment proceedings it is the result of their refusal to defend themselves on the return of the garnishment. The judgment is

Affirmed.

GWALTNEY v. INSURANCE COMPANY.

(Filed 5 April, 1904.)

For former opinion in this case and headnotes thereto, see *Gwaltney v. Assurance Society*, 132 N. C., 925.

Petition to rehear this case dismissed.

MONTGOMERY and WALKER, JJ., dissenting.

Maxwell & Kearns for the petitioner.
T. B. Hufham and *E. B. Cline* in opposition.

CLARK, C. J. This is a petition to rehear the former decision in this case, 132 N. C., 925. The same propositions of law as now were presented and argued on the former hearing. No material point of law or fact has been shown to have been overlooked, and our opinion would be simply a reiteration, substantially, of what was written on the former hearing. Whatever difference of view there may be as to the facts the jury, in their province, have determined the truth or falsity of the averments on both sides, and we cannot disturb their finding. The

case had been previously before this Court, 130 N. C., 629, and has been heretofore fully considered. It is now ordered

Petition dismissed.

MONTGOMERY, J., dissenting. The defendant company canceled the plaintiff's policy of insurance because of a refusal on the part of the plaintiff to pay premiums which the defendant averred that the plaintiff owed, and this action (553) was brought to recover the amount paid by the plaintiff as premiums before the cancellation of the policy. The complaint embraces two causes of action utterly antagonistic to each other, and in my opinion cannot be properly joined in the same action. The gravamen of the first cause of action is that the defendants, through one of their general agents, by means of false representations, induced the plaintiff to accept a policy of insurance unlike the one which the defendant, through its agent, verbally agreed to issue and deliver to him.

The particulars of the first cause of action appear substantially in the following allegations: That the plaintiff told the agent that he desired a policy, and would accept none other, based upon a level premium from year to year and which would not increase with advancing age; that the agent promised to deliver to the plaintiff such a policy, and that upon that representation the plaintiff made application in writing for the policy; that shortly thereafter the agent delivered to the plaintiff a policy in accordance with the application which did not provide for the payment of a level rate premium until the death of the plaintiff, but did provide for an increase in the rate of the premiums due on the policy with the yearly advance in the plaintiff's age; that the agent (in the language of the complaint) represented to the plaintiff and assured him that the policy so presented was such a policy as the plaintiff had in his former conversation stated that he, plaintiff, would accept, and that the policy so presented by him provided for the rate of a level rate premium, to-wit, "$22.40 per quarter, and that the insurance provided in said policy would be extended during the life of the plaintiff upon the payment of a regular premium of $22.41 per quarter." There was another allegation that those representations were false and that the agent knew they (554) were false. As bearing more particularly upon the alleged fraudulent intent of the agent we quote the eighth and ninth allegations of the first cause of action: "8. That Jones, the general agent of defendant, made the said false, deceitful and frauduelnt representation wickedly and fraudulently, scheming and contriving, designing and intending, as plaintiff be-

lieves and alleges to prevent the plaintiff from examining the policy and investigating the terms thereof, he the said general agent, well knowing that the plaintiff would refuse to accept the policy if he (plaintiff) should learn its terms, conditions, stipulations and provisions, and the plaintiff explicitly alleges that he would have refused finally and peremptorily to accept the policy if he (plaintiff) had known the terms, conditions, stipulations and provisions of the policy tendered him by Jones, the general agent, as aforesaid. 9. That the plaintiff, knowing said Jones to be the general agent of the defendant, being not at all familiar with the terms, conditions, stipulations, provisions or language of insurance policies, and being totally unskilled in interpreting the same, relied upon and believed the said wicked, false, deceitful and fraudulent representations of the said Jones, hereinbefore set forth, and was, by the said wicked, false, deceitful and fraudulent representations, misled, deceived and prevented from investigating the terms, conditions, stipulations and provisions of the said policy, and finding out for himself and by the aid of friends or counsel what said terms, conditions, stipulations and provisions really were, and in consequence thereof accepted the said policy."

The plaintiff further alleges that, believing for nine years these fraudulent representations, he paid during that time $22.41 per quarter, and that only at the beginning of the tenth year was any demand made for an increased premium; that for two years he paid the increased premium but refused (555) after that time to pay any further increase. The plaintiff has paid $1,030.84 as premiums to the defendant.

The second cause of action has its foundation in an allegation that the plaintiff took out the policy just as it read when delivered to him by the agent, that is, a policy providing for an increase in the rate of the premium due on the policy with the yearly advance in the plaintiff's age, but that before the second annual premium in quarterly equivalents became due, to-wit, in December, 1890, the defendant, through its general agent, verbally agreed to renew and extend said policy for the plaintiff during each successive year of his life upon the payment of a level annual premium in quarterly equivalents of $22.41 each, and to waive the conditions of said policy providing for an increase of the rate of premium for the actual age attained. The complaint was duly verified by the plaintiff.

A few words will be sufficient to dispose of the matters pertaining to the second cause of action. His Honor submitted this issue (7th) raised by the second cause of action in the complaint: "Did the defendant, through its general agent, some

time after the execution and delivery of the policy waive the provisions in the policy permitting the increase of the premiums, and agree to continue the policy upon payment of $22.41 per quarter during the life of the plaintiff, as alleged in the complaint?" Upon that issue his Honor told the jury that it was incumbent upon the plaintiff to go further and establish the affirmative of the same to their satisfaction by proof clear, strong and convincing. The jury responded to that issue under that instruction "Yes." I have examined carefully every word of the evidence bearing on that issue, and there is not a scintilla even to support it.

The allegation in the second cause of action is that the agent in December, 1890, waived the conditions of the policy providing for an increase of the rate of premium for the actual age attained, and agreed that he (plaintiff) should pay (556) $22.41 quarterly as a level rate until his death, instead of increased premiums as he advanced in age, as the policy provided. In his examination-in-chief he testified that "Jones came to Wake Forest in November, I think, and stayed several days and insured several parties. After he returned to Greensboro I had a conversation with a Mr. Powell, in consequence of which I told Jones that Mr. Powell told me that he had examined a policy like mine at my request, and he said there was some doubts as to its running level in all the premiums till my death. I told him that Mr. Powell said he was not satisfied, as he had not examined it carefully, and there might be a rising premium in it. I said I told Powell that there was no possibility that there was a rising premium on it for I had been assured there would be none. I said: 'Now, Mr. Jones, my people live to be very old; suppose I live beyond seventy-five, is there any possibility of a rise in that premium?' He told me emphatically that I need give myself no uneasiness. I went back home thoroughly satisfied that it never would rise on me. Q. Did he say anything more that you recollect? A. I thoroughly impressed upon him the fact. I went away assured." On his cross-examination he was asked: "I believe you stated that you never examined this policy and never knew that it was not a level rate policy till 1898, when they made a demand on you?" A. "That is right." Q. "You allege here that heretofore in the second year you knew it was a level rate policy?" A. "Exactly as it was issued." Q. "But that this company, acting through its general agent, made a verbal agreement with you to extend this policy?" A. "I thought that was the policy." Q. "What you say in this complaint is correct is it not?" A. "It is, as I understand it." Q. "You have sworn to the complaint, have you not?" A. "Yes."

Q. "Did you not say in your answer a while ago that about November, 1890, you had a conversation with Jones and
(557) he said you need not be uneasy about your policy?" A. "Yes. In 1890 he came to where I was living, and in consequence of Powell's statement I went there again in January; he came in November to the college and went back before Christmas." Q. "Then the only conversation you had with Jones some time in the second year caused him, in reply to something you said, to say that you need not give yourself any uneasiness about the policy?" A. "Yes." Q. "So that if this allegation means that you knew what the policy was at the end of the second year it is a mistake, is it not?" A. "I did not come to that knowledge, I am sure, at the end of the second year, that it was not a level rate."

The defendant denied the allegations of fraud and averred that the plaintiff received a policy of the nature applied for, and in accordance with the application signed by the plaintiff; that all verbal understandings or negotiations entered into between the plaintiff and Jones during the consultation about the policy were merged in the written policy when it was issued by the company and delivered; that no attempt was made by the agent to prevent the plaintiff from reading the policy when it was delivered, and that the plaintiff should have read it, and if he had read it he would have understood from reading it that it did not provide for a level rate; that the plaintiff kept the policy for years without reading it; that he knew that the agent did not issue the policy but that the same was issued in New York, the home office of the company, and sent to the agent at Greensboro for delivery to the plaintiff; and that the agent had no power to change the terms of the policy, and that the plaintiff is estopped by his conduct from rescinding the contract and demanding a return of the fees. The defendant denied also that the agent Jones was a general agent of the defendant.

It is to be seen from a reading of the complaint that the fraud charged upon the agent is in reference to the as-
(558) surances and representations made by him at the time of the delivery of the policy. Allegations eight and nine of the complaint on that point have been quoted in this opinion, and sections six and seven of the complaint specifically refer to the fraudulent representations alleged to have been made by the agent as confined to the delivery of the policy. Nowhere in the complaint is it alleged that the agent practiced any fraud upon the plaintiff in the procuring of his signature to the application. The allegation of the fraud practiced upon the plaintiff by the agent, which we have already called attention to, was that

the agent "Represented to the plaintiff and assured him that the policy so presented was such a policy as the plaintiff had, in his former conversation, stated that he (plaintiff) would accept, and that the said policy so presented by Jones provided for the rate of a level rate premium, to-wit, $22.40 per quarter, and that the insurance provided in said policy would be extended during the life of the plaintiff upon the payment of a regular premium of $22.40 per quarter." The evidence did not measure up to the allegation. The plaintiff testified that when the agent delivered the policy to him he said "here is your policy" or "this is your policy," and nothing more. It was not contested that the policy was strictly in accordance with the application; that the application was not for a level rate policy, but called for one upon the annual renewal term plan, with surplus applied to keeping premiums level; that attached to and forming a part of the policy was a schedule of rates showing exact premiums to be paid with advancing ages, and also providing that the surplus was to be applied to keeping premiums level, and that the defendant issued the policy and sent it to Jones to be delivered by him to the plaintiff. The plaintiff testified that he neither read the application at the time he signed it, nor did he read the policy and copy of the application attached thereto until about nine years after the (559) issuance of the policy, although it was in his possession all that time; and that no one attempted to prevent him from reading the policy or application, and he could have read and understood the contract as to increasing premiums if he had examined it. Witness further stated that he knew nothing about the insurance business and relied entirely upon the agent in the matter; that he had great faith in him. He was asked on cross-examination: "The clause in that policy about the several premiums for each successive year or each year that you should live is perfectly plain, is it not?" His answer was: "Yes, I suppose it is plain enough if I had not had the confidence that blinded me." And further, he was asked: "There is a schedule of rates in the policy setting forth the amount for each year; if you had read that policy you could have understood it, could you not?" He answered, "Yes." There is no evidence whatever in the case that the plaintiff asked a single question of the agent about the policy at the time of its delivery, nor did the agent express any opinion or make any assurance or representation about it. In my opinion the plaintiff should have read the policy under the circumstances of its delivery. The agent Jones was the agent of the defendant, and did not occupy any relation of trust or confidence as to the plaintiff. They

were engaged in a business transaction in which the plaintiff was acting for himself and the agent for the defendant. It appears from all the evidence that the plaintiff had ample opportunity to read the policy before he paid the first premium, for he gave his note for that premium payable more than a month after the policy was delivered; and there is no evidence that the defendant at any time afterwards did anything to induce him not to read it; and if he did not read it he can blame himself alone. There is not a particle of evidence of fraud at the time of the
(560) delivery of the policy or afterwards, and the contention of the plaintiff that his implicit and blind confidence in the agent warranted him in trusting that the policy was what he had verbally and previously contracted for is met by the safe and general rule that where there is no fraud parol negotiations leading up to a written contract are merged in the subsequent written contract, such written contract being presumed to embrace the *whole*, the final agreement of the parties, and to embody their intentions. When, therefore, one of the parties to an agreement delivers to the other a contract in writing, and that other party when he receives the paper understands that it is handed to him as a contract between them, then the one accepting the document and keeping it assents to its terms, conditions and stipulations as they are therein expressed, although he does not read it and even be ignorant of the contents. This view of the law is well expressed in the case of this same defendant against Mowatt, 32 Canada Supreme Court Report, 147, in a quotation from *Parker v. R. R.*, 2 C. P. D., 416. It was there said that when the company handeth the respondent the policy the law said for them: "Read, examine, be careful, for never mind what we or you may have said previously we accept your application to insure you, but we cannot give you any other policy but this one, and in that document alone is contained the contract between us; pay the first premium only if you are satisfied with it; if you accept it without reading it you will not be allowed to contend hereafter that it does not correctly express the contract between us; whatever is not found therein will be understood to have been reciprocally waived and abandoned." The contract was formed between the plaintiff only when the policy was delivered. All that had gone before was only preliminary. In *Upton v. Tribilcock*, 91 U. S., 45, it was said: "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do
(561) for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it. If this were permitted contracts would

not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs he alone is responsible for his omission." *In re Greenfield Estate,* 14 Pa. St., 489, *Gibson, C. J.,* for the Court, said: "If a party who can read will not read a deed put before him for execution he is guilty of supine negligence which, I take it, is not the subject for protection either in equity or in law." In *Dellinger v. Gillespie,* 118 N. C., 737, the plaintiff handed the defendant a written contract, making no attempt to conceal any of its provisions and practiced no trick to induce him to execute it. This Court there said: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." The defendant's negligence was held inexcusable, and the Court said that the introduction of parol evidence in the court below to show that there was a verbal contract before the execution of the written one was erroneous, and that it was nothing but an attempt to contradict the written instrument executed by the defendant concerning the same matter. The same principle was held in *Benedict v. Jones,* 129 N. C., 470, where a married woman undertook to avoid the legal sufficiency of the probate of a deed executed by herself and her husband because she did not read it and was ignorant of its contents. The Court said there that "It makes no difference that she said she did not know what the paper contained; that she did not understand its contents, and if she had she would not have signed it. She could read and write. The paper was before her and she was under no coercion." The same view is also expressed in (562) *Dorset v. Mfg. Co.,* 131 N. C., 254: "And that where a party can read and has the opportunity and does not do so, no other circumstances occurring or connected therewith, the party signing cannot have the instrument set aside upon the ground that he was deceived as to its contents." In *Leigh v. Brown,* 99 Ga., 258, it was held that it was the duty of the insured when he found that his policy differed in a material respect from the kind of policy for which he had contracted, if he did not desire to retain and accept the policy received by him, to return or offer to return the same within a reasonable time to the company. *Bostwick v. Ins. Co.,* 116 Wis., 392, is a most interesting case and the main facts very much like the one before us. The defendant there induced the plaintiff to sign an application for a policy of life insurance by representing to him that he called for one that would be fully paid in ten annual payments of a

specified amount. He signed and gave to the agent the application, relying on the truth of such representations. During the negotiations between the plaintiff and the agent of the company, with the result above stated, the agent urged the plaintiff to take out what was called a five per cent debenture policy, while the plaintiff all the time insisted that he wanted and would purchase only a contract that would be fully performed on his part by ten annual payments. In good time a policy was sent to the plaintiff by mail, ostensibly responsive to his application, accompanied by a letter from the agent, to the effect that it was a five per cent debenture policy, issued pursuant to the application. The plaintiff put the policy away among his papers, without reading it, relying upon its being what the agent assured him the application called for. He paid the first premium, but upon examining the policy, about four and one-half months (563) after it was delivered to him, he discovered that it was an annual life policy, requiring him to pay the premiums each year during his life. The same plaintiff bought a policy from one Parker and one from A. H. Barrington, issued by the same company, in which the insured claimed that he had contracted with the agent for a different policy from the ones they received. However, when the policies were delivered to them, there was no assurance that the policy was in accordance with the understanding between them, but simply a letter advising enclosure of policies. The court held that the plaintiff could not recover on the assigned policies, for the reason that there was no evidence of any assurance on the part of the agent, at the time of the delivery of the policies to the parties, that the policies were in accordance with the agreement. But because the plaintiff Bostwick was assured by the letter from the agent accompanying the delivery of the policy that the policy was in accordance with the agreement, the court held that his claim on his own policy should be submitted to the jury to say whether, under all the circumstances, the letter of the agent prevented him from examining the policy at the time of the delivery. In the case before us there were no representations made by the agent when the policy was delivered, and no questions asked by the plaintiff. The agent simply said: "Here is your policy," or "This is your policy," which was just the same thing as if it had been enclosed with a letter.

In the much-litigated case of *McMaster v. Ins. Co.*, first reported in 99 Fed., 856, the fact was, that the agent of an insurance company had told the insured, when the application for the policy was made, that the policy itself would give him thirteen months' insurance upon the payment of the first annual pre-

mium, but the policy, when afterwards issued by the company, did not contain that provision. Upon an action to reform the policy so as to make it conform to the agreement with the agent, it was proved that the insured had accepted it without reading it. (564) The Court there said: "Customary negotiations for insurance do not constitute a contract, where there is no intention to contract otherwise than by a policy made and delivered upon payment of the first premium. . . . It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them. But the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read and to learn their contents, and if he did not it was his own gross negligence and no act of the insurance company or of its agent that concealed them and misled him as to their effect. The statement of the agent fourteen days before the deceased received the policies that they would insure him for thirteen months from the payment of the first premium was not a statement of an existing fact. It was not calculated to impose upon him or to prevent him from reading his policies and learning for himself whether this promise had been kept or broken. It was not a fraudulent representation, because fraud never can be predicated of a promise or a prophecy. Neither the company nor its agent, therefore, made any representation or promise, or used any artifice or deceit to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement." That case was afterwards reviewed by the Supreme Court of the United States (183 U. S., 25), and the result of that decision was that the plaintiffs were allowed to recover. The principle of law, however, announced by the Circuit (565) Court, which we have quoted, was not overruled. The Supreme Court of Canada, in *Mowatt's case, supra,* referred to *McMaster v. Ins. Co., supra,* as it was reported both in the Federal Reporter and in the United States Reports, and in reference to the effect of the opinion of the Supreme Court upon that of the Circuit Court his Honor who wrote the opinion of the Court said: "Since the argument, I have noticed that the United States Supreme Court has reversed the decision of *McMaster's case.* But the Court exclusively based its conclusions, first, upon the

fact that the agent of the company had inserted material words in the application, after it had been signed, without the applicant's knowledge; secondly, upon the fact that the agent of the company, when delivering the policy, had deliberately put the insured off his guard and induced him not to read it, by the express assertion, in answer to the insured, that the policy was in the terms agreed upon. Had it not been for these two facts, to which sufficient weight had not been given in the lower courts, their judgment against the plaintiff's contentions, as I read *Chief Justice Fuller's* opinion, would have been sustained by the Supreme Court."

In *Bostwick's case* the Supreme Court of Wisconsin took the same view of the effect of the decision of the Supreme Court in *McMaster's case.* That Court, referring to that matter, said: "Returning to *McMaster's case,* we will say, and endeavor to demonstrate, that counsel is in error in his view that the Supreme Court, in reversing the decision of the Court of Appeals, 99 Fed., 856, held that possession of a policy of insurance does not impute knowledge of its contents, in the absence of any deception practiced upon the possessor subsequent to his making the application therefor, reasonably calculated to deter him from examining such policy at the time of its receipt. The
(566) Court, as it seems to us, held directly to the contrary."

These analyses, in our judgment, are correct expositions of the decisions of the two courts—the United States Supreme Court and the Circuit Court of Appeals. From the opinion of the Supreme Court of the United States we will make the following quotations in verification of these analyses: "But the company says that McMaster requested that the policy should go into effect on 12 December, 1893, and that his representative is estopped from denying that that is the operation of the policies as framed and accepted, or that the second premiums matured 12 December, 1894. It was found from the evidence that after McMaster had signed the applications, and without his knowledge or consent, the agent of the company inserted therein, 'Please date policy same as application,' and it was further found that the policies were returned to Sioux City and were taken by the company's agent to McMaster, he 'asking agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him,' and thereupon McMaster paid the agent the full annual premium, or the sum of $21 on each policy, and without reading the policies he received them and placed them away." We think the evidence of this unauthorized insertion, and of what passed between the agent and McMaster when the

policies were delivered, taken together, was admissible on the question whether McMaster was bound by the provision that subsequent payments should be made on 12 December, commencing with 12 December, 1894, because requested by him, or because of negligence on his part in not reading the policies.

So we see that the decision of the Supreme Court of the United States, in its reversal of the judgment of the Circuit Court of Appeals, did so solely on the ground that the assurance and representations made by the agent to McMaster when he delivered the policies rendered the question whether keeping them, as he did, without reading them and rejecting (567) them, constituted an acceptance in satisfaction of what was bargained for, one of fact for the jury. The general principles of law decided in both courts were, as we have set them forth in this opinion, approved; but in the Supreme Court it was held that the false representations, made at the time of the delivery of the policies, had a tendency to throw McMaster off his guard, and that the court below ought not to have held as a matter of law that he was inexcusably negligent. In my opinion, the court below ought to have granted the motion made by the defendant for a judgment of nonsuit against the plaintiff.

WALKER, J., concurs in the dissenting opinion.

LACY v. PACKING COMPANY.

(Filed 5 April, 1904.)

TAXATION—*Interstate Commerce—Laws* 1903, *Ch.* 247, *Sec.* 56—*Const. U. S., Fourteenth Amendment—Const. N. C., Art. V, Sec.* 3—*Constitutional Law—Licenses.*

An act taxing every meat packing house doing business in the State $100 for each county in which such business is carried on is valid.

ACTION by B. R. Lacy, State Treasurer, against the Armour Packing Company, heard by *Judge E. B. Jones,* at September Term, 1903, of BUNCOMBE. From a judgment for the plaintiff the defendant appealed.

Robert D. Gilmer, Attorney-General, for the plaintiff.
T. B. Felder and *Pou & Fuller* for the defendant.

CLARK, C. J. This action calls in question the consti- (568) tutionality of section 56, chapter 247, Laws 1903, which

chapter provides, in Schedule B, as one of the license taxes "for carrying on business" (section 26), the following: "Section 56. Packing houses.—Upon every meat-packing house doing business in this State, one hundred dollars for each county in which said business is carried on." From the facts agreed, it appears that the defendant was incorporated in New Jersey, but has its principal office and place of business in Kansas; that it has property in this State; that a meat-packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other purposes is carried on; the products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc.; that the defendant does not slaughter, dress or manufacture its products in this State, but after the animals are slaughtered, dressed and prepared for food or other commercial purposes by the defendant in Kansas, such product is shipped in bulk to five points in this State (Wilmington, Greensboro, Asheville, Charlotte and Fayetteville), where the defendant has cold-storage plants and warehouses, and sold from such storage plants some of such products to parties in this State and some to parties outside of this State; that part of said products shipped to the defendant's cold-storage warehouse in Asheville (whence this appeal comes) remain there until disposed of in due course of trade, on orders taken and received after said products have been stored or placed in said warehouse or cold-storage plants. At such of said five points in this State where the defendant maintains a warehouse and cold-storage plant it has one or more employees—*i. e.*, bookkeepers, stenographers, shipping clerks, salesmen, drivers, laborers who box said meats and who wrap and crate goods for delivery as they are (569) sold. There are in said city of Wilmington and other cities of said State commission merchants, brokers and butchers who sell by wholesale and retail in competition with the Armour Packing Company (and who are not engaged in a meat-packing-house business in North Carolina or elsewhere) fresh, cured and salt meats and other products that have been manufactured from the carcasses of slaughtered animals for food and commercial purposes; and, under the laws of North Carolina, said commission merchants, brokers and butchers are not amenable to the tax levied under section 56 of said Revenue Act of 1903. At all points in North Carolina where the Armour Packing Company is engaged in business, and at various other places in said State, there are engaged in business, as the Armour Packing Company is engaged, packing houses which pack articles of food, other than meat, and offer them for sale in said State, such

as peas, beans, tomatoes, corn, pumpkins, fruits, fish, oysters, etc. The products of said packing houses are articles of food and commerce, and are sold in the State of North Carolina, through agents, brokers, wholesale and retail merchants, just as the products packed by the Armour Packing Company are sold.

This is a statement of all the material facts agreed, as stated in the "action submitted without controversy." Upon these facts the defendant contends (1) that it is not engaged in doing a packing-house business in this State. This may be true, but upon the facts agreed the packing house is "doing business" here, and the license tax is laid upon whatever business it is doing. (2) That the tax is an interference with interstate commerce. (3) That the tax contravenes section 3, Article V of the Constitution of North Carolina, which requires taxation "by uniform rules." (4) That the tax is forbidden by the Fourteenth Amendment to the Constitution of the United States. (5) That singling out "meat-packing houses" for taxation is arbi- (570) trary or class legislation, and prohibited by both State and Federal Constitutions. These contentions were held adversely to the defendant, who was adjudged to pay the tax, and appealed.

If the business of the defendant was solely that of shipping food products into this State, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce, and a tax laid by the State upon such business would be illegal. But the defendant does a large business within the State—the selling of products already stored here, on orders received after these products are thus stored. The tax is laid upon every meat-packing house "doing business in this State." The evident meaning of the Legislature is to tax the agency "doing business" within this State, and not to lay any tax upon the interstate commerce of shipping products into the State to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped.

In *Express Co. v. Seibert,* 142 U. S., at p. 350, it is said that a tax "on business within the State cannot be made to mean business done between that State and other States." The appellant contends that a packing house cannot be considered as doing business in this State unless it actually engages, at some point in this State, in the business of maintaining a place where the slaughtering of animals and the dressing and preparing of the products of their carcasses for food and other commercial purposes is carried on. The record shows that the appellant ships its food products into this State in car-load lots, and deposits them in warehouses or cold-storage plants, where they remain

until disposed of, in due course of business, on orders taken after the goods have thus become intermingled with property in this State. The company also maintains at various points in North Carolina, in addition to its warehouses and cold-storage (571) plants, offices and sales places and agencies, where it has in its employment bookkeepers, stenographers, shipping clerks, salesmen, drivers, laborers who box said meat and who wrap and crate goods for delivery as they are sold." No question is raised here, or passed upon, as to the right to tax the sale of goods shipped here and resold in the original packages. The appellant is certainly "doing business" in this State, and it can only do this as a matter of comity, for the Legislature has the power to exclude foreign corporations altogether, or to prescribe such conditions as it sees fit. 3 Clark & Marshall Private Corporations, sec. 844, p. 2695, and cases cited; 2 Cook Corp., secs. 696-700; *Range Co. v. Carver,* 118 N. C., at p. 335; *Ins. Co. v. Edwards,* 124 N. C., at p. 121; *Commissioners v. Tobacco Co.,* 116 N. C., 441. This license tax is the condition upon which the defendant is permitted to do this *intrastate* business, above recited.

That this tax is not an interference with interstate commerce, we have a case exactly in point (*Osborne v. Florida,* 164 U. S., 650, filed January, 1897), in which it is held that "The license tax imposed upon express companies *doing business* in Florida, as construed by the Supreme Court of that State, applies solely to business of the company within the State, and does not apply to or affect its business which is interstate in its character; and, being thus construed, the statute does not in any manner violate the Federal Constitution. The construction of the State statute by its highest court is not open to review." The present case is stronger against the defendant, for, unlike the appellant in *Osborne v. Florida,* this defendant is not a common carrier. See citations of *Osborne v. Florida,* 12 Rose's Notes, 917.

The defendant *doing business* in this State, and the license tax being exacted only by virtue of its *intrastate* business, the first two grounds of objection are overruled. Nor is the third (572) exception any stronger, which is that the tax violates section 3, Article V of the State Constitution, which requires that "laws shall be passed for taxing by a uniform rule." That section has often been passed upon, and it is settled that *"A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed."* It has been held that the tax may be different upon a dealer in whiskey by retail and a dealer in the same article by wholesale, if uniform as to each class. *Gatlin v. Tarboro,* 78 N. C., at p. 122. On tobacco buy-

ers as a specific class (*S. v. Irvin,* 126 N. C., 989); on hotel keepers as a class, graduated in amount by the gross receipts and exempting those whose yearly receipts are less than $1,000 (*Cobb v. Commissioners,* 122 N. C., 307); on the total amount of purchases by a merchant, in or out of the city, except purchases of farm products from the producer (*S. v. French,* 109 N. C., 722; 26 Am. St., 590); in cities and towns, according to population (*S. v. Green,* 126 N. C., 1032; *S. v. Carter,* 129 N. C., 560). In *S. v. Stevenson,* 109 N. C., at p. 734 (26 Am. St., 595), it is said: "It is within the legislative power to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation, as classified by legislative enactment." This is stated as a universal rule. 1 Cooley Taxation (3 Ed.), p. 260.

The fourth exception is that the act violates the Fourteenth Amendment (which in these latter days it is diligently sought to construe into a *quo minus* and *ac etiam* device, by which every question may be drawn within the jurisdiction of the Federal courts). It has been repeatedly decided by the Supreme Court of the United States that this section of the Constitution does not forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all members of the same class, when the classi- (573) fication is based upon reasonable ground and not an arbitrary selection. *R. R. v. Ellis,* 165 U. S., 165; *Telegraph Co. v. Indiana,* 165 U. S., 304; *R. R. v. Iowa,* 94 U. S., 164; *Dowe v. Biedleman,* 125 U. S., 680; *Insurance Co. v. New York,* 134 U. S., 606; *R. R. Tax Cases,* 115 U. S., 321. *Com. v. Clark,* 195 Pa. St., at p. 638 (86 Am. St., 694; 57 L. R. A., 348), held, as has been held by this Court, that a separate classification of wholesale dealers from that of retail dealers is not an illegal and arbitrary classification. *Cable Co. v. State,* 46 N. J. E., 270; 19 Am. St., 394; *S. v. Applegarth,* 81 Md., 293; 28 L. R. A., 812 (imposing a license tax on oyster packers).

The fifth exception cannot be sustained. The Legislature is sole judge of what subjects it shall select for taxation (other than a property tax, which must be uniform and *ad valorem*), and the exercise of its discretion is not subject to the approval of the judicial department of the State. A very full discussion of the whole matter, concluding as above, will be found in *S. v. Packing Co.,* 110 La., 180.

No error.

Cited: Land Co. v. Smith, 151 N. C., 75.

(574)

COAL COMPANY v. ICE COMPANY.

(Filed 5 April, 1904.)

1. ISSUES—*Trials—Sales.*

In this action to recover for goods sold the issues submitted were sufficient.

2. SALES—*Contracts—Damages.*

Where a contract is made for the purchases of coal and the purchaser actually receives a part of the same, the seller may recover the amount of the sales over and above the damage resulting from the breach of the contract for failure to deliver the whole.

3. SALES—*Vendor and Purchaser—Contracts.*

A contract for the sale of coal to the defendant for a specified period does not bind the defendant to submit to a reduction of the amount of coal by prorating with the seller's other patrons.

4. SALES—*Damages—Measure of.*

In an action for failure to deliver coal the measure of damages is the difference between the contract and market price at the time of the breach, subject to the qualification that the buyer must use reasonable diligence to lessen the damages.

CLARK, C. J., dissenting as to measure of damages.

ACTION by the Indian Mountain Jellico Coal Company against the Asheville Ice and Coal Company, heard by *Judge W. A. Hoke* and a jury, at May Term, 1903, of BUNCOMBE.

This action was brought to recover the sum of $361.54, alleged by the plaintiff to be due from the defendant for coal sold and delivered to it in the months of February and March, 1899. The coal was delivered under a contract between the parties, of which the following is a copy:

(575) "JELLICO, TENN., 12 April, 1898.

"This agreement, entered into this day by and between Indian Mountain Jellico Coal Company, of Jellico, Tenn., and Asheville Ice and Coal Company, of Asheville, N. C., witnesseth: Party of the first part hereby agrees to sell party of the second part all the coal that may be required by said second party between this date and 1 May, 1899, at the following price per ton of two thousand pounds, f. o. b. mines. (Description of coal, with prices per ton.) Shipments to be made promptly when ordered, unless prevented by strikes or other causes beyond the control of the party of the first part. It is further agreed that the party of the second part has the exclusive agency for the sale

of Indian Mountain coal in Asheville market. Payments due succeeding month's shipment from 1 September, 1898. In consideration of the foregoing, the party of the second part agrees to handle no first-class coal except such as it may purchase from the party of the first part."

The plaintiff, in its complaint, alleged (1) that it had sold and delivered the coal under the contract; (2) that it was reasonably worth $361.54, and (3) that the defendant promised to pay that price for it. The defendant, in its answer, admits the truth of the first two allegations of the complaint, and also admits the third allegation, "except as stated in its further defense and counterclaim," in which it admits that it has not paid the said sum to the plaintiff, but denies that it is due and owing, because, as it avers, by reason of plaintiff's failure to comply with its part of the contract, the defendant has been damaged "in a sum far greater than the said sum of $361.54, to-wit, in the sum of $1,000, and that the defendant does not now, nor did at the commencement of the action, owe the plaintiff any sum whatever because of the damage aforesaid, as the defendant is advised and believes." There was a denial of this counter- (576) claim in the reply. The issues submitted, with the answers thereto, were as follows:

1. Is the defendant indebted to the plaintiff for coal sold and delivered, and, if so, in what sum? Answer: Yes; $361.54 and interest from 31 March, 1899.

2. Did plaintiff and defendant enter into the contract set out and described in defendant's counterclaim? Answer: Yes; 2 September, 1898.

3. Did the plaintiff wrongfully and in a breach of its contract fail or refuse to deliver defendant's coal, as therein required? Answer: Yes.

4. What damage is defendant entitled to recover of plaintiff for such wrong and injury? Answer: $150.

The other facts appear in the opinion. Judgment was rendered for the plaintiff, and defendant excepted and appealed.

Moore & Rollins and *H. B. Lindsay* for the plaintiff.
Merrimon & Merrimon for the defendant.

WALKER, J., after stating the case. The defendant insisted that it was entitled to rely upon its counterclaim in bar of any recovery by the plaintiff, and that the issue should be, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" and also that there should be issues on the counterclaim as to the surplus. We do not think the defendant has pleaded the matters

set forth in the counterclaim strictly in defense as a bar to the plaintiff's recovery, and the court so held. The counterclaim would, of course, have operated as a bar if the jury had found that defendant's damages for the breach of the contract by the plaintiff equalled or exceeded the amount of the plaintiff's claim, and in that event it would have been a bar in fact, though (577) not in law—that is, it would not have been a bar within the technical meaning of that word. The court held at the outset, and "at the request of the defendant," as the court recalled, "and certainly without objection by the defendant to the ruling," that the burden of proof was on the defendant. If the defendant's present contention as to the proper issues and as to the state of the pleadings is correct, and the plaintiff was required to show performance of the contract on its part before it could recover, the burden was on the plaintiff, and not on the defendant, as ruled by the court. We understand from the record—and by that we must be governed—the defendant insisted at the trial that upon the answer, as drawn, the issues should be so framed as to require the jury, in response to the fourth issue, to assess the defendant's damages in excess of the amount due the plaintiff for the February and March deliveries. While the form of the answer did not entitle the defendant to such an issue, we think the issues, as framed, enabled the defendant, by a proper prayer for instructions, to present this view to the jury, and it is not required that issues should be submitted in any particular form, provided the parties have the opportunity of presenting their case fully to the jury upon the law and the evidence applicable thereto. *Patterson v. Mills,* 121 N. C., 258. We have been unable to perceive what legal or practical difference there is between assessing the full amount of damages under the fourth issue, as was done in this case, and confining the assessment to the excess of damages, or the difference between the plaintiff's claim and the full amount of the defendant's damages. The usual and the better practice is that which was adopted by the court, and, under the clear and explicit instructions to the jury, we do not see how they could possibly have been misled as to the true nature of the controversy. The plaintiff, as we will show hereafter, was entitled to recover the value of the coal sold (578) and delivered to the defendant, or the price agreed to be paid therefor, which in this case are the same in amount; and the defendant was entitled to have assessed by the jury the full amount of the damages arising out of the breach of the contract by the plaintiff, if any; and the difference between these two amounts, whether in favor of the plaintiff or the defendants, is, of course, the amount of the judgment to be rendered against

the party recovering the smaller sum. There is no error in this ruling of the court.

