ANNOTATIONS INCLUDE VOL. 196

NORTH CAROLINA REPORTS

VOL. 100

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1888.

REPORTED BY

THEODORE F. DAVIDSON

ANNOTATED BY

WALTER CLARK

(FURTHER ANNOTATIONS ADDED, 1929)

(2D EDITION, ANNO.)

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FEBRUARY TERM, 1888.

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1888

G. W. DUGGER AND W. L. BRYAN v. WESLEY McKESSON AND OTHERS, AND JOHN E. BROWN, WHO DEFENDS AS LANDLORD.

Probate — Evidence in Ejectment — Hearsay — Opinion — Record — Secondary evidence of State Grants; Alteration of — When void and when voidable — Judge's Charge; Exceptions to.

1. Before the change in our judicial system, all the judges of the State had the power to take the probate and order the registration of deeds.
2. The testimony of one who assisted a surveyor, since deceased, in the survey of certain old grants from the State, as to a marked line which was pointed out, and the courses taken from a point in that line, is not rendered incompetent by the fact that an agent of the grantee was present at the survey.
3. Objection to the testimony of one appointed to survey the lands in controversy, showing how the calls in a grant were inconsistent with a plat attached to it, comes too late after the cross-examination by the party objecting.
4. And when such testimony, offered by a defendant claiming under the grant, served to show discrepancies between the plat attached and the land to which he is attempting to fit it, the plaintiff, *it seems*, can have no ground to complain of the evidence.
5. Where the grants for large bodies of land contain no reference to streams claimed to be within their boundaries, it is admissible to prove by an

experienced surveyor that the surveys for such grants are frequently silent as to the streams, when *not lines or termini*, or lay them down inaccurately.

6. The opinion of such surveyor is admissible to show why all the marks on trees along a line of a grant were on the northeast side, instead of on opposite sides, so as to show the exact course of the line.

7. A call of a grant, dated 20 July, 1796, for 59,000 acres, being "north 24° east 3,098 poles by the Washington County line to a white oak," and the party offering the grant proposing to show that the tract was properly laid down on the line of that county by the act of 1789, ceding the county and the State of Tennessee to the United States, and offering for this purpose the act of cession, the act appointing commissioners to run the lines in 1796, a resolution of Assembly of December, 1799, ratifying their report, proof of the loss of the report, depositions of witnesses, accompanied by a book containing notes alleged to be the field notes of the surveyors who ran the lines for the commissioners in 1799—the depositions showing that the field notes were in the handwriting of one of those surveyors and were in the custody of the son of another, and their accuracy in calling for the State line, by actual survey and knowledge of one of them—and declarations of deceased persons in respect to the proceedings of the commissioners and their surveyors: *Held*, that there was sufficient evidence of the authenticity of the record of the surveys to permit the *field* notes to be read in evidence; and that running the State line as the boundary in the grant, was a recognition of the location of the grant by the grantor, the State.

8. Evidence that there is a large number of persons settled within the boundaries of two grants issued in 1796, of 59,000 and 99,000 acres respectively, is admissible to repel the idea that the lands so occupied were vacant, and liable to entry in 1881.

9. The alteration of a course in a grant after its issue, does not revest the land in the State, but it is operative in its original form—there being a distinction in this respect between executed and executory contracts.

10. While grants for land not subject to entry are void, and the fact may be shown on the trial of title to the land, a grant irregularly sued out cannot be avoided in a suit between parties claiming the land, but may be annulled by proper proceedings instituted by the State.

11. Errors in a judge's charge must be pointed out specifically, and they will not be searched for in an entire charge, under an exception "to the charge as given."

(3) ACTION for the recovery of land, begun in MITCHELL County, and removed to the Superior Court of CATAWBA, where it was tried before *MacRae, J.*, at Fall Term, 1888.

The verdict and judgment were for the defendants and the plaintiffs appealed.

The facts sufficiently appear in the opinion.

J. F. Morphew and J. M. Gudger for plaintiffs.
P. J. Sinclair and G. N. Folk for defendants.

SMITH, C. J. The plaintiffs' claim of title to the land sued for, and described in the complaint, is derived under a grant of six hundred and forty acres, made, on 2 February, 1881, to J. F. Amos, and a deed from the latter, and his wife, executed on the 30th day of the next month, to the plaintiffs. The defendants, all of whom originally served with process, were acting by authority of John E. Brown, subsequently admitted to defend as landlord, and claiming to be the owner, concede that they are in the occupation of the same tract, and aver that the title thereto was not in the State when the grant issued to the plaintiffs' bargainor, but had long before, to wit, on 20 July, 1796, been divested out of the State by a grant to William Cathcart, of a tract of fifty-nine thousand acres, of which that now in dispute formed an inconsiderable part.

The essential matter in controversy is, as to the location of the boundaries of the land contained in the earlier grant, and the estate in which is claimed by the defendant, Brown.

The issues, eliminated from the pleadings and submitted to the (4) jury, were with the responses, as follows:

1. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: No.

2. Do the defendants wrongfully withhold possession of said lands from plaintiffs? Answer: No.

The response to the inquiry of damages was rendered unnecessary by the other findings, and none was returned.

The defendants offered on the trial in support of the claim of title in the defendant, Brown:

1. A grant of sixteen thousand acres, issued to William Cathcart, on 20 July, 1796.

2. A grant of same date to William Cathcart of eight thousand seven hundred and sixty acres.

3. A grant to him of same date of ninety-nine thousand acres.

4. A grant to same, and of same date, for fifty-nine thousand acres.

5. A grant, issued on 8 July, 1796, to Samuel Meeker and Alexander Cochran, for twenty-two thousand acres.

6. A transcript of proceedings in the Court of Equity of Buncombe County, for partition among the heirs of William Cathcart, in 1848 and 1849.

7. A sale and conveyance by deed of I. B. Sawyer, clerk and master in Equity, to W. J. Brown, executed on 10 March, 1853.

8. A deed for the same lands, made on 27 June, 1883, by said W. J. Brown to John E. Brown, the defendant admitted into the action at Spring Term, 1883, and before the removal.

It was admitted that the deeds embrace the same lands as those described in the grant to Cathcart. Much evidence was introduced on each side, and many depositions read in the defense of aged persons as to declarations of old and deceased persons, of the position of
(5) natural objects, and names, acquired by reputation, of certain localities, with a view to ascertain the boundaries of the Cathcart grants, of which so much only is set out in the case on appeal as will render intelligible the errors assigned by the plaintiffs and intended for revision.

Exception 1. An objection was made to the form of probate of the deed of the clerk and master when it was produced, but as the probate is not set out, nor is it shown wherein the alleged defect consists, the exception cannot be entertained. If it be, as the brief of counsel for the appellees state, a want of power in the judge to take the probate, and order the registration, it is expressly sanctioned by the law in force before the change in the judicial system. Rev. Stat., ch. 37, sec. 1.

Exception 2. One Wiseman, a witness for defendants, in his examination as to the location of the 90,000 and 59,000 acres granted, was allowed, after objection, to say: "When I was a boy, I was called on by John Brown to go with one Blackstock, a surveyor, from Buncombe, and went to a place called Davenport Spring, on Toe River," where was found a white oak, line marked, near to the spring, and the witness testified to the courses taken from that point. It does not appear that Brown pointed out the tree, or made any remark in regard to these objects, but he was at the time the general land agent of Cathcart, and this fact, it was claimed, rendered inadmissible, as evidence, what occurred in his presence. We are unable to see how evidence, otherwise free from objection, is rendered incompetent by reason of the presence of the agent. What was said and done, proceeded from the surveyor, a disinterested person, and was admissible upon his death, in accordance with repeated adjudications in questions of ancient boundaries. *Caldwell v. Neely,* 81 N. C., 114; *Huffman v. Walker,* 83 N. C., 411; *Strickland v. Draughn,* 88 N. C., 315.

(6) This is so when the declarant was at the time a slave, disabled to testify, inasmuch as, if living at the trial, he would have been heard. *Whitehurst v. Pettipher,* 87 N. C., 179.

Exception 3. C. W. Watkins, who surveyed the lands and made the plats in the action, under an order of the court, was examined at great length upon the boundary lines laid down by him, and testified in regard to the 99,000 acre tract, that one of its calls for the line of the Meeker

and Cochran grant would never reach it, if the course was followed, and in pursuing it the tract of 99,000 acres would cut it in two; and he spoke of errors in the diagram attached to the grant, which, according to his testimony, did not pursue the calls in the grant itself, though professing to do so.

He testified further that Toe River and the mouth of Plum Tree are placed upon the original plat differently from their location on his own, and that the survey covers land, judging from the streams, inside of the 59,000 acre grant.

After the testimony had been heard and the cross-examination ended, but before the redirect examination was concluded, plaintiffs' counsel asked that all the foregoing evidence, offered for the apparent purpose of correcting the original plat, be withdrawn from the consideration of the jury. The motion was denied, for that, if tenable, the objection came too late.

This application is not of right, but was addressed to the discretion of the presiding judge, and his ruling is conclusive upon the reviewing Court. *S. v. Efler,* 85 N. C., 585; *S. v. Pratt,* 88 N. C., 639.

We do not mean to say that, if made in apt time, the objection to the evidence would prevail, for it seems to conduce to a more intelligent apprehension of the controversy, to put the jury in possession of all the discrepancies between the plat and the locality to which it is attempted to be fitted, which seem to affect unfavorably the defendants' case, and not that of the plaintiffs, so far as it has any, and therefore furnishes no ground of complaint from them.

Exception 4. The grants were noted for the absence of refer- (7) ence to streams within their boundaries, and the defendants proposed to inquire of the witness, as an experienced surveyor and familiar with the subject, whether, in laying down the lines in old grants, the surveys were careful to give them an accurate position when not called for as termini or crossings. The answer, after objection taken and overruled, was: "They may be correct or incorrect. Where they are not called for, I do not think they are usually laid down at all. I have seen them very inaccurate."

The ruling is correct, for the usage among old surveyors, derived from personal examination of them by a surveyor, himself acquainted with the territory over which they extend, tends to account for error in the position of natural objects, which, not forming a part of the description of the lines, seem not to have been carefully observed. The fact may be of little significance in determining the location of the grant, but as furnishing some aid thereto, it was properly made known to the jury.

Exception 5. Another surveyor, Bright, admitted to be an expert, had testified as to an alleged boundary of the 8,700 acre tract on the north;

that all the marked trees found on the line bore marks on the northeast side, about the same position every time. He was then asked by defendants' counsel to explain why, in his opinion, the marks were put on the north side of the trees, variant from the direction in which the line ran. The plaintiffs objected, but the answer was received, and the witness said that, in his opinion, it was to protect the marks from the effect of the sun, and they would remain longer on the north than on the south side of the tree.

We think the explanation was entirely proper, and that inexperienced jurors were entitled to know why the marks were not on opposite sides of the trees, so as to show the course of the line they were put there to designate, and thus an error be avoided.

(8) Exception 6. The 25th call of the 59,000 acre grant being "north 24° east 3,098 poles by the Washington County line to a white oak," the defendants proposed to show that the tract was properly laid down on the line of that county, as defined by the act of cession, in which the county and the State of Tennessee were ceded to the United States, and that this line ran a direct course from the Yellow Mountain to the point on the Stone Mountain at a place where the Watauga River breaks through; that the distance between these points is fourteen miles, and the course north 24° east, and that the line of the 59,000 tract, surveyed in 1799, ran a direct course for nine or ten miles with the Washington County line, as established in the ceding act; and, further, that this line, as thus fixed, was capable of being made certain by the provision in the act at the time of the entry of that tract in 1796, under a survey, and that the line and course, as surveyed, is identical with that run and adopted by the State, through the commissioners appointed to survey and locate the lines of the Western lands, transferred to the United States, pursuant to said act of cession.

For this purpose the defendants offered in evidence:

1. The act of cession aforesaid, found in 1st Martin's Collection, ch. 299, and in 2 Rev. Stat., at page 171.

2. The act appointing commissioners to run the lines in 1796. 1st Mart. Coll., ch. 461.

3. A joint resolution of the General Assembly of 4 December, 1799, ratifying the commissioners' report.

4. The affidavit of the chief clerk in the office of the Secretary of State of his search for, and inability to find, the report of the commissioners, with the survey, accepted as evidence in the cause.

(9) 5. The report of Commissioner J. M. Gudger, employed to ascertain and fix the boundary between this State and Tennessee, a document of the General Assembly of 1887.

6. The depositions of E. Clayton and R. B. Justice, with the book containing the field notes of John Strother and Robert Henry, alleged to be the surveyors who ran the line for the commissioners in 1799.

The plaintiff objected to the reception of the field notes as evidence, on the ground:

1. The want of proof of their being contemporaneous entries, and

2. For that the survey took place in 1799, after the issue of the grant to Cathcart in 1796.

The depositions of E. Clayton and R. B. Justice identify the book, which is transmitted, with the record, to this Court, as containing the field notes, by which the State line was run in 1799, defining the boundary of the ceded territory as being in the handwriting of John Strother, one of the surveyors employed to run and ascertain the line, and it came from the custody of the late Judge J. L. Henry, whose father, Robert Henry, was also one of the surveyors engaged in surveying the line for the commissioners, Joseph McDowell, D. Vance and Mussendine Mathews, and its accuracy in calling for the State line is verified by the deponent Justice, from actual surveys and personal knowledge, thus acquired by himself. Testimony was given of declarations of deceased persons to the witnesses in respect to the proceedings by the commissioners and surveyors, which was not at the time objected to, but was afterwards.

We think the authenticity of the record of the surveys, then made and forming part of the survey itself, sufficiently established, to be read in evidence, the original report thereof being shown to have been lost.

The second reason assigned for rejecting the evidence is alike untenable. The running the State dividing line, as the boundary in the grant, is a recognition of the location of the grant, coming from the grantor who, alone, has an interest in the lands, and an induce- (10) ment to narrow, rather than enlarge, the limits, and is evidence of reputation, as to where they lie. Such evidence is admitted as hearsay, when coming from disinterested and deceased persons, and when called for in a junior grant. *Dobson v. Finley,* 8 Jones, 495; *Bethea v. Byrd,* 95 N. C., 309; *Halstead v. Mullen,* 93 N. C., 252.

Exception 7. The plaintiff also objected to proof offered, that there are settled, upon the 59,000 and 90,000 acre tracts, a large number of persons, perhaps as many as 400 or 500. The evidence was pertinent, as tending to repel the idea, that the lands, so occupied, were vacant, and subject to entry, in 1881, when the grant, under which the plaintiffs claim, was issued. The presence of the county town of Mitchell within the 99,000 acre tract, is hardly reconcilable with a supposed vacancy, or of a grant void for indefiniteness of description of the area enclosed.

Exception 8. This exception rests upon an alleged unauthorized change in the 26th call of the 59,000 acre grant, since its issue, from "south 17° east to" south 30° east.

To support the plaintiffs' contention, they produced a certified copy of the grant, from which it appeared that this call, in the body of the instrument, was for 17°, and in figures, on the margin, 30°. The defendants exhibited the original grant, and the disputed call, being in "the crease of the fold," and the paper much worn, it was uncertain what the true reading was, and conflicting evidence was offered, by the respective parties, upon the question of an alteration.

The judge, upon inspection, held it to be 30°.

But there was also testimony tending to show that, however read, the effect, so far as the land claimed by the plaintiffs was concerned, would be the same, and either running would take in the plaintiffs' grant. If, in fact, the change was made in the terms of the grant after its issue, it would not reinstate the title in the State, but it would operate still in the original form to vest the estate in the grantee.

(11) Destroying a deed has no legal force in restoring the estate after it passes out of the grantor and vests in the grantee, and the case bears no resemblance to the effect produced upon an executory agreement. The distinction is between a contract executed and passing an estate, and a contract executory and to be enforced against one by a spoliator, to which the court will refuse to lend its aid.

The plaintiffs asked for a series of instructions, of which the 1st, 2d and 5th were given in very words; the 2d, with additions set out in the charge, and the 4th and 6th, denied. Those refused are as follows:

4. If the grant of the 59,000 acre tract has been altered by the defendants in the 26th call, so as to substitute 30 degrees in place of 17, the grant thereby becomes void, and the jury must determine how that is from the evidence.

6. The grant is void, because, upon the plat of the survey attached, it appears that no survey was ever made by one having authority to survey and locate entries.

The first of the refused instructions, numbered 4 in the series, has already been considered and disposed of; the last only remains.

While grants of land, the entry of which is forbidden by law, are void, and the fact may be shown on the trial of title thereto, as in case of the Indian reservations, and "vacant lands," as defined in *S. v. Bevers,* 86 N. C., 588, and others not subject to entry, as held in *Strother v. Cathey,* 1 Murph., 162, and in *Stanmire v. Powell,* 13 Ired., 312, it is as well settled, that for irregularities in suing out a grant, it cannot be avoided in an action between parties, but must be vacated in proper

proceedings, instituted by the State, to revoke the issue and annul the deed. *Waugh v. Richardson,* 8 Ired., 470; *Stanmire v. Powell, supra,* and other cases.

The rulings are to the same effect in *Lovinggood v. Burgess,* Busb., 407; *McCormick v. Monroe,* 1 Jones, 13, and *Harshaw v. Taylor,* 3 Jones, 513.

The charge of the court, which shows familiarity with all the (12) matters in controversy arising in the protracted trial, and is full and explicit, we give entire:

"The general principle upon which we try cases of this kind, is, that the plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary, and the burden is upon the plaintiff to prove his case; but in this case the burden, upon the question of location, has shifted.

The plaintiffs, Dugger & Bryan, bring their action to recover of the defendants, McKesson and others, a certain tract of land in Mitchell County; and John E. Brown comes in and makes himself a defendant, and undertakes to defend the suit, as landlord, for all of his codefendants. The plaintiffs show, in evidence, a grant to J. F. Amos for 640 acres in February, 1881, and a deed from Amos and wife in March, 1881, to them, the plaintiffs.

The defendants admit that the land in dispute, the 640 acres, is properly located on the plat, and is covered by the grant and deed shown by plaintiffs.

The plaintiffs, having shown title out of the State and in themselves for the land, are entitled to recover, unless the defendants can show the right to the possession, which they admit they hold, under a better title than that of the plaintiffs. The issues are: First, are the plaintiffs entitled to the possession of the land described in the complaint? The plaintiffs having shown title, insist that it is upon the defendants now to satisfy you, by a preponderance of evidence, that they have a better title. They offer, in evidence, a grant to Wm. Cathcart, dated 30 July, 1796, and the plat and survey accompany the same, which you have a right to consider in determining the location for 59,000 acres, and they also offer you evidence of a succession of conveyances of this land by which it comes to defendant, Brown, under whom all the other defendants claim. Now, the question is, have the defendants (13) satisfied you that this 59,000 acre grant covers the 640 acre tract for which plaintiffs are prosecuting this action? If they have located it so as to include within its boundaries this 640 acre tract, they have shown an older, and, therefore, a better title to the land than plaintiffs, and your response to the issue should be No, the plaintiffs are not the owners. But if they have failed to convince you of the fact, the burden

being upon them, you should answer Yes, the plaintiffs are the owners, etc. Most of the testimony offered on each side has been directed to the question of the location of the boundaries of the 59,000 acre tract, and in order to properly locate it, the defendants have offered in evidence several other grants to the same party, Wm. Cathcart, and one to Meeker and Cochran for large bodies of land, which, they say, will aid you in your investigation, and enable you to determine whether the 59,000 acre tract has been properly located by defendants. They have, also, called your attention to the many acts of Assembly, establishing counties in the northwestern section of the State, to the act of 1789, by which a very large portion of territory was ceded to the United States, out of which the State of Tennessee was subsequently formed. It is a very interesting chapter of history which has been brought to our attention, and we cannot fail to have obtained much information as to the early settlement of this section, and the manner of disposition of the land belonging to the State in those early days of its existence. They have offered you evidence of the establishing of the county of Burke in 1777 from the older county of Rowan, and of the boundaries of Burke at its formation, also of Wilkes and of Washington, which were erected at the same session with Burke, and of subsequent acts fixing their boundaries. The 59,000 acre tract, as described in the grant, is in Burke County. The beginning corner is said to be a white oak, standing on what is
(14) supposed to be the line of Wilkes County, and the last call of the grant is from a black oak south 45° west, 2,040 perches, along the line of Wilkes County, to the beginning. Unless the 59,000 acre tract, or a part of it, is in the boundaries of Burke County, as it then was, the grant is then void and of no effect, but if part of the land granted is in Burke, the grant is not void, by reason of part of it being outside of the old boundaries of Burke. Have they located the beginning corner of the tract? In order to locate a tract of land, it is not necessary that the surveyor should begin his survey at the beginning corner; he may begin at any point which can be satisfactorily established, and when one point has been settled upon, he may fix the other, if he can. The Washington County line has also been called for as one of the lines of the tract. Have the defendants satisfied you of the location of this line, and of the point near which the Washington and Wilkes lines intersect? One call is for the line of Washington County; this line of the grant must go to the Washington County line, if it can be found, the line of Washington County as it was in 1796, and whether it had been surveyed or not, at the date of this grant, makes no difference, if it was afterwards run in accordance with an act theretofore passed, ascertaining where the Washington County line was; therefore I have admitted in evidence the notes of the surveyor who ran the State line in 1799, in accordance with

the act of cession made in 1789, in order that you may determine whether this location, as contended for by the defendants, is the correct one, and has reached the Washington County line.

The defendants, for the purpose of satisfying you of the proper location of the 59,000 acres, have offered evidence tending to show the location of the four or five other tracts, and the same rules will apply to the location of each tract as applies to the 59,000 acre tract. The number of acres called for in a grant is not always very material, for the boundaries will control, and if they are correctly ascer- (15) tained, the grantee is entitled to all within them, and not excepted, whether the number be greater or less than that stated in the grants, but, in ascertaining the situation of doubtful boundaries, the number of acres stated in the grant may be considered.

Courses and distances are controlled by a call for known objects or established lines. If the lines of 99,000 acres have been located to your satisfaction, and there is a call in the 59,000 acre grant from a point which has been located to and with the line of the 99,000 acres, you must go to it with this line regardless of course and distance, but if the 99,000 acres cannot be found, you must follow the course and distance of the 59,000 acre grant. Where lines of other tracts or counties, or State lines, are called for, which were known at the time of the grant, then the true boundary is such lines so called for, but if at the time of the issuing of the grant such lines were not run and marked, then the jury are at liberty to locate such lines according to the calls or points designated, without reference to any subsequently marked line, unless they have been satisfied that such subsequently marked line was run in accordance with the act or grant establishing the line. If they are satisfied that the subsequent survey reached the true location, they will be governed by it. These general directions will apply to the location of each of the tracts which the defendants have undertaken to locate to your satisfaction. The contention of defendants is, that all of these grants, made on the same day, were a series of grants calling for each other, and that the Meeker & Cochran grant, issued a few days before the others, is also called for in some of these grants, and they say that if they have satisfied you of the location of each of these different tracts, and that they correspond with each other, that they will materially assist you in arriving at your conclusion whether the defendants have properly located their 59,000 acres so as to include the land (16) in dispute. And so, if they have failed to locate the other grants, the plaintiffs contend that as the location of the 59,000 acres is so intimately connected with that of the others, they have failed to locate the 59,000 acres.

The copies of the survey and of the grants of the 59,000 acre tract were admitted, to enable you to see whether there has been an interlineation or erasure in the body of the grant, changing the 26th call from south 17° east to south 30° east.

It matters not what interlineations are made in the surveyor's plat and description. The question for you is, Has that call been changed in the grant since it was issued; and if so, what is the effect of it? If it has been changed since it was issued, would it affect the location of the tract to the prejudice of plaintiffs. For, unless the effect of the alteration, if there has been any alteration, would be to include the land claimed by plaintiff, when otherwise by the grant, as it was originally issued, it would not have done so, it would make no difference. I don't think an alteration would make void the grant; it would only, in this case, impose upon you the task of ascertaining what were the original calls of the grant, and whether, as it was written, it includes the boundaries of plaintiffs' claim, the land in dispute. But to prove an alteration, the burden, as entered upon the plaintiffs' authority, must satisfy you of its truth by a preponderance of evidence.

The response to the second issue will follow the response to the first. If you respond Yes to the first, or No to the first, make the same response to the second.

The third issue is as to damages. If you have found the first and second issues in favor of the plaintiff, the only testimony to damages is that of plaintiff, Dugger, who testifies that it was more than $200, but they claim no more than that sum. But if you have answered the
(17) first and second issues No, you need not trouble yourselves about the third.

The plaintiff "excepted to the charge, because of the charge as given, and because of the failure of the judge to give the charge as requested in the plaintiffs' prayer for special instructions." The jury rendered a verdict in response to the first and second issues, No.

We reproduce the instructions, as given, at large, in order to show their fairness, and the correct exposition made of the law by the able judge who presided and conducted the trial, of which no better evidence can be furnished than the failure of the appellants to point out any specific error in it. We cannot entertain an exception, that, failing to do this, is taken "to the charge as given." Errors must be pointed out, or they will not be searched for in an entire charge, under general words, such as are here used.

There is no error and the judgment is

Affirmed.

Cited: Respass v. Jones, 102 N. C., 11; *Burwell v. Sneed,* 104 N. C., 122; *McKennon v. Morrison, ibid.,* 362; *Carlton v. R. R., ibid.,* 369; *Allen v. Gallinger,* 105 N. C., 336; *Lewis v. Lumber Co.,* 113 N. C., 62; *Redmond v. Mullenax, ibid.,* 512; *Wyman v. Taylor,* 124 N. C., 431; *Carson v. R. R.,* 128 N. C., 97; *Bowser v. Wescott,* 145 N. C., 66; *Brown v. Hutchinson,* 155 N. C., 208; *Hollified v. Telephone Co.,* 172 N. C., 725.

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(18)

A. B. DAVIDSON v. ANN GIFFORD AND OTHERS.

Issues—Ejectment—Admissions of Counsel.

1. When, in an action of ejectment, it is alleged in the complaint "that plaintiff was the owner" and "entitled to the possession" of the land in controversy, and the defendant, in his answer, denies each of these allegations, and sets up new matter as a defense; *Held,* to be error to refuse to submit the issues raised by the allegations of the complaint, and to only submit those issues arising on the new matter set up in the answer.

2. When the complaint in ejectment does not set up any particular evidence of title in plaintiff, or that plaintiff claims under any specified title, the plaintiff is at liberty, on the trial, to prove title in himself, in any way he can, allowed by law.

3. The material issues of fact, *raised by the pleadings,* must be submitted, unless it appears to the Court that this right is waived by the parties.

4. When the pleadings are so framed as to present the case of either party in more than one aspect, as to the evidence that may be produced, the issues should not be so framed as to exclude any pertinent evidence affecting the merits, but should be so shaped as to embrace the whole of the material allegations controverted. This may be insisted upon, *as of right,* by either party to the action.

5. Merely casual, hasty, inconsiderate admissions of counsel, in the course of a trial, do not bind his client, and evidence of such admissions should be excluded. This is so, although the client was present when the admissions were made, and did not correct his counsel, or disclaim his authority.

CIVIL ACTION, tried before *MacRae, J.,* and a jury, at the Fall Term, 1887, of MECKLENBURG Superior Court.

There was a verdict and judgment in favor of the defendants. Plaintiff appealed.

The facts are set out in the opinion of the Court.

W. P. Bynum and C. N. Tillett for plaintiff.
P. D. Walker for defendants.

(19) MERRIMON, J. The plaintiff alleged in the complaint, simply, that he was the owner and entitled to the possession of the land described therein; that the defendants were in possession thereof, and wrongfully withheld possession from him; that the rental value of the property was $300, and the defendant, Gifford, had had such wrongful possession ever since November, 1878, and received the rents, etc.

The answer of the defendants broadly and specifically denied the several allegations of the complaint, except that alleging possession of the defendants, but it was alleged, as to it, that their possession was lawful; and it was further alleged in the answer, as a matter of defense, that the plaintiff claimed title, by virtue of a mortgage from the defendant, Ann Gifford, executed to the Charlotte Building and Loan Association of Charlotte, North Carolina; and also, a mortgage of the land executed to him by her codefendant, Steinhouse, who fraudulently obtained a deed for her for the land before he executed the last mentioned mortgage, and the plaintiff had notice of such fraud, and of her right in equity to have the deed, so executed by her to her codefendant, declared void for fraud, etc.

At the trial the plaintiff tendered, and asked the court to submit to the jury issues, whereof the following is a copy:

"1. Is the plaintiff the owner of the property mentioned in the complaint, and entitled to the immediate possession thereof?

2. Do the defendants unlawfully withhold the possession thereof?

3. What damages, if any, has the plaintiff sustained?"

The court declined to do so, and this refusal is assigned as error.

The plaintiff objecting, the court submitted to the jury issues, whereof the following is a copy:

"1. Was the deed from the defendant, Ann Gifford, to defend-
(20) ant, J. E. Steinhouse, obtained by fraud, surprise, or undue influence over her on the part of the said Steinhouse?

2. Did the plaintiff, A. B. Davidson, purchase the land in controversy for value, and without notice of the equity of said Ann Gifford?

3. Did the defendant, Ann Gifford, have notice of the sale under the mortgage from her to the Mechanics' Building and Loan Association?

4. Did plaintiff take an assignment of the note and mortgage given by Ann Gifford to the Mechanics Building and Loan Association, and did he afterwards sell the land, or cause the same to be sold, under said mortgage, and buy the same at said sale?

The submission of these issues is assigned as error. The court seems to have rejected the issues tendered by the plaintiff, on the ground that the state of the pleadings not only did not raise them, but rendered them wholly nugatory. In this view, we cannot concur; on the contrary, they were, in our judgment, the principal issues raised by the pleadings, and the plaintiff had the right to have them submitted, granting that those submitted were not improper, though not really necessary, as they were incidental and collateral to the principal ones.

The plaintiff did not allege, in the complaint, any particular evidence of title in himself to the land in question, nor did he allege that he claimed title thereto by virtue of any particular chain of title, or title deeds specified, and more particularly, he did not allege that he claimed title by virtue of the deed, which the defendant, Gifford, alleges her codefendant obtained from her by fraudulent practices, of which, she alleges, the plaintiff had notice, nor by the mortgage she executed to the Loan Association mentioned. He was, therefore, at liberty, on the trial, to prove title in himself, in any way he could, allowed by law. If he could not prove title in himself by the mortgages and other deeds, the validity of which was questioned on the trial, he had the right, under the pleadings, to give any other evidence of such title (21) within his power, and, moreover, he would have had the right, under the issues tendered by him, to prove that the defendant, Gifford, ratified and confirmed the deed, which she alleged her codefendant fraudulently obtained from her. No one of the issues raised any question in this respect, although there was some evidence of such ratification, which was not called to the attention of the jury, by the court in its instructions to them, for the reason, no doubt, that it was not pertinent to the issues submitted.

There is nothing in the record which shows that the plaintiff consented at all, that his title depended altogether upon the deeds specified in the defendant's answer, and put in question by the issues submitted. On the contrary, it appears that he insisted that the principal issues, plainly raised by the pleadings, should be submitted to the jury, so that he could give any evidence of title he might be able to give.

The defendants did not admit in their answer that the plaintiff had title, unless they could avoid and overthrow his apparent title. On the contrary, they broadly denied that he had any title, and then, as a particular, specific defense, alleged the matter already adverted to, which, if sustained, was not conclusive against the plaintiff's title, nor did it prevent him from showing title otherwise, and from other sources, nor from proving that the defendant ratified, and was thus bound by, the alleged fraudulent deed, already referred to. The issues raised by the special defense pleaded, were subordinate and collateral to the principal

ones raised by the general defense, and they did not exclude, supersede, or necessarily conclude inquiries pertinent, raised by the principal issues; indeed, they involved but a single aspect of the case, which was not, in view of the pleadings, conclusive of the whole case. It is not sufficient to say, that the plaintiff put in evidence only the deeds questioned by the answers. These deeds, and only these deeds, in certain aspects of
(22) them, were put in question by the issues submitted, and they, and not other evidence of title, were pertinent. If the principal issues raised by the pleadings had been submitted, it may be that the plaintiff would have produced other evidence, competent and pertinent, to prove his alleged title. It may be that the deeds litigated were the only evidence of title in himself that the plaintiff could produce, but it does not so appear from the pleadings, or in the record, by admission or otherwise, and we can only see and apply the law to the case as it appears in the record.

The material issues of fact raised by the pleadings must be submitted to the jury, unless, in some way, to be seen by the court, the right of a party, in this respect, shall be waived. This is essential to a proper determination of the action, particularly in respect to the matters of fact therein. *Porter v. R. R.*, 97 N. C., 66.

When the pleadings are so framed and directed as to present the case, on the part of the plaintiff or the defendant, in more than one aspect as to the evidence that may be produced on either side, the issues of fact should not be so framed—narrowed in their scope and application—as to exclude any relative pertinent evidence, affecting the merits of the cause of action, or the defense alleged; they should be so shaped as to embrace the whole—not simply a part—of the material allegations controverted, and put at issue by the pleadings. While, perhaps, it may, in some cases, be convenient to submit issues incident and subordinate to, and embraced by, the principal ones raised, the latter, as we have already said, should always be submitted to the jury, unless they shall be waived, because the trial of them is necessary to settle and conclude all the material controverted allegations of the pleadings; and this may be insisted upon, as of right, by either party to the action. *Henry v. Rich*, 64 N. C., 379; *McElwee v. Blackwell*, 82 N. C., 345; *Porter v. R. R.*, 97 N. C., 66, and the cases there cited.

(23) The defendant, Gifford, was examined as a witness in her own behalf on the trial, and stated, that she was present and examined on a former trial; that the plaintiff was then present sitting behind his counsel, and he was then examined as a witness. Her counsel then put to her this question: "What was admitted by the counsel of plaintiff on the other trial?" She answered, "It was admitted by counsel that I did

not have time to think before signing the paper." The plaintiff objected to the question and answer. The objection was overruled, and this is assigned as error.

It is not denied that the evidence objected to was material, if competent. We think it was incompetent, and ought to have been excluded. Exactly in what connection, and why, the admission was made, is not stated, but it does not appear to have been a distinct, formal, solemn admission, made for the express purpose of relieving the defendant from proving on the trial the fact so admitted, or some like purpose. Such must have been the character of the admission, to render it competent as evidence against the plaintiff. Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial, do not bind the client; they are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly and confusing, if the client should interpose to correct his counsel and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose. *Moffit v. Witherspoon,* 10 Ired., 185; *Guy v. Manuel,* 89 N. C., 83; *Reed v. Reed,* 93 N. C., 462; *Tobacco Co. v. McElwee,* 96 N. C., 71; 1 Gf. Ev., sec. 186; Whar. on Ev., sec. 1184; Weeks on (24) Attorneys, 390; *Young v. Wright,* 1 Comp., 138; *Pettle v. Lyon,* 9 Adolph and Ellis, 147.

There are numerous other assignments of error, but we need not advert to them.

The plaintiff is entitled to a *venire de novo,* and we so adjudge. Let this opinion be certified to the Superior Court according to law. It is so ordered.

Error. *Venire de novo.*

Cited: Gordon v. Collett, 102 N. C., 539; *Paper Co. v. Chronicle,* 115 N. C., 149; *Helms v. Helms,* 135 N. C., 176; *Falkner v. Pilcher,* 137 N. C., 451; *McKenzie v. McKenzie,* 153 N. C., 243; *Taylor v. Meadows,* 169 N. C., 126; *Tire Co. v. Motor Co.,* 181 N. C., 231; *Erskine v. Motor Co.,* 187 N. C., 831.

JORDAN SULLIVAN v. WM. POWERS, RUTH ANN POWERS AND OTHERS.

Deed, in Consideration of Marriage—Registration.

A deed was executed in May, 1872, by A. for an expressed consideration of $500, but really in consideration of the promise of the bargainee, a single woman, to marry him; in November following she did marry him, and the deed was not registered until 1885: *Held*, that the deed was not a *marriage settlement*, or *marriage contract*, which, under section 1269 of The Code, is required to be registered within six months, to make it valid.

CIVIL ACTION, tried before *MacRae, J.*, at Spring Term, 1887, of the Superior Court of ASHE County.

This action is to recover possession of land, and the sole controversy is, as to the plaintiff's title thereto, under the following facts:

The defendant, William Powers, owned the land, and, becoming a surety on the official bond of one Parsons, clerk of the Superior Court of Ashe County, was sued as such, judgment recovered, and exe-
(25) cution issued, under which the sheriff sold and conveyed the land to the plaintiff.

The *feme* defendant, Ruth A., in support of her title, introduced a deed from the said William Powers to herself, executed in May, 1872, for the recited consideration of five hundred dollars, conveying the land to herself, and proved that in April preceding, the grantor had agreed that, if she would marry him, and to this she gave consent, he would make her title thereto, in pursuance of which, the deed was made; and this was before the execution of the official bond of the clerk. The marriage took place in November of the same year, and the deed to the *feme* defendant was registered some time in the year 1885.

Before the trial of the issues, and these facts appearing in evidence, the court instructed the jury, that the deed to the *feme* defendant was a marriage contract or settlement, and, not having been proved and registered within six months, was inoperative against the plaintiff. To this charge the defendants excepted, and after verdict and judgment against the defendants, they appealed.

No counsel for plaintiff.
J. W. Hinsdale for defendants.

SMITH, C. J. (after stating the case): The statute, on the construction of which the ruling is predicated, is brought forward in The Code, and constitutes section 1269, and is in these words:

"All marriage settlements and other marriage contracts, whereby any money or other estate shall be secured to the wife or husband, shall be proved or acknowledged, and registered in the same manner as deeds for land, within six months after the making thereof; otherwise, they shall be void against creditors."

The act of 12 February, 1872, sections 11 and 12 of which are (26) *in pari materia*, and may modify the effect of that cited, since it went into operation on the first day of July thereafter, has no application to the present case, the deed having been executed before that time. The Code, secs. 182, 1821.

The same may be said of the Act of 1885, which gives efficacy to deeds conveying lands, other than leases not exceeding three years in duration, only from the date of registration, since this deed was registered under the provision of the law before in force.

The instrument before us is, in form and substance, and was so intended by the parties, an absolute deed, passing the land unclothed with any trust whatever, though its consideration unexpressed and the inducement to making were a contemplated future marriage, afterwards entered into, registration would have disclosed nothing, upon the face of it, to distinguish it from other conveyances of real property. The question is, whether the deed, because of its consideration, is within the purview of the statute cited. In our opinion, it is not. The law requiring registration refers to three classes of deeds: those absolute, and those with attaching trusts, and of the latter, distinguishes between such as are securities, and are denominated "deeds of trust and mortgages," and "marriage settlements," and contracts to be enforced as such. These distinctions run through all the enactments in reference to registration. "The deed in trust, meant in the act," says *Ruffin, C. J.*, in *Saunders v. Ferrill,* 1 Ired., at page 101, "is that species which, though of recent origin, has grown into general use *as a security* for debts, in the nature of a mortgage, with a power of sale." He *intended,* of course, to include in *debts* liabilities of every kind, fixed or contingent, against which security or indemnity were intended to be provided. In the same opinion, he speaks of marriage settlements in these words: "This *particular species of deed of trust* is to be governed by its own peculiar regulations." A marriage settlement is, then, a convey- (27) ance of property upon defined trusts, as a marriage contract is an agreement that it shall be made, enforceable in a Court of Equity, and its effect to give a different direction to property from that which would result from a marriage without any settlement or contract for settlement, and looks most usually to the interest of the wife and the issue of the marriage union.

The present deed is a simple conveyance to the use of the grantee, with no consideration or trusts resting in parol, which, as evasive of the statute and incapable of registration, might vitiate the instrument as against creditors, upon the ruling in *Dukes v. Jones,* 6 Jones, 14.

What difference can it make, in the nature and effect of the deed, whether the consideration was in money to be paid or marriage to be performed, or there was no consideration at all, unless it was put in this form for the purpose of defrauding future creditors, which is not suggested, inasmuch as the *liability* upon the official bond was not incurred until after the execution of the deed? We are unable to see how the nature of the consideration can change the character of the deed, and correct that which, alike in form and intent, was, and is, an absolute deed, into a marriage settlement. Nothing else but the title to the land is settled, and the wife, as well as the husband, retains every legal right that results from the marriage consummated, to his and her own property, and the property of the other, present or afterwards acquired. It is in no sense the marriage settlement contemplated by the statute, and to give it a wider force, it would embrace every gratuity given after contract, and in expectation of the forming of future marital relations. "Money or other estate," is the comprehensive term used in the Act, requiring the registration in six months. Even an infant female can execute a marriage settlement, so far as affects her personal
(28) estate—*Satterfield v. Riddick,* 8 Ired. Eq., 265—while she could not make a deed for it, not avoidable, to a stranger.

There is error, and the judgment is reversed and a new trial awarded.

Error.

M. P. PEGRAM v. THE WESTERN UNION TELEGRAPH COMPANY.

Principal and Agent—Telegraph Company—Negligence in transmitting Telegram.

1. The sender of a telegram constitutes the telegraph company his agent for the transmission and delivery of the message just as it is written by him and no further; therefore, the sender is not bound by the terms of a telegram in which a material alteration is made by the negligence of the company in transmitting it.

2. The sender of a telegram is entitled to at least nominal damages, and to such substantial damages as he may sustain by reason of his message being improperly transmitted; that is, such damages as are the natural and proximate consequence of the company's negligence.

3. The sender cannot recover of the company damages sustained by the receiver of a message, although the sender has been obliged, by the judgment of a court in another State, to pay damages sustained by such receiver, in consequence of the wording of the telegram being changed in transmission.

4. If an agent, upon being sued for a personal liability incurred by him in carrying out his principal's orders, give due notice of the suit to his principal, to the end that he may defend it, and, after this, judgment is rendered against the agent, such judgment is conclusive upon the principal, as to the extent of the agent's loss, in an action brought by the agent against his principal for indemnity. But no such relation exists between the sender of a telegram and the telegraph company as makes this principle applicable.

CIVIL ACTION, tried before *MacRae, J.*, and a jury, at Septem- (29) ber Term, 1887, of MECKLENBURG Superior Court.

The plaintiff resided in the town of Charlotte, in this State, and W. C. Sedden & Co. were doing the business of brokers in the city of Richmond, in the State of Virginia, in the year 1881.

On 4 February of that year these brokers sent the plaintiff a letter, as follows:

"If your customer will offer 100 shares (or any part of it), C. C. & A. R. R. stock at 43, delivered here, please wire us at our expense."

Afterwards, on the 14th of the same month, the plaintiff addressed to the brokers mentioned a message in these words:

"Party offers 100 shares C. C. & A. stock at forty-three. Answer quick." And he delivered it to the defendant, to be transmitted over its telegraph. It is admitted that this message was not sent truly, but that the word "three," at the end of the word "forty," was omitted, so that the message, as transmitted by the defendant, contained the word "forty" instead of "forty-three," as it should have done. The plaintiff paid the defendant sixty-two cents, the price required for sending the telegram, and the agent of the defendant understood at the time he sent the message that it referred to the stock of the Charlotte, Columbia and Augusta Railroad Company.

In about two hours after the message was so transmitted, on the same day, the brokers named replied to the plaintiff's message as follows:

"Will take the hundred shares; draw at sight, with stock attached."

Thereupon, at once, on the same day, the plaintiff purchased one hundred and one shares of the stock mentioned, and made his draft on the brokers named for $4,343, the price of the stock at "forty-three," and sent the same to a bank in Richmond for collection, with the stock attached, with instructions to the bank to deliver the stock (30) when the draft should be paid.

Afterwards, on the 16th of the same month, when the bank presented the draft for payment, the brokers were surprised at the amount of the same, and called upon the plaintiff for an explanation, who at once replied as follows:

"My offer was forty-three plainly, and you replied, 'Will take stock,' and bought on your reply."

The draft was not paid, and the stock was not delivered. This action is brought to recover damages sustained by the plaintiff, by reason of the grossly negligent and false transmission, by the defendant, of his telegram to the brokers named above, on 14 February, 1881, as above stated.

In the complaint it is alleged, among other things, that in consequence of the plaintiff's telegram so falsely sent, the brokers named at once sold the stock named, then *in transitu* to them as above stated, at the price of $41.75 per share, which was the market value thereof in Richmond (the face value being $100 per share), and as they failed to get the stock from the plaintiff as they expected to do, they had to buy such stock to make their contract good, at the price of $41.75 per share, or more, and that, in consequence of such negligence of the defendant, the plaintiff was afterwards compelled to pay the said brokers the difference between $40 per share and $41.75 per share of the stock, and other costs and damages, aggregating $250.

On the trial it was in evidence that the plaintiff did not send his first telegram mentioned, in response to the letter of 4 February, 1881, of the brokers to him; and that the first knowledge he had, of the missending of the telegram, was the information he received from the brokers as stated above.

It was likewise in evidence that the stock named was not regularly quoted as to price, but it was quoted in the Richmond papers at $41 to $43, and the market value of it in Charlotte was $42.50; that
(31) propositions between Charlotte and Richmond to buy and sell stock did not go beyond the day they were made.

It was likewise in evidence that the brokers named brought their action against the present plaintiff in an appropriate court, in the State of Virginia, to recover damages for his failure to deliver the stock he so contracted to sell them—that he made active and earnest defense thereto, but, nevertheless, the plaintiffs therein recovered the sum of $175 as damages, as well as costs, and he had to pay reasonable counsel fees, and other costs.

The plaintiff offered evidence to prove that he gave the defendant ample notice of the action and its nature so brought against him in the court of Virginia, to the end it might make defense thereto, and save

him harmless—that he would hold it responsible to him for any recovery that might be had against him—that after the recovery against him, he paid the judgment, costs, etc.

The defendant objected to this evidence; the court sustained the objection, and this is assigned as error.

There was much other evidence that need not be reported here.

At the close of the evidence the plaintiff requested the court to give the following instructions to the jury:

"1. That if the plaintiff was sued by W. C. Sedden & Co. in a court in Richmond, Va., having jurisdiction of an action for the recovery of damages, arising out of the mistake in the message, and Pegram, the plaintiff, gave the defendant company reasonable notice to come in and defend the said action, and the defendant company failed to do so, and Pegram, the plaintiff, in good faith, and with due diligence, defended the said action, and W. C. Sedden & Co. recovered judgment against him, the defendant would be estopped to deny its liability to the plaintiff, and the plaintiff would be entitled to recover the amount of the said judgment, with costs, provided said judgment and costs (32) were paid by him. This instruction was refused, and the plaintiff excepted.

2. That if Pegram delivered his telegram of 14 February, 1881, to the defendant, not in answer to Sedden's letter of 4 February, 1881, but as an original and independent proposition to Sedden, to sell him the stock, then the defendant was the agent of Pegram, and liable to him for any damages sustained by him from its gross negligence in transmitting the message.

This instruction was not given in the words asked, and the plaintiff excepted.

The court did instruct the jury that the defendant would be liable for gross negligence, and that if, by the exercise of ordinary care, the defendant could have avoided the mistake in the message, the jury should respond to the first issue, Yes.

3. That if the jury believe the evidence, the defendant was the agent of Pegram, and liable to him, by reason of its negligence in transmitting the message.

This instruction was not given in the words asked, but as above stated, and plaintiff excepted.

4. That apart from the estoppel referred to in the *first* prayer of plaintiff for instructions, the measure of damages would be the difference between the price as stated in the Sedden copy of Pegram's message of 14 February, 1881, and the market value of the stock at Richmond, Va., on the day it was to be delivered to Sedden.

This instruction was refused because the whole contention of plaintiff, as it appears by his complaint, was that his damage was that he *'was compelled to pay* W. C. Sedden the difference between 100 shares of said stock, at $40 per share, and the same stock at $41.75 per share, and other costs and damages,' etc., and the court held that plaintiff could not recover back the damage alleged in the complaint, and has proven
(33) no other except the amount paid for the transmission of the telegram. Plaintiff excepted.

His Honor stated in his charge on the second issue, that the plaintiff had proven no damages, except the amount paid for the transmission of the message, and this is sixty-two cents.

The plaintiff excepted to the instructions and charge given, and especially assigns as errors therein, that his Honor, instead of the charge he gave, should have instructed the jury:

1. That the plaintiff is entitled to recover as damages the difference between the price, as stated in the telegram delivered by him to the defendant on 14 February, 1881, and that stated in the telegram delivered to Sedden on said day, or the difference between the price of the stock as stated in the message, as delivered to Sedden by the defendant on said day, and its market value in Richmond, Va., on the day the stock was to be delivered to Sedden, or at the time Sedden first discovered the mistake; or, that plaintiff is entitled to recover as damages, at least the amount recovered of him in the action by Sedden against him, and which he paid before this suit was brought, or said amount and the cost of said action so paid by him on said amount, and the cost and reasonable expenses incurred by him in defending the said action, after reasonable notice to the defendant and its refusal to defend the same, provided said amount, costs and expenses, were paid by this plaintiff, after notice thereof to defendant, given before this action was brought; and further, that plaintiff was entitled to interest on said amount so paid by him, and certainly entitled to recover interest, if the jury should see fit to allow it.

There was a verdict for the plaintiff on the first issue submitted, and a verdict on the second issue submitted, in accordance with the instructions of his Honor, to wit: that plaintiff was entitled to recover, as damages, sixty-two cents."