It was contended in the argument before us by the defendant's counsel that, as the jury had found there was a breach of the contract by the plaintiff, its right to recover anything is wholly barred, and we were asked, "Can one who has wrongfully refused to do what he contracted to do recover for a part performance?" Our answer to this question is, that, under the circumstances of this case, he can. In the first place, this is not an entire contract. The shipments made in any one month were to be paid for in the next succeeding month, and the price per ton of coal was fixed. It appears from the testimony that the breach of the contract, or the failure to make deliveries under it, upon orders from the defendant, occurred prior to February. Mr. Collins, who was the president and manager of the defendant company and a witness for it, testified that, between 20 September to February and March, the defendant ordered and the plaintiff failed to deliver about 807 cars of coal. The case shows that it is not meant by this testimony that there was any failure to deliver in February and March, and, even if that had been the case, we do not think it would make any material difference, in the view we take of the law. It would be manifestly unjust, treating the contract as divisible, to permit the defendants to receive and use the coal delivered in February and March and refuse to pay for it, merely because the plaintiff had failed to fill orders for any one or more of the preceding months, (579) and especially so when the defendant, at the time he received the coal in February and March, well knew of the prior breaches. *Tipton v. Feitner,* 20 N. Y., 423; *Ming v. Corbin,* 142 N. Y., 334. We will go further and declare the law to be, that if the breach by the plaintiff had occurred in the same month when the coal, for the price of which this action is brought, was delivered, the defendant could not defeat a recovery by the plaintiff, provided he received the coal and had the full benefit of it. Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other, and full performance is required before there can be any recovery, as in *Lawing v. Rintles,* 97 N. C., 350; but this rule does not apply if, for instance, work has not been done or materials furnished in strict accordance with the contract, provided one of the parties has received and enjoyed any benefit from the contract, and certainly not unless full performance is made a condition precedent to payment. The law implies a promise by the party to pay for what has been thus received, and allows him to recover any dam-

ages he has sustained by reason of the breach, for this is exact justice. The language of the Court in *Britton v. Turner,* 6 N. H., 492 (26 Am. Dec., 713), seems to fit this case: "If, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case—one not within the original agreement—and the party is entitled to 'recover on his new case' for the work done—
(580) not as agreed, but yet accepted by the defendant."

In *McClay v. Hedge,* 18 Iowa, 66, the Court, by *Dillon, J.,* referring to *Britton v. Turner,* says: "That celebrated case has been criticized, doubted and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases." And the same court, in *Wolf v. Gerr,* 43 Iowa, 339, states it to be the settled doctrine "that a party who has failed to perform in full his contract may recover compensation for the part performed, less the damages occasioned by his failure." This principle is fully sanctioned by the authorities. *Chamblee v. Baker,* 95 N. C., 98; *Simpson v. R. R.,* 112 N. C., 703; *Gorman v. Bellamy,* 82 N. C., 496. In the case last cited this Court said: "The inclination of the courts is to relax the stringent rules of the common law, which allows no recovery upon a special unperformed contract itself, nor for the value of the work done, because the special excludes an implied contract to pay. In such a case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law therefore implies a promise to pay such remuneration as the *benefit conferred* is really worth." The Court also said, in *Brown v. Morris,* 83 N. C., at p. 257: "If there had been delivered a smaller number of bricks, and they had been received and used by the defendant without objection, we see no reason why the plaintiff would not be entitled to compensation for such as were delivered; and we are not disposed to carry the doctrine that a partial delivery under an agreement to deliver a definite quantity or number of goods leaves the purchaser the possession and use of such as are delivered, without liability to the
(581) seller, beyond the decided cases, and as operating only when the failure to deliver is willful and without legal

excuse." *Monroe v. Phelps,* 8 El. & B., 739; *Reade v. Rann,* 10 B. & C., 438; *Leonard v. Dyer,* 26 Conn., 172; 68 Am. Dec., 382; *Horne v. Batchelder,* 41 N. H., 86; *Bush v. Jones,* 2 Tenn., 190; *Duncan v. Baker,* 21 Kan., 99; *Lamb v. Brolaski,* 38 Mo. App., 51; *Myer v. Wheeler,* 65 Iowa, 390; *Hansen v. C. S. H. Co.,* 73 Iowa, 77; *M. L. Co. v. Coal Co.,* 160 Ill., 85; 31 L. R. A., 529.

The doctrine is well stated and supported by the citation of numerous authorities in 9 Cyc., 686 and 687, note 15.

The defendant excepted to an instruction in regard to the date of the contract, but we cannot see how the date is material, as the parties, according to the very terms of the contract, agreed that shipments should be made from 1 September, 1898, and this is the construction placed upon the contract by defendant in its first prayer for instructions.

The remaining exceptions relate to the judge's charge upon the counterclaim, and especially to the measure of damages. The defendant contended that the plaintiff was bound to supply it with coal, under the contract, unless prevented from doing so by strikes or other causes beyond the plaintiff's control, even though it had other customers at the time who had entered into similar contracts with the plaintiff, and that this is so, because the defendant had shown by the testimony that the plaintiff had represented, when the contract with the defendant was made, that it had no other outstanding contract and would make no other. It is sufficient to say, in regard to this matter, that it was fairly submitted to the jury and found against the defendant, or the latter had at least the full benefit of the point under the charge of the court. But it becomes immaterial, in the view we take of the case, as will appear hereafter. The court charged the jury, substantially, that if the plaintiff failed to ship the (582) coal to the defendant, upon its orders, according to its agreement, and was not prevented from doing so by strikes or other causes beyond its control, and which it could not have avoided by the exercise of ordinary care, it would be liable to the defendant for such damages as the latter sustained by reason of the breach; and that if at the time the plaintiff had other customers similarly situated with the defendant in respect to contracts with the plaintiff of the same character, and the plaintiff by reason of causes beyond its control could not fully supply all, the latter had the right, and it was its duty under the law, to apportion its shipments *pro rata* among its said customers, provided it did so in good faith and with perfect fairness to each, and provided it had not represented that there were no contracts other than the defendants', and had not agreed that it would make no other contracts. If, in fact, there were no other con-

tracts, then this instruction would not apply, and plaintiff would be liable in damages, unless the jury found, under the charge of the court, that the plaintiff was protected by the clause of dispensation in regard to strikes and other causes beyond the plaintiff's control. The plaintiffs say that this instruction is sustained by the cases in which it has been held that railroad companies should not discriminate against any of its customers in the transportation of freight. It is true it has been held that it is no proper business of a railroad company, as a common carrier, to foster particular enterprises or to build up new industries; but, deriving as it does its franchises from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public and to provide reasonable facilities for transportation of persons and property, and in this respect to put all its patrons upon an absolute equality. *R. R. v. Goodridge,* 149 U. S., 680; *U. S. v. R. R.,* 109 (583) Fed. Rep., 831. In the latter case it is held that, while the capacity of a shipper of coal may be greater than his allotment of cars, yet when such is also the case with every other operator similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand, without unjust discrimination, among all the operators, including the shipper in question. 4 Elliott on Railroads, sec. 1468, *et seq.; Root v. R. R.,* 114 N. Y., 300; 4 L. R. A., 321; 11 Am. St., 643. But those cases were decided under the provisions of the Interstate Commerce Act and upon the principles of the common law forbidding discrimination, and the doctrine is confined to cases where the party from whom the particular duty is owing is a common carrier or is operating under a public franchise which imposes upon it certain obligations and responsibilities with respect to the public and to those who deal with it in its capacity as a *quasi* public corporation. We are unable to see that they have any application to the facts of this case, nor did the learned counsel refer us to any authority for the principle upon which the court directed the jury to assess the defendant's damages, nor have we been able to find any. The question, therefore, must be decided according to the ordinary rule in the law of contracts. It is a well-settled principle of law that if a party, by his contract, charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him. The law regards the sanctity of contracts, and requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it

leaves the loss where the contract places it. If the parties have no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, (584) and it does not permit to be interpolated what the parties have not stipulated. *Ingle v. Jones,* 2 Wall., 1. The courts will not make an agreement for the parties, but will ascertain what they have agreed by what they have said, and by the meaning of the words used to express their intention. Where the intention clearly appears from the words used, there is no need to go further, for in such a case the words must govern; or, as it is sometimes said, where there is no doubt there is no room for construction. Clark on Contracts, p. 591. We must assume that the parties have fully and clearly expressed their agreement in the instrument which is the evidence of it, and to add to or take from it by construction would, under the circumstances, be the same as if we should arbitrarily give to it a meaning they did not intend it should have. We must therefore ascertain and enforce their intention as they have expressed it. "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications; the presumption is that, having expressed *some,* they have expressed *all* the conditions by which they intend to be bound under that instrument." Broom's Legal Maxims (8 Am. Ed.), star page 652; Bishop on Contracts (Ed. of 1887), secs. 380-381; 2 Parsons on Contracts (9 Ed.), star page 515. In *Aspdin v. Austin,* 5 Q. B., p. 683 (13 L. J., 155), *Lord Denman* says: "It is one thing for the court to effect the intention of parties to the extent to which they may have even imperfectly expressed themselves, and another thing to add to an instrument all such covenants as on a full consideration may seem to the court to have been the complete intention of the parties, but which they either purposely or by inattention omitted. It would be but a bad application of the rule of construction of written instruments to add to the obligation by which the parties have bound themselves. This would be quite unauthorized, as well as (585) liable to create particular injustice in the application."

By the contract in question the plaintiff was bound to sell and deliver to the defendant all the coal that should be required by the latter between the dates mentioned in the writing. Nothing else appearing, this was an absolute promise on the part of the plaintiff, based upon a sufficient consideration to furnish the coal; and nothing, as we have already seen, would excuse its performance, except the act of God, the law or the act or conduct of the defendant. But there was one, and only one, limitation upon this otherwise absolute undertaking, and that limitation is found

in the clause of dispensation, as it may be called, which exempted the plaintiff from liability for nonperformance, if by strikes or other uncontrolable causes it should become unable to comply with its contract. This being the case, what right have we to add a further clause of exemption and provide that the plaintiff should not only be excused from full performance by strikes and other causes beyond its control, but that the defendant should be required to submit to a reduction of the quantity of coal to which it was entitled, under the contract, by prorating with other patrons of the plaintiff company, when there is no such stipulation in the contract, and nothing from which it can be clearly inferred that the parties intended such a settlement under it? If the defendant's rights can be impaired by the fact that the plaintiff has entered into other contracts of the same kind, why could they not as well be affected by any other contractual relation the plaintiff may have assumed? The plaintiff's contract was not, as to its customers, a joint one, but must be treated and dealt with as several; and the rights of each customer are to be determined solely with reference to the contract made with him, and it was the duty of the plaintiff to take care that it did not go beyond its ability to perform, and to provide against any
(586) and all contingencies in the contract itself. We cannot release the plaintiff from any part of its liability because it has failed to do so in this case, but must leave the loss where the contract places it. To do otherwise would be to make the contract, and not to construe it.

We are not permitted to interpret a contract according to our notion of what may be fair and just, unless perhaps in a case where the terms of the contract are in themselves ambiguous. In this case they are not so. The contract is plainly one to furnish a stipulated quantity of coal at a fixed price, without any reference to other contracts made or to be made by the plaintiff, and subject only, in the ultimate settlement between the parties under its provisions, to any failure by the plaintiff to perform its undertaking, which it could show to be the result of the causes beyond its control, specified in the contract. It was not the duty of the defendant to protect itself against other contracts made by the plaintiff, but it was the latter's duty to make suitable provision in the contract for his own protection in respect to them. If the rule laid down by the court below is adopted, any reduction in the quantity of coal to be delivered under the contract will be made to depend, not upon causes beyond the control of the plaintiff, but upon causes of his own creation. The reduction will be in proportion to the number of contracts that its interest or cupidity might lead it to make. When the

question is properly considered, there is no more reason for applying the *pro rata* rule in a case where the coal dealer is protected by a clause of exemption against any failure which results from causes beyond his control, than there would be for enforcing it when there is no such clause of exemption in the contract. We must remember that a contract is to be construed according to the intention of the parties, as expressed in it, upon the principle that every one of age and discretion, and quali- (587) fied to do so, can make any contract he pleases, and we have no right to give the contract a meaning based upon any idea or consideration of abstract justice. When there is no allegation of fraud or undue influence, or of any other circumstance which can form the basis of an equity for setting aside the contract, we must assume that the parties understood what was fair and right when they entered into it, and were fully mindful of its obligations. If the capacity of the plaintiff's mine was so reduced "by causes beyond its control" that it could not furnish the quantity of coal agreed to be furnished, it was entitled to the benefit of the clause of exemption; but if, by reason of our construction—which we think is in accordance with the plain words of its agreement—it suffers any loss or will be made to respond in damages to this defendant or any of its other customers, it will be the result of its own folly in making a contract which, as it turns out, cannot be performed. This does not present an unusual case in the enforcement of contracts. It is a mistake to suppose that by construing the contract according to the ordinary and well-settled rules, the clause of exemption will be rendered nugatory. It may not have the meaning or effect that the plaintiff now thinks it ought to have, but it will have full operation in accordance with the intention as expressed in it, and that intention must be our only guide in ascertaining the rights and liabilities of the parties.

We have discovered no error in the other instructions given by the court to the jury. We do not think that the plaintiff was required, under the circumstances, to buy any coal from other miners in order to fill the contract which was made with reference to its own mine in Jellico—that is, in so far as the plaintiff was prevented from delivering upon orders by causes beyond its control.

The ordinary rule as to damages undoubtedly is that when a vendor fails to comply with his contract the vendee is entitled to recover the difference between the contract (588) and market price at the time of the breach. *Spiers v. Halstead,* 74 N. C., 620; *Holmesley v. Elias,* 75 N. C., 564; *Oldham v. Kerchner,* 79 N. C., 106; 28 Am. Rep., 302; *McHose*

v. Fulmer, 73 Pa., 365; 8 Ad. & El., 604; *Grand Tower Co. v. Phillips,* 23 Wall., 471. But the general rule is subject to the qualification that a party to a contract is required to use reasonable diligence to mitigate the damages caused by the breach, and in contracts of this kind the vendee should provide himself as cheaply as he conveniently can from the most accessible sources, and thus lighten the loss, and his recovery will be curtailed by the sum which thus might have been saved. *Oldham v. Kerchner, supra; Ice Co. v. Tamm,* 90 Mo. App., 189; *Warren v. Stoddart,* 105 U. S., 224. It is true that the injured party is to be placed as near as may be in the situation he would have occupied if the wrong or breach had not been committed, and that when a wrong has been done and the law gives a remedy the compensation should be equal to the injury, but this is only another way of stating the same rule of damages, and it is therefore subject to the same qualifications. *Wicker v. Hoppock,* 6 Wall., 94; *Hassard-Short v. Hardison,* 114 N. C., 482; 1 Southerland on Damages (3 Ed.), sec. 89. There must of course be evidence to which the rule can be applied.

While it is not necessary to consider the other exceptions we have examined them and think that they are without merit. The error in the charge of the court above indicated entitles the defendant to a new trial, but it will be restricted to the *fourth issue.*

New trial.

CLARK, J., dissenting as to measure of damages. The contract provides for an exemption from liability for failure of the plaintiff to ship if "prevented by strikes or other causes
(589) beyond the control" of the plaintiff. The judge charged, in substance, that if the plaintiff had contracts with the defendant and others of like purport covering the same period of time, and there was no contract with the defendant that such contracts should not be made with others, then, if there was a failure to ship to the defendant the quantity required, the plaintiff would be liable only to the extent that it was not prevented from shipping by such strikes or other causes beyond its control, *i. e.,* that the defendant in such case could only claim loss on its *pro rata* part of what the plaintiff was permitted by the "strike or other causes beyond its control" to mine and ship. This instruction was eminently fair and just. The defendant knew that the plaintiff was not running its mine solely to fill the defendant's contract, and that the plaintiff had insisted on protecting itself by a provision in the contract for exemption from liability for failure to ship when caused by "strikes or

other causes beyond its control." If the defendant wished to get the coal anyhow, if mined, it should have stipulated that its contract should be filled regardless of the plaintiff's contract obligation to others. It is quite certain that the plaintiff would not have made such contract with the defendant.

Suppose, for argument's sake, the plaintiff was prevented "by strikes or other causes beyond its control" from shipping one-half the quantity stipulated by its several contracts, then clearly its duty to each of its contractees was to ship them one-half the quantity contracted for. The failure to ship any one such half would not be caused by "the strike or other causes beyond the plaintiff's control," but by the plaintiff's own volition in preferring other contractees, and the plaintiff would be liable to each for its shortage in not shipping the one-half, which upon a *pro rata* it could have shipped.

If the plaintiff should have shipped the full quantity to the defendant, and is liable for the difference, then (590) the plaintiff should have shipped the full quantity to every other one of its contractees, and is liable for failure to do so, and the provision in its contracts for exemption from liability for any failure to ship, "caused by strikes or other causes beyond its control," would be a nullity, and the plaintiff would be liable just as if that important provision had been left out. No one or more contractees can be selected to bear the total failure to ship. If so, why should it not be the defendant, who in that event would recover nothing?

Knowing that the mine owners were not shipping exclusively to itself the defendant, by agreeing to the usual clause of exemption from liability for failure to ship caused by "strikes or other causes beyond the shipper's control," must have understood that it had no right to complain if the plaintiff abated the contract quantity *pro rata* according to the quantity it was prevented from shipping by such strikes or other causes beyond its control. This is the ruling always made as to shipments by common carriers, which is justified upon the above reason, arising out of the contract as well as upon public policy, which forbids discrimination by *quasi* public corporations. This is not the case of an unqualified agreement to ship a certain quantity of coal, but there is an agreement for an exemption if prevented by certain causes, and the defendant should bear its *pro rata* part of the failure to ship caused by the happening of such stipulated contingency.

No precedent either way has been presented to us, but this is a reasonable and just construction of the clause in the contract, which otherwise is nugatory as a protection to the shipper for

whose benefit it was inserted. It happens, it would seem, that this Court is the first to construe such contract, and there is every reason we should make a just and proper construction.

Cited: Parker v. Brown, 136 N. C., 286; *Hosiery Co. v. Cotton Mills,* 140 N. C., 455.

(591)

VOORHEES v. PORTER.

(Filed 5 April, 1904.)

1. PLEADINGS—*Contracts—Guaranty.*

In this action the complaint contains facts sufficient to constitute a cause of action.

2. PLEADINGS—*Judgment—Complaint.*

If a plaintiff states facts sufficient to entitle him to any relief it will be granted though there be no formal prayer for judgment corresponding therewith.

3. CONTRACTS—*Parties—Code, Sec.* 177.

A creditor may sue directly a party holding funds which the debtor has dedicated to the payment of claims of such creditor.

4. GUARANTY—*Contracts.*

Where the purchaser of goods agreed, in consideration of the transfer, to pay the debts of the seller, and a third person covenanted that the purchaser should faithfully perform the contract, such person was an absolute guarantor of payment, and a creditor of the seller might sue him without first proceeding against the principal.

5. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Sales.*

The creditor of one who had sold a stock of goods in consideration of purchaser's promise to pay his debts is entitled to recover from the assignee for the benefit of creditors under an assignment by the purchaser.

ACTION by Voorhees, Miller & Company against J. A. Porter, heard by *Judge E. B. Jones* and a jury, at September Term, 1903, of BUNCOMBE.

Action to recover a debt due to the plaintiff by C. D. Blanton, and for that purpose (1) to set aside an assignment by him to J. D. Brevard alleged to be fraudulent; (2) to enforce (592) a trust as to certain funds in the possession of Brevard

under a contract with Blanton that he would pay the same to Blanton's creditors, and (3) to recover against J. A. Porter and J. B. Bostic the amount of plaintiffs' debt upon their covenant given to Blanton, by which they guaranteed a performance of said contract by Brevard and the payment of the money by him to the creditors.

In November, 1892, Blanton was indebted to the plaintiffs in the sum of $3,445.50 for goods sold and delivered, and for which Blanton gave the plaintiffs his two several promissory notes with Cobb, Bostic and W. M. Blanton as sureties. Plaintiffs obtained judgment on these notes in the Federal Court, but were unable to collect any part of the amount due upon the judgment because of the insolvency of the defendants. On 30 December, 1903, Blanton executed to J. D. Brevard an instrument in writing, by which he sold and conveyed to him his stock of goods, wares and merchandise at their cost, less 12 1-2 per cent, and in consideration thereof Brevard agreed that after retaining $3,000 to pay a debt due to him from Blanton he would hold the purchase money and apply the same to the payment of (1) all debts due by Blanton on which Brevard is surety or endorser; (2) all the other debts owing by Blanton upon which Bostic or Cobb is surety. It was then provided that the surplus, if any, should be paid to Blanton. On the same day Bostic and Porter executed their guaranty, by which they agreed that Brevard should "faithfully keep and perform all the covenants and agreements to be by him kept, done and performed according to the terms of the foregoing contract, dated this day, between him and Blanton, and that he will pay faithfully the price of the goods sold to him by said contract according to the terms thereof and as therein stated," and they did "jointly and severally guaranty such performance and payment." There was a provision in the contract between Blanton and Brevard that the goods sold and conveyed to Brevard should be (593) inventoried so as to describe and identify the goods more definitely, and so as to ascertain the exact amount of the purchase price to be held by Brevard for the creditors and to be paid to them. An inventory was accordingly made and the net amount of the purchase money ascertained to be $18,158.47. On 3 March, 1904, J. D. Brevard made a general assignment to J. A. Porter of all his property for the benefit of his creditors. There was evidence tending to show the execution of the several instruments above mentioned, and also to show that Cobb, Bostic, C. D. Blanton and W. N. Blanton are insolvent. The plaintiffs allege that Porter had received the property assigned to him by Brevard and sold it, and had failed to execute his

trust by paying the proceeds of the sale or the price of the goods to the creditors of Brevard as required to do by the assignment, and "that neither the said Brevard, the said Bostic nor the said Porter has ever paid anything to the plaintiffs, although the plaintiffs were entitled to be paid by virtue of the terms of said contract and although they have repeatedly demanded payment"; and that while the assets received by Porter under the assignment amounted to $30,000, he has not paid out exceeding $5,000 to the creditors of Brevard, nor has he accounted for the proceeds of sale received by him as it was his duty as assignee to do. The defendants in this suit are Bostic, Cobb and Brevard, and J. R. Porter individually and as assignee of J. D. Brevard. The prayer of the complaint is as follows: "1. That the deed of assignment from the defendant J. D. Brevard to the defendant J. A. Porter be declared to be fraudulent and void, and that the said Brevard and Porter account for the said assets and proceeds thereof. 2. For judgment against the said Porter and the defendant J. B. Bostic upon the contract mentioned in
(594) paragraph seven of the complaint. 3. For such other and further relief," etc.

At the close of the plaintiff's evidence the defendant Porter, individually and as assignee of Brevard, moved to dismiss the complaint and for judgment as in case of nonsuit. Motion granted, and plaintiffs excepted and appealed from the judgment.

Merrimon & Merrimon for the plaintiff.
F. A. Sondley and *Tucker & Murphy* for the defendants.

WALKER, J., after stating the case. It appears in the record that the court below was of the opinion the plaintiffs could not recover because they were not in privity with the parties to the contract of 30 December, 1902, by which Blanton conveyed his stock of goods to Brevard, and the plaintiffs therefore could not sue upon the contract, but were excluded from doing so by the rule laid down in *Morehead v. Wriston,* 73 N. C., 398, and *Peacock v. Williams,* 98 N. C., 324, and much of the argument in this Court was addressed to this feature of the case. It is also stated in the record that in the argument of the motion to nonsuit in the lower court the plaintiffs' counsel admitted that there was no cause of action for subrogation, nor was any such equity claimed by the plaintiffs under the contract between Blanton and Brevard of 30 December, and that counsel further argued that while said contract was a bill of sale it constituted Brevard a trustee of the purchase price for the purpose of paying it to

the creditors of Blanton, and that the plaintiffs had a primary equity to have it so applied, and that to enforce that equity they could sue Brevard and Porter directly, and also sue Porter on his guaranty hereinafter mentioned. It was argued by the defendants' counsel in this Court that "there is no allegation in the complaint of any contract between Blanton and Brevard, to any extent, for the benefit of the plaintiffs," and (595) that the plaintiffs in their pleading simply assert the right to follow the goods in the hands of Brevard as trustee, and do not aver that Brevard is individually the creditor of the plaintiffs.

We simply mention these matters for the purpose of stating that we are not bound here by any argument that counsel made below. We hear the case upon the facts alleged in the pleadings, and if the plaintiffs have set forth in their complaint such facts as entitle them to relief they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional and different relief which is not inconsistent with the facts so alleged in their complaint, it being the pleadings and the facts proved which determine the measure of relief to be administered. *Knight v. Houghtalling,* 85 N. C., 17. In this case it makes no difference, if such is the fact, that the plaintiff does not distinctly claim that the contract between Blanton and Brevard was for the benefit of the plaintiffs, and that he does claim only that Brevard held the goods in trust and makes no claim against Brevard individually. He simply sets forth the facts of the case according to his version of them, which is the proper way to do, and upon those facts he prays for an accounting from Brevard and Porter "for the said assets and the proceeds thereof," meaning the assets received under the contract and assignment, and for judgment against Porter and Bostic as guarantors of the performance by Brevard of the contract, and for such other and further relief as they may be entitled to have in the premises. We cannot therefore agree with the learned counsel for the defendants that the plaintiffs are not entitled to call for a showing from Brevard and Porter as to the administration of their several and respective trusts under the contract and assignment if the facts justify such relief, even though the plaintiffs may not have made any special or particular claim for that relief. But it is our opinion (596) that the facts are sufficiently set forth in the complaint to entitle them to such relief, and if Brevard and Porter have committed a breach of their trusts they are further entitled to judgment against them respectively for any damages they have sustained by reason thereof.

The case in one aspect of it turns upon the question whether the plaintiffs can sue Brevard for failing to pay over to them their share of the price he agreed to pay for the property sold to him by Blanton, and we are unable to see why he cannot do so. The case is not like *Morehead v. Wriston, supra.* In that case the substance of the agreement was that Wriston, the incoming partner, would indemnify the old firm against the payment of its debts, and this view of the case is fully explained and made clear by *Smith, C. J.*, in *Peacock v. Williams,* 98 N. C., 324, in which he says: "The agreement is, in substance, one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is solely between the parties to it with whom the plaintiff is not in privity. Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment." It will be observed that the distinction between the cases arises out of the particular nature of the contract, whether it be one strictly of indemnity or one in which there is a direct and express promise to pay to the creditor the amount of his claim out of the funds placed in the hands of the party who is sought to be charged or which are held by him for that specific purpose. This doctrine that the creditor may himself sue directly the party so holding the funds which have been dedicated by the debtor to the payment of the claims of his creditors is recognized in *Woodcock v. Bostic,* 118 N. C., 822, as is also the creditor's right to proceed in equity to have the fund applied, according to the intention of the debtor and the agreement of the party who holds it to
(597) the uses for which it was created, whether the right can be enforced at law or not. It is true the Court held in that case that the action was in form *ex contractu,* and that as the guaranty of Ray to Settle and Bostic was not assignable, even to the plaintiff Mrs. Woodcock, the plaintiff could not recover, but there is a strong intimation that she could have recovered if she had properly pleaded her equity or set forth facts upon which equitable relief could be based. When the Court said in that case, "She cannot have equitable relief because she has prayed for none," it simply meant that there was no sufficient allegation of an equity upon which a prayer for such relief could be predicated, for we find it to be well settled by the decisions of this Court that if the plaintiff in his complaint states facts sufficient to entitle him to any relief this Court will grant it, though there may be no formal prayer corresponding with the allegations and even though relief of another kind may be demanded. *Knight v. Houghtalling, supra; Gillam v. Insurance Co.,* 121 N. C., 369. In the case last cited *Clark,*

J., for the Court, says: "Under the Code the demand for relief is immaterial, and the court will give any judgment justified by the pleadings and proof," citing numerous cases. Clark's Code (3 Ed.), p. 584, and notes to section 425.

In the case at bar all the facts, which in our opinion are necessary to constitute a good cause of action even in equity, are set forth, and besides the prayers for special relief there is a prayer for general relief, or, to be more accurate, for other and further relief than that specially demanded. If the plaintiffs by their pleadings and proof are entitled to recover against the defendants Brevard and Porter, even by way of subrogation, we would direct that relief to be administered notwithstanding that in the argument below the particular equity was not claimed, but disclaimed, because we act in the adjudication of rights, not upon arguments, but upon the plead- (598) ings and evidence when there has been an involuntary nonsuit as in this case, or upon the pleadings and findings of the jury when there has been a verdict, the arguments of counsel being only intended to aid us in understanding the case, and not being in any sense an estoppel upon counsel or the party whom he may represent. Parties are bound by admissions of facts but not by arguments or admissions as to the law. Arguments of counsel are exceedingly valuable in enabling us to ascertain the true principles of law upon which the decision of the cause in its last analysis must rest, and especially so when they are as searching, able and exhaustive as they were in the case at bar, and exhibit such a complete mastery by counsel of the facts and law of the case; but parties must not be concluded or prejudiced by any mistaken view of the law presented during the course of the argument in the lower court or in this Court. A contrary course would result in our deciding the case not according to the law but according to the argument. We do not intend to imply, for we do not think that any admission has been made in this case *in arguendo* calculated to prejudice the plaintiffs, whose counsel may have chosen wisely and well among the several grounds of action open to him, and who may have selected the strongest one upon which to base his claim for relief.

It is not necessary that the plaintiffs should show in this case any right to equitable relief by way of subrogation. They contend that their equity or, more properly speaking, their cause of action, whether legal or equitable, is a primary and not a secondary one; that Brevard, as the consideration for the purchase of the goods, promised and agreed not merely to indemnify Blanton against any and all claims of his creditors, but to pay

directly and immediately to his creditors, who are named in the contract and in order and according to the classification (599) therein stated, all of the said claims. This, the plaintiff's counsel argued, impresses a trust upon the purchase price of the goods in the hands of Brevard. Conceding this to be so, we do not see how the condition of the plaintiffs is improved by reason of it. If Blanton had placed in the hands of Brevard a fund for the payment of his debts, or if Brevard when he purchased the goods had set apart a certain fund in payment of the purchase price of the goods and for the purpose of paying Blanton's creditors, and if either of the funds, being capable of identification, had gone into the hands of Porter as assignee, the plaintiff or any other creditor of Blanton mentioned in the contract with Brevard could follow the fund in the hands of Porter and subject it to the payment of his claim. But such is not the case here. The purchase price of the goods consisted merely in the promise of Brevard to pay the claims of creditors, which he failed to do. While he is liable to Blanton or to his creditors for this breach of his contract he did not assign to Porter any part of his property which can be said to represent a trust fund and which can be applied to the claims of Blanton's creditors in preference to the claims of other creditors secured by Brevard's assignment. In other words the law will not compel the assignee to set aside for the benefit of Blanton or his creditors an amount equal to the inventoried value of the goods received by Brevard under the contract in payment of the purchase price of the goods.

But the plaintiffs are entitled to relief in another aspect of the case. In the first place, they are creditors of Blanton, and are entitled to receive payment of their claims from Brevard under the provisions of the contract by which the latter purchased the goods and agreed to pay Blanton's debts, and being thus secured, and Brevard having failed to pay them the share to which they are entitled under the contract, they have (600) the right to call on Brevard for an account of the debts and liabilities of Blanton secured by the contract and of the amount of the purchase price applicable thereto, so as to ascertain the amount due from Brevard to them, and this amount they can recover from the assignee of Brevard if he has received any assets which should be applied to the payment of this debt. They acquired no priority by reason of the peculiar nature of Brevard's liability to them, but they occupied the same position that they would have held if they had been general creditors of Brevard at the time of the assignment. They are entitled though to have the assignee of Brevard account with

them, so that it can be ascertained whether there are any assets in his hands which should be devoted to the payment of their claims against Brevard.

The plaintiffs are also entitled to recover from Porter, as guarantor, the amount due from Brevard under the contract with Blanton, and Porter may absolve himself from this liability if he has sufficient assets for that purpose, or reduce the amount thereof, if he sees fit to do so, by voluntarily paying the plaintiffs whatever is due them under the assignment, and if the plaintiffs cannot make the full amount due them under the Brevard contract out of Porter they can recover the balance out of any assets in the hands of Porter as assignee which are applicable to the payment of their claims, and conversely if the assets in the hands of the assignee are not sufficient to pay their claims, then Porter, as guarantor, will be liable for the balance. But the plaintiffs may proceed against Porter in the first instance for the recovery of the entire amount or against the assignee for an account and settlement of his trust and the payment of the amount due to them, or they may proceed against both as they may be advised. See *Brown v. Bank,* 79 N. C., 244, as explained and distinguished in *Bank v. Alexander,* 85 N. C., 352. As Porter covenanted that Brevard should faithfully perform the stipulations of his contract with Blan- (601) ton and "faithfully pay the price of the goods sold to him by said contract according to the terms thereof," he is an absolute guarantor of payment as distinguished from a guarantor of collection, and the plaintiffs have the right to sue him immediately upon his default without first proceeding against and exhausting the principal. *Jones v. Ashford,* 79 N. C., 172; *Jenkins v. Wilkinson,* 107 N. C., 707; 22 Am. St., 911; *Hutchins v. Bank,* 130 N. C., 285; *Cowan v. Roberts,* 134 N. C., 415.

We have stated the general principles which we think are applicable to this case and which, as we will now proceed to show, are sustained by recent decisions of this Court.

In *Shoaf v. Insurance* Co., 127 N. C., 308; 80 Am. St., 804, it appeared that the plaintiff had received a policy of fire insurance from the Merchants Insurance Company, and while the policy was in force the defendant, the Palatine Insurance Company, reinsured all the outstanding risks of the Merchants Company. By the contract of reinsurance it was provided that no holder of a policy in the Merchants Company should be entitled to enforce the contract against the Palatine Company, but that they should sue the Merchants Company alone, and the Palatine Company agreed to pay all claims legally arising and duly proved against the Merchants Company, and all costs and

expenses of litigation. In that case the Court held that the plaintiff, whose property had been destroyed by fire and who had complied with the terms and conditions of his policy, was entitled to recover against the Palatine Company. The Court thus states the reason for its decision: "The plaintiffs were neither a party to nor in privity with said contract. The question is, have they an interest in or arising out of the contract?

The defendant is bound to indemnify the reinsured for
(602) all risks and loss, and the reinsured at the same time is bound to indemnify the plaintiffs for risks 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 must be prosecuted in the name of the real party in interest. 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. 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 upon the ground that it has no contract with the plaintiffs."

Our case is stronger than the one just cited, for Brevard expressly promised to pay to the creditors of Blanton, and his promise was based upon a good and sufficient consideration.

In *Gorrell v. Water Co.*, 124 N. C., 328; 46 L. R. A., 513; 70 Am. St., 598, the plaintiff sued the defendant, the Water Supply Company, for damages to property alleged to
(603) have been caused by the negligent failure of the defendant to furnish water and a sufficient pressure at its hydrants for the purpose of extinguishing a fire which destroyed her property, the defendant having previously entered into a contract with the city of Greensboro, where the property was

situated, to supply said city with water for extinguishing fires and for other purposes. In passing upon a demurrer to the complaint this Court, through the present Chief Justice, said: "One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere" (citing numerous cases from other States), 124 N. C., at p. 333.

But still more to the point is the case of *Gastonia v. Engineering Co.,* 131 N. C., 363, in which it appeared that one of the defendants, the Engineering Company, undertook to construct for the plaintiff, the town of Gastonia, "a waterworks, sewerage and lighting system," and the other defendant, the American Surety Company, by a bond given for the purpose, guaranteed the performance of the contract by its co-defendant. The plaintiffs, other than the town of Gastonia, sued the defendants for work and labor performed for and materials furnished to the Engineering Company in the construction of the works under their contract. The Court held that the contract of the Engineering Company was made for the benefit of the persons who performed the labor and furnished the material, and as there was an express provision for the payment of their claims they were the beneficiaries of the contract, and that they either singly or collectively could sue the Engineering Company and its surety and recover the amounts due to them respectively. The Court distinguishes *Morehead v. Wriston* from the case then under review by the fact that in the former case there was no indication of any intent of the parties that the (604) creditors of the old firm should have any benefit under the contract, the contract in that case being one strictly of indemnity. In *Lacy v. Webb,* 130 N. C., 545, it is said: "If the State had been nothing more than the beneficiary of the bonds it could maintain this action, and 'it is not the case either of subrogation or substitution.' The party, in other words, for whose benefit the contract is made, is the real party in interest under the Code, and sues in his own right and not in another's right to which he is subrogated by any principle of equity, and especially is this true when the money due under the contract is made payable directly to him."

But we think *Mason v. Wilson,* 84 N. C., 51; 34 Am. Rep., 612, is directly in point. The doctrine there stated is that if a third person promises the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise or for money had and received, "For although," says the Court, "the

promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an *original* and *distinct* cause of action," and it is immaterial, as is further said by the Court, whether the liability of the original debtor is continued or not, the promise being an independent and original one founded upon a new consideration, and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price and to pay the amount of that price to the creditors of the vendor amounts to the same thing, and brings our case (605) within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely, "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties." In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not. *Threadgill v. McLendon,* 76 N. C., 24; *Stanley v. Hendricks,* 35 N. C., 86. In *Draughan v. Bunting,* 31 N. C., at p. 13, *Pearson, J.,* for the Court, says that a new and distinct cause of action of the creditors against the third person, who receives money or the proceeds of property from the debtor to pay his debt, arises out of the promise which is implied by law from the receipt of the money or the proceeds of the property to pay the debt, and that the creditor may sue directly on this promise. In our case Brevard bought the property and expressly promised, as the consideration of the purchase, to pay the debts of Blanton, and the two cases are therefore in principle the same. In *Threadgill v. McLendon, supra, Pearson, J.,* for the Court, says, substantially, that when a party receives property for another upon a promise to pay that other's debt the creditor can sue and recover, not on any promise implied from the receipt of the property, but on the direct and express promise to pay the amount of the debt. The promise is binding and inures directly to the benefit of the creditor, because the promisor has received the consideration, and in justice should be made to perform his undertaking.

It was suggested on the argument by the plaintiffs' counsel that the goods bought by Brevard from Blanton were charged with a trust in the hands of Brevard in favor of Blanton's creditors, and it seems that some courts have so held the law to be. *Kaiser v. Wagoner,* 59 Iowa, 40; *Hamilton v. Barricklow,* 96 Ind., 398. We do not know to what extent the courts in making

those decisions were influenced by the doctrine of the (606) vendor's lien, which is an equity not recognized by this Court.

Again it may be that if Brevard was insolvent when the sale to him was made it would be void as against Blanton's creditors, and his assignee in that case would have to account for the goods to such of Blanton's creditors as are mentioned in the contract if the goods went into his hands. But there is no evidence of Brevard's insolvency at that time. It is not necessary though that we should pass upon those two questions even if they were distinctly raised in the record, as the plaintiffs may be able to recover the amount of their claims from Porter upon the principles already stated, and the other matters may not be presented if the case should come back to us again.

We are of the opinion, upon a review of the whole case, that the plaintiffs have stated in their complaint a good cause of action against Brevard and Porter, and that there was evidence to sustain it. The court erred in its ruling. The judgment of nonsuit must be set aside and a new trial awarded.

New trial.

Cited: Deaver v. Deaver, 137 N. C., 244; *Hicks v. Mfg. Co.,* 138 N. C., 324; *Wood v. Kincaid,* 144 N. C., 395; *Satterfield v. Kindley, ib.,* 461; *Bradburn v. Roberts,* 148 N. C., 218; *Marrow v. White,* 151 N. C., 96; *Hardware Co. v. Schools, ib.,* 509.

(607)

STATE v. BUTTS.

(Filed 16 February, 1904.)

APPEAL—*Justice of the Peace—Costs—Code, Secs.* 548, 895, 3756.

An appeal from an order of the Superior Court remanding a case to a justice to find the facts relative to taxing a person with the costs as prosecutor is premature.

INDICTMENT against W. H. and J. H. Butts, heard by *Judge Frederick Moore,* at June Term, 1903, of HALIFAX. From an order remanding the case to a justice of the peace the prosecutor appealed.

Robert D. Gilmer, Attorney-General, for the State.
Day & Bell for the prosecutor.

CLARK, C. J. The defendants were tried before a justice of the peace for an offense within his jurisdiction. He adjudged the defendants not guilty, and that the prosecution was frivolous and malicious, and that "J. O. Heptinstall pay the costs of the action." In such cases the Code, sec. 3756, requires that the costs be taxed "against the complainant or prosecutor." J. O. Heptinstall was one of the witnesses for the prosecution, but the warrant had been issued upon the affidavit of J. W. Heptinstall, another witness. From such order taxing him with the costs J. O. Heptinstall appealed to the Superior Court. The judge remanded the case to the justice of the peace with directions to serve notice upon J. W. and J. O. Heptinstall "to show cause why one or the other should not be marked prosecutor" and taxed with the costs; and further ordered that "said justice of the peace shall find the facts and reform his judgment in accordance therewith" and make return to the court. From this order and also from the refusal to set aside the order of
(608) the justice taxing him with the costs before such finding returned by the justice J. O. Heptinstall appealed to this Court.

The appeal is premature. In execution of said order the justice may find the facts in favor of said J. O. Heptinstall and reform the judgment accordingly, which would render this appeal useless. The appellant should have noted his exception, and if the justice should find the facts against him they would be reviewable by the judge. *S. v. Murdock,* 85 N. C., 598; *S. v. Powell,* 86 N. C., 640. The judge's findings of fact would be binding upon us, and no appeal would lie except upon the ruling of law upon such finding. *S. v. Hamilton,* 106 N. C., 660; *S. v. Morgan,* 120 N. C., 563. Here the judge has made no ruling except the very proper one that the justice must find the fact whether J. O. Heptinstall was the real prosecutor. In *S. v. Roberts,* 106 N. C., 662, where the appellant was taxed in the Superior Court with costs without a sufficient finding of facts, this Court held that this was error, but that the Superior Court at a subsequent term could still investigate the matter, either on motion of the solicitor or *ex mero motu* even, and find the facts and tax the prosecutor with the costs if justified by such finding of facts. This was cited and approved in *S. v. Sanders,* 111 N. C., at p. 702.

As under the Code, sec. 895, the costs in such cases can in no event be taxed against the county (*Merrimon v. Commissioners,* 106 N. C., 369), and if the prosecution is frivolous and malicious (as here adjudged) the costs are taxable against the "prosecutor or complainant" (Code, sec. 3756), it is but just that the matter

should be re-referred to the justice to ascertain who was the prosecutor, unless the judge had chosen to find that fact himself, as he might have done. The absence of J. W. Heptinstall doubtless caused him to remand to the justice to find the facts upon notice to both J. O. and J. W. Heptinstall. (609) Though the affidavit was made by J. W. Heptinstall, it may be that J. O. Heptinstall was the real prosecutor, and the facts should be found.

The appeal is premature, for there has been no judgment of the Superior Court affecting a substantial right and authorizing an appeal. Code, sec. 548.

Appeal dismissed.

STATE v. POYNER.

(Filed 23 February, 1904.)

LIMITATIONS OF ACTIONS—*Nuisance—Agency.*

An employee who erects a nuisance in a waterway for his employer cannot be indicted therefor after the expiration of two years.

INDICTMENT against A. J. and T. G. Poyner, heard by *Judge W. B. Councill* and a jury, at Fall Term, 1903, of CURRITUCK. From a verdict of guilty and judgment thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, and *E. F. Aydlett* for the State.

Pruden & Pruden and *Shepherd & Shepherd* for the defendants.

CONNOR, J. The defendants were indicted for erecting and maintaining a public nuisance, in that they "did erect, place and put in" Wills Island Lead, a common highway, certain piles and posts, and unlawfully and willfully doth continue said obstructions and impediments, etc. There was evi- (610) dence tending to show that "Wills Island Lead" is a water way extending from one end to the other of Currituck Sound. That it was navigable and used by the citizens for hunting and fishing. There was also evidence that the stakes and obstructions placed in said water way have remained there until the trial of this indictment, and were put there by the defendants; that they were put there from ten to thirteen years

before the presentment or indictment herein; that the work was done by the defendants, who were laborers employed by and under the direction of one Thomas J. Poyner, who was superintendent of the Currituck Shooting Club; that defendants left the employment of said Poyner and said club the same year the obstructions were put in and had not been in the service of either since, nor had they had anything to do with said obstructions.

The defendants' counsel in apt time requested the court to charge the jury: "If the defendants were laborers and employed in the service of T. J. Poyner or other employee, and as such employees and laborers, under direction of the said employee, more than two years before the finding of the bill of indictment in this case, drove said stakes and thereafter had nothing to do with keeping of and maintaining said obstructions, they cannot be convicted, and you should return a verdict of acquittal." The court declined to give this instruction, and the defendants excepted. The court instructed the jury that if they believed the evidence they should find the defendants guilty, notwithstanding the lapse of time since they did the work and ceased their connection with the matter. The defendants duly excepted, and from judgment upon a verdict of guilty appealed.

The indictment is drawn in accordance with the decision of this Court in *S. v. Club,* 100 N. C., 477; 6 Am. St., 618, and charges a nuisance at common law for placing obstruc-
(611) tions in a public highway, navigable water, and for continuing and maintaining the same. If the bill charged the defendants with *placing* the obstructions in the highway they could not have successfully defended themselves by showing that they did so by direction of their employer. *S. v. Campbell,* 133 N. C., 640. They would, however, have been entitled to an acquittal because more than two years had elapsed since the commission of the offense. The Attorney-General insists that the indictment is also for continuing and maintaining a nuisance, and that against this offense the statute does not run so long as the nuisance continues. This is undoubtedly true as held by this Court in *S. v. Holman,* 104 N. C., 861. The present Chief Justice says: "The State was entitled to show the existence of the nuisance at any time within two years before the indictment." In that case the defendants owned the land upon which the milldam complained of was situate, they had control of it and actively maintained it. In this case the defendants, laborers in the employment of other persons, in the discharge of their duty and by their direction put the stakes in twelve years ago. They had no interest in the matter and nothing to

do with keeping them there or maintaining the obstruction. During the same year they left the employment. It does not seem that in any proper or legal sense the defendants can be said to *maintain* the nuisance. The industry of the defendants' counsel has brought to our attention the case of *Lyman v. Dorr,* 1 Aikens (Vt.), 217, in which the distinction is very clearly pointed out. *Rogie, J.,* says: "When a person in his own right and for his own benefit commits a trespass by erecting a nuisance on another's land it is but reasonable that he should remain liable for the continuing injury. And on the other hand if he committed the original trespass as an agent and for the benefit of another, the continuance should not be re- (612) garded as his act, but as that of the principal." It would be a strange result if the law should hold a laborer liable for maintaining a nuisance erected by him in the course of his employment, and by direction of his employer, twelve years after he had quit the service, and had not had any connection with the master. Certainly if a civil action would not lie he could not be indicted and convicted of a criminal offense. The court should have given the instruction asked, and for the refusal to do so the defendants are entitled to a

New trial.

STATE v. PATTERSON.

(Filed 1 March, 1904.)

1. INTOXICATING LIQUORS — *Statutes—Caption—Laws* 1903, *Ch.* 349—*Laws* 1903, *Ch.* 233.

   Laws 1903, ch. 349, sec. 2, making the place of delivery to the purchaser of intoxicating liquors the place of sale, applies to the whole State, notwithstanding the limitation in the title of the act to certain counties.

2. VENUE—*Intoxicating Liquors—Const. U. S., Sixth Amendment—Laws* 1903, *Ch.* 349—*Jury.*

   Under Laws 1903, ch. 349, sec. 2, making the place of delivery to the purchaser of intoxicating liquors the place of sale, an indictment at the place of delivery is not prohibited by the Sixth Amendment to the Constitution of the United States.

DOUGLAS, J., dissenting.

INDICTMENT against J. G. Patterson, heard by *Judge C. M. Cooke,* at January Term, 1904, of DURHAM. From a verdict of guilty on a special verdict the State appealed.

(613) *Robert D. Gilmer, Attorney-General, Manning & Foushee* and *R. B. Boone* for the State.
Winston & Bryant for the defendant.

CLARK, C. J. The defendant is indicted for selling spirituous liquor to one Guess in the town of Durham, where such sale is prohibited by virtue of an election had under the provisions of chapter 233, Laws 1903.

The special verdict finds that the defendant was not a druggist and had no license to sell spirituous liquor within the city of Durham; that he resided in Roxboro, where he had license to sell spirituous liquor; that Guess sent the defendant two dollars by mail with an order to ship said Guess at Durham one gallon of corn whiskey by express, charges prepaid, which the defendant did, and the whiskey was delivered to Guess in Durham; that said Guess was not a druggist, nor was said liquor sold to him upon the prescription of a regularly practicing physician.

The point presented therefore is whether this was a sale at Roxboro, where the liquor was delivered to the carrier by the defendant for transportation to Guess, or was it a sale at Durham, where it was received by Guess and where such sale was prohibited by law.

Laws 1903, ch. 349, sec. 2, provides: "That the place where delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors is made in the State of North Carolina shall be construed and held to be the place of sale thereof, and any station or other place within said State to which any person, firm, company or corporation shall ship or convey any spirituous, malt, vinous, fermented or other intoxicating liquors for the purpose of delivery or carrying the same to a purchaser shall be construed to be the place of sale; provided this section shall not be construed to prevent the delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors to
(614) druggists in sufficient quantities for medical purposes only."

This section is explicit that the place of actual delivery to the buyer or to which it shall be shipped for delivery to him *"shall be construed to be the place of sale."* It is contended that this provision does not have the effect of the plain purport of the words used by the law-making power because:

1. This section two is found in a statute entitled "An act to prohibit the manufacture, sale and importation of liquors in Cleveland, Cabarrus, Mitchell and Gaston Counties." Formerly the caption of an act was not at all considered to any extent

whatever in construing it for reasons given in *S. v. Woolard,* 119 N. C., 779, but the modern doctrine is that when the language of the statute is ambiguous the courts can resort to the title as aid in giving such act its true meaning, but that this cannot be done when the language used is clear and unambiguous. *Randall v. R. R.,* 107 N. C., 748; 11 L. R. A., 460; *S. c.,* 104 N. C., 410; *S. v. Woolard,* 119 N. C., 779; *Hines v. R. R.,* 95 N. C., 434; 59 Am. Rep., 250; *Blue v. McDuffie,* 44 N. C., 131. To like purport in *Hadden v. Collector,* 72 U. S., 107, *Mr. Justice Field* uses the following language: "At the present date the title constitutes a part of the act, but it is still construed as only a formal part; it cannot be used to extend or to restrain any positive provisions in the body of the act." The language of section two is "That the place where delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors is made in the *State of North Carolina* shall be construed and held to be the place of sale thereof." . . . This provision is positive in its character, and its operation cannot be restrained by any reference to the title of the chapter. In the sections of chapter 349, other than sections 1 and 2, there is no reference to the place in which the act is to be operative, and hence by reference to the title they are to be applied only to (615) the four counties therein named. Section 1 is specifically made operative in the counties therein named, and is to take effect at a different date, and section 2 is made operative as to the sale of any spirituous or intoxicating liquors anywhere in the State, and as to them the title cannot be used to restrict or extend the meaning of the explicit, clear and unambiguous language used.

It is well settled, says *Ruffin, C. J.,* in *Humphries v. Baxter,* 28 N. C., 439, "That one part of a statute may be public in its nature while another is local and private." Part of a statute may be local and another of general application; part may be a public statute of which the court will take judicial notice and another part a private statute, which must be set up in the pleadings, and whether an enactment in a statute is general or local, public or private, is a question of law for the court, and is not determined by the nature of the act in which the enactment is found nor by its publication in the public or private statutes." The decisions are uniform as to this. *S. v. Wallace,* 94 N. C., 827; *Durham v. R. R.,* 108 N. C., 401; *S. v. Barringer,* 110 N. C., 529; *Hancock v. R. R.,* 124 N. C., at p. 225; Potter's Dwarris, 53.

2. It is further objected that if the statute had this meaning it is unconstitutional, but we are not pointed to any section of

the Constitution which forbids the law-making power to designate the place of sale when the goods are shipped by the vendor to the vendee by a common carrier or other agency. It is true the courts have held that the place of sale is where the goods are delivered to the carrier, the latter being the agent of the vendee, thus making the constructive delivery, instead of the place of actual receipt of the goods by the purchaser, the place of sale.

(616) This rule is of comparatively modern origin, and at first was held to apply only when the vendee designated the carrier by whom the goods were to be shipped. *Davies v. Peck,* 8 D. & E., 330. It has not been uniformly held, and is subject to many exceptions (1 Beach Cont., sec. 563; 2 Kent Com., 499), as the right of stoppage in transitu, and other exceptions. It is merely a rule of judicial construction, which was made in the absence of legislation, and is not protected by any constitutional provision from legislative power to change it. Especially can the Legislature change such rule in the exercise of its police power over the sale of intoxicating liquors when, as here, it can be readily seen that with the multiplication of common carriers and the speed and ease with which intoxicating liquors can be shipped, it would be a vain thing to prohibit the sale of liquor in any designated territory if vendors a short distance off can at will fill orders coming from within the prohibited territory upon the judicial fiction that the sale is complete upon delivery to the carrier, who is construed as the agent of the vendee. Whether it may or may not require an act of Congress to make a similar change as to liquor shipped into prohibited territory from points outside the State in nowise affects the power of the State to so provide when the shipment is from another point in the State. *Rhodes v. Iowa,* 170 U. S., 402. In *O'Neill v. Vermont,* 144 U. S., 323, as construed by the same court in *R. R. v. Simms,* 191 U. S., 441, it seems to be held that by virtue of the police power shippers of intoxicating liquors into a State from without its borders are subject to the same regulations as shippers from points within the State, it not being a matter of taxation upon interstate commerce. But that point is not now before us.

(617) Where one upon one side of the line of a political division, as a State or county, shoots across the line and kills a person on the other side, the courts have held that the act is committed where the shot is delivered by striking the body of the victim. *S. v. Hall,* 114 N. C., 909; 28 L. R. A., 59; 41 Am. St., 822; or if he commit false pretense by a letter delivered in another State the offense is committed in the State in which the letter is delivered. *In re Sultan,* 115 N. C., at p.

60; 28 L. R. A., 294; 44 Am. St., 433. A statute modifying the latter rule was sustained in *S. v. Caldwell,* 115 N. C., at p. 800; and in *Com. v. McLoon,* 101 Mass., 1; 100 Am. Dec., 89, in which *Gray, J.,* said that the statute rested upon the general power of the Legislature to declare any willful or negligent act which causes an injury to persons or property in its territory to be a crime. The General Assembly has authorized the people of Durham to hold an election by virtue of which it is deemed injurious to sell intoxicating liquors in the limits of Durham, and by virtue of such exercise of the police power, and to make it effective, it is further enacted that the sale shall be deemed made in Durham (or elsewhere in this State) upon the delivery there of the injurious article to the buyer, just as in the case of a shot fired across the line, or a letter or poison so sent by the mail or other agency.

It was suggested on the argument, though the point is not made in the record, that the statute contravenes the Sixth Amendment to the United States Constitution, which provides that in all criminal prosecutions the accused shall be tried by a jury of the State and district where the crime shall have been committed. But aside from the fact that the law has construed the crime to be committed in Durham, where the forbidden article was actually delivered, instead of at Roxboro, where it was only constructively delivered, it is well known that the first ten amendments were all passed as restrictions upon the Federal Government and courts, and as a concession to States which reluctantly and hesitatingly had entered into the Union upon a pledge that such amendments should be submitted. That
these amendments are restrictions upon the Federal Gov- (618)
ernment, and not upon the States, has been uniformly
held in the United States Supreme Court. *S. v. Caldwell,* 115 N. C., at p. 803, and cases there cited; *Fox v. Ohio,* 46 U. S., 410; *Cook v. U. S.,* 138 U. S., 157; *Barron v. Baltimore,* 32 U. S., 343; *Spies v. Illinois,* 123 U. S., 131, and there are numerous others. *Twitchell v. Com.,* 74 U. S., 321; 2 Tucker Cons., sec. 325, and cases collected in 3 Rose's notes, 368-372. In *Barron v. Baltimore, supra, Marshall, C. J.,* referring to the first eleven amendments, said: "These amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them." Upon the special verdict the defendant should be adjudged guilty.

Reversed.

DOUGLAS, J., dissenting. Regardless of any personal predilections I am forced to dissent from the decision of the Court as a

pure matter of law. It is impossible for me by any process of reasoning to bring my mind to the conclusion that the Legislature had a *legal* intention of doing something that I am morally certain never entered their minds.

It is a matter of common knowledge, borne out by the legislative journals and published laws, that the Legislature, after most careful consideration, enacted a general act intended to reduce the regulation of the whiskey traffic throughout the State to a uniform system as far as possible. In framing this act two bills were earnestly pressed by their respective supporters—the Watts bill, which was substantially adopted, and the London bill, which was ably drawn and expressed in clear and exact language the purposes of its distinguished author. These bills represented distinct schools of thought, and the adoption (619) of one over the other was an unmistakable expression of legislative preference. At the same term at which the Legislature passed the general act, and the act now held by the Court to be amendatory to the general act, it also passed twenty-five or thirty other acts relating to the same general subject. These acts profess to be local, like the act now construed by the Court as general in its operation, and with four exceptions are likewise printed in the public laws. Can we suppose that the Legislature intended every section in every one of these numerous acts to operate as an amendment to the general act unless specifically restricted in each section? If one of them can have such an effect why should not the others? If that were so what would become of the general act, and what hope would there be of extricating the law from the hopeless confusion that would result? Oliver Cromwell denounced the laws of England in his time as "a tortious and ungodly jumble." If the great Protector were brought face to face with our liquor laws, including the general act with all the amendments constructively adhering thereto, and the infinite variety of municipal ordinances passed thereunder, I fear that words would fail him.

But it may be asked what other construction is open to us? The answer seems simple enough to me: construe those statutes to be general which on their face profess to be general, and those to be special which are avowedly special. Of course I am now alluding to conflicting statutes passed at the same session of the Legislature and *in pari materia*. Where there is neither conflict nor ambiguity in the statute there is no room for interpretation. The act containing the section which the Court now says is general in its application is specifically entitled "An act to prohibit the manufacture, sale and importation of liquors in *Cleveland, Cabarrus, Mitchell and Gaston Counties.*" I know that

it has been said that the caption or title is no part of the (620) act. This was so originally, because in England all acts of Parliament passed at the same session were considered as one act. The separate acts had no captions when passed, and hence the captions were not the words of Parliament, but of the speaker or some parliamentary clerk who subsequently added them thereto. But now, since the title has become a part of the act as passed by the Legislature itself, the rule is necessarily different. Indeed, the title has become so essential a part of the act that it is sometimes taken as the act itself. Section 23 of Article II of the Constitution provides that "All bills and resolutions of a legislative character shall be read three times in each house before they pass into laws."

It is a well-known fact that bills are rarely ever read in full except on the second reading, if then; and that they are habitually "read by title" on both the other readings. If the Legislature did not consider the title as an essential part of the bill, giving substantial notice of its contents, would not such habitual action be a flagrant violation of the Constitution?

I have said that these acts are *in pari materia,* being passed by the same Legislature, at the same session and upon the same general subject-matter. They should therefore be construed together so as to preserve them both as complete and effective acts, each operating within its own sphere of action. 26 Am. and Eng. Ency. (2 Ed.), 620, *et seq.,* and cases cited therein; Black. Int. Laws, sec. 86; Sedgwick Stat. and Const. Law, 247; Endlich on Statutes, secs. 43, 44, 45, 56; *S. v. Bell,* 25 N. C., 506; *Simonton v. Lanier,* 71 N. C., 498; *Rhodes v. Lewis,* 80 N. C., 136; *Bowles v. Cochran,* 93 N. C., 398; *Wortham v. Basket,* 99 N. C., 70; *Wilson v. Jordan,* 124 N. C., 683. I do not feel that any legal principle forces me to impose such a constructive intent upon the Legislature, and I feel sure that no (621) such intent existed in fact. Custom permits the writer of a dissenting opinion to allude to known facts outside the record. In the light of such facts it will hardly be contended that the Legislature *actually* intended the act in question to apply to any counties other than those mentioned in its title. I understand that the author of the bill disclaims any such general application; and I am informed on the highest authority that when the bill was read in the Senate it was distinctly asked and positively answered that it did not apply to any counties other than those named therein. Upon that assurance it was passed.

It is not for me to discuss the merits of the act, but in answer to a suggestion in the opinion of the Court I may say that the

practical effect of the section is not so much to restrict the traffic as to force it into the hands of nonresidents, who can carry it on with impunity. All that the present defendant has to do is to "move a little further from the road," over into the State of Virginia, and continue his business. But this does not influence me in my view of the law. As to the moral effect of a statute not resting upon the will of the people I may be permitted to express my doubts. After years of faithful devotion to the cause of temperance, I am satisfied that it can never rest upon a legal fiction, and that no great moral question ever made any permanent advancement along the pathway of indirection.

Cited: S. v. Long, post, 754; *In re Briggs,* 135 N. C., 120; *S. v. Lewis,* 142 N. C., 650, 653; *S. v. Hanner,* 143 N. C., 638; *Stone v. R. R.,* 144 N. C., 229; *S. v. Herring,* 145 N. C., 420; *S. v. Williams,* 146 N. C., 626; *Gaskins v. R. R.,* 151 N. C., 21.

(622)

STATE v. CAPPS.

(Filed 1 March, 1904.)

1. HOMICIDE—*Murder—Evidence—Laws* 1893, *Ch.* 85.

   In this indictment for murder there is no evidence of manslaughter, the presumption of malice arising from the killing with a deadly weapon not being rebutted.

2. EVIDENCE—*Homicide.*

   Where one accused of murder had deliberately shot into a house and killed an inmate, evidence that accused was on friendly terms with the family of the deceased is not competent.

3. PUNISHMENT—*Judgments.*

   Where the sentence of the trial court is within the limit fixed by law it is not excessive.

INDICTMENT against George Capps, heard by *Judge W. B. Councill* and a jury, at February Term, 1904, of BEAUFORT.

The defendant was indicted in the court below for the murder of Augustus Tuten, and having been convicted of murder in the second degree appealed to this Court.

The evidence tended to show that the deceased, who was a boy seven years old, lived with his grandmother, Mary McCulloch, whose house was about thirty or forty yards from the home of

the defendant. The house had only one room, and at the time of the homicide there were in this room Mary McCulloch, her three daughters, Georgia, Florence and Annie, and the little boy, who was killed by the defendant some time in the afternoon between 4 o'clock and sunset, one of the witnesses stating that he heard the gun fire about 5 o'clock, and another that she heard it about 4 o'clock. The defendant came directly from his house to the McCulloch house, and had with him a single- (623) barrel gun, into which he placed a shell as he was approaching the house of Mary McCulloch. The principal facts are stated by one of the witnesses for the State, Georgia McCulloch, who testified as follows: "When the defendant got to the house he called me and said, 'Georgia, come here a minute.' I said, 'I have not got time.' He said again, 'Come here a minute,' and I said, 'I have not got time.' Defendant was at the gate when he began calling me. When I said 'I have not got time,' he said, 'You are scared of me, ain't you?' I said, 'No, sir, I ain't scared of you; I am cool.' He said, 'You act like you are scared of me.' I was sitting at the sewing machine during this conversation. I left the machine about the time it was over, and went up to the fire to warm my hands. While I was warming my hands my sister Florence said, 'Mr. Capps, when I go to your house I recognize your house, and when you come to mamma's I want you to do the same.' He then said, 'Florence, 'tain't worth while for you to begin to cut up, God damn it; I am going to shoot.' At the time the defendant and Florence were talking, defendant was standing on the doorstep. He then raised his gun and presented it and fired it right through the door into the house. When the defendant shot, I saw the boy fall in the middle of the floor, between the two doors. I saw the boy after he fell. He was shot in the side. As the boy fell he put his hand to his head and side, and said, 'Uncle George has shot me.' I was about three steps (nine feet) from the boy when he was shot. The boy, myself, my mother and my sisters, Florence and Annie, were in the house when the shooting occurred. After the shooting, the defendant walked around the house and went away." This witness further stated that the defendant did not like any of the McCulloch family much; that he sometimes quar- reled with the little boy; that the gun was pointed in the (624) direction where the deceased stood at the time he was shot, and that the defendant said nothing to or about the boy before he fired the gun. The evidence of the witness Georgia McCulloch was in all essential particulars corroborated by the testimony of Mary McCulloch and her daughter Florence. The witness Florence Tuten also testified that the defendant "shot right

through the house," and when he shot he was twelve or fifteen feet from where the boy fell. After the defendant fired the gun he immediately left the house and went towards the main road, and passed by his own house without stopping; that "he put up the gun to his face and seemed to take aim," but she was unable to say whether or not he put the breech to his shoulder. She further stated that, before the shooting occurred, the defendant's wife came over to their house, and she heard her say, "George, your gun is going to get you into trouble."

Laura Collins, a witness for the State, testified: "I remember when Gus Tuten got killed. I saw the defendant twice that day. The last time I saw him was in the evening, at Mary Tuten's house. I heard a noise or fuss over there. I stopped and heard the defendant say, 'I am going to shoot,' and I saw him raise his gun and take sight along the barrel and fire into the house. After shooting, he turned and walked away from the house. I hid in the bushes, and he passed me with his gun in his hand. It was a single-barrel breech-loading shotgun. I heard the defendant doing loud talking before the shot was fired. When he passed me, after the shooting, the defendant had passed his own house, going on. The shooting occurred about 4 o'clock on Saturday evening. I saw the defendant with the greens in his arms that evening as he went towards Mary McCulloch's house. On his way over there he did not stop at his house or at the
(625) gate. His wife was behind him as he went over. The gun was against his face when he shot."

Annie McCulloch, a witness for the State, testified: "I was present at the time the boy was shot. I heard the defendant say, 'I am going to shoot, damn it,' and he raised his gun up and shot right in the house and struck Gus and killed him. I dodged out of the way when I saw he was going to shoot. The defendant left after the shooting. The back and front doors were both open at the time he shot. The defendant gave Georgia some greens that evening when he came over to our house, and she took them. I do not know where the boy was standing when the defendant came to the door."

Alexander Watson, a witness for the State, testified: "I live about a quarter of a mile from the defendant and Mary McCulloch. I recall the time Gus Tuten was said to have been shot. I heard the gun fire about 5:15 that evening. I saw the defendant as he was going home that evening about 5 o'clock. He had his gun then. His wife and Mary McCulloch were with him. They had some greens. I did not speak to the defendant, nor he to me. About 8 or 9 o'clock that night I saw the defendant again. He came to my house and wanted me to go to his wife

and get his clothes for him. I said, 'You had better leave here.' A few minutes later he came back to the house and asked me to let him go up stairs, and I agreed that he could do so."

There was testimony tending to show that the defendant was not drinking nor under the influence of liquor when he committed the homicide. The jury rendered a verdict of guilty of murder in the second degree, and judgment was entered thereon, to which the defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State. (626)
Small & McLean and *E. F. Simmons* for the defendant.

WALKER, J., after stating the case. The defendant's counsel, at the close of the testimony, requested the court to give certain instructions to the jury, which it refused to do, but we do not deem it necessary to consider or discuss them, as all of the questions intended to be presented by the other exceptions of the defendant are raised by the defendant's exception to one of the instructions given by the court in its charge to the jury. The court charged the jury correctly in regard to murder in the first degree, and also as to the circumstances under which the defendant would be entitled to an acquittal, but told the jury that in no view of the evidence could they convict him of manslaughter, and in this connection the jury were instructed as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant shot the deceased with a gun, inflicting a wound, from which death resulted, but you are not satisfied beyond a reasonable doubt that the shooting and killing were the result of willful premeditation and deliberation, then your verdict should be that of murder in the second degree. If it resulted from willful premeditation and deliberation, then your verdict should be guilty of murder in the first degree. In no view of the evidence, if you believe it, can you return a verdict of manslaughter."

The question, then, is, was there any evidence, if the testimony is considered in the most favorable light for the defendant, upon which the jury could have returned a verdict that the defendant was guilty only of manslaughter? The defendant could not have his case presented here in a more favorable aspect for him than it is by this charge of the court, because, if there is any view of the evidence which the jury might have taken, (627) and which would have reduced the grade of his offense from murder to manslaughter, he is entitled to have us consider the case in that view. We have not discovered any evidence which entitled the defendant to an acquittal, if the jury found as a fact—which fact seems to have been admitted at the trial—that he killed the deceased with a deadly weapon; and we do not

understand it to be seriously contended before us that there was any such evidence. The defendant's counsel, as it appears in the record, virtually admitted the killing with a deadly weapon, and also requested the court to charge the jury "That, upon all the evidence in the case, if believed by them, the jury can find the defendant guilty of murder in the second degree or of manslaughter." The real question, therefore, is whether there was any evidence to reduce the grade of the offense from murder in the second degree to manslaughter.

There is no principle in the criminal law better settled than that, where the killing with a deadly weapon is admitted, or proved, in the sense that it is established as a fact in the case, the law implies or presumes malice, and at common law the killing, if nothing else appears, is murder. *S. v. Willis,* 63 N. C., 26; *S. v. Johnson,* 48 N. C., 266; *S. v. Brittain,* 89 N. C., 481. When this implication is raised by an admission of proof of the fact of killing, the burden is upon the defendant of showing all the circumstances of mitigation, excuse or justification to the satisfaction of the jury. *S. v. Johnson* and *S. v. Willis, supra; S. v. Vann,* 82 N. C., 631; *S. v. Barrett,* 132 N. C., 1005. And that burden continues to rest upon him throughout the trial. *S. v. Brittain, supra.* As malice is an implication or presumption raised by law from the fact of the killing, it must
(628) needs be a matter of law as to what facts or circumstances which the evidence tends to establish will or will not rebut the presumption. *S. v. Matthews,* 78 N. C., 523; *S. v. Byrd,* 121 N. C., 684; *S. v. Wilcox,* 118 N. C., 1131; *S. v. Craton,* 28 N. C., 164; *S. v. Johnson, supra.* Whether the evidence sufficiently establishes the facts or circumstances which will constitute a rebuttal of the implication of the law must as surely be a question of fact for the jury to pass upon; and when, therefore, there is any evidence tending to show these facts or circumstances, it is the duty of the court to submit them to the jury, with proper instructions as to what will be sufficient to rebut the presumption, so that the jury may finally decide whether or not the presumption has been met and overcome by the defendant. It follows that whether there is any evidence in this case to rebut the implied malice is a question of law. When there is a killing with a deadly weapon, the law, as we have said, implies the malice, and the offense at common law is murder, and, under Laws 1893, ch. 85, it is murder in the second degree, if there is nothing in the case to reduce the homicide to a lower grade. *S. v. Wilcox,* 118 N. C., 1131. This being so, all matters in mitigation or excuse must be shown in the same way as at com-

mon law, if the defendant would reduce the offense to manslaughter, or acquit himself altogether of the charge.

We have examined the testimony set forth in the record with great care, and have been unable to find anything which tends in law to extenuate the crime of which the defendant was convicted, and there is certainly nothing to excuse it. Instead of rebutting the implied malice, the evidence tends to strengthen and confirm the presumption raised against the defendant from the act of killing with a deadly weapon. The malice necessary to constitute murder may exist, though there was no intent to kill or even to injure the particular person or anyone else. It is implied when an act dangerous to others is done so (629) recklessly or wantonly as to evince depravity of mind and a disregard of human life; and if the death of any person is caused by such an act it is murder. *Dunaway v. People,* 110 Ill., 338; 51 Am. Rep., 686; *Pool v. State,* 87 Ga., 530; *Galliher v. Commonwealth,* 87 Am. Dec., 493; *Washington v. State,* 60 Ala., 16; 31 Am. Rep., 28; *S. v. Edwards,* 71 Mo., 312; 1 McLain Cr. Law, sec. 325; 1 Wharton C. L., sec. 319; 21 Am. & Eng. Enc., 153.

We believe the authorities cited support the general rule laid down; and several of the cases, while not presenting precisely the same facts, cannot be distinguished in principle from the case under consideration. In Clark's Criminal Law, p. 190, the rule is thus substantially stated: Where a person does an act with knowledge that it will probably cause death or grievous bodily harm to some person, although he has no actual intention to injure any person, but may wish the contrary, and death ensues from his act, he is guilty of murder. Thus, if a man recklessly throws from a roof into a crowded street a heavy piece of timber, which kills a person in the street, or if he intentionally fires a pistol in a crowded street and kills another, in either case it is murder. In *Pool v. State, supra,* the Court says: "The law infers guilty intention from reckless conduct; and where the recklessness is of such a character as to justify this inference, it is the same as if the defendant had deliberately intended the act committed. When, therefore, one recklessly fired a pistol with criminal indifference as to the consequences, and another is killed, it is not necessary, in order to constitute this killing murder, that the accused should at the time of firing have been engaged in the commission of some unlawful act, independent of and in addition to the reckless firing itself." In *Brown v. Commonwealth,* 91 Ky., 472, it is said by the Court: "If we are mistaken as to there being evidence of the appel- (630) lant's malice towards the deceased in particular, it is

clearly established that the appellant, without lawful excuse, intentionally fired the pistol in a room crowded with persons. If he did this, not with the design of killing anyone, but for his diversion merely, but killed one of the crowd, he is guilty of murder; for such conduct establishes 'general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty and fatally bent on mischief.'" In *Aiken v. State,* 10 Tex. Cr. App., 610, it appeared that the defendant fired his pistol into the window of a passenger car, in which he knew there were passengers, and the court said, in discussing the case, that "Where an act unlawful in itself is done with deliberation and intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensues, against or beside the original intention of the party, it will be murder. The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of a forbidden act, and this rests upon the principle that a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." It is further said by the court that, "According to the evidence, the defendant fired his pistol into the window of a passenger car of a railroad train, in which, it is shown, he must have known and did know there were passengers. The deceased was struck by the ball and died in a minute or two thereafter from the effects. More reckless disregard of human life was never shown and can scarcely be imagined, and the act, under the circumstances developed, is and could be in law nothing short of murder." If it be suggested that the killing might have been done accidentally and without negligence, in which case the (631) defendant would be entitled to an acquittal, or that it was done recklessly, but without intention to kill, in which case the defendant would be guilty only of manslaughter, there is no evidence, as we think, to sustain either view. Such a suggestion is fully met and answered by the case of *S. v. Vines,* 93 N. C., 496 (53 Am. Rep., 466), in which *Merrimon, J.,* speaking for the Court, says: "The test of responsibility depends upon whether the conduct of the person accused was unlawful or, not being so, was so grossly negligent, reckless or violent as necessarily to imply moral impropriety or turpitude. In some cases it may be difficult to determine the grade of the offense, but the case before us leaves no ground for doubt or hesitation in determining that it is at least one of manslaughter; indeed in one aspect of the case it was murder. There was some evidence going to show the willful purpose of the prisoner to shoot with-

out regard to the consequences, and if this purpose existed it was murder. If he had been allowed to say that in his opinion the shooting was accidental this could not have materially changed the case, because the prisoner had used the loaded pistol in an unlawful and reckless manner, and whether the firing was accidental or not made no difference. The law does not tolerate such use of deadly weapons, and when fatal consequences result from it the offender cannot be held guiltless; in such case he must answer for the consequences. It would be monstrous and shocking to reason to allow a man to so use a loaded pistol and then take shelter behind the fact that the firing was accidental."