(34) There was judgment for the plaintiff, from which he appealed to this Court.

W. P. Bynum and P. D. Walker for plaintiff.
C. N. Tillett for defendant.

MERRIMON, J. (after stating the facts): A brief reference to the nature and purpose of the defendant's employment will serve to throw

light upon the plaintiff's cause of action, and the extent of damages to which he is entitled. It is a corporation, invested with powers, and has functions appropriate in kind and extent, to effectuate and facilitate the transmission of intelligence from one place to another, by means of electricity. The chief instrumentality it employs for its purposes is a machine, apparatus or contrivance, styled the *electric* telegraph, or *electro magnetic telegraph,* an instrument that conveys intelligence with the velocity of lightning, by means of signals, certain mechanical movements, or sounds representing letters, words, ideas, or expressions, produced by the application of electricity—electric fluid—conducted through and along iron wires for any distance, long or short.

The business of the defendant ordinarily is, to employ its telegraph for the use, benefit, advantage and convenience of the public—all persons who desire to take benefit of it in the transmission of intelligence that may be lawfully transmitted, upon the payment of reasonable compensation. In other words, its business is, by such means and appliances, simply to transmit intelligence—what one or more persons desire and intend to say or communicate to another or other persons at a distance—delivered to it for transmission in the shape of messages, dispatches, telegrams, or communications, usually and properly in writing. Its office and undertaking are to transmit promptly, as directed, in the message to be sent, precisely what is said and expressed therein—that is, to transmit, by such signals in the way indicated above, the exact words, in their proper order and connection, as set down in the (35) message. In the absence of special agreement, it undertakes to do, and has authority from the sender of the message, to do no more.

Generally, when it receives the message, it agrees, in terms, or by implication, to so send it; and has no other agency of the sender, or of the person to whom it is sent. It has no authority or agency of the person sending or to whom a message is sent, to make, modify, or alter at all, the terms or effect of an agreement or proposition to buy or sell anything contained in the message it receives to transmit, or has been transmitted by it, or to bind a person sending or receiving such message. Its sole duty is to send the message, truly, and as promptly as may be, in the order of business. If it is negligent, and fails in this respect, the party injured by such neglect will have his cause of action against it, and may recover such damages as he has sustained.

Now, it appears that the defendant received from the plaintiff, and undertook, for compensation paid, to transmit for him, as directed, this message: "Party offers 100 shares C. C. & A. stock at forty-three. Answer quick."

It sent only a part of this message—it negligently omitted to transmit the word "three" at the end of the word "forty," thus materially chang-

ing the proposition to sell, and misinforming and misleading the party to whom it was sent, and causing the latter to send a message in reply that misled the plaintiff.

Such neglect created the plaintiff's cause of action, alleged in the complaint, and he is clearly entitled to recover at least nominal damages, and such substantial damages as he has sustained; that is, such as in the course of things were naturally the proximate consequence of the wrong complained of—such as the parties may have fairly contemplated by their contract, in case of a breach thereof; but not such as may
(36) have been the consequence of secondary and remote causes, indirectly growing out of such breach.

Thus, if the plaintiff, in consequence of the message received by him in reply to his, falsely transmitted by the defendant to the brokers in Richmond, purchased the stock referred to, and failed to realize for it what it cost him, and reasonable compensation for his labor and trouble about it, he might recover the amount so lost and such compensation, and also the sum he paid for transmitting the message.

But he could not recover damages for any injury sustained by the persons—the brokers—to whom his message was falsely transmitted, by reason thereof, because the injury done to them was not an injury to him. He had no cause of action on that account; they had, if they so sustained injury.

Nor was the plaintiff liable to the brokers for any such injury sustained by them, or on account of the breach of any contract with them, created by the message as transmitted, because he did not send, or direct the defendant to transmit, the message it transmitted—he did not offer or agree to sell to the brokers the stock at "forty"—they had no contract with him.

As we have seen, the defendant had no agency or authority of the plaintiff to change or modify, in terms, the message he delivered to it to be transmitted to the brokers named. It transmitted the false message to them in its own wrong, and it alone was answerable to them for any injury they sustained thereby—the plaintiff had done them no injury—the defendant may have done so, in delivering to them the false message, upon which they may have acted to their detriment. If they did not, they could not have recovered substantial damages. *West. U. T. Co. v. Hall,* 125 U. S., 444.

But it is earnestly contended by the plaintiff that the brokers named brought their action in a court in the State of Virginia, having proper jurisdiction, against him, and recovered judgment for damages and costs, which he paid, on account of such falsely transmitted mes-
(37) sage to them; that the plaintiff notified the defendant to appear

and defend that action, and save him harmless, which it failed to do, and he is therefore entitled, in this action, to recover such outlay on his part as damages.

We cannot so decide. We are unable to see how an action upon a contract, never in fact made, could be successfully prosecuted against the present plaintiff; and it is still more difficult to comprehend how the damages he has sustained in such action, or any outlay of his therein, can be recovered by him in this action, there being, as we have seen, no privity between the plaintiff and defendant in that respect, and no such relations subsisting as to give the former cause for redress against the defendant, measured by the results of the action referred to, the only evidence of which was the transcript of the record thereof. Such evidence would be admissible if an agent, in performing his principal's orders, should incur a personal responsibility and loss, and seek indemnity therefor against the latter, on the ground of their relations. In such case, if the principal had notice of the action, its result would be conclusive as to the extent of the damage. But this is a very different case from one of that nature.

Here the present plaintiff was not answerable to the plaintiffs in the action just referred to for injuries they sustained by the negligence of the present defendant, nor was the latter answerable therefor to the plaintiff in this action in any aspect of their relations. *Hare v. Grant,* 77 N. C., 203; *Leak v. Covington,* 99 N. C., 559.

As the defendant was not answerable to the plaintiff for any injury the brokers named sustained, by reason of the false message transmitted to them by it, the plaintiff cannot recover from the defendant, as damages in this action, any sum the brokers may have, for any cause, recovered from the plaintiff.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

DAVIS, J., dissenting: The plaintiff sent a message and received (38) a reply thereto. By reason of the gross and inexcusable negligence of the defendant, the message was not delivered as it was given for transmission, in consequence of which a reply was made to, and received by, the plaintiff, upon which he acted, and upon which he had a right to act, because he had a right to assume that the message, to which it was a response, had been correctly sent. Acting upon the reply received to the message so transmitted, he purchased and sent stock to Richmond, which, in consequence, and as a direct consequence, of the misunderstanding caused by the gross negligence of the defendant, was there attached, and the plaintiff was put to necessary and unavoidable cost, expense, and loss, for which (there being gross negligence found)

I think the defendant was liable. By the inexcusable negligence of the defendant, the plaintiff has been made to incur expense and loss, which he could, by no possible diligence, prevent, and for which, I think, the defendant ought to answer. It was the direct and unavoidable, not the *speculative or remote,* result of the negligence.

I cannot concur in the view taken of the authorities cited, as applied to this case.

Cited: Hughes v. Tel. Co., 114 N. C., 75; *Helms v. Tel. Co.,* 143 N. C., 393; *Cotton Oil Co. v. Telegraph Co.,* 171 N. C., 707; *Leigh v. Telegraph Co.,* 190 N. C., 706.

A. G. THORNTON AND WIFE v. A. G. BRADY.

Appeal—Practice—Error Apparent in Record—Assignment of Error.

The statute (section 957 of The Code) requiring the Supreme Court to render such judgment, etc., as shall appear to be proper from *inspection of the whole record,* has reference to the essential parts of the record, such as the pleadings, verdict and judgment, in which, if there be error, the court will correct it, though it be not assigned. If there be error in such matters as are not necessarily of the record, the Court will not see and correct it, unless it be assigned. (Report of *S. v. Reynolds,* 95 N. C., 616, adverted to as incorrect and misleading.)

CIVIL ACTION, heard before *Clark, J.,* at Spring Term, 1887, of the Superior Court of CUMBERLAND County.

Judgment was rendered in favor of defendant and the plaintiffs appealed.

(39) *N. S. Ray for plaintiffs.*
D. Rose for defendant.

MERRIMON, J. In this case, no exception or assignment of error appears, in terms or by implication, in the case stated or settled on appeal, or in the record proper. This is conceded, but on the argument the counsel for the appellants insisted that inasmuch as the statute (The Code, sec. 957), provides that, "In every case the Court (this Court) may render such sentence, judgment and decree, as, on inspection of the whole record, it shall appear to them ought, in law, to be rendered therein," etc., it becomes the duty of this Court to scrutinize all such matters and things as may occur and be noted on the record in

the course of the action, including the trial, whether error be assigned or not. This is a misinterpretation of the statutory provisions cited. It refers only to such constituted matters of the action as must necessarily go upon and constitute the record of it, and which the Court sees and must take notice of, such as the pleadings, the verdict, and the judgment; it does not refer to such matters and things as are of, but incident to the action and do not necessarily go upon the record, such as the rulings of the Court upon questions arising upon motions, evidence, its instructions to the jury, and the like. Such matters as those last mentioned, do not go upon and become part of the record, unless the correctness of the decisions of the court, upon them is questioned, in which case, they are made part of the record, to the (40) end, the complaining party may enter his objections, and the grounds thereof, and assign error. Such decisions of the court are presumed to be correct and acceptable to the parties, in the absence of objections so made. But as to the essential parts of the record, as pointed out above, the court will, *ex mero motu,* take notice of errors apparent in it, correct them and enter such judgment as in law ought to be rendered. The reason is, that it is the first and imperative duty of the court, to render only such judgment as the law, upon the facts ascertained, allows and will sanction. If what it must necessarily see in the record of the action is erroneous, it will correct the error, although it be not assigned. If there be error in such matters as are not necessarily of the record, it cannot see and correct the same, unless and until it shall be assigned. Hence *Ruffin, C. J.,* said in *Gant v. Hunsucker,* 12 Ired., 254: "But though that be the opinion of the court, it is not now open to the plaintiff to complain of that error, because he took no exception to it on the trial. For the best reasons it is entirely settled, that the court can take no notice of an error not apparent in the record, that is, in the pleadings, verdict, or judgment, unless the appellant excepted to it at the trial. Besides the presumption, that every thing was done right until the contrary be alleged, there is another, that, for purposes of his own, the party assented to or acquiesced in every opinion of the court to which he did not at the time except." *King v. King,* 4 Dev. & Bat., 164.

Error, as has been decided in many cases, must be assigned in the case stated, or settled on appeal, or in the record of the cause, or proceedings in the action, unless the error is apparent in the essential parts of the record, as pointed out above.

The counsel of the appellant cited *S. v. Reynolds,* 95 N. C., 616, as a case in which no error was assigned as to the instructions given by the court to the jury, but nevertheless, this Court examined the instructions sent up, and discovered and corrected error therein. (41)

The report of the case in this respect is misleading. It is said in the report, that "the case on appeal did not show that any exception was made to the charge below." This is a mistake. On reference to the record, we find that *Justice Ashe,* who delivered the opinion, did not say, in his statement of the case, that error was not assigned, and it also appears that exception to the charge was expressly taken.

In this case, error in the record is not apparent, nor is error assigned in the record, or in a case stated or settled on appeal. The judgment must therefore be affirmed.

Judgment affirmed.

Cited: S. v. Watkins, 101 N. C., 704; *Hutson v. Sawyer,* 104 N. C., 4; *McKinnon v. Morrison, ibid.,* 364; *R. R. v. Church, ibid.,* 533; *Robeson v. Hodges,* 105 N. C., 52; *Taylor v. Plummer, ibid.,* 58; *Walker v. Scott,* 106 N. C., 61; *Allen v. R. R., ibid.,* 523; *S. v. Roberts, ibid.,* 664; *Baker v. Garris,* 108 N. C., 227; *Smith v. Smith, ibid.,* 368; *Rogers v. Bank, ibid.,* 578; *Carter v. Rountree,* 109 N. C., 31; *Wells v. Fisher,* 112 N. C., 540; *S. v. Ashford,* 120 N. C., 589; *Appomattox Co. v. Buffaloe,* 121 N. C., 38; *Westbrook v. Hicks,* 121 N. C., 132; *Huntsman v. Lumber Co.,* 122 N. C., 586; *Murray v. Southerland,* 125 N. C., 176; *S. v. Truesdale, ibid.,* 702; *Griffith v. Richmond,* 126 N. C., 380; *Mfg. Co. v. Hobbs,* 128 N. C., 47; *Wilson v. Lumber Co.,* 131 N. C., 164; *S. v. Matthews,* 142 N. C., 624; *Ullery v. Guthrie,* 148 N. C., 419; *Hoke v. Whisnant,* 174 N. C., 660; *Phillips v. Ray,* 190 N. C., 152; *Powers v. Jones, ibid.,* 185; *Snipes v. Monds, ibid.,* 190.

J. N. DORSEY AND OTHERS v. NANCY B. MOORE, H. C. BENNETT AND OTHERS.

Life Estate—Waste.

1. While a life tenant of forest lands may cut sufficient timber for firewood, fences, repairs of buildings and erection of such as are reasonably needed on the land or plantation, it is waste to cut timber merely for sale.

2. One who purchases timber trees from a life tenant, and severs them from the land, is liable to the reversioner for the value of the timber severed, or for the damage thereby done the inheritance.

3. The fact that a purchaser of timber trees from a life tenant has paid the life tenant for them, is no defense to an action brought against him by the reversioner, for the waste committed in severing the trees from the land.

DORSEY *v.* MOORE.

CIVIL ACTION, tried before *Boykin, J.*, at Fall Term, 1887, of BURKE Superior Court.

It appears that Babel Moore died in the county of Burke in 1874, leaving a last will and testament, which was duly proven, by which he devised to his surviving widow, Nancy B. Moore, all (42) his real estate—the land described in the complaint—for her life or widowhood, and then to the plaintiffs, except the husband plaintiff, in fee.

This action was brought by the plaintiffs, as the owners of the fee simple estate in the lands, subject to the life estate, to recover damages for alleged waste by the life tenant and the other defendants, and for general relief, etc. The following is a copy of the case settled upon appeal:

"The plaintiffs allege in their complaint, that the defendant Nancy B. Moore was the owner of a life estate in the lands described in the complaint, and was in the possession thereof at the commencement of this action. They further allege, that said defendant has forfeited her said estate, by reason of waste committed by her in selling valuable timber thereon to defendant Bennett, and in permitting him to erect and operate a saw mill thereon, and in allowing her agent, the defendant Gaither Conly, to cut and remove large numbers of cross-ties therefrom. It appears in the complaint, that the defendant H. C. Bennett and defendant Nancy B. Moore, the life tenant as aforesaid, had entered into a contract, whereby the purchaser, said Bennett, was permitted by the life tenant to cut and remove said timber, and to erect and operate said mill. They demand damages against the defendants, and ask that they be restrained from committing further waste.

The defendants Bennett and Conly allege in their answer, that they committed the acts complained of under a contract with the said life tenant, as appears likewise in the complaint, and declare that they have satisfied her. At the beginning of the trial, the death of the life tenant Nancy B. Moore, since the last continuance, was suggested, whereupon the plaintiffs entered a *nol. pros.* as to her. The court was of opinion that the plaintiffs were not entitled to recover upon the pleadings and admissions, because the life tenant was dead, (43) and no personal representative appeared in her behalf in the cause, and that, therefore, as to her employee Conly, no damages could be recovered, it being admitted in the complaint that said life tenant, by and through said Gaither Conly, was engaged in cutting and hauling away cross-ties, timber, etc. As to defendant H. C. Bennett, it being alleged in the complaint, that he had cut and removed said timber, and erected and operated said mill, by virtue of a contract with the life tenant, it was held by the court, that plaintiffs could not recover

damages therefor in this action against him. The court did not pass upon the right of plaintiffs with reference to the other defendants, further time being granted to make service, etc. The plaintiffs asked the court to sign judgment, perpetually enjoining Bennett and the other defendants from committing waste on said land, and taxing the *defendant with the cost of the injunction.* The court refused, inasmuch that it appears from the restraining order of his Honor, Judge MacRae, that the defendant Nancy B. Moore, Gaither Conly and Thomas Conly, and their agents, be restrained from committing waste, etc. The defendant Bennett was not restrained, and it was upon this order that the motion was made by the plaintiffs. Plaintiffs excepted; there was judgment for the defendants Bennett and Conly."

The court gave judgment, whereof the following is a copy:

"This action having been brought to trial by the court, and it appearing that the plaintiffs allege a contract between the defendant Nancy B. Moore and Gaither Conly for the sale of timber, and that the said Nancy B. Moore was in possession of the freehold, and the said Bennett and Gaither Conly had paid said Nancy B. Moore in full under said contract, it was now, on motion, adjudged that the plaintiffs take nothing by their writ against said Bennett and Conly; that said defend-

ants be discharged and go hence without day; that they recover
(44) their cost of suit, to be taxed by the clerk."

From this judgment the plaintiffs appealed to this Court.

C. M. Busbee for plaintiffs.
No counsel for defendants.

MERRIMON, J., after stating the facts: As to forest lands and timber trees thereon, generally, the life tenant may, if need be, clear tillable land, to be cultivated for the necessary support of himself and his family, and this he may do although the ordinary forest timber be destroyed in the course of clearing the land. He may also cut and use timber appropriate for necessary fuel, for repairing fences, for making such as are necessary—for repairing houses and building such as are reasonably needed on the land or plantation. But it is waste to cut timber from the land merely for sale—to sell the timber trees and allow them to be cut down and manufactured into lumber for market—because this would impair the substance of the inheritance—it would take from the land that which is not incident to the life estate and the just enjoyment of it consistently with the estate and rights of the remaindermen or reversioners. The law intends that the life tenant shall enjoy his estate in such reasonable way, as that the land shall pass to the reversioner, as nearly as practicable, unimpaired as to its

natural capacities and the improvements upon it. *Ballentine v. Poyner,* 2 Hay., 268 (110); *Churchill v. Speight's Executors, ibid.,* 515 (338); *Ward v. Sheppard, ibid.,* 461 (283); *Shine v. Wilcox,* 1 D. & B. Eq., 631; *Davis v. Gilliam,* 5 Ired. Eq., 308; *Potter v. Mardre,* 74 N. C., 36.

Accepting the facts as alleged in the complaint, and admitted in the answer to be true, the life tenant, in this case, clearly committed waste. She sold from the land, for the purpose of gain, large numbers of "cross-ties," and much timber—to one of the defendants, who erected a saw mill on the land and sawed the timber into lumber (45) for market. All this, the life tenant had no right to do. Plainly, she committed waste. She, it appears, died pending the action, and thus passed out of it, and it has not been revived against her personal representative—indeed, the action as to her is abandoned.

The appellees admit that they cut down and took the timber from the land, substantially, as alleged in the complaint, but they seek to justify these "acts complained of under a contract with the life tenant . . . and declare they have satisfied her." But they cannot thus excuse or justify their acts as to the plaintiffs. The life tenant could not, by contract or otherwise, authorize them to cut down and remove the timber for any purpose; she had neither right nor authority to do so, and the fact that they "satisfied her," cannot alter the case. She could not authorize them to do what she could not lawfully do herself. They cut down the timber in their own wrong, and thus a cause of action arose in favor of the plaintiffs against them. Their acts were an injury to the inheritance—indeed, trees, as soon as they were cut down, became the personal property of the plaintiff, and they could have maintained an action to recover the same. They might have sued for and recovered the value of the timber severed from the land; or they may maintain their action for the injury to the inheritance, and this seems to be the scope and purpose of the present action, which, under the system of civil procedure that lately prevailed in this State, would be designated as *an action on the case, in the nature of waste. Williams v. Lanier,* Busb., 30; *Dozier v. Gregory,* 1 Jones, 100; *Bennett v. Thompson,* 6 Ired., 210; *Burnett v. Thompson,* 7 Ired., 486; *Potter v. Mardre, supra; Ellitt v. Smith,* 2 New Hampshire Rep., 430; *Close v. Hazleton,* Ired., 175; 6 Wait's Ac. & Def., 253.

The judgment, it seems, is founded upon the supposition, that the contract between the life tenant in possession and the appellees, purporting to give them the right to cut and remove the timber, had the legal effect to exempt them from liability to the plaintiffs (46) on such account. This was a misapprehension of the law applicable. Upon the pleadings, the court should have given judgment for the plaintiffs, directing an inquiry as to the damages.

There is error. The judgment must be reversed, and further proceedings had in the action according to law. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

Cited: King v. Miller, 99 N. C., 597; *Turner v. Turner,* 104 N. C., 573; *Sherrill v. Connor,* 107 N. C., 633; *Latham v. Lumber Co.,* 139 N. C., 10; *Wall v. Holloman,* 156 N. C., 276; *Thomas v. Thomas,* 166 N. C., 631.

C. A. MULL AND OTHERS v. P. J. WALKER AND OTHERS.

Step-father — Parent and Child — Executors and Administrators — Statute of Presumptions—Pleading—Counterclaim—Variance.

1. Plaintiffs sued the defendant, who was their step-father, and administrator of their deceased father, for their distributive shares in their father's estate. The defendant set up as a counterclaim the money expended by him in the necessary support of plaintiffs during their minority, and while they lived with him as part of his family; *Held,* (1) that as plaintiffs' demand was against the defendants personally, for an estate wasted and misapplied, there was no want of mutuality in defendant's demand for reduction of plaintiffs' claim, although it was not strictly a counterclaim; (2) that as the parties in this case constituted one family and were provided for in common, and it did not appear that the defendant step-father had not means of his own, sufficient for the support of the plaintiffs, plaintiffs incurred no liability to defendant, upon an implied contract, for their support and maintenance.

2. If a step-father, or father, has not means of his own sufficient for the support of his step-children or children, he may retain the interest on funds in his hands belonging to them and expend it in their necessary support. Such expenditure will be allowed him as a lawful disbursement.

3. The statute, Rev. Code, ch. 65, secs. 18, 19, was enacted to quiet controversies and prevent the presentation of stale demands, and contains no saving clause or exception in favor of infants or *femes covert.*

4. Where a defendant, sued for an account, sets up, in his answer, matter in bar of an account, but also demands a reference and account, the demand for the account will not be construed as a waiver of the other defenses, but must be understood as contingent upon the failure of the other defenses. Therefore such a demand in answer is not a variance.

(47) CIVIL ACTION, tried at the Fall Term, 1887, of the Superior Court of BURKE County, before *Boykin, J.,* and a jury.

The defendant P. J. Walker, individually, and as administrator of Job Hicks, appealed.

The facts appear in the opinion.

S. J. Erwin for plaintiffs.
E. C. Smith for defendant.

SMITH, C. J. The case made in the complaint is this:

One Job Hicks, the first husband of the defendant Eliza, removed in 1851, without his family, to California, and soon after died. Administration on his estate was on 24 November, 1853, committed to the defendant, Peter J. Walker, with whom his surviving widow had intermarried, and took possession of the intestate's personal estate.

The present action begun on 21 May, 1886, is prosecuted by the intestate's two surviving daughters, Mary Jane and Martha, with their husbands, A. J. Cooper the husband of a deceased daughter and their infant children, against the defendant Peter J. Walker and wife and Joseph Brittain, to recover judgment for their distributive shares, and to pursue a part of the trust fund alleged to have been invested in a tract of land sold to said Peter by the last named defendant, the title to which he retains, and subject the land to their claim, as well as the rents and profits derived by the administrator therefrom. (48)

The complaint further alleges that the infant daughters all married while under age.

The answer admits the allegations of the complaint in regard to the death of the said Job Hicks, and the issue of letters of administration to him, as well as his taking possession of the personal property, but alleges that he has used the same, and more, in the support of the children, while living with him before marriage, to wit: for the several periods of 15, 14, and 8 years, and denies the purchase and payment of the land to have been made with the moneys or funds of the trust estate.

It moreover sets up the defense of the statute of limitations, and the lapse of the long period of time since the issue of letters of administration, as a bar to the relief asked.

The defendant Joseph Brittain admits his sale of the land and reception of full payment, and submits to make title to whomsoever the court may direct.

There was a replication, denying the debt denominated a counterclaim, its validity as such in the present suit, and interposing the statutory bar, if it ever existed.

At March Term, 1887, of Burke Superior Court, a "restraining order," the terms of which are not set out in the record, was issued

and the cause tried at the next term, before a jury, upon issues in which they find that the infant daughters of the intestate each married before attaining their majority, and that the land in dispute was not bought with money belonging to the estate of the intestate; and thereupon judgment was rendered against the defendant Peter Walker for the sum admitted in his inventory, filed on 22 February, 1855, to be the value of the personal estate, reduced by debts paid and commissions, and mentioned in the judgment; from which the defendant appeals.

After the empaneling of the jury and the reading of the plead-
(49) ings, the court expressed or, as the case states, intimated an opinion against the counterclaim, as it is called, on the twofold ground, that it is personal to the defendant, while the action is against him in his capacity as *administrator,* and that the law raised no contract, on account of the relations of the parties, of indebtedness on the part of the infant distributees to pay expenses incurred in their support while members of the family. Without exception thereto, but in consequence of this intimation of intended ruling, no evidence in support of this part of the defense was offered.

The defendant insisted upon the statutory bar and the presumption, arising from the lapse of time, of payment or abandonment of the present demand, and, further, that the action would not lie until "the filing of a final account." The court ruled against the defense, under the statute, and refused the motion to dismiss the action on account of the delay in bringing the suit. These rulings are involved in the appeal and are to be here reviewed and the law declared.

If the refusal to entertain the demand for a reduction of the plaintiffs' claim by the sums expended in their necessary support, out of their or his own funds, not strictly a counterclaim, but a diminution of the defendants' liability, had no other support than the first reason assigned for its rejection, we should be reluctant, if we did not refuse, to give our sanction to the ruling.

There is no want of mutuality in the relation of the claim. The plaintiffs' demand is against the defendant personally, for an estate wasted and misapplied by his individual conduct, and the execution upon the judgment would run against his own property only. Where the judgment and execution are against him upon a liability incurred by the intestate (or testator, as the case may be), it is against him in his representative capacity, and satisfaction is to be made out of the goods of the deceased.

(50) But the second ground assigned for disallowing the defense, in the form in which it was presented to the court, is tenable and quite sufficient. No liability is incurred upon an implied contract, where the parties, as in this case, constitute one family and are pro-

vided for in common. *Hussey v. Rountree,* Busb., 110; *Dodson v. McAdams,* 96 N. C., 149; *Barnes v. Ward,* Busb. Eq., 93.

If, however, the step-father, or even the father, has not means of his own, and has in his hands funds belonging to them, which he employs in their necessary maintenance, he would be allowed to retain so much as does not exceed accruing interest, and be accountable for what remains, not as a contract, but as a lawful disbursement.

But these modifying circumstances are not suggested, to exempt the claim from the operation of the rule, that excludes the inference of an implied contract, which would be drawn if no such family relations existed. *Walker v. Crowder,* 2 Ired. Eq., 478.

But we do not concur in the opinion and consequent ruling against the defense, growing out of the long lapse of time since the cause of action existed and the bringing of the suit.

Letters of administration issued in 1853, two years after which the administrator could have been called to an account and settlement. The suit was not brought until nearly thirty-one years had passed, and if the time during which all legal and statutory presumptions are drawn from its lapse be deducted, there would still remain about 22 years of inaction. The statute then in force, Rev. Code, ch. 65, secs. 18 and 19, restricts the period to ten years, after which all contracts, unrecognized as binding during the intermediate space, are presumed to have been satisfied, and all "equitable interests," after "the right of action shall have accrued on any equitable interest or claim," are presumed to have been, in like manner, paid or abandoned.

Now, there is no saving clause in this enactment, made to quiet (51) controversies, and prevent the presentation of stale demands, or exception in favor of infants or *femes covert,* and hence the cumulative disabilities, which prevent the starting of the statute limiting the time in which other actions are to be brought, have no application here. *Hamlin v. Mebane,* 1 Jones Eq., 18; *Hodges v. Council,* 86 N. C., 181; *Headen v. Womack,* 88 N. C., 468.

The answer of the defendant, Walker, whom we refer to when using the word, inasmuch as he is the only contestant party, itself demands a reference and account, the ordinary effect of a judgment for which concludes all defenses that are made to the defendant's liability. But obviously this consequence cannot be ascribed to the present pleading, consistent with its general purpose and other parts, as the objection to the action is made, and the right to make it recognized and acted on by the court. The demand for the account must, therefore, be understood as contingent upon the failure of the defense to the action, when it might become necessary. This, then, is not a variance.

At the opening of the cause, the appellee moved to dismiss the appeal, upon the alleged insufficiency of the papers to warrant it in *forma pauperis,* but was denied.

There is error, and the judgment is reversed, and the court below will proceed to dispose of the case in accordance with the law, as declared in this opinion.

Error. Reversed.

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(52)

W. SMITHDEAL, SURVIVING PARTNER, ETC., v. JAS. WILKERSON.

Venue, or Place of Trial—Claim and Delivery—Distress.

The words "*distrained for any cause*" (section 190, (4) of The Code), in reference to the place of trial of actions for the recovery of personal property, do not apply to the seizure by the sheriff in the provisional remedy by claim and delivery; and the situation of the property in such actions, in which *claim and delivery* is resorted to, does not regulate the place of trial of the actions.

CIVIL ACTION, for the recovery of personal property, heard before *Clark, J.,* at November Term, 1887, of the Superior Court of ROWAN County.

The plaintiff alleges that he is the surviving partner of Smithdeal & Ritchie, and, as such, is the owner and entitled to the immediate possession of the horse described in the complaint.

The plaintiff is a resident of Rowan County, and claims the horse by virtue of a chattel mortgage, executed by one Daniel to Smithdeal & Ritchie, and duly registered in Cabarrus County. The defendant is a resident of Stanly County, and the plaintiff alleges that the horse is wrongfully detained by him.

At the same time that the summons was issued to the county of Stanly (3 November, 1887), the plaintiff filed the necessary affidavit, etc., for claim and delivery, which was issued, and under which the horse was taken by the sheriff of Stanly, but, the defendant giving the requisite undertaking, the horse was left in his possession.

At the return term, after complaint filed, and before answering, and before the time to file an answer expired, the defendant made a motion in writing for a change of *venue* from the county of Rowan to the county of Stanly, in which the defendant resided, and in which
(53) the horse, the subject of the action, was when the summons and order were issued.

"The court (Clark, J.), being of opinion, upon a proper construction of section 190, subsection 4, of The Code, that the plaintiff can bring his action in the county of Rowan, in which the plaintiff resides, the motion for change of *venue* was denied."

From this the defendant appealed.

Theo. F. Klutz for plaintiff.
J. M. Brown (by brief) for defendant.

DAVIS, J. (after stating the facts): The defendant insists that the action should have been brought to the county of Stanly, in which the defendant resides, and where the horse, the subject of the action, is. He says it is governed by section 190, subsection 4, of The Code, which provides, that actions "for the recovery of personal property, distrained for any cause," must be "tried in the county in which the subject of the action, or some part thereof, is situated," and that the place of trial should be changed, as provided in section 195 of The Code.

This depends upon the construction to be placed upon the words *"distrained for any cause."*

It is said by *Taylor, C. J.*, in *Kitchin v. Tyson,* 3 Murph., 314, "It is a rule, that when a statute makes use of a word, the meaning of which was well ascertained at common law, the word will be understood in the sense it was at common law." The same rule is laid down in *Adams v. Turrentine,* 8 Ired., 150.

The word "distrained," used in The Code, must, of necessity, constitute an exception to this general rule. The old action of "Distress," which Blackstone says was of "great use and consequence," was limited to the *distraining* cattle or goods for "nonpayment of rent, or other duties, or *distraining* another's cattle, *damage feasant.*" This old remedy, as was said by *Rodman, J.*, in *Harrison v. Ricks,* 71 (54) N. C., 7, quoting *Dalgleish v. Grandy,* Conf. R., 22, "was long ago held to have been abolished in this State." The word "distraint" or "distrained," cannot have the old technical common law meaning, in the legal vocabulary of the present day; with all its "use and consequence" to the landlord of old, and all the ancient learning incident to it, we now have no practical concern. But conceding, as the appellant insists, that its common law meaning no longer attaches, we are unable to see, if it has any meaning, how it can help the defendant; for the property in question was not "distrained" for any cause; and, to adopt the construction insisted upon by him, these words must be treated as superfluous and unnecessary, which is not permissible, if any consistent meaning can be given to them. If the view of the defendant be correct, the Legislature would have simply said, "for the recovery of personal property,"

without the added words, which limited, and were intended to limit it, to property "distrained," that is, "seized," "taken and lawfully held," not wrongfully, but by some recognized legal right. We think this is made clear by the oath required of a plaintiff before he can obtain an order for the delivery of personal property. He is, among other things, required to make oath, that the property "has not been taken for tax, assessment, or fine, pursuant to a statute, or *seized* under an execution or attachment against the property of the plaintiff," etc.

There is another view fatal to the appellant's contention. Claim and delivery is not a substantive *action,* but is only provisional and ancillary to the action for the recovery of personal property, where the plaintiff seeks to get possession of the property, pending the action, and in this respect it is not unlike the old action of replevin, which would not lie against an officer who had seized property under legal process, or "against persons holding the same in custody of the law."

(55) The plaintiff is not obliged, when he brings an action for the recovery of personal property, to make the affidavit and give the undertaking required for claim and delivery. The latter is only ancillary, and if he does not give such undertaking, the judgment, if he recover, as in the old action of detinue, is for the possession of the property, or for its value, and damages for its detention. *Jarman v. Ward,* 67 N. C., 32.

It may be that great inconvenience and difficulty may sometimes arise, in the enforcement of the ancillary remedy of claim and delivery, when the plaintiff resides in a county at a great distance from that in which the defendant, from whose possession the property is taken, resides; but this cannot affect the clear meaning of the statute, which allows actions for the recovery of personal property (unless "distrained for any cause") to "be tried in the county in which the plaintiffs, or the defendants, or any of them, shall reside at the commencement of the action."

Before the present system (Revised Code, ch. 31, sec. 37, and ch. 98), a plaintiff residing in the county of Cherokee might bring his action of replevin to the *Superior* Court of that county, against a defendant, wrongfully in possession of his property, residing in the county of Currituck. We think the law is plain, and the difficulties or inconvenience that may result, are not for our consideration.

There is no error. Affirmed.

Cited: Kelly v. Fleming, 113 N. C., 138; *Vann v. Edwards,* 135 N. C., 667; *Brown v. Cogdell,* 136 N. C., 33; *Oil Co. v. Grocery Co., ibid.,* 355.

(56)

JOS. DOBSON AND OTHERS v. ROXANNA SIMONTON, EXECUTRIX, AND OTHERS.

Res Judicata—Judgments of the Supreme Court.

1. When this Court announces its decision, that there is no error in the judgment rendered in the court below, that court has no right or power to modify the judgment in any respect. The judgment cannot be modified except by a direct proceeding, alleging fraud, mistake, imposition, etc. This rule holds and applies also to an adjudication upon an interlocutory order reviewed on appeal.
2. The Superior Court has no right to disturb a judgment which has been affirmed by the Supreme Court, no matter how unjust the ruling might be, if it were an open question.

CIVIL ACTION, heard by *Gilmer, J.*, at May Term, 1887, of IREDELL Superior Court.

T. C. Hauser's executors, who were plaintiffs, appealed.

The facts appear in the opinion of the Court.

J. B. Batchelor for plaintiffs.

D. M. Furches and B. F. Long for defendants.

SMITH, C. J. T. C. Hauser deposited moneys in the bank of Statesville, which, with interest computed to 13 December, 1880, the rest fixed in the referee's report, at which the value of all the creditors' claims is ascertained, amounts to $3,125.27. Of this sum, he had sued and recovered from Samuel McD. Tate, two thousand and five hundred dollars, the facts connected with which, forming the basis of his demand, and set out in the case on appeal, are reported in 85 N. C., 81. The judgment has been paid in full. In the distribution of the assets of the insolvent bank among the creditors in the present action, Hauser proved his whole claim, as if none of it had been paid, and claimed a *pro rata* share of the fund, estimated upon his entire and undiminished debt against the bank, and it was allowed by the referee. The (57) ruling, upon exceptions, was so far corrected by the court as to allow a *pro rata* division upon the whole deposit, except that when the deficiency, that is the difference between the sum recovered from Tate and the proved demand, was made up, and the whole demand thus satisfied, Hauser should receive no more. Tate does not, himself, prefer any claim on the fund. From this ruling Hauser appealed, while none others did, and the appeal was disposed of by affirming the judgment. See case reported in 95 N. C., 312.

The concluding sentence in the opinion declares that, "there is no error in the order appealed from, *of which the appellant can complain.*"

very distinctly intimating that if there were error in the ruling, it was in allowing the appellant to share in the apportionment upon any larger sum than the excess of his demand over what he had collected. Upon the resumption of the case in the court below, the judge directed the receiver to pay over to the executors who, after the death of Hauser, had assumed the administration of his personal estate and been made parties in his place, "the *pro rata* per cent on the sum of $617.36, as has been, or shall be hereafter, paid to the other creditors of the bank, who have proven their claims, and which have been passed on and allowed by the court. That 30 per cent upon this amount shall be paid to the executors of said Hauser before the creditors, who have heretofore received that amount, shall receive any more."

The previous adjudication determined the sum which was to share with the other proved claims, and this was not unsettled by the appeal, but the judgment in this respect remained in force, the distribution being arrested when the debt was paid in full, so that there should be no overlapping beyond.

(58) In *Calvert v. Peebles,* 82 N. C., 334, it is declared that when this Court announces, by its decision, that there is no error in the judgment in the court below, that court has no right or power to modify that judgment in any respect, and that this can be done only by a direct proceeding, alleging fraud, mistake, imposition, etc. This is not less true of an adjudication upon the matter of an interlocutory order, reviewed on appeal.

This is held in *Mabry v. Henry,* 83 N. C., 298; again, in *Wilson v. Lineberger,* 82 N. C., 412, a demurrer was interposed by the defendant and overruled, and an appeal entered but not prosecuted. At a subsequent term a motion was made to dismiss the action, and it was decided that the subject-matter was *res adjudicata,* and the motion denied.

The Court, therefore, had no right to disturb the affirmed judgment in this particular, however unjust the ruling might be, if it were, as it is not, an open question. It was error to do so, and, in reversing this action, the cause must proceed to a final determination, according to the ruling upon the former appeal, which seems to have been misinterpreted by the judge in the court below.

It is so ordered.

Error. Reversed.

Cited: Herndon v. Ins. Co., 108 N. C., 650; *Banking Co. v. Morehead,* 126 N. C., 282, 291; *Merrimon v. Lyman, ibid.,* 542; *McCall v. Webb, ibid.,* 762; *Cook v. Bank,* 131 N. C., 98; *Tussey v. Owen,* 147 N. C., 337; *Jones v. Life Association,* 150 N. C., 381; *Chavis v. Brown,* 174 N. C., 123.

W. H. PHIFER, ASSIGNEE, v. JNO. R. ERWIN, ADMINISTRATOR OF MARSHALL E. ALEXANDER.

Evidence—Fraud—Intent—Mortgage of Stock of Goods—Sale; what constitutes.

1. Where evidence is offered of an act, from which a fraud may be presumed, the adverse party is entitled to show other acts and declarations connected therewith, in explanation.
2. Where a witness, on his examination upon a second trial, gave his opinion that the value of the property in controversy was greater than the amount he had testified to on a former trial: *Held*, that he might state the reasons for the change, by way of explanation.
3. In questions of unlawful intent, when the facts conclusively show an illegal purpose, and the party intended to do the act, from which the consequences inevitably flow, he is held to intend both, and cannot be heard to the contrary; but when the act and the intent must be alleged and proved, as distinct facts, the inference of an illegal intent may be repelled by the testimony of the party, that such intent was not entertained by him.
4. So where a mortgagor of a stock of goods was left in possession of them, to dispose of them to the best advantage, without any arrangement for the appropriation of the moneys received, it was competent for him to testify that he had no intent, in making the mortgage, to defraud his creditors.
5. One taking, by assignment, such mortgage and a note secured by the same, can testify in his own behalf, that he knew nothing of any understanding between the parties to the mortgage, that the mortgagor was to remain in possession, nor of any purpose on the part of either to defraud the mortgagor's creditors.
6. To render a conveyance fraudulent, it must be so in its execution, and a fraudulent use of the property afterwards does not avoid it, though it furnishes strong evidence of the intent, in making the conveyance, from which the jury may infer fraud.
7. A charge to the jury, that when one mortgages a stock of goods to secure a debt, and is permitted to remain in possession of them, to use them as his own, and sell and replenish the stock, and deal with them as in ordinary course of business one deals with his own property, the transaction is fraudulent and void as to creditors, without referring to the intent with which the deed was made, is erroneous.
8. Our law differs from the civil law, which requires a *fixed price* for the purchase to constitute a *sale;* and with us it is sufficient, if the price is left to be fixed afterwards, by reference to the market value, by a designated person, or in any other way in which it may be ascertained with certainty, especially when there is a delivery of the article.

(60) CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1887, of the Superior Court of MECKLENBURG.

On 25 December, 1882, W. H. D. Wager bought a stock of goods from M. E. Crowell, for which he gave his note for $1,910.18, payable on 20 February following, and to secure the same, as also a debt of about $300, due by account, reconveyed the same by deed of mortgage to said Crowell. The latter, on 10 October, 1883, assigned the debt and the mortgage security to the plaintiff.

On 15 October, five days after the assignment, certain creditors of Wager, who had recovered judgment against him in a justice's court, caused the same to be docketed in the Superior Court of Mecklenburg, on which executions issued to Marshall E. Alexander, sheriff of that county, and he seized and sold the goods to satisfy said debts. To recover damages for the conversion, the present action was begun and prosecuted to final judgment, from which the defendant appealed to this Court, and it was reversed, and a new trial awarded. *Phifer v. Alexander,* 97 N. C., 335.

The sheriff having since died, intestate, the present defendant, Erwin, has become a party to the action, as his administrator, and in his stead.

At Spring Term, 1887, of said Superior Court, the cause was again tried before the jury upon issues which, and the responses to each, are as follows:

1. Is the plaintiff the owner of the property described in the complaint? Answer: Yes.

2. Did the defendant's intestate seize and convert it? Answer:
(61) Yes.

3. What is the value of it? Answer: $350.

And from the judgment thereon the defendant again appealed.

C. W. Tillett for plaintiff.
Platt D. Walker for defendant.

SMITH, C. J. (after stating the case): The controversy is confined to the disputed efficacy of the mortgage executed by Wager to Crowell, which the defendant assails as fraudulent and void, as to the executions sued out against the property of the judgment debtor, in which inquiry the *bona fides* of the assignment does not enter, as there is no judgment upon any indebtedness of Crowell, the assignor, of which his creditors alone can complain.

The only question arises, under the first issue, as to the plaintiff's title, and that depends on the validity of the deed of Wager. Upon the former hearing in this Court, when the mortgage was not copied in the record, as it is not now, though referred to as an exhibit in the case, *Merri-*

mon, J., speaking for the Court, and referring to its absence, says that, "so far as appears from the pleadings and the evidence, it is not, upon its face, fraudulent, and the jury expressly find that it was not made with the actual intent of the parties to it to defraud the creditors of the mortgagor." The remark is not out of place in the aspect which the case, upon the evidence, now wears, and the *fraudulent intent,* as an outside but coincident fact, must be found by the jury, to render the mortgage deed void, as against the attacking creditors of the mortgagor. To this view of the case, we confine our examination of the record in determining the appeal. The exceptions consist of two classes: that relating to evidence, and that relating to the instructions asked and refused, and those given to the jury. (62)

Exceptions concerning evidence:

1. Exception.—The mortgagee, Crowell, testified that the day after the assignment the plaintiff, who lived at Monroe, came to Matthews, where witness resided, and they went to the storehouse of Wager, when the fact of the assignment was made known to him, and the plaintiff took possession of the goods, and locked them up, and that some of the property was left by plaintiff with witness, who knew more about the debtors than the plaintiff; but he "was not authorized to use any of the money."

The latter remark was objected to but allowed, and the exception thereto is now very properly withdrawn.

The witness was then asked, "for what purpose did the plaintiff leave the notes with you?"

Objection was made to the question, and to the answer in response, but they were allowed, and the witness replied: "From the fact that I had contracted the debts with the parties and was acquainted with them, and better able to collect than the plaintiff," who left nothing with the witness that was included in the assignment, except the evidences of debt. The evidence was properly admitted. If the inference of a fraudulent connivance for the ease of the debtor, Wager, was sought to be drawn from the fact of the property being placed in the hands of the witness, it was surely competent to explain the transaction, and repel the inference, by stating the other facts, of which the understanding of the parties, if not expressed in terms, constitutes a part. The force of the declaration is spent in removing an injurious imputation upon a naked, unexplained fact, and for this limited purpose (and its legal effect extends no further) the statement was clearly receivable.

2. The next exception rests upon these facts: The witness, from his experience in the mercantile business, estimated the goods to be worth $550, and, upon cross-examination, was inquired of, if he had not,

(63) at a former trial, put upon them a lower valuation, of $400? The witness replied in the affirmative, adding, that from what he saw of the goods, and information received since, he had given the higher estimate, and that he had not, when his first opinion was expressed, examined them closely.

Upon his examination by the plaintiff, he said: "I changed my mind as to the value of the property from what I heard the other witnesses testify at that trial, after my examination."

To this testimony objection was made, and overruled.

We are unable to see any reason for excluding the evidence. It was explanatory of a discrepancy in the estimates; and certainly a witness, who hears a fuller description of the goods, and thus has information of their condition and kind, may change his mind as to their value; and besides, it was competent to account for the change his opinion had undergone, and his reasons for it, and is but matter going to his credit, and the weight due to his opinion. The defendant examined Wager himself, who, in describing what occurred at the time when the plaintiff, after the assignment, came for the goods, stated that he said to the plaintiff, that if the latter would take an inventory, and give witness credit for the stock in hand, and the book accounts, he would turn over the stock; that no agreement was made, and the stock was turned over, with the understanding that credit should be given on the secured debts for whatever sum might be derived from sales and collections. The witness, in answer to defendant's inquiry, "How did you turn over the goods to him?" replied: "Of course, I turned them over to him as mortgagee."

He further stated, that when he made the mortgage, it was understood between them, that witness was to remain in possession and make the most he could out of the goods.

(64) Upon his cross-examination, the witness said it was not understood between himself and Crowell that witness was to sell the goods and apply the proceeds to that debt, as he was expecting at that time to get between five and ten thousand dollars, pension money, and he had no intention, when he made the mortgage, to defraud his creditors. To this latter statement objection was made, and overruled, and it has been earnestly pressed in the argument here, upon the authority of rulings in this Court, which affirm the general proposition, that acts fraudulent in themselves, as tending to hinder or obstruct a creditor pursuing his legal remedy, "do not cease to be such because the fraud, as an independent fact, was not then in the mind." *Cheatham v. Hawkins,* 80 N. C., 161; *Boone v. Hardie,* 83 N. C., 470; same case, on second appeal, reported in 87 N. C., 72.

The contention is, of course, undeniable, that where the necessary consequences of an act are to defraud a creditor, as by securing property for the use of the debtor, and if upheld, to place it beyond the reach of his debts, whether patent upon the face of the instrument or proved *aliunde*, the fraudulent element cannot be purged by a disavowal of such intent as present in the mind, and inducing the act.

Here, the evidence to sustain the imputation of fraud, is derived from the mortgagor's being left in possession, to dispose of the goods to the best advantage, and the absence of any positive arrangement for the appropriation of the moneys received by sale, and because the debtor expected to discharge the secured debts out of other funds he was looking for. Now, these facts furnish evidence of a fraudulent purpose, in making the mortgage to secure the goods for the benefit and ease of the debtor, calling for repelling proof to the contrary, and we can see no reason, in such case, for refusing to hear the mortgagor disclaim *such intent*, without which, its infectious presence in the transaction might, upon the other facts accompanying, have been inferred. As in the present case the intent with which the conveyance is made is not an irrebuttable presumption, but must so exist in (65) the act of making the mortgage to render it void against a creditor, it is competent for the mortgagor to deny that it was entertained.

"The test of the admissibility of the evidence of motive, or intent," says this Court, "is the materiality of the motive or intent in giving character to the act, and when they must, as separate elements, coexist to constitute guilt or *produce a legal result*. When, as distinct facts, each must be alleged and proved, the inference to be deduced may be met and *repelled* by the direct testimony of the party as to their being entertained by him." *S. v. King*, 86 N. C., 603, citing 1 Whar. Ev., sec. 482.

When the facts show, irresistibly, the illegal purpose, and the party intended to do the act from which the consequences inevitably flow, he is held to intend both, and cannot be heard to speak to the contrary.

The plaintiff, then, on his own behalf, was allowed, after objection, to state that he knew nothing of any understanding between the parties to the mortgage, that the mortgagor was to remain in possession, when the goods were delivered to him, nor of any purpose on the part of either to defraud the mortgagor's creditors.

This negative testimony, disconnecting the plaintiff from any pervious arrangements between them, affecting him as a purchaser, without notice, and for a valuable consideration, was competent and pertinent, so obviously so as to render comment and the citation of authority needless; and we proceed to examine the instructions asked.