The defendant, on the cross-examination of some of the State's witnesses, proposed to show that he had been friendly with Mary Tuten and her family at the time when the homicide was committed, and also proposed to show certain facts and circumstances from which his friendly feeling towards them could be inferred by the jury. The court excluded the (632) evidence, and we think it did so properly. This evidence, if admitted, could not have reduced the grade of the homicide. A defendant must show something more than a mere friendly disposition towards the person killed if he would justify, excuse or mitigate his offense. It was so decided, as it seems to us, in *S. v. Johnson, supra.*

The evidence in this case tends to show that the defendant's anger was aroused by the refusal of Georgia McCulloch to come to the door of the house when he called her, and perhaps by what Florence Tuten said to him at the time. This reference to the testimony is made, not so much to show that there was evidence in the case of actual malice, as to show that the evidence not only does not rebut the implication of malice but rather tends to confirm it.

The defendant excepted to the judgment upon the ground that the punishment imposed is excessive. The sentence of the court was entirely within the limit fixed by the law. It imposed only the extreme punishment for manslaughter. We do not think in any view of the evidence that it was excessive. *S. v. Miller,* 94 N. C., 904.

Upon a review of the whole case our conclusion is that the rulings and charge of the court were correct.

No error.

Cited: S. v. Lipscomb, post, 695; *S. v. Worley,* 141 N. C., 767; *S. v. Kendall,* 143 N. C., 665; *S. v. Lance,* 149 N. C., 556.

(633)

STATE v. DAVIS.

(Filed 8 March, 1904.)

1. INSTRUCTIONS.

It is not essential that the exact words of a request for instructions should be given, even when correct, if substantially given.

2. INSTRUCTIONS.

Requests for instructions containing recitals not found in the evidence should not be given.

3. DYING DECLARATIONS—*Evidence—Weight of Evidence—Experts.*

The weight of dying declarations and the credibility of testimony of medical witnesses in relation to the condition of the deceased at the time of making dying declarations are questions for the jury.

4. ARGUMENT OF COUNSEL.—*Judge—Exceptions and Objections—Appeal.*

An objection to a statement of the trial judge of the contention of the State, such argument having been used by the solicitor and not objected to, cannot be made for the first time on appeal.

5. INSTRUCTIONS—*Jury.*

A recommendation by the trial judge to the jury not to consider the case until the next morning is not error.

INDICTMENT against Frank Davis, heard by *Judge George H. Brown* and a jury, at November Term, 1903, of LENOIR. From a verdict of murder in the first degree and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
T. C. Wooten and *Shepherd & Shepherd* for the prisoner.

(634) CLARK, C. J. The prisoner was convicted of murder in the first degree. The first, second, fourth and eighth prayers for instructions asked by the prisoner were given. The third prayer, "That the dying declarations of the deceased should be received with caution and care for the reason there being no cross-examination before the jury of the defendant, was given, merely substituting "should be carefully weighed and considered" in lieu of the words "should be received with caution and care." We find no error in the modification. It is not essential that the exact words of the prayer should be given,

even when correct, if substantially given. *S. v. Hicks,* 130 N. C., 710. Here the substituted phrase was more proper than that asked, and is in accordance with the rule stated, 1 Bishop New Cr. Pr. (4 Ed.), p. 743, sec. 1216.

The fifth and sixth prayers were properly refused because containing recitals not found in the evidence. *Harris v. R. R.,* 132 N. C., 160.

The only other prayer, the seventh, was "That in no event can the jury find the prisoner guilty of the crime set out in the indictment under all the evidence in this case." This was properly refused. The dying declarations were coherent and made to several persons, and if believed were explicit as to the guilt of the prisoner. There was also other evidence, though it may be that in the absence of the dying declarations and the identification of the prisoner by the deceased as the man who shot him the jury might not have convicted.

The prisoner's counsel insisted that the testimony of one of the physicians as to the condition of the dying man and its probable effect upon his memory would justify the court in setting aside the dying declarations. The other physician testified that when the declarations were made to him the deceased was in his right mind. The credit to be given to the physician's testimony and opinion, as well as the weight to (635) be given to the dying declarations, was a matter solely for the triers of the fact, the jury. This Court can review only the rulings of the court below upon the law.

The prisoner further excepts that in summing up the contention for the State his Honor said: "The State contends that Frank Davis might have had his shoes hidden in the woods, and that he might have put on his shoes, stood behind the stump and shot Pate, then removed the shoes and returned home barefooted, and that this might have been a mere subterfuge." The court was stating and arraying the contentions of both sides. It is not denied that this argument had been used by the solicitor and had not been objected to. The prisoner could not let it pass unobjected to when made in the argument and again keep silent when repeated by the court as one of the contentions of the State, and then ask a new trial by an exception to the recital of the contention made for the first time in the statement of the case on appeal. *S. v. Tyson,* 133 N. C., 692. The object of all criminal trials is a just and strict enforcement of the law by the conviction of the guilty, with such care for the rights of the accused that the innocent may be protected. But this does not permit the accused and his counsel to be silent in face of what they may deem prejudicial, and when it might be corrected by

the judge (if erroneous) by objection taken in apt time. Besides, in this case, while there was no evidence to the exact purport of the contention of the State, it was not an unfair or unreasonable argument upon the testimony. The solicitor stated it merely as an inference—"might have"—from the testimony, and the jury could not have misunderstood it.

The only other exception is to the recommendation of the court to the jury, doubtless given at a late hour and after a long and fatiguing session, not to consider the case till next morning, and is without merit. It is not shown that it prejudiced
(636) the prisoner in any way, nor can we see that it was likely to do so.

No error.

Cited: S. v. Lance, 149 N. C., 555.

STATE v. EDWARDS.

(Filed 8 March, 1904.)

INTOXICATING LIQUORS—*Elections—Laws* 1895, *Ch.* 159—*Laws* 1899, *Ch.* 507—*Laws* 1901, *Ch.* 89—*Code, Sec.* 2740—*Licenses.*

Under Laws 1901, ch. 89, sec. 76, it is no offense for a person who has license to retail spirituous liquors to sell liquors on an election day.

INDICTMENT against A. M. Edwards, heard by *Judge Frederick Moore,* at October Term, 1903, of CRAVEN. From a quashal of the indictment the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. D. McIver for the defendant.

MONTGOMERY, J. The question raised by the appeal of the State in this case is whether or not the sale of intoxicating liquors on an election day by one who had a license to retail spirituous liquors is unlawful. For nearly a third of a century, from 1868 down to 1900, it was the settled policy of our law that the giving away and the sale of intoxicating liquors within five miles of any polling place on an election day should be prohibited. We first meet with the legislative purpose in section 2740 of the Code in the chapter entitled "Elections Regulated." That section is in these words: "Any person who shall give

away or sell any intoxicating liquors, except for medical purposes and upon the prescription of a practicing (637) physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, shall be guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars." Then the General Assembly, at its session of 1895, enacted a new election law, the act being entitled "An act to revise, amend and consolidate the election laws of North Carolina." The first section of the last-mentioned act repeals the chapter of the Code entitled "Elections Regulated," embracing section 2740, and all laws and clauses of laws relating to elections enacted subsequent to the Code; but section 2740 of the Code was re-enacted in the act of 1895; and in the election laws of 1899 and 1900 the exact words of section 2740 were incorporated. Under the general election law enacted by the General Assembly at its session of 1901, section 2740 of the Code was again, word for word, with the exception of the words "or sell," incorporated (section 76).

From the reading of these various statutes it appears from both the language and the captions that each one of them was a separate and complete election law of itself. Each one was a revising and consolidating statute, covering the whole subject-matter of the antecedent ones, and was therefore a repeal of the others; the last one, that of 1901, being the whole law in North Carolina on the subject of "Regulation of Elections." *Winslow v. Morton,* 118 N. C., 486. It will be remembered that section 76 of the act of 1901 is section 2740 of the Code with the words "or sell" left out, and it is therefore perfectly clear that the matter of selling or giving away liquor, the use of liquor, at or near polling places on election days, was considered by the General Assembly when the act of 1901 was passed; and that being so, it necessarily follows that its last expression on the subject is a repeal by implication of the words "or sell," (638) as they had appeared in the former statutes.

But if there could be any error in that construction of the law the matter is clinched by section 86 of the Laws of 1901, which is as follows: "That chapter 507, Public Laws of 1899, and chapter 1, Public Laws of 1900, and all other laws and clauses of laws in conflict with this act are hereby repealed, *and the law regulating elections as contained in this act shall be construed as above, and not in connection with any existing provisions of law for the regulation of elections.*" (Italics ours.) Those last words confine the courts to the law on the subject of

this indictment to section 76 of the act of 1901 as it is written there.

His Honor properly quashed the bill of indictment for the defendant, under his license to retail spirituous liquors, was not prohibited from selling intoxicating liquors on an election day. It would have been unlawful for him to have given away liquor on that day, but it was not unlawful to sell it.

No error.

WALKER, J., concurring. I concur in the conclusion of the Court in this case, but not for the reasons given in its opinion. The general or common law rule seems to be that the simple repeal, suspension or expiration of a repealing statute revives the repealed statute, whether such repeal was express or implied. *Brinkley v. Swicegood,* 65 N. C., 626; Southerland Stat. Const., sec. 168. But this rule is subject to a well-recognized exception, which is that when the repeal of a repealing statute is for the purpose of substituting another provision in its place the implication of an intention to revive the repealed statute cannot arise, and especially if the substituted provision is repugnant to the original provision or is not properly cumulative to it. So (639) the repeal of a statute which was a revision of and a substitute for a former act to the same general effect, and which was therefore repealed, cannot be deemed to revive the previous act; for this would be plainly contrary to the intention of the Legislature. Endlich Interp. of Statutes, sec. 475; Dwarris on Statutes, p. 159; Sutherland Stat. Const., p. 228. Our case, I think, falls within the exception. By a succession of acts, commencing with chapter 16 of the Code, which was followed by Acts of 1895, ch. 159; Acts of 1899, ch. 507; Acts of 1900, ch. 1, and finally by Acts of 1901, ch. 91, the Legislature has, from time to time, provided a complete scheme for the conduct and regulation of elections in the State, and it was manifestly the purpose that each of said acts should be a substitute for the one that preceded it, and that the last act, which entirely covered the ground of each of the others, should supersede them and become itself the final and full expression of the legislative will on the subject. I can discover nothing on the face of the last act to rebut the intent which the law infers from the very nature of the several acts, but in my opinion there is everything to indicate that the real intention of the Legislature was in strict accordance with that which is presumed by the law. Again, the provision by which the *sale* of liquor within five miles of a polling place and within the twelve hours next preceding or succeeding the day on which any public election is held, was in-

serted in Laws 1899, ch. 507, and Laws 1900, ch. 1, it being section 78 of each of said chapters, and it would be strange indeed if the Legislature intended to revive section 61 of chapter 159 of the Acts of 1895, containing the same provision, or section 2740 of the Code, as argued in this Court, that it should have expressly repealed two acts with that provision in them without making the slightest reservation in respect to it. As far as the act of 1895, sec. 61, is concerned, we find upon (640) examination of the statutes that it was expressly repealed by Laws 1899, ch. 16, and as the latter act simply contained a repeal of the act of 1895, and nothing more, the general rule applied, and the Code, ch. 16, including section 2740, and any intervening general election law repealed by the act of 1895, were thereby revived; but as the Acts of 1899 and 1900 revised all prior general election laws and substituted for them a scheme complete in itself, the Code, ch. 16, was repealed by them (*Winslow v. Morton,* 118 N. C., 486), and the subsequent repeal of those two acts by the act of 1901, ch. 91, did not revive the provisions of the Code under the rule to which I have referred. It all therefore results in this: that the act of 1901, ch. 91, was, at the time the offense is alleged to have been committed, the only law in force which regulated elections. I do not attach any special importance in this discussion to the words in section 86 of the act of 1901, namely: "The law regulating elections as contained in this act shall be construed as above and not in connection with any existing provisions of law for the regulation of elections." These words could not have referred to the Code, the act of 1895, or any other intervening act in regard to general elections, for they had been repealed by the act of 1899 and the act of 1900 successively, and therefore were not "existing provisions of law," and they could not have had reference to the Acts of 1899 and 1900, as they were expressly repealed by the act of 1901, and could not therefore be construed in connection with the latter. While the omission of the words "or sell" from the act of 1901 may have been the result of inadvertence, the general law, when considered in the light of well-settled rules of interpretation, does not now forbid the sale of liquor in the manner in which it is charged in the indictment to have been made, and the court was right in granting the mo- (641) tion to quash.

CLARK, C. J., and DOUGLAS, J., concur in the concurring opinion.

STATE v. ALFRED DANIELS.

(Filed 8 March, 1904.)

1. JURY—*Grand Jury—Challenges—Code, Secs.* 1722, 1725, 1741—*Quashal.*

There is sufficient evidence in this case upon which to base the findings of fact of the trial judge, and upon such findings the motion to quash the indictment on account of alleged discrimination against the negro race in revising the jury list was properly overruled.

2. JURY—*Indictment—Taxation—Grand Jury.*

The irregularity in the county commissioners failing to make the prepayment of taxes a qualification for persons on the jury list, though the subject of censure, is not ground for quashing an indictment found by a grand jury drawn therefrom.

3. CONFESSIONS—*Admissions—Evidence.*

In this prosecution for homicide the statement of the accused as to the killing, not being induced by threats or promises, is admissible.

4. EVIDENCE—*Homicide—Tracks.*

The evidence of footprints near the scene of the crime is admissible in a prosecution for murder, though it is not shown that accused made tracks at the time similar to those found.

5. ARGUMENT OF COUNSEL—*Evidence—Homicide.*

The argument of counsel for the State, in this prosecution for murder, that the accused waylaid the deceased is justified by the evidence.

(642) INDICTMENT against Alfred Daniels, heard by *Judge Frederick Moore* and a jury, at Fall Term, 1903, of LENOIR. From a verdict of murder in the first degree and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, and *A. D. Ward* for the State.

J. C. L. Harris for the prisoner.

CONNOR, J. The prisoner was charged with the murder of F. G. Simmons, and in apt time filed a plea in abatement and moved the court to quash the indictment for that:

1. The list of thirty-six jurors drawn by the county commissioners of Jones County, from which the grand jury was drawn, and which found the bill of indictment, was revised with partiality, unjustly and purposely against competent persons of the

negro race, to which the prisoner belongs, on account of the race or color of such persons.

The officers whose duty it was to revise the jury lists and to draw the panel to be summoned, from which the grand and petit juries were drawn for the present term of the court, at which the indictment was found against the prisoner, with the unlawful and avowed purpose of discriminating against persons of the negro race, excluded the persons who of right, being competent, should not have been excluded from the jury lists; that such unjust and unlawful discrimination against the prisoner deprives him of a fair and impartial trial in this Court, as is guaranteed to him under the Constitution of North Carolina and the Thirteenth and Fourteenth Amendments to the Constitution of the United States and the acts of Congress; that there are in Jones County about seven thousand persons, more than one-third of whom are of the negro race, who pay taxes on more than thirty thousand dollars' worth of property, a large number of whom are equal to the average citizen (643) of said county. In accordance with the request of the prisoner the court caused *subpoenas duces tecum* to issue to the chairman of the board of commissioners, the register of deeds (*ex officio* clerk to the board) and the sheriff of the county, commanding them to bring their several records into court, and also the jury boxes, etc. The motion to quash was founded upon the affidavit of the prisoner. The court, after hearing the testimony offered in support of the motion, found the following facts: The jury box contains the names of four hundred and thirty persons. It does not appear, and the court is unable to find, whether any of said persons are negroes. There are five hundred and twenty-eight colored males residing in Jones County over twenty-one years of age who had paid their taxes for 1902 prior to 1 June, 1903. There are as many white males over twenty-one years of age and upwards residing in said county whose names are not in the jury box as there are colored males of the same age whose names are not in said box. The jury boxes were revised on the first Monday in June, 1903, as required by law: the commissioners taking the tax books or lists for the preceding year and selecting from said tax books or lists the names of such persons as they thought were competent and morally fit to sit on the jury, and placing the names thus selected in the jury box. In selecting the names to be placed in the jury box the commissioners did not think of or discuss the race question. They considered only the question of competency and fitness. They did not make the payment of taxes a prerequisite. They discussed the qualification of various negroes and white men, and rejected

their names when they decided they were not competent and fit. The only test which was applied was capacity and fitness of persons whose names appeared on the tax list. The commissioners at their regular meeting in September, 1903, before
(644) the commission of the alleged offense for which the prisoner is indicted, drew from the jury boxes of the county the names of thirty-six persons to serve as jurors at this term of the court. They were drawn in the manner required by law. The thirty-six persons whose names were so drawn and were summoned to serve as jurors at this term of the court were all white persons. The grand jury was regularly drawn from the thirty-six jurors drawn and summoned as above set forth. It appeared from an examination of the said grand jurors, before they were empaneled, that each of said grand jurors had paid his tax for the year 1902. The total population of Jones County is 8,239, of which 4,479 are whites and 3,760 are colored. The prisoner is a negro. Upon the foregoing findings of fact the motion to quash the bill of indictment is overruled, and the defendant excepted, assigning as cause thereof:

1. That the court erred in not finding that none of the names contained in the jury boxes are the names of negroes.

2. That the court should, from the evidence, have found that the test was not honestly applied, and that negroes or persons of the colored race were unjustly excluded on account of race and color.

3. That there is no evidence upon which to base the findings.

The prisoner was thereupon arraigned and pleaded not guilty. From a judgment pronounced upon a verdict of guilty of murder in the first degree he appealed.

The prisoner, by his motion to quash the indictment for the causes set forth, evidently intended to present the question passed upon by this Court in *S. v. Peoples,* 131 N. C., 784. In accordance with the ruling in that case his Honor granted to the prisoner a *subpoena duces tecum* for the chairman of the board of commissioners, with the jury box, and such other wit-
(645) nesses as the prisoner desired to examine. Counsel for the prisoner in this Court conceded that there was nothing in the statutes prescribing the qualification of grand or petit jurors or the mode of selecting them conflicting with the Constitution of the United States or the amendments thereto. His Honor finds that "in selecting the names to be placed in the jury box the commissioners did not think of or discuss the race question. They considered only the question of competency and fitness. They did not make the payment of taxes a prere-

quisite; they discussed the qualifications of various negroes and white men, and rejected their names when they decided they were not competent or fit." In *Carter v. Texas,* 177 U. S., 442, the defendant, in apt time and by a proper motion, alleged that all persons of the colored race, etc., were excluded from the jury list "on the ground of their race and color, etc." He offered to introduce witnesses and requested the court to permit him to do so to sustain the allegation. The court declined to hear any testimony in support of the motion and overruled the same. The Supreme Court of the United States, reversing the Texas Court, held that upon the allegations made in the motion, the defendant had been denied a right duly set up and claimed under the Constitution of the United States. This ruling was followed by this Court in *S. v. Peoples, supra.* His Honor, in strict conformity with these authorities, granted the subpœnas, heard the testimony, and found the facts in regard to the manner of making up the jury lists as set out in the record. The prisoner's counsel properly conceded that upon the record it does not appear that the prisoner has been denied any right secured to him by the Federal Constitution. He insisted, however, that upon the findings of the court it appears that the commissioners have failed to comply with the statutes regarding the manner of making up the jury list from which the grand and petit jurors were drawn. He says: "According to section 1724 of the (646) Code, the jury list must contain the names of all the inhabitants who are qualified as provided in section 1722 to serve as jurors; and if the list as made out by the clerk of the board of commissioners does not contain all the inhabitants, the commissioners are required to insert the names of such persons or inhabitants in the jury list; that section 1725 provides that the commissioners, after the jury list has been laid before them by the clerk, shall diligently inquire whether any person qualified to serve as a juror has been omitted, and if so, to insert his name and strike off such as were not qualified"; that the commissioners violated section 1722 by making competency and fitness the qualification instead of obeying the requirements of that section; that the number of jurors whose names are in the box being less than one-third of the voting population of the county, and the further fact that there are 528 negro males twenty-one years of age who had paid their taxes, that there are as many white males over twenty-one years of age residing in Jones County as there are colored males of the same age whose names were not in the jury box, "emphasizes the fact that the commissioners did not revise the jury list but made a selection of the persons whom they desired to serve as jurors, and that there

were gross irregularities in making up the jury list." . . . He insists that upon these facts found by the judge his motion to quash the indictment should have been allowed.

We do not care to place the disposition of this case upon the fact that the contention made in this Court is different from and foreign to that made in the court below. The prisoner made his motion in apt time and in accordance with the provisions of section 1741 of the Code. If, upon the facts found, there be any legal ground for quashing the indictment we should not hesitate to grant the motion although such grounds (647) be different from those assigned in the Superior Court.

Any suggestion made pursuant to the rules of practice prescribed, either by statute or the procedure prevailing in the courts, involving the integrity of the jury lists or the manner in which the law in respect to making up such lists has been executed, is entitled to the respectful and careful consideration of the court. It affects not only the honor of the State, but the lives, liberties and property of the citizens. "At common law no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of the court, but the uncontrolled discretion was vested in the sheriff, in the coroner or in officials called *elisors,* of summoning such 'good and lawful men' as they might choose under the command of the writ of *venire facias.* This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens, to remedy which American statutes have generally provided, with more or less particularity, for the preparation a given time before the commencement of any term of court, or at other stated periods, of a list of persons within the county or other jurisdiction from whom jurors are to be summoned." Thompson on Trials, sec. 13. In accordance with this policy of the law, there has been in force in this State, from the earliest period of our history, statutes prescribing the mode of making the jury lists from which the jurors to serve at each term of the court shall be selected by drawing the names thereof from a box provided for that purpose, by a child not more than ten years of age. The law in this respect is set forth in chapter 39 of the Code, the only change since the adoption of the Code being that the time at which the jury lists shall be revised is the first Monday in June instead of September. It is made the duty of the commissioners, at the time stated, in each year, to cause their clerks to lay before them the tax returns of the pre- (648) ceding year for their county, from which they shall proceed to select the names of such persons only as have paid their taxes for the preceding year and are of good moral charac-

ter and sufficient intelligence. The names thus selected shall constitute the jury list. This list shall be revised once every two years, on the first Monday in June, and the names of all inhabitants qualified to serve who may not be of said list shall be added thereto. The commissioners are further required to carefully examine the list, as already made out, compare the same with the tax returns, and diligently inquire whether any persons qualified to be jurors, as provided, are omitted, and whether any persons not qualified have been inserted, and to strike such names from the list. In these four sections is comprised the entire legislation on this subject in force in this State. The remaining sections of the chapter are directed to the manner of drawing from the list thus prepared the jurors to be summoned to attend upon the succeeding term of the court. It has been held, from the earliest period of our judicial history, that the provisions of these statutes are directory and not mandatory. *S. v. Seaborn,* 15 N. C., 305. In *S. v. Haywood,* 73 N. C., 437, *Bynum, J.,* says: "The facts are, that the jury list, from which the grand jury finding the indictment was drawn, contained the names of 451 qualified jurors, but did not contain the names of 241 others who were also qualified and ought regularly to have been on the list, but were omitted therefrom by the county commissioners in preparing and revising the jury list, from some cause not appearing and not alleged to have been intentional or corrupt. Was the indictment well found? is the question. There is no allegation that any of the jurors comprising the grand jury were not properly qualified jurors and were not properly on the list drawn from, or that they were not in every other respect regularly drawn and impaneled in the manner prescribed by (649) law." The learned Justice further says: "It is highly conducive to the fair and impartial administration of justice that these details should be strictly observed and followed, and any intentional nonobservance of them is the subject of censure, if not of punishment. But it is well settled that they are only rules and regulations, which are *directory* only, and have never been held to be *mandatory* where the persons summoned are qualified jurors in other respects." *S. v. Martin,* 82 N. C., 672; *S. v. Smarr,* 121 N. C., 669. The record in this case does not show that any persons qualified to serve upon the jury as jurors were excluded from the list. The argument that such is the case is based upon the facts found by the judge in respect to the number of inhabitants in the county and the number of persons who had paid their taxes. There is no evidence and no finding that persons of good moral character or of sufficient intelligence, residing in the county, were omitted from the jury list. The duty of

passing upon the qualifications of the inhabitants of the county in this respect is imposed upon the commissioners, and, in the absence of any finding that they failed to discharge such duty or exercise good faith in doing so, their conclusion is final and not subject to review. If, however, it be conceded that such persons were omitted from the jury list, it seems to be well settled, both in this country and in England, that this would not be a ground to quash the indictment. In the celebrated case of *O'Connell v. The Queen,* 11 C. & Fin., 155, it was held by the House of Lords, after a most able and exhaustive discussion, that a challenge to the array in the Court of Queen's Bench, alleging that the jurors' book had not been completed in conformity to the act of Parliament, in that the names of a number of persons qualified to act as jurors had been fraudulently omitted from the general (650) list from which the book was made up, for the purpose of prejudicing the defendants, could not be sustained. From this judgment *Lord Denman,* in a masterly opinion, dissented. We are not called upon in this case to adopt the law as therein laid down, as there is no evidence or finding that there was any fraudulent omission of the names of persons from the list. We do not understand the American authorities upon this subject to approve the doctrine to the extent held in *O'Connell's case.* The extent to which they go is thus stated in Thompson on Trials, sec. 33: "Statutes which prescribe the manner of selecting by county, town or other officers, the general list of persons liable to jury duty, from which the panel is drawn, are generally treated as directory only. It is hence a general rule that irregularities in the discharge of this duty constitute no ground for challenging an array. If the jurors who have been selected and drawn are individually qualified, that is generally deemed sufficient." In *People v. Jewett,* 3 Wendell, 314, *Savage, C. J.,* says: "By the act directing the mode of selecting grand jurors, passed in 1827, the duty of making the selection is conferred upon the supervisors of the several counties of the State. They are required to select such men only as they shall know or have good reason to believe to be possessed of the necessary property qualification to sit as petit jurors; to be men of approved integrity, of fair character, of sound judgment and well informed. Thus the qualifications of the grand jurors are defined by statute; and if those selected possessed the required qualifications, there can be no objection to the array. . . . A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without inquiry whether the individuals selected do or do not belong to any particular society, sect or denomination, social, benevolent, political or religious." The

learned Chief Justice says: "But if they did thus err, the array cannot for that purpose be challenged. While those (651) who are selected are unexceptionable, the fact that others equally unexceptionable are excluded is no cause of challenge of the array. A challenge can be supported only by showing that the persons selected are not qualified according to the requirements of the statute."

In this case his Honor expressly finds that the grand jurors were examined before they were impaneled, and that each of them had paid his taxes for the year 1902. There is no suggestion that in any other respect they were not qualified in accordance with the statute. The jury list was revised several months before the commission of the homicide for which the prisoner is indicted. While we cannot approve the course pursued by the commissioners in failing to make the payment of taxes a prerequisite, as required by the act, it having been found that the grand jurors were qualified in this respect, we can see no reason for quashing the indictment upon that ground. It is to be regretted that those who are commissioned to perform this important duty in the administration of public justice should fail to observe the clear and unmistakable requirements of the statute. In *Moore v. Guano Co.*, 130 N. C., 229, it appeared that there were gross irregularities in drawing the jury from the box, which, this Court held, constituted good cause for challenge to the array. The conclusion to which we arrive in this case does not conflict with what is there said. We have carefully examined the several grounds set out by the prisoner in his motion to quash the indictment for alleged irregularities in making the list, and find no error in his Honor's refusal to grant the motion. The law secures to him, as to every other citizen of the State, without regard to race, color or other condition, the right to a fair and impartial grand jury, composed of the inhabitants of the county qualified to serve as jurors. This, upon the finding of the court below, he has had, and he has no just (652) cause of complaint.

We find in the record no other objection to the petit jury, either by way of challenge to the array or to the poll.

We proceed to pass upon the exceptions made to his Honor's rulings on the trial. The testimony tended to show that the deceased was shot, upon his own land, a short distance from the river low grounds; that he was last seen early in the morning of the day of the homicide, going into the woods; that about 9 o'clock a witness, introduced by the State, heard two guns fire down the river, and, after the last firing, heard some one "holler." The deceased was seventy-seven or seventy-eight years old.

The body was found on the day following the disappearance of the deceased, about one hundred and fifty yards from the road; it was lying on side; his gun was about ten steps from him and had not been discharged; shells looked as if they had been in the gun three or four weeks; the woods where the body was found were right thick; one could not see the deceased from where he was found to the river; the leaves were disturbed somewhat; shot in the front, six wounds just over the heart, ranged slightly up. There was evidence tending to show that the prisoner crossed the river on the morning that the deceased was missing; that he made a paddle of cypress boards; he had a gun with him; the paddle was found near the river and identified as being the same one that the prisoner had made. One witness testified that "On the morning the deceased was found, several persons took a boat, went up the river and looked at the bank, found that a boat had landed right off against where they found the body; the bank looked like some one had slipped in; saw two tracks made by some foot measuring eight or nine shoe; sole of left shoe was cut and left there, and there was an impression where the man got up and got in a boat; tracks went up to where the
(653) body was found, almost straight from where the boat landed. The witness got into a boat, and saw a boat, which in the morning had been a little down the river, on the opposite side of the river; went across and landed and saw tracks where a man had got out; a paddle was in the sunken boat; a chain was thrown around the cypress knee, but not fastened; tracks on each side of the river were the same—sometimes walking and other times running; followed the tracks up to the fields." The witness described the course of the tracks. One witness testified that he was with the prisoner in the woods some time before the homicide. The prisoner went to the house and got a gun and shot a squirrel and hid the squirrel under bushes; asked him why he did that; he said that Ed. Cox was as damned a rascal as Furney Simmons (the deceased), and that he would be out there directly; said that Simmons would come into the woods and get after him for shooting; said that he wished F. G. Simmons would run on him one time, and he would give him his dose and leave him there. Clen Simmons was the son of the deceased. This was in 1901. There was testimony to the effect that the prisoner had bought shells about two weeks before the homicide; they had No. 4 shot in them. There was evidence of some conversation between the prisoner and other persons in regard to hunting on posted land, and that the land of the deceased had been posted. The prisoner said frequently that he was going to hunt upon the land of the deceased if he had to kill

him. One witness swore that he saw the prisoner about sunrise on the day of the homicide; that he said he was going towards Quaker Bridge and down by the side of the river and kill some squirrels. There was much other evidence of the same character, to which no exception was made.

The prisoner was carried to the jail of Craven County. When brought back to Jones County, in custody of the sheriff, he got off the train and saw a big crowd of colored "camp- (654) meeting" people, and seemed to be scared. About halfway between Core Creek, where he left the train, and Trenton, he made a statement. No one besides the sheriff, Will Baker and the witness were with him. The prisoner said: "Do not let them hurt me." Sheriff Taylor said: "No one shall hurt you"; said that he would sit beside the prisoner, and if they shot they would hit both. The witness Brogden asked the prisoner how it was. He said he was coming up the river and Mr. Simmons beckoned to him to come across the river. He said when he got up to the bank the deceased told him to stop, that he was close enough. The deceased said that he was tired of these negroes and white people hunting on his land, and that he was going to shoot him. The deceased threw up his gun to shoot him, and that he (the prisoner) began to "holler"; that the deceased took his gun down to cock it, and he shot him; that he then went across the river. The witness then asked him if the tracks found were his, and he said "No," that he was in the boat on the river when he shot the deceased, and the deceased was on the bank; that he was coming up the river. To all of this the prisoner objected, and excepted to its admission. This witness further testified that he went to where the body was found; that the banks were about six feet high and the bushes were thick, and it could not be seen by one on the river; would have to be on the bank; he saw where the boat had landed; saw the track which looked like a man had jumped down hill and slid; did not see any tracks above there on the hill; the body was in the woods when he got there; no shots in the arm; butt of the gun was towards the river; if the deceased was pointing the gun towards the prisoner the muzzle would have fallen toward the river. We find no error in his Honor's ruling in admitting this testimony. No threats were made. There is no suggestion that the crowd of people made any demonstration or did anything (655) to put the prisoner in fear.

The prisoner objected to testimony in regard to the tracks, because no comparisons were made and no similarity of tracks shown, other than that they were made by an eight or nine shoe. It is well settled that evidence in regard to tracks is of little

value, unless it is shown that the person charged with the crime made tracks at the time similar to those found at or near the place of the crime. They are competent, however, in connection with other testimony, and entitled to such weight as the jury may give them.

The prisoner excepted because his Honor allowed the State's counsel to argue at length that the prisoner waylaid the deceased, whereas there was no evidence to support his argument. We are of the opinion that there was no error in that respect. We find no exceptions to his Honor's charge in the record. We have carefully examined the testimony and the entire record, and find no error therein.

The question as to the prisoner's guilt depended entirely upon the finding of the jury as to the truth of the testimony and the conclusions to be drawn therefrom. Upon a careful consideration of the entire record, we think there is

No error.

Cited: *S. v. Teachey,* 138 N. C., 591; *S. v. Exum, ib.,* 607; *S. v. Horner,* 139 N. C., 606; *S. v. Bohanon,* 142 N. C., 699; *S. v. Hodge, ib.,* 695; *S. v. Hunter,* 143 N. C., 610; *S. v. Jones,* 145 N. C., 470; *S. v. Paramore,* 146 N. C., 606; *S. v. Banner,* 149 N. C., 521.

(656)

STATE v. TEACHEY.

(Filed 8 March, 1904.)

EVIDENCE—*Homicide.*

In a prosecution for homicide, where defendant's father testified that defendant was at home at 7 o'clock on the night of the shooting, and that he (the father) went to bed early and did not see defendant until the next morning, and deceased was shown to have been shot about 9 o'clock that night, testimony of a State's witness that a few days after the shooting the father said, on hearing that the shooting was done at 9 o'clock, that he might as well give the case up, as he could not account for defendant after 7 o'clock, was inadmissible, for it was neither contradictory of any statement of defendant's father nor connected with any fact concerning the shooting.

INDICTMENT against Dan Teachey, heard by *Judge O. H. Allen* and a jury, at August Term, 1903, of DUPLIN. From a verdict of guilty of murder in the first degree, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Stevens, Beasley & Weeks* for the State.

J. O. Carr and *John D. Kerr* for the prisoner.

MONTGOMERY, J. In addition to the statement of witnesses concerning the dying declarations of the deceased, there was strong evidence that the prisoner shot and killed the deceased. His Honor, however, in the course of the trial, received a certain piece of evidence, offered by the State, which was so clearly incompetent, and which may have been harmful to the prisoner, that we are on that account compelled to order a new trial.

Robert Teachey, the father of the prisoner, testified for the defense that his son, the prisoner, was at his home at (657) 7 o'clock on the night of the shooting, and that he (the father) went to bed early and did not see the prisoner until next morning. The deceased was shot about 9 o'clock at night. W. D. Teachey, a witness for the State, was allowed to testify, over the prisoner's objection, that on Sunday, after the shooting, he, at the house of Robert Teachey, was asked by Robert if he (W. D.) had heard anybody say at what time the shooting took place, and that he answered, "About 9 o'clock," and that in reply Robert said: "I might as well give the case up, as I have no grounds to fight upon. I cannot account for Dan after 7 o'clock." Joe Bostick testified that he heard Robert Teachey say that he could not account for Dan after 7 o'clock. At the close of his testimony the jury were instructed "That the evidence as to what Bob Teachey (who is the same as R. Teachey) said was not to be considered, unless they found from the evidence of said Teachey that he fixed Dan Teachey at home that night after 7 o'clock, and he (Bob Teachey) was thereby contradicted." Assuming that this instruction to the jury had reference to the testimony of W. D. Teachey, as well as to that of Bostick, it could not have the effect of curing the error in the admission of the testimony of W. D. Teachey. In no sense could the testimony of W. D. Teachey be considered as contradictory of any statement made by Robert Teachey as to the whereabouts of Dan on the night of the shooting. The despair of the father, Robert, in successfully defending his son against the charge of murder had no connection with any statement made by the father as to the time when he saw the son last on the night of the shooting. It was entirely independent of all reference as to the time of the shooting, and was but the individual opinion of a distressed parent about the difficulties surrounding his son's condition. It was not contradictory of any statement (658)

made by the witness, and was not connected with any fact concerning the alleged homicide.