These were seventeen in number, and the appellant admits that those numbered 4, 5, 11, 13 and 15, are substantially given, while the plaintiff insists that all are embodied therein, except such as are numbered 1, 2, 3, 7, 8 and 10. These instructions requested, as well as the charge given *in extenso,* are as follows:

(66) 1. That even if the jury should find the facts to be as stated by the plaintiff's witnesses, Phifer and Crowell, as to the transaction with W. H. D. Wager, at his store, on 11 October, 1883, there was no sale to the plaintiff, and no title passed to him by said transaction, but the goods still belonged to Wager, at least so far as his creditors were concerned.

2. That if no inventory was taken of the goods, and there was no agreement between Wager and Phifer as to the value or price, then there was no sale to Phifer, sufficient to pass the title and right of the possession to him, and certainly not, as against the creditors of Wager, of the sheriff who seized them under executions against Wager.

3. Even if the jury believe the testimony of Crowell and Phifer, no title or right of possession to the property in dispute passed to the plaintiff by the transaction at the store of Wager.

4. That if, under the instructions of the court, the jury shall find the mortgage of Wager to Crowell to be void, and shall further find that the goods were taken by Phifer by virtue of, and under the said mortgage and assignment thereof to him, or that the goods were delivered to the plaintiff, as the assignee of the mortgage, and not simply and solely to pay the debt, without regard to the mortgage, the plaintiff cannot recover, provided the defendant's intestate seized the goods under judgments, and executions issued thereon against Wager for his debts, as testified to.

5. That if Wager, from and after the time the mortgage was given to Crowell, continued in possession of the property mortgaged, by or with permission or consent of Crowell, dealing with and selling the same in the usual course of business, and appropriating the proceeds to his own use, and with the understanding and agreement, that he should so

(67) deal with them, and the said Wager was insolvent, then the mortgage, as to his creditors, would be void.

6. That if the jury should find that if, at the time Crowell made the assignment to the plaintiff, he was insolvent, or had no other property, subject to the payment of his debts, but that conveyed in the assignment, and retained possession of any of the property with Phifer's consent, and in pursuance of a prior understanding to that effect, it is void, and passed no title or right of possession to Phifer to the debt of Wager due Crowell, and the mortgage made is to secure it or the property in dispute.

7. That there is a presumption of law that Phifer took the goods under and by virtue of the mortgage from Wager to Crowell.

8. That there is the same presumption of fact.

9. That the possession of Wager of the goods in dispute is constructive notice to plaintiff of the fraud.

10. That if the property in dispute was placed in possession of the plaintiff as a pledge, then the pledge is void by reason of uncertainty, no time being fixed for the dispossession of the property pledged.

11. That if, at the time the mortgage of Wager to Crowell was executed, Wager was insolvent and indebted, and it was understood and agreed that he, Wager, should remain in possession of the property and use it as his own, selling it and appropriating the proceeds of sales to his own use, and Wager did remain in possession, as testified, the said mortgage was fraudulent and void as to the creditors of Wager, and the defendant, or the creditors in the executions; and if the jury find further that Phifer took the goods from Wager as mortgagee, then he did not acquire a good title, as against defendant's intestate, and they will respond to the first issue, "No."

12. That if it was understood and agreed that Crowell should remain in possession of the property conveyed by the assignment, and he did remain in possession, and Crowell was insolvent at the time the assignment was made, the assignment would be void, and they (68) will respond to the first issue, "No."

13. That if it was agreed that Wager should deliver and surrender, and Wager did deliver and surrender the property to Phifer under the mortgage, because of Phifer's right of possession as mortgagee and the power of sale given to him (Phifer), in order that he might sell and discharge the debt to the value of the goods, the jury will find that Wager delivered the goods to Phifer as mortgagee, and that Phifer took them as mortgagee.

14. That if Phifer knew of the contents of the mortgage to Crowell at the time he took his assignment, and that Wager was in possession of the property, using it as his own, and that Wager was insolvent, the law raises a presumption that he had notice of the fraudulent character of the mortgage, and the jury will find that he had such notice, if they find the mortgage was fraudulent.

15. That from a knowledge of the facts stated in the last instruction, the law raises a presumption, that Phifer made due inquiry into the character of the transaction, and had notice of such facts as that inquiry would have disclosed.

16. That the registration of the mortgage to Crowell was notice to Phifer, as to its contents, at the time he took the assignment.

17. That if it was understood between Phifer and Crowell at the time the assignment was made, that Crowell should remain in possession of the land conveyed in the assignment and use it as his own, receiving and enjoying the rents and profits thereof, and he did so remain in possession, in pursuance of said assignment, the assignment would be void as to the creditors of Crowell and the defendant's intestate who held and levied under executions as testified, and the plaintiff acquired no right or title or right of possession to the property described in the complaint, by virtue of said assignment.

His Honor instructed the jury as follows:

(69) This was an action brought by the plaintiff against M. E. Alexander, now deceased, to recover damages for the taking and conversion, as it is called, of a certain stock of goods, which, it is alleged, he seized and converted. The plaintiff says Mr. Wager, in December, 1882, made a mortgage to one Crowell of a certain stock of goods at Matthews, to secure the payment of a $1,900 note, due 25 February, 1883, and that Crowell assigned, among other things, this note and mortgage to plaintiff, in October, 1883, and that, by this assignment, the plaintiff became the legal owner of the stock of goods, and that Alexander took those goods out of the possession of the plaintiff, and plaintiff demands a judgment for the value of said goods and damages for the taking and conversion.

The defendant, as administrator, answers, that defendant Alexander was sheriff of Mecklenburg County, and had execution in his hands, and, by his deputy, levied upon, seized and sold the goods as the property of Wager; he says that the alleged mortgage from Wager to Crowell was fraudulent and void, and therefore the assignment from Crowell to Phifer of this mortgage, and the note by which it was attempted to be secured, did not pass anything to Phifer. And the first issue submitted to you, "is the plaintiff the owner of the goods?" etc., involves in it these important questions, concerning the validity of the mortgage from Wager to Crowell. Upon the face of the mortgage there is nothing to indicate fraud; so you must look further to see whether the mortgage from Wager to Crowell was in fraud of the creditors of Wager. Now the burden being on the defendant, if he has satisfied you, by a preponderance of evidence, that, at the time the mortgage from Wager to Crowell was executed, Wager was insolvent, and indebted to other persons than Crowell, and that it was understood and agreed between

(70) Wager and Crowell that he, Wager, should remain in possession of the property conveyed by the mortgage, and use it as his own, selling it and appropriating the proceeds to his own use, and Wager did remain in possession, as testified, then the mortgage was fraudulent and void as to the creditors of Wager, and the defendant, or the creditors in

the execution; and if the jury find further, that the plaintiff took the goods from Wager as mortgagee, then he did not acquire a good title as against defendant's intestate, and the response to the first issue should be "No." The fact, as proven, that the mortgage was made to secure, in large part, an indebtedness incurred at the time of the execution of the mortgage, cannot affect the principle of the law, which is applicable to this case, that when one mortgages a stock of goods to secure a debt, and is permitted to remain in possesion of this stock, and use the same as his own, and sell and replenish the stock, and deal as in ordinary course of business one deals with his own property, the transaction is fraudulent and void as to the creditors of the mortgagor; that is, while it may be good between the parties themselves, yet, as to the creditors of the mortgagor, the transaction cannot be allowed to stand to their prejudice. Whether there was an actual intent to defraud, makes no difference, for the law holds that the effect of such delivery is to hinder and delay creditors of the mortgagor. So that, if Phifer took the stock of goods because he was the assignee of Crowell, and therefore stood as the mortgagee himself, and for the purpose of appropriating them as directed by the mortgage, and if you have found that those circumstances were around the mortgage transaction, which I have told you would make it fraudulent as to creditors, and if Phifer knew of the contents or provisions of the mortgage to Crowell at the time he took the assignment (and the registration of the mortgage was notice to him of its provisions), and if he knew that Wager was in possession of the property, using it as his own, that he was insolvent and was indebted to others, the (71) law raised the presumption that he had notice of the fraudulent character of the transaction, and your response to the first issue should be "No." The plaintiff was not the owner of the goods. But if the testimony brings you to the conclusion that Phifer, being the assignee of the note, took the goods from Wager without regard to the mortgage, and independently thereof, in payment of the note, the debtor, Wager, would have the right to pay the note, even though he owed other debts, and to deliver up the goods in payment, or satisfaction of the said note; and if this was the transaction between Wager and Phifer, the giving up of the goods, to be sold and credited upon the note, without regard to the mortgage, the effect would be to treat the mortgage as if it had never been, and simply being indebted on the note, to turn over the goods in payment of the debt as far as they would go, and Phifer did get a good title to the goods, your answer will be "Yes"; unless you shall find that the assignment from Crowell to Phifer was fraudulent, upon the same principle of law as I have explained to you, governing the mortgage from Wager to Crowell. The placing of notes and accounts in the hands of Crowell, or the leaving them in his hands for collection, as

agent of Phifer, or the leaving of the land, described in the assignment, in the possession of the assignor, he being insolvent, would not, of themselves, raise a presumption of fraud in the assignment. Now, if upon these principles, which I have endeavored to explain to you, you have come to the conclusion that the plaintiff Phifer was not the owner of the goods, and your answer being "No," you may return your verdict without troubling yourselves about the other issues; for if he was not the owner of the goods, the plaintiff has no right of action. But if you have come to the conclusion, upon the evidence, that the plaintiff was the owner of the property described in the complaint, you will respond to the first issue "Yes," and your response to the second issue will
(72) follow, as a matter of course, that of the first. If you say "Yes" to the first, say "Yes" to the second, and proceed to consider the third and last issue, as to the value of the goods, and there is not a great deal of testimony on this issue; the largest estimate is $500 to $550, the lowest is something like $300. You will consider the testimony, and say what you think right.

Defendant excepted, and assigns as ground for exception:

1. That his Honor refused to give his prayers for instruction in several particulars, as shown by the prayers and the charge.

2. That his Honor erred in that part of his charge in instructing, relating to the fraudulent character of the assignment to Phifer.

Jury found issues one and two for plaintiff, and assessed his damages at $350.

Motion by defendant for a new trial; motion overruled. Judgment for plaintiff, and appeal by defendant.

The charge, in response to the proposition in which are enumerated, in juxtaposition, the facts which, if found to exist upon the evidence, involve fraud, and render the mortgage deed void, strongly presents the case against the plaintiff claiming under it, and, to say the least, quite as favorably to the appellant as he could reasonably ask. In portions of the charge the mortgage is declared void in law, upon certain facts existing and found by the jury, without any finding of the intent. Thus it declares, that "when one mortgages a stock of goods to secure a debt, and is permitted to remain in possession of this stock, and use the same as his own, and sell and replenish the stock, and deal as in ordinary course of business one deals with his own property, the transaction is fraudulent and void, as to creditors," etc.; and this, without reference to the *intent* with which the deed was made, or the inferences to be drawn, by the jury, from these subsequent facts, of the intent in making it, of which those facts are forcible evidence.

(73) To render an instrument fraudulent, it must be so in its execution, the vitiating intent, coexisting in the making; and a fraudu-

lent use *afterwards* made of the property, does not, *per se, avoid* the conveyance, but furnishes evidence, very strong, from which the jury may infer the *intent in making the conveyance,* and this use may call for the intervention of the equitable power of the court in behalf of the creditor. *Moore v. Hinnant,* 89 N. C., 455; *Beasley v. Bray,* 98 N. C., 266.

We refer to this much of the charge as going very far in sustaining the defendant's contention, and, in our opinion, invading the prerogatives of the jury, in deducing conclusions, as to the intent, from the subsequent action of the parties, in regard to the use of the property.

The only matter contained in the instructions requested, not responded to favorably, is, as to what transpired when the goods passed into the possession of the plaintiff, and its legal effect in passing title, if none passed under the mortgage.

The jury were advised that if the plaintiff took the goods, without regard to the mortgage, and independently of it, in part payment of the note, as understood by both, and it was agreed that the sum to be credited should be whatever was collected, then the plaintiff would acquire the title thereto. The evidence pointed strongly to a delivery to the plaintiff, as assignee of the mortgagee, yet there was some evidence to support the hypothesis of a disposition of the goods, and to warrant the charge, if correct in law, and this brings us to the consideration of this point.

The appellants' counsel insists that, assuming the parties intended a sale, it was ineffectual to pass the property in the goods, by reason of the want of a fixed and agreed price. Such was the rule of the civil law, and *Mr. Justice Story,* who was most learned in that system of jurisprudence, and an admirer of it, as his valuable works all (74) show, in the copious illustrations drawn from that source, says: "It seems to be of the very essence of a sale that there should be a fixed price for the purchase." *Flagg v. Mann,* 2 Sum. R., 538.

But the rule, established by repeated adjudications, is not so rigorous, and the price may be left to be fixed afterwards, by reference to market value, or by a designated person, or in any other way in which it may be ascertained with certainty, and then the sale is effectual, and the price determined; and especially is this so, when the thing is delivered to the purchaser. If nothing is said at the sale and delivery, the sum to be paid is what the goods are reasonably worth. 2 Benj. Sales, 102, 4 Am. Ed., in two volumes. It is only necessary to refer to a definite standard, that the price may be made certain. 1 Parson Cont., 459.

The only material matter to give effect to a sale, and the transfer of title, is to provide in the contract a definite and sure means of arriving at the sum to be paid, and when this is ascertained, it is the same as if it

had been definitely agreed upon at the time of the sale, and the vesting of the property is referable to that time.

It is otherwise if the price is left open for future adjustment between the parties, with no agreement, binding on each, as to how the price is to be ascertained, and what it shall be.

These principles are settled by Mr. Benjamin in chapter 5 of the 2d volume of his excellent work, and in the valuable notes contributed thereto. *Wittkowsky v. Wasson,* 71 N. C., 451; *Mallory v. Jordan,* 12 Ired., 79; *Devane v. Fennell,* 2 Ired., 36; *Morgan v. Perkins,* 1 Jones, 171.

It must be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Bobbitt v. Rodwell, 105 N. C., 245; *Booth v. Carstarphen,* 107 N. C., 401, 402; *Barber v. Buffaloe,* 111 N. C., 213; *Autry v. Floyd,* 127 N. C., 188; *McArthur v. Mathis,* 133 N. C., 143; *Sanford v. Eubanks,* 152 N. C., 700; *Smathers v. Hotel Co.,* 167 N. C., 474; *Chilton v. Groome,* 168 N. C., 641; *Little v. Fleishman,* 177 N. C., 25; *Williams v. Bailey, ibid.,* 37; *S. v. Biggs,* 181 N. C., 550.

(75)

J. S. RAMSEY AND W. R. MAXWELL v. DAVID WALLACE AND AMELIA WALLACE, HIS WIFE.

Sale of Land—Fraudulent Representations—Negligence of Purchaser—Measure of Damages on Warranty of Title.

1. Where an issue was submitted, whether the defendant, in order to induce the plaintiff to buy a certain town lot, falsely and fraudulently represented that the boundary began at a certain point and ran so as to include a strip of land, which was not, in fact, included, a charge to the jury that, if the defendant, at the time of sale, or pending the negotiations which led to it, represented that the boundary began as plaintiff alleged, and that said representation was false, and the defendant knew it to be false, or had no knowledge whether it was true or false, nor any reasonable grounds to believe it to be true, or had no honest or well grounded belief that it was true, they should find for the plaintiff, but if otherwise, for the defendant, was not liable to exception by the plaintiff.

2. An issue being, whether the plaintiff, relying upon such (fraudulent) representation, purchased the lot from the defendant, it was proper to charge the jury that, if, upon the evidence, they found that plaintiff and defendant agreed for A. B. to settle the boundaries, and he accordingly did settle them, as contained in the deed, they should find for the defendant.

3. Where a purchaser is negligent, in cases where he ought to have informed himself of the facts, he will not be heard to say he relied on the vendor's representations.

4. When the title fails as to part, or all of the land conveyed in a deed, the bargainee cannot claim as damages, in an action on the warranty in the deed, more than the purchase money and interest.

CIVIL ACTION, tried before *Connor, J.*, at February Term, 1888, of the Superior Court of IREDELL County.

The complaint alleges that the plaintiff, desiring to purchase a lot in the town of Statesville, on which to erect a factory, with the necessary buildings, in which to carry on the business of manufacturing tobacco, and so informing the defendant, entered into a negotiation for the purchase of that hereinafter mentioned, for which the sum of $500 was demanded. To induce the purchase, the defendants falsely and fraudulently represented that the boundary of the lot began at a (76) stake, the middle of the old gate, and so ran as to include a strip of level land, of the width of eight or ten feet, on the top of the hill, on the side next to the Baptist church, most of the balance of said lot being hillside, when, in fact, as the defendants well knew when they made said representations, the boundary of said lot did not commence at the middle of the old gate, but eight or ten feet further down the hill, and did not include the strip of level land, eight or ten feet wide on the side next to the Baptist church.

4. That afterwards, to wit, on 10 March, 1884, the plaintiffs, relying on said representations of defendants, and believing that the said lot of land embraced in its boundaries the said strip of level land, eight or ten feet wide, on the top of the hill, next to the Baptist church, and would therefore be suitable for the purpose for which they wanted it, to wit, the erection of a tobacco factory and appurtenant buildings, purchased the said lot of land from the defendants, and paid them therefor the sum of five hundred dollars ($500), and took a deed from defendants in fee for said land.

5. After said payment and the taking of said deed, plaintiff discovered, for the first time, that the boundaries of said lot of land did not run so as to include the said strip of level land, eight or ten feet wide, on the top of the hill next to the Baptist church, but that the said strip, before the making of plaintiff's deed, had been conveyed by defendants in fee to another person.

6. Plaintiffs have, since their said purchase, erected a tobacco factory and appurtenant buildings on said lot of land, but, owing to plaintiffs not getting said strip of land, eight or ten feet wide, on the top of the hill, next to the Baptist church, said lot was not suitable for the erection

of a tobacco factory and appurtenant buildings, by reason of which plaintiffs have incurred great additional expense in building said
(77) tobacco factory and appurtenant buildings, and the same are not nearly so commodious, convenient or valuable as they would have been had they obtained the said strip of level land, which they failed to get as aforesaid; by reason of which, and by reason of the loss of said strip of land, which is the most valuable part of said lot, plaintiffs have sustained damages to the amount of one thousand dollars.

For the alleged damages the plaintiffs demand judgment for the sum of one thousand dollars.

The answer, admitting the allegations as to the sale of the lot, denies every imputation of misrepresentation and fraud, and avers that the plaintiffs well knew the beginning point to be at the corner of the lot on Broad street, which was conveyed, in 1876, to Rev. J. B. Boone, of the Baptist church, by a deed duly registered, and whose calls could be ascertained by reference to the registry, and that the plaintiffs were not misled or misinformed, as to its location, by the defendant in any way.

The issues submitted, by consent, to the jury, with responses, are as follows:

1. Did the defendants, or either of them, if so, which, in order to induce plaintiffs to buy, falsely and fraudulently represent to the plaintiffs that the boundary of the lot in controversy began at a stake in the middle of the old gate, and so ran as to include a strip of land, eight or ten feet wide, on the hill, on the side next to the Baptist church? Answer: No.

2. Did the plaintiffs, relying on said representations, purchase and take a deed from the defendants for said lot? Answer: No.

The deed of the defendant to Boone, made in 1876, describes the land therein conveyed, as "beginning at the intersection of Tradd and Broad streets, and running along Tradd street N. 24° W., 148½ poles, to Davie avenue; thence with said Avenue N. 29½° E., 132 feet; thence
(78) S. 29° E., 203 feet, to Broad street; thence S. 66° W., 134 feet, to the beginning." A portion of this lot was subsequently sold to the witness John B. Holman.

The deed to the plaintiffs defines the lot conveyed to them, as follows: "Adjoining the lands of David Wallace and others, and beginning at *a stake in the middle of the old gate,* and corner of Baptist church lot on Broad street, in the town of Statesville, and runs with said street N. 66° E., 137 feet, to David Wallace's corner; thence N. 24° W., 100 feet; thence S. 66° W., 137 feet, to the said church lot; thence with the same 24° E., 100 feet, to the beginning, containing one-fourth of an acre, more or less." There is evidently an omission in not inserting S. before "24° E.," in the last line, as this is necessary to make an enclosure.

It is hardly necessary to recapitulate the testimony in detail, in reference to the disputed fact upon which the allegations of fraud and false representations are dependent, further than to refer to that of G. W. Clegg, a witness for the defendant, whose statement of what occurred when the deed was prepared, and preliminary to its being made, is in some degree explanatory of the misunderstanding between the parties.

He says: "I am a surveyor, and run the lines described in the deed from the defendants to plaintiffs; there was some sign of an old gate on Broad street; the center of the gate was the dividing line between the Baptist church lot and Ramsey & Maxwell; I measured from the corner of Tradd street, as it now is, to the center of the old gate; it made 132 or 133 feet; we allowed 56 feet for the width of Tradd street; if the street is 66 wide, there would be a difference of ten feet. Tradd street was formerly narrower than now; it has broadened in the last fifteen years; if the measurement had been made as the street was at the date of the deed to Boone, the 134 feet on Broad street, the Baptist church lot on Broad street, including Holman's lot, would not have reached the middle of the old gate. When I went to survey, Mr. (79) Ramsey and Mr. Wallace went with me; I was selected by them to get the boundaries of the lot from said defendants to the plaintiffs; there was something said, when we were all there, as to where the corner of the Baptist church lot was; I said that, by calling for the corner of the Baptist church lot, and by beginning and calling for the corner of the Baptist church lot, all further difficulty as to the location of the beginning point would be obviated. This, as I understood it, was agreed upon by both parties, and I made out the boundaries accordingly. I gave D. Wallace a copy; he drew the deed."

From this testimony it would seem that, by reason of the widening of Tradd street, the position of the beginning corner of the lot conveyed to Boone, on that street, had been rendered uncertain, and to avoid difficulty, it was concluded to so describe the plaintiffs' lot, as that it would begin at that corner, wherever its true location might be, and this was agreed on by both parties to the contract. Aside from all this, the verdict negatives the charge that the defendants, to induce the purchase, represented the beginning to be at the gate, and the line to so run as to include an additional narrow strip of land eight or ten feet wide, or that the plaintiff relied upon such in accepting the deed for the premises. Our inquiry, then, is whether there is any error in the refusal of the court to give the instructions asked for by the plaintiffs, or in those given instead, which are the subject of exception? It was conceded that the *feme* defendant executed the deed only to bar her contingent right of dower in the premises, in case of her survivorship, and had no knowledge of what transpired in connection with the sale.

The court instructed the jury that, as to her, the plaintiffs could not recover, and the plaintiffs excepted.

Plaintiffs' counsel requested the court to charge the jury:

(80) "That if they found that the defendants, at and before the purchase, represented to plaintiffs that the middle of the old gate was the beginning corner of the lot purchased, and plaintiffs believed such representation, and relied upon it, and were induced thereby to make the purchase, and the jury find that said representation was false in fact, and that, by reason of its falsity, plaintiffs have suffered damage, plaintiffs are entitled to recover on the first issue, although defendant did not know, when he so made such representation to plaintiffs, that it was false."

The court declined to give the instruction as requested, and plaintiffs excepted.

The plaintiffs' counsel requested the court to instruct the jury:

"That if the jury find that, when defendant conveyed away the land adjoining the land sold to plaintiffs, he was present, and directed the line to be run between the land so conveyed to Boone and the land sold to plaintiffs, so as to strike Broad street below the middle of the old gate, seven or eight feet further down on the lot purchased by plaintiffs than the middle of said gate, and they further find that the defendant said the line so ran, and directed a deed, from him to Boone, to be made in accordance with this line, and the deed to Boone was so made, that this fixes the defendant with actual notice—knowledge of the location of the line between the lot sold to Boone and the lot sold to plaintiffs; and although the jury should believe that, at the time he made the representation to plaintiffs, if he did make it, and it was false in fact, he had forgotten these facts, and forgotten where the line was, such forgetfulness of defendant would not prevent plaintiffs' right to recover in this action, and the jury should find the first issue for the plaintiffs."

The court declined to give this instruction as prayed, but instructed the jury that, upon the supposition made, "the burden would be cast upon the defendant to reconcile such facts with such representa-

(81) tion, and if he made the same recklessly, and without consideration, it would be fraudulent."

The court proceeded to instruct the jury as follows:

"If, upon the consideration of the whole evidence, the plaintiffs have, by a preponderance thereof, satisfied you that the defendant, David Wallace, at the time of the sale or before and during, and as part of the negotiations which resulted in the sale, and as an inducement thereto, represented to the plaintiffs, that 'the boundary of the lot began at a stake in the middle of the old gate, and so ran as to include a strip of land eight or ten feet wide on the hill on the north side next to the

Baptist church,' and that said representation was false, and that the defendant knew it to be so, or had no knowledge whether it was true or false, nor any reasonable cause to believe it to be true, or had no honest or well grounded belief that it was true, that they should find the first issue in the affirmative. But if, upon such consideration, you believe the statement was not made, or if made, that it was true; or if untrue, the defendant honestly believed it to be true, and had reasonable ground to so believe, then you should find the first in the negative." The plaintiffs excepted.

The court, upon the second issue, instructed the jury:

"That if they found from the evidence that plaintiffs and defendant agreed for Clegg to settle the boundaries of the lot, and in pursuance thereof Clegg did make out the boundaries now in the deed, and settle them, the jury should answer the second issue in the negative."

Rule for a new trial; rule discharged.

There was a judgment upon the findings for the defendants, and the plaintiffs appealed.

R. F. Armfield for plaintiffs. (82)
J. B. Batchelor for defendant.

SMITH, C. J. (after stating the case): We do not see any just ground of complaint, which the plaintiffs can prefer, either in declining to charge the jury as requested, or in the statement of the law, in the directions given them by the judge.

What more favorable to the plaintiffs could be asked than an instruction that, if the defendant, David Wallace, represented at the time of the sale, or pending the negotiation that looked to this end, "that the boundary of the lot" began as plaintiffs alleged, and that said representation was false, and that the defendant knew it to be false, or had no knowledge whether it was true or false, nor any reasonable grounds to believe it to be true, or had no honest or well grounded belief that it was true," the verdict on the first issue should be in the affirmative?

And then followed the correlative propostition, in a negative form, upon which the finding should be for the defendant.

The charge upon the second issue is equally free from objection.

The cases collected by the industry and care of Mr. Batchelor, of the rulings in this State, are so clear and decisive of the law, as to leave little to do, except to make reference to them. *Tilghman v. West,* 8 Ired. Eq., 183; *Lytle v. Bird,* 3 Jones, 222; *Credle v. Swindell,* 63 N. C., 305; *Etheridge v. Vernoy,* 70 N. C., 713; *Etheridge v. Palin,* 72 N. C., 213; *Hill v. Brower,* 76 N. C., 124; *Knight v. Haughtalling,* 85

N. C., 17; *Cohen v. Stewart,* 98 N. C., 97. Several of these cases go further, and require that the vendee shall not be culpably negligent, in cases where he ought to have informed himself of facts, and allege, that he relied upon the vendor's representations.

(83) In *Etheridge v. Palin, supra,* which related to a sale of personal property, the jury found, that the vendor's representations were in fact untrue, and that the plaintiff relied upon them, and yet as they were not embodied in the contract it was held that the plaintiff could not recover, while the rule was admitted, that "where a party affirmed as a fact a matter which turns out not to be true, it makes no difference whether he knows it to be untrue or not."

The complaint makes the necessary averments of false and fraudulent representations, as the inducement that brought about the contract, and the damage alleged to result from it.

There was no inquiry as to the amount of the damages, and it is dispensed with by the verdict; yet we notice that a sum is demanded twice the amount of the purchase money; so that, while a total failure of title in an action upon a warranty in the deed would only admit of a recovery of the purchase money and interest, the loss of a very narrow strip is to be compensated by a recovery of double the purchase money, according to the plaintiff's demand.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: May v. Loomis, 140 N. C., 356; *Whitehurst v. Insurance Co.,* 149 N. C., 276; *Machine Co. v. Feezer,* 152 N. C., 520; *Unitype Co. v. Ashcraft,* 155 N. C., 67; *Machine Co. v. Bullock,* 161 N. C., 16; *Bell v. Harrison,* 179 N. C., 195; *Bank v. Yelverton,* 185 N. C., 319; *Corley Co. v. Griggs,* 192 N. C., 173.

THE SINGER MANUFACTURING COMPANY v. M. N. WILLIAMSON.

Report of Referee—Exceptions to Report.

A report of a referee having been filed, and the parties allowed time for exceptions, a party who has not filed exceptions within the time, has no right to take the objection, by motion for a recommital, that the evidence was not filed with the report, and the referee did not report the facts upon which he based his conclusions of law; though the court might in its discretion, allow him to except for sufficient cause shown.

MANUFACTURING COMPANY *v.* WILLIAMSON.

CIVIL ACTION, heard before *Gilmer, J.*, at November Term, (84) 1887, of the Superior Court of FORSYTH County.

The facts sufficiently appear in the opinion.

In the course of the action the court directed a compulsory reference to take and state an account, etc.

The referee, while proceeding in some respects to act upon the matters referred to him, declined to pass upon the question of the liability of the defendant, in a certain respect specified by him, and as to this he recommended the submission of an issue to a jury.

Thereupon, the court directed that the case be rereferred to a second referee, and, from the evidence taken by the first one, to report, whether the defendant "is responsible to the plaintiff for the acts and defaults of canvassers working under him." The second referee afterwards simply made report that the defendant was responsible to the plaintiff "for the acts and defaults of canvassers working under him"; he did not report the evidence before him, nor his findings of fact from the same.

The second referee having filed his report, "the court granted leave to both parties to file exceptions within sixty days"; within that time, the plaintiff filed exceptions to the report of the first referee, Buxton. The defendant filed no exceptions to either report.

When the case was called for hearing, at November Term, 1887, all the exceptions filed to referee Buxton's report were either disallowed or withdrawn, and the defendant filed a written motion to recommit the question of liability of defendant for the default of canvassers, "to the end that the referee may report the facts upon which he bases his conclusions of law, so that the court may be able to review his findings."

The court denied this motion, and the appellant assigns this denial as error.

There was judgment for the plaintiff, and the defendant appealed to this Court. (85)

No counsel for plaintiff.

R. B. Glenn and J. C. Buxton for defendant.

MERRIMON, J. The report complained of was not void, and on that account it was necessary to recommit it; on the contrary, it efficiently served the purpose of the reference, and was sufficient in the absence of objection taken to it, by exception, in apt time. When the objection, in a case like this, is that the evidence is not reported, or the facts are not specifically found, the objection must be taken by exception, in which the ground of it must be set out with reasonable certainty, so that the opposing party can have just opportunity to controvert it, and the court can see what the objection is—its nature and extent.

The court allowed the parties sixty days, after the report was filed, within which to except to it. This was ample time for the purpose. The defendant did not do so within that time, or at all. As he did not, the reasonable inference was, that he was satisfied with it. He was bound to be diligent; he could not be allowed to wait until the case was called for hearing, and then interpose objections, by motion, that he had ample opportunity to make, in apt time, by proper exceptions.

If, for some possible reason he could not have excepted, when regularly he should have done so, the court might, in its discretion, still have allowed him to except, but the exercise of such discretion is not reviewable here. It is not sufficient, that a party has ground of objection—he must avail himself of it, at the proper time, and in the proper way.

Any other course would give rise to injustice and confusion. *S. v.*
(86) *Peebles,* 67 N. C., 97; *University v. Lassiter,* 83 N. C., 38; *Long v. Logan,* 86 N. C., 535.

There is no error, and the judgment must be affirmed.

Judgment affirmed.

Cited: Coleman v. McCullough, 190 N. C., 593.

R. C. PEARSON AND ANOTHER v. STONEWALL J. POWELL.

Entry and Grant—Entry-taker—Constructive Noice.

1. Plaintiff made an entry on the books of the entry-taker, and in his presence, but without his authority: *Held,* that such entry was void, and, being void, was not constructive notice to one who subsequently entered the land and procured a grant therefor according to law.

2. The statute does not authorize an entry-taker to appoint a deputy.

CIVIL ACTION, for the recovery of land, tried before *Montgomery, J.,* at Fall Term, 1886, of BURKE Superior Court.

The plaintiffs claim title under a grant from the State, dated 4 September, 1882, issued upon an alleged entry, made 10 January, 1880, and a survey, made 10 February, 1882, of which entry, they allege, the defendant had notice.

The defendant claims under a grant from the State, issued 31 March, 1881, in pursuance of an entry, made 29 October, 1881, and denies the alleged entry of the plaintiffs, or that he had any knowledge of it.

The following is the case on appeal:

"The following issue, by consent of counsel of plaintiffs and defendant, was submitted to the jury, as the only one material to be submitted to the jury, to wit:

"Did defendant take his State grant with knowledge or notice, at the time, that the plaintiffs had an entry on the same land?" (87)

The plaintiffs introduced one Harbison, as a witness, who swore that he was entry-taker for Burke County on 10 January, 1880, and that he found on the books in the office of the register of deeds for said county, the following, to wit:

"No. 1728. Dr. R. C. Pearson enters and locates fifty acres of land lying in Burke County, on or near the headwaters of Sandy Run, adjoining lands of Monroe Mull, Calvin and John Mosteller and George Fullbright and others, and running various courses and distances so as to include vacant lands."

The witness further testified that the above entry on the books was not in his handwriting; that he believed it to be in the handwriting of Dr. Pearson, and that he, witness, has no knowledge of how or when the said entry was made on his books; that he never deputized or authorized any one to take entries.

Dr. R. C. Pearson was introduced for plaintiffs, who swore that he made that writing on the books, in the presence of the said Harbison, in the register's office. Witness further swore that he made it because he thought there was some vacant land; that he never made any entry or any other paper, but that all that was done, or written, was the writing above stated on the books.

The witness further swore that he, as claimant, never had or produced to the entry-taker any writing signed by himself, setting forth where the land was situate, etc., as required by Act of Assembly, and that all he did was to write, in the books, the entry above stated.

There was evidence tending to locate the entry. Plaintiffs closed their case, when the court intimated that plaintiffs were not entitled to recover, in submission to which plaintiffs submitted to a nonsuit. Judgment against plaintiffs for costs.

Appeal prayed by plaintiffs. Notice waived. Appeal bond (88) fixed at fifty dollars."

C. H. Armfield for plaintiffs.
W. S. Pearson (by brief) for defendant.

DAVIS, J. (after stating the facts): Section 2756 of The Code directs the manner in which the entry-takers shall be elected, and the following section provides that, in cases of vacancies, the register of deeds shall discharge the duties of entry-taker.

The entry-taker is required to give bond for the faithful discharge of his duties, and to take an oath of office. His duties are clearly defined. Section 2765 prescribes the manner in which entries and grants shall be made and issued. By reference to that section it will be seen that none of its provisions have been complied with by the plaintiffs.

The alleged entry was not made by the entry-taker, and the statute does not authorize him to appoint a deputy, and if it did, the evidence shows that the plaintiff was not authorized to take or make the entry. It is true that the plaintiff testifies "that he made the writing on the books, in the presence of the said Harbison, in the register's office," but he does not say that it was authorized by the entry-taker, and Harbison testifies "that he never deputed or authorized any one to take entries."

The case of *Maxwell v. Wallace,* 3 Ired. Eq., 593, cited by counsel for the defendant, is decisive of this case. There the claimant went to the entry-taker, and the entry-taker being absent, he applied to his wife to take and make the entry, which she did, but the writing was not signed by the claimant, and was not left with the wife, but was carried away by him.

It was proved by the entry-taker himself that his wife had often taken entries, and that he had authorized her, in his absence, to enter them on his books. *Nash, J.,* speaking for the Court, said: "The
(89) plaintiff's claim rests upon the assumed fact that he made an entry before the defendant, as required by law, and upon it procured a grant for the land to issue to himself, and that the defendant, with a knowledge of his priority, made an entry of the same land. As he has never made an entry, such as the law required, his equity has never arisen."

In the case before us, the plaintiff "has never made an entry, such as the law requires," and the entry found on the books, in the office of the register of deeds, was unauthorized and of no validity whatever. Not being a proper entry, it was not constructive notice, and there was no evidence of actual notice, and if there had been, the authority of *Maxwell v. Wallace, supra,* to the reasoning in which we refer, seems conclusive against the plaintiff.

There is no error. Affirmed.

Cited: Brem v. Houck, 101 N. C., 629.

LYDIA A., JANE M. AND MARGARET STIKELEATHER v. WILLIAM STIKELEATHER.

Construction of Will—Jurisdiction of Justice of the Peace.

A testator's will contained the following provision: "It is my will, and I direct, that my real estate and personal property be kept together for the use and benefit of my four daughters (naming them) as long as they, or any two of them, will remain together," and three of them (one having died), the year after testator's death, lived and raised on the land devised a bale of cotton, which the executor took and sold: *Held*, that they were entitled to recover, and that a justice of the peace had jurisdiction of the action.

CIVIL ACTION, heard before *Clark, J.*, at November Term, 1887, (90) of IREDELL Superior Court, on appeal from a justice of the peace.

It appears that Nicholas Stikeleather died in 1885, leaving a last will and testament, which was duly proven.

The following is a copy of so much thereof as is necessary to set forth here:

Item 3d. It is my will, and I direct, that my real estate and personal property be kept together for the use and benefit of my four daughters, Susan Stikeleather, Jane Malinda Stikeleather, Margaret E. Stikeleather, and Lydia A. Stikeleather, as long as they, or any two of them, will remain together; and in the event that my four daughters, aforementioned in this item of my will, or any of them, fail to agree or remain together, then I give and devise all my real estate and personal property to my children above.

The defendant qualified as executor of the will.

The following is a copy of the case agreed, submitted to the court, the action having been commenced before a justice of the peace, and brought, by appeal, to the Superior Court, and a jury trial being waived.

It is agreed that the plaintiffs raised and picked out the bale of cotton in controversy, on the farm on which they now live, the same being the tract of land which belonged to Nicholas Stikeleather at the time of his death, and being the real estate described in said will.

It is agreed that plaintiffs took the cotton to the gin, the defendant having told their hired man to take it there, and that defendant went to the gin and took the cotton to Statesville and sold it for 8 45/100 cents per pound, there being 434 pounds of the cotton; ten cents off for weighing.

Plaintiffs are the only surviving daughters of Nicholas Stikeleather, Susan being dead, and they lived on the land described ever since his death, which was in 1885. The bale of cotton sued for was raised in 1886.

(91) It is agreed, that if, upon the above facts, the justice should believe that the cotton belongs to plaintiffs, he is to give judgment in their favor for the price of the cotton and the costs; if he thinks it does not belong to plaintiffs, he is to give judgment in favor of the defendant for cost.

The court gave judgment for the plaintiffs, and the defendant appealed to this Court.

R. F. Armfield for plaintiffs.
M. L. McCorkle (by brief) for defendant.

MERRIMON, J. (after stating the case): It seems to us very plain that the testator intended, by the clause of his will above recited, that his daughters should have the "use and benefit" of his land while they, or any two of them, should live together upon it—that is, that they should have the right to live upon, use and cultivate it, or have it cultivated, for their own exclusive benefit. There is nothing in the will that even suggests the contrary.

The plaintiffs are the three surviving daughters; they have lived upon the land together ever since the testator's death, and upon it they produced the cotton in question the year next after his death. It, so far as appears, was theirs absolutely. The defendant had no right to it whatever, for any purpose; nevertheless, he took and sold it for his own use. Obviously, the plaintiffs were entitled to recover.

The counsel for the appellant contended, on the argument, that the clause of the will mentioned, created a trust in favor of the plaintiffs, and inasmuch as a justice of the peace has not authority, ordinarily, to administer trusts, therefore he did not have jurisdiction of this action. This contention is unfounded. Neither the executor nor any other person is directed by the will to take charge of, supervise and control the property, collect the rents and pay the same to the daughters—no such provision appears in terms or by implication. Indeed, it seems
(92) that the purpose of the testator was to provide a home for his daughters, and a means for their support; they were to have the use and benefit of the land; it was not intended that a trustee should let the land and hire the personal property, first to one person and afterwards to another, and account for the rents and hires.

No error. Judgment affirmed.

W. T. BROWN, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS, ETC., v. THE COMMISSIONERS OF HERTFORD.

Municipal Corporations—Townships—Township Bonds—Constitution—County Revenue Subject to Legislative Control.

1. Townships are within the power and control of the General Assembly, just as are counties, cities, towns, and other municipal corporations. It may confer upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose. Such powers may be conferred for a *single* purpose as well as many. *Semble*, the people of localities may be incorporated into road districts, school districts and the like.

2. The General Assembly may empower a township, with the sanction of its qualified voters, to aid in the construction of a railroad by levying taxes and contracting a debt to raise money for that purpose.

3. The mere fact that other neighborhoods will derive incidental advantages from such action on the part of the township, is no objection to legislation of this kind.

4. An act of Assembly directing that the county taxes, which might be levied upon the property and franchise of a railroad company in a certain township, should be applied, as far as necessary, to the payment of the interest on bonds issued by such township in aid of the railroad, is constitutional.

5. The General Assembly may direct how the ordinary county revenue shall be applied. It may direct that the revenue arising from a specified source shall be applied to a particular object.

CIVIL ACTION, tried before *Graves, J.*, at Fall Term, 1887, of (93) HERTFORD Superior Court.

The facts appear in the opinion.

Geo. Cowper and Pruden & Vann (by brief) for plaintiffs.
R. B. Winborne and E. C. Smith for defendants.

MERRIMON, J. This is a controversy, submitted to the court below without action, as allowed by the statute (The Code, secs. 567-569). The plaintiffs are taxpayers of Murfreesboro Township, in the county of Hertford, and the defendants are the commissioners of that county.

The statute (Acts 1887, ch. 365) incorporates *The Murfreesboro Railroad Company*, and sections fourteen and thirty-one thereof provide as follows:

Sec. 14. "That Murfreesborough Township, in Hertford County, and Town of Murfreesboro, in said county, may subscribe to the capital stock of The Murfreesboro Railroad Company, or make donations to

said company, to be secured by the bonds of said Township, or said town, as the case may be, bearing six *per centum* interest, as hereafter provided, subject to the approval of the qualified voters of said Township or said town."

Sec. 31. "When any township shall subscribe its bonds to the capital stock of said railroad company, or donate the same, as provided in this act, the county taxes, which shall be levied and collected upon the property and franchise of said company in said township, shall be applied in payment of the interest on the said bonds, to the amount of said interest, so long as the same shall accrue, and the excess of said taxes, if any, shall be applied to general county purposes; that when the said interest shall cease to accrue, by reason of the payment of said
(94) bonds, the said taxes shall be applied to general county purposes."

Of the numerous questions raised, and submitted to the court below, the following are the material ones as to which error is assigned:

"1. Has the General Assembly the constitutional power to authorize a township to vote its bonds to aid in building a railroad, running partly through said township, into an adjoining county?

2. Has it the power to direct the application of the taxes levied and collected on the property and franchise of said company, within said township, to the use of the township, as provided for in section 31 of said act; if not, does that provision render the whole act unconstitutional,"

As to these questions the court decided:

"1. That the Legislature has not the power under section 4, Article VII, of the Constitution, to authorize the issuing of the bonds, and the levying of the tax, provided for in chapter 365, Laws of North Carolina, session 1887; nor was the power of the Legislature enlarged so as to authorize the same by section 14, Article VII, of the Constitution, as to a particular township.

2. That the Legislature had not the power, under the Constitution, to direct the general tax levied upon the property of the said railroad, or to be levied to be applied to the purpose named in section 31 of the act; but this section does not render the whole act unconstitutional, nor prevent the collection of the tax upon the property of the said railroad, and its application to general county purposes."

The appellants contend that these rulings are erroneous.

The court gave judgment that the defendants be enjoined perpetually against subscribing for the capital stock of the company named, and likewise against issuing the bonds of the township named, to pay for such stock, etc., and for costs.

The defendants, having excepted, appealed to this Court.

Several of the questions raised by the case agreed upon by the parties and submitted to the court, involving the regularity and (95) sufficiency of the order of the county commissioners, directing an election to be held, and the conduct of it, to ascertain the voice of the electors of the township, in respect to the proposed subscription for capital stock of the railroad company named, were decided adversely to the appellee. As he did not appeal, these questions are not before us for our consideration, and hence, we express no opinion in respect to them, except so far as they may be incidentally affected by the questions we are called upon to decide. Indeed, they might, very properly, have been omitted from the transcript of the record on appeal.

The Constitution of this State (Art. VII, secs. 3-4), as it prevailed before it was amended in 1877, and as amended, provided that the county commissioners of every county in the State should divide the same into convenient districts, determine the boundaries thereof, and prescribe a name for each. It further provided that when this was done, and report thereof was made to and approved by the General Assembly, that then "the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships."

Thus townships were established in every county invested with corporate powers.

But an amendment of the Constitution provided, as to that article including the sections thereof cited (sec. 14 thereof), that "the General Assembly shall have full power, by statute, to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen."

The Legislature, in the exercise of the power thus conferred upon it, enacted (Acts 1876-77, ch. 141, sec. 7), that "All the provisions of Article VII of the Constitution, inconsistent with this act, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the provisions of this act substituted in their place; (96) *subject, however,* to the power of the General Assembly to alter, amend, or abrogate the provisions of this act, and to substitute others in their stead, as provided for in section fourteen of Article VII of the Constitution." It further enacted, in the same statute, as follows: "Sec. 3. The townships heretofore created, or hereafter established, shall be distinguished by well defined boundaries, and may be altered, and additional townships created, by the board of county commissioners, but no township shall have, or exercise, any corporate powers whatever, unless allowed by act of General Assembly, to be exercised under the supervision of the board of county commissioners."

The counsel for the appellee contended, on the argument before us, that the statute last cited abolished the provisions of the Constitution cited in respect to townships, and wholly deprived them of corporate powers and authority, and that the General Assembly has not power now to confer upon them such corporate powers, and particularly such powers for a single purpose, as for the purpose of subscribing for the capital stock of a railroad company, as in this case, and create a township debt, secured by bonds, to be put upon the markets to pay for such stock.

The view thus insisted upon is, we think, clearly untenable. It will be observed that the provision of the Constitution, conferring power upon the General Assembly in respect to Article VII thereof, is clear, distinct and comprehensive; it confers *full* power to *modify, change* or *abrogate* its provisions, except as to those sections specified, and to *substitute others* in their stead.

This does not imply that the General Assembly shall exercise the power thus conferred, but once, and never afterwards. The effect of such an interpretation would be to give the act of the Legislature as much permanency and unchangeable effect, as if it were a consti-
(97) tutional provision; in that case, the statute could not be changed, modified or repealed; and if such was the purpose of the amenders of the Constitution, they might as well have abolished Article VII thereof, and substituted one more acceptable for it. The more reasonable interpretation is, it seems to us, that the purpose was to confer upon the General Assembly full power to legislate in respect to the municipal corporations, provided in the article mentioned, except as to the matters embraced by sections seven, nine and thirteen thereof; that is, power to create and abolish them; to amend, modify, or repeal the laws affecting them, from time to time, as the changing circumstances, the convenience and common good of the people generally, or in particular sections or localities may require.

The Legislature, in the statute last cited in the sections above set forth, cautiously reserved the right and power "to alter, amend, or abrogate the provisions of this act, and to substitute others in their stead," and from time to time, in a great variety of ways, such power has been exercised by it.

Townships are, therefore, within the power and control of the General Assembly, just as are counties, cities, towns and other municipal corporations. It may confer upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose, to promote the prosperity, safety, convenience, health, and common good of the people residing within them, and resorting thither, from time to

time. And we can see no good reason why it may not confer such power for a single purpose, as well as many. There may be enterprises important to the people of localities—such as townships, road districts, school districts, and the like—that may be promoted by the exercise of corporate powers, to a limited extent, by such communities.

It is not necessary to advert here to the nature and extent of the powers of the Legislature, in creating and controlling municipal corporations. (98) We have had occasion to do so frequently, within the last two or three years. *White v. Commissioners,* 90 N. C., 437; *McCormac v. Commissioners, ibid.,* 441; *Dare County v. Currituck County,* 95 N. C., 189; *Mills v. Williams,* 11 Ired., 558; *Caldwell v. Justice,* 4 Jones Eq., 323; *Wood v. Oxford,* 97 N. C., 227.

We are unable to see any just reason why the people of a township, through which a railroad is located, shall not, if they see fit, aid in its construction, by taxing themselves, and creating a debt for the purpose, when the Legislature provides that they may, just as the people of a county, city, or town may do, and for the like considerations. It may be unwise or inexpedient, as a measure of economy, but the taxpayers—electors—must judge as to that. In important respects, the citizens of a township are an organized community, separate from their neighbors, and they may derive great and special advantages from a railroad, to be located and constructed in their midst. The mere fact that other neighborhoods will derive incidental advantages, is no good objection. If so, it would apply, generally, in the case of such aid extended by counties, cities and towns. *Wood v. Oxford,* 97 N. C., 227.