New trial.

Cited: S. v. Exum, 138 N. C., 610.

STATE v. GREEN.

(Filed 16 March, 1904.)

1. ASSAULT AND BATTERY—*Evidence—Self-Defense — Questions for Jury.*

The trial judge should not instruct that the defendant is guilty of assault and battery under his own defense, if the jury could find from any phase of his evidence that he acted in self-defense.

2. INSTRUCTIONS—*Judge—Code, Sec.* 413—*Trial.*

The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence."

MONTGOMERY, J., dissenting.

INDICTMENT against Thomas Green, heard by *Judge Frederick Moore* and a jury, at November Term, 1903, of CRAVEN.

The defendant was indicted for assault and battery upon Mack Hudson. There was testimony on the part of the State tending to show that the prosecuting witness was employed in a barroom as a clerk, and that about 11 o'clock at night the defendant, together with one Flowers, entered the barroom and called for the witness (Hudson); that he came into the room, and immediately Flowers demanded of him to know what he had been saying about the defendant. Thereupon a dispute arose between Flowers and the witness, which was followed by Flowers striking Hudson with his fists and knocking him down.

(659) The defendant testified as follows: "Flowers hit Hudson. He (Hudson) went behind the counter and got a pot and threw it at me, and I struck him with a bottle. I had to strike him to keep him from striking me. Hudson was drinking." On cross-examination, he said: "After Hudson threw the pot at me, he was advancing on me. He was as far from me as the post at the corner of the bar, fifteen or twenty feet, behind the counter. I threw the bottle, partly filled with benzine, at him. He had thrown the pot at me. I threw the bottle at him because he threw the pot at me. I think he would have thrown

something else at me. He was advancing on me when I struck him, but had nothing in his hand. Flowers had knocked Hudson down. I think Hudson intended to strike Flowers with the measuring pot which he threw." This was all the evidence offered by the defendant.

The court instructed the jury that if they believed the evidence they should convict the defendant. The defendant excepted and appealed from the judgment pronounced upon a verdict of guilty.

Robert D. Gilmer, Attorney-General, for the State.
D. L. Ward for the defendant.

CONNOR, J. The sole question presented upon the appeal is whether the court was correct in instructing the jury that in any phase of the defendant's testimony he was guilty. This excludes from our consideration the testimony in behalf of the State. We are of the opinion that the case should have been submitted to the jury, with proper instructions, to the end that the jury should say what portion of the defendant's testimony was true and what portion of it was untrue. His testimony, taken in one aspect, certainly establishes his guilt. It is equally true that, taken in another aspect, he was not guilty. It is the (660) province of the jury to say what portion of the testimony they will believe and what portion they will reject. Taking his testimony alone, there is nothing to show that he went there for the purpose of provoking or engaging in a difficulty with the State's witness. As he states the transaction, Flowers hit Hudson, Hudson threw a missile at him, and he was advancing on him when he struck Hudson with the bottle. He says: "I had to strike him to keep him from striking me. He was advancing on me when I struck him, but had nothing in his hands." It is true that he says that he threw the bottle because Hudson threw the pot at him. It was the province of the jury to reconcile these statements, or reject that which they find untrue. If the jury shall find this to be a correct statement of the transaction, and shall further find that he had reasonable ground to apprehend that he would be stricken, that the witness was advancing upon him, and that he used no more force than was necessary, or reasonably appeared to be necessary under the circumstances, to prevent the assault, he would not be guilty. *S. v. Davis,* 23 N. C., 125; 35 Am. Dec., 735. If, on the other hand, the jury should find that he threw the bottle at the witness because he threw the pot at him, he would undoubtedly be guilty; or, if they should find that he did not have reasonable ground to apprehend that he would be stricken, or, having such reasonable ground, he

used excessive force—that is, more force than was necessary or reasonably appeared to be necessary—he would be guilty. These are questions for the jury and not for the court to decide.

If the jury find the transaction to be as testified by the State's witness, he would undoubtedly be guilty; but, for the purpose of passing upon the defendant's exception, we must take his testimony as being true, and exclude the consideration of the State's evidence. We would suggest that this Court has held
(661) that the formula used by his Honor to the jury—that "if they believed the evidence they should convict the defendant"—is open to criticism. *S. v. Barrett,* 123 N. C., 753; *Sossamon v. Cruse,* 133 N. C., 470.

Section 413 of the Code prescribes the duty of the judge in charging the jury: "He shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." We feel sure that the error of the learned and careful judge who tried this case was an inadvertence. The testimony strongly tended to show the defendant's guilt, and doubtless so impressed his Honor.

In the administration of the criminal law it is wise to observe the "landmarks," and preserve the well-defined rights and duties of the court and jury.

The defendant's exception to his Honor's charge must be sustained, and, for the errors complained of, he is entitled to a New trial.

MONTGOMERY, J., dissenting. I regret to have to enter my dissent to the opinion of the Court; but, after a careful examination of the evidence, I am so clearly of the opinion that his Honor correctly instructed the jury as to their duty that I am constrained to do so. The State introduced evidence to the effect that the prosecuting witness, Mac Hudson, a negro, was employed in a barroom, conducted by a negro in the city of New Bern, as a clerk, and that about 11 o'clock one Saturday night in July, 1903, the defendant Thomas Green, together with a man by the name of Flowers, both white men, entered the barroom and called for Hudson; that Hudson came into the room, whereupon Flowers demanded of him to know what he had been saying about the defendant Green, and that instantly a dispute arose between Flowers and Hudson, which resulted in Hudson
(662) being knocked down by Flowers. There was evidence, too, that the defendant Green threw a bottle, partly filled with benzine, which struck Hudson on the forehead. The injury from the blow was a severe one. Prior to the throwing of the bottle by Green there had been no words between Green and

Hudson and no demonstration by Hudson against Green, and that Green cursed Hudson before he struck him with the bottle. Green was examined as a witness in his own behalf, and said that Hudson went behind the counter and got the pot and threw it at him, and that he struck Hudson with the bottle. He said, further, that he had to strike Hudson to keep Hudson from striking him, and that Hudson was drinking and advancing on him. On his cross-examination, however, he said that Hudson was fifteen or twenty feet off and behind the counter when he (the witness) threw the bottle at him, and that he threw the bottle at him because Hudson had thrown the pot at him. In the conclusion of his cross-examination he admitted, too, that he thought Hudson had intended to strike Flowers with the measuring pot when he threw it. The court instructed the jury that if they believed the evidence they should convict the defendant.

From a careful examination of the evidence in the case, and from the testimony, especially of the defendant, it appears that, even if Hudson had ever intended to or actually did have trouble with Green, the defendant, that he (Green) provoked it, and was therefore himself guilty. But his own cross-examination shows that Hudson was behind his counter, fifteen or twenty steps from the defendant, at the time when the defendant threw the bottle of benzine.

The defendant, as we have seen, admitted, too, that he thought Hudson, when he threw the measuring pot, intended to strike Flowers, who had knocked Hudson down. The testimony of the defendant in respect to the reason which he gave for his assault on Hudson, viz., that he threw the bottle of (663) benzine at Hudson because Hudson had thrown the measuring pot at him, cannot be a justification or excuse for his act. The law does not justify an assault by way of retaliation or revenge for a blow previously received. *S. v. Gibson,* 32 N. C., 214. It appears, further, that Green did not deny that he cursed Hudson before any demonstration or word had been made or spoken by Hudson; and, as we have seen, the defendant admitted at the end of his cross-examination that he thought Hudson threw the measuring pot at Flowers.

Upon the whole matter, as I see it, there were no variant aspects of the evidence to be submitted to the jury. If it was true, the defendant was guilty in law; otherwise, he was not. His Honor expressed no opinion as to whether the jury ought or ought not to believe the evidence. He simply said, "If you believe the evidence, the defendant is guilty."

Cited: S. v. Garland, 138 N. C., 683; *Merrell v. Dudley,* 139

N. C., 59; *S. v. Hill,* 141 N. C., 772; *S. v. Simmons,* 143 N. C., 617; *S. v. Godwin,* 145 N. C., 463; *S. v. R. R., ib.,* 572, 577; *Smith v. R. R.,* 147 N. C., 609.

STATE v. DUNN.

(Filed 16 March, 1904.)

1. ASSOCIATIONS—*Benevolent Associations—Embezzlement—Code, Secs.* 1014, 1017, 724, 764, 1399, 1402, 1617, 1618, 1865, 1868.

An association organized for the benefit of its members solely is not a benevolent or religious association under sec. 1017 of the Code.

2. ASSOCIATIONS—*Benevolent Associations—Code, Sec.* 1017—*Embezzlement.*

The treasurer of an association having rendered a statement of his receipts and expenditures thereby complied with the provisions of the Code, sec. 1017, requiring him to render an "account," and is not guilty of embezzlement.

3. ASSOCIATIONS—*Statutes—Construction—Embezzlement.*

In section 1017 of the Code, the words "benevolent" and "religious" qualify the words "society" and "congregation" as well as "institution."

(664) INDICTMENT against C. F. Dunn, heard by *Judge George H. Brown* and a jury, at November Term, 1903, of LENOIR. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Land & Cowper* for the State.

N. J. Rouse, Loftin & Varser and *W. D. Pollock* for the defendant.

WALKER, J. The defendant was indicted, under section 1017 of the Code, in one count, for unlawfully lending, and in the other for unlawfully failing to account for, money belonging to the Love and Union Society, an unincorporated body or association of individuals. The members paid an initiation fee and monthly dues, and in this way the necessary funds were raised for the uses of the society, which was formed "for extending aid to sick members and their families and to defray the expenses of

burying their dead." The defendant was a member of the society, and was elected treasurer. In his official capacity he received the funds of the society, and when demand was made by the proper authority upon him to account and pay over the money to his successor he refused to pay the money, though he presented a statement of the amount in his hands, and this appears to have been correct and to have been satisfactory to the trustees.

We deem it necessary to consider only one or two of the questions involved in the case in order to dispose of this appeal.

The defendant's counsel requested the court to charge the jury that the Love and Union Society is not such a (665) benevolent institution or organization as is described in section 1017 of the Code, and that they should therefore acquit the defendant. The court refused to give his instruction, but charged the jury that if they believed the testimony beyond a reasonable doubt, it is established that the Love and Union Society is a society or congregation within the meaning of that section of the Code; that the words "benevolent" and "religious" are adjectives, qualifying the word "institution," but not the words "society or congregation." The court further charged that if the jury believed the testimony beyond a reasonable doubt, the defendant, as treasurer of the society, had failed to account for and pay over the said money to the proper officers, and, therefore, that he is guilty under the second count. The defendant excepted to the refusal to give the instruction, and also to the charge. The jury convicted the defendant, and from the judgment upon the verdict he appealed.

In this construction of the statute we cannot concur. The society was organized for the mutual benefit and advantage of its members, and was not "benevolent" within the ordinary meaning and acceptation of that word. Webster defines "benevolent" to mean, "Having a disposition to do good; possessing or manifesting love to mankind and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable." Substantially the same definition is given in the other standard dictionaries. Black, in his Law Dictionary, defines benevolence as the doing a kind or helpful action towards another, under no obligation except an ethical one. He says it will include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. A benevolent society, of course, is one organized for benevolent purposes. He defines a benefit society as one which (666) receives periodical payments from its members and holds them as a fund to be loaned or given to those of the members

needing pecuniary relief. "The essential difference between a benevolent association and a beneficial society, in the strict use of those terms, is that the former has for its object the conferring of benefits without requiring an equivalent from the one benefited, and in that sense it may be a charity." 3 Am. & Eng. Ency. (2 Ed.), p. 1043. In *Attorney-General v. Critchett,* 37 Minn., 13, an association was organized as a "benevolent" one, under a special statute, for the purpose of endowing the wife of each member on his marriage with a sum equal to as many dollars as there were members. The Court, in passing upon the validity of its incorporation, said: "It is clear, from the plan of the association, that it was not intended to bestow any benefit or help without what was thought to be an equivalent," and the Court therefore held that it could not be a "benevolent society," within the ordinary or legal meaning of those words. And so, in another case, in which the association was in all essential respects like the one described in this case, the same Court said that "The undertaking is not in any sense benevolent, but is for a *quid pro quo;* it is paid for. It is no more a *benevolent* society than any mutual insurance company or other mutual company, or any partnership of which one member undertakes to do something for the pecuniary advantage of another member in consideration of the undertaking of the latter to do a like thing for him." *Foster v. Moulton,* 35 Minn., 458; Beam Benev. Soc., sec. 44. The law upon the subject is clearly stated in *Gorman v. Russell,* 14 Cal., 531. In that case it appeared that certain persons of a particular avocation associated and agreed that each should contribute a certain fixed sum to the common treasury, which sum, consisting of initiation fees and dues, was (667) to be applied, in certain events, as in sickness, etc., to the relief of the necessities or wants of the individual members or of their families. The Court held that it was not a benevolent society, nor a charity, any more than an assurance or benefit society is a charity, and that it was simply a fair and reciprocal contract among the members to pay certain amounts under certain contingencies to each other out of a common fund.

It is perfectly clear in our case that the members of the society united for the purpose of mutual benefit and advantage, and not merely from motives of charity, or with the desire or the design merely of doing good to *others,* which would seem to be the very essence of benevolence. The object of their organization was a most commendable one, but, though it was laudable in its purpose, it was not for that reason benevolent. The statute (Code, sec. 1017), being a penal one, must be construed strictly. We are of the opinion, therefore, that the court erred in refusing to

give the instruction prayed for by the defendant, and in the instruction given to the jury to the effect that the Love and Union Society was a benevolent society, within the meaning of section 1017 of the Code.

We think there was also error in the instruction that the adjectives "benevolent" and "religious" do not qualify the words "society and congregation." The general arrangement of the section and of those particular words with respect to each other, and the punctuation, clearly indicate that the purpose was to protect only benevolent or religious institutions and benevolent or religious societies or congregations, and it was not intended that the section should apply to any society, regardless of its being either of a benevolent or religious character. We observe that the word "congregation" is used in the indictment in describing the society. The evidence does not disclose why this word was so used. It may be that it is a religious society or congregation in fact, though the proof does not show (668) it to be such. If it is, then, of course, the case would come within the provisions of that section of the Code, but it may be necessary in that event to send another bill, so that the allegations can be made to correspond with the facts as they will be shown at the next trial.

If the defendant is not indictable under section 1017, it may be that he is amenable to the law under section 1014. We do not think that the words "fail to account," as used in section 1017, refer to any failure to pay upon demand what is in the hands of the fiduciary, but only require that he shall render an account or statement of the funds, and, too, an itemized account, if required, in order that it may be known what disposition he has made of the funds entrusted to him. An account is defined to be "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates." Black's Dictionary, p. 17. In our statutes the word is used in this sense, and when not only an account, but payment or settlement, is intended, additional words are used to express that idea. Code, secs. 724, 764, 1399 to 1402, 1617, 1618, 1865, 1868. In this case the defendant seems to have rendered what was accepted by the prosecutors as a satisfactory account, but the court charged that if he failed to pay on demand he had not complied with the requirement of the law. We do not think this is so. A failure to pay or settle on demand would be an unlawful conversion, and, if done with a dishonest, corrupt or fraudulent intent, would be embezzlement, which particular offense is indictable and punishable under section 1014. It is for this reason that we have suggested that the defendant may be indictable

under the latter section. If so, there must be a separate bill, as counts under each of the sections (1014 and 1017) cannot be united in the same bill. *S. v. Watts,* 82 N. C., 656. The fact that the defendant is a member of the society may seem
(669) to present an obstacle in the way of his successful prosecution under section 1014, but it seems to be settled by the authorities that where a member of an unincorporated society receives money of the society, not in his capacity merely as a member, but in trust or as a fiduciary, he will be criminally liable for any embezzlement of the money so held by him. Having acquired it by virtue of the confidence reposed in him, any fraudulent conversion of it is indictable, although, as a member of the society, he may be one of the joint owners of the money, and his conversion of it, therefore, would not, at common law, have been criminal. McLain Crim. Law, sec. 631; *Reg. v. Woolley,* 4 Cox C. L. C., 251, 255; *Reg. v. Turberville, ib.,* 13; *Rex v. Hall,* 2 Eng. Cr. Cases, 474; *Reg. v. Proud,* L. & C., 97; *Reg. v. Murphy,* 4 Cox Cr. L. Cases, 101. In *Reg. v. Woolley, supra* (p. 251), the defendant was indicted for embezzling funds, the property of E. M. B. and others, his partners (members of Friendly Society), and pleaded that he could not be convicted because he was a member of the society. The Court said: "Even assuming that the prisoner, being himself one of the members, was included in the word 'others,' that point was taken in a case before *Mr. Justice Erle,* at the last Monmouth Assizes (*Rex v. Tuberville, supra*), and that learned judge ruled that he should consider the prisoner included or excluded in the word 'others,' as the justice of the case might require." The same principle is laid down in *Laycock v. State,* 136 Ind., 217, in which the Court says: "The fund in question was set apart and devoted to charitable and benevolent purposes. The appellant was made the trusted agent of the association, charged with the duty of preserving its funds for the use of the needy and distressed brothers of the order; and an answer by him to a charge of fraudulent conversion that he had an equal interest with the others therein, and no one had a right to complain because there was no
(670) principal entitled to its recovery, does not find support under existing statutes. This money having been dedicated to the wants of the sick and helpless, the trustee had no right to profane or violate a sacred trust in the manner charged, and for such he is answerable. The act of embezzlement may be perpetrated as well against the property of an association as of a corporation." We see, therefore, that the technical rule of the common law that in general a party having a right of property in goods, and also a right to the possession, cannot be guilty of

larceny, and consequently that tenants in common, joint tenants and partners cannot be guilty of stealing their own property (Roscoe Cr. Ev., p. 626), seems not to apply to a case of embezzlement by one who has received the property in trust and confidence to apply it to certain specific uses. We merely call attention to this principle for the purpose of showing the difference between section 1014 and section 1017 of the Code, the latter referring only to the unlawful lending of money or failing to "account" for the same when received in trust for a benevolent or religious institution, society or congregation, and the former to the fraudulent conversion of the same (evidenced by the failure to pay over on demand) when received in trust for any corporation, person (or persons, by the Code, sec. 3765, subsec. 1) or copartnership.

Whether the prosecution can be successfully maintained under the present indictment, and whether it is advisable to send a bill under section 1014, are matters which we leave entirely to the consideration of the learned and able solicitor who prosecutes in behalf of the State in the district from which the case has come to this Court.

We only decide now that there was error in the rulings of the court as above indicated, and because thereof there must be another trial.

New trial.

Cited: S. c., 138 N. C., 673.

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(671)

STATE v. GEORGE W. DANIELS.

(Filed 22 March, 1904.)

1. HOMICIDE—*Premeditation and Deliberation—Questions for Jury —Questions for Court—Laws* 1893, *Ch.* 85—*Intent.*

In a prosecution for homicide, whether certain evidence shows premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court.

CLARK, C. J., dissenting.

INDICTMENT against George W. Daniels, heard by *Judge George H. Brown* and a jury, at November Term, 1903, of DUPLIN. From a verdict of murder in the first degree, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Charlton & Williams* for the State.

Stevens, Beasley & Weeks for the prisoner.

CONNOR, J. The prisoner was charged with the murder of one Maxwell, and from a conviction of murder in the first degree, and judgment thereon, appealed. The prisoner's counsel requested several prayers for special instructions, all of which were refused. In the view we take of the case, it is unnecessary to pass upon the exceptions to his Honor's refusal to give them. There was, besides the prisoner, but one eye-witness to the homicide. Rufus Stroud, introduced by the State, testified that he saw Maxwell alive last in the woods, dipping turpentine. George Daniels shot him; he saw the prisoner standing in the path, the deceased standing by the side of a pine; the prisoner asked the deceased why he went to his house last night, and the
(672) deceased said he did not go; the prisoner said, "You are a damned liar, you did; I am going to kill you; throw up your right hand." The prisoner then shot him; he was in about ten or eleven steps from the deceased; shot once. When he shot, the witness ran off; the deceased ran to him and said, "I am shot." He died in a short time. The deceased was about three feet from the prisoner when shot, and had a turpentine dipper in his hand. There was evidence on the part of physicians that the deceased died from wounds inflicted by the prisoner.

The prisoner testified in his own behalf that he was at his tobacco barn the night before the homicide; that he left there that morning about sun-up; Susan Whaley and Hannah and their children stayed with him from midnight till he left; all started to the prisoner's house; he told Susan to prepare breakfast; the night before, he had taken his gun to the tobacco barn, and as he passed by the barn, going down the path, he stopped and shot the gun; went down the path toward the Pink Hill Road, calling the women; had started to George Turner's, where they said they were going; was going along the path, about fifty yards from the fence; saw the deceased; he was about forty yards in the woods from the road; was standing on one knee on the ground and one hand on a log; did not know he was in the woods at this point; was calling Susan and Hannah as loud as he could; some one said, "What is the matter?" Looked in the direction of the voice, and the deceased arose and said, "What do you want?" He said, "I want my people." The deceased said, "You shan't have them; I will protect them." The deceased was coming towards the prisoner with a dipping iron in his hand (a piece of flat iron twelve inches long and nearly one inch thick

to a point, and handle five feet long). The deceased said that the prisoner had been talking about him; he was very mad. The prisoner said, "Will, if you don't quit coming on me, I will shoot you." He said, "Shoot, shoot"; was then (673) about ten or fifteen steps off, and had about stopped when the prisoner shot; had the dipper in one hand, up against the tree, and with his hands spread out against two trees; he was not in striking distance, making no effort to strike the prisoner with the dipper; had no previous difficulty with the deceased. The prisoner was looking "for his folks"; snapped the gun at him before it fired; the prisoner had not seen the deceased before on that morning; did not know where he was; did not know whether the women were in the woods. The prisoner and the deceased were perfectly friendly; had not had any difficulty, and was not mad with him; when he shot, was "scared" of him; he weighed about 140 pounds. "I shot him because I was scared of him, with the dipper, coming towards me; was on good terms with him; never went there to shoot him; did not expect to see him." The prisoner ran off and went to Jim Maxwell's and told him he had shot Will Maxwell, and he asked him why, and he told him that "Maxwell was coming with a turpentine dipper at me"; told several others; went to Stroud and surrendered; "told him to take me in charge." There was much testimony in regard to the prisoner's mind before and after the homicide. Several witnesses described his conduct, and expressed the opinion that he was crazy, some of the witnesses saying that "he was insane." Dr. Smith, who heard the testimony, gave it as his opinion that "he was not insane." Dr. Kennedy testified that he had known the prisoner four years and had heard the testimony. "From the evidence of the witnesses, and my previous knowledge of him, I would not say he was bright; I think he was crazy from the way he did and the way he acted." The prisoner excepted specially to portions of the charge. The only exception which we deem it necessary to discuss is to the following instruction:

The court stated to the jury that only two persons have testified that they were eye-witnesses to the homicide; the (674) one is the prisoner and the other is Rufus Stroud. The court then read the evidence of Rufus Stroud, and charged the jury that, "If you find those facts to be true, beyond a reasonable doubt, the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation upon the part of the prisoner."

There was evidence proper to be submitted to the jury to show premeditation, and, if believed by them, to justify the verdict of murder in the first degree. Hence there was no error in the

refusal of his Honor to instruct the jury as prayed by the prisoner in that respect.

The sole question, therefore, to be considered is whether his Honor was correct in saying to the jury that if they found the facts to be as testified by Stroud, "the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation." Whether an act is the result of premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court. In *S. v. McDonald,* 133 N. C., 680, *Mr. Justice Walker,* writing for the Court, said: "When an act becomes criminal only by reason of the intent, unless the intent is proved the offense is not proved, and this intent must be found by the jury as a fact from the evidence. It is for them to infer, and not for the court." The authorities cited in the opinion fully sustain and illustrate the principle. It may be that, as an inference to be drawn by the jury, we should not hesitate to say that they came to a correct conclusion. In the light of the charge, they were not permitted to draw an inference, but, upon finding the account of the homicide to be true, as testified by Stroud, it became their duty, and they were required, as a conclusion of law, to find the prisoner guilty of murder in the first degree. Assuming that the jury fol-
(675) lowed his Honor's instruction and "took the law from the court," as it was their duty to do, they did not consider, pass upon or decide the question of fact, the existence of which is an essential element in the crime charged. They did not and could not inquire whether the act was premeditated. The case, as presented, may be likened unto a special verdict, in which the question is submitted to the court, as one of law, whether upon the facts found there was premeditation. The statute (Laws 1893) declares that the jury must fix the degree of murder. To do this they must find the fact that the murder was committed either by means of poisoning, lying in wait, imprisonment, starving, torture, or by willful, deliberate and premeditated killing, or in the perpetration or attempt to perpetrate certain enumerated crimes or other felony. The judge should instruct the jury what constitutes lying in wait . . . or premeditation, but he may not go further and instruct them, as a conclusion of law, that certain facts show premeditation.

Mr. Justice Douglas, writing for the Court, in *S. v. Booker,* 123 N. C., 713, said: "When the circumstances of the killing do not bring it within the classes which by the statute are made *per se* murder in the first degree, the State must prove deliberation and premeditation, but this may be done by circumstances and not necessarily by express and positive evidence."

It will be observed that the statute classifies murder in the first degree:

1. By poisoning, lying in wait, etc. Herein the State is not required to prove premeditation, because the manner of doing the act necessarily involves premeditation. The presumption is made, by the statute, irrebutable. When committed in either of the methods mentioned, it is *per se* murder in the first degree. A person who lays poison for or waylays or tortures another unto death will not be heard to say that he did not (676) premeditate. *S. v. Gilchrist,* 113 N. C., 673.

2. In the perpetration or attempt to perpetrate a felony. Herein it is not necessary to show premeditation. The killing under these conditions, although without premeditation, is declared to be murder in the first degree. *S. v. Covington,* 117 N. C., 834.

3. By willful premeditation and deliberation. The line which separates felonious homicides committed otherwise than as defined in the foregoing classes, without premeditation, from those accompanied by the additional mental condition, called premeditation, is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term and submit the question of its existence to the jury. It is well settled that the state of mind—intent, sanity, etc.—is always a question of fact for the jury. The principle is well stated by the present Chief Justice in *S. v. Freeman,* 122 N. C., 1012: "The degree of murder depends upon the facts as the jury find them to be, applying the law laid down by the court upon that state of facts. . . . As the jury is to determine the degree of murder, it is for the jury, not the court, to find from the evidence whether there was the premeditation which would raise the killing from murder in the second degree (presumed from the killing with a deadly weapon) to murder in the first degree." This case comes clearly within the third class—there was no lying in wait.

"Whenever the degree of the offense depends upon the particular intent with which an act is done, the intent to be inferred from the circumstances is for the jury, and every fact which will throw light upon that question may be given in evidence." *Filkin v. The People,* 69 N. Y., 101; 25 Am. Rep., 143.

Danforth, J., in *McKenna v. The People,* 81 N. Y., (677) 360, says: "Whether this intent existed could not be a question of law. It was necessarily to be determined by the jury from all the facts and circumstances of the case, and if not found the prisoner could not be convicted. . . . The charge, as

given, may well have been understood by the jury as involving an opinion of the court upon this as well as other elements of the crime. . . . Instead of informing the jury what must be established to make out the offense, and leaving it to them to determine whether it had or had not been done, the judge says, 'Enough has been proved, if you believe the witnesses on the part of the people.' Their attention is directed to evidence of inculpation merely; its weight is stated to them as sufficient in law to sustain a conviction for the grave offense; so that, the question of fact, to which their minds have been turned, relates to the credibility of certain witnesses, and not to the weight or measure of their testimony or the existence of the intent. How far that testimony was modified or neutralized by that produced by the prisoner, or what inferences should be drawn from any of it, is virtually excluded from their inquiry."

While his Honor correctly instructed the jury in regard to the suggestion of insanity or intoxication as relieving the prisoner from responsibility, it may be that if the jury found that the homicide was committed in the manner and under the circumstances testified by Stroud, they would, if permitted to consider the entire evidence, have found in the testimony regarding the prisoner's peculiar behavior before and after the killing, sufficient evidence to create a reasonable doubt as to the question of premeditation. They may, in this view, have reached the conclusion that while the evidence in his behalf did not rebut the presumption of malice raised by the law from the use of a deadly weapon, it did create a reasonable doubt whether
(678) the prisoner was capable of premeditating and deliberating. However this may be, they were entitled and it was their duty to consider all of the evidence, and find all of the essential facts before arriving at their verdict. The prisoner, however guilty, is entitled to be tried by "the ancient mode of trial by jury," in which the court decides all questions of law, and the jury all questions of fact. "The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of fact resulting therefrom." *Henderson, J.*, in *Bank v. Pugh*, 8 N. C., 198. For the error in the instruction, there must be a new trial.

We concur with his Honor's ruling upon the motion to set aside the verdict for improper conduct on the part of the father of the deceased and of some of the jurors. We are quite sure that his Honor felt, as we do, that such conduct was exceedingly improper and calculated to shake confidence in the integrity of the verdict—so far, at least, as one of the jurors was concerned. The absolute, unquestioned and unquestionable integrity of

jurors in basing their verdicts upon the law and the evidence is of such vast and vital importance to suitors and people, that any conduct which casts upon it the slightest suspicion merits severe condemnation from the courts. While the ancient custom of keeping the jury in close confinement, "without meat or drink," has been abandoned, we should be careful to see to it that while impaneled and in a way set apart from the public, to true deliverance make between the State and the prisoner, the strictest vigilance be had to protect them from suggestions or approach by interested persons. The conduct of the father of the deceased was calculated to arouse suspicion that he desired to exert some influence over some of the jurors. The judge cannot, in the discharge of his duties, keep a jury at all times in his presence, and is directed to place them in charge of a sworn officer. It is the duty of the officer to promptly report to the judge any improper conduct on the part of jurors or other persons (679) in this respect. Judges are often embarrassed to find, after long and expensive trials, verdicts in capital cases brought into question by improper conduct of the jury, often the result of thoughtlessness, too frequently not so easily explained. While we approve the course pursued by his Honor, we feel, in view of the frequency with which these questions are brought to our attention upon appeals, that it would be well to enforce the law by punishment for contempt, questionable conduct by or towards jurors while engaged in the trial of capital felonies.

New trial.

CLARK, C. J., dissenting. The entire evidence, except that of the prisoner himself, is that of Stroud, who testified that he "saw the prisoner standing in the path, the deceased standing by the side of a pine; the prisoner asked the deceased why he went to his house last night, and the deceased said he did not go; the prisoner said, 'You are a damned liar, you did; I am going to kill you; throw up your right hand.' The prisoner then shot him; he was in about ten or eleven steps from the deceased; shot once. When he shot, the witness ran off; the deceased ran to him and said, 'I am shot.' He died in a short time." The court read the above testimony to the jury, and told them, "If you find those facts to be true, beyond a reasonable doubt, the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation upon the part of the prisoner." In this there could be no error; for if under those circumstances the prisoner said, "I am *going to kill you;* throw up your right hand," and then shot and killed, there was premeditation and deliberation. There was the declaration of the inten-

tion to kill, the ordering the deceased to throw up his hands, and then the aiming, firing and killing. That the deliberate (680) purpose is formed, for however brief a period before the killing, is sufficient, under all our authorities. *S. v. Dowden,* 118 N. C., 1145; *S. v. Foster,* 130 N. C., 666; 89 Am. St., 876, and many others. Here, if the evidence is believed, the purpose was not only formed, but announced by the prisoner. When premeditation is an inference to be drawn from other facts, it is for the jury. But when the jury find that the prisoner announced his intention to shoot, and ordered the deceased to hold up his hands, and that then, without provocation, the prisoner did fire and kill, there is no inference to be drawn. The jury find the fact of premeditation when they find that the prisoner announced his intention, already formed, to kill, and then, without provocation, does kill. Authorities can be cited, but no ruling of any court could add force to this simple statement of the facts which the jury found to be true.

Cited: Abernethy v. Yount, 138 N. C., 342; *S. v. Turnage, ib.,* 570; *S. v. Spivey,* 151 N. C., 685.

STATE v. MUNN.

(Filed 29 March, 1904.)

HOMICIDE—*Harmless Error—Instructions.*

Where there is error in the charge as to mitigation below murder in the second degree, it is harmless, the prisoner having been convicted of murder in the first degree.

INDICTMENT against W. R. Munn, heard by *Judge H. R. Bryan* and a jury, at November Term, 1903, of CUMBERLAND. From a verdict of guilty of murder in the first degree, and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, and *N. A. Sinclair* for the State.

Thomas H. Sutton for the prisoner.

(681) CLARK, C. J. In this case, if the evidence of the State is to be believed—and the jury by their verdict have found it to be true—a most aggravated and inhuman murder was committed by the prisoner. It is our province to consider only

the alleged errors of law committed by the trial judge, and which his counsel has seen fit to point out and assign by exceptions thereto, taken in apt time and duly entered in the record. Rule 27 of this Court provides: "*No other exceptions than* those set out or filed and made part of the case *shall be considered* by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment." This rule formulates the decisions of this Court. See cases cited in Clark's Code (3 Ed.), pp. 512, 514.

The errors alleged have been ably and exhaustively argued by the prisoner's counsel, and the court has carefully and diligently examined each and every exception, with proper regard to the importance of the case. We find no error therein. In a case of this nature, whenever there is reason to believe that injustice has been done, and a meritorious exception has by some inadvertence not been taken, the Attorney-General has always consented cheerfully to an exception being entered here *nunc pro tunc*.

The point counsel wished to present, though not excepted to, that there was error in the charge as to mitigation from murder in the second degree, would not be before us even if it had been excepted to, for the reason that the jury found, upon the very full and careful charge of the court as to the difference between murder in the first and second degree, that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately and with premeditation, and was guilty of murder in the first degree. The State has thus satisfied them of facts raising the crime above murder in the second degree, which only was (682) presumed from the killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error.

There is no exception which presents any new point nor any new or unusual application of an old principle. As often stated heretofore by us (*Douglas, J.*, in *Parker v. R. R.*, 133 N. C., 335; *Osborn v. Leach*, 133 N. C., 428; *S. v. Council*, 129 N. C., at p. 516), the decision is all that concerns the parties to any appeal. An opinion giving at length the reasons for any decision is useful solely as a guide to the trial court, and to this Court in future cases presenting the same or similar points. Finding no error on any of the grounds presented by the exceptions, and there being no new propositions of law or application of any principles which have not been already passed upon and announced by the Court in former cases, and fully satisfied that justice has been done and a fair trial has been had by the pris-

oner, it does not seem to us necessary to do more than to say that, after full and most careful investigation in this case, we find

No error.

Cited: S. v. Teachey, 138 N. C., 598.

(683)

STATE v. BLACKMAN.

(Filed 29 March, 1904.)

INTOXICATING LIQUORS—*Instructions—Questions for Jury.*

An instruction, on a prosecution for unlawfully keeping liquor for sale, that if defendant had whiskey in his possession he would be guilty of keeping it unlawfully, was erroneous, it being for the jury to determine from all the evidence whether he was guilty as charged.

INDICTMENT against Robert Blackman, heard by *Judge M. H. Justice* and a jury, at November Term, 1903, of UNION. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Adams, Jerome & Armfield* for the State.

Redwine & Stack for the defendant.

PER CURIAM. His Honor said to the jury that the first question to decide was "whether the man had the whiskey in his possession; if he did, that would make him guilty of keeping it unlawfully." The defendant excepted.

In any point of view, the instruction was erroneous. The jury should have been permitted, upon the whole of the evidence, to say whether or not the defendant was guilty, as charged. For this error, without passing upon the other exceptions, there must be a

New trial.

(684)

STATE v. HUNT.

(Filed 5 April, 1904.)

1. HOMICIDE—*Evidence—Deadly Weapon.*

A requested instruction that if there was an opportunity to use a deadly weapon, but one was not used, it was strong evidence against premeditation, is properly modified by striking out the word "strong."

2. HOMICIDE—*Premeditation and Deliberation.*

No particular time is necessary to constitute the premeditation and deliberation requisite to the crime of murder in the first degree.