The objection that the Legislature could not direct the county taxes levied upon the property and franchise of the railroad company named, within the township, to be applied to the payment of the interest accruing upon the bonds to be put upon the market, is unfounded. The section of the charter of the company (section 31) complained of, does not, in any way or respect, interfere with the levy of the taxes referred to; it only directs the application of the part of the county revenues arising from the source named, to a particular purpose. There is no provision of the Constitution that forbids this. The Legislature may direct how the ordinary county revenues shall be applied within the county for any lawful purpose. Thus, it might direct that the revenues, arising from a specified source, should be applied to the debt created in (99) building a courthouse, a jail, a poorhouse, a public bridge, a public road, and the like. Counties are instrumentalities of government, and are subject to the control of the Legislature to a great extent, in the absence of constitutional limitation upon its powers. *Holton v. Commissioners,* 93 N. C., 430.

There is, therefore, error. The judgment must be reversed, and judgment entered in the court below for the defendant, as stipulated in the case agreed upon and submitted to the court. To that end, let this opinion be certified to the Superior Court, according to law.

It is so ordered.

Error. Reversed.

Cited: Jones v. Commissioners, 107 N. C., 265; *R. R. v. Commissioners,* 108 N. C., 57; *Goldsboro v. Broadhurst,* 109 N. C., 231; *Harris v. Wright,* 121 N. C., 182; *Tate v. Commissioners,* 122 N. C., 814; *S. v. Sharp,* 125 N. C., 633; *Debnam v. Chitty,* 131 N. C., 686; *Wittkowsky v. Commissioners,* 150 N. C., 95; *Trustees v. Webb,* 155 N. C., 385; *Newell v. Green,* 169 N. C., 464; *Cabe v. Board of Aldermen,* 185 N. C., 160.

J. C. HALLIBURTON AND OTHERS, EXECUTORS OF JACOB HARSHAW, v. JOHN CARSON, EXECUTOR OF GEO. M. CARSON AND OTHERS.

Executors and Administrators—Evidence, sec. 590—Statute of Limitations and Presumptions—Bonds payable in Coin—Relations between Personal and Real representatives of Deceased Debtor.

1. An executor, when sued for an account, is entitled to credit for payments made by him on debts of his testator, although such debts were barred by the statute of limitations, or were, under the statute of presumptions, presumed to have been paid at or before the death of the testator. The law does not require an executor to make his testator "sin in his grave," by setting up an unconscientious defense.

2. Especially is the above true, when the testator, shortly before his death, told the executor that he owed the debts in question, and wished them paid.

3. In such a case, the testimony of the executor as to the statements of his testator, that he owed the debts, etc., is not rendered incompetent by sections 580 and 590 of The Code.

4. An executor, acting under the rule laid down in *Roberson v. Brown,* 63 N. C., 554, in settling a bond of his testator's, payable in coin, is protected, although the rule established by that case is at variance with the ruling of the Supreme Court of the United States.

5. The ruling in *Bevers v. Park,* 88 N. C., 456, as explained and corrected in *Speer v. James,* 94 N. C., 417, with reference to the relations existing between the personal representative of a deceased debtor, and his devisees and heirs at law, confirmed.

HALLIBURTON *v.* CARSON.

CIVIL ACTION, heard upon exceptions to report of referee G. F. (100) Bason, by *MacRae, J.*, at Spring Term, 1886, of MCDOWELL Superior Court.

The defendants, other than John Carson, appealed.

J. G. Bynum and G. N. Folk for plaintiffs.

J. B. Batchelor, Jno. Devereux, Jr., P. J. Sinclair and W. H. Malone for defendants.

SMITH, C. J. This suit, instituted in January, 1876, by the plaintiffs, executors of Jacob Harshaw, who died in 1868, against the defendant, John Carson, executor of George M. Carson, on behalf of themselves and other creditors, is to enforce a sale of the devised land of the testator, George M., in order that the proceeds, as far as necessary, may be applied to the discharge of his indebtedness, upon an allegation of an exhaustion of the personal estate. The devisees were subsequently made codefendants.

After the complaint and other pleadings were put in, an order of reference, by consent of counsel, was made to John D. Shaw, to take and state the administration account, and to ascertain and report:

1. The number and value of the shares received by the several legatees, and when taken possession of by each.

2. The value of each of the tracts of land devised by the tes- (101) tator, George M.; and

3. The refunding bonds, executed by the legatees, each set out in its essential particulars.

At Spring Term, 1881, the defendant, Emily Carson, having died the year previous, her administrator was permitted to become a party in her stead, and he filed an answer, adopting that of J. McD. Whitson and wife Rebecca, and of ..... Gowan and wife. At June Term, 1883, the relations between the original defendant, John Carson, and those subsequently introduced into the action, being adversary, the said Whitson and wife, on behalf of all of the defendants last mentioned, put in an answer, controverting the allegation contained in the answer of the former, the executor, to which he made reply.

The referee made his report, to which objections were taken, and, upon motion of counsel for the contesting defendants, by whom we designate all except the executor, and upon the ground of newly discovered matter, omitted in the report, it was set aside, except in so far as it ascertains the plaintiffs' debt, and as to this, it was confirmed. It was then, by consent, referred to W. W. Flemming, to find particularly the sum due the plaintiffs, and he did so, during the term, reporting a balance of $3,373.37, whereof $2,167.64 is principal money.

Thereupon, at the instance of plaintiffs' counsel, it was "considered by the court that the said sum of $3,373.37, being principal and interest, is the amount of the debt of the plaintiffs, and that they are entitled to judgment ascertaining the same, but in what proportion the same shall be paid by the devisees of said George M., and others, and at what time, is left open for adjudication, when the report of G. F. Bason, to whom the cause has again been referred for an account, shall be returned." And it was further ordered, "that this cause be recommitted, and referred to George F. Bason, to take and state an account of the estate of
(102) George M. Carson, which has come, or ought to have come, from all sources, into the hands of John Carson, the executor, and what disposition has been made of such estate, and especially, that he state what funds have come into the hands of the said executor from the estate of William Carson" (he being also executor of the latter), "which ought to be subjected to the debts of any one, and to him, as executor of George M. Carson; what personal property of the estate of said George M. came to the hands of each of his legatees, and the value thereof; what real estate of the said George M. came to each of his devisees, and the value thereof; and in case it shall appear that there is not in the hands of the executor sufficient assets to pay off the plaintiffs' debt, then to ascertain and report what sum each of the devisees, including the executor, is liable to contribute to the payment of the plaintiffs' debt; that, in ascertaining what sums ought to have come into the hands of the executor, the referee may inquire what estate, either by devise, descent, conveyance or gift, if any, has come to the executor from the estate of William Carson, subject to the payment of debts due him, as executor of said George M.

The referee will find all the facts that he deems material, and state his conclusions of law; state his account separately, and report to the next term."

The referee proceeded to execute the commission, and made the required report, with separate findings of fact and of law, arising upon them, from which it appears that the executor has paid towards the liability of the testator, and the expenses of administering the estate, in excess of the assets, with which he is chargeable, the sum of $3,341.92.

Exceptions, twelve in number, were filed by counsel of the contesting defendants, after the ruling upon which, and exceptions entered thereto, in so far as they were not sustained, the account was rereferred to the same referee, for reformation, in the particulars requiring correc-
(103) tion, and again reported to the court, with the evidence taken upon the matters in controversy. Of this report, it is not out of place for us to remark that it indicates great care and painstaking, and the bestowal of much labor, in eliminating from the mass of evidence

the points in dispute and in presenting them, in a clear and intelligible form, for the reviewing Court.

Similar objections are made by the same party, to the reformed report, nine in number, whereupon the court proceeded to render final judgment, and the contesting defendants appealed.

The question, whether the lands devised to the executor in the codicil to the will, made after the death of some of the devisees, were primarily liable to be sold to meet the demands against the testator's estate, in relief of the other devised lands, or whether all were to contribute, was decided when that matter was before us, upon a former appeal, in favor of an equal liability, and is now put out of view. *Halliburton v. Carson*, 86 N. C., 290. We pretermit an examination of the exceptions to the referee's first report, for the reasons: (1) that it is embodied substantially in the last, to which a new series of exceptions has been filed; and (2) because the argument here upon points excepted to, and expected to be decided upon the appeal, has been confined to this series. Indeed, the argument for the appellant was still more restricted, calling our attention only to a part of that series of rulings, to which error is imputed. We limit, therefore, our inquiries into the sufficiency in law of the exceptions to the last report:

1. The first exception is to the referee's conclusions that the statutory limitations of three, seven and ten years, as well as the statutory presumption of payment, is not available as a defense to claims paid that had been due more than ten years as an allowed credit to the executor. The objection applies to the claims, the vouchers showing payment, which are numbered 7 and 16 in the report, and which had (104) been overdue, and were reduced to judgment without resistance by the executor, and afterwards paid. These claims were due to Martin E. Carpenter, by two notes under seal, each in the sum of $550, on 9 May, 1850, and executed by the testators, George M. and William, suits to recover which were commenced on 30 January, 1867, and to R. C. Burgin, guardian of James Conley's heirs, by note under seal, executed by J. L. Carson, principal, and George M. Carson and John Carson, sureties, for $2,262, principal and interest, when reduced to judgment, the last payment being made by A. Burgin, administrator of the principal debtor, on 5 July, 1873, of $259.50, generally against the surety, John Carson, and guards against the representatives of the other obligors, at Fall Term, 1869.

The defense to these credits is, that more than ten years had elapsed after the maturity of the bonds, and they are presumed to have been paid, and are barred by the statute of limitations, applicable to claims against the estate of deceased debtors.

2. The admission of the testimony of the executor to show the subsisting indebtedness of the testator, George M., to Carpenter, and others, which consisted of his declarations made to the witness whom he made executor in some three months before his death, in which conversation he said he wanted the Carpenter debt paid. The objection to the declaration of the deceased is based upon the prohibitory provisions of The Code, sec. 590.

The referee, in our opinion, misconceives the nature of the objection to the allowance of the credits, in requiring them to be set out with the same particularity as the rules of pleading require, when the statutory bar is relied on to defeat the plaintiff's action. The complaint is, that the executor did not set up this defense, and thus protect his
(105) testator's estate from the demands, and that he was remiss and neglectful of official duty, and should bear the loss himself. The bonds are not in suit, and no statutory bar can now be set up. The strict rule of pleading, which the referee invokes in support of his action, has no application to the case, and the controversy, as to any particular item of claim and resisted credit, springs up when it is offered in the taking the account, and must be disposed of by the evidence in support of, and in opposition to, its allowance, then to be produced and heard. The only inquiry is, shall, under such circumstances, money paid upon a debt, presumed to have been paid before, be admitted without proof, in rebuttal, showing that it has not been paid, or that, acting in entire good faith, the executor had sufficient reasons for his belief and action in making the payment?

Now, as to the Carpenter notes, if the evidence of the executor is to be received, the testator, just before his death (and, perhaps, after making his will, for its date is not given), declares to the person, who is to settle his estate, that he does *owe this debt,* and another due to a named creditor, as well as some others of small amount, and not specified, and *wishes it to be paid,* and, in his will, he provides for the payment of all his just debts. If, then, the testimony, coming from the source that it does, is admissible, it fully rebuts the presumption of payment, and leaves the debt as subsisting in full force, notwithstanding the lapse of time, and justifies the executor in submitting to the judgment without resistance.

We come now to consider the competency of the witness to testify to the declarations of the testator, under sections 580 and 590 of The Code, the interpretation of the latter of which has been a prolific source of controversy heretofore. The main purpose to be subserved, in the enactment, is as stated by the late *Chief Justice* in *McCanless v. Reynolds,* 74 N. C., 301, and reiterated in *Thompson v. Humphrey,* 83 N. C., 416, that of the parties to a transaction or communication, one being

dead, the survivor shall not be permitted to speak of it, because (106) the mouth of the other is closed, so that his version cannot be heard. This, however, presupposes some antagonism of interest as to the subject-matter of the evidence then existing, which might be favorably affected as to one, and unfavorably as to the other of the parties, between whom it takes place. Thus, when the controversy was, as to whom the deed was made by the grantor, he was allowed to testify that it was to deceased party, under whom the defendant claimed, because there was no controversy as to the witness's ownership, and he was indifferent as to the results of the issue. *Gregg v. Hill,* 80 N. C., 255.

And so are held to be competent, as outside the purpose of the statute, declarations and acts of the deceased upon a question of mental capacity, through whatever witness the testimony is derived. *McLeary v. Norment,* 84 N. C., 235.

In the case before us the executor, being also a legatee and devisee, had a common interest, with the others, in refusing to allow the debt and exonerating the trust estate therefrom. He would in this be promoting the interest of each, and not his own, separate from theirs.

With such information as he had from such a source, not to be distrusted, and under a sense of fiduciary duty, could he rightfully repudiate the liability of his testator, and resist the obligation under the technical rule of presumption opposed to fact; or, if he does not, expose himself to the loss of the whole sum paid?

It is true that in *Barnawell v. Smith,* 5 Jones Eq., 168, *Battle, J.,* distinguishes between the liability incurred by an executor or administrator, in refusing to set up the statutory bar, which puts an end to the action, and in not taking advantage of the presumption of payment, raised by the lapse of time, declaring him responsible in the latter case, unless, when a credit for the expenditure is claimed, he can repel the presumption, while in the other he may exercise his own dis- (107) cretion. He says that before paying the demand, against which the presumption operates, he "ought to show that the presumption was untrue, and in fact it had not been paid or satisfied," before permitting a judgment to be recovered, or making payment.

But if he has personal knowledge or ample proof of the indebtedness as still subsisting, and acts upon either, we are unable to see why he should be held personally responsible, and be denied the opportunity of giving his reasons therefor, under the old or the recently amended rules of evidence. In all cases he must act in good faith in protecting the trust estate against unjust demands, but not against those that are honest and just. The law does not require of him, in the expressive words of another, in opposition to an argument, that it was the legal duty of the representative to plead the statutory bar, "to make him sin in his

grave"; and such is the well established doctrine in this State, under numerous adjudications of this Court.

And again, assuming the testimony incompetent to prove the fact of nonpayment, why is it not admissible to refute the charge of culpable indifference and inattention, and show wherefore the indebtedness was not contested, and the good faith of the executor?

"The legatees or next of kin," remarks *Gaston, J.*, "cannot, in conscience, object to payment, whether voluntary or compulsory, made by the representative of the estate of what was justly due therefrom. In equity, as respects legatees or next of kin, the estate consists only of what remains after satisfaction of the creditors." *Williams v. Maitland,* 1 Ired. Eq., 92.

Suppose the presumption could have been repelled by frequent admissions and acts of the debtor, to be proved by an indifferent witness, who dies before the administration account is taken, so that any resistance to the action would have been fruitless, must the executor, who pays (108) the amount after judgment, be disallowed the credit, because the proof cannot then be had? And shall he not be permitted to show his reasons for making a useless opposition to the recovery? Yet these consequences might follow the adoption of the principle that applies to an action upon the claim itself when in suit, in a controversy growing out of its payment. Unless some difference is recognized, very great hardship might come to the most careful and honest trustee in the discharge of his official duties, and for which the enabling statutes in The Code were specially intended, as is apparent from their structure and scope.

The rule would be very stringent, which imposed so great responsibility upon fiduciary agent left unprotected, when his disbursements, made in fidelity to his trusts, and to be disallowed, because of inability to produce the proofs upon which the claim could have been established, and when resistance would have entailed needless expense. The executor "is answerable only," says *Nash, C. J.*, in *Deberry v. Ivey,* 2 Jones Eq., 370, "for that *crassa negligentia,* or gross neglect, which evidences *mala fides.*" To the same effect are *Nelson v. Hall,* 5 Jones Eq., 32; *Mendenhall v. Benbow,* 84 N. C., 646; *Patterson v. Wadsworth,* 89 N. C., 407. We therefore sustain the rulings of the judge upon these two exceptions.

The Burgin judgment, in many of its features, is similar to that which has been discussed. In some respects it has peculiarities of its own. John Carson was, himself, a surety obligor, and if the pleadings were to be verified by oath, how could he swear that the debt had been paid when he knew it had not been, and why should he be required to set up for his testator a defense he would not set up for himself? It

would be evasive to say the debtors relied upon the protection of the statute, when its presumption was known to be untrue. His duty to the estate cannot be such as to require him to do, for its exoneration, what he could not conscientiously do for his own. Their interests are one and the same, and every motive was against any dereliction (109) of duty in the premises to both.

Besides this, he was not bound to set up an unjust, though legal defense, as the condition of his own recovery from the principal debtor, or from a cosurety, his ratable part of what he may have been compelled to pay, by reason of his personal liability. This has been expressly decided, when the surety failed to plead the statute of limitations to a demand from which it would have protected him, inasmuch as his right of action commences at the payment. *Sherrod v. Woodard,* 4 Dev., 360; *Jones v. Blanton,* 6 Ired. Eq., 115.

"There was no obligation on the plaintiff, in law or in equity," are the words of *Nash, C. J.,* in the last cited case, "to plead that statute" (protecting the sureties from liability upon guardian bond, after three years, from the ward's becoming of age and not calling him to an account) "or rely upon the protection it gave him," citing *Leigh v. Smith,* 3 Ired. Eq., 442, and *Williams v. Maitland, supra.* This was said of the plaintiffs' claim for a contribution from a cosurety to the bond.

Why is it more his duty to rely upon a defense, not less unconscientious, furnished in the statutory presumption?

With the funds in his hands, the appropriation was at once made by the law. *Ruffin v. Harrison,* reported in 81 N. C., 208, and upon the rehearing, in 86 N. C., 190. There was, therefore, no limitation resulting from the lapse of time afterwards, depriving the executor of his right to a credit upon a settlement of the estate.

3. The next exception, pressed with earnestness and force by appellees' counsel, in argument, is in allowing a credit for an alleged premium, entering into the judgment rendered upon the bond due to Jacob Harshaw, the plaintiffs' testator, and executed by J. L. Carson, William Carson and George Carson, on 20 April, 1860, and payable upon its face "in United States coin." It was reduced to judgment, at Fall Term, 1869, of McDowell Superior Court, and the record (110) thereof was produced before the referee Shaw, showing the amount recovered to be $4,326.45, and upon the back of the bond, besides an endorsed payment of $198.33, is an entry, as follows:

"Pl (intended for principal)	$2,167.64
Int. to 2d September, 1869	1,037.14
Gold premium, 35 per cent	1,121.67
	$4,326.45."

This entry, as well as the computation of interest accrued, sufficiently shows that the premium upon gold has been added to the amount due upon the face of the bond, which, it is not denied, measured the difference in value between gold and National currency, at the date of the judgment. This method of conversion of the one into the other fund, is in accordance with the decision of this Court in *Roberson v. Brown,* 63 N. C., 554, while it is at variance with that of the Supreme Court of the United States—*Branson v. Rhodes,* 7 Wall., 229, and *Butler v. Harwintz, ibid.,* 258, wherein the currency in the contract is preserved, in kind, in the judgment, and in the execution, that follows. The executor, acting upon the rule laid down in this Court, is warranted in not resisting the recovery of the sum thus augmented by the premium upon coin, and payable in National currency; nor is there any principle in law or equity, known to us, nor any authority referred to by counsel, on which, in consequence of the appreciation of the latter to the level of the former in value, the debt can be reduced, as it could not be increased in case of depreciation.

Besides, the sum adjudged due, in the ruling upon the report of the referee, Flemming, acquiesced in and not the subject of exception, is thus conclusively settled in this very action, and cannot come up
(111) again, except upon a revisal of that adjudication, upon a proper application to the Court.

It is unnecessary to consider the original judgment against the executor, and inquire if the statute of limitations can still be set up, in opposition to the present proceedings, to charge the devised land with the debt; and it is only necessary to say, that the ruling in *Bevers v. Park,* 88 N. C., 456, has been misunderstood, and the mistake explained and corrected in *Speer v. James,* 94 N. C., 417, where the subject-matter of the relations between the personal representative of a deceased debtor, and his devisees and heirs at law, is fully considered.

The other exceptions, based upon alleged erroneous rulings upon the law, for none others are before us in this appeal, without special and separate reference to each, must be overruled.

There is no error, and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Crenshaw v. Carson, 120 N. C., 276; *Marshall v. Kemp,* 190 N. C., 493.

JOHN M. GALLOWAY, EXECUTOR, AND OTHERS, v. W. B. CARTER, JR., AND OTHERS, EXECUTORS.

Construction of Wills—Defeasible Estates.

1. A testator, by his will, after first making provision for his wife, and then for his children, severally, and in order, giving each in severalty certain lands in fee, besides slaves and other personalty, directed that all his property, real and personal, not specifically disposed of, should be sold, and out of the proceeds, after payment of certain pecuniary legacies, one thousand dollars should be paid to each of his said children, and the residue divided equally between his wife and children. After the above provisions, is the following clause: "My will further is, that if any or either of my children should die without leaving issue living at his, her, or their death, the share or shares, of him, her or them, so dying (as well the accruing as the original share) shall be, go over and remain to the surviving brothers and sisters and the child or children of such of them as may be then dead, equally to be divided between them share and share alike; but the children of my deceased child shall, in such case, represent their parents respectively and take in families": *Held*, that the will did not vest an absolute and fee-simple title to any of the property in a child of the testator living at his—the testator's—death; but upon the death of such child, leaving no issue, *all the property* to which such child was entitled under the will, went over to and became the property of the surviving brothers and sisters, and the child or children of such of them as were then dead, to be divided among them *per stirpes*.

2. Where the estate created by a will is defeasible, and the intention of the testator is doubtful, and the property itself is given, and not the mere use of it, and the time is not definitely fixed at which the estate shall become absolute, if there be any intermediate period between the death of the testator and that of the devisee or legatee, at which the estate may fairly, in view of the whole will, be considered absolute, this time will be taken as that intended by the testator; but if there be no such intermediate period, and the time of the devisor's death, or that of the devisee's or legatee's death must be adopted, the former will be treated as the time intended.

3. The general rule is to construe the estate, whether vested or contingent, as absolute and indefeasible, rather than defeasible; and if it cannot be construed to be absolute, then to construe words which make it doubtful, as to when the estate shall become absolute, in such manner as to render the estate absolute at as early a period as can be fairly done.

4. The above rules do not apply when a contrary intention appears from the whole will—its terms, phraseology, several parts, provisions, conditions, and their bearing upon each other.

5. It is not the object of rules of interpretation to direct, modify or prevent the intention of the testator, but to ascertain what it is and make it effectual.

SMITH, C. J., dissented.

GALLOWAY *v.* CARTER.

CIVIL ACTION, tried before *MacRae, J.*, at August Term, 1886, of STOKES Superior Court.

Judgment for defendants. Plaintiffs appealed.

(113) It appears that Robert Galloway died, in the county of Rockingham, in the year 1832, leaving a last will and testament, which was duly proven, and the executors therein named duly qualified as such. The following is a copy of the will:

"In the name of God, amen: I, Robert Galloway, of Valley Field, in Rockingham County, North Carolina, do make and publish this paper writing as my last will and testament, hereby expressly revoking all former wills by me made.

I give and devise to my beloved wife, Mary S. Galloway, my manor plantation, and the lands thereto belonging, called 'Valley Field,' and containing about twelve hundred acres, for and during the term of her natural life; and I give absolutely to her the following slaves, namely: Hubbard, Joe, Dick (the miller), Jerry (who has been employed at the court-house), Patrick, my old and faithful servant and friend, Isaac (who lives at the court-house), Isaac (at the Eagle Falls), Lorenzo, William (purchased from Fitzgerald), Reuben, James, Nancy, Elsey, Tamer, Diana and her three youngest children, named Grochus, Nancy and Polly; Leanthea, Alice, Dorcas and her child Betsey; Allen, Philip (at the court-house), and Sylla and Delilah, two children of Nancy; and also my household furniture and kitchen utensils, at Valley Field; my farming implements and utensils, wagons, carts, plows, gear, and the like; stock of horses, cattle, hogs and sheep, and all my crop and provisions on hand, and the crop growing on that plantation at my death; also my twenty-two shares of stock in State Bank of North Carolina, and the sum of one thousand dollars in money, to be paid as she may require it. But I further direct that my wife shall furnish my sons, Thomas and Rawley, and my daughters, Mary and Elizabeth (if not done in my life-time), with three beds and furniture each, and for that purpose she may take eight beds and furniture from the court-house; I also give her my carriage and horses.

(114) I give to my son Charles the tract of land called 'Rose Hill,' situated on Dan River, on which he resides, containing about thirteen hundred acres, in fee simple; also, the following negroes, to wit: Reuben, Anthony, Winnie, Philip, Tilda, Pinkney, Nancy, Isaac (son of Phillis), Lethe, George, Alsey, daughter of Edy, and Billy; also, all the furniture, household, kitchen and farming utensils, crops on hand or growing on said plantation, and the stocks of all kinds there belonging.

I give to my son Robert, in fee simple, the tract of land situated on Dan River called 'Eagle Falls,' containing about one thousand twenty-five acres; also, the following negroes, to-wit: Armistead, Sam, William,

Jerry, Delia, Branton, Dochia, Mary, Dick, Alley, Joe and Tom; also, all the household and kitchen furniture in his possession at Eagle Falls, or Spring Garden, and all farming utensils, crops on hand or growing at Eagle Falls, and the stocks of all kinds there belonging.

I give to my daughter Marion, wife of James E. Galloway, in fee simple, the following tracts of land, situated in the Western District of Tennessee, viz.: One tract on the Obion River, which James Martin conveyed to me, being part of a five thousand acre tract, called the 'Big Clover Lick'; and one other tract, containing about one thousand three hundred and nine and a half acres, lying on the waters of Loore Hatchee River, in Fayette county, which the said James E. conveyed to me; also, the following negro slaves, to-wit: Daniel (whom the said James E. hath already sold by my consent), Peter, young Hubbard, Lewis, Bob, Henry, Lucy, Hester, Lucinda, Milly, Abbey and Lavinia, and all the furniture, stock and other perishable property which I put into possession of her said husband.

I give unto my son Thomas three tracts of land, situated on Dan River, adjoining each other, which I purchased from Daniel (115) Worsham and Joseph Crook, and the heirs of Gideon Rooche (the latter of which was conveyed to him, my said son), containing altogether about one thousand acres, in fee simple; also, the following negroes, to-wit: Tom (purchased from W. Leary), Stephen, George, Sam, Hannah, Luke, Armstrong, Martha, Hannah, Esther, Sophy and Lucretia, and all such stocks of any kind, household and plantation utensils, as I may in my life-time place on said land, or put into possession of my said son Thomas.

I give to my son Rawley, in fee simple, a tract of land which I purchased from Theophilus Long, situated on Dan River, containing about three hundred acres, with all implements of husbandry, and all the stocks thereon, and the crops thereon growing at my death; also, my manor plantation, called 'Valley Field,' in fee simple, in reversion after his mother's death; and also the following negroes, namely: Henry, son of Tamer, Hubbard, son of Maria; William, son of Dinah; Harrison, Washington, July, Edy, Shelton, Aggy and Henderson; Elijah, Martha, daughter of Tamer; Elias. I also give my son Rawley, in fee simple, a tract of land adjoining the Lacy tract, conveyed to me by the executors of Martha Scales, and containing about sixty acres, making that whole tract about three hundred and sixty acres, or thereabouts.

I give my daughter Mary S. the land which I purchased from Barnes; also that purchased from George Barnes; also that purchased from William Pratt, that purchased from Stephen Pratt and John Robinson, and that purchased from John Strong, containing about six hundred acres, more or less, in fee simple; also the following negroes, to-wit: Henry,

purchased of William Buck; James, son of Bridget; Anthony, son of Winnie; Judah, Mary Ann, Phœbe, Bridget; Abram, son of Diana; Catherine, Dorre, Ann and Nelson, son of Dorcas, at the court-house.

I give to my daughter Elizabeth, in fee simple, the tract of
(116) land called 'Barnes tract,' containing about eight hundred acres, which was conveyed to me by the Clerk and Master in Equity for the county; and also the following negroes, to-wit: Martha, Jefferson, Adam, David, Bonaparte, Peggy, Minerva, Adeline, Harrison, son of Peggy; Dorcas and her son Lewis, and Abbey, daughter of Tamer. I also give to each of my said two daughters, Mary and Elizabeth, the sum of four thousand dollars in ready money, and a horse and saddle, to be raised out of my estate, as hereinafter directed. I further will and declare, that any issue belonging to me of any female slave herein bequeathed, which is now born, and which is not in this will particularly named, or which may be born before my death, and not otherwise disposed of by me, shall go and belong to the same person or persons to whom I have bequeathed the mother. This I direct, knowing that several already have children, and that others probably will have them.

I order and direct, that my tract of land, called 'Austin's old place,' situated on Dan River, opposite the Mulberry Island, and containing about five hundred acres, more or less, also my tract, called 'Spring Garden,' containing about two thousand one hundred acres, conveyed to me by James E. Galloway; and also the lands I purchased from Drury Williams and son, from Mitchell Pounds and Purtle, and all my lots, lands and houses near Rockingham court-house, and all the residue of my lands and real estate, not herein devised, and situated in North Carolina, which I own in my own right, or in company with others; and also all my lands situated in Tennessee, and all the residue of my specific personal estate, be sold by my executors, or such of them as may prove my will and act in its execution; which sales may be made at public auction, or by private contract, at the discretion of my said acting executor or executors, with this restriction: that no private sale shall be made to any or either of my executors, but my said executors may
(117) be bidders and buyers at any public sale; and, in that event, the other executors may, and shall have power to convey the lands, or other things purchased by a coexecutor, to him or them so buying, in the same manner as to any other purchaser; and I direct that sales of the Tennessee lands be made on a credit of one, two and three years; and out of the proceeds of such sales of my stocks of merchandise on hand, and other property not given away herein, my cash on hand, and debts owing to me, I order the expenses of the execution of my will to be paid, and the pecuniary legacies of my wife and daughters, Mary S. and Elizabeth; the residue thereof I give to my wife and all my children, equally

to be divided between them, except that my wife is not to have any part thereof, until each of my children shall have received one thousand dollars out of this residue.

My will further is, that if any or either of my children should die without leaving issue living at his, her or their death, the share or shares of him, her or them so dying (as well the accruing as the original share) shall be, go over and remain to the surviving brothers and sisters, and the child or children of such of them as may be then dead, equally to be divided between them, share and share alike; but the children of my deceased child shall, in such case, represent their parents respectively, and take in families.

I appoint my four sons, Charles, Robert, Thomas and Rawley, the executors of this my last will and testament, and I enjoin it on them and all my children to live in harmony, and carefully to avoid all differences and disputes about my estate, being well assured that it would be more for their interest if I had nothing to leave them, rather than that what I do leave them should break brotherly love, and become subjects of contention among them.

Given under my hand, this the 8th day of December, 1831.

R. GALLOWAY.

Signed, declared and published by the testator in our presence, (118) who attested the same in the presence of him and of each other, by his request.

THOMAS RUFFIN,
PETER WILSON,
PETER H. DILLARD."

The daughter of the testator, Mary S. Galloway, named in the will, died in the month of March, 1886, never having been married and without issue, leaving a last will and testament, which was duly proven, by which she disposed of all her property, real, personal and mixed, including such as she acquired under the will of her father. The defendants are the executors, devisees and legatees of her will.

The plaintiffs are the surviving children of the testator, and others, who represent such of his children as are dead, and the purpose of this action is to obtain a construction of the will set forth above, an account, etc.

In the Superior Court the defendants moved to dismiss the action, because the complaint does not state facts sufficient to constitute a cause of action. The court sustained the motion, and gave judgment accordingly, and the plaintiffs, having excepted, appealed to this Court.

The following is so much of the case, settled on appeal, as shows the contention of the parties:

"The plaintiffs contended that, under the said will, each child took a defeasible estate in fee in the lands and personal property devised and bequeathed to said child, and that upon the death of Mary S. Galloway, in 1886, without issue, living at her death, all her property and estate that was devised and bequeathed to her by Robert Galloway, her father, and the residue thereof, in her hands, vested, by way of executory devise, in the plaintiffs and individual defendants (who are the children of the deceased children of said Robert Galloway), as tenants in common thereof.

(119) The surviving defendants, on the other hand, by demurrer *ore tenus,* contended that, by a proper construction of the will of the said Robert Galloway, deceased, the land and personal property devised and bequeathed to Mary S. Galloway, was vested in fee simple, and absolutely, in the said Mary S. Galloway, upon the death of the testator; and that, as appears by the complaint, the said Mary S. Galloway had died, leaving a last will and testament, by which she disposed of her estate; and that the plaintiffs were not entitled to the relief demanded in the complaint."

Mebane & Scott for plaintiffs.
Watson & Glenn for defendants.

MERRIMON, J. (after stating the facts): The will before us, to be interpreted, is orderly in its form, very clear and intelligible—certainly in most respects—in its several provisions, and, of itself, affords evidence of an able and skillful draughtsman. By it, the testator carefully disposed of all his large and valuable estate, embracing much real and personal property, certainly and exclusively to his own immediate family, consisting of his wife and seven children, thus manifesting a settled purpose to devote his property, as far as practicable, to persons of his own blood.

It will be observed, that the testator first makes provision for his wife, and then for his children, severally, and in order, giving each, in severalty, certain lands in fee, besides slaves and other personal property. Having thus disposed of much the greater part of his property, he directs that certain lands, specified, be sold—part of them on a credit of one, two and three years—thus turning them and all his property, not specifically devised or bequeathed, into a cash fund, out of which he directs, first, that certain pecuniary legacies be paid to two of his daughters, named; secondly, that each of his children be paid one thou-

sand dollars; and thirdly, that the residue thereof be divided (120) equally between and among his wife and children. These dispositions embrace all his property, and he then adds:

"My will further is, that if any, or either of my children, should die without leaving issue living at his, her, or their death, the share or shares of him, her, or them, so dying (as well the accruing as the original share), shall be, go over and remain to the surviving brothers and sisters, and the child or children of such of them as may be then dead, equally to be divided between them, share and share alike; but the children of my deceased child shall, in such case, represent their parents, respectively, and take in families."

It is this clause of the will that gives rise to the questions presented for our decision. The principal contention of the appellees is, that the testator intended that it should have application and operative effect only in case one or more of his children had died in his lifetime, after the execution of his will; and that, as his daughter Mary S., now deceased, and under whose will they claim, survived him, her title to the property, devised and bequeathed to her, became absolute on the death of the testator.

Construing the will as a whole, as we must do, we cannot accept the interpretation thus insisted upon, as the correct one.

As contended by the learned counsel for the appellees, it seems to be settled—certainly in this State—that where the estate, created by the will, is defeasible, and the intention of the testator is doubtful—not clearly expressed—and the property itself is given, and not the mere use of it, and the time is not definitely fixed at which it shall be absolute, if there be any intermediate period between the death of the testator and that of the devisee or legatee, at which the estate may fairly, in view of the whole will, be considered absolute, this time will be taken as that intended by the testator; but if there be no such intermediate period, and the time of his death, or that of the devisee or legatee, (121) must be adopted, the former will be treated as the time so intended. This is so, unless there be words that forbid such interpretation, or considerations appearing from the will that clearly imply, or disclose, a different intent.

The general rule applicable in such doubtful cases is, to construe the estate, whether vested or contingent, as absolute and indefeasible, rather than defeasible; and if it cannot be construed to be absolute in its creation, then to so interpret words and phrases implying such conditions as render the estate defeasible, doubtful as to the time of their operation, so as to render the estate absolute at as early a period as can fairly be done. *Cox v. Hogg,* 2 Dev. Eq., 121; *Hilliard v. Kearney,* Bus. Eq.,

221; *Biddle v. Hoyt,* 1 Jones Eq., 159; *Vass v. Freeman,* 3 Jones Eq., 221; *Davis v. Parker,* 69 N. C., 271; *Murchison v. Whitted,* 87 N. C., 465; *Price v. Johnson,* 90 N. C., 592.

But such rules of interpretation do not apply when, from the whole will—its terms, phraseology, several parts, provisions, conditions and their bearing upon each other, and just and reasonable implication arising thereupon—a different intention of the testator clearly appears. He might provide otherwise. Unquestionably, it is competent for him to devise and bequeath his property to his children, coupled—clogged—with the condition, that if one or more of them should die at any time before, or after, his death, without issue then alive, then, and in that case, it should pass to and become the property of his or her surviving brothers and sisters. The law, for reasons of wise and sound policy, does not favor such a disposition of property, but it does not forbid it, and, on the contrary, when it appears that such is the purpose of the testator, it will uphold and enforce his purpose. *Bullock v. Bullock,* 2 Dev. Eq., 307; *Fortescue v. Satterthwaite,* 1 Ired., 566; *Garland v. Watt,* 4 Ired., 287; *Biddle v. Hoyt,* 1 Jones Eq., 159; *Motts v.*
(122) *Caldwell,* Bus. Eq., 289; *Webb v. Weeks,* 3 Jones, 279; *Vass v. Freeman,* 3 Jones Eq., 221; *Williams v. Cotten, ibid.,* 395.

The will, however it may dispose of property, not inconsistently with the rules of law and statutory regulations, will be upheld, and the intention of the testator must prevail. The law does not seek to mould or direct his purpose—on the contrary, it effectuates it as nearly as may be. Hence, it is no part of the object of rules of interpretation, such as those adverted to above, to direct, modify, or prevent the intention, but only to ascertain what it is, to the end it may become operative and effectual.

Now, in our judgment, the testator of the will under consideration, intended, by the clause of it above recited, to render the estate and title of the property devised and bequeathed to his several children, defeasible, and to provide that, in case any one or more of them should die at any time after the death of the testator, without leaving issue living, at his, her or their death, respectively, the property so devised and bequeathed, including any that might have accrued under the clause, should at once, upon his, her or their deaths respectively, at any time, go over to, and become the property of, the surviving brothers and sisters, and the child or children of such of them as may then be dead, equally to be divided among them, share and share alike, the children of any deceased child representing their parents respectively, and taking as families. This, we think, sufficiently appears from the clause just referred to. It provides, "that if *any or either* of my children should die

without leaving issue living, at his, her, or their death," etc. These are comprehensive words, used in a broad sense—they do not imply, simply, that if one, two, or three shall so die, but if *any*—several—an indefinite number, at least five—shall so die. This is made clearer by the further provision, in this connection, that then "the share or *shares* of him or *them*, so dying (as well the accruing as the original share) shall be, go over and remain to the surviving brothers and sisters, and (123) the child or children of *such of them* as may be then dead," etc. The testator must have been a man advanced in life—he had a large family, seven children—and it appears from the will, that at least one of them was married, thus indicating that the children were not all very young, and the advanced age of the father. Is it probable—is it reasonable to infer, that he intended such provision to apply to such of his children as might die in his, the testator's lifetime? Reasonably, in the nature of the matter, did he contemplate that several of his children—perhaps as many as five—would have children, and die before himself, and he ought to provide for such a contingency? We cannot think so. To conclude that he did, would be to ignore the ordinary course of nature, in such respect, as well as the common experience and observation of men. *Hilliard v. Kearney,* Bus. Eq., 221, 231, 232.

Moreover, if the clause refers to the death of children in the lifetime of the testator, then the words of it—"as well the accruing as the original share"—could have no practical meaning or purpose, because, in that case, the devise and bequests would lapse and become inoperative, and under the will, the property would pass into and become a part of the residuary fund, and thus go to the surviving brothers and sisters and their mother. But if the clause applies to such death after the death of the testator, then the words, "as well the accruing as the original share," would serve the important purpose of certainly keeping the whole property in the family of the testator—devoting it exclusively to the benefit of his children and their children, as far and as long as he could. This, indeed, seems to have been his purpose. It cannot be said that the testator was *inops concilii,* and therefore, could not know with accuracy, the legal effect of such provisions. The will, upon its face, shows the contrary—that he was well advised how to effectuate his purpose, and that it was skillfully and very thoroughly drawn.

Then, as the provision of the clause last mentioned does not (124) apply to such death of a child or children in the lifetime of the testator, plainly, by its terms, it has reference and application to such death, after his death. At such death of a child, his or her share, including any accruing share, would go over, as provided. As the intention of the testator was that we have indicated, the argument, that his disposi-

tion of his property was unwise and inconvenient, and might result in injustice to some of his children, and has so resulted in the case of his daughter named, who died without ever having had issue, is without force. He certainly had the right to dispose of it as he did, whatever may have been his motive and whatever the consequences.

It has been suggested that the clause of condition and defeasance does not apply to all the devises and bequests of the will, but only to the bequests to be paid out of the fund to be raised from the sale of the land directed to be sold, and the personal property not specifically bequeathed. We cannot yield our assent to this view. There is nothing, it seems to us, to warrant such, or any restricted application. The clause appears separately from any other, at the end of the clauses disposing of all the property, and begins thus: "My will further is"—that is, in addition to all the testator had provided—and then proceeds as follows: "That if any, or either of my children, should die without leaving issue living at his, her, or their death, the *share or shares* of him, her, or them," etc. What share? It is not designated or described in terms, by implication or inference, as the share of the fund last mentioned. There are no words implying such, or any restriction, in this respect. These bequests, in the clause granting them, are not designated as *shares*—nor are any of the devises or bequests so designated in the several clauses creating them. Nor can we conceive of any adequate reason for such restricted application. In the absence of terms or particular provision authorizing it, it is not probable, nor reasonable, as it seems to us, that the testator would restrict the application to transitory pecuniary (125) bequests, without some distinct provision for the purpose, and not to valuable devises, and bequests of slaves and other personal chattels, not at the time of the execution of the will so transitory. He would more likely apply such restriction to the devises and the bequests of slaves, but, as we have said, there is no such purpose expressed, and no apparent motive or purpose to make such restriction or distinction.

If it be said, that it is not likely the testator would intend to restrict his children in the exercise of the power to dispose of the property given them, the answer is, he had the right to do so, and in very sweeping terms, he exercised that right, manifesting, apparently, a settled purpose to devote his property to persons of his own blood. When such purpose appears upon the face of the will, the mere fact that its provisions may be unwise, inconvenient, and not what most men would make, cannot be allowed to affect, or give direction to, the intention expressed. Nor is it at all probable, that a testator who prepared his will so cautiously and intelligently, would have omitted some expression, as to such restriction, if he intended it.

As we have said, the clause in question appears as a separate paragraph at the end of the clauses of the will, disposing of all the testator's property. In its terms, it is precise, apt, comprehensive, and thorough, for the purpose contemplated. There are no pertinent restrictive words—nothing appears to show that it was intended to apply to one class of gifts more than another. The term *"share"* is used without qualification. In its connection, it must mean share of the testator's estate—his whole property disposed of by the will, in which whole each and all of his children shared. By a child's "share" was meant his share of the whole, not his share of a part of the estate, else the testator would have said so. The clause is inserted in the will at the orderly and proper place, to apply to the whole of the property disposed of; it so applies in its terms, and nothing to the contrary appears.

There is error. The judgment must be reversed and further (126) proceedings had in the action according to law. To that end let this opinion be certified to the Superior Court. It is so ordered.

Error. Reversed.

SMITH, C. J., dissenting: The will, whose construction is the subject of controversy in this action, came from the hands of the late Chief Justice of this Court, *Thomas Ruffin,* who is also an attesting witness to its execution, and must be read as a well considered and carefully prepared instrument, and not made, as many are, without intelligent advice, *inops consilii.* The dispositions of his estate among his seven children, observing an essential equality in the value of what he gives, are separate and dstinct. Each devise is of land in fee simple, and each clause begins with words, "I give to," and then with the real estate a number of named negro slaves, and that perishable, personal property found on the devised farms, inclusive of implements of husbandry, furniture, stock, and growing crops.

The devises to the daughters are of land and slaves, omitting the other articles given to the five sons, in lieu of which he adds a legacy of $4,000 in money to each, and a horse and saddle to the two.

After this distribution of so much of his estate, intended in the several clauses that contain them to be absolute and in perpetuity to each, follows the clause, beginning in a changed form of expression: "I order and direct that my tract of land called Austin's Old Place," etc., in which the residue of his property is to be aggregated into a sum of money, which the testator expected it would require a considerable time to bring about, since the lands in Tennessee were to be sold on a credit of one, two and three years, and therefrom were to be paid the expenses of administration and the money legacies ($9,000) to his wife and daughters, and what remained he directs to be divided between

(127) his wife and children, except that each child should have therefrom $1,000 before his wife shall participate in the distribution.

Then follows the clause, whose legal application and operation form the subject of contention, abruptly introduced: "My will further is, that if any or either of my children should die without leaving issue living at his, her or their death, the share or shares of him, her or them so dying (as well the accruing as the original share) shall be, go over, and remain to the surviving brothers and sisters, and the child or children of such of them as may be then dead, equally to be divided between them, share and share alike; but the children of any deceased child shall, in such case, represent their parents, and take in families."

In the argument, two repugnant methods of interpreting this last clause were pressed, with references to adjudged cases, upon our attention. One, that the limitation was upon all the preceding dispositions, and the contingency attached to each, at the time of the death of the several devisees and legatees, whenever that event should happen.

The other, that the contingencies were confined to the testator's own lifetime, and ceased to affect the property at his death.

From a careful and critical study of the will, my mind has been brought to a different conclusion as to the intent of the testator, and the form in which it finds expression.

It is, I think, plain that the testamentary gifts were to take present effect when the testator died, and were then to become absolute and unconditional.

The estates in the lands are everywhere declared to be "in fee simple," and can it be supposed that stock, farming utensils, slaves, and even growing crops, most of it, if not all, worn out or consumed in the use, were to be accounted for, as in the present case, after a lapse of more than fifty years? Can it be attributed to the learned and accurate draftsman who put the testator's purposes in shape that such a (128) construction should be given to his work?

Were not the large legacies in money an offset to what the brothers got besides land and slaves to be as absolute and unconditional as those for which they were substituted to make all equal? Such a construction is compatible with the general and controlling purposes apparent in all the antecedent donations.

Again, the words used in passing from the next preceding, to the clause which gives rise to the controversy, are quite different from those that mark the transition in the others. The beginning of the limiting clause, "My will further is," seems to indicate an unfinished disposition of the residuary fund, now to be supplied.

The term implies *incompleteness* in what goes before, and is not at all appropriate to those well defined and clear devises and bequests before

made to the children separately, and must be supposed to have significance in the carefully drawn instrument. The reason of the discrimination is apparent. The previous donations are absolute. The residuary fund would require years after the testator's death to be reduced to a condition that would admit of division. Meanwhile some might die, and as this provision was for the common benefit of the children as a *class* rather than as *individuals,* it was intended to secure the fund to the survivors and the issue of such as died leaving issue at the period when distribution was to be made, thus confining the contingencies to the intervening period, and making the bequests, when received, unconditional.

This view derives additional support from the description of the property thus limited. The contingent limitation is confined to *"shares,"* original and accruing, a word aptly designating an interest in a common fund, not property separately and independently given. "Shares," in a strict sense, means a fractional or partial interest in a common fund held by several, and hence peculiarly applies to the residuary fund, to be apportioned among the legatees, in the future, who (129) would be entitled under the prescribed conditions.

This construction derives support also from the case of *Cox v. Hogg,* 2 Dev. Eq., 121, decided in 1831, just before the will was drawn, and in which the leading opinion is delivered by the eminent Judge who drew it. In this case the disputed bequest was in these words: "My negroes I wish divided equally among my wife, Louisa, Nancy, Olivia, and the child of which my wife is pregnant, and in the case of the death, that third share be equally divided among the survivors, and also the remaining parts of my estate; providing in all cases that Lucy Drew (a child who had incurred her father's displeasure) shall never inherit one stiver, in the case of the death of either of the above children or wife."

This was a disposition and limitation of common property, and would, perhaps, have been construed, as in *Hilliard v. Kearney,* Busb. Eq., 221, but for the disinheriting provision which might otherwise let in the daughter Lucy, as confining the contingencies to the testator's own life and to the first death among the legatees. After reciting numerous cases from the English reports, the Judge says: "Upon their authority I conclude, however unnatural that construction may be, when another period may be collected, not destructive of *the tenancy in common,* yet that it is to be taken as natural and reasonable and intended, when opposed to the still more unnatural one of a survivorship indefinitely, whereby the whole estate accumulates for one."

The opinion concludes: "I am therefore of opinion that upon the death of the testator, which was in this case *the period for the vesting and division,* the legacies became absolute to his wife, and such of his children as were then living."

HALL, J., expresses himself in the same case thus: "In the present case it might not be considered as going far out of the way to (130) believe that the testator meant this: that if either of the legatees should die before (in common parlance) they got their legacy, or before it vested in them, then the survivors should have it. However, the doctrine seems so well established that words of survivorship *added to a tenancy in common* are so construed as to prevent a lapse, and become inoperative at the death of the testator, that questions of that description may be considered as put to rest."

He cites a long array of authorities for the proposition.

These extracts are reproduced from the exhaustive discussion which the subject underwent to show that, as in *Hilliard v. Kearney,* where the discussion was not less thorough, the rule prevails in limitations of survivorship among tenants of property given to them in common; and further, that soon after the decision the present will was prepared by one of the Judges who participated in making it, and who had become familiar with the rules of construction applied to such testamentary dispositions.

To extend the limitations to all of the property given, and restrict the defeating contingencies to the testator's lifetime, would be to provide, by will, precisely what the law would have done upon the event, without any testamentary direction; an unnecessary provision, which it can scarcely be supposed the draftsman would have inserted.