3. HOMICIDE—*Deliberation and Premeditation.*

Deliberation and premeditation on the part of accused on a prosecution for murder may be inferred from such circumstances as ill-will, previous difficulty between the parties and declarations of an intent to kill after or before the crime.

4. HOMICIDE—*Premeditation and Deliberation—Questions for Jury.*

Whether there is premeditation and deliberation in a prosecution for murder is a question for the jury.

INDICTMENT against Adam Hunt, heard by *Judge O. H. Allen* and a jury, at November Term, 1903, of PERSON. From a verdict of guilty of murder in the first degree, and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. T. Bradsher and *F. O. Carver* for the prisoner.

CLARK, C. J. The prisoner was convicted of murder in the first degree. The deceased was in charge of a store belonging to his brother, who employed the prisoner as a sawmill hand. It was in evidence that the deceased had no authority to (685) settle with the sawmill hands; that the deceased went to the store that Saturday night, and stated, in conversation with one West, about a half-hour before the homicide, that "he would have his pay or there would be a God d—n dead nigger there that night." He left, but returned to the store about 9 o'clock, asked for a settlement; deceased told him he could not pay him without authority from his brother; the prisoner commenced cursing and stamping the floor; the deceased told him to hush, and started around the counter, with a hammer in his hand; the prisoner jerked the hammer out of his hand and struck the counter violently, saying, "Pay me." The witness told prisoner he

would go off and get the timekeeper to get prisoner's time; when he returned with the timekeeper the prisoner had deceased down, with his knees on his breast, jumping up and down on him and beating deceased in the face; the timekeeper told him to "Stop, stop," whereupon the prisoner assaulted him, and in the fight that followed knocked the timekeeper down. The witness led the deceased towards his house, thirty yards away, holding him up and helping him along, and they were met half-way by the wife of deceased's brother, crying; the prisoner then came on and made at her, but she got home without being caught by him. The prisoner than ran around the witness and knocked deceased down; the prisoner then pulled off a strip about twenty feet long and tried to strike the deceased; struck trees; the deceased staggered along, half-bent, trying to get into the house; the prisoner then ran up and struck the deceased a heavy blow on the head, knocking him down, his head striking the porch. Mrs. Wilkins said, "Lord, you have killed Fleetwood." Prisoner replied, "Yes, damn him; that is what I intended to do." The deceased fell, entirely unconscious. The deceased was a weakly man,
(686) weighing about 118 pounds, and six feet tall. The prisoner was a powerful man for his size, and weighed 160 pounds or 165. The deceased died of his injuries on Thursday following.

The prisoner testified in his own behalf, contradicting the two State's witnesses, who testified to his having deceased down, beating him, when they got there, and testified that deceased assaulted him with his knife and cut him in the back and side, and he took the knife away; that Wilkins ran to his house, as though to get his gun, and he hit him as he went into the porch and "knocked him against the floor of the porch"; that he (prisoner) ran against the pole and knocked it down, but did not try to use it; that he hit deceased only one lick, and that was at the porch; was only trying to keep them from killing him; that he was badly cut. The wounds exhibited to the jury were a slight cut in the hand and another about one inch long on the back, and a cut on nose, and some cut places on clothing were also shown, all of which prisoner said were made by deceased.

The prisoner says he followed the timekeeper, who fled out of the back door, and lost him; that then he went around the store to the front and overtook deceased as he was going into his house and struck him with his fist, and that this was the only blow he gave deceased. The medical evidence was that the teeth of deceased were crushed and his temple appeared to have been struck with a hard substance; both blows may have been made with a hammer, though they may have been inflicted with a fist.

That the breast and other parts of the body of deceased showed severe contusions, and that the cuts on the prisoner were not serious. The evidence of a broken plow point found on the floor next morning was competent. It does not appear whether the point was used or not, nor does the evidence appear to have been prejudicial to the prisoner.

The prisoner, in apt time, requested the court, in writ- (687) ing, to charge:

1. Taking the evidence offered for the State to be true, there was no evidence of a premeditated and deliberate intent to murder, and the prisoner cannot be convicted of murder in the first degree. Refused, and the prisoner excepted.

2. In no view of the case, as shown by the whole testimony, is there evidence of a premeditated and deliberate intent to kill and murder, and the prisoner cannot therefore be convicted of murder in the first degree. Refused, and the prisoner excepted.

3. If the jury shall find in this case that there was an opportunity to use a deadly weapon, but that none was actually used, this circumstance should be considered as strong evidence against willful and premeditated murder. This was given, the word "strong," however, being struck out, and the prisoner excepted to the modification.

4. If the jury shall find that it was the intention of the prisoner to do serious bodily harm to the deceased, and death ensued in consequence of injuries inflicted with such intention, then the prisoner cannot be convicted of a higher crime than murder in the second degree. This was modified and given as follows: "If the jury shall find that it was the intention of the prisoner to do serious bodily harm to the deceased, and death ensued in consequence of injuries inflicted with such intention, then the prisoner would be guilty of murder in the second degree." The prisoner excepted to the modification.

5. In the case at bar, before the prisoner can be convicted of murder in the first degree, the jury must be satisfied beyond a reasonable doubt, from the evidence, that the prisoner killed the deceased in pursuance of a fixed and deep-rooted purpose, with cool premeditation, formed in a cool state of the blood. This was given, but modified by striking out the words "and deep-rooted," before the word "purpose," and the word (688) "cool," before "premeditation," and the prisoner excepted. There was no exception to the charge of the court.

We find no error in the matters excepted to. If the prisoner's own evidence is to be believed, the only blow he struck was when the deceased was entering his house, and was felled to the floor of his porch; and by the prisoner's testimony there had been

cooling time, for he had followed the fleeing timekeeper out of the back door, and, after "losing him," had gone around the store and had gone thirty yards to the home of the deceased, there being also testimony that the deceased was supported and staggering and was helped to get that far. Besides, no particular time is necessary to constitute premeditation. *S. v. Norwood,* 115 N. C., 791; 44 Am. St., 498; *S. v. McCormac,* 116 N. C., 1033; *S. v. Covington,* 117 N. C., 834; *S. v. Dowden,* 118 N. C., 1145; *S. v. Foster,* 130 N. C., 666; 89 Am. St., 876.

We may mention here that in capital cases it is according to precedent and more appropriate to style the accused "the prisoner," and not "the defendant," as was done here, but we have substituted the proper word.

Whenever the circumstances attending the killing do not bring the case within the language of the statute, the State must prove deliberation and premeditation. This it may do in many ways. Ordinarily, they are not capable of direct proof, but are inferable from various circumstances, such as ill will, previous difficulty between the parties, declarations of an intent to kill after or before striking the fatal blow. *S. v. Conly,* 130 N. C., 683; *S. v. Covington,* 117 N. C., 861. The circumstances surrounding this homicide were sufficient to go to the jury on the question of premeditation and deliberation. Besides, assuming
(689) that some provocation existed, the evidence shows that the killing was done in a brutal and ferocious manner; and where this is so, the killing will be attributed to a malicious disposition and not to a provocation, and the homicide will be murder. *S. v. Hill,* 20 N. C., 491; 34 Am. Dec., 396; *S. v. Chavis,* 80 N. C., 364; *S. v. Boon,* 82 N. C., 637; *S. v. Coley,* 114 N. C., 879.

No error.

Cited: S. v. Exum, 138 N. C., 618; *S. v. Daniel,* 139 N. C., 553; *S. v. Jones,* 145 N. C., 470; *S. v. Roberson,* 150 N. C., 839.

STATE v. LIPSCOMB.

(Filed 5 April, 1904.)

1. HOMICIDE—*Evidence—Premeditation and Deliberation.*

In this prosecution for murder there is sufficient evidence of premeditation and deliberation to be submitted to the jury.

STATE *v.* LIPSCOMB.

2. HOMICIDE—*Malice—Presumptions.*

It is not error to instruct that, defendant having admitted that he killed deceased with a deadly weapon, there was no evidence sufficient to rebut the presumption of malice, and that defendant was guilty at least of murder in the second degree.

3. HOMICIDE—*Premeditation—Harmless Error.*

Where the jury found that defendant killed deceased with premeditation, an instruction that defendant under certain circumstances was guilty at least of murder in the second degree, if erroneous, was not prejudicial.

4. JURY—*Infants—Appeal.*

The setting aside of a verdict because a juror was under 21 years of age is discretionary with the trial judge, and not reviewable on appeal.

INDICTMENT against Archie Lipscomb, heard by *Judge C. M. Cooke* and a jury, at February Term, 1904, of GRANVILLE.

The defendant was indicted in the Superior Court for the murder of Caswell Merrett, and, having been con- (690) victed of murder in the first degree, appealed.

Mary Merrett, a witness for the State, testified: "I am the wife of the deceased, Caswell Merrett, who was about forty years old. He lived on W. L. Umstead's place, in this county. Arch Lipscomb lived about one-quarter of a mile from us. On Friday night, 10 January, it being dark and cloudy, and about one hour after dark, Arch Lipscomb came to our house. He came in. My husband was sitting near the fireplace, near the bed, and I was plaiting my hair. My husband was sitting about twelve or fifteen feet from the door. Arch came in and sat down in the corner. Arch and my husband got to arguing about the Scriptures. They did not seem to be angry, and Caswell said something Arch did not like—I do not remember what. Arch jumped up and said if his best friend was going back on him for somebody else, that was all right, and he stepped out of the door at once, and came back, and before I had turned my head he had shot. He did not have the gun in the house, but got it outside of the door. Caswell was sitting down, with his legs crossed and his head hanging down. He had not gotten up from the chair. It was a shotgun, and the load went into my husband's throat and he died at once, without ever speaking. I went up the lane and hallooed for Mr. Umstead, and he came. My husband was still sitting in the chair, but dead. As soon as Arch shot, he left there. There was a lighted lamp on the table near Caswell, and the shot broke that to pieces. There are two rooms in our

house. They had just a religious argument about the Bible, but I never heard my husband making threats. I did not have anything against the defendant, and I have not got anything against him now."

W. P. Wheeler, a witness for the State, testified: "I
(691) arrested the defendant next morning after the killing, and, without any word of inducement or threat, he told me he killed the deceased. He said the deceased had threatened him and his wife's life and they were afraid of him, and that he carried his gun over and shot him and killed him that night. I never heard that deceased and his wife were 'conjurers' until after the killing. I did not know of any ill feeling between the parties. The defendant did not try in any way to escape. He was dressed up when I got him, and said he was waiting for the officers."

The defendant, in his own behalf, testified: "I shot and killed Caswell Merrett on the night of 10 January last. I left home about a half-hour by sun to go hunting. I went down on Mr. Williams' land and Mr. Eugene's (Umstead's), and then, when I got to the deceased's house, I set my gun down by the door and went inside the house. Caswell Merrett had before been threatening mine and my wife's life several times. He said he had given my wife three weeks in the way he was going to do, and that was to kill her, I understood it. I have seen him run up and take hold of her with both hands. I was afraid of the deceased. He and I got to talking together at his house that night, and we both seemed to get mad. I thought he was a conjurer, and I am afraid of a conjurer. It was not my intention to kill the deceased when I left home. I went hunting. I went up and hallooed at his house. He hallooed out and invited me in. I went in. I had been before that time so wrought up on account of the threats he had made that I could not work in my field. We first commenced talking about arithmetic; then we got on the Scriptures. I arrived at the deceased's house about dark, and remained about an hour, and then shot him and left immediately. I did not like the way he had been fooling around my wife. It looked like he had been trying to get between
(692) me and my wife. During Christmas my wife was at his house, and she said he caught her in his arms and hugged her. I did not kill any birds that hunt."

Mary Lipscomb, a witness for the defendant, testified: "I am the wife of the defendant. I was at home that afternoon. I was sick in bed, and had been for about a week. Arch left home before night. H did not tell me what he was going out for. The deceased sometimes visited us."

Eugene Umstead, a witness for the defendant, testified: "I live near the parties. My attention was first attracted when, a little before 10 o'clock, my attention was directed to Caswell Merrett's house by his wife's hallooing. When I reached the house Caswell was sitting up in the chair, dead, with his legs crossed and his head fallen to one side and his hand hanging down by his side."

There was evidence to the effect that the general character of the prisoner is good.

"The court instructed the jury as to what constituted murder in the first and second degree, and manslaughter, and also instructed them fully as to the law of malice, explaining to them the difference between general malice and particular malice, and further instructed them that to constitute murder in the first degree there must exist on the part of the slayer towards the deceased express malice; and that in order to convict the prisoner of murder in the first degree the jury must be satisfied beyond a reasonable doubt that he slew the deceased with particular or express malice, and that he did it with premeditation and deliberation. The court also called the attention of the jury to the evidence, and gave the contentions of the parties."

First exception. There was no exception to the charge of the court, save to the following instruction: "The defendant having admitted that he killed the deceased with a deadly weapon, there was not in evidence any facts or circumstances sufficient to rebut the presumption of malice from such killing with (693) a deadly weapon, and that the defendant was at least guilty of murder in the second degree."

The jury rendered a verdict of murder in the first degree. The defendant moved for a new trial, for error in the charge, as above pointed out by his exception. The motion was overruled, and the defendant excepted.

Second exception. "The defendant then moved to set aside the verdict and for a *venire de novo,* on the ground that it had been discovered since the verdict that B. F. Blackwell, one of the jurors in the case, was under twenty-one years of age. The court found as a fact that the said juror would not be twenty-one years old until next July, and that the fact was unknown to the defendant or his attorney or the solicitor of the State or any other officer of the court. The court also overruled this motion of the defendant, and the defendant excepted.

"The court then pronounced judgment upon the verdict, as contained in the record, and the prisoner appealed to the Supreme Court and was allowed to appeal without giving security."

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the prisoner.

WALKER, J., after stating the case. There was no exception taken to the charge, so far as it related to murder in the first degree. In this respect the instructions of the court to the jury were full and explicit and sustained by all of the authorities. *S. v. Gilchrist,* 113 N. C., 673; *S. v. Fuller,* 114 N. C., 885; *S. v. Norwood,* 115 N. C., 789; 44 Am. St., 498; *S. v. McCormac,* 116 N. C., 1033; *S. v. Gadberry,* 117 N. C., 811; *S. v. Covington,* 117 N. C., 834; *S. v. Thomas,* 118 N. C., 1113; *S. v. Dow-*
(694) *den,* 118 N. C., 1145; *S. v. Rhyne,* 124 N. C., 847; *S. v. Spivey,* 132 N. C., 989; *S. v. Cole,* 132 N. C., 1069. There was ample time for deliberation and premeditation by the defendant, according to any rule that has been laid down upon the subject. No particular time is required for this mental process of premeditation and deliberation. The question always is, whether under all the facts and circumstances of the case the defendant had previously and deliberately formed the particular and definite intent to kill, and then and there carried it into effect. This is a question for the jury to determine. *S. v. Johnson,* 47 N. C., 247; 64 Am. Dec., 582. The facts of our case are substantially like those in *S. v. McCormac,* 116 N. C., at p. 1034.

The testimony of the witness W. P. Wheeler, as to the confession made to him by the defendant, was sufficient in itself to warrant the jury in finding the fact of premeditation and deliberation, if they believed it, and if, after weighing the testimony, they inferred and found the fact therefrom; but this testimony was reinforced by that of the defendant himself at the trial, which tended to show, not only premeditation and deliberation at the time of the killing, but preconceived malice and a spirit of revenge.

The exception to the charge of the court is not well taken. There is no principle better settled in the law of homicide than the one stated by the court to the jury. When a killing with a deadly weapon is shown or admitted, the law presumes malice, and if nothing else appears it is murder in the second degree, just as it would have been murder at common law, and would still be if it were not for the act of 1893, requiring the State to prove premeditation and deliberation in order to establish a case of murder in the first degree, and in this respect leaving murder
in the second degree, as defined by that statute, just as
(695) was murder at the common law. If there is no proof of premeditation and deliberation, and there is a killing with a deadly weapon, the law presumes malice, and it is murder in

the second degree, under the statute. *S. v. Wilcox,* 118 N. C., 1131; *S. v. Capps,* 134 N. C., 622.

This being so, the conviction should be of murder in the second degree, unless the defendant can satisfy the jury of the existence of such facts as will in law rebut this presumption of malice which is raised when the killing is with a deadly weapon. What facts are sufficient to rebut the presumption has always been held to be a question of law which the court must decide. Whether there is any evidence to rebut the presumption is also a question of law. Whether, if there is any evidence sufficient for the purpose, the presumption is repelled in the particular case, is a question for the jury, under proper instructions from the court. *S. v. Matthews,* 78 N. C., 523; *S. v. Capps, supra; S. v. Craton,* 28 N. C., 164.

To illustrate: If A assault B, giving him a severe blow or otherwise making the provocation great, and B strikes A with a deadly weapon and kills him, or if, on a sudden quarrel, the parties begin the fight without deadly weapons, and, after blows pass, one uses a deadly weapon and kills the other, or if, on a sudden quarrel, the parties fight by mutual consent, at the instant, with deadly weapons, the fight being on equal terms and no undue advantage being taken, the implication of malice in either of the cases stated is rebutted and the law mitigates the offense out of indulgence to the frailty of human nature, and adjudges the killing to be manslaughter. *S. v. Ellick,* 60 N. C., 452; 86 Am. Dec., 442. And if the first assault is committed under such circumstances as to induce the party assaulted reasonably to believe that he is about to be killed or to receive enormous bodily harm, and he kills his adversary, the law excuses the killing, because any man who is not himself legally in (696) fault has the right to save his own life or to prevent enormous bodily harm to himself. In each of the above cases it would be the duty of the court to charge the jury that if they found the facts to be as we have stated them, provided there is evidence to prove the facts, the implication of malice is rebutted and the killing is either manslaughter or excusable homicide, according as the facts may be found by them. Whether the blow was given or whether the parties fought suddenly or on fair and equal terms, so as to reduce the killing to manslaughter, or whether the assault was committed under such circumstances as to justify the fear or apprehension of the defendant that he was about to be killed or to receive enormous bodily harm, so as to reduce the killing to excusable homicide, are questions solely for the jury. The matter is fully considered in *S. v. Matthews, supra.* It was therefore proper for the court to charge the jury

in this case that there was no evidence of any facts and circumstances sufficient to rebut the presumption of malice which arose from the killing with the gun, which, of course, is a deadly weapon, and the defendant was at least guilty of murder in the second degree. There was no evidence of any provocation, nor was there evidence of any fact which could be considered in mitigation, excuse or justification of the killing. The only question in the case was whether the defendant was guilty of murder in the first degree or of murder in the second degree, the killing having been admitted.

But if there had been error in the instruction to which exception was taken, we do not see how the defendant could have been prejudiced thereby, for the jury found that he killed his victim intentionally and willfully and with premeditation and deliberation, and it could make no difference, with that fact found by the jury from the evidence, whether the presumption of the
(697) common law as to malice arising from the use of a deadly weapon had been rebutted or not. Prejudice could not come from such a charge, if erroneous, unless the defendant had been convicted of murder in the second degree and there had been evidence of facts or circumstances in mitigation or excuse of the killing. We have said there was none. The principle contained in the instruction of the court had no application to the difference between murder in the first degree and murder in the second degree. It related only to the difference between murder in the second degree and manslaughter or excusable or justifiable homicide.

The motion to set aside the verdict because one of the jurors was under twenty-one years of age was properly refused, or at least the refusal of it was not reversible error. The challenge *propter defectum* should be made when the juror comes to the book to be sworn and before he is sworn, or the right of challenge will be deemed to be waived. No juror can be challenged by the defendant after he has been selected and sworn, without the consent of the State, unless it be for some cause which has arisen since he was chosen and sworn. *S. v. Patrick,* 48 N. C., 443; *S. v. Davis,* 80 N. C., 412. In *S. v. Lambert,* 93 N. C., 618, a motion to set aside a verdict for a reason the same as the one now urged was held to have been properly refused. As indicated by this Court in *Patrick's case, supra,* there is an apt time for each and every step in all legal proceedings, and every objection must be made and every privilege claimed at the proper time, or the party who should thus have asserted his right will be considered as having waived it. The objection to the juror in this case was not presented in apt time. *S. v. Parker,* 132

N. C., 1014. It came too late, after verdict, and could then be addressed only to the discretion of the court. *S. v. Maultsby,* 130 N. C., 664, and cases *supra.* The exercise (698) of this discretion adversely to the defendant is not reviewable by this Court. *S. v. Davis, supra; S. v. Perkins,* 66 N. C., 126; *Spicer v. Fulghum,* 67 N. C., 18.

The indictment in this case, though drawn according to the precedent in use before the act of 1893, is in proper form and charges the offense of murder in the first degree. *S. v. Gilchrist, supra.*

We have considered the case and the record with the greatest care and scrutiny, and our conclusion is that there is no error in the rulings of the court below and none in the record, and it must be so certified.

No error.

Cited: S. v. Daniel, 139 N. C., 552, 553.

STATE v. CLARK.

(Filed 5 April, 1904.)

1. HOMICIDE—*Self-Defense.*

The facts and circumstances, in a prosecution for murder, in mitigation or excuse, need be shown only to the satisfaction of the jury.

2. HOMICIDE—*Self-Defense.*

In a prosecution for murder an instruction that requires the prisoner to prove beyond a doubt that the deceased was actually making a felonious assault and that the prisoner at the time had reasonable ground to believe that the deceased was making such an assault, was erroneous.

3. INSTRUCTIONS—*Trial—The Code, sec.* 413.

Under the Code, sec. 413, requiring the court to state in plain and correct manner the evidence and declare and explain the law arising thereon, the duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them.

4. HOMICIDE—*Self-defense.*

Where an instruction states that in order to justify the use of a deadly weapon in self-defense it must appear that the danger was so urgent and pressing that to save his own life or to pre-

vent his receiving great bodily harm the shooting by defendant was absolutely necessary, the error as to the existence of the absolute necessity to kill was not cured by a subsequent instruction explaining what kind of reasonable apprehension that he was about to be killed or to receive great bodily harm would have justified defendant in acting on the facts and circumstances as they appeared to him.

5. HOMICIDE—*Self-defense.*

Where deceased was attempting to kill another or to do him great bodily harm, or defendant had a well-grounded belief or apprehension that he was attempting to do so, he had the right to interfere to prevent deceased from executing his intention, and if, while engaged in the interference for such lawful purpose, deceased advanced on him in such manner as to induce defendant to reasonably apprehend, and defendant did actually apprehend, that he was about to be killed or receive great bodily harm, he was justified in killing deceased to save his own life or to prevent great bodily harm to himself.

CLARK, C. J., dissenting.

(699) INDICTMENT against G. Clark, heard by *Judge B. F. Long* and a jury, at Spring Term, 1903, of ASHE. From a verdict of guilty of murder in the first degree, and judgment, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.

R. A. Doughton, R. Z. Linney and *George L. Park* for the prisoner.

WALKER, J. The defendant was indicted for the murder of Charles Stanberry. The evidence tended to show that Stanberry and Asa Miller, both being under the influence of liquor, were cursing each other in the public road, when Stan-
(700) berry grabbed Miller and threw him to the ground and held him down, while he brandished his knife over him, and with an oath threatened to cut his throat or to cut his head off. Miller begged Stanberry not to cut him. The defendant interfered for the purpose of preventing Stanberry from cutting Miller, and as he did so Stanberry cursed him and asked him what he had to do with it, at the same time advancing on him with a knife drawn and in a threatening attitude. The defendant retreated, and when he was near the fence on the side of the road, and not more than four feet from Stanberry, the latter "grabbed at the defendant with his left hand and tried to strike him with his right," and the defendant thereupon fired at him with his pistol and inflicted a wound, from which Stanberry died about a month afterwards. Before the defendant fired the pistol, he warned the deceased not to advance on him with the knife.

While it appeared that deceased was drunk, there was evidence tending to show that "he had good use of himself." A constable who was present told the bystanders not to let the deceased hurt Miller. Without reciting any more of the testimony, it is sufficient to say that it tended to show that the deceased was in the act of cutting Miller, with the present ability to do so, when the defendant interfered to prevent it.

At the request of the State, the court gave the following instructions:

"2. If the jury are satisfied beyond a reasonable doubt that the defendant slew the deceased with a deadly weapon, to-wit, a pistol, and are left in doubt as to the circumstances of mitigation or excuse offered by the defendant or derived from the State's evidence, they should convict of murder in the second degree.

"3. If the jury are satisfied beyond a reasonable doubt that the defendant slew the deceased with a deadly weapon, to-wit, a pistol, and are left in doubt from the whole evidence as to whether the deceased, at the time he was slain, was mak- (701) ing a felonious assault upon the defendant with a knife, either because he did not then have the knife or because he was too drunk to be capable of making such assault, and are left in doubt as to whether the defendant, at the time he slew the deceased, believed, and had reasonable ground for believing, that the deceased was making such felonious assault upon him with a knife, then they should convict of murder in the second degree."

Defendant excepted to each of said instructions.

The defendant's counsel requested the court to give the following instruction:

"If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller and was attempting to cut said Miller with a knife, in the presence of the defendant, it was his duty to endeavor to suppress and prevent the same; and if in attempting to do so the deceased left off his difficulty with Miller and made upon the defendant with a drawn knife in such a manner as to cause the defendant to apprehend, and he did apprehend, that he was about to be slain or to receive enormous bodily harm, then the defendant had a right to stand his ground and, if necessary, to take the life of the deceased without retreating."

The court refused to give the instruction as asked, but in response thereto charged the jury as follows:

"If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller and was attempting to cut said Miller with his knife, in the presence of the defendant [and the deceased was then capable of executing such a purpose],

it was his duty to endeavor to suppress and prevent the same; and if in attempting to do so the deceased left off his difficulty with Miller and made upon the defendant with a drawn knife in such manner as to cause the defendant to [reasonably] apprehend, and did [actually] apprehend, that he was about to (702) be slain or to receive enormous bodily harm, then the defendant had a right to stand his ground and, if necessary, to take the life of the deceased without retreating [provided the assault made upon the defendant was felonious or with felonious intent]."

Defendant excepted.

The parts of the instruction in brackets indicate the modifications of the defendant's prayer made by the court.

We are of opinion that the court erred in the instructions given in response to the State's second and third prayers. Those instructions required the defendant to establish the facts and circumstances in mitigation or excuse, not merely to the satisfaction of the jury, but to the exclusion of any doubt. We have recently said, in *S. v. Barrett,* 132 N. C., 1005, that the defendant is required to *satisfy* the jury of the existence of the mitigating circumstances in order to reduce the offense from murder to manslaughter, or of the matters in excuse in order to sustain his plea of self-defense, not beyond a reasonable doubt nor even by a preponderance of evidence. It is well said in *S. v. Brittain,* 89 N. C., 502, that "The principle of reasonable doubt has no application to the doctrine of mitigation. The rule in regard to that is, that the jury must be satisfied by the testimony that the matter offered in mitigation is true," citing *S. v. Ellick,* 60 N. C., 450; 86 Am. Dec., 442; *S. v. Willis,* 63 N. C., 26, and *S. v. Vann,* 82 N. C., 632. In *Asbury v. R. R.,* 125 N. C., 568, the Court held that a charge substantially like the one given in this case imposed upon the party having the burden the duty of making out his case beyond any doubt.

We have seen that the doctrine of reasonable doubt does not apply to the case of a defendant indicted for murder, when he is attempting to establish the mitigating circumstances necessary to reduce the grade of the homicide; and if he is not re- (703) quired to prove them beyond a reasonable doubt, how can it be said that he must remove every doubt from the minds of the jury? This would include not only a reasonable doubt, but any kind of doubt; and therefore the burden upon him would be much lighter if the simple doctrine of reasonable doubt alone applied. This Court has repeatedly said that the law does not require such strict proof from the defendant, but it is sufficient to reduce the homicide from murder to manslaughter, or to

make out a plea of self-defense, or other affirmative defense, if the jury are merely satisfied of the existence of the facts necessary for that purpose.

We are aware that expressions like that used by the learned judge in this case may occasionally be found in our Reports, and they may seem to have received the tacit approval of this Court. But when the cases are examined—and they are very few—it will be seen that they are mere *dicta* or were inadvertently used; and we have not been able to find a single case in which the question has been presented and it has been decided that any doubt in the minds of the jury as to the matters in mitigation or excuse is sufficient to turn the scales against the defendant and to convict him of murder or manslaughter, as the case may be, when the killing with a deadly weapon is admitted or proved. We would hesitate to follow a decision to that effect, because, as we think, it would be contrary to many cases where the question has been directly involved, and in which the principle which we have already stated has been laid down as a reasonable and just one. It imposes a greater burden than the defendant should be required to carry. Surely it cannot be that the State is required to exclude only a reasonable doubt in order to convict, and the defendant must exclude every doubt in order to reduce the grade of the homicide or to acquit himself of so serious a charge.

But the Court also told the jury, in response to the (704) State's third prayer for instruction, that they must convict the defendant of murder in the second degree if they were left in doubt as to whether the deceased, at the time he was slain, was making a felonious assault upon him, and as to whether the defendant, at the time he slew the deceased, believed or had reasonable ground for believing that the deceased was making a felonious assault upon him. This charge required the defendant to prove not only that the deceased was actually making a felonious assault, but also that the defendant at the time had reasonable grounds to believe and did believe that he was making such an assault. Whether a felonious assault was being made or not, if the defendant, from the circumstances and surroundings as they then appeared to him, reasonably apprehended that the deceased was assailing him with the intent to kill him or to do him great bodily harm, he had the right, if he was not himself already in fault, to stand his ground and defend himself, and, if necessary, to take the life of his assailant; and this would be true, though it afterwards appeared that the deceased did not in fact intend to commit a felonious assault. *S. v. Matthews,* 78 N. C., 523; *S. v. Barrett, supra,* and cases cited.

The defendant is to be judged, not by what the deceased

actually intended, but by the reasonable apprehension excited in his own mind by the acts of the deceased as to what the latter intended to do, provided the defendant acted in good faith and with ordinary firmness. But, while he could thus act upon appearances, he must have judged, at his peril, of the grounds of his apprehension to this extent: that on his trial for the homicide, while the jury are bound by the law to pass upon the defendant's act according to the facts and circumstances as they appeared to him at the time he committed the homicide,
(705) they must be the sole judges of the reasonableness of the grounds of his apprehension. We stated this principle fully in *Barrett's case,* and sustained it by the citation of authority, not only from the decided cases, but from the great writers upon the criminal law, and, without reproducing it, we are now content to refer to what we then said as applicable to the particular instruction of the court in this case. *S. v. Dixon,* 75 N. C., 275.

It is said, though, to be a complete answer to those exceptions, that the defendant was convicted of murder in the second degree, and could not therefore have been prejudiced by them. This is very far from being the case. The court plainly referred in both of the instructions not only to "matters in mitigation," but to "matters in excuse," and told the jury that if they were in doubt as to either they should convict of murder in the second degree—that is, if they were in doubt as to the matters in excuse which tended to acquit the defendant, they should convict him of murder in the second degree. It would be difficult to conceive of a charge more prejudicial than this one. If the jury entertained any sort of doubt as to the matters in excuse, they could not, under this instruction, acquit the defendant, for they were directed not to do so. If they entertained no doubt, it was as much their duty to acquit as it was, in the other case put, to convict; and yet they convicted of manslaughter instead of acquitting. It is true that if there has been error the defendant must show that he has been prejudiced before he is entitled to a new trial; but when the court tells the jury that they cannot acquit if the defendant has not removed every doubt as to the matters in excuse, the prejudice to the prisoner is perfectly manifest. One of the fallacies in supposing otherwise arises from not giving heed to the fact that both instructions referred not only to matters in mitigation, but to matters in excuse, and therefore to instruct the jury that if they had any doubt as to the
(706) matters in excuse they should convict of murder in the second degree, was the same as telling them that in such a case they could not acquit. It is very true that when the kill-

ing with a deadly weapon is either admitted or proved, and nothing else appears, the presumption is that the defendant is guilty of murder in the second degree, and every matter of excuse or mitigation must be shown by the defendant, but only to the satisfaction of the jury, and there the rule stops, and it is unsafe to substitute any new, untried and unnecessary formula for this simple principle which has been approved in all cases, and especially commended by this Court as the only safe and correct one. We said, in *S. v. Barrett,* 132 N. C., 1012: "It is well not to depart from established forms and precedents which are the products of the wisdom and wide experience of the sages of the law. It is said in the cases just cited that the prisoner must satisfy the jury, neither beyond a reasonable doubt nor yet by a preponderance of testimony, but simply satisfy them of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense. We are not prepared to say whether the jury can become satisfied of the existence of a fact unless the evidence in favor of its existence is stronger than or preponderates over that against its existence. But what we do say is, that it is best to follow settled forms in the trial of causes." In *S. v. Byers,* 100 N. C., 512, the expression now objected to appeared in the charge of the judge in the lower court, but there was no exception taken to it, and the language of the Court in the opinion did not make the slightest reference to it. *S. v. Potts,* 100 N. C., 457, would seem to be clearly against the State's contention in this case. The instructions as to the burden of proof in regard to insanity were there rejected, because of the use in them of the very expression, "if the jury are left in doubt," etc., and the Court expressly (707) recognizes the rule to be that the defendant is required only to satisfy the jury. In *S. v. Smith,* 77 N. C., 488, the objectionable words are used by *Faircloth, J.,* inadvertently and without the slightest reference to the facts of the case or the exceptions, which did not present the question at all, and the same may be said of *S. v. Jones,* 98 N. C., 651, and *S. v. Rollins,* 113 N. C., 722. *S. v. Mason,* 90 N. C., 676, is an authority against the State, for in that case the principle which the Court, by *Smith, C. J.,* referred to as "settled and put at rest by judicial decisions," is the rule established by *S. v. Willis,* 63 N. C., 26, and a long line of cases, ending with *S. v. Barrett,* 132 N. C., 1005, namely, that the defendant is only required to show matters in mitigation or excuse to the satisfaction of the jury. It is not necessary to review each of the cases cited by the State. We have carefully examined them and have not been able to find a single one among them, or indeed any other case, for we have

diligently searched everywhere, in which such an instruction was held to be correct when exception was taken to it as in this case. In *Pool v. State,* 87 Ga., 526, the Court held that a request to charge that if there is any doubt the jury should acquit, required that the jury should be satisfied beyond all doubt, and was therefore erroneous. It is conceded by the State that the defendant is not required to satisfy the jury beyond a reasonable doubt as to the mitigating circumstances; and if so, how can he be required to satisfy them beyond all doubt by excluding "only doubt" which may be in their minds, as said in *Pool v. State, supra?*

When it is said that the jury cannot be *satisfied* that the plea of self-defense is true, if "they are left *in doubt* about it," nothing more or less is meant or can be intended than that the defendant must exclude from the minds of the jury not only
(708) every reasonable doubt, but every other kind of doubt, which is directly opposed to all authority. The true principle is stated in *S. v. Byrd,* 121 N. C., 684, as follows: "Facts offered by the prisoner in excuse or mitigation need not be proved beyond a reasonable doubt, but only to the satisfaction of the jury," and this is all of it. Referring to the rule (as thus stated) in *S. v. Mazon,* 90 N. C., 683, *Smith, C. J.,* said: "If anything can be settled and put at rest by judicial decisions, this principle has been, and we cannot now permit it to be drawn in question without impairing the confidence which ought to be reposed in the integrity and stability of the judicial administration of the law."

The suggestion that if we follow this established precedent of the law, unrestrained violence and lawlessness may ensue, is one to which we can give no heed. If we take our eyes from the law and give attention only to consequences, or if we stop to consider who is morally right or wrong, without regard to right or wrong as judicially ascertained, we will soon have a government, not of law, but without law, and the lawlessness which is sought to be avoided will follow as an inevitable result. We must apply the law as we find it to be, and not as we think it should be, for to do the latter would be to legislate and not to expound.

But we think the court inadvertently fell into error when it responded to the defendant's prayer for instructions and told the jury that, if the deceased advanced upon the defendant with a drawn knife in such manner as to cause him reasonably to apprehend, and he did actually apprehend, that he was about to be slain or to receive enormous bodily harm, the defendant had the right to stand his ground and, if necessary, to take the life of the deceased without retreating. Thus far the charge was cor-

rect, but the court added to this instruction the following: "provided the assault made upon the defendant was felonious or with felonious intent." As the court superadded these (709) words to the prayer of the defendant, or, rather, to its own response to that prayer, it certainly became necessary that some explanation should be made to the jury as to the meaning of the term "felonious or with felonious intent." The word "felonious" is a technical one, and not supposed to be understood by laymen of whom juries are composed. In *S. v. Gaither,* 72 N. C., 458, it is said to be the duty of the judge to explain to the jury what is meant by felonious intent, and that it is error not to do so. In *S. v. Coy,* 119 N. C., 903, the Court says: "What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say," citing several cases. It was all-important in this case, because of the connection in which the words were used, that such an explanation should have been made. The jury had already been told that if the defendant reasonably apprehended that he was about to be slain or to receive great bodily harm he had a right to kill his assailant without retreating, provided he acted in good faith and with ordinary firmness. This was the true principle, and was sufficient to impart to the jury a correct idea of what was required to constitute the right of self-defense. Why, then, add the proviso that the assault must have been made by the deceased with a felonious intent? This clearly implied that more than a mere intent of the deceased to kill or to do great bodily harm was necessary to justify the defendant in taking the life of his assailant, whereas the murderous intent of the deceased in assailing the defendant was itself a felonious intent, and all-sufficient as the intent required in order that the defendant might rightfully use such force as was necessary to defend himself, even to the taking of his assailant's life.