To embrace all the property and tie it up until the death of the donee, whenever that might occur in the uncertain future, is inconsistent with the evident intent that each donee of a separate portion of the estate should have it absolutely, to use and dispose of as his own, and is wholly irreconcilable with so much of it as that the use and property are inseparable.

This is a fair and reasonable interpretation of the will, in harmony with its whole structure and the intention developed in the language used, to give it force and effect.

Cited: Buchanan v. Buchanan, 99 N. C., 314; *Williams v. Lewis, post,* 145; *Rhyne v. Torrence,* 109 N. C., 656; *Kornegay v. Morris,* 122 N. C., 202; *Harrell v. Hagan,* 147 N. C., 113; *Campbell v. Cronly,* 150 N. C., 468; *Smith v. Lumber Co.,* 155 N. C., 392; *Vinson v. Wise,* 159 N. C., 656; *Dunn v. Hines,* 164 N. C., 120; *Rees v. Williams,* 165 N. C., 208; *Springs v. Hopkins,* 171 N. C., 492; *Hunt v. Jones,* 173 N. C., 553; *Ryder v. Oates, ibid.,* 575; *Bank v. Murray,* 175 N. C., 65; *Radford v. Rose,* 178 N. C., 290; *Goode v. Hearne,* 180 N. C., 478; *Dupree v. Daughtridge,* 188 N. C., 197; *McCullen v. Daughtry,* 190 N. C., 219; *Robertson v. Robertson, ibid.,* 562.

(131)

ALBERT D. JOHNSON v. JAMES I. ALLEN.

Husband and Wife—Harboring Wife—Evidence—Leading Questions—Dockets of Justices, Quasi Records—Incompetent Evidence Not Objected to—Vindictive Damages—Evidence to Impeach Verdict.

1. In a suit by a husband, charging defendant with harboring and debauching plaintiff's wife, it was competent to ask the plaintiff, testifying in his own behalf, in reference to an action theretofore brought by the wife for divorce, "Do you know who was present (at the trial of that action) as the friend and adviser of your wife? If yes, who was it?"

2. It is for the judge below to exercise a discretion, as to when the rule as to *leading questions* should be relaxed; and it is only when his exercise of such discretion is clearly erroneous, and to the prejudice of the complaining party, that it constitutes ground for a new trial. It seems that the exercise of the discretion is not assignable as error.

3. To show relations between defendant and plaintiff's wife, it was competent to prove that, while she was living in a house belonging to defendant, he had her supplied with a sewing machine and instructed in its use.

4. While the minutes of proceedings before a justice of the peace are a *quasi* record and evidence of what is properly entered upon them, it is competent to prove the conduct of a person at a trial, to show his relations with one of the parties.

5. Plaintiff having, at former term, issued a writ of *habeas corpus ad testificandum*, to his wife commanding her to produce the body of her young child at the trial: *Held*, that the admission of the writ in evidence was proper, for the purpose of *showing* that plaintiff had endeavored to have witness and child present at the trial.

6. The admission of incompetent evidence, without objection, is assignable as error, only when the evidence is made incompetent by statute.

7. In actions for torts, where it is proper for the jury to give vindictive damages, it is competent to hear evidence of the pecuniary condition of the defendant.

8. Where the defendant wantonly enticed plaintiff's wife away from him, and harbored and debauched her, held to be a case for vindictive damages.

9. A stranger is justified in giving the wife of another continued shelter and protection, only when the husband treats her with such violence as to endanger her personal safety.

10. Evidence to impeach a verdict for the misconduct of a jury, must come from other sources than the jury itself.

CIVIL ACTION, tried before *Shepherd, J.*, at November Term, (132) 1887, of the Superior Court of ORANGE.

The facts sufficiently appear in the opinion.

A. W. Graham for plaintiff.
J. W. Graham and W. W. Fuller for defendant.

MERRIMON, J. The purpose of this action is to recover damages from the defendant for "enticing, harboring, and debauching the plaintiff's wife." On the trial the plaintiff was examined as a witness in his own behalf. He testified as to his relations with his wife and the interference of the defendant therewith; and further, "That his said wife sued him for a divorce *'a mensa et thoro,'* the summons being dated 10 July, 1885, and the case came on for trial at March Term, 1886, of this Court, when the said wife, after testifying in her own behalf, submitted to a nonsuit. Plaintiff's counsel asked him the following question: 'On the trial of the action for divorce, brought against you by your wife, tried at March Term, 1886, do you know who was present as the friend and adviser of your wife? If yes, who was it?'" To this question the defendant objected. Objection overruled. Defendant excepted.

The evidence elicited was competent, because it tended to show the relations between the wife and the defendant. The question was only slightly leading; it did not strongly suggest the particular answer
(133) to be given by the witness, and, in view of all the evidence, the discretion exercised by the court in allowing it, and the answer to it, ought not to be reviewed, although, perhaps, it had been better to have required the question to be put in a wholly unobjectionable shape. Much must be left to the just discretion of the presiding judge in the conduct of the trial, including the examination of witnesses. Particularly, in a case like this, he observes the course of the examination of the witness, and can better determine when the rule, as to leading questions, should be relaxed, and to what extent. It is only when the exercise of his discretion in such respect is clearly erroneous and to the prejudice of the party complaining, that of itself, it constitutes ground for a new trial. Indeed, it seems that the exercise of the discretion of the judge is not assignable as error. *McCurry v. McCurry,* 82 N. C., 296; 1 Gf. Ev., sec. 435.

A witness for the plaintiff—a merchant—testified that "Defendant came to my store and asked the price of sewing machines. I told him $40. He then selected one, and asked me to bring one like that he had picked out to that house, the house on the defendant's land where the plaintiff's wife was. He requested me to bring it myself, as the person he intended it for was in a delicate condition and would rather that I would not send either of the young men. When I got to the house, defendant was in the field near by, and came up and sat on the doorstep. I carried the machine in, and was explaining it to plaintiff's wife, when defendant asked her, 'Do you think you understand it?'"

Defendant objected to all testimony in regard to the sewing machine, before and after it was given. Objection overruled. Defendant excepted.

Obviously this evidence was competent. It tended, in connection with other evidence, to show the defendant's illicit relations with the plaintiff's wife, and that he encouraged her to remain on his land (134) away from her husband.

Another witness for the plaintiff testified as follows: "I was deputy sheriff and constable, and served a peace warrant on plaintiff, and took him to Rose Jones', on Colonel Allen's land, for trial. Defendant was then acting for plaintiff's wife, at whose instance the warrant was issued, and was urging a trial, and objected to the removal of the case. Plaintiff swore that he would not get justice before Sharp, and the case was removed to W. T. Tate, another justice of the peace, in same township. Defendant objected to it, but it was never prosecuted further. Plaintiff's wife said she was not in a condition to go to the trial if the case was removed."

Defendant objected to the above testimony. Objection overruled. Defendant excepted. (Defendant had cross-examined plaintiff at length, and brought out the fact that he had been arrested on a peace warrant at the instance of his wife.)

The objection to this evidence went upon the ground that the "record" of the court of the justice of the peace was the only proper evidence as to what was done in respect to the warrant. The minutes of proceedings before justices of the peace are, for many purposes, treated as *quasi* records, and they are evidence of what is properly entered upon them. But the purpose of the evidence objected to was not to prove anything on the minutes kept by the justice of the peace, but to prove the conduct of the defendant towards the plaintiff's wife in her relations with her husband, and for this purpose it was competent and properly received.

It appears that "the plaintiff, in his rebutting testimony, after defendant had closed his testimony, offered in evidence a writ of *habeas corpus ad testificandum,* issued at last term of the court, directed to plaintiff's wife, commanding her to produce the body of her youngest child to give evidence in behalf of the plaintiff." (135)

Defendant objected. Objection overruled, his Honor allowing it to be used only for the purpose of showing that plaintiff had endeavored to have witness and child present at the trial. Defendant excepted.

What evidence produced on the trial by the defendant led to the introduction by the plaintiff of the writ named does not appear. It seems that it was suggested, in some connection, by the defendant, that the plaintiff had not been diligent in bringing the infant referred to before the court for some appropriate or supposed appropriate purpose. The

court received the writ in evidence only for the purpose mentioned. For this purpose it would, so far as we can see, be unobjectionable. In any view of it, it was of slight importance, and its admission in evidence is certainly not ground for a new trial. The burden was on the appellant to show its importance, its incompetency, and that it tended to prejudice him in some material respect.

It further appears that "At the close of the testimony, before any argument, defendant moved to strike out all the evidence relating to defendant's pecuniary condition. The motion was denied, and defendant excepted. This evidence was not objected to when offered."

Upon principle and authority, objections to the admission of evidence on the trial should be made in apt time, that is, when it is offered or received; the refusal of the court to exclude it at a subsequent time cannot be assigned as error, except in cases where the evidence received is made incompetent by some statutory provision. Parties in the conduct of the trial must be circumspect and careful; it is serious; each step in it is important, and carelessness cannot be indulged. To allow evidence to be brought out at one time on the trial, and excluded at a subsequent one, might work injustice to the party introducing it; give rise to delay and confusion, and encourage a looseness of practice that would (136) certainly interfere more or less with the orderly and intelligent conduct of trials. If, sometimes, the omission to object at the proper time was occasioned by inadvertence or mistake in some way, the presiding judge might grant a motion to exclude the objectionable evidence, or allow the objection to be entered as of the proper time, but the exercise of his discretion would not be reviewable here. *S. v. Ballard,* 79 N. C., 627; *S. v. Efler,* 85 N. C., 585; *S. v. Pratt,* 88 N. C., 639. Moreover, as we shall presently see, the evidence which the appellant sought to exclude was competent.

The case settled on appeal states that the plaintiff requested the court to instruct the jury:

"1. That if they believed the defendant used his wealth and social position to entice the plaintiff's wife away from him, and to induce her to remain, they may give vindictive damages."

This instruction was given.

"2. That defendant, not being the parent of plaintiff's wife, had no right to harbor her after being forbidden."

This instruction was given, with this modification: "This is true, unless he shows he harbors her simply to protect the wife from the violence of the husband; and as to this, the burden is on the defendant to show. If he has harbored her after being forbidden, you will find this issue for plaintiff, unless you find it was unsafe, by reason of violence, for her to return."

The court further instructed the jury "that if defendant aided plaintiff's wife in procuring a divorce, by employing counsel for her and in advising and encouraging her, they might consider this as some evidence of his harboring her, when taken in connection with the other circumstances of the case."

He further instructed them "That punitive or vindictive damages are addressed to the sound discretion of the jury, and if, (137) from all the circumstances of the case, they are satisfied the injury was wanton and wrongful, they may award such damages."

The defendant, among other special instructions asked for, requested the court to give the following, which it gave, as stated below:

"2. So, if a wife is kept by the defendant from a principle of humanity, to secure her from the ill treatment of her husband, an action will not lie, even after notice."

This was given, with the following modification: "Provided the ill treatment is of such a cruel character as to force the wife to leave, and it is not safe for her, by reason of her husband's violence, to return to him; and as to this, the burden of proof is on the defendant."

The defendant insists that the court erred in instructing the jury, in substance, that they might give the plaintiff vindictive or punitive damages, if the defendant used his wealth and social position to entice the plaintiff's wife away from him, and so remain, and they might give such damages in their sound discretion, if they were satisfied from all the evidence that the injury done to the plaintiff was wanton and wrongful.

The evidence, in some aspects of it, tended strongly to prove that the defendant was a man of considerable wealth; that he had strong influence over the plaintiff's wife; that she occupied a house on his farm, near to his dwelling-house, with his permission; that he was often seen about her—sometimes in the house with her, having the door closed; that he let her have articles, such as she needed; that he encouraged and helped her in opposition to her husband, and the like. We do not deem it necessary to recapitulate the evidence more at large here. It is sufficient to say that, while it was to some extent conflicting, there was much of it that strongly warranted the instruction given as above stated, and it was for the jury to take such views of and give it such weight and application as they might deem just, subject to the (138) power of the court to set their verdict aside for just cause.

The instructions complained of, now under consideration, were substantially correct. It is well settled in this State that for tortious injuries juries are not confined in ascertaining the damages to such as are merely compensation for the actual injury sustained; they may go further and give exemplary, vindictive and punitive damages, the

amount to depend upon the character of the parties, the nature of the injury complained of, its circumstances of aggravation and outrage towards the injured party, the pecuniary circumstances of the defendant, and the like considerations.

In *Gilreath v. Allen,* 10 Ired., 67, this Court says: "In actions of *tort,* where there are circumstances of aggravation, juries are not restricted, in the measure of damages, to a mere compensation for the injury actually sustained, but may, in *their discretion,* increase the amount according to the degree of malice by which the evidence shows the defendant was actuated, the extent of the injury intended, and not that which was really inflicted. Accordingly juries are told, in many cases, they may give exemplary damages—that is, such as will make an example of the defendant, or vindictive damages, or smart money—terms which explain themselves. . . . Injuries sustained by a personal insult or attempt to destroy character are matters which cannot be regulated by dollars and cents. It is fortunate that, while juries endeavor to give ample compensation for the injury actually sustained, they are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. Otherwise there would be many injuries without adequate remedy." To the like effect are *Howell v. Howell,* 10 Ired., 84; *McAulay v. Birkhead,* 13 Ired., 28; *Bradley v. Morris,* Busb., 395; *Smithwick v. Ward,* 7 Jones, 64; *Reeves v. Winn,* 97 N. C., 246. And these cases and that of *Adcock v. Marsh,*
(139) 8 Ired., 360, likewise decide that, in such cases, it is competent to give evidence of the pecuniary circumstances of the defendant, with the view to enhance the measure of the damages.

There can be no question that the rule of law thus settled in this State is applicable to the present and like cases. The jury have found, by their verdict, that the defendant enticed plaintiff's wife away from him; that he harbored and debauched her; that he did this "wrongfully and wantonly!" What greater tortious injury—deeply humiliating and afflicting in its nature—could be done to a man? And for what injury should the guilty party pay more dearly in exemplary damages, in the absence of mitigating circumstances?

The defendant complains here that the court below failed to direct the attention of the jury, particularly, to evidence tending to prove that the plaintiff and his wife did not live harmoniously together before their separation; that he maltreated her; that she was not a pure woman, and the like, and to give them proper instructions as to this part of the evidence. But it does not appear from the record that the court did not give such instructions, nor does it appear that it was requested to give them, and refused to do so; and, moreover, there is no assignment of error in that respect.

This Court can only consider and act upon errors assigned. Besides, where, as in this case, the court gives instructions applicable to the facts, and gives, or refuses to give, special instructions asked for by the parties, it cannot be assigned as error that it failed to present to the jury a possible view of the facts that might have been of advantage to the complaining party. *Burton v. R. R.,* 82 N. C., 504; *King v. Blackwell,* 96 N. C., 322; *R. R. v. McCaskill,* 98 N. C., 526.

The court properly declined to give the special instructions asked for by the defendant. (140)

"Ill treatment" is not a definite expression, but mere ill treatment of the wife did not warrant the defendant in entertaining her, thus keeping and encouraging her to stay away and apart from her husband. The purpose and policy of the law are that husband and wife shall live harmoniously together, and if need be that each shall endure the shortcomings of the other. They may not separate because of slight or even serious differences and disagreements and mere ill treatment of one towards the other; and it is only when the husband treats his wife with violence—endangers her personal safety—that a stranger shall be justified in giving her continued shelter, support and protection against the husband's will. Otherwise the strength and permanency of the marriage relation would be impaired, to the great detriment of family ties and the good order and well-being of society.

We think, also, that the court properly told the jury that the burden of proving the alleged cruel conduct of the plaintiff towards his wife was upon the defendant. Generally a man shall not entertain and keep a wife away from her husband against his will; if he shall do so, and the husband shall bring his action against him for that cause, and he shall rely upon the defense that the plaintiff was violent towards his wife and endangered her safety, so that she was forced to flee from him, he must plead and prove his defense. The plaintiff need not allege in his complaint that he was not violent towards his wife, and did not imperil her safety while she lived with him in his house, and he is not bound to prove an allegation he is not required to make in the complaint.

The defendant moved for a new trial, assigning, among other grounds for it, that of the alleged misconduct of the jury in settling the *quantum* of damages allowed the plaintiff. The evidence relied upon to support the motion, in this respect, consisted of affidavits, stating (141) what one or more of the jurors had said, in the presence of the affiants, as to how the jury had conducted their proceedings in ascertaining the damages. To allow the motion, founded upon such evidence, would be virtually to allow jurors to impeach their own verdict. It is

settled, as the court properly held, that this cannot be allowed. Evidence to impeach the verdict of the jury must come from sources other than the jurors themselves. Otherwise motions for a new trial would frequently be made, based upon incautious remarks of jurors, or declarations by them procured to be made by the losing party or some person in his interest, and thus the usefulness and integrity of trial by jury would be impaired. Moreover, controversies thus arising would lead to unseemly confusion. *S. v. Tilghman,* 11 Ired., 513; *S. v. Smallwood,* 78 N. C., 560; *S. v. Brittain,* 89 N. C., 481; *S. v. Royal,* 90 N. C., 755.

The court did not decide that it did not have authority to set aside the verdict and grant a new trial because of misconduct of the jury; it simply held that the evidence relied upon to support the motion was not competent, and in this it was correct.

Judgment affirmed.

Cited: Purcell v. R. R., 119 N. C., 739; *Brooks v. R. R.,* 115 N. C., 625; *Powell v. Benthall,* 136 N. C., 156; *Powell v. Strickland,* 163 N. C., 400; *Hollifield v. Telephone Co.,* 172 N. C., 725; *Brown v. Hillsboro,* 185 N. C., 373; *Bartholomew v. Parrish,* 186 N. C., 85; *Lumber Co. v. Lumber Co.,* 187 N. C., 418; *Power Co. v. Casualty Co,* 193 N. C., 618.

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(142)

H. C. WILLIAMS AND WIFE v. GEO. N. LEWIS.

Construction of Will—Contingent Limitations—Partition—Estoppel.

1. A testatrix, among other provisions, devised as follows:

"Item 3. I will and devise that my son Robert and my daughter Ellen have two hundred acres of land laid off in good shape, to include all the houses and improvements—to remain undivided until Robert becomes of age, or until one of them gets married—then to be equally divided between them.

(Item 5, gives land to her son John, in fee.)

"Item 9. I will and desire, that should my son John die, leaving no heir, I will and desire that Ellen and Robert heir his part of my estate; and should Ellen and Robert die leaving no heir, then the surviving one to heir the estate of deceased brother or sister."

Held, that the time when the contingencies are to happen, so as to give effect to the ulterior limitations, is the death of the respective devisees without children then living, and no earlier period.

2. Where land is devised to several, "to be equally divided between them," with cross contingent limitations, a judgment, in a proceeding for partition, does not estop either to claim the share of the others upon the happening of the event which is to give effect to the limitations. The partition, being in accordance with the provisions of the will, separates that which was before held in common; but in no way disturbs the limitations; these adhere to the respective shares after partition, as fully as they did to the whole before partition.

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

CIVIL ACTION tried before *Merrimon, J.*, at Spring Term, 1887, of NASH Superior Court.

Judgment for plaintiffs; defendant appealed.

The facts appear in the opinion.

F. A. Woodard (C. M. Cooke also filed a brief) for plaintiffs.
Jacob Battle for defendant.

SMITH, C. J. The controversy in this action arises out of the (143) conflicting interpretations of the will of William Jane Bryant (under which both parties derive their claim of title), who died in August, 1872, shortly after making it.

The testatrix, after giving to her daughter Medora fifty acres, to be taken from the southern portion of her tract of land, to be run off and allotted to her by her executor, which has been done, devises as follows:

"Item 3. I will and devise that my son Robert and my daughter Ellen have two hundred acres of land, laid off in good shape, to include all the houses and improvements, to remain undivided until Robert becomes of age or until one of them gets married, then to be equally divided between them."

"Item 5. I give and bequeath unto my son, John Bryant, all the balance of my tract of land, being about one hundred and five acres, to him and his heirs forever." To which, elsewhere, she adds certain pecuniary bequests.

"Item 9. I will and desire that should my son John die, leaving no heir, I will and desire that Ellen and Robert heir his part of my estate, and should Ellen or Robert die, leaving no heir, the surviving one to heir the estate of the deceased brother or sister."

The two hundred acres mentioned in the third item of the will were, soon after the death of the testatrix, cut off by the executor and allotted to Ellen and Robert, who entered into possession and jointly occupied the same until November, 1876, when Ellen, the *feme* plaintiff, intermarried with Henry C. Williams, who and herself are the parties to the action; and thereupon, at their instance and in association with Robert,

under proceedings in the Superior Court before the clerk, the land was divided, and the moiety of each tenant assigned and set apart to her and him in severalty.

Robert was at that time a minor, but he became of age before 1882, in which year he conveyed by deed the tract which he held to the
(144) defendant, George N. Lewis, in fee. Robert died in 1886, never having married, and without issue.

The plaintiffs construe the limitation as dependent upon there being no issue living at the time of Robert's decease, and insist that the contingency having happened, the estate of Robert vests, under the will, in Ellen, his surviving sister. The defendant claims that to make the limitation valid and effectual the death, without issue, must occur during the testator's lifetime, or at least before the period specified for a division, and that this not having happened, the estate of Robert became absolute and free from the contingent limitation. The solution of this controversy determines the title and the consequent result of the action.

We do not attribute to the proceedings for partition the effect of an estoppel, since this is in accordance with the provisions of the will, and it must be consistent with itself. The partition separates into parts that which was before held in common as a whole, and no more disturbs the limitations affixed to the devised estates than would have been a devise of the several portions to the respective tenants by the testatrix herself. Indeed the separate parts are, after the partition directed, as truly held under the contingent limitations as were previously thereto the undivided estates of each in the entire three hundred acres. There was no estoppel, therefore, in executing the directions of the testatrix, and the recital of the devising clause in the petition shows such was the intent and understanding of the parties to the proceeding, and that it was not to supersede or disturb the conditions annexed to the devised estates of the tenants.

The only question then is as to the time when the contingencies are to happen, if at all, so as to give effect to the ulterior limitations. In our opinion the time contemplated by the testatrix is the *death of the respective* tenants without an heir—that is, without children then living, and no earlier period. The postponed division shows that
(145) it was not the intention of the testatrix to confine the contingency even to the period of her own life, for in such case there would be no partition to make; nor was it her purpose to restrict it to the time of making the division, which was but a severance of the estates, and left the relations between the devisees the same as before.

Taking the terms of the instrument as a guide to us in finding what the testatrix meant, and without superadding words that she does not use, it is to us manifest that the estate should remain in each devisee

until his or her death, and then go over to the survivor, if no children or child were left by the deceased.

The subject is so fully considered in the cases of *Galloway v. Carter, ante,* 111, and *Buchanan v. Buchanan,* 99 N. C., 308, decided at this term, that we deem it useless to protract the discussion. There is no error, and the judgment must be

Affirmed.

Cited: Trexler v. Holler, 107 N. C., 622; *Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Emnett,* 151 N. C., 545; *Perrett v. Bird,* 152 N. C., 222; *Jones v. Myatt,* 153 N. C., 230; *Smith v. Lumber Co.,* 155 N. C., 391; *Vinson v. Wise,* 159 N. C., 656; *Weston v. Lumber Co.,* 162 N. C., 171; *Rees v. Williams,* 164 N. C., 132; *S. c.,* 165 N. C., 208; *Springs v. Hopkins,* 171 N. C., 491; *Whitfield v. Douglas,* 175 N. C., 48; *Stallings v. Walker,* 176 N. C., 323; *Ziegler v. Love,* 185 N. C., 42; *Cook v. Sink,* 190 N. C., 626.

J. S. BURWELL, ADMINISTRATOR, v. H. C. LINTHICUM, ADMINISTRATOR.

Statute of Limitations—Seal After Signature of Firm Name—The Code, Sec. 155, Subsec. 9.

1. Where a contract, entered into by an individual and a copartnership, is reduced to writing, and signed and sealed by the individual, and the firm name is signed, and a seal put after it by a member of the firm, the instrument is the *covenant* of the individual, and the *simple contract* of the firm.

2. An action on such an instrument is barred by the statute of limitations after three years from the time it arose, as to the copartnership and the members thereof.

3. In 1882 defendant's intestate contracted to build a house for plaintiff's intestate. The house was completed, turned over to, and accepted by plaintiff's intestate in 1883. In 1887 plaintiff sued on the contract to recover for defective work done on the house, contrary to the terms of the contract, which defects were *not discovered* until 1885: *Held,* (1) That the cause of action arose at the time the house was completed and accepted, and was barred after three years from that time. (2) That the action would have been at law, under the former system of practice, and, therefore, did not come within the saving in subsection (9), section 155, The Code.

CIVIL ACTION tried before *Shipp, J.,* at October Term, 1887, of (146) VANCE Superior Court.

The court intimated an opinion that plaintiff's cause of action was barred by the statute of limitations, in deference to which plaintiff submitted to a nonsuit and appealed.

This action, begun on 2 February, 1887, by the plaintiff, J. S. Burwell, administrator of Henry H. Burwell, against the defendant, H. C. Linthicum, administrator of William H. Linthicum, is brought to recover damages for the breach of a contract in writing for the construction of a storehouse for the plaintiff's intestate, the particulars whereof are set out in detail therein. It is only necessary, in order to show the parties to it and the nature of the obligations respectively entered into, to set out the beginning and concluding words, and these are as follows:

"Articles of agreement, made and entered into this 31 March, 1882, by and between Henry H. Burwell, Jr., of the first part, of the county of Vance, N. C., and Wm. H. Linthicum and James B. Ley, trading under style and firm of W. H. Linthicum & Co., at Durham, N. C., of the second part, witnesseth: That the said W. H. Linthicum & Co. agree to build for said H. H. Burwell, Jr., in the town of Henderson, N. C., on the lot," etc. The concluding words are: "This con-
(147) tract to be in full force, binding on both parties, unless they hereafter agree on a turnkey job, then this is to be null and void; otherwise, in full force and effect.

"As witness our hands and seals, this 3 March, 1882.

"H. H. BURWELL. [Seal.]

"W. H. LINTHICUM & Co. [Seal.]

"Witnesses: JAS. C. WATKINS, E. HINES."

The complaint assigns violation of the terms of the contract by the parties undertaking the work, which are controverted in the answer, and the further defense is relied on arising from the lapse of time, since the completion of the building, of more than three years, and the interposing bar of the statute of limitations to the action.

Upon the trial it was admitted that the structure was finished, turned over to the plaintiff's intestate, and accepted by him in the summer of 1883, but the defects therein were not discovered until the year 1885.

The court intimated an opinion that the cause of action arose at the time when the house was finished and received, and that it was barred by the statute. In deference thereto the plaintiff submitted to a nonsuit and appealed, presenting the sole question of the application of the statutory bar.

Geo. H. Snow for plaintiff.

No counsel for defendant.

SMITH, C. J., after stating the facts: The rulings of this Court are decisive of the character of the instrument and the nature of the obligation which it imposes. While bearing the seals of the parties, it is a *covenant* as to the intestate, H. H. Burwell, and a *simple unsealed contract* as to the other party. This rule is settled by several adjudications in this Court.

In *Brown v. Bostian,* 6 Jones, 1, which was an agreement to (148) deliver to the plaintiff firm of Brown, Brawley & Co. one hundred barrels of good, merchantable flour, and after the words, "witness our hands and seals," it bore the signatures, thus:

BROWN, BRAWLEY & Co. [Seal.]
DAVID BOSTIAN. [Seal.]

In the body of the instrument are found the words: "Said Brown, for Brown, Brawley & Co., contracts and agrees," etc., and *Battle, J.,* in the opinion, says: "It is true that, in the body of the instrument, the contract purports to be made between John L. Brown, for the plaintiffs and the defendant; and John L. Brown, for the plaintiffs, promises to pay the defendant for the flour upon its delivery. Brown, as a member of the firm, had full authority to make the contract, but not to bind the partnership by a seal. Had the defendant performed his part of the contract by the delivery of the flour he might have found a difficulty in suing any person upon this written agreement. He could not have maintained an action upon it against Brown alone, because it was not signed in his name; nor could he have sued the partnership upon it, because Brown was not authorized to put their seal to it. The defendant would not, however, have been without an adequate remedy, as he could have brought an action against them for goods sold and delivered, and used the written instrument as evidence of the price and terms of payment." For this he cites *Delius v. Cawthorn,* 2 Dev., 90; *Osborne v. The High Schools Mining and Mfg. Co.,* 5 Jones, 177.

In *Fronebarger v. Henry,* 6 Jones, 548, *Ruffin, J.,* declares the rule of the common law to be "that one partner cannot bind another by deed by virtue of his authority as partner merely, and that an instrument like this (before the Court) is the deed of the executing party alone." And he questions the admissibility of the instrument as "plenary evidence of a debt of the firm on any consideration." (149)

In *Fisher v. Pender,* 7 Jones, 483, the apparent discrepancy in the two cases is explained and removed in a full and learned discussion of the doctrine, and the conclusion reached is announced by *Battle, J.,* in these terms: "It is apparent from the case (*Elliot v. Davis,* 2 Bos. & Pull. Rep., 338) that one partner may bind himself by deed by signing

it in the name of the partnership, *provided he seal and deliver it as his own deed as well as that of the partnership,* and he will be bound by the instrument, though the other partner or partners will not, unless he had their authority, under seal, to execute for them. That is the true rule, and it is in accordance with the well-established principles which govern the execution of deeds."

The same principle is recognized in *Osborne v. High Schools M. & Man. Co., supra,* and *Taylor v. School Com.,* 5 Jones, 98; *Holland v. Clark,* 67 N. C., 104.

The agreement shows clearly that the partnership and not an individual member was intended to be bound, and it was, at most, if effectual at all, a parol contract of the firm, and subject to the three years statutory bar, while the obligation of the plaintiff's intestate, incurred by covenant, is governed by a different period of limitation, and there is no inconsistency in this, as decided in *Davis v. Golston,* 8 Jones, 28.

The appellant seems to have claimed the benefit of subsec. 9, sec. 155, of The Code, which provides for relief against fraud in cases theretofore "solely cognizable in a court of equity," in which the cause of action accrues from the time of its being discovered. The present action, under the former system, would have been at law and not in equity, and does not belong to the class mentioned in the statute. *Blount v. Parker,* 78 N. C., 128, and cases at the foot of the section. There is no error, and the judgment is

Affirmed.

Cited: Pipe Co. v. Woltman, 114 N. C., 185; *Shankle v. Ingram,* 133 N. C., 259; *Cowan v. Cunningham,* 146 N. C., 454; *Supply Co. v. Windley,* 176 N. C., 19.

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(150)

BLACKWELL'S DURHAM TOBACCO COMPANY v. JOHN H. McELWEE.

Evidence, Sec. 590—Objections to Evidence—Effect of Forbearance to Sue for Unlawful Use of Trademark.

1. In a legal controversy concerning the ownership of a trade mark, plaintiff claimed title to the same under one G. Defendant also claimed an interest in the trade mark, acquired, as he alleged, in association with, or by virtue of transactions with G.: *Held,* that defendant could not be heard to testify as to any dealings or transactions between himself and G.—who was then dead—with reference to the subject of the controversy.

2. Where a copy is offered in evidence and objection is made, not on the ground that the original is not produced, but on some other specified ground, the objection that the paper is not primary evidence cannot be made in the appellate court.

3. Plaintiff introduced in evidence a copy of defendant's application for registration of a trade mark. Defendant stated on his examination as a witness, that the paper was a copy of his application: *Held*, that it was proper to allow plaintiff to require defendant to state that there was a proceeding or declaration interfering after his application was filed, as such answer tended to show that there had not been a quiet acquiescence in the validity of defendant's claim to ownership of the trade mark, and a submission to it.

4. Allowing an improper question to be asked cannot be assigned for error if the witness makes no response to it.

5. As between two adverse claimants of the invention and sole ownership of a trade mark, no greater force is to be given to the fact that one of the parties used the trade mark for several years without being molested therein by the other, than that of evidence tending to disprove the claim of the other. Such forbearance on the part of the true owner, beyond its weight in disproving his title, cannot have the effect of extinguishing his rights, or operate beyond barring an action under the statute of limitations, or a presumption of an abandonment. But such indulgence may be deemed such an assent to the use of the trade mark as would not entitle the owner to demand damages for its intermediate use.

6. Upon an issue as to the title to a trade mark, a witness testified on the trial, without objection, "the plaintiff owns it now": *Held*, that, there being no contradictory evidence, it was proper to leave the jury to pass upon it, although it had been previously shown that B. was formerly the owner and there was no other proof offered of a transfer from B. to the plaintiff.

CIVIL ACTION tried before *Shepherd, J.*, and a jury, at Au- (151) gust Term, 1887, of DURHAM Superior Court.

Verdict and judgment for plaintiff. Defendant appealed.

A. W. Graham, John W. Graham, and W. W. Fuller for plaintiff.
John Devereux, Jr., for defendant.

SMITH, C. J. The nature and purpose of the present action, as set forth in the pleadings, are restated and explained in the opinion of the Court when the case was before us upon a former appeal (94 N. C., 425), and dispense with a repetition of the facts. Upon the last trial at September Term, 1887, of Person Superior Court, issues were submitted and answered, as follows:

1. "Is the plaintiff, as against the defendant, entitled to the sole and exclusive use of the device or symbol of a bull in connection with the words smoking tobacco, when attached to packages of smoking tobacco?" Answer: "Yes."

2. "Is the plaintiff entitled to the sole and exclusive use of, as against the defendant, the label, sign and trademark mentioned in his complaint and set forth in his exhibit? And if not to all of said trademark, to what part or parts of it?" Answer: "Yes; all."

3. "Has plaintiff been damaged by the defendant unlawfully affixing or annexing to packages of smoking tobacco manufactured or sold by defendant, defendant's labels containing plaintiff's trademark, or any part of it?" Answer: "No."

The plaintiff derived its claim to the property in and the exclusive right to use the trademark device and label in dispute under one
(152) J. R. Green, and the defendant introduced evidence to show that in the fall of 1865 himself and Green, who were partners and manufacturers of smoking tobacco, originated and adopted the same trademark, and used it upon their goods manufactured at Durham. In the progress of the trial before the jury the plaintiff offered in evidence a certified copy of a copyright issued to Green which, after objection from the defendant, was admitted, and it was afterwards ruled out, and the jury directed to disregard it.

The defendant's counsel proposed to ask him what interest, if any, he (the witness) had in the trademark at the time when he was manufacturing tobacco at Rowan Mills? This inquiry was not allowed for the same reason that the interest, as the witness had already stated, was acquired in association with Green, and grew out of a transaction between them.

A similar question, "When was the trademark originated?" was, upon the same grounds, not permitted to be answered by the witness.

These rulings form the subject of the three exceptions mentioned, and, we think, come clearly within the inhibitions of the statute, and the evidence was properly excluded, as coming from a party to the transaction with one under whom the plaintiff claims.

5. The next exception was to the introduction by the plaintiff of a certified copy of the defendant's application for registration of his claimed trademark, admitted to be in due form, and resisted on the ground that the law under which it had been filed was unconstitutional. It was permitted to be read as a declaration of the defendant. The defendant said, in his further examination, that he applied for such registration, and that the paper referred to and handed the witness was his said application, but he did not remember that he claimed an
(153) exclusive right in the trademark. The plaintiff then inquired, "Was there not a proceeding or declaration interfering after you filed the application?" Upon objection made and overruled, the witness answered "Yes."

It is to be observed that the objection is not to the character or quality of the evidence, as secondary, and not admissible under section 4940 of the Revised Statutes of the United States, but because the Constitution allows no such exclusive right to the use of a trademark to be thus secured to the inventor. Regarding the copy as if the original had been produced, and to this, and for the reason that it was not primary evidence, objection to be available should then have been made (*Bridgers v. Bridgers,* 69 N. C., 451; *Gidney v. Moore,* 86 N. C., 485; *S. v. Kemp,* 87 N. C., 538) and put upon proper ground.

The answer to the last question was sought, to show that there had not been a quiet acquiescence in the validity of the defendant's claim to ownership of the trademark and a submission to it. Offered for such purpose, we find no just ground for exception to its reception.

7. The objection to an inquiry of the defendant, whether he had ever sued any one for an infringement of his alleged right to the trademark. This was followed by an answer that he had sued no one but Blackwell & Carr, and the answer was received as tending to qualify and explain his previous testimony as to his use of it, and the time and place, when and where it had been so used, and for this object was competent.

8. The inquiry put to S. A. Sharpe, a witness for defendant, as to the character of the witness Geo. F. Shepherd, whose deposition had been read, and if there were not, in his community, many hard reports in regard to his reputation, if liable to objection, is freed from it by the answer—"I have heard of none." *Bost v. Bost,* 87 N. C., 477.

The next exceptions are to instructions asked and refused, and to the instructions given to the jury.

The defendant's counsel asked the court to charge the jury: (154)

"1. That if they find from the testimony that the defendant was at any time in the open, public, and continuous use of the trademark in question, by placing it on packages of smoking tobacco, and placing such packages upon the market in North Carolina and elsewhere for the space of *three* years, with the knowledge of plaintiff or of those under whom it claims, before plaintiff became their assignee, and neither plaintiff nor those under whom it claims took any legal proceedings to stop or restrain defendant in the use of said trademark, there being during these *three* years no legal proceedings by defendant against plaintiff or those under whom it claims involving defendant's right to so use said trademark, then the jury ought to find that, as against defendant, plaintiff is not entitled to the exclusive use of said trademark.

"2. I ask the above instructions in the same words as above, only substituting the words *two years* for the words three years in the two places where they occur in No. 1, as asked above.

"3. I ask the same instructions as are asked in No. 1 above, substituting the words *one year* for the words three years in the two places where they occur in No. 1, as above.

"4. If Nos. 1, 2 and 3, as asked above, are all refused by the court, then I ask the instruction as asked in No. 1, substituting *seven years* for three years in the two places where they occur in No. 1, as above.

"5. I ask his Honor to tell the jury that if they believe the witness J. S. Carr, then he had notice in the year 1872 that defendant was using the said trademark on packages of smoking tobacco; said Carr was then a partner with W. T. Blackwell, under whom plaintiff claims, in the use of said trademark.

(155) "6. I ask his Honor to tell the jury that there is no evidence of any legal proceeding or litigation involving the right of plaintiff, or those under whom it claims or of defendant, to use said trademark, being instituted by either plaintiff, or those under whom it claims or by defendant, before the year 1880.

"R. F. ARMFIELD,
Attorney for Defendant."

If No. 6 is declined, then I ask it with the modification, "before 23 July, A. D. 1877." R. F. ARMFIELD.

The court gave instructions 1, 2, 3 and 4, with this modification: "But if you believe that the plaintiff, or those under whom it claims, did no act or thing by which the defendant was induced to believe that it had abandoned its alleged exclusive right to use the said brand, and the plaintiff and those under whom it claims had been in the continual use of said brand from its invention and adoption to the present time of the commencement of this suit, claiming the exclusive right to use it, and that whenever they had notice of the use of the same by the defendant they promptly interfered with such use by threats to sue, seizure of the tobacco so labeled or put on the market by defendant, notice to defendant's purchasers of the same, or by such other acts and declarations known to defendant, by which the defendant knew that the plaintiff and those under whom it claims at all times claimed the exclusive right to use said brand, and at all times after notice of the use by defendant denied and contested the right of the defendant to use it, then the failure to bring said suit within the periods mentioned would not take away the plaintiff's exclusive right to use the same."

To this modification the defendant excepted.

(156) The court gave the 5th instruction as prayed for.

The court declined to give the 6th and 7th instructions, stating to the jury that they might consider the evidence of the defendant and

the witness Allen as some evidence on these points. Defendant excepted.

There was a verdict for the plaintiff on the first two issues, and to the issue as to damages the jury found that no damage had been sustained by plaintiff.

The defendant moved for a new trial on the following grounds:

For that the court admitted incompetent evidence against and excluded competent evidence for him;

For error in refusing instructions asked and giving others in their place, and

For that, in the absence of any proof to connect the plaintiff with W. T. Blackwell in the alleged ownership, it was left to the jury to so find.

The motion was denied, and judgment being rendered for the plaintiff, the defendant appealed.

The instructions requested are embodied in one general proposition, varying as to the interval of time only, that the inaction of the successive alleged owners of the trademark to put a stop to the use of it by the defendant by a restraining judicial order or other means, when aware of the continued infringement, and the same course pursued by the defendant, asserting, but not enforcing, his own claim thereto, warrant the jury in finding the first issue in the negative.

As the question between the parties is as to the invention and appropriation of the trademark, whereby a proprietary and sole right to its use is acquired, we do not see why any other force should be given to the supposed acquiescence in the defendant's alleged invasion than that of evidence tending to disprove the claim itself.

The modification in the charge presented the matter in another aspect, leaving to the jury to pass upon the evidence and derive (157) such conclusions as were warranted by it. Of the charge, considered as a whole, the defendant has no just cause of complaint. If his contention, as expressed in the instructions asked, was that the proprietor's right was lost by such forbearance, although it was already vested, we cannot give it our sanction. The delay in vindicating an invaded right, beyond its weight in disproving its existence, cannot have the effect of extinguishing it or operate beyond barring the action under the statute of limitations or a presumption of an abandonment. The indulgence may be deemed such an assent to the use of the device as would not entitle the owner to demand damages for its intermediate use, and so, accordingly, none are awarded against the defendant.

As is held in *Taylor v. Carpenter,* 2 Woodb. & M., 1, a long delay in prosecuting the claim after knowledge of the wrong would be competent evidence of acquiescence in it, but could be no bar to a recovery unless extended to the period presented in the statute of limitations.

The last error assigned is that the jury were permitted to connect the plaintiff in ownership with W. T. Blackwell, from whom it is alleged to have been derived, without any evidence of a transfer.

The testimony of J. S. Carr was (and that without objection) that "the plaintiff company owns it now," referring to the trademark, and there being no controversy upon this point during the trial, this seems to have been received as sufficient proof of the fact of transfer, and it was proper to let the jury pass upon it.

We find, therefore, no error in the record, and the judgment is Affirmed.

Cited: Carey v. Carey, 104 N. C., 174.

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(158)

THE STATE, ON THE RELATION OF MARTIN KELLOGG, v. THE SUFFOLK AND CAROLINA RAILROAD COMPANY.

Rail Bonds—The Code, Sec. 1964.

1. A house and platform on the side of the track of a railroad, at which freight is occasionally received and discharged by the company, but at which no agent's office or books are kept, or bills of lading or receipts given, is not a "regular depot or station," within the meaning of section 1964 of The Code, which imposes a penalty on a transportation company for refusal to receive freight.
2. Where the engineer and conductor of a railroad train occasionally stopped the train to take on freight at points along the line, not regular stations: *Held*, that such acts did not constitute the engineer and conductor receiving and forwarding agents of the railroad company within the terms of section 1964 of The Code.

CIVIL ACTION tried before *Avery, J.,* at Spring Term, 1887, of GATES Superior Court.

Judgment for defendant. Plaintiff appealed.

The facts appear in the opinion of the Court.

W. D. Pruden for plaintiff.

L. L. Smith and John Gatling for defendant.

DAVIS, J. This was a civil action, originally commenced before a justice of the peace for the county of Gates, to recover a penalty of $50, for refusing to receive freight, under section 1964 of The Code, and

carried by appeal to the Superior Court of said county and tried before Avery, J., at Spring Term, 1887, of said court.

The evidence was, in substance, that during the latter part of November, 1886, the plaintiff carried two mattresses and put them on the platform of a building standing at a place on the line of defendant company's road called "Meara Station," about one mile from Sunsbury, a regular station, and gave the usual signal to an approaching train to stop. It did not stop, "but the engineer shook his head and went on." After the train had passed, at the request of the plaintiff, (159) Captain Meara, who lived one-fourth of a mile distant, and who was not an agent of defendant company, procured some tools and a lock which he put on one door to the building, and nailed up the other (there were two doors to the building; one of them was off the hinges and to the other there was no lock) and then "put away" the plaintiff's mattresses for him.

On the next morning the train stopped, and they were shipped to Suffolk.

Freight had been "taken off and on," and "it was not uncommon to see the train stop at the point during trucking season." There was never any station agent there; no tickets were kept or sold there; no agent's office, and no books were kept there or bills of lading or receipts given. The conductor stopped the train and took on freight and passengers. The plaintiff testified that he had heard the conductor say, about ten days before he brought the mattresses to ship, that he did not intend to stop at Meara again.

Captain Meara testified that he had known freight to be shipped from there twenty times since the house was built there two years previously, and had known freight to be delivered on three or four occasions, and he had never known the refusal to stop the train before when the usual signal was given.

The issue was, "Did the defendant company refuse to receive freight when tendered by the plaintiff at a regular station on its line of road, to be forwarded as directed by the plaintiff?"

The court instructed the jury that, upon the testimony, there was no view in which the plaintiff could recover; that there was no view of the testimony in which the jury could find, in reference to the issue submitted, that Meara was a regular station on the defendant company's road. There was a verdict and judgment for the defendant, from which the plaintiff appealed. (160)

Section 1964 of The Code, under which this action was brought, declares that "Agents and other officers of railroads and transportation companies, whose duty it is to receive freight, shall receive all articles of the nature and kind received by such company for transportation

whenever tendered at a regular depot, station, wharf or boat landing, and shall forward the same by the route selected by the person tendering the freight, under existing laws; and the transportation company, represented by any person, refusing to receive such freight, shall be liable to a penalty of fifty dollars, and each article refused shall constitute a separate offense."

Section 1963 prescribes the rules for transportation, and requires railroad companies, among other things, to provide for the transportation of such "property as shall, within a reasonable time previous thereto, be offered for transportation," etc.

Section 1967 makes it unlawful to permit articles received for shipment to remain unshipped for more than five days, etc.

We can see no error in the ruling of his Honor. Meara was no "regular depot or station," within the meaning of the statute. There was no agent of the company there charged with the duty of receiving property for transportation, and the engineer or conductor on the train could not be, as disclosed by the evidence, such receiving and forwarding agents as are contemplated by section 1964.

There are several other questions presented by the record which we need not consider as the evidence, all of which was offered by the plaintiff, fails to present any state of facts that would entitle him to recover. There is

No error. Affirmed.

Cited: Land v. R. R., 104 N. C., 56.

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(161)

A. H. HAMMOND AND W. H. JUSTICE v. PHILIP SCHIFF AND JONAS SCHIFF.

Experts — Easement—Party Walls—Evidence—Pleading—Damages—Excepting to Judge's Charge.

1. The decision of the judge, that a witness is qualified to testify as an expert, cannot be reviewed in the Supreme Court.

2. A., by a written instrument, signed, but not under seal, agreed, for a valuable consideration, that B., his heirs and assigns, might use a wall on land belonging to A., as one of the walls of a building which B. was about to erect on his lot adjoining A's: *Held*, (1) that such an instrument while it did not transfer an easement *in law*, because not under seal, has *in equity*, when acted on, a force and efficacy little short of a grant of an easement, and disables A., and those claiming under him, from an

arbitrary and reckless use of the land of A. whereon the wall in question stands, to the detriment of B.; (2) that oral evidence was admissible to prove acts of the parties to such instrument, treating and recognizing the wall in question as a party wall.

3. Where the plaintiff had testified, on the trial, that he had told the defendant he would sue out an injunction to stop him from recklessly excavating the earth close to plaintiff's wall: *Held*, that it was not error, to allow plaintiff to testify, that he did not sue out the injunction because he could not get to the judge.

4. A general objection to evidence of which only a part is incompetent will not be entertained, if the evidence is severable.

5. Where plaintiff sued for damages resulting from the unlawful and reckless undermining of plaintiff's wall by defendant, evidence of injury to plaintiff's goods by being flooded with water used in extinguishing a fire, which was caused by the falling of the wall, was properly admitted, although such cause of injury was not specially set out in the complaint.

6. The rules of pleading are not so stringent as to require a special averment in the complaint, of every *immediate cause* of injury, in an action for damages.

7. In an action to recover damages for an injury done to plaintiff's goods, no reduction can be made on the ground that plaintiff has recovered on insurance policies; because, to allow such diminution, would be to permit the wrongdoer to take all the benefit of the policy of insurance without paying the premium.

8. The Supreme Court will not entertain an exception in general terms to an entire charge; the errors complained of must be specifically assigned, or they will not be reviewed.

9. The employment of experienced and competent agents only extenuates and excuses when their experience and judgment become the basis of what is done. The employment of such agents will not excuse one who insists upon their doing an act which they warn him is dangerous and likely to cause great injury to another.

CIVIL ACTION tried before *MacRae, J.*, and a jury at the Fall (162) Term, 1887, of MECKLENBURG Superior Court.

Verdict and judgment for plaintiffs. Defendants appealed.

The plaintiffs, as tenants under a lease from John H. McAden, the owner, were in the occupation of a house and lot fronting on Trade Street in Charlotte, pursuing a mercantile business, in the year 1885, while the defendants, similarly engaged, were early in that year in possession of an adjoining lot with like frontage, under a contract of purchase made on 1 July, 1875, with Henry W. Fries, the building on which was consumed by fire in the month of February, 1885.

While the lots belonging, respectively, to said McAden and Fries, to wit: on 1 May, 1875, they entered into a contract, a copy of which is contained in the complaint, and in form is as follows:

"Whereas, John H. McAden, of Charlotte, North Carolina, is owner of a certain lot or parcel of land in said city, fronting on Trade Street and extending back about one hundred and forty feet, and adjoining the property of W. J. Yates and the lot owned by H. W. Fries, of Salem, N. C., on which last-mentioned lot is situated the brick storehouse occupied by W. J. Black, the south wall of said storehouse being built along the dividing line between the said McAden and Fries;

"Now, this agreement, made this 1 May, 1875, between the said John H. McAden and the said H. W. Fries,

"Witnesseth: That the said Fries, for and in consideration of
(163) the stipulations and agreement of the said McAden, hereinafter contained, does hereby covenant that the said McAden, his heirs and assigns, may use said south wall of said brick storehouse as the north wall of the storehouse to be erected by the said McAden on his aforesaid lot, and may make such excavations in said wall as may be necessary for the support of the floor of said house: *Provided, however,* that no injury is done to the building of the said Fries.

"And, *provided further,* that said wall is not to be torn down without the consent of the parties hereto, their heirs and assigns.

"And in the event of its destruction by any means, nothing herein contained is to be construed as conveying to the said McAden any right or title to the land on which said wall is located.

"And the said McAden, for himself and his heirs above, covenants and agrees to and with the said Fries that he will add to and improve said wall at his own expense, and for the mutual benefit of himself and the said Fries, so as to make it serve as the north wall of his aforesaid storehouse, which is to have a basement ten feet deep, and to extend back from Trade Street one hundred feet, the third story to extend only fifty feet back, and the front of said wall to be about.....feet high, all which improvements are to be made in a workmanlike manner, and of good material.

"And the said McAden does further agree that the said Fries, his heirs and assigns, may use said wall in such manner as may be proper and necessary to support or strengthen the building he or they may erect in the place of the one now on said lot; and that he will, at his own expense, repair any injury that may be done to said wall by reason of said addition made thereto. H. W. FRIES."

The contract of sale of July following, after a recital of the
(164) terms of sale, not necessary to be set out, contains this concluding clause:

"Now if the said Schiff & Bros. (the defendants, being its constituent members) will pay to H. W. Fries the interest due on the above notes on 1 January of each year, and the principal of the same at maturity,

the said H. W. Fries will make to the said Schiff & Bros. a deed to the above described property, free of any encumbrances thereon to this date, *but subject to an agreement made between H. W. Fries and J. H. McAden, in regard to the wall next McAden's lot.*

In witness whereof, we have hereto put our hands and seals.

J. SCHIFF. (Seal.)
PH. SCHIFF. (Seal.)
H. W. FRIES. (Seal.)

Test:
PATRICK MARTIN.
W. E. SHAW."

After the destruction of the house on the defendant's lot they determined, about the middle of May, to erect a new brick building on the same site, and to excavate for a cellar or basement room underneath, and having entered into arrangements for doing so, began to dig away the earth for that purpose, and had proceeded until, from the loosening and removal of the soil from a too close proximity to the wall, it was unable to support its weight, and, giving way, the wall fell, causing the damage to the plaintiff's goods and his interest in the leased house, for which the present action is brought. Upon the five issues submitted to the jury they responded under the charge of the court, as follows:

1. Was the wall between the Schiff building and the McAden building a party wall? Answer: "Yes."

2. Did the defendants, by themselves or through their agents, (165) *unlawfully* dig and excavate the earth so near to the wall between the Schiff and McAden buildings that it gave way and tumbled in? Answer: "Yes."

3. Did they *negligently* so dig and excavate the wall that it gave way and tumbled in? Answer: "Yes."

4. Did the plaintiffs, by their want of due care, contribute to the injury? Answer: "No."

5. What damages, if any, are the plaintiffs entitled to recover? Answer: "$9,000."

The plaintiffs examined three witnesses, whose testimony we give, as far as necessary to a proper understanding of the rulings assigned as error, in the defendant's appeal.

J. H. McAden testified that, in pursuance of his contract with Fries, he excavated within five feet of the main wall, and erected a dead wall, on which the sleepers of the witness's structure rested, extending over to Fries' wall, as shown on an accompanying plat; that his building excavation extended 100 feet back, 40 feet short of his line, and when the house reached the second story, the joists were let into places opened in

the Fries wall; that the parapet wall on the Fries building, 9 inches high, was found to be defective, and witness took it down, and built a new one 14 inches high; that the Fries building had a rear extension beyond that of witness, in which were windows, from which the rear of witness' lot could be seen, and the wall was in common use by both proprietors; that in 1877 Philip Schiff said that some repairs were needed in the foundation, and as both were interested in it, witness ought to pay half the expense, and this witness agreed to do, and did so.

To this evidence objection was made, if offered to show an estoppel or easement, and after admitting such to be the object, it was received by the court.

The witness further testified to meeting Schiff soon after the fire in February, and the latter said he wanted witness to pay for some
(166) repairs in the wall, places where windows had been filled up, the lintels being on his side, and having been burned, and witness agreed to pay one-half of the cost, but did not, in consequence of the wall falling down; that Schiff said he wanted to know, before his purchase, whether he could put an additional story on the front of his house without paying for the use of the improvement put on the wall by witness, and inquired if he could use a second story and the windows, to which he was answered that he would be entitled to use the light from the windows, and that, in order not to interfere with them, witness had stopped at 100 feet short of his line, which was 140 feet.

Similar objection was made to this testimony and overruled.

The witness testified that in May, after the fire, Schiff and witness agreed to bear, in equal parts, the expense of certain improvements in the wall, to be made by putting new bricks on his side of the wall at the price of $100.

A similar objection to this testimony was made and overruled.

The defendants, by contract with Ahrens and Phifer, the latter doing the work, were about to begin the excavation, when witness laid off a line five feet from the wall, and insisted that it should approach no nearer, and so stated to Schiff, as, if pushed further, it would endanger him; that when they crossed the line, and witness was informed of it by Phifer, he went to the place, and finding Ahrens and Asbury, the contractors for the brick work, they both expressed the opinion that they could go nearer than five feet, but not nearer than four feet, without great danger; that Schiff was sent for and came, and the matter was discussed, the ground not being clay, but of a micaceous soil, when witness pointed out the danger, and warned him against going over the four-foot line; Schiff, becoming vexed, asked Asbury, "Didn't you make estimates for excavating to the three-foot line?" and the latter
(167) replied, "Yes, but how could I tell what was under the ground?"

And to a similar interrogatory addressed to Ahrens, the like reply was returned, Asbury adding that it would be dangerous for him to work his bricklayers nearer than the four-foot line, and he did not want to do it; that Ahrens attempted to explain, when Schiff said he had made the contract and expected it to be carried out, and left; that Phifer worked all day on the four-foot line, cutting it down to the front, and Asbury, beginning on the front, had laid a few feet on the same line, and on Wednesday morning commenced *here* (pointing out the place on the plat), to get it up that day; that Schiff came, and finding that the bricks were being laid on that line grew angry, and ordered the cutting to be to the three-foot line; and thereupon witness went to him and told him he was going to throw the building down, as witness feared, since he was going beyond the danger limit, and begged him to desist, instead of which "he got mad" and said "he had made a contract, and given directions to go to the three-foot line, and they would have to do it, *let the consequences be what they may*"; that upon witness remarking that his only remedy was by injunction, Schiff replied, "If you bother me with an injunction I'll go smack to the wall"; that returning to the building he found Ahrens marking off a line three feet from the wall and Phifer chopping, and that he did not sue out an injunction because he could not get to the judge.

To this evidence objection was made and overruled.

That the workmen went to the line so ordered, and desisted for the night; that the next morning at 9 or 9:30 the wall fell, and when witness saw the wreck that had been made—the worst, he testifies, he ever saw—the intervening wall was 2 or 2½ feet deep on the ground, and the next excavation 9 or 10 feet deep; that the wall that fell out, clear from top to bottom, until it reached the point where the excavation had not extended beyond the four-foot line, but there stopped, and the brick fell over, the foundation standing where it was before. (168)

Upon cross-examination witness stated that Schiff had proposed, before commencing to dig, that it should be done in sections, the walling keeping up with the excavating, and requested witness to do the work at his own expense, or to pay half the expense of so doing, which was declined, and witness said he did not want the wall's foundations disturbed, and thus weakened.

Upon re-examination witness said that Schiff sent Ahrens to him with certain propositions, and in the conversation that ensued he said to Ahrens that the latter had advised witness to put his dead line at five feet, and ought to adopt the same rule with Schiff and make him set his dead wall at same distance, and Ahrens replied that Schiff was greedy for land, and he (Ahrens) would not let him go nearer than five feet, if

he could talk him out of it, and that he had told him that this would make a sufficient basement for his store.

To this conversation objection was also made and disallowed.

That Ahrens and Asbury, standing at a corner, called Schiff's attention to a seam in the earth, to which Ahrens did not wish to go, and would not unless he was forced, as the soil was exceedingly treacherous, and would not bear pressure, and an approach nearer than four feet would be attended with great danger, and both insisted upon stopping there, to which Schiff responded that he had made the contract and intended to carry it out, saying at the same time to Phifer if he would not execute the contract he would get some one who would.

Testimony, quite as strong and to the same effect, as to the persistent purpose of the acting defendant to push the excavation up to the three-foot mark, and his disregard of warnings from experienced men whom he had employed was given by Phifer, and it would be a needless (169) repetition to state it in detail.

The plaintiff Justice was examined as to the damages sustained by his firm from the falling of the wall, and he gave the estimate, about which no question of law is raised, except that the defendants deny their responsibility, if held to be responsible at all, for such loss as resulted from the water used to put out the fire, for the reason that this was a special damage not demanded in the complaint as such.

There were also exceptions to the proof of the witnesses, who were allowed to express opinions of the hazard of excavating so near the wall, being experts, which we dismiss at once with the remark that the decision of the court is upon a fact, not examinable on appeal, when there is evidence, and the correctness of their judgment has been fully vindicated by the results.

The defendants introduced no testimony, explanatory or other, and asked for these instructions:

1. If the jury believe that F. W. Ahrens was a competent and experienced builder, and the defendants, in making the excavation, acted upon his advice and assurance, but there was no danger in digging up to the three-foot line, there was no negligence, and the jury should answer the third issue "No."

2. That under the contract with Fries, McAden had no right to rest the truss and rear wall on Schiff's wall, and that he, having done so, was bound, as were the plaintiffs, to prop up their building when notified of the intention of the defendants to dig out the basement.

The instructions were declined, and instead the court charged:

You have noticed that a great part of the very able and interesting discussion of this matter has been addressed to the presiding judge and not to the jury.

The evidence in the case is all upon the part of the plaintiff, the defendants having offered none. Not that they have admitted all of it to be true, but they contend that upon the evidence, as you (170) may believe it, the plaintiff cannot recover.

The responsibility of declaring the law is upon the judge; it is necessary, however, that you shall decide certain issues of fact in order that the judge may be able to pronounce the judgment of the law.

And the first question is, Was the wall between the Schiff building and the McAden building a party wall—that is, a wall of right, used for the common benefit of both?

The answer to this issue depends upon the effect of certain instruments of writing and of certain facts which are undisputed; and as this effect is entirely a question of law, it devolves upon me to instruct you what the response to this issue should be upon the evidence. Without troubling you with a discussion of the law of the case, I will simply say that upon the evidence your response should be "Yes."

The second issue is, Did the defendants, by themselves or through their agents or employees, unlawfully dig and excavate the earth so near to the wall between the Schiff and McAden buildings that it gave way and tumbled in?

There is no contention on the part of the defendants that the falling of the wall was not in consequence of the digging away of earth by direction of defendants (though they say the falling might have been avoided if McAden had adopted proper measures to prevent it).

The question then is, Was it unlawfully done—that is, was it wrongfully done? For it is lawful for a man to do what he will with his own, but this is qualified by the maxim that he shall so use his own as not to injure another's. As a general principle, if one so uses his own property as to inflict unnecessary injury upon the property of another his acts are wrongful and therefore unlawful.

It follows in this case, as a consequence of the answer to the first issue, the wall being a party wall, neither party interested (171) in it had a right to do anything which would affect the wall injuriously to the other.

It is my duty to instruct you that if you believe the testimony your response to this issue should be "Yes."

The third issue presents the matter in another aspect which, in some views of the case, may be necessary to be determined by you. Did the defendants, by themselves or through their agents and employees, *negligently* dig and excavate the earth so near the wall between the Schiff and McAden buildings that it gave way and fell in? Did they use proper precaution and care to avoid injury to the plaintiffs?

The general rule on this subject of lateral support to adjacent walls, not party walls, is that one who owns land adjoining another who has a wall on or near the line may excavate upon his own land, provided he exercises proper care and skill to prevent any unnecessary injury to the adjacent landowner.

And if he had no just cause for supposing such consequence would follow and it resulted from some unforeseen cause—if he, not being skilled in such matters, employed a competent and skillful person to do the work for him, the making the excavation, and acted upon the advice and assurance of such person that there was no danger in digging up to within a certain distance of his neighbor's wall, there would not be negligence.

Trying this issue as if it were not a party wall, were the defendants negligent in their excavation? You are to consider the testimony upon this point as brought out upon the examination and cross-examination of plaintiff's witnesses.

Did defendants act upon the advice of a competent and skillful person in making the excavation, or did the person employed by defendants, or did any other competent and skillful person advise the defendants that it was not safe to excavate up to the three-foot line, and did the
(172) defendants insist upon the work being done up to that line, notwithstanding such advice?

It is insisted, on the part of defendants, that the work was done under the advice of Ahrens, a competent and skillful person, according to the testimony.

On the other hand, the plaintiffs say that the testimony shows you that Ahrens advised against it, and that Asbury, another competent and skillful person, advised against it, and insisted upon putting in a wall at the four-foot line, and that Phifer protested against it, and that all the circumstances testified to show you that defendants had notice of the danger of excavating up to the three-foot line.

You must determine, upon the testimony, whether defendants exercised due care and precaution; if they did, there was no negligence; if they did not, there was negligence.

The fourth issue is, Did the plaintiffs, by their own want of due care, contribute to the injury? Did they know of the danger and do what they reasonably could to prevent the injury? Did they do what plaintiffs suggested to them was proper to be done for the protection of their property? If they did, you will respond to this issue "No."

If they knew or had reason to believe there was imminent danger of the fall of the wall, and had time to take precautions and did not do so, you will answer "Yes."

Now you come to consider the last issue—What damages, if any, are plaintiffs entitled to recover?

If your response to the first and second issues shall be in the affirmative, however, you may answer the third issue; and if you shall answer the fourth issue "No," you will proceed to the fifth—What damage are they entitled to recover, if any?

The measure of damages would be a fair compensation for the (173) injury received. The value of the goods in the store just before the fall of the store, from which is to be deducted the value of the goods after the accident, as impaired by the falling of the wall, the breaking, the fire and the water. This would leave the loss upon the goods. To this sum should be added the expense of taking them out of the ruins, of removing them to another place, of having them cleaned and prepared for sale, and any other actual expense incurred by the plaintiffs by reason of the injury, as by loss of time and trouble incurred; and you may give interest if you see fit. But I have not permitted evidence to go to you to prove the probable profits which plaintiffs might have made out of the sale of the goods if they had not been injured, nor injury to the credit of the plaintiffs by reason of the loss of the stock. You are to determine this issue upon reason and judgment. I am requested to instruct you, and do instruct you, that you have no right to have each juror to put down his estimate of the damages and divide the aggregate by twelve. This would not be a sensible manner of reaching your conclusion.

To the refusal to charge as requested, and to the charge as given, the defendants excepted.

The defendants further except specifically to his Honor's charge as follows:

1. That his Honor committed error in instructing the jury that upon the evidence they should answer to first issue that it was a party wall.

2. That there was error in instructing the jury that if they believe the evidence they should respond to second issue "Yes."

Schenck & Price (by brief), W. W. Flemming and Batchelor & Devereux for plaintiffs.

C. N. Tillett and F. H. Busbee for defendants.

SMITH, C. J., after stating the facts: With this long and de- (174) tailed recital of what occurred at the trial, we enter upon a consideration of the exceptions taken by the defendants.

The exceptions numbered 1, 2 and 3 rest upon the same proposition—the insufficiency of the acts proved to raise an estoppel or confer any

right upon McAden or his lessees to the use of the wall built upon the Fries lot and at its boundary.

The objection is not so much, as we have repeatedly had occasion heretofore to remark, to the *admissibility* of the evidence as to its sufficiency to prove an estoppel, legal or equitable, against the defendants; in other words, to its *effect*.

In our opinion it was competent to show a common interest created under the contract, and recognized and acted on afterwards in the joint contributions for the maintenance and repair of the wall made by both parties.

It contains an express agreement on the part of Fries, based upon a valuable consideration, that McAden "may use the wall in such manner as may be proper and necessary to support and strengthen the building he or they (his heirs and assigns) may erect in the place of the one now on said lot," thus creating a vested interest therein.

While an easement is not transferred at law for want of a seal to the instrument necessary for that purpose, the contract, as executory, has in equity when acted on a force and efficacy little short, if any, of an easement or right of support to the wall for the security of the adjacent premises, and alike disables Fries and his successors from the arbitrary and reckless use of the adjoining earth, to the detriment of the other proprietor, without an accountability for the consequences.

Exception 4. This exception has as little support in law as the preceding. The plaintiffs are charged with a reckless inattention to their own premises, in not making provision for the strengthening of the wall to enable it to stand the effects of the removal of the earth (175) in impairing its capacity to bear the strain to which it was subject. In this connection McAden, finding his remonstrances unheeded, had threatened a resort to a judicial restraining order to arrest the work. It was met by a defiant declaration from Schiff that if "bothered" in that way "he would dig smack to the wall."

The objectionable words are but explanatory of the reason for not making application to the judge for protection against this unwarranted invasion of a right to be secure in the possession and enjoyment of his own premises, so seriously menaced. In our opinion it was competent, and, indeed, the forbearance was a strong appeal to the defendants to desist from their purpose.

Exception 5. This exception relates to a conversation between McAden and Ahrens, who came with propositions from Schiff to the former, and what passed was clearly admissible. The particular part deemed obnoxious, we suppose, from the argument, to be the remark about Schiff's greed for land. If so, the objection should have been confined to that remark, for it is an established rule that a general objection to

evidence, of which only a part was incompetent, will not be entertained if they are severable. *Barnhardt v. Smith,* 86 N. C., 473; *Smiley v. Pearce,* 98 N. C., 185.

If, however, the obnoxious part had been specifically pointed out, it was a portion of the conversation drawn out on cross-examination and pertained to its subject-matter, Schiff's unwillingness to respect the interests and rights of an adjoining proprietor, and at most was declaratory of the principal's anxiety to have an enlarged basement upon his own premises. But in any view the exception is untenable.

Exception 6. The exception to the ruling that the witness Phifer was an expert, after a preliminary examination of his experience in digging cellars, has been already disposed of, as also the next exception, to his being allowed to say that it was dangerous to go nearer to the wall than four feet in excavating. (176)

Exception 8. This relates to the admissions of proof of the injury to the goods from water employed to extinguish the flames.

We do not understand the rule in pleading to be so stringent as to require a special averment of every *immediate cause* of the injury suffered, as in this case, from rust, depredations, and the like. The primary and efficient cause *of all* the injury, however, directly produced from fire or water, was the falling of the wall, and this brought about by undermining the earth near to it, and all the consequences resulting therefrom are within the compass of the demand for compensating damages.

Such is the ruling, even under the former strict practice in *Whitehurst v. Ins. Co.,* 6 Jones, 352, referred to by counsel.

Exception 9. The court refused to entertain an inquiry into insurances effected on the property by the plaintiffs as foreign to the purposes of the present suit. Thus it has been held that, in an action to recover damages for an injury to the plaintiffs' ship, no reduction could be made on the ground that he had recovered from the insurers. Wood's Mayne on Dam., pp. 155-156, citing *Yates v. Whyte,* 4 B. N. C., 272; *Bradlum v. G. W. Railway Co.,* L. R., 10 Ex., 1; 44 L. J., Ex. 9.

The reason given for which is that to allow such diminution would be to permit the wrongdoer to pay nothing and take all the benefit of a policy of insurance without paying the premium.

Exception 10. The court charged that upon the evidence accepted as truthful the wall was a party wall—that is, a wall of right, used for the common benefit of both parties.

That this is such clearly appears from the contract upon the faith of which it is inferable, from the terms of the instrument as well as from other facts, the injured structure was put up, as its timbers entered into and derived support from the wall. What become party walls

(177) and in what manner they are created are questions the learning in regard to which is so copiously set forth in Mr. Washburn's book on Easements, at the original paging 429, and following, that we deem it needless to pursue the discussion in regard to the relative rights of owners of adjacent lands or lots further than to say whether, in a technical sense, this was or was not a party wall, it had become invested with all the incidents attaching to such so far as regards the right to its use by both, and the denial of the asserted right of the owner of the soil on which it stood to remove it or endanger its stability by digging around, without reasonable precautions against doing injury to the other party interested in its remaining.

Exception 11. We cannot entertain an exception in general terms to an entire charge, and it is required to assign specific errors therein in order to the reviewal on appeal.

We shall therefore only notice the second alleged error, the first having been disposed of in the instruction, that, upon the evidence, if believed, the response to the second issue should be in the affirmative.

The evidence was so full and positive, contradicted by no one, not only of negligence, but of a reckless and persistent disregard of the *admonitions and remonstrances* of his own skilled workmen, as well as of indications visible in the ground, as the work progressed towards the danger limit, as wholly to set aside the defense and render the defendant's conduct inexcusable. It may be that the danger would have been averted if the suggestions had been heeded of excavating and building the new wall in sections, so that a correspondent strengthening would have accompanied the weakening as the work progressed, and the result vindicates the wise judgment of the contractors that it would be safe to dig up to a four-foot line and dangerous to go beyond it, for the wall remained when bearing a greater pressure where the four-foot
(178) space was left, and gave way where but three feet were left.

Exception 12. The last exception seeks to excuse the defendants from the consequences, in that they employed skillful workmen to do the work.

If that had furnished any defense for the reckless manner in which the work was in fact done, it disappears in the further fact that it was not left to their experience and judgment, but disregarding their skill and advice the defendants assumed full control, and ordered and directed what was done, thus themselves becoming chargeable with the consequences.

The employment of experienced and competent men only serves to extenuate and excuse when their experience and judgment become the basis of what is done. There is no complaint that what they were com-

pelled to do was not done with proper skill, but that they were forced to go too near the wall, removing too much of the supporting soil, and this was the directly ordered act of the defendants.

There is no error and the judgment must be

Affirmed.

Cited: Armfield v. Colvert, 103 N. C., 158; *S. v. Wilkerson, ibid.,* 341; *Burwell v. Sneed,* 104 N. C., 122; *McKinnon v. Morrison, ibid.,* 362; *Carlton v. R. R., ibid.,* 369; *Blue v. R. R.,* 117 N. C., 649; *S. v. Stanton,* 118 N. C., 1186; *Davis v. Summerfield,* 131 N. C., 353; *S. v. Ledford,* 133 N. C., 722; *Cunningham v. R. R.,* 139 N. C., 438; *Davis v. Wall,* 142 N. C., 451; *Rollins v. Wicker,* 154 N. C., 563; *Phillips v. Land Co.,* 174 N. C., 545; *Conrad v. Shuford, ibid.,* 721; *Hunt v. Eure,* 189 N. C., 488; *Davis v. Robinson, ibid.,* 599; *Michaux v. Rubber Co.,* 190 N. C., 619.

GEO. W. MICHAEL v. ALEXANDER FOIL.

Evidence—Statute of Frauds—Attorney at Law; Privileged Communications—Judge's Charge—Reasonable Time.

1. At the time of the delivery of a deed for land, and as part of the inducement for its execution, it was orally agreed between the vendor and vendee, that if the vendee should sell the mineral interest in the land during vendor's life, he would pay the vendor one-half of the amount received therefor: *Held,* that such agreement could be shown by oral evidence, and did not come within the statute of frauds.

2. Where an attorney at law acts in his professional capacity for several parties, in the same transaction, he cannot testify as to what transpired as between such parties and a third person, unless all the parties for whom he acted consent; but as between the parties themselves, he can testify to all that was said and done.

3. It is not the duty of the judge to charge the jury upon a single selected fact, nor is he bound to charge in the language asked for in a special instruction.

4. The doctrine of reasonable time applies when no time is specified in the agreement of the parties. Where defendant promised to pay plaintiff one-half the proceeds of a mineral interest in land if sold during plaintiff's life a shorter time will not be fixed by the law. The plaintiff's life is the time fixed by the agreement, and the law will not change it.

CIVIL ACTION tried before *Connor, J.,* at January Term, 1888, (179) of the Superior Court of CABARRUS County. Defendant appealed.

1. The plaintiff alleged that in 1881 he conveyed, by deed in fee, to the defendant a tract of land mentioned in the complaint for the sum of $5,000.

2. That at the time of the execution of the deed and before, it was contracted and agreed that the plaintiff would take $5,000 for the land, provided the defendant would pay to him one-half of the proceeds for which the mineral interests of said land should be sold, if the defendant, during his lifetime, should sell said mineral interests. The defendant agreed to these terms, and the deed was executed, without embracing them, but subject to them.

3. That in 1883 the defendant sold the land and mineral interests to W. H. Orchard for $6,000, and received the money therefor—the mineral interests for $1,000 and the land for $5,000.

The plaintiff demanded of the defendant the one-half of the proceeds of the sale of the mineral interests, which was refused, and this action is brought to recover it.

(180) The defendant admits the purchase of the land by him at the price of $5,000, but denies the other allegations.

The following issues were submitted to the jury without objection:

1. Did the plaintiff and defendant contract before and at the time of the execution of the deed from the plaintiff to the defendant, the deed being made subject to the contract, that plaintiff should take $5,000 for the land and the defendant would pay plaintiff one-half of the proceeds for which the mineral interests in said land should be sold, if defendant should during his lifetime sell said mineral interests?

2. Did the defendant, on or about 11 April, 1883, sell the mineral interests, and if so, what was the price paid therefor?

3. What sum of money, if any, is due from the defendant to the plaintiff?

George W. Michael, the plaintiff, was introduced in his own behalf and testified: "I sold the land to the defendant, 15 March, 1881, for $5,000."

The plaintiff's counsel then proposed to ask the witness the following questions:

"Was there any agreement made at the time, in respect to the proceeds of the sale of the mineral interests in the lands, which was not embraced in the deed?"

Answer: "There was."

"Was such agreement in writing?"

Answer: "It was not."

"What were the terms of said agreement?"

Defendant objected, for that the agreement proposed to be proven was concerning an interest in land, and could only be shown by some writing

signed by the defendant. Objection overruled. Exception by defendant.

"The agreement was that I was to have one-half of the proceeds of the sale of the mineral interests in the land, if sold dur- (181) ing my lifetime.

"The agreement was made in Mr. Puryear's office. He drew the paper. I paid him for it. On the same day and after the deed was made the defendant said that he would attend to the sale. We agreed that Mr. Richards should go and show the mine to any person who might wish to buy. I received a letter from Mr. Richards about the sale. After I heard that defendant had sold, I came to North Carolina and demanded pay for my share of the proceeds of the mineral interests. The defendant declined to pay it. I told him that he knew that it was a fair contract. He said he only got one thousand dollars for the mineral interests. He sold to Captain Orchard. He said that he never would pay me; that he would keep it in court as long as he lived. The agreement was that Richards and Foil were to sell for our benefit."

The plaintiff's counsel then proposed to read a letter from Richards to plaintiff, and Richards was called and testified that he signed the letter and Foil, the defendant, wrote it.

The defendant objected. Objection overruled. Defendant excepted.

The following letter was then read, for the purpose of corroborating the witness:

"CONCORD, N. C., 21 May, 1881.

MR. GEORGE W. MICHAEL:

DEAR SIR:—I mailed you a letter some three weeks ago as to selling the mining property on Foil's plantation, and have not received an answer yet, nor has Mr. Foil. I directed your letter to Ashboro, Illinois, so I write again. If you want to sell your interest, I am of the opinion you can do so if you offer it at a low price. I think Mr. Foil is out of patience, as well as myself, as you have not written to either of us. Our plan is to make hay while the sun shines. Several (182) parties have been here, and will not consider any sale until I hear from you. Have a speedy answer, or all be go-by. Put your price low down if you want to sell—no mistake. Foil is ready to sell at any price to make a sale. Let me know your price—at a low rate at that. With my best wishes to you and family, I remain

Yours truly, WILLIAM RICHARDS.

"Direct your letter: William Richards, Concord, N. C., care of A. Foil."

Mr. Hal Puryear was then introduced by the plaintiff and testified:

"I drew a deed for the plaintiff to the defendant. It was drawn in my office. The first time I heard of the matter Mr. Foil met me and

said that he was about to buy some land from Michael; that they wanted me to draw the deed. They came to my office, and I did so. Mr. Michael paid me."

The plaintiff then proposed to ask the witness: "What took place between the parties at that time, in your presence?"

The defendant objected, for that the witness, an attorney at law, was in the employment either of himself or the plaintiff and himself, and that the conversation in his presence was, as to him, confidential. The objection was overruled. Defendant excepted.

"I heard the parties say that when the land was sold the plaintiff was to have one-half of the proceeds of the sale of the mineral interest. This is impressed on my memory. I heard it twice. That was their agreement. Michael wanted to retain one-half of the mineral interest and insert a reservation to that effect in the deed. This was objected
(183) to by Foil. I then suggested a collateral agreement in writing, and wrote it. Foil refused to sign it. The agreement was in parol, that Michael was to have one-half of the proceeds of the sale of the mineral interest."

The plaintiff then put in evidence the bond for title from the defendant Foil to W. H. Orchard for the mineral interest in said land, dated 2 April, 1883, by the terms of which he was to convey to said Orchard the mineral interests, with the timber on twenty-five acres and other privileges not material to be stated, for the sum of $1,000. On the bond is the following endorsement:

"Received of William Treloar the sum of one thousand dollars for one-half interest in the within bond and a second bond covering the mineral interest of said tract, the said bond bearing even date with this instrument. W. H. ORCHARD."

2 April, 1883.

"On the payment of one thousand dollars more I agree to transfer all of my right, title and interest in the within bond as well as the bond mentioned above. W. H. ORCHARD."

2 April, 1883.

The plaintiff then put in evidence the bond for title to the said land from the defendant Foil to Orchard, dated 2 April, 1883, in which he enters into the obligation to convey the land to the said Orchard in fee for the sum of $6,000.

The plaintiff then introduced a deed from Foil and wife to W. H. Orchard, dated 18 April, 1883, conveying to the latter the land in fee for the consideration named therein of $6,000.

He then offered in evidence a deed from himself and wife to the defendant Foil, dated 27 December, 1880, conveying to him the said land in fee for the consideration named therein of $5,000, "to have and to hold three-fifths of said land to him, said party of the (184) second part, and his heirs, as trustee for Nancy E. Melchor, and the other two-fifths to him, the said Foil, and his heirs."

The defendant then testified in his own behalf as follows:

"The plaintiff came to me and offered to sell his land. Said that he wanted to leave the State. Something was said about a gold mine. He charged five thousand dollars for the land. I declined to take it, but offered four thousand dollars and permit him to retain four acres and a right of way to the mine. He finally agreed to rent the land for that year and pay me nine bales of cotton rent, and I agreed to give five thousand dollars for it. Mr. Puryear wrote the deed. I employed him to write it. Michael wanted to insert a reservation of one-half of the mineral interest. I declined to permit it, but told him that he was to open the mine and have half of what he got from the sale of the mineral interest. I did not agree with him to give him one-half of the proceeds of the sale of the mineral interest. Orchard never paid me anything for the mineral interest. He paid me for the plantation. I made some improvements on the land, amounting to about one hundred and seventy dollars. When I sold there was a crop on it—wheat, etc.—worth about seven hundred dollars. My interest was about one-third."

Cross-examined he said:

"I have no recollection that Mr. Puryear, at the time of writing the deed, suggested that the reservation be put in the deed. I do not think Michael was present. He and his wife signed the deed the day that it was written. When I sold the land to Orchard I had been in possession two years. The first year I got about four hundred or four hundred and fifty dollars rent for it. The improvements were put on the land before I sold to W. H. Orchard. I put some after I made the bond to Orchard. Mr. McDonald came to me and wanted a bond. I refused to give it. I told him that I had promised Michael that if he opened up (185) the mine he was to have one-half of it; that he had a chance on it. I wrote the letter in evidence at Mr. Richards' suggestion. I sold the farm to Orchard. I claim no interest there now. I considered the mineral interest worthless. I made a bond to Orchard, to sell it to him for two thousand dollars."

The plaintiff then introduced William Richards, who testified:

"Some time after Michael left I came to town to see Mr. Foil, to ascertain what he would take for the mineral interest. He said that he could not sell without Michael's consent; that he owned one-half interest. I told him that could be easily fixed, that we could write Michael. He

then wrote the letter in evidence and I signed it. When Orchard bought I asked defendant if he had sold the mineral interest and he said yes."

It was conceded that both of the bonds from defendant to W. H. Orchard came from the custody of Mr. Treloar.

The defendant requested the court to instruct the jury:

1. That the agreement alleged by plaintiff and shown by his testimony, even if made, is void by reason of the same not being in writing, signed by defendant or some agent of his.

2. That it being admitted that the four-thousand-dollar bond to Orchard had never been surrendered, being executed at the same time as the other bond to Orchard, they should be construed together as forming one transaction, and the proper construction of the whole transaction is that the equitable, if not legal, title to the mineral interest remains in defendant, and therefore the plaintiff cannot recover.

3. That, even viewed as distinct instruments, the effect of the deed from the defendant to Orchard was not a sale within the true
(186) intent and meaning of the parol agreement, as testified to by plaintiff and his witnesses.

4. That if a sale of the mineral interest was even agreed to be effected for the joint benefit of plaintiff and defendant, such authority is confined to an execution within a reasonable time, and that two years was not a reasonable time, and that such agreement had ceased to be of effect on 1 April, 1883.

5. That the agreement, even according to plaintiff's testimony, is without consideration, and therefore the jury should respond to the first issue "No."

6. That by the bonds for title, introduced by plaintiff and executed by defendant to Orchard, and by the assignment of said bonds by Orchard to Treloar, there was in equity a conveyance of all the mineral interest to Treloar, and the deed from defendant to Orchard being made subsequent to the execution of these bonds, must be construed in the light of and in connection with the bonds.

And it appearing that these bonds for title were never surrendered by Treloar to the defendant, there was no estate in the mineral interest conveyed by the deed. Up to this time, then, the contract to sell the mineral interest is executory only, and there are no "proceeds of sale" of the mineral interest from which the plaintiff can recover. All of which were refused by the court.

The defendant also asked the following instruction, which was given:

"If the jury shall find from the testimony that the contract, if any, was that the defendant agreed to allow the plaintiff, Michael, to have half of the mineral interest itself in the land specified in the complaint, the jury should respond to the first issue 'No.'"

The court then instructed the jury that the burden of proof being on the plaintiff, they must be satisfied by a preponderance of testimony that the contract, if any, made by the defendant was as alleged, otherwise they should answer the first issue in the negative. (187)

That as to the second issue, the burden was on the plaintiff to show that the defendant had made sale of the mineral interest and received the money therefor; that a sale of the land alone would not entitle the plaintiff to recover. That they might consider all of the evidence, including the bonds put in evidence, and say whether the defendant had sold the mineral interest and received the money therefor, and if so, what amount.

That as to the third issue, if they found the two first for the plaintiff, he would be entitled to one-half of the amount received by the defendant for the mineral interest, with interest from 12 January, 1884.

Motion by defendant for new trial for error in refusing instructions asked and for admitting testimony objected to. Motion denied, and appeal.

B. F. Long and W. G. Means for plaintiff.
W. H. Bailey for defendant.

DAVIS, J., after stating the facts: 1. The first exception was to the admissibility of the testimony of Michael to prove the agreement in parol in regard to the proceeds of the sale of the mineral interest in the land.

The contract for the sale of the land was in writing—the land itself was sold—but the agreement, that if the mineral interest in the land should be sold during the lifetime of the plaintiff he should have one-half of it, was not put in writing. If the contract of sale was made subject to this agreement, as an inducement to the contract, the agreement, though in parol, may be enforced. The agreement did not pass or purport to pass any interest in land, and does not fall within the statute of frauds.

In *Manning v. Jones,* Busb., 368, Jones contracted to sell (188) Manning a tract of land at a stipulated price. It was, at the same time, agreed that the defendant, Jones, should repair the plantation and houses by a day named. The deed was executed and delivered to Manning, and at the time of the delivery of the deed Jones said he would have the repairs made by the time specified. Having failed to do so, the plaintiff brought an action to recover on the contract.

The court below held that parol evidence was inadmissible. *Nash, C. J.,* said: "In this there is error. It is true, as a rule of evidence,

that where a contract is reduced to writing, parol evidence cannot be received to contradict, add to, or explain it.

"The error consists in considering the evidence in this case as offered for either of these purposes. It was offered to set up another and distinct part of the contract, which never was reduced to writing—a contract which was ancillary to the main one, which was the sale and purchase of the land. . . . As soon as the deed was delivered . . . the title passed . . . unclogged with any conditions whatever; but it did not have the effect to discharge Jones from his obligation to put on the premises the agreed repairs. And as the contract was in parol, it might be proved by parol. Its existence added no new covenant to the deed, . . . nor did it contradict or explain any one that was contained in it.

"The action is maintainable upon the contract as to the repairs made at the time the deed was delivered."

In *Trowbridge v. Wetherbee,* 11 Allen's Mass. Rep., 361, it is said that a parol promise to pay to another a portion of the profits made by a promissor on the purchase and sale of real estate is not within the statute of frauds, and may be proved by parol. See, also, *Sherrill v. Hagan,* 92 N. C., 345.

2. The second exception was to the evidence of Richards in regard to the letter written by Foil to the plaintiff, but signed by Richards.
(189) It was competent as corroborating Michael, and also as tending to show the fact that Foil, after the deed from Michael to him, recognized the latter as interested in the sale of the mineral interest.

3. The defendant objected to the competency of Puryear, because he was an attorney and "was in the employment either of himself or the plaintiff and himself," and the conversation was therefore confidential and privileged.

It is not denied by the plaintiff that if Puryear had been counsel for the defendant alone his testimony would have been incompetent, but it is insisted, and we think it so appears, that he was counsel for the plaintiff, who alone paid the fee, and if so, the communication was privileged only as to him, and could be removed by his consent. 1 Greenleaf's Evidence, sec. 243.

But conceding that the witness was the attorney of both the plaintiff and defendant (there is nothing to show that he was the attorney for the defendant alone), as between the counsel and the plaintiff and the defendant, the matter was not, in its nature, private and confidential; it was common to all three, "and could in no sense be termed the subject of a confidential disclosure." 1 Greenleaf Ev., sec. 244.

The learned counsel for the defendant says that if an attorney acts for several clients he cannot testify without the consent of all, and for

this he cites several authorities. This is undoubtedly true as between his clients or any one of them and third parties; "but a communication made to counsel by two defendants is not privileged from disclosure in a subsequent suit between the two."

We are not aware that the question, in its present form, has ever been before the courts of this State, but in *Rice v. Rice*, 2 B. Monroe, 417, referred to in Greenleaf, it was directly before the court, and after laying down the general rule that a legal adviser will not be permitted to disclose communications or information derived from clients as such, it is said:

"But does this rule apply in this case? Here the controversy (190) is between the parties themselves, and the attorney is under the same obligations to both of them. The matter communicated was not, in its nature, private as between these parties, who were both present at the time, and consequently, so far as they are concerned, it cannot, in any sense, be deemed the subject of a confidential communication made by one which the duty of the attorney prohibited him from disclosing to the other. The reason of the rule has no application in such case. The statements of parties made in the presence of each other may be proved by their attorneys as well as by other persons, because such statements are not, in their nature, confidential, and cannot be regarded as privileged communications. The testimony of the attorney was therefore properly admitted in this case."

This reasoning seems to be sound, and so we say, in the present case, the testimony was properly admitted.

4. The fourth exception is to the refusal of the court to instruct the jury that the alleged agreement was void because not in writing. This exception cannot be sustained for the reason assigned for overruling the first exception to the evidence. If it had been an agreement to sell any interest in the land, or if, as his Honor charged, it was that the plaintiff should "have half the mineral interest itself in the land specified," it would have been otherwise.

5. Even if the two bonds be taken together and construed as one transaction his Honor instructed the jury "that they might consider all of the evidence, including the bonds put in evidence, and say whether the defendant had sold the mineral interest and received the money therefor; and if so, what amount?" and this was a compliance with the plaintiff's prayer, as far as he was entitled to it. It was a correct enunciation of the law as applicable to all facts as the jury should find from the evidence.

It is not the duty of the court to charge the jury upon a single (191) selected fact, nor is he bound to give the charge in the language

asked for. *Wilson v. White,* 80 N. C., 280; *Rencher v. Wynne,* 86 N. C., 268; *S. v. Boon,* 82 N. C., 637; *Clements v. Rogers,* 95 N. C., 248.

6. The refusal to give the third instruction as asked for is disposed of with the last.

7. The refusal to instruct the jury that, admitting the agreement, the sale must be effected within a reasonable time, was not error. The doctrine of reasonable time applies when no time is specified.

When stated in the agreement, why should it be limited to a shorter time?

8. The sale and conveyance of the land constituted a consideration for the agreement. *Manning v. Jones, supra; Sherrill v. Hagan, supra.*

This disposes of the exception to the refusal to give the fifth prayer.

9. The sixth prayer for instruction to the jury is disposed of with the exception to the refusal to give the second and third. It was substantially given, as far as the defendant was entitled to it.

There is no error. Affirmed.

Cited: Hughes v. Boone, 102 N. C., 159; *Holler v. Richards, ibid.,* 549; *McGee v. Craven,* 106 N. C., 356; *Carey v. Carey,* 108 N. C., 270; *Sprague v. Bond, ibid.,* 386; *Barbee v. Barbee, ibid.,* 585; *S. v. Booker,* 123 N. C., 725; *Quin v. Sexton,* 125 N. C., 452; *Winders v. Hill,* 141 N. C., 704; *Bourne v. Sherrill,* 143 N. C., 382; *Brown v. Hobbs,* 147 N. C., 74; *Buie v. Kennedy,* 164 N. C., 300; *Brogden v. Gibson,* 165 N. C., 19; *Holden v. Royall,* 169 N. C., 678; *Collier v. Paper Corporation,* 172 N. C., 74; *Woody v. Spruce Co.,* 175 N. C., 547; *Newby v. Realty Co.,* 182 N. C., 40; *Wells v. Crumpler, ibid.,* 365; *Pinnix v. Smithdeal, ibid.,* 412; *Pate v. Gaitley,* 183 N. C., 263; *Erskine v. Motors Co.,* 185 N. C., 495; *Colt v. Kimball,* 190 N. C., 173.

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(192)

W. A. GIBSON v. H. A. BARBOUR AND WIFE.

Trustee and Cestui Que Trust—Purchase by Trustee At His Own Sale—Acting As Attorney for Both Buyer and Seller—Counterclaim.

1. A purchase by a trustee or mortgagee at his own sale is void, if the *cestui que trust* or mortgagor elect so to treat it.

2. A conveyance by a trustee or mortgagee to one who purchased the mortgaged property, as the agent of such trustee or mortgagee, although it passes the estate, is voidable at the election of the *cestui que trust* or mortgagor.

3. Where a mortgagee employed an attorney to conduct a sale of the mortgaged property, under a power of sale vested in the mortgagee by the terms of the mortgage, and a third person employed the same attorney to buy the property for him at such sale, and at the sale, which was public, the attorney bid off the property for such third person, who paid the price and took a deed from the mortgagee: *Held*, that such sale was voidable at the election of the mortgagor, and that the legal estate, which passed to the purchaser by the deed from the mortgagor, remained charged with the trusts of the mortgage.

4. A mortgagee, of both land and personalty, sold all the property covered by the mortgage under powers therein contained. Plaintiff purchased the land at such sale and took a conveyance therefor from the mortgagee. But the sale was made under such circumstances as rendered it voidable, in equity, at the election of the mortgagor. Plaintiff brought an action of ejectment against the mortgagor. The mortgagor pleaded, as a counterclaim, the matter which rendered plaintiff's purchase voidable, and also, that the mortgagee had sold and purchased at his own sale the personalty covered by the mortgage, had taken possession and rendered no account thereof. The mortgagor also demanded that the mortgagee be made party to the action and that he account for the personalty in question: *Held*, (1) that there was no case for marshaling, and a sale of the land should have been ordered by the court; (2) that the plaintiff occupied the place of a trustee so far as the mortgagor was concerned, and his money, expended in purchasing the land, having gone in diminution of the mortgage debt, he was entitled to the restoration thereof; (3) that the mortgagor was only necessary as a party, in order that he might be compelled to repay the money received by him from the plaintiff, in the event of the purchase of the land by some one else at the sale to be ordered by the court; (4) that it was error to order an account of the personal property to be taken in this action, as the plaintiff was not interested therein.

5. A counterclaim must be one arising out of the subject of the action as set out in the complaint, and must have such relation to plaintiff's claim as that its adjustment is necessary to a full determination of the cause between the plaintiff and defendant. Matter in which only the defendant and his codefendant, or a third person, not a party to the action, are interested, and the settlement of which is not necessary to a final determination of the controversy between the plaintiff and the defendant, cannot be pleaded as a counterclaim.

CIVIL ACTION for the recovery of land, heard before *Connor, J.*, (193) at September Term, 1887, of RICHMOND Superior Court.

Jury waived. Trial by the judge. The plaintiff appealed.

The defendant, Hugh A. Barbour, becoming indebted to the firm of W. F. Kornegay & Co. in the sum of $2,000 due by notes, to secure the same conveyed to the said creditors, by deed of mortgage, with a power of sale in case of default in making payment, as each became payable, a steam engine and certain other machinery, as also the tract of land described in the complaint, and sought to be recovered in the present action.

The indebtedness not having been provided for at maturity, according to the stipulations in the mortgage, the personal property conveyed therein was put up and sold by an agent and attorney of the mortgagees employed for that purpose, and being bid off by the agent conducting the sale, was put down by them to him as purchaser at the price of one thousand five hundred dollars. In like manner, on the day following, and after due advertisement, the land was also sold at the courthouse by the agent, who, on behalf and by authority of the plaintiff
(194) Gibson, bid off the same for him at the price of five hundred dollars, and accordingly, on his making payment of the price, the said W. F. Kornegay & Co. executed a deed of conveyance therefor to him. The present action was then commenced to recover the possession withheld by defendant, damages for the detention, and to establish title to the premises.

The defense arises out of the foregoing statement of facts, and the defendant resists the claim, insisting upon the absolute nullity of the attempted sale of the personal property, and demanding that the deed, purporting to pass the estate in the land, be declared null and inoperative to divest the defendant of his equity of redemption therein, and that the plaintiff holds the legal estate, clothed with the same attaching trusts as when held by the mortgagees. He also asks for a reference of the account between the parties to the mortgage, claiming that there will be found nothing due from him.

A jury was dispensed with, and the court, by consent, finds upon the testimony of plaintiff's witnesses the above facts. At defendants' instance W. F. Kornegay & Co. are made parties defendant by summons, but have failed to make answer or defense. The court, in entering judgment, recites the facts in substance as stated, and proceeds to declare the deed made to the plaintiff by the mortgagees ineffectual to divest or defeat the defendants' equitable right to redeem, and that the trusts of the mortgage follow and adhere to the transferred legal estate in the land, and directs a general account to be taken of the mortgage liabilities between the original parties thereto by the clerk, with the value of the engine and machinery, to the end that it be applied to the secured indebtedness, with leave to said W. F. Kornegay & Co., consisting of W. F. Kornegay and C. Dewey, partners, to file their answer within thirty days thereafter, if so advised, and that the cause be retained for
(195) further proceedings.

The plaintiff excepted to the said judgment, and assigned as grounds of exception:

1. That his Honor has found as a fact that James T. LeGrand, at the sale of the land, acted as agent of the plaintiff, W. A. Gibson, whereas, upon the evidence, his Honor ought to have found, either as a conclusion

of fact or law, that LeGrand was not the agent of the plaintiff at said sale, and did not buy as his agent, there being no evidence of said alleged agency.

2. That his Honor has found that the defendant Barbour was at the sale, but did not have notice or knowledge that LeGrand was bidding for the plaintiff, there being no evidence upon which to base said finding.

3. That his Honor has failed to find that the defendant Hugh A. Barbour made no objection to the sale, though he was present at the sale and had the opportunity, all of the evidence being that he made no objection.

4. That his Honor has failed to find the rental value of the land, all of the evidence showing that it was between $40 and $50 per year.

5. That he has not found that the plaintiff was the owner and entitled to the immediate possession of the land.

6. That his Honor, in the said judgment, has not stated separately his conclusions of fact and law.

From the judgment rendered by the court the plaintiff appealed.

C. W. Tillett and P. D. Walker for plaintiff.
John Devereux, Jr., and J. D. Shaw for defendants.

SMITH, C. J., after stating the facts: We proceed to examine the series of exceptions taken to the rulings of the judge and (196) brought up on the appeal.