But the addition to the defendant's prayer for instructions was in itself erroneous. It was not necessary that (710) the assault upon the defendant should have been felonious or committed with a felonious intent. If the assault was made with the purpose of inflicting great bodily harm, or even if the defendant had a reasonably well grounded apprehension that such was the fact, he had the right to act in defense of himself. An assault with an intent to kill is not a felonious assault. It was a felony at one time (Laws 1868-'69, ch. 167), but the law making it a felony was repealed by Laws 1871, ch. 43, and since the date of the passage of that act it has been a misdemeanor. It is true that an assault with intent unlawfully to kill would be

an assault with a felonious intent, but the court did not only say that it must have been committed with a felonious intent, but that it must have been so committed, *or* the assault itself must have been felonious. We have seen that neither was required in order to give the defendant a perfect right of self-defense.

We cannot for a moment think that the right of a defendant to a correct statement of the law by the court to the jury can in any case depend upon the mere possibility, and a very remote one, of there being some member of the jury with sufficient intelligence and knowledge to explain clearly the meaning of technical words to his fellows. That, as we understand it, is the peculiar office and function of the judge. We doubt if any layman could give a correct definition of the word "felonious," as now used in the law of this State, this Court itself having had at least *some* difficulty in stating its exact meaning. The law presumes that the jurors do not know the law, and for this very reason enjoins upon the judge to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." Code, sec. 413. This duty is not even perfunctory, and much less can it be omitted upon
(711) the mere chance that the jury, or at least one of them, may know the law.

There is another objection to the proviso which was added to the instruction by the court. The court had charged the jury virtually by this instruction that an actual assault with the intent to kill or to do great bodily harm was not necessary, as he told the jury that if the defendant apprehended upon reasonable grounds that the deceased was about to assault him with that intent "he had the right to stand his ground and, if necessary, to take the life of his assailant, without retreating"; and yet, by the proviso, the jury, in order to give the defendant the benefit of that instruction, were required to find that there was a felonious assault, or an assault with a felonious intent. Under this instruction, the jury could not have acquitted the defendant if they had found that he had a well-grounded apprehension that the deceased was about to assault him with the intent to kill him or to do him great bodily harm, unless they further found that an assault had been actually committed with a felonious intent. We think that this instruction, given in response to the prayer of the defendant, was calculated to mislead the jury as to the true principle upon which the defendant's right of self-defense was founded, and it therefore necessarily prejudiced him.

In this connection it may be well to notice an expression of the court in the general charge. The jury were instructed that, in order "to justify the use of a deadly weapon in self-defense, it

must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the shooting by the defendant was absolutely necessary, and it devolves upon the prisoner to make it appear to you that the deceased was the assailant and at fault, and that he (the prisoner) was not at fault, or that he (the prisoner) had really and in good faith endeavored to decline a struggle (712) before the shot was fired." It is true the court afterwards, in a very clear and forcible manner, explained to the jury what kind of reasonable apprehension that he was about to be killed or to receive great bodily harm would have justified the defendant in acting upon the facts and circumstances, as they appeared to him; but the fact, as we pointed out in *Barrett's case, supra,* that the court afterwards gave this correct instruction, did not cure the error of the charge as to the existence of the actual or "absolute" necessity to kill. In this respect the charge in *Barrett's case* and the charge in this case were substantially alike. The error was not corrected by the subsequent charge, nor was it intended to be, but the two instructions conflicted, and the jury were thereby left in doubt and uncertainty as to which of the two was right. What we said in *Barrett's case,* upon the same state of facts, substantially, is applicable here, namely, "It is well settled that when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly or when incorrectly. We must assume, in passing upon the motion for a new trial, that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous," citing *Edwards v. R. R.,* 132 N. C., 99; *Tillett v. R. R.,* 115 N. C., 662, and *Williams v. Haid,* 118 N. C., 481.

While the exception to this part of the charge is not very specific, we have noticed it in order that attention may again be called to the correct principle upon which a charge in such a case should be based.

It is true that an actual necessity to kill in order to save the defendant's own life would have justified the killing of his assailant, if the defendant himself was not in fault (*S. v. Dixon, supra*), but it is not true actual necessity is the only ground upon which the defendant can claim that he killed (713) in self-defense; for if there was this actual necessity, or if the defendant had a reasonably well grounded apprehension of death or great bodily harm if he did not kill his assailant, his right of self-defense was complete.

If Stanberry was attempting to kill Miller or to do him great

bodily harm, or if the defendant had a well-grounded belief or apprehension that he was attempting to do so, he had the right to interfere to prevent Stanberry from executing his intention, and if while engaged in the act of interference for that lawful and commendable purpose Stanberry advanced upon him in such a manner as to induce the defendant reasonably to apprehend, and defendant did actually apprehend, that he was about to be killed or to receive great bodily harm, he was justified in taking the life of Stanberry in order to save his own or to prevent great bodily harm to himself; for when he interfered he was in no fault, but was performing a legal duty, and therefore had a perfect right to stand and defend himself against the threatened attack. Clark's Criminal Law, sec. 65, p. 164; *S. v. Matthews, supra; S. v. Rutherford,* 8 N. C., 458; 9 Am. Dec., 658.

There was error in the rulings of the court in the respects we have stated.

New trial.

CLARK, C. J., dissenting. The court gave the following prayers, at the request of the State:

"2. If the jury are satisfied beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon, to-wit, a pistol, and are left in doubt as to the circumstances of mitigation or excuse offered by the prisoner or derived from the State's evidence, they should convict of murder in the second degree.

(714) "3. If the jury are satisfied beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon, to-wit, a pistol, and are left in doubt from the whole evidence as to whether the deceased at the time he was slain was making a felonious assault upon the prisoner with a knife, either because he did not then have the knife or because he was too drunk to be capable of making such assault, and are left in doubt as to whether the prisoner at the time he slew the deceased believed, and had reasonable ground for believing, that the deceased was making such felonious assault upon him with a knife, then they should convict of murder in the second degree."

It is a complete answer to these exceptions that the prisoner was acquitted of murder in the second degree and could not have been prejudiced thereby. Besides, the charge was warranted upon all our authorities. When the killing with a deadly weapon is admitted or proved, the presumption is that the prisoner is guilty of murder in the second degree (*S. v. Hicks,* 125 N. C., 636; *S. v. Booker,* 123 N. C., 713; *S. v. Dowden,* 118 N. C., 1145), and every matter of excuse or justification must be shown by the prisoner. *S. v. Johnson,* 48 N. C., 266; *S. v. Ellick,* 60

N. C., 451; *S. v. Brittain,* 89 N. C., 481; *S. v. Rollins,* 113 N. C., 722, p. 734, where several cases are cited; *S. v. Barrett,* 132 N. C., 1005. From the foregoing cases it will appear that the doctrine is well established that the burden devolved upon the prisoner to prove all matters of excuse or mitigation, and this he must do to the satisfaction of the jury. *S. v. Whitson,* 111 N. C., 695, *syllabus* 9, p. 696; *S. v. Willis,* 63 N. C., 26; *S. v. Locklear,* 118 N. C., 1154; *S. v. Barrett, supra.* It was incumbent on the prisoner to *satisfy* the jury as to the circumstances offered by him in evidence to rebut the presumption of malice and to reduce the crime to manslaughter or self-defense.
If the evidence left the jury in doubt, it fell below the re- (715)
quired standard, and therefore the charge was not erroneous.

In *S. v. Potts,* 100 N. C., at p. 463, the court below refused instructions "to the effect that if upon the evidence the minds of the jury are left in doubt as to the sanity of the prisoner or of his malicious intent in taking the life of the deceased, it should be resolved in his favor, leading in one instance to acquittal and in the other to the reduction of the grade of the offense to manslaughter." The ruling of the court below was affirmed by this Court.

In *S. v. Byers,* 100 N. C., 512, the following charge, at p. 517, by the judge below was affirmed by this Court, *Chief Justice Smith* delivering the opinion: "That when the killing was proved to have been done with a deadly weapon, or admitted by the prisoner, the burden of showing the mitigating circumstances shifted to the prisoner; and this he must show, not by a preponderance of testimony or beyond a reasonable doubt, but to their satisfaction; and if the jury were left in doubt as to the mitigating circumstances, it would be a case of murder."

In *S. v. Smith,* 77 N. C., at p. 488, *Faircloth, J.,* also says: "Homicide is murder, unless it be attended with mitigating circumstances, which must appear to the satisfaction of the jury; and *if the jury are left in doubt on this point,* it is still murder." This is quoted *verbatim* and approved by *Davis, J.,* in *S. v. Jones,* 98 N. C., at p. 657, as well as by *Smith, C. J.,* in *S. v. Byers,* 100 N. C., 518, and it is again held in *S. v. Rollins,* 113 N. C., p. 733. *S. v. Smith,* on this point, is also cited as authority, but without *verbatim* quotation, in *S. v. Brittain,* 89 N. C., 502; *S. v. Mazon,* 90 N. C., 683; *S. v. Whitson,* 101 N. C., 700, and by *Douglas, J.,* in *S. v. Byrd,* 121 N. C., 686.
In *S. v. Carland,* 90 N. C., at p. 674, *Ashe, J.,* says: "A
bare preponderance of proof will not do to show matters (716)
of mitigation or excuse, unless it produces satisfaction of

their worth in the minds of the jury." Certainly the jury cannot be *satisfied* of the truth of such defense when "they are left *in doubt* about it."

When counsel, in zeal for their clients, have sought to change this rule, whose maintenance the Court has heretofore deemed necessary for the prevention of murders, the Court has always refused; and *Smith, C. J.*, citing and approving *S. v. Smith*, 77 N. C., 488, and other cases, says, in *S. v. Mazon*, 90 N. C., 683: "If anything can be settled and put at rest by judicial decisions, this principle has been, and we cannot now permit it to be drawn in question without impairing the confidence which ought to be reposed in the integrity and stability of the judicial administration of the law." These are wise words of one of the ablest and most distinguished of our predecessors, and the principle there followed has not till now been shaken in any subsequent case. The State, always at a gross and unfair disadvantage, by reason of the disparity in the number of challenges and other causes, in any effort to enforce the law in this State against homicides, has been reduced almost to a state of impotence, except when the killing has been by lying in wait, by the late statute and the construction placed upon it in *S. v. Gadberry*, 117 N. C., 811, and similar cases. In view of the vast increase in the number of murders in this State which has followed, and which now amount almost to an epidemic, and the consequent increase in the number of attempts by the people themselves outside of the law to repress crime by lynchings, I view with regret the overruling of another long and unbroken line of precedents which our learned and able predecessors thought just and necessary, that murders might less abound.

(717) There has been no statute and no decision impeaching the uniform and hitherto unanimous decisions of this Court to the above effect. As the burden was upon the prisoner to prove the matter in mitigation to the *satisfaction* of the jury, it inevitably follows that if the jury had been left in doubt the matter in mitigation was not proved to their satisfaction, and their verdict should have been rendered "guilty of murder in the second degree." But their verdict establishes that they were so satisfied.

The prisoner requested the court to charge the jury that "if they believed from the evidence that the deceased was engaged in a difficulty with Asa Miller and was attempting to cut said Miller with his knife, in the presence of the prisoner, it was his duty to endeavor to suppress and prevent the same; and if in attempting to do so the deceased left off his difficulty with Miller and made upon the prisoner with a drawn knife in such a man-

ner as to cause the prisoner to apprehend, and he did apprehend, that he was about to be slain or to receive enormous bodily harm, then the prisoner had a right to stand his ground and, if necessary, to take the life of the deceased, without retreating."

This prayer was certainly defective in leaving out the word "reasonably," which the judge supplied in the following instruction, which he gave in lieu of that asked: "If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller and was attempting to cut said Miller with his knife, in the presence of the prisoner, and the deceased was then capable of executing such a purpose, it was his duty to endeavor to suppress and prevent the same; and if in attempting to do so the deceased left off his difficulty with Miller and made upon the prisoner with a drawn knife in such a manner as to cause the prisoner to reasonably apprehend, and he did actually apprehend, that he was about to be slain or receive enormous bodily harm, then the prisoner had a right to stand his ground and, if necessary, to take the life of the deceased, without (718) retreating, provided the assault made upon the prisoner was felonious or with felonious intent." This was asked by the prisoner (except the additions), and was fully as favorable to the prisoner as he was entitled to, under *S. v. Gentry*, 125 N. C., 733; and the addition, "provided the assault made upon the prisoner was felonious or with a felonious intent," was too plain and intelligible to require a translation of the word "felonious" to the jury. Twelve men of ordinary intelligence could not be impaneled who would not have at least some man upon it who could instruct those upon the jury who were so illiterate (if any) as not to understand the meaning of the judge in that context. If, however, they could have understood the judge to mean an assault with a lesser intent than homicide, then the error was in favor of the prisoner, and he cannot complain. If the failure to explain the word "felonious" was error, it being prejudicial to the State only, it could not possibly be error against the prisoner.

The evidence was that the deceased, who was a lame man, was "perfectly drunk" and "wild drunk," and there was direct evidence that he was not trying to hurt Miller, and that they were in a drunken squabble, and there were other circumstances which would have justified the jury in drawing the inference that the deceased was not capable of harming Miller or of executing any purpose to harm the prisoner if the latter had retreated, as he should have done, after the deceased left Miller, if he (the prisoner) could do so with safety, and thereby have avoided taking the life of a human being. "The dead are always wrong," says

the proverb, truly, and the deceased is not here to give his version of the slaying; but if upon this evidence the condition of the deceased was such that the prisoner could have retreated with safety, but he preferred rather to stand his ground and (719) kill the deceased, without overpowering necessity to prevent injury to himself, then the verdict of manslaughter and the short term in the penitentiary imposed should not be complained of by him. Human life ought to retain something of its former sacredness in the eye of the law.

Cited: S. v. Worley, 141 N. C., 767; *S. v. Lilliston, ib.,* 871; *S. v. Frisbee,* 142 N. C., 674; *S. v. Kendall,* 143 N. C., 664; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Fowler, ib.,* 733.

STATE v. POTTER.

(Filed 5 April, 1904.)

HOMICIDE—*Conspiracy—Evidence—Instructions.*

In a prosecution for murder an instruction on conspiracy between the prisoner and another is erroneous, there being no evidence tending to show such conspiracy.

CLARK, C. J., dissenting.

INDICTMENT against Clarence Potter, heard by *Judge B. F. Long* and a jury, at Spring Term, 1903, of WATAUGA. From a verdict of guilty of murder in the first degree, and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. H. Bower for the prisoner.

MONTGOMERY, J. The prisoner was convicted of murder in the first degree of A. W. Howell, at Spring Term, 1903, of the Superior Court of Watauga. There was evidence on the part of the State tending to show that a warrant was issued by a justice of the peace and placed in the hands of Calvin Turnmire, a constable, to be served on the prisoner, and that another warrant, issued by a justice of the peace named Smith, in which (720) the prisoner and Boone Potter, his near kinsman, were intended to be charged with a forcible trespass, was placed in the hands of the deceased as a specially deputized officer for service on the accused; that Turnmire and the de-

ceased, together with Will Hamby, Joe Wilson and June Snider, on the night before the homicide, met and stayed all night in the house of a man by the name of Hodges, a short distance from a sawmill, where it was anticipated that Clarence and Boone Potter would bring saw logs to the mill; that on the early morning of the next day, 5 November, Clarence and Boone arrived with a load of logs on a wagon drawn by four mules; whereupon Turnmire, who testified that he had summoned Hamby to assist him in the arrest of Clarence, while the deceased and the others, Wilson and Snider, were to arrest Boone, walked up to Clarence and told him that he had a warrant for him; that Hamby read the warrant to Clarence, who was standing behind the wagon and about fifteen or twenty paces from Boone, who was in front of the lead mule; that Hamby, when he read the warrant, in an ordinary tone, had his back towards Boone, and that just about the time of the conclusion of the reading of the warrant by Hamby to Clarence, Boone came around to Clarence and said, "Come on, cousin"; whereupon both mounted the wagon and drove rapidly off down the road toward their home. There was no evidence that either one of the party had said a word about the arrest of Boone before the wagon was driven off. The whole *posse* overtook and headed off the team, after having given chase for about three hundred yards, at a branch or creek that crossed the road. The witnesses for the State testified that the deceased, with a pistol in one hand and the warrant plainly visible in the other, headed off Boone, who was driving the team, at the same time demanding his surrender and notifying him that he had a warrant for his arrest; that thereupon Clarence, who was on the other side of the team, handed his pistol across the hind mule to Boone, who thereupon shot the deceased in the (721) arm and breast, while almost at the same time the prisoner Clarence struck the deceased on the forehead with a large stone. The prisoner testified that the deceased fired at Boone first. Howell died three days afterwards. Four physicians were examined, but we can get very little out of their evidence, except that either wound might have caused the death.

The case was tried with great care by his Honor, and with marked ability he instructed the jury upon the many perplexing and important features of the case. In one aspect of the case, however, his Honor committed an error, that error being founded on a mistaken view of the nature of certain of the evidence. His Honor, in stating the contention of the State, used this language: "Upon this indictment the State first maintains that the prisoner is guilty of murder in the first degree; that he maliciously and feloniously and with premeditation and deliberation slew the

deceased with a deadly weapon, or aided, assisted and helped to do it, or conspired, co-operated and acted in concert with Boone Potter in thus slaying the deceased." It is to be seen from the contention of the State that a *conspiracy* on the part of Boone and the prisoner to kill the deceased was one ground upon which the State relied to show deliberation and premeditation on the part of the prisoner, and on that point his Honor instructed the jury: "You are instructed, further, that the burden is upon the State to satisfy you beyond a reasonable doubt, not only that the killing was done by the prisoner, or by his assistance, aid, help and consent, or in consequence of concert and *conspiracy* with another" (the word "conspiracy" italicised by us), "but also with deliberation and premeditation. . . . And if you find that the prisoner slew the deceased with a deadly weapon, or that he conspired with or aided and abetted Boone in doing the (722) killing with a deadly weapon, you will examine all the evidence and circumstances and say whether you are satisfied from them that the killing was done with premeditation and deliberation; and if you so find, you will find the prisoner guilty of murder in the first degree." His Honor, to make clearer his meaning in connection with that part of his charge, said: "In other words, if the State has shown beyond a reasonable doubt, and you so find, that the deceased and those associated with him had a lawful warrant from a justice of the peace to arrest Clarence Potter, the prisoner, and also a lawful warrant to arrest Boone Potter for shooting into and breaking into a house, and on the day the deceased was injured the deceased and the *posse* with him, duly summoned for the purpose and acting with him as such *posse,* read the warrant to Clarence and notified him to consider himself under arrest, and that this was done openly, in the daytime, within about fifteen paces of Boone Potter; and you further find that Clarence failed to submit to the arrest, but, under a suggestion of Boone, got on the wagon then and there hitched and under their control, and hurriedly drove away; and you further find that the deceased and his associates, with their warrants, pursued and overtook them, said Clarence and Boone and their associate, Heck, at the branch, and that thereupon the deceased, with the warrant open in his hand, notified Boone that he had a warrant for him, in hearing distance of Boone and Clarence, and, by declarations made by the deceased or the *posse,* both Boone and Clarence were fixed with the knowledge that the deceased and his associates were clothed with a warrant to arrest Boone; and you find that Boone hastily descended from the wagon on one side and Clarence on the other, and, by preconcert and understanding and agreement between themselves, the pris-

oner handed Boone a pistol over the mules, in consequence of words or motions between themselves, and thereupon Boone deliberately and premeditatedly shot at the de- (723) ceased twice in rapid succession, with the deliberate intention to take his life; and you find that the death of the deceased ensued from the wound inflicted, Boone Potter would be guilty of murder in the first degree; and if, in addition to the foregoing facts, you find that Clarence understood that the officers had a warrant for himself, and had read it to him, and that he was there engaged in escaping from the officers, and that Boone understood this, and that they were acting in concert in flight; and you find that Boone and Clarence, from their acts and conduct, were acting in concert throughout, and both had predetermined and agreed to resist arrest to the extent to take the life of any one of the officers authorized to execute the warrant, and with premeditated and deliberate purpose to resist the arrest of Boone by the deceased or his associates, or the arrest of himself, the object of the officers being known, and with a premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and Boone shot the deceased with the pistol, and thereby inflicted injuries, from which the deceased died, the prisoner is guilty of murder in the first degree, and you will so find."

It is clearly to be seen from his Honor's instruction that he not only regarded what occurred at the sawmill at the time the officers attempted to arrest Clarence as evidence tending to show a part of a conspiracy between Boone and Clarence to resist the officers, even if it became necessary to kill one or all of them, but he carefully recited to the jury all the incidents connected with the attempted arrest. We cannot agree with his Honor that the facts connected with the attempted arrest at the sawmill furnished any evidence whatsoever of a conspiracy to kill one or all of the officers or any one of the *posse*. Boone, by all of the evidence, did not know at the sawmill and at the time of the attempted arrest of Clarence that any warrant had been (724) issued for him. It seems that the jury believed that Boone heard the warrant read to Clarence, although he was fifteen or twenty paces off, with a wagon and four mules between him and Hamby, who read the warrant, and Hamby speaking in an ordinary tone and with his back towards Boone; but that evidence having been believed by the jury, though it might have been sufficient to justify them in finding that there was an agreement between Boone and the prisoner, entered into at the very time of the arrest of Clarence, to effect the escape of Clarence, it certainly, in our judgment, was not evidence of a conspiracy

to kill the deceased or any member of the *posse*. In fact, the witnesses for the State showed that neither Boone nor Clarence had made any preparations to use Clarence's pistol on the occasion before the arrival of the party at the branch where the team was headed off; neither Boone nor the prisoner had heard anything of the warrants or the preparations to arrest either Boone or Clarence before their arrival at the sawmill; and at the branch Clarence's pistol was between his overalls and his trousers, and his suspenders had to be unbuttoned before he could get the pistol out; all of which goes to show that not until the parties left the sawmill was there any preparation made to use the pistol.

As we have said, this case was conducted by his Honor with marked ability, and, so far as his connection with the making up of the case on appeal is concerned, all is correct; but the remainder of the record comes before us in poor shape. In many parts of the evidence bearing on vital points of the case we are at a loss to understand what the witnesses said; then there are hyphens and blank spaces and inconsistent words, confusing to the understanding. This is especially so in respect to the two warrants, said to have been issued for the prisoner and Boone.

Those papers are referred to as "Exhibits A and B," but
(725) they are nowhere to be seen in the record. They are not alleged to have been lost, and no proof of their contents is offered.

For the one error pointed out, there must be a
New trial.

CONNOR, J., concurring. I would be content to concur in the opinion written by *Mr. Justice Montgomery* without saying more, but for the fact that my understanding of the testimony is so entirely different from that of the Chief Justice, as set out in his dissenting opinion, that I feel constrained to give my reasons for concurring in the conclusion arrived at by the majority of the Court. If I understood the facts as does the Chief Justice, I should not hesitate to concur in his conclusions as to the law. It is a source of regret to me that it is sought to place the majority of the Court in the position, from the viewpoint of the Chief Justice, of giving encouragement to the commission of murders in this State. As I gather the transactions from the State's witnesses, Turnmire had a warrant for the arrest of the defendant for a misdemeanor, and the deceased (Howell) had a warrant for the arrest of Boone Potter. There was much controversy as to the regularity of the warrant and the deputation of Howell, and although these warrants were used upon the trial

and are referred to in the testimony as "Exhibits A and B," they are not attached to the record in the case, and we are unable to pass upon their regularity. Defendant is a young man of nineteen years, uneducated; Boone Potter, it seems, was older; they are cousins; they were engaged in hauling logs to a sawmill. On the night prior to the homicide Turnmire and Howell collected a *posse,* composed of one Joseph Wilson (who said that he had served a term of eight years in the penitentiary), Hamby and Snider, at the house of one Hodges. On the morning of the homicide they went to the mill, and in a short time the defendant and Boone Potter drove up with their wagon. (726) Turnmire and Hamby called the defendant out to one side, four or five steps from the wagon, and told him that they had a warrant for him. Hamby's account of the transaction at this point was as follows: "Defendant said 'All right'; Turnmire handed warrant to me and told me to read it, and I read it; defendant two feet from me; I read it in common tone; Boone was then fifteen steps off; had my back to Boone. Defendant said, 'I cannot have my trial to-day; I have got to help Boone haul logs.' Defendant asked Turnmire to file bond. Turnmire said, 'Yes, we will do what is right.' Defendant asked if he would take his father on bond. He said, 'Yes, anybody most.'" The defendant's testimony upon this point is as follows: "On night prior to the homicide was at Boone Potter's; lived there; worked for him; he was logging; took log to mill on that morning. Turnmire told me they had warrant for me. I asked him to let me change some clothes; he gave me leave; I asked him if he'd take father on my bond, and he said 'Yes.' It was raining. I wanted dry clothes. He said, 'All right.' I got on the wagon; I thought (he) was coming on; we got on wagon and started towards home; sort er rainy; Boone trotted off. When he is not loaded, drives fast." Hamby says: "I heard Boone talking, and we come to where Wilson, Howell and Snider were; could not hear what Boone said until after I turned round. He said, 'Go down with me, cousin'; bounced upon wagon and told Clarence to come on. Defendant slipped on wagon as Boone started off in a trot. Boone began whipping mules. Am kin to Boone and Clarence by marriage. I said to Howell, 'Now, what are you going to do? We will run on down and arrest them.' We ran on down to where they crossed the creek, Howell in front." There was no evidence that a word was said to Boone about the warrant for him, or that he knew that there was such a warrant, or a warrant for defendant, nor is there any evi- (727) dence that the defendant knew that deceased had a warrant for Boone. There seems to be no substantial difference in

the testimony in regard to what occurred at the time of the homicide. After the wagon drove off, some of the witnesses used the term, "The mules loped down the hill." The deceased and his *posse* ran after them. The mules, at the foot of the hill, came to a stop, when the homicide occurred in the manner set forth in the opinion of the Court.

The portion of his Honor's charge to which defendant excepted, and which exception, I think, should be sustained, is as follows: After saying to the jury that if they found certain conditions, his Honor said: "And if in addition to the foregoing facts you find that Clarence understood that the officer had a warrant for himself, and had read it to him, and that he was then engaged in escaping from the officers, and that Boone understood this, and that they were acting in concert in flight, and you find that Boone and Clarence were acting in concert throughout, and that both had predetermined and agreed to resist arrest to the extent of taking the life of any one of the officers authorized to execute the warrant, and with premeditation and deliberation purposed to resist the arrest of Boone by the deceased or his associates, or an arrest of himself, the object of the officers being known, and with the premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and that Boone shot the deceased with the pistol and thereby inflicted injuries, from which deceased died, the prisoner is guilty of murder in the first degree, and you will so find."

There can be no question that the law as laid down by his Honor is correct, but I cannot find in the testimony any evidence to support the theory submitted to the jury that Boone
(728) and the defendant had formed and preconceived a purpose to resist arrest to the extent of taking the life of the officers or their associates. I can find no testimony tending to show that Boone had any knowledge that the deceased had a warrant for him, or that Clarence had any such knowledge, nor can I see any evidence that Clarence was attempting to escape arrest. Taking the testimony of the State's witnesses and of the defendant, which in no material respect contradicts them, I can see nothing in the conduct of Clarence at the time the warrant was read to him indicating a purpose to resist the arrest. His suggestion to the officer to give his father as security, followed by the officer's acceptance of the suggestion, excludes, to my mind, any possible theory of a purpose on his part to resist an arrest. No witness says that Boone heard or could have heard the conversation between Turnmire, Hamby and Clarence. His conduct appears to me to be entirely consistent with that of a man

in his station in life making his daily bread by his labor; he had unloaded his wagon, and I can see nothing in his conduct inconsistent with what might have been expected of a man of his occupation. It is not denied that it was a rainy day. As he drove off, he went down hill. The fact that he hit his mules with his whip, and that they loped off, does not impress my mind with any purpose to escape the *posse*, or officers, in the absence of any evidence that he knew or suspected that they had any warrant for him. If I am correct in my conclusion that there was no evidence to sustain the theory of a preconceived purpose between the defendant and Boone Potter to escape arrest, to the extent of taking the life of the officers, then such theory should not have been submitted to the jury. This is elementary. I do not undertake to say that at the time of the homicide there was no evidence of premeditation. The doctrine of instantaneous premeditation seems to be well established by this Court, and, in deference to the opinions of the eminent judges who have pre- (729) ceded me, I have given it my approval in the disposition of appeals which have come before us.

In the light of these decisions, it was not error in his Honor to leave the question to the jury whether the homicide was the result of premeditation. I do not think that the defendant should have been required to carry with him to the jury the theory of a preconcerted purpose, in combination with Boone, to resist arrest to the extent of taking the life of the officer or his associates. Upon his own showing, this uneducated young mountaineer, before reaching his majority, is guilty of murder in the second degree. It is more than probable that, at the best, he will forfeit to the State more than a score of years of his freedom. I make no comment on the unfortunate man who lost his life. Whether he was a "brave officer," or not, I do not know, and I forbear saying more, upon the record before us, than that it is fortunate for the administration of our criminal law that it is not the custom to proceed as these men did in the arrest of persons charged with violating the law. I cannot think, from his own testimony, that the majesty of the law was promoted, or respect for it increased, by the services of the witness Wilson. But these are not questions before us. I cannot but regret that it so frequently occurs that such widely divergent views exist in this Court in regard to the plainest principles of the criminal law. I am sure that each member of this Court is prompted by no other motive or purpose than to declare the law as he believes it to be and as befits a judge. Certainly the State has made ample provision for the protection of her officers in the discharge of their duties, and I am sure that the judges of the Superior

Court and of this Court do all in their power to enforce the law in this respect. This defendant is, upon his own testimony, guilty of murder. A jury may, upon another trial, find
(730) him guilty of the capital felony. This will be for the jury. I express no opinion in respect to their duty. I simply give expression to my conviction that there was no evidence that the homicide was the result of a preconceived purpose between the two men engaged in the affair to resist arrest to the extent of taking the life of the officer.

WALKER, J., concurring. I concur in the opinion of the Court, as delivered by *Justice Montgomery,* and also in the opinion of *Justice Connor,* as his views in regard to one aspect of this case, which are therein fully and clearly expressed, coincide with mine, and I shall add but a few words to what he has so well said. The learned and able judge who presided at the trial of this case charged the jury correctly as to the law of "premeditation and deliberation," so far as the charge was confined to what occurred at the branch when Boone Potter and the defendant were overtaken by the *posse,* but he fell into error, I think, when he added, "If in addition to the foregoing facts you find that Clarence understood that the officers had a warrant for himself and had read it to him, and that he was then engaged in escaping from the officers, and that Boone understood this, and that they were acting in concert in flight, and you find that Boone and Clarence, from their acts and conduct, were acting in concert throughout, and both had predetermined and agreed to resist arrest to the extent of taking the life of any one of the officers, being known, and with a premeditated purpose to kill to effect their purpose, and in pursuance of this purpose he handed Boone the pistol to kill the deceased, and Boone shot the deceased with the pistol and thereby inflicted injuries, from which the deceased died, the prisoner is guilty of murder in the first degree, and you will so find."

There was no evidence whatever as to any preconcerted
(731) design to resist arrest prior to the time the officers overtook and stopped them at the branch. Indeed, the evidence as to the transactions up to that time tended to prove directly the contrary. I do not think it can be successfully contended that the two men had conceived the purpose to resist arrest when they were driving away from the officers and in the direction of their home with all possible speed. Even if Clarence had not supposed that his offer to give his father as bail was satisfactory (and there is evidence to show that he did think it had been accepted), and even if Boone Potter was aware of what

had taken place between Clarence and the officers, and thought that they had attempted to arrest him, and if the two were not merely returning to their home, as they supposed they had a right to do, but were attempting to escape from the officers, I yet do not think that the instruction which I have quoted from the charge of the court was correct. There is a vast difference, in law, between trying to escape arrest and forming a conspiracy or preconcerted design to resist it. The rights of the parties in the two cases given are essentially different, and this difference we stated fully at the last term, in *Sossamon v. Cruse,* 133 N. C., 470. There is no proof in the case of anything said or done by the Potters when they were driving towards the branch that has the slightest tendency to show a preconcerted design to resist arrest, and, this being so, it only remains to be considered whether the instruction was calculated to prejudice the defendant. It is hardly necessary to argue this question, as the harm to the defendant is perfectly apparent on the face of the instruction. Nothing can be more prejudicial than a charge to the jury to convict, based upon a theory not supported by the evidence. *S. v. Smith,* 125 N. C., 615.

CLARK, C. J., dissenting. The prisoner is not indicted for nor convicted of conspiracy, but of murder. His Honor told the jury that "The burden is upon the State to satisfy the jury beyond a reasonable doubt, not only that the killing (732) was done by the prisoner, or by his assistance, aid, help and assent, *or* in consequence of concert and conspiracy with another, but *also* with deliberation and premeditation; . . . and if you find that the prisoner slew the deceased with a deadly weapon, *or* that he conspired with *or* aided and abetted Boone in doing the killing with a deadly weapon, you will examine *all the evidence and circumstances and say whether you are satisfied from them that the killing was done with premeditation and deliberation,* and if you so find, you will find the prisoner guilty of murder in the first degree."

It would be difficult to make the charge more absolutely in accordance with the precedents. The learned and accurate judge was not charging upon an indictment for conspiracy, nor telling the jury what would amount to a conspiracy. He recited the evidence, as it was his duty to do, but impartially and fairly. It was in evidence that when the summons was served upon the prisoner, Boone, who was near by, called to the prisoner to jump on the wagon, and immediately the horses were put into a lope down the hill, and this by men, both of whom had been evading arrest; that the deceased officer and his *posse* started after them

and headed them off, and, with his warrant in one hand and pistol in the other, the deceased (who as an officer had a right to carry the pistol), ordered Boone to stop. Then Boone Potter said to the prisoner, "Shoot, or give me the pistol," and motioned to the prisoner to hand him the pistol, and he did so, whereupon Boone fired at the officer. This was sufficient aiding and abetting, combining and conspiring to make the prisoner guilty, whether (as is doubtful) the prisoner or Boone killed the deceased. Though the judge recited the evidence, as it was his duty to do, he did not (as the opinion assumes) tell the jury that the action in putting the horses into a lope was a con-
(733) spiracy or combination, nor could the court tell them it was, nor that it was not. The remark, "Shoot, or give me the pistol," is certainly some evidence, taken with the other circumstances, of a combination or conspiracy, the pursuit of a common design. That was for the jury to consider, for the jury also alone could say whether Boone knew the warrant had been served on Clarence, as he had the opportunity to do (*S. v. Bowman,* 80 N. C., 432; *S. v. Perkins,* 10 N. C., 377), and was acting in concert in the flight. The motion for the pistol, the accompanying remark, and the handing it over, under the circumstances, the immediate use of it by Boone, and the prisoner joining in the attack with a rock, certainly constituted some evidence (and very strong evidence) of aiding, abetting, combining and conspiring, and if there was *any* evidence it was properly left to the jury. The court told the jury that *they* should examine the evidence, and if "upon all the evidence and circumstances the jury was satisfied of premeditation and deliberation," etc. Upon all the authorities (unless they are to be overruled), a moment of premeditation, no matter how brief, is sufficient, if the jury find that there was premeditation and deliberation. *S. v. Dowden,* 118 N. C., 1145, and numerous cases since.

The deceased was an officer, bravely and faithfully trying to obey the process which his State had put into his hands to be served. The prisoner and Boone were defendants in that warrant, resisting the power of the State. When halted and the process shown him, Boone motions to the prisoner to hand him his pistol—he evidently knew the prisoner had it—the latter hands it over and for use on the deceased, as the jury had a right to infer. Boone fires upon the officer because he was trying to serve the warrant, and the prisoner joins in the assault upon the officer with a stone. Which caused the death is immate-
(734) rial. There was a joint action, a combination and conspiracy in the doing of the unlawful act. There was no self-defense or manslaughter, as the jury found the facts to be;

and the jury having found, as the judge instructed them was necessary, first, that there was joint action by aiding, abetting or combining and conspiring, and then, further, that the killing was done with premeditation and deliberation, there could be no other verdict than murder in the first degree.