First Exception. So far as the finding of the agency of the attorney rests upon the sufficiency and credibility of the testimony in establishing the fact, the finding of the judge is conclusive.

If the objection be predicated upon the *absence of any evidence* it cannot be sustained, for the attorney expressly states that he acted as such in the matter of selling the property.

Second Exception. The same witness states: "I made the sale for W. F. Kornegay & Co., the mortgagees, and bid off the land as agent for Gibson. Mr. Barbour was here and made no objection to the sale."

There was no evidence that the defendant was aware of the fact that the agent, a witness for the plaintiff, knew for whom the land was bid off. This supports the finding.

Third Exception. As every fact must be found upon evidence, and there was none that the defendant had the supposed knowledge, it could not be so found.

Fourth Exception. The court does not find the rental value of the land, for in the judgment following the general statement of facts it is declared that "the rental value of said land was $40 or $50." The exception is founded in error.

Fifth Exception. The main and really only point embodied in the fifth exception is as to the effect of the proceedings in conducting the sale upon the title acquired by the plaintiff, in divesting it of the trusts of the mortgage, upon which the ruling is against the plaintiff, and in our opinion it rests upon well established and universally recognized principles of equity. At law, a sale by a vendor directly to a vendee, when one person, is a nullity, since all contracts must be between two or more persons with antagonistic relations as to the subject-matter of the contract; but a deed executed by the owner of land or other property to another person, though the latter accepts the title under an
(197) agreement to reconvey at law passes the estate, when the parties are competent to contract; but it may be avoided by persons in interest because, though pursuing the forms of law, such a transaction tends to fraud, under the veil which covers it, and in equity will be avoided if demanded by those who may be prejudiced. The principle is elucidated by *Reade, J.*, in *Froneberger v. Lewis,* 79 N. C., 426, and reiterated in the more recent case of *Sumner v. Sessoms,* 94 N. C., 371.

So far has been carried the doctrine of the right to have set aside a sale made by a trustee to one who was buying for him, under a promise to reconvey, that creditors, not secured in a deed of trust, may demand an annulling of the transaction and an execution of the trust, though all others interested in the disposition of the property were content with what was done, and this even after a long interval of delay. *Elliott v. Pool,* 3 Jones Eq., 17.

Even when the trustee has an interest in the property thus transferred it may be avoided. *Hunt v. Bass,* 2 Dev. Eq., 292; *Boyd v. Hawkins,* 2 Ired. Eq., 304.

The principle underlying the equitable rule is in the language of *Lord Eldon* in *Ex parte James,* 8 Ves., 345: "The purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance"; and he uses substantially the same language in reference to a commissioner in bankruptcy, purchasing through a solicitor, in *Ex parte Bennett,* 10 Ves., 385.

"It is an inflexible rule" are the words of the late Chief Justice, an Associate Justice when they were uttered, "that when a trustee buys at his own sale, even if he gives a fair price, the *cestui que trust* has his election to treat that sale as a nullity, not because *there is,* but because there *may be,* fraud. *Brothers v. Brothers,* 7 Ired. Eq., 150.

In *Joyner v. Farmer,* 78 N. C., 196, after land had been bid
(198) off by an agent of the mortgagee, the mortgagor being *present and not objecting,* and as tenant of the latter remaining in pos-

session for a year, nevertheless as no intervening rights had been acquired by others, and no misconduct in the selling was alleged, the mortgagor was held to be entitled to have a resale because, as was said by *Rodman, J.*, in the opinion, "the interest of a vendor and a purchaser are so antagonistic that the same man cannot be allowed to fill both characters."

"In all cases where a purchase has been made by a trustee," we quote from section 322 of the first volume of *Mr. Justice Story's* excellent treatise on Equity Jurisprudence, "on his own account of the estate of his *cestui que trust,* although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not."

It can make no difference in the result that the same agent employed to make the sale is employed to make the bid for an independent purchaser. There is a legal incompatibility in one man's occupying such adverse relations and representing antagonistic interests in the transaction, and a court of equity will not tolerate the attempt and give efficacy to what is done, when opposed by competent parties in interest. The cases to which the brief of appellants' counsel calls our attention are in no degree hostile to this universally accepted rule. That of *Dexter v. Shepard,* reported in 117 Mass., 480, simply decides that a trustee, expressly authorized under the deed to purchase at his own sale, may exercise the right by employing some one to bid for him at the sale, and so might the court, directing a commissioner interested in the trusts to make a sale, give him authority to bid, as a means of securing himself against loss, as was done in *McKay v. Gilliam,* 65 N. C., 130, although the fact does not appear in the report, and so, we think, may this be allowable with the general consent of all who could otherwise (199) make objection to the sale.

The judgment of the court must therefore be upheld, so far as it charges the legal estate vested in the plaintiff with the trusts of the mortgage.

But inasmuch as it is apparent that a sale of the property—some of it at least—is necessary to discharge the secured indebtedness, the attempted sales being out of the way and there being no rule which requires the personal to be put in front of the real estate in disposing of the property, the judgment, giving a day for redemption, should have directed a sale of the land, unless the debt was before paid as "the *only property in controversy in this action.*"

The case has this aspect: The mortgagee holds, as such, the personal property under the trusts, and has parted with the legal estate in the land by his deed to the plaintiff, with its adhering trusts, and has re-

ceived $500 in payment therefor. There is no marshaling of the funds required. The land has been sold and the title conveyed. The plaintiff occupies the place of the trustee, so far as the mortgagor is concerned, and he has paid money into the trust fund in the hands of the mortgagees which, if the purchase were upheld, would go in diminution of the indebtedness, and if not, must be restored to the plaintiff, and this would be a self-adjustment *pro tanto* should the plaintiff again become purchaser.

The presence of the members of W. F. Kornegay & Co. in the cause is only necessary to compel the restoration of the purchase money in the event of the land being bought by some one else at a sum less than that already paid, or to return to the plaintiff, should he buy, the excess coming to him.

This is the whole extent of the controversy in the action, and it is limited to the land and the disposition to be made of it. It would be unjust to the plaintiff to allow his action to lose its identity by
(200) merging into one of wider dimensions, involving the administration by the mortgagees of the whole trust estate, with which, outside of the land, he has no interest whatever; and this seems to have been comprehended in the action of the court in the form of the judgment. Nor does this practice find any countenance in the provisions of the Code of Civil Procedure in respect to a defense or counterclaim. Section 244 only authorizes a counterclaim when, as "a cause of action," it is one "arising out of the contract or transaction *set forth in the complaint* as the foundation of the plaintiff's claim or connected with the subject of the action," or when the action is on a contract a counterclaim on another and independent contract is allowed. The present counterclaim or defense is not such as the statute authorizes, inasmuch as it goes wholly outside the limits of the complaint, and is foreign to the controversy, which springs out of the plaintiff's action, and introduces a new controversy among the defendants to which he is indifferent. In the case of *Hulbert v. Douglas,* 94 N. C., 128, this practice was declared inadmissible and supported by no known precedent. In this case the court declared that such controversies cannot be "rightfully introduced in the present action, as they are wholly foreign to its purpose, and must be settled in another suit between the defendants themselves. The practice, sanctioned by The Code, does not go so far as to permit the introduction of questions in dispute among the defendants *unless they arise* out of the subject of the action *as set out in the complaint,* and have such relation to the plaintiff's claim as that their adjustment is necessary to a full and final determination of the cause," citing *Hughes v. Boone,* 81 N. C., 204.

So much of the proceeding as looks to an adjustment of controversies arising out of the administration of the whole trust estate by the mortgagees and beyond that which belongs to the land must be declared to be erroneous, and is reversed. The cause will proceed in the court below in accordance with the law as declared in this opinion. (201)

Modified and affirmed.

Cited: Martin v. McNeely, 101 N. C., 638; *S. c.,* 103 N. C., 322; *Whitehead v. Whitehurst,* 108 N. C., 461; *Maxwell v. Barringer,* 110 N. C., 83; *Cole v. Stokes,* 113 N. C., 273; *Jones v. Pullen,* 115 N. C., 471; *Russell v. Roberts,* 121 N. C., 325; *Monroe v. Fuchtler, ibid.,* 103; *Austin v. Stewart,* 126 N. C., 527; *Moring v. Privott,* 146 N. C., 564; *Hayes v. Pace,* 162 N. C., 292; *Owens v. Manufacturing Co.,* 168 N. C., 399; *Thompson v. Buchanan,* 195 N. C., 158.

L. C. CALDWELL AND M. G. CALDWELL, HIS WIFE, v. ELLA V. STIREWALT AND C. L. SUMMERS.

Fraud in Sale of Land—Injunction Until the Hearing.

1. Where a sale and conveyance of land had been made and bonds and mortgage executed to secure the purchase money, and the purchaser brought an action for an alleged fraud in the contract of sale, and asked for a cancellation of the papers, etc., and moved for an injunction to restrain defendant from collecting or disposing of the bonds until the hearing; and the evidence, offered in support of the motion, tended to prove that the action was brought in good faith: *Held,* that though the answer, admitting some of the material allegations of the complaint, denied others, and alleged matters in defense, and put in question the matter in litigation, still the cause of action being serious, and there being a doubt, it was proper to grant the injunction until the hearing.
2. Though one, who would have a sale avoided for fraud, should abandon it on discovering the fraud, and give notice thereof promptly to the vendor, where the purchaser alleges that he did so, and details in his complaint his actions in respect thereto, and on a reasonable interpretation of his conduct, in view of the facts, it is doubtful whether he did or did not abandon the sale, a decision of the question of abandonment should be deferred until the hearing.

MOTION FOR AN INJUNCTION in a civil action heard before *Clark, J.,* at November Term, 1887, of the Superior Court of IREDELL County.

This was an application, by motion, for an injunction to restrain the *feme* defendant pending the action, until the hearing upon the merits,

(202) from selling, disposing of, or collecting the promissory notes and enforcing the mortgage to secure the same, specified in the complaint.

The motion was heard upon the sworn complaint and answers, treated as affidavits, and additional affidavits of the plaintiffs. The following is a copy of the material parts of the complaint:

The plaintiffs, complaining of the defendants, allege:

1. That on 1 January, A. D. 1886, the defendant Ella V. Stirewalt was the owner in fee of a lot of land in the town of Statesville whereon is a dwelling-house, situated on Broad Street, adjoining the lots of C. H. Armfield, A. A. Hampton, and the heirs of T. S. Tucker, deceased, known as the Richard Allison lot, and containing about one acre.

2. That on the day last aforesaid the plaintiff M. G. Caldwell, through the plaintiff L. C. Caldwell, her husband, acting as agent, entered into a negotiation with the defendant Ella V. Stirewalt, acting through her agent, the defendant C. L. Summers, who is her father and who was fully thereto authorized by her, for the purchase of said lot of land, and the plaintiff in said negotiation, through her agent, informed the defendant Ella V. Stirewalt, through her said agent, C. L. Summers, that she desired to purchase said house and lot for a residence for herself and family, and that the main and moving cause for her said purchase was to secure a healthy location for herself and family; and through her agent aforesaid she called the attention of the defendant's agent to a basement under the dwelling-house on said lot, and asked him if the water ever arose or stood in said basement, and declared to him during said negotiation that if the water ever did rise or stand in said basement or get in there in any way she would not purchase said property at any price whatever. The defendant Ella V., through her said agent, declared to the plaintiff's agent that the water never did rise or stand in said basement or get in there in any way; that the same was at all times perfectly dry and fit for use as a cook-room or a place for servants

(203) to sleep; whereas, in truth and in fact, said basement was then, to the knowledge of both of these defendants, and had been for a long time, in such a condition that whenever any considerable or ordinary rains fell the water would rise, run into and stand in said basement, rendering the same totally unfit for use, and rendering the whole house unhealthy to its occupants, damp and unsuitable for a dwelling-house, and especially rendering the rooms immediately above said basement damp and unhealthy; so much so that in ordinary wet weather bed clothing, wearing apparel, and furniture were constantly covered with damp and mould, and the plaintiff M. G. and her said agent, being strangers to said property, believed and relied on the said representa-

tion of said Ella V.'s said agent, and were induced thereby to proceed with said negotiation, and to purchase said property as hereinafter stated.

3. That afterwards, to wit, on the day and year aforesaid, the plaintiff M. G., acting through her said agent, and moved and induced by the fraudulent and false representation of the defendant Ella V.'s said agent that said basement was at all times dry and fit for use as aforesaid, and that the water did not rise or stand therein or get in in any way, bought said property of said Ella V. through her said agent at the price of $2,250, and took a deed therefor from said Ella V. in fee, and gave her three several notes for the same, signed by herself and the plaintiff L. C.; one for $250 due 1 January, 1887; one for $1,000 due same date, and one for $1,000 due 1 January, 1888, all dated 1 January, 1886, and bearing 8 per cent interest from date, and to secure the same gave a mortgage on said house and lot, which is recorded in Book 6, pages 691-2, in the register's office in Iredell County, and that all of said notes are now in the possession of said defendant Ella V. or her said agent.

4. That about the time of said purchase plaintiffs moved into (204) her house on said lot with their family, and in less than a week after said purchase, it having rained, the plaintiffs found that in said basement story the water was standing almost knee deep, and as long as they remained in said house the water would enter and stand in said basement until the same was bailed out or escaped by evaporation, rendering said house damp, unhealthy and unfit for occupation as a dwelling, and rendering plaintiffs' family sick. Plaintiffs repeatedly, during their occupation of said house, called the attention of the said C. L. Summers (defendant Ella V. beng at a distance from Statesville) to the flooded condition of said basement, and requested him to look at the same and take some steps to remedy it, but he persistently refused to look at it or take any steps to remedy it.

5. The plaintiffs continued to reside in said house with their family until about 1 November, 1886, when, finding that said dwelling-house, by reason of the constant flooding of said basement, was unhealthy and totally unfit for a dwelling-house, removed from the same and totally abandoned and surrendered said premises, and notified the said Ella V. through her agent, C. L. Summers, that they abanoned the said contract for the said house and lot, and offered him the key of the house and possession of the premises, having before that demanded of him that all their papers in regard to said trade be canceled and delivered up; and since said 1 November, 1886, the plaintiffs have had no possession of and have exercised no control over said house and lot or any part of it, and that a summons has been issued in this action.

The complaint demands judgment that the sale of the land by the *feme* defendant to the *feme* plaintiff be declared and decreed to be void for fraud alleged, for further specific relief, and for general relief.

The answers of the defendants admit some of the material
(205) allegations of the complaint, deny others, especially those alleging fraud, explain others—admitting them in part and denying them in part, and the *feme* defendant alleges that the *feme* plaintiff knew that the cellar complained of sometimes became wet and damp; that she occupied the house for months, and did not in good faith offer to surrender it or abandon the sale complained of for a long while, etc., etc.

The court made an order granting the motion for the injunction until the hearing, etc., from which the defendants appealed to this Court.

R. F. Armfield for plaintiffs.
D. M. Furches for defendants.

MERRIMON, J., after stating the case: The plaintiffs allege a cause of action, and the evidence produced by them in support of the motion for an injunction until the hearing upon the merits tends strongly to prove that the action is brought in good faith to obtain the relief demanded, and that the *feme* plaintiff may be entitled to have the same substantially.

On the contrary, while the answer admits some of the material allegations of the complaint and other evidential facts, it denies others and alleges matter in defense, and seriously puts in question the matter in litigation. As the matter is serious, and there is doubt, the *feme* defendant should not be allowed to collect or dispose of the notes in question until the cause of action shall be litigated. The case is one that comes within the rule of equity applied in *Harrison v. Bray,* 92 N. C., 488; *Coates v. Wilkes, ibid.,* 376; *Ellett v. Newman, ibid.,* 519; *Whittaker v. Hill,* 96 N. C., 2; *McElwee v. Blackwell,* 94 N. C., 261; *Lewis v. Lumber Co.,* 99 N. C., 11, decided at this term.

(206) It is true, as contended by the counsel for the appellant, that the *feme* plaintiff, if she intended to abandon the sale, should have done so, and given notice of this her purpose promptly on discovering the alleged fraud practiced upon her in bringing it about, as was decided in *McDowell v. Simms,* 6 Ired. Eq., 278; *Alexander v. Utley,* 7 Ired. Eq., 242; *Knight v. Houghtalling,* 85 N. C., 17, and other like cases But she alleges that she did so, and it is not at all clear that under the circumstances she did not. What she did in this connection must receive a reasonable interpretation, in view of the whole facts. That she did or did not abandon the sale as promptly as she should have done

is a question that ought not to be decided now. There is such doubt about it as that it ought to be considered and determined when the case shall be heard upon the merits.

There is no error. Let this opinion be certified to the Superior Court, to the end that further steps may be taken in the action there according to law. It is so ordered.

Affirmed.

Cited: Durham v. R. R., 104 N. C., 264; *Davis v. Lassiter*, 112 N. C., 130; *Moore v. Sugg, ibid.*, 235; *Faison v. Hardy*, 114 N. C., 61; *Yount v. Setzer*, 155 N. C., 219.

WALLACE BROTHERS v. J. R. ROBESON AND OTHERS.

Attachment—Interpleader—Burden of Proof—Practice in Supreme Court—Directing the Verdict

1. Interpleaders in an attachment proceeding having failed to appear and prosecute their plea, at the proper term of the Superior Court, judgment was rendered on their bond. At a subsequent term, they moved to set the judgment aside, which motion was denied; but the judgment was set aside to the extent that an issue was ordered to be submitted as to the ownership of the property attached. At a still subsequent term, this issue was tried, and the interpleaders appealed to the Supreme Court, from the judgment then rendered. In the Supreme Court it was held, that the judgment refusing the motion to set aside the judgment rendered on the bond could not be reviewed on such appeal.

2. In proceedings in attachment, one who interpleads under section 331 of The Code, is *an actor*, upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff.

3. Where an issue is submitted to the jury and the party upon whom rests the burden of proof refuses to offer any evidence, it is proper for the judge to direct the jury to answer the issue in favor of the other side.

CIVIL ACTION tried before *Connor, J.*, and a jury at February (207) Term, 1888, of IREDELL Superior Court.

The plaintiff brought this action against J. R. Robeson, in the Superior Court of the county of Iredell, to recover the money alleged to be due upon certain promissory notes specified in the complaint, and in the action sued out a warrant of arrest and also a warrant of attachment, which latter was levied upon certain goods alleged to be the property of the defendant in the action. The plaintiffs afterwards obtained judgment for their debt.

The appellants claim the goods so levied upon and interpleaded as allowed by the statute (The Code, secs. 331, 375). They allege "that on 22 June, 1885, a stock of goods, wares and merchandise belonging to them, and of which they had possession in their storehouse in said county of Yancey, was seized and taken by the sheriff of said county, and they turned out of said house, under an attachment issued from the Superior Court of Iredell County in favor of the plaintiffs, Wallace Brothers, and against the defendant, J. R. Robeson, parties to the above entitled action.

Affiants further state that they are the owners of said stock of goods, and are lawfully entitled to the possession thereof, and also the building or storehouse in which the goods are kept.

(208) That they purchased said stock of goods from the defendant J. R. Robeson, and also his interest in the storehouse, on 15 June, 1885, and at the same time took possession and control of the whole of said property.

That the purchase of said property was *bona fide,* made upon and for good consideration by these affiants, who took the same innocently without any knowledge or notice of any fraudulent intent on the part of defendant Robeson as alleged by plaintiffs, Wallace Brothers, as alleged in their affidavit."

At the August Term, 1887, of the court the appellants, interpleaders, failing to appear and prosecute their plea, the court gave judgment upon their bond in favor of the appellees.

At the November Term of the court of 1887 the appellants moved to set the judgment against them aside because of excusable neglect and irregularity affecting the judgment. The court, after reciting the facts, denied the motions, as follows:

"It is therefore adjudged by the court that the motion to set aside the judgment for excusable neglect, and to allow the said defendants to plead and answer and to set aside the judgment for excusable neglect and surprise, be and the same is denied.

"It is further adjudged that the motion to set aside the judgment for irregularity be allowed, to the extent that an issue be submitted to the jury to pass upon the said interpleader of Griffith and Higgins, who claim the said property agreeably to sections 331 and 375 of The Code.

"And it is further adjudged that the motion of the defendant G. D. Ray to interplead and set up title and claim the property attached, as aforesaid, in Exhibit 'C' as his own be denied on the ground that he has heretofore signed the forthcoming bond of Higgins and Griffith, and signed and filed an affidavit in the cause setting up title thereto in Higgins and Griffith. His motion is also refused, as a matter of

(209) discretion, after so long a delay to apply."

Afterwards, at the February Term, 1888, of the court, the case was tried. The following is a copy of the material facts of the case settled on appeal:

The plaintiffs' action was instituted June, 1885, and warrants of arrest and attachment sued out, and by successive steps judgments for the debt sued on and on the bail and attachment bonds, rendered.

After the writ of attachment against the defendant Robeson's property was levied the interpleaders, Joseph Higgins and W. E. Griffith, filed an interpleader in the cause, claiming the attached property as their own.

At November Term, 1887, of this Court, Judge Clark modified the judgment against the attachment bond which had been obtained at the August Term, 1887, of this Court, as follows, to wit: "To the extent that an issue be submitted to the jury to pass upon the said interpleader of Griffith and Higgins, who claim the said property, agreeably to sections 331 and 375 of The Code."

From this judgment and from the other judgments in the cause theretofore rendered no appeals have been perfected by any of the defendants or the interpleaders.

The cause coming on to be heard at this term solely upon the said interpleader of the said Griffith and Higgins and upon the issue directed by Judge Clark, as above stated, the counsel for the interpleaders stated that they only wished to raise the question whether the said interpleaders were *bona fide* purchasers of the property attached, for value and without notice of the fraudulent character of the assignment; whereupon the court drew and submitted the following issue:

"Did Higgins and Griffith purchase the property described in the complaint (interplea) for a valuable consideration and without notice?"

To this issue the plaintiffs objected. The interpleaders insisted upon the issue as thus framed. (210)

The interpleaders insisted that, upon this issue, the burden of proof was upon the plaintiffs.

The court held that the burden was upon the interpleaders. The interpleaders excepted.

The interpleaders declined to introduce any testimony to support the issue, whereupon the court directed the jury to answer the issue in the negative.

The verdict was rendered accordingly.

The interpleaders moved for a new trial. Motion denied. Judgment was then rendered for the plaintiffs. Appeal by the interpleaders.

J. B. Batchelor and John Devereux, Jr., for plaintiffs.

C. M. Busbee for interpleaders.

MERRIMON, J., after stating the facts: It was contended on the argument before us by the learned counsel for the appellants that they have the right in this appeal to insist that the court below erred in denying their motion to set aside the judgment entered against them at the August Term of that court of 1887. Clearly they have no such right. No error was assigned in that respect, nor was there any appeal from the judgment, which was final. Indeed it seems that they were well satisfied, inasmuch as the court somewhat irregularly allowed an issue of fact to be submitted to a jury that afforded them fair opportunity to prove their title, if they had any, to the goods in question. The appellees objected to the issue, the appellants insisted upon it, their counsel declaring that they only wished to raise the question presented by it. Notwithstanding their default, in the course of the action the court, anxious to do them justice, allowed them the largest opportunity to establish their claim.

(211) The single question presented for our decision by the assignment of error is, On whom did the burden of proof of the issue submitted to the jury rest? We cannot hesitate to decide that the court below held properly that it was upon the appellants.

The statute (The Code, sec. 331) provides, in respect to warrants of attachment, that "when the property taken by the sheriff shall be claimed by any person other than the plaintiff or the defendant, the claimant may interplead, upon his filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title," etc. Thus the person interpleading is allowed to come into the action in the course of it, not as a defendant or an ordinary plaintiff, but as an actor—in a sense a third party, alleging not simply that he is the owner of the property, but he must allege "his title and right to the possession of the property, stating the grounds of such right and title." Wherefore such strictness and particularity required of the person interpleading? Is he required thus to allege his title and right of possession and the grounds thereof affirmatively, simply to compel the plaintiff in the action to disprove the same negatively? Rather, is it not the purpose of the statute to allow him to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring? This seems to us to be the just and reasonable view and the one that harmonizes with well settled principles of law applicable. *Claywell v. McGinsey,* 4 Dev., 89; *Churchill v. Lee,* 77 N. C., 341; *Hudson v. Wetherington,* 79 N. C., 3; Bailey's *Onus Probandi,* 27; 1 Gr. on Ev., 74; Abb. Tr. Ev., 715.

Moreover the plaintiff, by his action—the warrant of attachment and the levy of the same on the property as that of the defendant—has acquired some right to the property for the purposes of the (212) action that a party interpleading should ordinarily be required to overthrow by proving his better title, if he has one. In such case the presumption is that the property was properly levied upon as that of the defendant in the action; the warrant commanded the sheriff to levy upon his property and not that of another.

The counsel of the appellants laid much stress on the fact that they were in possession of the property when the sheriff levied upon it; he insisted that such possession was evidence of title. If this be granted, the burden was on the appellants to prove such possession. It was not admitted, as alleged, but if it had been, evidence of the admission should have been produced by the appellants. But evidence of mere possession would not have been sufficient; the appellants were bound to prove their title and right of possession of the property, substantially as alleged by them and as required by the statute. *Boon v. Chiles,* 10 Pet., 211.

There is no error and the judgment must be

Affirmed.

Cited: Wilson v. Chichester, 107 N. C., 389; *McQueen v. Bank,* 111 N. C., 516; *Grambling v. Dickey,* 118 N. C., 989; *Wagon Co. v. Byrd,* 119 N. C., 462; *Redman v. Ray,* 123 N. C., 507; *Tyler v. Capehart,* 125 N. C., 70; *Cotton Mills v. Weil,* 129 N. C., 455; *Graves v. Currie,* 132 N. C., 311; *Maynard v. Ins. Co., ibid.,* 713; *Mfg. Co. v. Tierney,* 133 N. C., 635; *Furr v. Johnson,* 140 N. C., 160; *Patrick v. Baker,* 180 N. C., 592.

WM. REDMOND AND F. M. SCOTT v. EDWARD STEPP.

Boundary—Natural Objects—Course and Distance—Description in Complaint—New Trial—Motion in Arrest—Newly Discovered Evidence.

1. When the question is one of *boundary* of a tract of land conveyed by a grant or deed, the court decides what are the boundaries, and the jury ascertain where they are. If besides course and distance, natural objects, marked trees or lines of adjacent tracts are called for, these control course and distance; but if they cannot be found, the course and distance must guide in fixing the boundary.

2. The two last calls in a grant being, "thence south 106 chains to a stake in the South Carolina boundary line; thence with said line east to the

beginning," and it being conceded that such boundary line was south of the State line as now fixed, it was for the jury to fix that line as recognized at the date the grant was issued, and according to its intent, as appearing by reference to natural objects, etc., as then existing, rather than from course and distance, in case of conflict between them. But if that line could not be so ascertained, it was proper to follow course and distance, and the last corner thus being fixed, run direct to the beginning corner.

3. Land sued for being described in the complaint as Patent 250, and the grant having been introduced and a witness allowed to testify as to the identity of the land, without objection, the vagueness of the description was no ground for new trial, after a verdict, nor for a motion in arrest of judgment. If the objection had been made in due time, it could have been met by an amendment of the complaint.

4. It is in the discretion of the court below to refuse, or to grant a new trial, because the verdict was *against the evidence*, as when it was *against the weight* of the evidence, and no appeal lies from its exercise.

5. When new evidence is discovered during the term, a motion for a new trial on account of it must be made to the court which tried the case, and if denied, it will not be heard in the Supreme Court.

(213) CIVIL ACTION for recovery of land, tried before *Graves, J.*, at Spring Term, 1886, of the Superior Court of HENDERSON.

The facts appear in the opinion, in which the plat, on page 214, is referred to.

No counsel for plaintiffs.

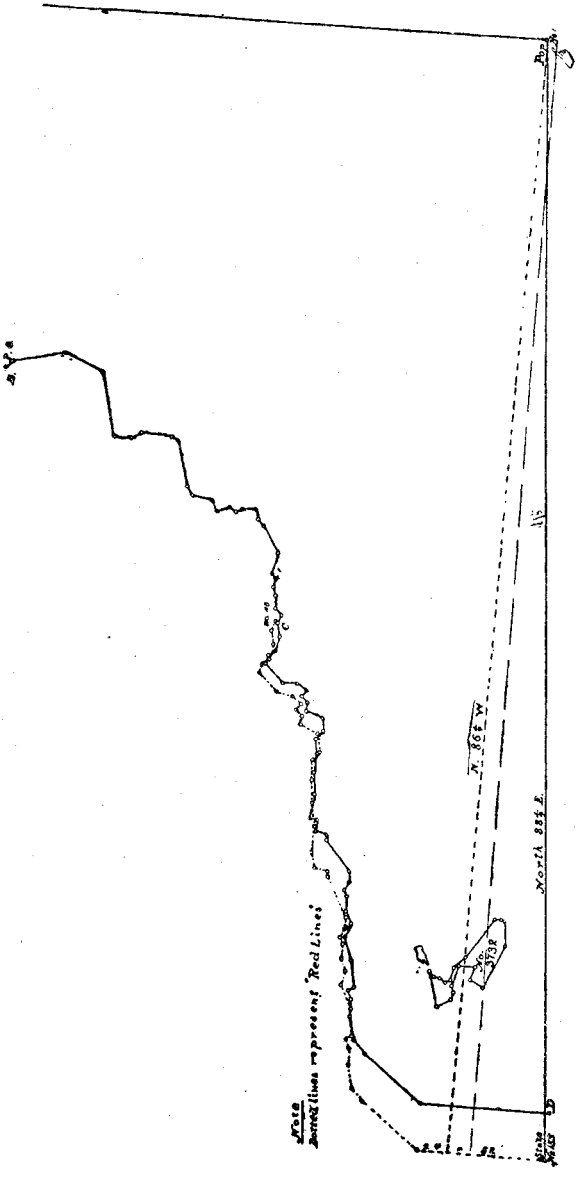
T. F. Davidson and S. V. Pickens (by brief) for defendants.

SMITH, C. J. The object of the action, begun in March, 1882, is to establish title to and recover possession of a tract of land described in the complaint as "known as patent or grant No. 250," containing 36,494 acres (except certain tracts within the designated boundaries be-
(215) fore granted to others), issued on 26 November, 1796, to one Tench Coxe.

From him, it is not disputed, an unbroken line of conveyances has transmitted title to the plaintiffs.

The controversy between the opposing parties is one of boundary, and whether it includes a tract afterwards granted as No. 3732, of which the defendant was in the occupation, claiming it as his own.

The lines enclosing the large area in the grant to Coxe are very numerous, calling at times for natural objects, and again pursuing course and distance only, without other guides to their location, yet the beginning point is fixed at a conceded place, described as "beginning at a large poplar, marked on the north side R. H., on the west side and on


N. 86° W.
North 88½ E.
Note
Sometimes represent Red Lines

the east side R., standing on the South Carolina boundary on a rich level, on the top of a high ridge near a gap on said ridge on the east side of said gap below Williams' Mill, and runs north 32 chains to Pacolet crossing," etc.

The last call but one is "thence south 106 chains to a stake in the South Carolina boundary line," and the last, "thence with said line east to the beginning." The excepted tracts are numerous, and in the aggregate contain about 3,000 acres.

The controversy was about the location of the State boundary, as along it runs the line last called for in the grant to Coxe, and it is therein represented as running a due west course from the terminal point next preceding the last, an undefined distance along the State boundary to the initial point, or reversing the course, due east from the initial point to the next corner. If, therefore, the initial point is, as seems to be conceded, at the place on the diagram marked No. 1, Pop., the actual line dividing the territory of the two States, if ascertained, as it existed in 1796, when the grant issued, must be followed, and is the southern boundary of the land conveyed; and if it cannot be ascertained, the line must be run a course east and west, and this is coincident with
(216) and determines, in the absence of other evidence showing a different location, the position of the said dividing State boundary.

The plaintiffs' contention is that as the runnings around the tract bring you to the terminus of the dark line at D, the last line must run therein direct to the beginning, and that this is the South Carolina line.

The defendant insists upon stopping the line next to the last, at its intersection with the red line, and thence direct to the beginning. Neither of these runs a course directly west, the red line as represented in the survey, north 86¼ west, and the black line in a reversed direction north 88¼ east, so that each diverges from a west course, but the plaintiffs' in a less degree than the other.

At the close of the evidence the defendant submitted a proposed written instruction to be given to the jury, and it was so given, in these words:

"1. In doubtful questions of location as to lines, the intent of the contracting parties at the time controls everything but calls for a natural boundary, and that the original plat or diagram made at the time and accompanying the grant is evidence of such intent.

"2. If the first and last corners called for in the plaintiffs' grant are in the South Carolina boundary line, and the last call from one of these points to the other with the said South Carolina boundary line, the burden is on the plaintiff to locate said line so as to include the possession of the defendant, and on failing to satisfy the jury of such the plaintiffs cannot recover."

This instruction was not given, and to the refusal of the court so to charge the defendant enters his first exception.

Instead thereof, upon this point, the jury were told, in substance—for we do not undertake to set out the charge, which was very full and extended in words, but so much of it as will illustrate the exceptions—that the plaintiffs must locate the land conveyed in the grant to Coxe and show that the defendant is in possession of some por- (217) tion of it or they fail in their action. In determining the position of the surrounding lines, for the subsequent deeds, it is not denied, embrace the land in the patent, the rule of law is that the court adjudges what are the boundaries of a conveyed tract of land, and the jury ascertain where they are. If only course and distance are given, and the beginning is found, the line will run by course and distance. But when, in addition to course and distance, natural objects, marked trees or lines of other tracts are called for, these, when shown, will control course and distance, and must be reached by a further extension or shortening of the line, so as to reach such objects, trees, or adjoining tracts. If none such can be found, then the course and distance must be the guide in fixing the boundary. It is conceded that the dividing State boundary, as now established, is south of the *black* line claimed by plaintiffs, but the defendant insists, as it existed at the time of the grant, it was further north at the red line. Our inquiry is, What lands were covered by the grant when it was made? If, guided by the instructions given, the jury shall ascertain the recognized line between the States at the period of its issue, and that it was the intent of the parties to run to and stop at that line, then such must be the effect, but this intent must be ascertained from the provisions of the instrument and the places of the natural objects, marked trees, or adjoining tracts, as they *then existed.* If there was then a line known as "the South Carolina line," by which it is designated in the grant, that line, when located, will prevail over course and distance, in case of conflict between them. But if the jury are not satisfied upon this point from the evidence, course and distance must be followed, and when the last corner is reached the line must run direct to the beginning.

To this responsive instruction, in place of that asked and re- (218) fused, the defendant's second exception is entered.

After verdict the defendant moved for a new trial for the reason that the court permitted evidence to identify the land described in the complaint as Patent No. 250 by hearsay, or reputation, because of the vagueness of the descriptive reference.

The motion was refused, the grant having been introduced and the witness Watkins allowed to testify to the identity without objection. This is the defendant's third exception.

The defendant also asked that the verdict be set aside:

1. Because it was against the evidence under the instructions of the court.

2. For error in refusing an instruction and in that given.

3. For newly discovered evidence which, if heard, would change the result of the finding by the jury.

This application being also denied, the defendant moved in arrest of judgment because of the vague and indefinite designation of the land in the complaint.

This motion was also refused, and from the judgment rendered upon the verdict the defendant appealed.

1. The charge which separates the functions of the court from those of the jury in passing upon questions of boundary has the clear sanction of past adjudications, and is, upon reason, well settled. *Tatem v. Paine,* 4 Hawks, 64; *Burnett v. Thompson,* 13 Ired., 379; *Marshall v. Fisher,* 1 Jones, 111; *Spruill v. Davenport, ibid.,* 203; *Clark v. Wagoner,* 70 N. C., 706; *Dickson v. Wilson,* 82 N. C., 487.

The instruction has equally the support of past rulings as to the runnings when the calls are by course and distance, and also refer to natural objects or well-known lines of adjacent tracts and the predominance of the latter, when they cannot be reconciled *Dickson v. Wilson, supra; Miller v. Bryan,* 86 N. C., 167; *Jones v. Bunker,* 83 N. C., 324; *Strickland v. Draughan,* 88 N. C., 315; and among the older cases,

Cherry v. Slade, 3 Murph., 82; *Haughton v. Rascoe,* 3 Hawks,
(219) 21; *Hurley v. Morgan,* 1 D. & B., 425; *Brooks v. Britt,* 4 Dev.,
481; *Slade v. Neal,* 2 D. & B., 61; *Becton v. Chesnut,* 4 D. & B., 335.

The charge covers so much of the second instruction as the defendant could properly ask, and there is no error to be found therein.

Third Exception. The objection, first made after verdict, to the indefinite terms in which the complaint describes the lands trespassed upon, is sufficiently answered in the fact that the grant or patent, referred to by its number, was produced in aid of the reference, and testimony given as to its location and lines, without opposition, to the jury. Thus the patent is incorporated in the complaint, and the trial proceeds as if the complaint specially and in detail set out the lines. There was no surprise, and the defendant was in no way damaged in his defense. If the objection had any force it would be a case for amendment under sections 269 and 270 of The Code.

The other grounds for setting aside the verdict are also untenable.

(*a*) The objection that the verdict is against the evidence is matter belonging to the discretion of the judge, and is not within our appellate jurisdiction, whether exercised discreetly or not.

When it is alleged to be against the evidence, as against *the weight* of the evidence, the new trial, for this cause, can only be granted in the court below. *Alley v. Hampton,* 2 Dev., 11. See, also, in this connection in reference to the effect, as evidence of boundary of the plat annexed to a grant, *Pres. and Dir. Lit. Fund v. Clark,* 9 Ired., 58.

(*b*) The application based upon newly discovered evidence must be disposed of in a similar manner.

Where the new evidence is discovered *during the term* it must be made, as in this case it has been made, to the court that tried the cause; the decision, whether granting or refusing the new (220) trial, is conclusive of the result. It is necessary to refer to but a single case where the subject is discussed and the rule declared. *Carson v. Dellinger,* 90 N. C., 226, affirmed in *Munden v. Casey,* 93 N. C., 97.

The rule which demands a *quantum* of evidence not possessed at the trial as a condition for vacating the verdict, according to the established practice is one acted on by the court in which the cause is tried, and involves no assignable error which this Court can correct, for this Court acts upon the law arising upon *facts* found, not upon *evidence* of the facts, and however strong the proposed proof may be we cannot overrule the action of the trying court and reverse what the court does or refuses, however *positive the evidence* may be.

There is no principle of law involved in his ruling and our jurisdiction is only to correct, when properly presented, erroneous rulings in law.

The motion in arrest of judgment is disposed of in what has been already said.

There is no error and the judgment is

Affirmed.

Cited: Davenport v. Terrell, 103 N. C., 53; *Allen v. Sallinger,* 108 N. C., 161; *Humphrey v. Church,* 109 N. C., 139; *Buckner v. Anderson,* 111 N. C., 576; *Boomer v. Gibbs,* 114 N. C., 81; *Norwood v. Crawford, ibid.,* 521; *Brown v. House,* 118 N. C., 881; *Higdon v. Rice,* 119 N. C., 625; *Edwards v. Phifer,* 120 N. C., 406; *Bowen v. Gaylord,* 122 N. C., 820; *Echerd v. Johnson,* 126 N. C., 411; *Turner v. Davis,* 132 N. C., 189; *Abernethy v. Yount,* 138 N. C., 342; *Moore v. McClain,* 141 N. C., 479; *Gudger v. White, ibid.,* 519; *McNeely v. Laxton,* 149 N. C., 335; *Mitchell v. Wellborn, ibid.,* 352; *Bowen v. Lumber Co.,* 153 N. C., 369; *Miller v. Johnston,* 173 N. C., 56; *Geddie v. Williams,* 189 N. C., 336.

ALLISON PERKINS AND OTHERS v. JESSE J. PRESNELL AND ANOTHER.

Power of Sale in a Will—Statute of Frauds, Section 1554, The Code.

1. When, by the terms of a will, power is given to an executor to sell certain lands, the lands descend to the heirs of the devisor until divested by an effectual exercise of the power.

2. Where an executor, having power conferred upon him by the will to sell certain land, exposes the land to public sale, announcing at the time that no deed or contract for title would be given until the price was paid, and the land was bid off by a purchaser, who gave his bond for the price, but received no written acknowledgment of his purchase from the executor: *Held*, that the sale was a nullity under the statute of frauds, and the heirs of the devisor could recover the possession from the purchaser or those claiming under him.

(221) CIVIL ACTION (ejectment) tried before *MacRae, J.*, at Spring Term, 1887, of BURKE Superior Court.

Judgment for plaintiffs. Defendants appealed. The facts are stated in the opinion.

C. H. Armfield for plaintiffs.
C. M. Busbee for defendants.

SMITH, C. J. The action is prosecuted by the plaintiffs to recover possession of the rectangular tract of land described in the complaint and withheld by the defendants, the title to which is brought into controversy in the pleadings, and the only issues submitted to the jury were:

1. Are the plaintiffs the owners and entitled to the land mentioned in the complaint? The response being in the affirmative.

2. What damages, if any, have the plaintiffs sustained? The answer returned: "One penny."

On the trial the plaintiffs produced in evidence a grant for 100 acres, issued in 1803 to Benjamin White; a deed for the same land made in 1812 by the grantee to Alexander Perkins, under whom the plaintiffs claim, and then proved by a witness these facts: The said Alexander Perkins died a few years before the late Civil War, having had three children—Theodore, Thaddeus and Clarissa. The two sons died in the lifetime of their father, the said Theodore leaving one daughter, Clara, who married and died, as did her husband, without issue. Thad-
(222) deus, the next son, left four children, who, except a daughter, are plaintiffs in the action. This daughter, Clara, married Horton, and upon his death married the defendant Jesse J. Presnell, and then died herself, leaving no issue. In answer to this *prima facie* show-

ing of title the defendants introduced the will of the deceased ancestor, Alexander Perkins, admitted to probate in 1857, wherein Tod R. Caldwell is nominated executor, so much of which as bears on the matter in issue is contained in the second clause or item, and is as follows:

"My will and desire is that all my debts be paid by my executor as soon as funds may come into his hands sufficient to pay the same, and for this purpose he is to sell the following negro slaves," etc. (designating them by name, and followed by the enumeration of other property, personal and real), adding, "also one other tract of land, containing about one hundred acres, lying on the head branch of Camp Creek, purchased by me from Benjamin White, and I desire my executor to apply the proceeds of the sale of the foregoing property and lands to the payment of my debts and expenses of executing this will; and if after paying the same there remains a surplus in his hands it shall be disposed of as hereinafter directed."

The defendants exhibited a deed executed in 1863 by Isbell and other heirs at law of Horton, but if they were the children of his wife, Clarissa, the fact does not appear, conveying the land in dispute to the defendant Presnell.

The following paper-writing was filed as "facts admitted":

"It is admitted that there was a sale of said land at auction, but that it was announced by the executor at the sale that no bond would be given nor deed made till purchase money was paid for said land; that Horton bid off the land and gave his note, which note is now in the hands of the administrator d. b. n. c. t. a. of said testator, who is a party plaintiff to this action though not in that capacity. It is admitted that all of the plaintiffs were of full age before the commencement of this (223) action; that no deed for the land has ever been made by executor or administrator *de bonis non,* nor has the purchase money ever been paid to them or either of them.

It was admitted that the plaintiffs were heirs at law of Alexander Perkins.

The presiding judge understood that it was admitted that the debts of the Perkins estate had all been settled; that it was not necessary to sell this land to pay debts.

The contention of defendant Presnell was that by the will of Alexander Perkins the title to the land in dispute passed out of the heirs at law of Alexander Perkins, or had never vested in them, and that they could not recover as his heirs; and further, that defendant Presnell had title by adverse possession of over twenty years.

The presiding judge being of opinion that the plaintiffs had shown title to the land in controversy in themselves as heirs of Alexander

Perkins, and that there was no evidence of continuous adverse possession of said land in defendant for twenty years, nor of such possession under color of title for seven years, instructed the jury that plaintiffs, having shown title in themselves, were in law entitled to recover possession of the land.

The jury found the issues in favor of the plaintiffs. Judgment was rendered for plaintiffs. Defendants appealed to the Supreme Court.

The defendants' claim of title, acquired by possession, having been abandoned, it becomes unnecessary to consider the voluminous testimony reported in the case sent up upon that part of the defense, and we shall confine what we have to say to the other defense.

The defendants' contention in the record is that the legal estate of the deceased was not at his death transmitted to the heirs at law, or if it was it was as an equitable estate, equally a bar to the recovery (224) of possession as would be a legal estate divested, and by the executor's sale passed to Horton, and by his heirs conveyed to the defendant Presnell.

Assuming the attempted sale to be a nullity under the Statute of Frauds, the title to the land in controversy, unless embraced in a clause in the 12th section of the will, descended to the heirs at law; and if included in the words, disposing of "all the balance of the lands lying in Burke and Caldwell counties, not heretofore disposed of in the preceding clauses of this will," therein found, the estate in the tract is devised to the executor in trust for the use of his four grandchildren—Allison, John, Thomas and Thaddeus—who are the plaintiffs. The solution of this inquiry is not necessary to a decision of the case on appeal. If the executor is invested merely with a power of sale and the particular land, as specifically mentioned in the second clause, is not embraced in the term "balance," or, more properly speaking, the residue of lands in the counties specified, nor elsewhere devised, the legal estate would descend to and remain in the heirs at law until divested by an effectual exercise of the power conferred upon the executor. This is ruled in *Ferebee v. Proctor,* 2 D. & B., 439; *McLeran v. McKethan,* 7 Ired. Eq., 70; *Beam v. Jennings,* 89 N. C., 451, and in *Munds v. Cassidey,* 98 N. C., 558.

If it be a part of the residue, the equitable estate vested at once in the grandson's devisees, and the legal estate also upon the arrival of Thaddeus at full age, before which only the legal title was to reside in the executor.

These difficulties being out of the way, the inquiry is (and such was the contention for the appellants), Did the parol sale, even though the note of the purchaser Horton was taken for the price, pass any estate

of any kind to obstruct the recovery of possession? And especially when the purpose of the sale is to pay debts and charges of administration, and the debts had all been settled, and there was no necessity for making the sale? It is too plain for argument that the legal (225) estate could only be conveyed by a deed in proper form, executed and registered, and it is not less so that no equitable estate can be created under a contract not capable of being enforced in equity against the vendor. There must be a *valid obligation* entered into, and to this it is indispensable that it should be in writing "and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." The Code, sec. 1554. It is no answer to say that a party may assent to perform the contract; he must so *bind himself* that he can be made, against his will, to perform it, or become answerable in damages if he refuses. As the sale is repudiated, the note for the purchase money should be surrendered.

There is no error and the judgment must be and is

Affirmed.

Cited: Farabow v. Green, 108 N. C., 343; *Speed v. Perry,* 167 N. C., 129; *Barbee v. Cannady,* 191 N. C., 533.

W. B. ALLEN v. ROBERT STRICKLAND.

Notices; Form and Service of—Personal Property Exemptions; Allotment of—The Code, Secs. 519, 597, 228—Alias Process.

1. Notices of dissatisfaction with allotment of personal property exemption, under section 519 of The Code, cannot be served by mail or given orally.

2. When a statute requires notice to be given, the notice must be in writing, addressed to the proper person, contain an intelligent and sufficiently expressed statement of the matter to be communicated, signed by the party giving it or his attorney, served in such way that the court can see that it has been served, and the original, or a copy, properly authenticated, returned into court.

3. Section 597 of The Code is of general application as to notices in judicial proceedings, and its requirements are essential to a valid notice.

4. The proof of the service of a notice must be such as is required by section 228 of The Code.

5. A notice must be given as the law directs or allows, otherwise the party notified is not bound by it.

6. Since The Code there is no statute allowing judicial notices to be served by mail, and in the absence of a statute such a service is void.

7. *Semble:* If a notice is duly placed in the hands of a proper officer, and he fails to serve it in time, an *alias* may be ordered. But a notice served by the party in a manner not recognized by law, is in law *no notice*, and therefore no *alias* can be ordered.

(226) CIVIL ACTION tried before *Merrimon, J.*, at April Term, 1887, of FRANKLIN Superior Court.

Judgment dismissing the action. Defendant appealed.

The following is a copy of the material parts of the case stated on appeal:

W. B. Allen obtained judgment on 2 November, 1886, before a justice of the peace against Robert Strickland, and procured execution to issue thereon to F. C. Holden, the constable. Strickland claimed his personal property exemption. The constable summoned as appraisers and assessors John Knight, Nathan May, and C. C. Jeffreys who, on 3 November, 1886, appraised and allotted to the defendant certain articles of personal property as his exemption. They made return of their proceeding to the justice's court, and the constable levied on the excess of personal property.

On 10 November, 1886, the defendant, being dissatisfied with the valuation and allotment of the appraisers, filed with the clerk of the Superior Court a transcript of the return of the appraisers, and with it a statement in writing of his objection to said return; that at the same time the defendant, by his attorney, prepared and signed a written notice for the plaintiff in the execution and the constable, of the defendant's dissatisfaction and exception to the valuation and allotment

(227) of the appraisers, and that his exceptions would be filed, with a transcript of the return, with the clerk of the Superior Court.