If there is no liability to capital punishment for taking the life of an officer, under the circumstances of this case, then the only safe method of serving process on those defying the State's authority will be service by mail or with a shotgun, and the Legislature should so provide, authorizing the officer to fire first. The life of the officer is worth at least as much to the State and to his family and friends as that of the defiant lawbreaker, and the life of the latter is not the only one that should be regarded with tenderness in the administration of the law. The Legislature in its wisdom can abolish capital punishment, except when the killing has been done by lying in wait or poisoning (and, indeed, in all cases), but it has not seen fit to do so. No case could be presented more strongly demanding the capital sentence of the law than this, where two men who had been defying the law and the service of its precepts are halted by an officer with the State's process in his hand, and one of them motions to the prisoner for his pistol, which is passed over to him by the prisoner, and both unite with pistol and rock in taking the officer's life, for no other cause than that he was there honestly, faithfully endeavoring to obey the trust the State had confided in him. Is the State not strong enough, is it not just enough to vindicate its majesty and execute the law against the willful murderer of its own officer, when its process is thus defied and its officer slain without provocation or excuse, for no fault save that he was endeavoring to do his sworn duty? Shall (735) the condition of him who defies the law be so far better than that of him who shall attempt to execute it that the officer may lose his life, but the lawbreaker cannot? That State certainly cannot have faithful service which is more tender of the life of him who resists and slays an officer in the discharge of duty than careful to throw the terror of its power as a shield around the officer who would execute its orders.

STATE v. LILES.

(Filed 19 April, 1904.)

1. BASTARDY—*Civil Action—Code, secs.* 32, 2967.

A proceeding in bastardy is a civil action and not a criminal prosecution. *S. v. Ostwalt*, 118 N. C., 1208, and *S. v. Ballard*, 122 N. C., 1024, *overruled* on this point.

2. BASTARDY—*Husband and Wife.*

In a bastardy proceeding the legitimacy of a child born of a married woman is an issue of fact depending on proof of the impotency or nonaccess of the husband.

INDICTMENT against Lester Liles, heard by *Judge H. R. Bryan* and a jury, at January Term, 1904, of UNION. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, Adams, Jerome & Armfield for the State.

Redwine & Stack and *Williams & Lemmond* for the defendant.

CLARK, C. J. This is a proceeding in bastardy. The prosecutrix was a married woman at the time of the birth of the child, which was born four or five months after marriage. (736) The court charged the jury that "This is a criminal action and the offense is completed when the child is begotten." To this the defendant excepted. The object of the proceeding, as stated in the Code, sec. 32, is to require the mother, if she shall refuse to declare the father, to "give bond, payable to the State, with sufficient surety to keep such child or children from being chargeable to the county"; and if she shall accuse any man with being the father, if he admit the charge, or, denying it, shall be found to be the father of such child, he shall give bond, with sufficient surety to indemnify the county from charges for the maintenance of such child, with a provision that from the judgment "the affiant, the woman or the defendant, may appeal to the next term of the Superior Court of the county where the trial is to be had *de novo.*"

The law as to proceedings in bastardy first appears in the Laws of North Carolina, 1741, ch. 14, sec. 10, and may be found in 23 State Records, 174, in which volume the laws still extant from 1666 to 1791 are collected and reprinted. Some slight changes were made in 1799, chapter 531, section 2, and other statutes mentioned in the heading to section 32 of the present Code (of 1883). The statute is also codified in Revised

Statutes, ch. 12, sec. 1, and Revised Code, ch. 12, sec. 1. Clearly the object of the statute is in no sense criminal, but is expressed on its face to be a fiscal regulation to compel the mother or (if the father was declared by her and proved to be such) the father to give sufficient surety "to keep such child from being chargeable to the county" for its maintenance. Accordingly, we find that in an unbroken line of decisions, down to and including *S. v. Edwards,* 110 N. C., 511 (1892), in which the authorities are collected, and which was an unanimous opinion, it is held that the proceeding, though it has some anomalous features, was civil in its nature, and not even *quasi* criminal, (737) citing with approval, among other cases, *S. v. Higgins,* 72 N. C., 226, to that effect. Among the long line of cases holding that the proceeding was civil in all essential features are, besides *S. v. Edwards, supra,* the following: *S. v. Peebles,* 108 N. C., 768; *S. v. Crouse,* 86 N. C., 617; *S. v. Bryan,* 83 N. C., 611; *S. v. Wilkie,* 85 N. C., 513 (all of these being cases subsequent to the act of 1879); *S. v. Hickerson,* 72 N. C., 421; *S. v. McIntosh,* 64 N. C., 607; *S. v. Waldrop,* 63 N. C., 507; *Ward v. Bell,* 52 N. C., 79; *S. v. Thompson,* 48 N. C., 365; *Adams v. Pate,* 47 N. C., 14; *S. v. Brown,* 46 N. C., 129; *S. v. Pate,* 44 N. C., 244; *S. v. Carson,* 19 N. C., 368, and "there are others." All these were unanimous opinions, and the point was presented. In *S. v. Pate,* 44 N. C., 244, *Pearson, J.,* calls attention to the fact that this proceeding was not begun by presentment or indictment, and could not be criminal in its nature. In *Myers v. Stafford,* 114 N. C., 234 (1894), it was held for the first time and by a divided Court (dissenting opinion on page 689) that bastardy was a misdemeanor, the dissent calling attention to the fact that if it was a crime, and not a police regulation, as theretofore held, then the woman must be equally guilty. This case was followed by *S. v. Ostwalt,* 118 N. C., 1208 (1896); 32 L. R. A., 396, and *S. v. Ballard,* 122 N. C., 1024 (1898), both by a divided Court, two judges dissenting each time. These cases have not been affirmed since, and, indeed, seem to have been questioned in *S. v. Pierce,* 123 N. C., 748. The result of these cases, all by a divided Court, has been practically to destroy almost entirely the efficiency of the proceeding by requiring proof beyond a reasonable doubt, a disparity of challenges, a denial of appeal by the woman or the State, and of the competency of the woman's affidavit (though all these are expressly given in the statute), and by exacting other incidents of a criminal trial. We (738) feel impelled, as the point is now presented for the first time since *S. v. Ballard, supra,* to review these latter cases and give some of the reasons why we cannot sustain them as au-

thority. The above three cases were followed by two or three others of like purport, in which the point was not discussed, as it was not deemed necessary to reiterate the dissent. The cases named were put on the ground that the act of 1879 incorporated into the Code, sec. 35 (not section 32), a provision that if the issue of paternity shall be found against the father, there should be, in addition to the bond for maintenance and the allowance to the woman, a fine of ten dollars imposed upon the father for the benefit of the school fund. But this contention overlooked the fact that in the very section (32) there was, and had been since its first enactment, in 1741, a provision that if the woman should not declare the father she should give the bond to prevent the child from being chargeable on the county, and "shall pay a fine," which the statute of 1799 made "five dollars," at which it still stands. Yet during all these years the proceeding had been held a civil remedy. If the fine of five dollars against the woman, in the same section, did not make the proceeding a criminal action, the fine of ten dollars laid in a different section upon the man could not have that effect. Furthermore, three opinions by unanimous courts subsequent to the act of 1879 (which imposed the fine of ten dollars) held that this provision did not have the effect to change the proceeding into a criminal action. One of these only (*S. v. Crouse,* 86 N. C., 617) was called to the attention of the Court, and, though that case was in point, the other two, by some oversight, were not called to the eye of the Court in either of the three cases (*Myers v. Stafford, S. v. Ostwalt* and *S. v. Ballard*), in which the majority of the Court held that the action had been changed into one to punish a mis-
(739) demeanor. Had the other two cases to same effect as *S. v. Crouse* been then called to the attention of the Court, doubtless they would have been followed.

In one of these (*S. v. Giles,* 103 N. C., at p. 396), *Smith, C. J.,* speaking for a unanimous Court, says: "The remaining exception is to the judgment itself as inconsistent with the Constitution, though following the statute, in that it imposes upon the defendant the payment of fifty dollars for the use of the woman and a *fine of ten dollars besides,* and imprisons for an indefinite period in case of a default in making payment. The fine is *quasi* penal, but the payment of the residue is not, and the proceeding is not in the exercise of a *criminal,* but of a *civil* jurisdiction in providing for the present support of the child and an indemnity to the county in case of its becoming a further public charge. . . . The error in this contention consists in regarding the requirement of the payment of these amounts and an enforcement of imprisonment as an award of punishment for a criminal

offense, which *in no sense they are,* unless the ten-dollar fine may be so considered. It is but the exercise of a power to compel obedience to the order of the court, and an imprisonment from which the party may be relieved under the insolvent law, as if committed for fine and costs in a criminal prosecution. Code, sec. 2967; *S. v. Davis,* 82 N. C., 610; *S. v. Bryan,* 82 N. C., 611." This was followed in *S. v. Edwards,* 110 N. C., 511, in which (at p. 512) it is said that, though "a fine is imposed by the statute," the action remains a civil proceeding. Although this case was cited in *S. v. Ostwalt* and *S. v. Ballard,* this direct ruling on the point was overlooked. The true principle applicable is thus stated by *Ruffin, J.,* in *S. v. Snuggs,* 85 N. C., 541 (upon another section of the Code): "The statute not only creates the offense, but fixes the penalty that attaches to it, and *prescribes the method of enforcing it;* and the rule of law is that wher- (740) ever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed." This case is cited as authority in *S. v. Pierce,* 123 N. C., at p. 748.

Among the reasons why we return to *antiquas vias* is, that the cases of *Myers v. Stafford, S. v. Ostwalt* and *S. v. Ballard* were decided by a divided Court upon the effect of the statute of 1879, imposing (in another section) a fine of ten dollars, which it is held *per se* changed the proceeding into a criminal action, whereas three opinions of a unanimous Court (two of which were not cited in the three cases just named) had held that the statute of 1879 did not change the nature of the action; further, because section 32, from 1741, had contained a provision for a "fine of five dollars" against the woman, and, notwithstanding this, our unbroken line of decisions had held the proceeding to be civil in its nature; because, also, to construe the statute criminal in its nature is contrary to its express provisions, which declare its object to be to secure sureties to prevent the child becoming a charge on the county; and that if the action were changed into a criminal proceeding, this might negative appeals by the woman and by the State and the use of the woman's affidavit as presumptive evidence (all of which are given by the statute and are essential to its enforcement), and by further requiring a disparity of challenges and proof beyond a reasonable doubt, and other incidents of a criminal action, which would practically make the statute nugatory, and would also repeal the statute of limitation of three years provided by section 36. We do not think such radical changes can fairly be inferred to have been caused by the incidental authorization in another section of a fine of ten dollars. If the fine cannot be levied as an incident

in the civil action, like the fine of five dollars upon the
(741) woman, authorized by section 32, or the fine of $2,500
authorized to be taxed against a sheriff when judgment is rendered against him on his bond for failure to pay over the taxes in full (*Davenport v. McKee,* 98 N. C., 500), then, under the rule, *Magis quam valeat quam pereat,* either the fine in section 35 should be held invalid, rather than the destruction of the efficacy of the ancient proceeding under sction 32, or the $10 fine can be levied in a subsequent and independent criminal proceeding begun under section 35, but based upon the verdict and judgment thereon, rendered under the provisions of section 32.

Besides, there being already the criminal action for fornication and adultery, there is no need to abolish this proceeding, which was enacted to protect the county against being chargeable with the maintenance of the child. If it were a criminal proceeding, it is singular that the woman is not made liable when the man is; for if tried for a criminal offense, both are guilty, since she was present, aiding and abetting in its commission. In construing statutes, the mischief to be remedied must be considered, and there was in this matter no defect of criminal proceeding, for fornication and adultery was already a complete remedy.

The weight of authority elsewhere recognizes bastardy as a civil proceeding to enforce a police regulation. Bishop Stat. Crimes, sec. 691; 2 McLain Cr. Law, sec. 1186; 3 Am. & Eng. Ency. (2 Ed.), 874; 3 Ency. Pl. & Pr., 277, which cites numerous cases to that effect from Arkansas, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Nebraska, New Hampshire, New York, North Carolina, Rhode Island and Vermont; and among the States which hold the proceeding neither strictly civil nor strictly criminal, but *quasi* civil to enforce a police regulation, are cited Alabama, Florida,
Michigan, Ohio and Wisconsin. To similar effect is 9 Cyc.,
(742) 644, which adds to States holding as above Minnesota,
New Jersey, Ohio, Oklahoma, South Dakota, Tennessee and Wisconsin, and sums up the doctrine thus: "The object of these proceedings is not the imposition of a penalty for an immoral or unlawful act, but is merely to compel the putative father to provide for the support of his offspring and thus secure the public against such support."

We are constrained to return to the former uniform rulings of this Court, that proceedings in bastardy are essentially civil in their nature, though with some anomalous features. *S. v. Edwards,* 110 N. C., 511, and cases there cited. *Myers v. Stafford, S. v. Ostwalt* and *S. v. Ballard* are overruled as to this point,

together with any other cases based on the holding by them that bastardy is a criminal proceeding.

The presumption in bastardy proceedings is that the woman is single. *S. v. Peebles,* 108 N. C., 768; *S. v. Allison,* 61 N. C., 346. Here it affirmatively appears that the woman was married, both when she made the affidavit and when the child was born. But it was held by *Taylor, C. J.,* in *S. v. Pettaway,* 10 N. C., 623, and by *Ruffin, C. J.,* in *S. v. Wilson,* 32 N. C., 131, cited with approval in *S. v. Allison,* 61 N. C., 346, that, though the statute specifies "any single woman big with child or delivered of the child," the subsequent language in the section, that the object is to protect the public against the charge of maintaining bastard children, includes married women, since a bastard child can be begotten upon a married woman as well as upon a single woman.

Formerly a child born of a married woman was conclusively presumed to be legitimate, but now legitimacy or illegitimacy is an issue of fact resting upon proof of the impotency or non-access of the husband. See *Woodward v. Blue,* 107 N. C., 407; 10 L. R. A., 662; 22 Am. St., 897, where the subject is fully discussed and authorities given. This is true even (743) when the child is begotten as well as born in wedlock. For a stronger reason, this is true when, as in this case, the child was begotten four or five months before the marriage, and the jury believed the evidence that the husband had no intercourse with the prosecutrix prior to the marriage. The evidence to that effect, and to show the paternity of the defendant and his admissions, were properly admitted. This disposes of all the other exceptions.

Though there was error in holding the action to be a criminal proceeding, it was harmless error, in the view we have taken, and upon the whole case the judgment below is

Affirmed.

DOUGLAS, J., concurs in result only.

Cited: S. v. Morgan, 141 N. C., 732, 733; *Burton v. Belvin,* 142 N. C., 152; *S. v. Addington,* 143 N. C., 685, 687.

STATE v. GOULDEN.

(Filed 26 April, 1904.)

1. BIGAMY—*Declarations—Evidence—Code, sec.* 988.

In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage.

2. BIGAMY—*Evidence.*

In a prosecution for bigamy, in which defendant had testified that he drove his first wife away, his reasons for so doing were not admissible.

3. BIGAMY—*Burden of Proof—Evidence.*

Under the Code, sec. 988, the burden is on the defendant, in a prosecution for bigamy, to show that he did not know that his former wife was living.

4. BIGAMY—*Husband and Wife.*

Under the Code, sec. 988, the absence of the wife for seven years, caused by being driven away by her husband, does not justify him in remarrying without making inquiry as to whether the wife was living.

5. INDICTMENT—*Statutes—Proviso.*

Where a proviso in a statute withdraws the case from the operation of the body of the section it need not be negatived in the indictment.

6. BIGAMY—*Statutes—Proviso—Burden of Proof.*

Where a proviso withdraws a case from the operation of the body of the statute the burden is on the defendant to bring himself within the proviso.

7. BIGAMY—*Intent.*

A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy.

DOUGLAS, J., dissenting.

(744) INDICTMENT against Julius Goulden, heard by *Judge T. A. McNeill* and a jury, at August Term, 1903, of ROCKINGHAM. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
C. O. McMichael for the defendant.

STATE *v.* GOULDEN.

CLARK, C. J. The defendant was indicted, under the Code, sec. 988, for bigamy. The admissions of the defendant were competent to prove the first marriage. *S. v. Wylde,* 110 N. C., 500; *S. v. Melton,* 120 N. C., 591; 2 McLain Cr. Law, sec. 1083, and cases cited in note 6; 2 Bish. Stat. Cr. (2 Ed.), sec. 610. It was therefore not error to admit evidence that when the defendant, about three weeks before the second mar- (745) riage, stated his intention to marry, and was charged with the existence of his first wife, he had replied, "I wish I could hear she was dead, so I could be a free man." The defendant stated that he drove his wife off. It was not error to refuse to permit him to give his reasons for so doing, for it was not matter pertinent to the issue.

The court charged the jury: "The burden is on the defendant to show that he did not know that his first wife was living for the seven years prior to his second marriage." In this there was no error. The Code, sec. 988, after prescribing that a second marriage, during the lifetime of the former husband or wife, is bigamy, and fixing the punishment therefor, contains the following proviso: "*Provided,* that nothing herein contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been living within that time, nor shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage, nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

The burden is on the State to prove beyond a reasonable doubt both marriages, and that at the date of the second marriage the husband or wife of the defendant by the first marriage was still living. This completes the offense, but the proviso exempts the defendant, notwithstanding, from conviction and punishment if either one of three things, peculiarly within his knowledge, are shown—*i. e.,* (1) that such former wife or husband had been continually absent for seven years at the date of the second marriage *and* shall not have been known by the defendant to have been living within that time; *or* (2) that the defendant had been lawfully divorced at the time of the second (746) marriage; *or* (3) that the first marriage has been declared void by any court of competent jurisdiction. These are matters of defense to withdraw the defendant from liability, notwithstanding proof that bigamy has been actually committed by a second marriage during the lifetime of the first husband or wife. These matters being set out in the proviso, withdrawing the

defendant from liability, by our uniform decisions they are not required to be negatived in the indictment, and, of course, the State is not required to prove what it is not called on to allege.

In *S. v. Norman,* 13 N. C., 222, construing the act of 1790, now substantially the above section (988) of the Code (save that the punishment is not death, as was then the case), *Henderson, C. J.,* says that the proviso therein "withdraws the case from the operation of the act," and the burden was upon the defendant to show the divorce, which in that case was the part of the proviso relied on. This ruling, that the State is not called on to negative in the indictment matter of defense set out in a proviso when it withdraws a case from the operation of the body of the section, has been cited and approved. *S. v. Davis,* 109 N. C., 780; *S. v. Melton,* 120 N. C., 591; *S. v. Call,* 121 N. C., 643; *S. v. Newcomb,* 126 N. C., 1104, in which last case the authorities are reviewed.

The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living. The authorities for this are abundant: *S. v. Barrow,* 31 La., 691; *S. v. Lyons,* 3 La. Ann., 154; *Stanglein v. State,* 17 Ohio St., 453; *S. v. Abbey,* 29 Vt., 69; 67 Am. Dec., 754; *Fleming v. People,* 27 N. Y., 329; *S. v. Williams,* 20 Iowa, 98; 2 Wharton Cr. Law (10 Ed.), secs. 1704, 1705; 2 McClain Cr. Law, sec. 1080. The State could (747) rarely prove that a defendant was not ignorant that his wife was living, while he can as a witness in his own behalf testify that he was.

Speaking of another (the second) ground of defense, allowed in the proviso, *Lord Denman, C. J.,* said, in *Murray v. Reg.,* 7 Q. B., 706, that it would be as reasonable to require the prosecution to deny that the statute had been repealed as to negative a divorce—one being as much a matter of defense as the other. The matters set out in the proviso are, as above stated, matters peculiarly within the knowledge of the defendant, and none more so than whether he was ignorant of his wife's existence at all times within seven years before the second marriage. "In such cases . . . the negative is not to be proved by the prosecutor, but on the contrary, the affirmative must be proved by the defendant as matter of defense." Wharton Cr. Law, sec. 614; 1 Greenleaf Ev., sec. 79. In *Rex v. Jarvis,* 1 East., 643, *Lord Mansfield* said: "It is a known distinction that what comes by way of proviso in a statute must be insisted on, by way of defense, by the party accused; but where exceptions are in the

enacting part of the law, it must appear in the charge that the defendant does not fall within any of them."

All the authorities concur that neither the belief of the defendant, however honest, that the first spouse is dead, nor ignorance of his or her being alive for less than seven years, is a defense. *Reg. v. Cullen,* 9 C. & P., 681; *Com. v. Hayden,* 163 Mass., 453; 28 L. A. R., 318; 47 Am. St., 468; *Com. v. Mash,* 7 Metc., 472. In 2 Wharton Cr. Law (10 Ed.), sec. 1705, it is well said: " 'Men readily believe what they wish to be true,' is a maxim of the old jurists. To sustain a second marriage, and to vacate a first, because one of the parties believed the other to be dead, would make the existence of the marital relation determinable, not by certain extrinsic facts, easily capable of forensic ascertainment and proof, but by the subjective condition of individuals." In this case the evidence is that the first (748) wife had lived in twenty or thirty miles of the defendant ever since he testified that he drove her off, and, though his testimony was that he had not heard of her for twenty-four years, except that he heard a year before his second marriage that she was dead, he showed no effort to verify that fact, and the State offered evidence tending to show that the defendant knew she was alive within seven years of the bigamous marriage. Indeed, he having driven her off, such involuntary departure being absence procured by the defendant himself, is not such "absence" as would have excused the defendant from inquiry even after the lapse of seven years. *Parker v. State,* 77 Ala., 47; 54 Am. Rep., 43.

No error.

DOUGLAS, J., dissenting. I am inclined to agree with the line of authorities holding that where it has been shown that the wife has been absent from her husband for over seven years, the burden of proving that he knew she was alive at the time of the second marriage rests upon the State. Otherwise the defendant would be required to prove a negative, which he could do only by going upon the stand and submitting to cross-examination. He would be forced to become a witness in his own case, with all its possible consequences. On the other hand, the State could prove the fact affirmatively by any evidence, direct or circumstantial, that the jury might believe, as, for instance, that the defendant had been seen with his wife within the seven years, or that she had been seen in the neighborhood, or that some one had told him she was alive, or that her whereabouts were generally known in the community. Any one of these facts would *tend* to prove his guilty knowledge. To require a defendant to

prove a divorce is essentially a different matter, and,
(749) indeed, is the converse of the former. A divorce is an affirmative fact peculiarly within the knowledge of the defendant, and which can be easily and conclusively proved by a mere transcript of the record, without requiring the defendant to become a witness or involve himself in any dangerous consequences. *Cessante ratione cessat et ipsa lex.*

Cited: S. v. Connor, 142 N. C., 701, 705, 707; *S. v. Long,* 143 N. C., 677.

STATE v. GARLAND.

(Filed 3 May, 1904.)

PUBLIC OFFICERS—*Sheriffs—Counties—Code, sec.* 1009.

Under the Code, sec. 1009, a sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners.

INDICTMENT against C. Garland, heard by *Judge T. J. Shaw* and a jury, at November Term, 1903, of MITCHELL. From a judgment of guilty on a special verdict the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
S. J. Erwin for the defendant.

MONTGOMERY, J. The defendant was indicted in the Superior Court of Mitchell County for purchasing, while holding the office of sheriff of that county, willfully and unlawfully, certain claims against the county of Mitchell at a less price than their full value. The jury returned a special verdict, the substance of which, as to its material parts, is as follows: The county of Mitchell has been for many years largely in debt, and the General Assembly has enacted at various sessions laws authorizing the commissioners to levy special taxes to be used in compromising and settling the floating indebtedness of the county at
(750) less than its face value. Through those years it has been a custom of the several sheriffs of the county to take up such indebtedness as was offered by creditors at fifty cents on the dollar, either in payment of taxes due to the county, or from the special tax fund at that rate, the sheriff having been instructed in each case to do so by the board of county commissioners; and

on settlements between the sheriffs and the county commissioners they would be allowed credits for the claims at the rate they paid for them.

The defendant in the present case was directed and instructed by the commissioners to accept all claims due by the county and offered by the holders at the rate of fifty per cent of their face value, and to pay therefor either in tax receipts or in cash, out of the special fund; and the defendant, under these instructions, acting as the agent of the board of commissioners, did, in June, 1902, accept from a holder two certain claims, particularly numbered and specified, due and owing by the county, and he paid for the claims at the rate of fifty per cent of their face value. The claims were paid for partly in tax receipts and the balance by a check. That amount was charged by the defendant on his books against the special tax fund, but paid by check drawn by him as sheriff on a bank in which the special and general tax fund was deposited under one account to his credit as sheriff. Thereafter, on a settlement between the sheriff and the commissioners, he produced the claims taken up by him from the holder, and he received a credit for the same as sheriff and tax collector only to the amount he had paid the holder, and no more. The jury further found that in taking up the claims from the holder the defendant, who at the time was sheriff of the county, "acted as the agent of and for and in behalf of Mitchell County, and under instructions and directions of the commissioners of Mitchell County, and not for or in his own behalf; and (751) that in settlement with the county he was credited only with the amount he had paid Tappan (the holder) therefor."

The statute under which the defendant was indicted (Code, sec. 1009) is chapter 260, Public Laws 1868-'69. The act of 1868-'69 had for its caption "An act to declare it a misdemeanor for any county officer to speculate in county claims." The caption of the Code section is "County claims, speculation in, indictable." The purchase of claims against the county by a county officer is not prohibited by the statute if a full price is paid therefor. If such an officer pays full price for a claim against a county, he has as much right to buy it as has anybody else. It is only when he buys such claims at less than their face or full value that the law interferes and declares such act a misdemeanor. The reason for this prohibition is apparent. If such conduct were allowed, the county officers might refuse to pay the indebtedness of the county at the full value of the claims, although the money might be in the treasury for that purpose, to the end that those who held such claims might be compelled to take less than their face value, or commence litigation for

their collection. The intention and meaning of the statute, therefore, are to prevent county officials from buying for their own benefit claims due by the county of which they are officials. But if the meaning from the context was doubtful, the caption of the act of 1868-'69 and that of the Code, sec. 1009, might be invoked to aid in the construction of the law; and, as we have seen, those captions declare that the object of the law is to prevent county officers from speculating in claims due by their counties. They themselves are not allowed, under the pains of indictment, either to buy a claim due by the county, or to be interested in any sale or purchase by any other person or persons of such claims.

(752) The defendant in this case, as we have seen, was directed by the county commissioners to buy these claims for the county, and he bought them, not for himself, but for the county. The county got the benefit of the purchase, and not one cent of profit in any way went into the pocket of the defendant. In fact and in law, as the jury found, he did not buy for himself, but for the county, through the direction of the commissioners. It was contended by the Attorney-General in this Court that, under the act of 1901 (chapter 214), no part of the special tax fund of the county could be used for any purpose except by the joint act of the board of commissioners and the finance committee of Mitchell County, and that therefore the direction of the commissioners to the defendant was a nullity, and the action of the sheriff was on his own responsibility. It is true that the passing upon the validity of claims of the county of Mitchell by the commissioners and the finance committee was an act judicial in its character, and it could not be delegated to the sheriff, who virtually passed upon the claims which he bought, as both valid in law and due by the county; and it might be in some civil procedure that the holders of the claims which the sheriff purchased might be made to return the money and take back their claims; or it may be that any holder of claims against the county of Mitchell might by due process of law prevent the authorities of that county from preference among its creditors, because of a willingness on the part of some to compromise their claims against the counties. But all that is a very different matter from indicting and punishing the defendant, who is sheriff of the county, for following an invalid instruction. He has reaped no benefit; he made no purchase for himself, and the county alone was benefited. The judgment of guilty pronounced by his Honor upon the special verdict was erroneous.

Reversed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

PARKER v. R. R. (appellant). GATES. *Bond* for plain- (753) tiff; *Cowper* for defendant. Affirmed.

LEGGETT v. R. R. (appellant). BEAUFORT. *Warren* for plaintiff; *Small & McLean* for defendant. Affirmed.

VANN (appellant) v. HARE. HERTFORD. *Winborne & Lawrence* for plaintiff; *Cowper* and *Winston* for defendant. Affirmed.

MAHONEY (appellant) v. TYLER. BERTIE. *Winston* for defendant. Motion to docket and dismiss plaintiff's appeal allowed.

EASON v. DORTCH (appellant). GREENE. *Lindsay* for plaintiff; *Woodard* for defendant. The Court being equally divided, *Connor, J.*, not sitting, the judgment is affirmed.
Cited: S. c., 136 N. C., 291.

STATE v. DOLES (appellant). NASH. *Attorney-General* for State; *Spruill* for defendant. Motion to reinstate appeal denied.

STATE v. ALSTON (appellant). FRANKLIN. *Attorney-General* for State; *Spruill* for defendant. Affirmed.

EDWARDS v. R. R. (appellant). WILSON. *Woodard* for plaintiff; *Daniels, Elliott* and *Connor & Connor* for defendant. The Court being evenly divided, *Connor, J.*, not sitting, the judgment below is affirmed.

DAWSON (appellant) v. BARNES. VANCE. *Hicks* for plaintiff; *Pittman* for defendant. Affirmed.

DEAN (appellant) v. NORWOOD. VANCE. *Pittman* and *Hicks* for plaintiff; *Bickett* and *Zollicoffer* for defendant. Affirmed.

HARPER v. ANDERSON (appellant). EDGECOMBE. *Bridg-* (754) *ers* for plaintiff; *Fountain* for defendant. Affirmed.
DOUGLAS, J., dissenting.

STATE v. CLENNY (appellant.) SAMPSON. *Attorney-General* for State; *Cooper* for defendant. The Attorney-General conceded that there was error in the record, entitling the defendant to a new trial, and it was so ordered.

WILLIAMS v. WILLIAMS (appellant). DUPLIN. *Stevens* for plaintiff; *Carr* for defendant. Affirmed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

BRADSHAW (appellant) v. WILLIAMS. DUPLIN. *Carlton & Williams* for plaintiff; *Carr* for defendant. Affirmed.

BECTON v. DUNN (appellant). LENOIR. *Loftin* and *Rouse* for plaintiff; *Harris* for defendant. Affirmed.

MORGAN v. LUMBER CO. (appellant). SAMPSON. *Stevens* and *Davis* for plaintiff; *H. A. Grady* for defendant. Affirmed on authority of *Mizell v. Burnett,* 49 N. C., 247; *Green v. R. R.,* 73 N. C., 524; *Drake v. Howell,* 133 N. C., 162.

CHEMICAL CO. v. KIRVEN (appellant). NEW HANOVER. *Rountree & Carr* for plaintiff; *J. D. Bellamy* for defendant. Defendant's appeal dismissed under Rule 17.

STATE v. LONG (appellant). WAKE. *Attorney-General* and *W. N. Jones* for State; *Dockery* and *Morrison* for defendant. No error, on authority of *S. v. Patterson, ante,* 612.

HUGHES v. FAYETTEVILLE (appellant). CUMBERLAND. *Sutton* for plaintiff; *Murchison* for defendant. Affirmed on authority of *Lewis v. Raleigh,* 77 N. C., 229; *Shields v. Durham,* 118 N. C., 450.

WILLIAMS (appellant) v. COMMISSIONERS. ROBESON. *McLean* for defendant. Plaintiff's appeal dismissed under Rule 17.

(755) STATE v. BLACKMAN (appellant). UNION. *Attorney-General* for the State; *Redwine & Stack* for defendant. New trial.

STATE v. BASS (appellant). UNION. *Attorney-General* for State; *Adams, Jerome & Armfield* for defendant. Affirmed.

WILSON v. HEATH (appellant). UNION. *Lemond* for plaintiff; *Redwine & Stack* for defendant. Affirmed.

STATE v. JOHNSON (appellant). DURHAM. *Attorney-General* for State; *Winston & Bryant* for defendant. Affirmed.

RAGAN (appellant) v. RICHARDSON. GUILFORD. *King & Kimball* and *Bynum* for plaintiff; *Scales* and *Barringer* for defendant. Affirmed.

PEPPER v. CLEGG (appellant). ORANGE. *Graham* for plaintiff; *Staples* for defendant. Defendant's petition to rehear dismissed.

HOLLOWAY v. PROCTOR (appellant). DURHAM. *Winston* and *Manning* for plaintiff; *Boone* for defendant. Affirmed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

TYSON v. R. R. (appellant). GUILFORD. *Barringer* for plaintiff; *King & Kimball* for defendant. Affirmed.

WALKER v. BROOKS (appellant). PERSON. *Kitchin & Carlton* and *Bradsher* for plaintiff; *Boone & Reade* for defendant. Affirmed.

WATLINGTON v. JONES (appellant). GUILFORD. *Stedman & Brooks* for plaintiff; *King & Kimball* for defendant. Affirmed.

MAYS (appellant) v. TRACTION CO. DURHAM. *Boone* and *Biggs* for plaintiff; *Manning & Foushee* for defendant. Affirmed.

NUNNALLY (appellant) v. R. R. DURHAM. *Biggs* and *Boone & Reade* for plaintiff; *Winston & Bryant* for defendant. Judgment of nonsuit affirmed. This does not prevent plaintiff from bringing another action.

Cited: Hood v. Tel. Co., 135 N. C., 627; *Tussey v. Owen,* 147 N. C., 338; *Lumber Co. v. Harrison,* 148 N. C., 334.

BANK v. MCCORKLE (appellant). GUILFORD. *W. P.* (756) *Bynum* for plaintiff. Defendant's appeal dismissed under Rule 17.

G. W. CLEGG (appellant) v. R. R. IREDELL. *Armfield & Turner* for plaintiff; *Caldwell* for defendant. Reversed on authority of *Prevatt v. Harrelson,* 132 N. C., 250, and *Evans v. Allredge,* 133 N. C., 378.

SPENCE v. R. R. (appellant). STANLY. *Price* and *Spence* for plaintiff; *Bason* and *R. L. Smith* for defendant. Affirmed.

GORDON v. HUGHES (appellant). DAVIDSON. *Raper* for plaintiff; *Walser & Walser* for defendant. Affirmed.

PICKARD v. DICKS (appellant). RANDOLPH. *J. T. Morehead* for plaintiff. Defendant's appeal dismissed under Rule 17.

STATE v. JOHNSON (appellant). WILKES. *Attorney-General* for plaintiff; *Barber* for defendant. Dismissed for failure to print record.

WILLIAMSON (appellant) v. MFG. CO. FORSYTH. *Patterson* for plaintiff; *Watson & Buxton* and *Glenn & Manly* for defendant. Affirmed.

HARRIS (appellant) v. SMITH. SURRY. *Patterson* for plaintiff; *Watson* for defendant. Plaintiff's appeal dismissed under Rule 17.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

BOYD v. R. R. (appellant). MECKLENBURG. *McCall & Nixon* for plaintiff; *Bason* for defendant. Affirmed.

757) CONNOR (appellant) v. MFG. CO. MECKLENBURG. *Bell* for plaintiff; *Jones & Tillett* for defendant. The Court being evenly divided, WALKER, J., not sitting, the judgment below is affirmed.

HOLSBROOKS (appellant) v. R. R. MECKLENBURG. *McCall & Nixon* for plaintiff; *Bason* for defendant. Affirmed.

RATLIFF v. R. R. (appellant). MECKLENBURG. *Bennett* and *Justice* for plaintiff; *Bason* and *Caldwell* for defendant. Affirmed.

MINISH (appellant) v. R. R. CALDWELL. *Edmund Jones* and *L. Wakefield* for plaintiff; *S. J. Ervin* for defendant. Action dismissed. (Both parties appealed, and both appeals decided in favor of defendant.)

STATE (appellant) v. HOWARD. HENDERSON. *Attorney-General* for State; *H. G. Ewart* for defendant. Affirmed.

STATE (appellant) v. GETTYS. RUTHERFORD. *Attorney-General* for State; *McBrayer* for defendant. Dismissed.

BOND (petitioner) v. WILSON. BURKE. *Avery, Justice* and *Perkins* for plaintiff; *Hill* and *Avery & Ervin* for defendant. Petition to rehear dismissed.

RHETT v. EDWARDS (appellant). HENDERSON. *Smith & Valentine* for plaintiff; *Toms & Rector* and *H. G. Ewart* for defendant. Affirmed.

JOHNSTON v. CASE (appellant). BUNCOMBE. *Craig* for plaintiff. Defendant's appeal dismissed under Rule 17.

STATE v. LONG (appellant). MACON. *Attorney-General* for State; *J. F. Ray* for defendant. Affirmed.

FULLER v. JENKINS (petitioner). SWAIN. *Fry* for plaintiff; *Crawford* for defendant. Petition to rehear dismissed for failure to print.

IN RE WAKEFIELD (petitioner). CHEROKEE. *Posey & Welch* for petitioner; *Ferguson, contra.* Affirmed.

(758)

AMENDMENT TO RULE 27.

ADOPTED 16 MARCH, 1904.

Add at the end of Rule 27:

When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

INDEX.