The attorney of the defendant, on the same day, took the said written notice to the attorney of the plaintiff in the case of *W. B. Allen v. Robert Strickland* and told him what the notice was, and showed the same to the said attorney, but did not leave it with him, and asked him if he would accept service thereof. He replied that he preferred that notice should be sent to Mr. Allen, meaning thereby the plaintiff.

The attorney of the defendant then, and on the same day, mailed a copy of said notice to Allen, and a copy also to Holden, the constable, directed to their postoffice, Youngsville, on the Raleigh & Gaston Railroad, distant from Louisburg sixteen miles, and between which two places there is a daily mail. Allen received the notice within ten days

after the allotment of the exemption; but Holden, although he resided within one mile of the postoffice, did not receive his until the eleventh day after the allotment.

The clerk of the Superior Court placed the case on the Civil Issue Docket for the next term of court, which commenced on the ..... of January; that at said term the attorneys for the plaintiff Allen entered a special appearance, stating that they did so for the purpose of moving to dismiss, on the ground that notice had not been properly served.

The defendant moved for *alias* notices. The court being of opinion that notice had not been served, that it had not the power to allow the defendant's motion for *alias* notices, and resting his position on that ground and stating that if it were in his discretion he should feel it his duty to allow the motion, refused the motion of the defendant and allowed the motion of the plaintiff, and gave judgment dismissing the action.

To the refusal of the court to allow defendant's motion and in allowing plaintiff's motion, and to the judgment dismissing the (228) action, the defendant excepted and appealed.

F. D. Spruill and N. Y. Gulley for plaintiff.
Charles M. Cooke for defendant.

MERRIMON, J., after stating the facts: We think that the appellant failed to give the notice to the appellee and the constable of his dissatisfaction with the valuation and allotment of the appraisers of his personal property exemption required by the statute. (The Code, sec. 519.)

Notice in judicial proceedings is important. In many cases it is the means whereby the jurisdiction of the court attaches to the party, as in this case, and generally it gives vitality and efficiency to important action of the court in the course of the action or proceeding. It is not to be treated lightly and as of slight moment. When, therefore, ordinarily a statute requires such notice to be given it is not meant that the party to whom it is to be given shall simply have information given orally or in writing, but it must be given in writing, addressed to the proper person, contain the substance, intelligently and sufficiently expressed, of the information to be communicated, signed by the party giving it, by himself or his attorney, and served in such way as that the court can see and learn that it has been served; and, moreover, it or a copy of it must be returned into court, properly authenticated, unless it shall in some way be waived, as by the appearance of the party to be affected by it.

The statute (The Code, sec. 597), which is of general application as to notice in judicial proceedings, provides that: "Notices shall be in writing; notices and other papers may be served on the party or his attorney personally, when not otherwise provided in this chapter."

The chapter then provides that service may be made by leaving the notice in the cases provided for at the office of the attorney, the
(229) residence of the person to be notified, by publication, and particularly how subpœnas may be served. But generally the notice must be served personally, and the statute (The Code, sec. 228) provides that "Proof of service of the summons or notice must be:

"(1) By the certificate of the sheriff or other proper officer.

"(2) In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.

"(3) The written admission of the defendant."

The service of notice, made in a way and manner recognized and sanctioned by the law, is an essential requisite of it; without this it is ineffectual for the purpose intended and void. Unless it is given as the law directs or allows, the party to whom it is given is not bound to recognize or act upon it, nor indeed is it notice. It is the legal sanction that gives the notice, in sufficient form and substance, life and efficacy. Wade on Notice, secs. 1293, 1295, 1335, 1342.

Now, neither any statutory provision nor any settled practice in this State within our knowledge, since the enactment of The Code, warrants the service of notice in judicial proceedings through the mails. In the absence of statutory regulation such method would be impracticable. Practically it could not contemplate a return of the notice or a copy of it, and it would not be sufficient proof of service of it to show by affidavit that it was mailed at a particular time and postoffice to the address of the party to be charged by it.

The appellant gave no notice to the adverse party and the officer within ten days, as required by the statute. An *alias* notice was not, therefore, in order or allowable. It may be that if a sufficient notice had been placed in the hands of a proper officer, to be served by him on the party to be charged therewith, and he had returned the same unexecuted, that an *alias* notice might have been allowed, and thus the right of the party giving it would be preserved; but any question as to that is not now before us. The appellant having allowed the
(230) time within which he might have given notice to lapse, the court had no authority to revive and give effect to his lost right. Judgment affirmed.

No error. Affirmed.

Cited: S. v. Johnson, 109 N. C., 854; *Cummings v. Hoffman,* 113 N. C., 268; *Forte v. Boone,* 114 N. C., 177; *McNeill v. R. R.,* 117 N. C., 643; *Smith v. Smith,* 119 N. C., 317; *Martin v. Buffaloe,* 128 N. C., 308; *McKeithen v. Blue,* 142 N. C., 362; *Lowman v. Ballard,* 168 N. C., 18; *Herndon v. Autry,* 181 N. C., 273; *Hatch v. R. R.,* 183 N. C., 621.

J. C. HORNER v. A. H. A. WILLIAMS, LESSEE OF THE OXFORD AND HENDERSON RAILROAD.

Contributory Negligence—Stock Law.

1. It is not contributory negligence in a plaintiff to put cattle in an enclosure of forty acres through which a railroad runs. The fact that the "stock law" was in force where the enclosure was situate, makes no difference.

2. Negligence on the part of an injured party will not bar a recovery of damages caused by the negligence of another, unless the negligence of such injured party be the *direct* and *proximate* cause of the injury. *Farmer v. R. R.,* 88 N. C., 564, approved.

CIVIL ACTION originally commenced before a justice of the peace for the county of GRANVILLE to recover the value of plaintiff's cow, killed on defendant's road, and carried by appeal to the Superior Court and tried before *Shepherd, J.,* at Fall Term, 1887, of said court.

It was admitted that the plaintiff's cow was killed by defendant's railroad a month before this action was brought; that the value of the cow was $50; that Granville is a stock-law county, and that defendant's railroad is duly incorporated. The defendant denied the negligent killing and also alleged contributory negligence, and two issues were submitted:

1. Did defendant kill plaintiff's cow through negligence?

2. Was the killing caused by the negligence of the plaintiff (231) contributory thereto?

The first issue was found in the affirmative and the second in the negative.

There was evidence, independent of the statutory presumption, tending to show negligence on the part of the defendant, but there is no exception or question before us bearing upon the first issue, and it is only necessary to state so much of the case as is material to the question involved in the second issue—that is, contributory negligence.

It is in evidence that the plaintiff's cow with other cattle was in an enclosure, containing about forty acres, used for a pasture, lying on both

sides of the railroad, with a fence extending to the bed of the road on each side of the same, and with cattle-guards between the ends of the fence where the same came to the railroad. That three-fourths of the land was on the left side of the road going from Oxford to Henderson, "and within that portion there was a fish-pond near said railroad track; and there was also a branch of water within and running through the same portion of said enclosed parcel of ground or pasture and near to and parallel with said railroad track; that the cattle pasturing in said enclosed parcel of ground or pasture were turned into the same on that side which lay on the right of said railroad in going from Oxford to Henderson, and were usually turned into the same about 7 o'clock a. m. and taken out a little before sundown, and that the schedule time for defendant's train to leave the depot was 9:15 a. m.; that cattle running in said enclosed parcel of ground or pasture could not pass from the portion of the same lying on either side of said railroad to the other without crossing said railroad track, and could at any and all times freely cross said railroad track in order to pass from the portion of said enclosed parcel of ground or pasture lying on either side of said railroad to the other, there being no fence or other obstruction to prevent them from doing so; that cattle running in said enclosed parcel of
(232) ground or pasture had no access to water except at said fish-pond or branch, at which, when running in said pasture, they were accustomed to drink; that on the morning of the day when plaintiff's cow was killed she was turned into said enclosed parcel of ground or pasture, along with other cattle, at or about 7 o'clock a. m., and was running loose and unguarded with said other cattle therein; that defendant's regular train left the depot at Oxford for Henderson the same morning at the usual time, according to schedule, to wit, at or about 9:15 o'clock a. m."

It was also in evidence that going from the Oxford depot towards Henderson there was a heavy descending grade to and entirely through the enclosed parcel of land.

The defendant's counsel asked no special instructions of the court.

Among other things the court charged the jury, on the second issue, that the fact that plaintiff had fenced in forty acres of land through which the railroad ran as a pasture, and kept his cattle therein, would not constitute contributory negligence. To this the defendant's counsel excepted.

There was judgment for the plaintiff and the defendant appealed.

A. W. Graham for plaintiff.
C. M. Busbee for defendant.

DAVIS, J., after stating the case: It is insisted by the defendant that the plaintiff was guilty of contributory negligence in putting his cow and other cattle in an enclosure such as is described in the evidence and allowing them to run loose and unguarded therein, with nothing to prevent them from crossing and recrossing the railroad track at will, and that the court erred in the instructions given to the jury. Granville is a stock-law county, and the able and learned counsel for the defendant insists that it was a wrongful act on the part of the plaintiff (233) to permit his cattle to run at large or, what is alleged to be worse, "pen" them on the railroad.

We do not concur in this view, but think that there was no error in the charge of his Honor that it was not contributory negligence to put cattle in a pasture of forty acres through which the railroad ran. The fact that the "stock law" was in force could make no difference, even if the fact of negligence on the part of the defendant rested upon no positive evidence, but only upon the statutory presumption. This is settled by *Roberts v. R. R.*, 88 N. C., 560, cited by defendant.

In *Farmer v. R. R.*, 88 N. C., 564, in considering the question of contributory negligence, *Ashe, J.*, said: "If the act (of the plaintiff) is directly connected so as to be concurrent with that of the defendant, then his negligence is proximate, and will bar his recovery; but where the negligent act of the plaintiff precedes in point of time that of the defendant, then it is held to be a remote cause of the injury, and will not bar a recovery if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant." So that, assuming in this case that it would be negligence to turn cattle in a pasture of forty acres, as described in the evidence, even then it would not be such a direct and proximate cause of the injury as to bar the plaintiff's recovery, if caused by the want of reasonable care and prudence on the part of the defendant. But we do not think the fact of turning the cattle into such a pasture was *per se* negligence, and we content ourselves with a reference to *Farmer v. R. R., supra*, and the cases there cited.

No error. Affirmed.

Cited: Randall v. R. R., 104 N. C., 415; *Bethea v. R. R.*, 106 N. C., 281; *Malloy v. Fayetteville*, 122 N. C., 484; *Winkler v. R. R.*, 126 N. C., 373.

(234)

JOSHUA CONWELL v. CHERRY MANN AND ALANSON CAPEHART.

Ejectment; Proving Title in Plaintiff—Estoppel of Tenant—What Constitutes a Tenancy—Special Instructions; Very Words Need Not Be Given.

1. In ejectment a plaintiff may show title in himself as follows: (1) By a connected chain from the State; (2) by showing title out of the State and that his title matured by seven years' adverse possession under color of title, by himself or those under whom he claims, before bringing his action; (3) by showing possession for twenty-one years under color of title, in which case he need not prove title out of the State; (4) by showing defendant to have been his tenant when the action was commenced, and thus establish his title by estoppel.

2. Where A. puts B. in possession of land, saying at the time, "This is a home for you. Go and live in it," and B. enters under such authority, B. becomes the tenant of A., and is estopped even after thirty years' possession, to deny the title of A., or his assigns.

3. If the judge, while not giving a special instruction in very words, puts the defense raised therein distinctly to the jury, there is no cause for complaint.

CIVIL ACTION (ejectment) tried before *Avery, J.*, and a jury at the Fall Term, 1887, of NORTHAMPTON Superior Court.

Verdict and judgment for the defendant. Plaintiff appealed.

The plaintiff, in support of his title to the land described in his complaint, produced in evidence:

1. Proceedings for partition of land of one Edward E. Moore among his heirs at law in 1825, and the allotment of share B to Stephen L. Moore in the court having jurisdiction.

2. A deed from said Moore, made on 8 November, 1832, to Maurice Baugham for the same land.

(235) 3. A deed dated 1 November, 1848, from said Baugham therefor to Joab Outland.

4. A deed from the latter bearing date 8 December, 1866, to Alanson Capehart, one of the defendants, executed also by the plaintiff, upon certain trusts, and among them that the property conveyed, both personal and real, after payment of debts, and the proceeds of such as may be sold, be paid and delivered to the plaintiff, he undertaking to provide for and support the said Joab, his father-in-law, and wife, Julia, during the life of each. It was in evidence that the plaintiff had taken care of both, furnishing board and clothing as for members of his own family, until the death of said Joab in 1865, and the death of his wife, who survived him and died in October, 1878, and provided for the burial of

each. The plaintiff offered further testimony tending to show that the said Joab said to William Mann and his wife, also a daughter and a defendant, "he had beat the race, and that (referring, as we understand, to the land) was a home for them, and to go and live on it," and they were in possession in 1881.

It was also in proof that the said Joab lived near Roxobel, in Bertie, before 1850, and the plaintiff worked there; that plaintiff moved to Roxobel, and Joab and his wife moved there and lived with him, and that all of them moved to Rich Square, in Northampton, between 1850 and 1860 and there lived as one family.

The deed in trust conveys two tracts of land in Northampton, eight slaves, all the products of the farms and stock and farming implements, and all debts due the grantor to Capehart, who, after payment of debts, is required to deliver over the proceeds to the plaintiff "for the consideration of the said Conwell supporting him, the said Joab, and his wife, Julia, in a decent and comfortable manner during their each and separate lives," with condition to return the property if he fails to do so, and this obligation the plaintiff enters into in becoming (236) a party to the deed.

In a separate instrument, under seal, made on the same day by all the parties, and forming part of the deed, it is provided that if not required to be sold for the debts the slaves may be delivered over with the proceeds of such of the property as has been sold to the plaintiff, upon the same trusts and conditions.

It is stated in the case to have been admitted that deeds introduced subsequent to that to Capehart (of whose import this brief mention conveys the only information we have of them) describe the same land.

The defendants offered in evidence a deed from the Sheriff of Northampton to Jason Lassiter, dated 25 August, 1843, and to prove that it described the land in controversy. The deed, a copy of which is said to accompany the case as Exhibit "A," is not sent up, and we can only arrive at its contents by conjecture, and from what is said about it in the deed from Baugham to Outland of 8 November, 1848, which is Exhibit "A."

This latter, in its recitals of the considerations and inducements to its being made, uses these words: "As also to remove any doubt that may exist as to the title to the premises hereinafter described, under a sale and deed from the sheriff of said county to one Jason Lassiter, by whom the same was conveyed to the said Joab Outland, have bargained," etc.

The admission of the deed to Lassiter was opposed on the ground that it sets out a levy by the sheriff on the land of Baugham, by virtue of several judgments rendered by a justice (executions we must suppose to

have been meant), and it was "not competent to show, even by producing the levies, that he levied on any particular lands."

The evidence was presently received, the court reserving the question as to the effect of the deed.

James Langford testified for the defendants that Baugham
(237) lived on the land now in the occupation of the defendant Cherry in the year 1843, just before which witness built the house thereon, Baugham in the meantime cultivating the land and residing with a brother.

John J. Muldrow testified to the fact that William Mann entered into possession of the land in 1849, but does not know if he paid rent for the use of it.

The clerk of the Superior Court testified to his search among the records for the executions issued on the judgments and for the original papers, and failing to find them. The defendant was then allowed, after objection, to read to the jury entries on the execution docket of the issue of sundry executions against Baugham, returnable to September Term of the County Court. The reserved question was decided against the defendant.

G. M. Powell testified that William Mann had possession ever since he knew the land in 1857, cultivating and using it as his own, as has his surviving wife used it since his death, and he had never heard of any payment of rent by either.

Instructions were asked for the plaintiff as follows:

1. If Mann went into possession with the verbal consent of Outland, he thereby became a tenant at will; and if he continued in possession, without paying any rent, continued to be a tenant at will until the death of Outland's wife in 1878, when the tenancy was determined, and his possession was not adverse during that period.

2. That if such be the case, his adverse possession commenced at the death of Mrs. Outland in 1878, and was not sufficient to bar plaintiff.

3. That if he was a tenant at will, and the tenancy determined by the death of Mrs. Outland, he had no estate after her death, and the defendant cannot claim under him, and her possession is adverse.

4. If you believe the testimony of the witnesses, the relation of land-
lord and tenant was established between Mann and Outland, and
(238) defendant cannot set up Mann's possession against the plaintiff.

The court instructed the jury as follows:

The burden is on the plaintiff to establish his title or show that he was the owner of the land in controversy when the action was brought. He may do this in either one of several ways.

He may show a connected chain of title from the State to the plaintiff. He may show the title out of the State, and that his title matured before

the action was brought by seven years possession by plaintiff or those under whom he claims. He may, without showing his title out of the State, establish his title by showing possession, under color of title, for 21 years.

He may, if he can, show that the defendant, when the action was brought, was a tenant of the plaintiff as to the land in controversy, and establish his title by estoppel. The plaintiff has shown papers, title, or color of title as far back as 1825, but has offered no proof of possession under it prior to the entry of William Mann, 1848. It is admitted that William Mann entered on the land in 1848 to 1850, and his wife, Cherry Mann, the defendant, had had possession from that entry up to the bringing of the action on 13 September, 1881.

If William Mann entered upon the land in 1848 or 1850 and held the land, claiming it as his own until his death in the year 1881, and it was held by his wife, the defendant, Cherry Mann, from his death in 1881 till 13 September, 1881, when the action was brought, and if Joab Outland put William Mann in possession, telling him that the land should be a home to him, as testified by the witnesses, and the plaintiff complied with the stipulations of the trust deed by supporting Joab Outland till he died in 1865, and his wife till she died in 1878, the defendant would be deemed in law the tenant of the plaintiff and estopped from disputing his title, and you would respond "Yes" to the first issue. The finding on the first issue settles the finding on the (239) second. If Mann did not enter under license from Joab Outland or as his tenant, you will respond "No" to the first issue; or if the plaintiff did not support Outland and his wife until they died, you will respond "No" to the first issue. The jury will respond in dollars and cents to the third issue, giving the value of annual rent as they may determine from testimony. The burden is on the plaintiff to show that he has complied with his contract to support Outland and his wife, and if he has failed to do so he cannot recover, and you will respond to the first issue "No."

The plaintiff excepted to the refusal of the court to give instructions asked and to the instructions given in lieu thereof. The plaintiff entered no specific objections to the charge at the time. Verdict for defendant.

T. N. Hill for plaintiff.
No counsel for defendants.

SMITH, C. J., after stating the facts: While the instructions asked were not given, in very words, all that is material to the defense contained in them are embodied in the charge. For the court told the jury that "if Joab Outland put William Mann in possession, telling him

that it should be a home to him, *as testified to by the witnesses;* and further, if the plaintiff complied with the provisions of the trust deed, the defendant would be deemed in law the tenant of the plaintiff and estopped from disputing his title." So the defense was distinctly put to the jury, and the appellant has no cause of complaint.

There is no error and the judgment is

Affirmed.

Cited: Mobley v. Griffin, 104 N. C., 115; *Carlton v. R. R., ibid.,* 368; *Bonds v. Smith,* 106 N. C, 563; *Alexander v. Gibbon,* 118 N. C., 798; *S. v. Booker,* 123 N. C., 725; *Pool v. Lamb,* 128 N. C., 2; *Stewart v. Keener,* 131 N. C., 487; *Moore v. Miller,* 179 N. C., 398.

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(240)

SARAH OWENS v. JAMES OWENS AND OTHERS.

Dower—Forfeitures for Crime.

1. The only criminal misbehavior which bars a widow's right of dower is the commission of adultery and living separate from her husband at the time of his death, as provided in section 2102 of The Code. A widow convicted as accessory before the fact to her husband's murder, and confined in the State's prison under sentence therefor, is entitled to dower in his lands.

2. Forfeiture of property for crime is unknown to our law, nor does crime intercept the transmission of an intestate's property to his heirs and distributees.

SPECIAL PROCEEDING for dower, heard on appeal at Fall Term, 1887, of WASHINGTON Superior Court, before *Graves, J.*

There was judgment for the defendants, from which plaintiff appealed. The facts appear in the opinion.

T. N. Hill (S. B. Spruill also filed a brief) for plaintiff.

A. W. Haywood (C. L. Pettigrew also filed a brief) for defendants.

SMITH, C. J. This special proceeding, instituted in the Superior Court before the clerk, on 11 July, 1887, by the plaintiff, the widow of A. D. Owens, who died by an act of violence intestate, in the month of September in the year preceding, against the defendants, his infant children and heirs at law, is to have her dower assigned in the lot whereon he resided. The defendants, not disputing the general allegations contained in the petition, deny the plaintiff's right to dower in the

lot, for that, at Fall Term, 1886, of the Superior Court of Beaufort, on the trial, she had been convicted of being an accessory before the fact to the murder of the deceased, and was sentenced to imprisonment for life in the State prison, wherein in pursuance of said judg- (241) ment she is still confined. The plaintiff entered a demurrer to the answer which, upon hearing before the clerk, was adjudged to be insufficient, and the application denied.

Upon her appeal to the judge he affirmed the judgment of the clerk, overruling the demurrer, and from this an appeal is taken to this Court, in which is brought up the question whether the petitioner, by her criminal act in participating in the murder of her husband, has thereby deprived herself of the right to have dower allotted to her under the law in the estate of which he was seized and which has descended to his heirs at law.

The natural feeling inspired by her proved co-operation in the unnatural and wicked act of taking her husband's life, and thus availing herself of the generous provision of the law that secures her surviving a home for life, is repugnant to a claim preferred under such circumstances of perfidy to the marital relations. In the absence of authority, the well instructed and able judge who tried the cause ruled against the allowance of dower, as it would in fact be "to reward crime" by conferring benefits that result from and are procured by its commission.

We feel ourselves unable to concur in this conclusion for the reason that while the law gives the dower and makes it paramount to the claims of creditors even, there is no provision for its forfeiture for crime, however heinous it may be and even when the husband is its victim. The only statutory provision which, for criminal misbehavior, bars an action prosecuted for the recovery of dower is where she shall commit adultery, and shall not be living with her husband at his death, "The Code, section 2102, extended to a distributive share in the personal estate, and a right to administer," section 1481. The statute is more stringent than that before existing and found in the Rev. Code, ch. 118, sec. 11, which bars the claim to dower to cases in which the wife willingly leaves her husband and continues to live with her adulterer, (242) unless a reconciliation takes place and the husband again suffers her to dwell with him.

As there is no other act of the wife which by statute known to us works a forfeiture, we do not see how any legal obstacle can be in the way of her seeking to get what the law in unqualified terms gives her. She may not be able to enjoy in person the possession of the lot—and so it might be of other property—yet the profits of the limited estate, the fruits of the occupancy, are not the less hers and at her disposal.

She may obtain a pardon and release from confinement and then could enter into possession, but possession in fact and the right to possess or lease or sell the estate are distinct and separate things.

Is the right of the wife to share in the personal estate as a distributee lost or affected by the fact that the intestate died at her hands or through her procurement? Does the child who slays a parent thereby lose his right to participate with his brothers and sisters in the distribution of the personal or to take his part of the descended real estate? Or, reversing the matter, does the husband who kills his wife impair his right, under the statute of distributions, to succeed to the ownership of her personal property left after payment of debts? Or, in general terms, does any one, as a consequence of an unlawful taking of human life, become thereby disabled to take a part of the estate left by the deceased which the law gives him and gives him subject to no such condition?

We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands, and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife.

Forfeitures of property for crime are unknown to our law, nor (243) does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle. We have searched in vain for an authority or ruling on the question and find no adjudged case; the fact that none such is met with affords a strong presumption against the proposition. We must, therefore, determine the appeal "upon the reason" of the thing.

There is error, and the judgment must be reversed, to the end that the cause proceed to a final determination in accordance with law.

Error. Reversed.

Cited: Scarborough v. Ins. Co., 171 N. C., 355; *Bryant v. Bryant,* 193 N. C., 376.

WM. P. ROBERTS AND OTHERS v. RICHMOND PRESTON.

Deed, Description in—Declaration of Grantor—Res Gestæ—Evidence as to Boundary.

1. Plaintiffs claimed title to land under M. R. Defendant claimed title to the land under M. and H., to whom certain lands had been conveyed by M. R. The dispute was as to the location of the beginning point called for in the deed to M. and H. If located as contended for by plaintiffs it did

not embrace the land in controversy, and consequently the land was owned by plaintiffs. There were no courses or distances given in the deed: *Held*, that it was competent for plaintiffs to prove by H. (one of the grantees in the deed from M. R. to M. and H.) the declarations of M. R. made to him, H., contemporaneously with the delivery of the deed, that the deed did not convey the land in controversy.

2. A statement made under such circumstances amounts to more than a mere declaration; it is an act, a fact, *pars rei gestæ*.

3. The evidence was admissible, not to aid a defective description, but to aid the jury in determining where the beginning point and boundaries of the land were.

CIVIL ACTION to recover damages for trespass on land, tried (244) before *Graves, J.*, at Fall Term, 1887, of CHOWAN Superior Court.

Judgment for defendant. Plaintiffs appealed.

The record is voluminous and the statement of the case is a lengthy one, but as only two exceptions appear in the record, only so much of the case is stated here as is necessary to the full understanding of these exceptions.

In the progress of the trial it appeared that Mills Roberts, under whom the plaintiffs claim, owned two adjoining farms, one called Long Beach and the other Long Lane, on Albemarle Sound in Chowan County, Long Beach being on the west of Long Lane, and that in 1863 the said Mills Roberts executed a deed conveying the land described therein to Merrimon & Hughes, under whom the defendant claims by a chain of mesne conveyances, containing the same description in each that is found in the deed from Mills Roberts to Merrimon & Hughes, and this description, so far as it is necessary here to set out, is as follows: "A certain tract of land and Long Beach fishery, on Albemarle Sound in Chowan County, beginning on the sound at a ditch in the Roberts-Benbury farm; thence up the ditch to the fence; then along the fence, outside, to the edge of the swamp; then up the swamp to the said Roberts-Benbury line; then along that line to the main Edenton road," and other calls, around to the beginning.

It became material to locate the description in the deed from Roberts to Merrimon & Hughes, for if the land upon which the alleged trespasses were committed were not embraced in the said deed the plaintiffs were entitled to recover.

. . . . . .

The plaintiffs contended that the description in the deeds under which defendant claims began on the sound at a ditch which emptied into the sound, ran along that ditch to the fence; then along that fence west, on the outside, to the edge of the swamp to a line of marked (245)

trees, which they claim is the Roberts-Benbury line; then along that line of marked trees to the Edenton road.

The defendant insisted that the description begins on the sound at the southwest corner of the Roberts-Benbury line, at a point east of the ditch claimed by plaintiffs as the true location; thence northwardly along the original Roberts-Benbury line, along a ditch to the fence; then along the fence, westwardly, to the edge of the swamp; then up the swamp to another line of marked trees, which defendant insists is the Roberts-Benbury line called for; then along that line of marked trees to the Edenton road; or if the beginning is properly to be on the sound, at the ditch insisted upon by the plaintiffs as the true beginning, and run up the ditch to the fence, it then ran east along the outside of the fence to the edge of the swamp to the Roberts-Benbury line, as claimed by the defendant.

If the true location of the lines of the deed from said Roberts to Merrimon & Hughes is as the plaintiffs insist, then the place where the trees were cut is not embraced in the description; but if either of the views of the defendant is correct, then the place where the trees were cut is embraced in the description.

It appeared from the plots used on the trial that if the location of the description is, as contended for by plaintiffs, both as to the Roberts-Benbury line and the Merrimon & Hughes line, that about one hundred and four acres of the Long Beach farm were not embraced in the deed of Roberts to Merrimon & Hughes (and there was evidence tending to show that this one hundred and four acres were well timbered), and that if the location was as contended for by the defendant, about twenty-nine acres of Long Beach farm was not embraced (and the evidence tended to show that this was cleared land), there was evidence
(246) tending to show that there was not timber enough on Long Lane farm to fence it.

There was evidence on the part of plaintiffs tending to show that after the sale to Merrimon & Hughes, Roberts, and those who claimed under him, continued to keep the cleared land east of the line claimed by the plaintiffs enclosed and cultivated, built houses thereon and put tenants in them up to three months before the bringing of this action; that he erected buildings and put up a steam sawmill on the woodland east of the line claimed by the plaintiffs and west of the line claimed by defendant; cut timber for market and did other acts tending to show occupation and actual possession up to what plaintiffs claim to be known and visible boundaries; and plaintiffs also offered evidence tending to show that defendant, and those from whom he claims, did work up to the line claimed by plaintiffs, and not over, until the trespasses complained of.

The defendant offered evidence tending to show the Roberts-Benbury line, tending to show the age of marks on trees on the line claimed by defendant, and plaintiffs' declarations to John Roberts and other testimony tending, as he insisted to the jury, to show that his view was correct, and among other things that there was another ditch extending to the edge of the swamp near the sound. The plaintiffs offered evidence tending to show that this ditch did not extend to the sound, and that it had been cut subsequent to the making of the deed by their ancestor.

First Exception. The first exception of plaintiffs is to the ruling of the court excluding the testimony of Hughes as to what was said by Roberts at the time the deed was made.

The plaintiffs offered to prove by one of the vendees in the said deed that at the time of its execution Roberts said to him it did not convey the whole of Long Beach, but that he had reserved to himself one hundred acres of timber for the use of his Long-Lane farm. To this the defendant objected, and the court sustained the objection, and the plaintiffs excepted. (247)

Second Exception. It appeared that at a sale made by the Clerk and Master in Equity in 1858, Mills Roberts bought the Long Beach farm as the property of Alexander Cheshire, and paid for the same and took possession, and no deed was then executed. Since the beginning of this action a deed has been executed under an order of court in the original cause, and this deed the plaintiffs offer in evidence and the defendant objects, and the court sustains the objection, and the plaintiffs except.

T. F. Davidson and E. C. Smith for plaintiffs.
C. M. Busbee for defendant.

DAVIS, J., after stating the facts: The instructions of the court to the jury are set out in the case stated on appeal, but as it is stated that no written instructions were asked and no exceptions were taken to those given, they are immaterial for the purpose of this appeal.

No courses and distances are mathematically given in the deeds under which either plaintiffs or defendant claim. Both claim under titles derived from Mills Roberts, and this action grows out of a controversy as to where the boundary between the tracts of land claimed by them respectively is. On the trial much evidence was offered, many deeds were read in evidence, and many witnesses were examined.

The first exception is to the exclusion of the testimony of Hughes to prove the declaration of Roberts, made at the time of the execution of the deed to Merrimon and Hughes, that "it did not convey the whole

of Long Branch, but that he had reserved to himself one hundred acres of timber for the use of his Long-Lane farm." The plaintiffs say that this evidence is relevant and competent not to vary or change the boundary line in the deed, but to show where the true boundary is, and
(248) that the location of the one hundred acres of timber land alleged not to have been included in the deed from Roberts to Merrimon and Hughes is consistent with the boundary as claimed by them, and inconsistent with the boundary as claimed by the defendant.

The defendant says that it is incompetent:

1. Because it is the declaration of a deceased grantor in his own interest.

2. Because it varies the terms of the deed.

3. Because it is excluded by section 590 of The Code.

The plaintiffs say the declaration is competent and will aid the jury in determining where the boundary line is, and that it is a question for them. They must begin "on the sound, at a ditch in the Roberts-Benbury line." The plaintiffs say that this ditch is the ditch at a point designated by them; the defendant says that it is the ditch at the point designated by him.

In *Sasser v. Herring,* 3 Dev., 340, it is said that the "single declaration of a deceased individual as to a line or corner" may be permitted to be proven and have the weight of common reputation, but the declaration of the owner of the land, however ancient, cannot be used in behalf of those claiming under him, and counsel for the appellees insist that this well-established rule will exclude the testimony of Hughes.

The defendant, as well as the plaintiffs, claims under Roberts, and Hughes, to whom the declaration was made and through whom the defendant claims, was one of the persons to whom the deed was made, and to whom the declaration of Roberts was made at the time of executing the deed. It was more than a simple declaration, it was an act, a fact, *pars rei gestæ,* upon which the parties acted.

Why should not the declaration of Roberts to Hughes, made at the time the deed was executed, indicating what was and what was not conveyed, be competent? And why is not Hughes, who accepted the
(249) deed thereby, according to the declaration that it did not convey the one hundred acres of timber land, a competent witness to prove this fact not for the purpose of varying or changing a known line, but for the purpose of throwing light upon the matter and aiding the jury to determine where the controverted and unfixed line really is? It was the declaration of a deceased grantor in his own interest; it was a declaration made at the time of the execution of the deed to a grantee against whose interest it was who accepted and acted upon it, and

thereby recognized it as true, and he is one of the persons through whom the defendant claims, and is the witness by whom it is proposed to prove the declaration. It could subserve no purpose in the interest of Hughes, the grantee, and being made to and acted upon by him at the time it became more than the mere declaration of Roberts, the grantor. It was an accepted *fact* by both parties, and we cannot see why Hughes, the grantee under whom the plaintiffs derive title, is not a competent witness to prove it. It was *against* his interest. *Halstead v. Mullen,* 93 N. C., 252; *Mason v. McCormack,* 85 N. C., 226.

The declaration was accepted by Hughes as lessening the area of the tract of land purchased, and was to that extent in disparagement of his rights, and is competent as *original* evidence. 1 Greenl. Ev., sec. 109.

Where the line is uncertain, the acts and admissions of adjoining proprietors are admissible. *Davidson v. Arledge,* 97 N. C., 172. Where there is no ambiguity in the description given in a deed, nothing short of running and marking a line contemporaneously with the deed can have the effect to vary the boundaries as called for in the deed. *Caraway v. Chancy,* 6 Jones, 361. But here the very question in dispute grows out of the ambiguity or uncertainty as to where the boundary line is.

Evidence to aid a defective description in a deed is not competent. *Kitchen v. Wilson,* 80 N. C., 191. (250)

The evidence here is not offered to aid a defective description, but to aid the jury in determining where the beginning point and boundaries are. We think that upon no one of the grounds insisted upon by the defendant can the testimony of Hughes be excluded, and there was error in sustaining the objection.

As no question is made as to the title of Mills Roberts, we do not see the materiality of the deed from the Clerk and Master in Equity to him; but if the deed executed since the beginning of this action contains matter of description affecting the boundary not warranted by the decree under which it was made, it would not be accepted as concluding the parties upon the question of boundary; but as there was error in sustaining the defendant's first objection we need not consider this. There is

Error. *Venire de novo.*

Cited: Euliss v. McAdams, 108 N. C., 513; *Shaffer v. Gaynor,* 117 N. C., 24; *Hill v. Dalton,* 140 N. C., 17; *Haddock v. Leary,* 148 N. C., 380; *Woodard v. Harrell,* 191 N. C., 197.

ETHERIDGE, FULGHUM & CO. v. L. HILLIARD & CO.

Chattel Mortgage—Mortgagor, When Agent for Mortgagee—Agent, Implied Powers of.

Where a mortgagee of an ungathered crop authorizes and directs the mortgagor to prepare and house the crop for market, and the mortgagor, having no other means, sells part of the crop and uses the proceeds for that purpose: *Held*, that the directions to house and prepare the crop for market gave the mortgagor an implied power to sell part of the crop to get money for that purpose, and a purchaser from him was protected.

CIVIL ACTION tried before *Graves, J.*, at Fall Term, 1887, of PERQUIMANS Superior Court, upon the following case agreed:

(251) "1. On 25 January, 1886, Joshua L. Whedbee executed to the plaintiffs the mortgage hereto attached and marked 'A,' which was duly registered in the proper county at once.

"2. Both plaintiffs and defendants were nonresidents of North Carolina, and were commission merchants and cotton factors in Norfolk, Va.

"3. About the beginning of the fall of 1886 one T. Clayton Whedbee went to defendants' office in Norfolk and said to them, 'I think I can make some money buying cotton in North Carolina if I can get it sold on reasonable terms,' and asked the defendants to name their best terms for selling. The defendants answered that they would sell for him any cotton he might ship them for $1 per bale commissions, to the best advantage, and would honor Whedbee's drafts on them to the extent of such sales. Whedbee returned home, and later in the year shipped to the defendants, for sale on his own account, over one hundred bales, which they sold for him on the terms named, placed the proceeds to his credit as sold, and honored his drafts for it or sent to him by express as he directed. No other relations existed between T. Clayton Whedbee and the defendants.

"4. Among the cotton thus shipped to defendants by T. Clayton Whedbee were two bales which he bought of Joshua L. Whedbee, and which had been raised by the latter on the 'Crow Point' farm described in the mortgage referred to in section one hereof, and which netted when sold ....., $....., the proceeds of which went to T. Clayton Whedbee's credit as aforesaid, and were paid upon his draft or sent to him by express.

"5. The said two bales were in no way distinguished from the other cotton shipped defendants by T. Clayton Whedbee. The defendants had no knowledge of where they were raised, nor had they any

(252) actual notice that the plaintiffs held a claim or mortgage against Joshua L. Whedbee and no constructive notice of the same, unless

the facts herein stated amount to constructive notice of the same. T. Clayton Whedbee did have actual notice of said claim and mortgage, and knew also that the said cotton was raised on said farm.

"6. The defendants had no such notice, nor was any demand made on them for the said cotton or its proceeds till after they had settled in full with T. Clayton Whedbee.

"7. That Joshua L. Whedbee was in possession of the 'Crow Point' farm, and was authorized and directed to prepare and house the crops thereon for market; that he was insolvent and without means, and could raise money only for that purpose by selling the crops, or part of them, and the proceeds received by him from the sale of the two bales of cotton were actually used in housing the crops on said farm, which were shipped to the plaintiffs."

The mortgage referred to as marked "A" was not sent up with the transcript, but it was admitted on the argument in this Court that J. L. Whedbee, on 25 January, 1886, executed to the plaintiffs a certain mortgage, which was duly proved and registered, by which he "conveyed to the plaintiffs his crops of every kind to be grown by him during the year 1886 upon a certain farm in said county known as the 'Crow Point' farm," to secure the debt named in said mortgage.

Upon the case agreed his Honor gave judgment for the defendants, and the plaintiffs appealed.

T. F. Davidson (J. H. Blount also filed a brief) for plaintiffs.
No counsel for defendants.

DAVIS, J., after stating the facts: Whether the sale of cotton (253) made by a factor or agent or commission merchant in the State of Virginia, for his principal in this State, who shipped it to him for sale in the regular course of business, such factor or commission merchant selling it, without any notice or knowledge of any claim by another, and paying over the proceeds to his principal without such knowledge or notice, is such a conversion by him as will make him liable to the actual owner for the proceeds of the cotton so sold and paid over to his principal, it is not necessary for us to decide in this action.

The case states that J. L. Whedbee was authorized and directed to prepare and house the crops for market, and that the proceeds of the cotton in question were so used by him, and that he had no other means for that purpose. But counsel for the plaintiffs say "the case does not state who gave this authority or direction." The clear and only reasonable inference is that, as it existed, it was given by some one who had the *power* to give it, and this, we assume, could only have come from the plaintiffs.

Having then the authority from the plaintiffs to house and prepare the crops for market, he had the implied authority from them to use the necessary and proper means to that end. The proceeds of the cotton were used by him as the means and, as the case shows, the only means which he possessed for that purpose. The plaintiffs thus, by and through an agent authorized by them, received the benefit of the proceeds of the cotton, and to allow them to take the benefit of his act and to repudiate so much of it as was against them, though necessary and proper in the execution of the authority given, would be to reverse the ordinary rules of fair dealing and make fraud easy and profitable.

Whedbee had the authority from the plaintiffs to house and prepare the corps for market, and this carried with it the implied authority to use the means necessary for that purpose, and in this respect (254) the plaintiffs were bound by his acts. *Huntley v. Mathias,* 90 N. C., 101, and the cases there cited. There is

No error. Affirmed.

Cited: R. R. v. Simpkins, 178 N. C., 276; *Whitehurst v. Garrett,* 196 N. C., 158.

W. R. HOWELL AND OTHERS v. MARY A. KNIGHT.

Rule in Shelley's Case—Section 1329, The Code—Construction of Will.

1. Chapter 43, section 5, Rev. Code—section 1329, The Code— may have the effect of abolishing the rule in *Shelley's case,* in the construction of instruments executed since 1 January, 1856.

2. The rule in *Shelley's case* prevails only where the words "heirs, or heirs of the body" of the tenant for life, to whom the estate in remainder is limited, are simply used; but it yields to an intention manifested in the context, or gathered from other provisions of the instrument.

3. A devise, as follows: "I *lend* to A., and if he hath a lawful heir begotten of his body at his death, I *give* it to said heir or heirs; and if he dies without an heir as aforesaid, I lend it to B.," repeating a similar *gift* to the heir or heirs of B., if he should have such living at his death, creates an estate for life only in A., and the rule in *Shelley's case* does not apply.

CIVIL ACTION (ejectment) tried before *Avery, J.,* at Fall Term, 1887, of EDGECOMBE Superior Court.

Judgment was rendered for the plaintiffs. Defendant appealed. The facts appear in the opinion.

John Devereux, Jr. (Gilliam & Son filed a brief) for plaintiffs.
No counsel for the defendant.

SMITH, C. J. The controversy is in respect to the proper con- (255) struction of a clause in the will of James Knight, made in July, 1844, and proved after his death in November, 1847. The facts are stated in a case agreed and submitted under section 567 of The Code. The plaintiffs are the children, and as such the heirs at law of James W. Knight, the devisee named in the fourth item of the will, the meaning and legal effect of which is in dispute, who died intestate in 1875. The defendant, his widow, claims an estate in fee by virtue of a sale of the interest in the land devised under execution against her husband made in his lifetime by the sheriff to her as purchaser, and his deed of conveyance therefor. It is agreed that if, under the aforesaid item or clause of the will, the devisee, James W. Knight, took an estate for life only, judgment shall be rendered for the plaintiffs, but if an estate in fee vested in him thereby, judgment shall be for defendant.

The fourth item is in these words:

"I lend unto my son James W. Knight all my land after the death of his mother, and if he hath a lawful heir begotten of his body at his death, I give it to said heir or heirs; and if he dies without an heir as aforesaid, I lend it to Virginia Staton, William Ann Staton and Simmons B. D. Staton, and if Virginia Staton hath an heir lawfully begotten of her body at her death, I give her share to said heir or heirs; and if not, I lend her share to William Ann Staton and Simmons B. D. Staton, and if William Ann Staton hath an heir or heirs at her death lawfully begotten of her body, I give her share of said land to said heir or heirs; but if she dies without heirs as aforesaid, I lend her part to Virginia Staton and Simmons B. D. Staton; and if Simmons B. D. Staton hath an heir or heirs lawfully begotten of his body at his death, I give his share to said heir or heirs, but if he dies without an heir or heirs as aforesaid, I lend his share to Virginia Staton and William Ann Staton; and if all of them die without an heir as aforesaid, then I give said land to the two eldest sons of Lunsford R. Cherry, (256) of said county."

The following is the judgment rendered:

This cause coming on to be heard before me at Fall Term, 1887, of Edgecombe Superior Court, upon the foregoing statements of facts submitted as a controversy without action, it is adjudged that plaintiffs recover possession of the land sued for and the costs of this action, from which judgment the defendant prays an appeal to the Supreme Court.

Exception by the defendant that the rule in *Shelley's case* applies;

that by the will of James Knight the absolute estate in the land sued for passed to James W. Knight.

From this ruling the subject-matter of exception and the judgment consequent thereon, as error assigned, the defendant appeals and brings up for determination the principle known as "the rule in *Shelley's case*" to the facts of the present case, in interpreting the testator's will. The rule in *Shelley's case* has long been recognized as in force in this State, and even so late as the year 1881, in *King v. Utly,* 85 N. C., 59, in its application to wills and deeds made previous to the enactment introduced into the Revised Code, ch. 43, sec. 5. This act declares that the limitation in any writing "to the heirs of a living person shall be construed to be to the children of such person," unless a contrary intention be apparent in the instrument, and this change, in the interpretation of the technical words in common use, corresponding with the evident intention of the person employing them, may have the effect of abolishing the rule, as so many of the States have already done. Wash. Real Estate, note 5, at page 563, in the construction of such phraseology found in the writings executed since 1 January, 1856, when that Code went into effect.

The will before us is not affected by this statute, as the testator died before that date, and the clause in dispute must be interpreted in the light of antecedent adjudications by which the law in force at
(257) the time of its execution is established. The rule, however, is not an inflexible one, for it prevails only where the words "heirs or heirs of the body" of the tenant for life, to whom the estate in remainder is limited, are simply used, while the construction yields to an intent manifested in the context or gathered from other provisions of the instrument, that persons answering the description should take the inheritance as a gift.

Thus the superadded words, "equally to be divided between them" or "share and share alike," have been held to prevent the application of the rule of construction, since they require a division *per capita* among the donees of the remainder, while under the law of descent the heirs take *per stirpes* and representatively, and, to give the rule operation, in the language of the late Chief Justice, "the same persons will take the same estate whether they take by descent or purchase, in which case they take by descent." *Ward v. Jones,* 5 Ired. Eq., 400, and *Mills v. Thorne,* 95 N. C., 362.

So, as the predominant and controlling purpose of the testator must prevail, when ascertained from the general provisions of the will, over particular and apparently inconsistent expressions, to which unexplained a technical force is given, we may inquire and find out in what sense such expressions were used and what the testator meant in using them.

Now, examining the will according to this test, we think it quite manifest the terms "heir," "heirs," "lawful heir begotten of his body," were employed not to designate the estate, but the person to take it—the children of the devisee to whom the immediately preceding life estate is limited; in other words, a *designatio personarum.* The considerations which support this view will be briefly mentioned:

1. The testator uses one word when giving a limited or life estate to a donee and another and different word when giving an absolute estate or remainder in fee; and this distinction is carefully maintained throughout the entire clause, as well as in subsequent clauses (258) where similar limitations are found. Thus he says: "I *lend* unto my son James," and "if he hath a lawful heir, begotten of his body at his death, I *give* it to said heir" or "heirs"; if he die without such, "I lend it to Virginia Staton" and others, and upon similar contingency "I *give* her share," etc.; and if she die without such heir, I *lend* her share to William Ann Staton, etc., and at her death "I *give* the share to her heir or heirs," and so on to the end of the clause. Studiously throughout the will, in the disposition alike of real and personal estate, this phraseology is preserved, the word *"lend"* being used to indicate the nature and extent of the donation, when the estate or property is to be limited, implying a reservation in the donor, as in a strict sense the word means; and when the absolute property is to be parted with, it is given to the ulterior donee. This distinctly marks the differences in the devises and an intent which can only be fulfilled by giving a meaning to the term "heir," which confines it to a child or children, a sense in which it is generally understood in popular use. *Payne v. Sale,* 2 Dev. & Bat. Eq., 455; opinion of *Gaston, J.*

2. The expression, "if he have a lawful heir, begotten of his body at his death," most clearly points to personal offspring, which must be a "lawful" as distinguished from an "illegitimate" child. There can be no such thing as an *unlawful* heir, for it is by virtue of the law that one bears that relation to the estate of an intestate, and the absurdity vanishes when the qualification is attached to a child.

3. The term throughout the will, for it is constantly used, must bear this construction to give full scope and efficacy to the successive limitations, and unless it is given the will must utterly fail to carry out the testator's obvious purposes.

With this manifestation of an intent predominating in the will, the rule in *Shelley's case* must be subservient, and the rule itself admits an exception from its operation under such circumstances. (259)

We do not subvert a principle which has long been a rule of property in this State as well as in England, and under which have vested rights we would be unwilling to disturb; and the General As-

sembly alone can repudiate it if unjust in its operation, if this has not already been done as to wills or deeds made after an abolishing enactment.

There is no error and the judgment must be

Affirmed.

Cited: Taylor v. Smith, 116 N. C., 534; *Nichols v. Gladden,* 117 N. C., 499; *Hauser v. Craft,* 134 N. C., 329; *Wool v. Fleetwood,* 136 N. C., 470; *Perry v. Hackney,* 142 N. C., 375; *Puckett v. Morgan,* 158 N. C., 347; *Settee v. Electric Ry.,* 170 N. C., 365; *Gorham v. Cotton,* 174 N. C., 727; *Howard v. Mfg. Co.,* 179 N. C., 118; *Blackledge v. Simmons,* 180 N. C., 542.

JAMES A. HARRELL v. JAMES C. WARREN.

Execution—False Return—Sheriffs—The Code, Secs. 1112, 2079—Pleadings; Form of Complaint for a False Return.

1. Any person may sue for the penalty imposed upon sheriffs by section 2079 of The Code, for a false return, and he need not mention in his complaint the other party to whom the statute gives one-half of the recovery.

2. The penalty of $500 imposed for a false return by section 2079 is restricted to *sheriffs*, and false returns by them made to *civil process.*

3. Formerly the penalty of $100, imposed for a false return to criminal process, was restricted to constables. Under The Code, section 1112, it is extended to sheriffs and other officers, State or municipal, but is still confined to criminal process delivered to such an officer as is bound by law to execute it.

4. In order to render a sheriff liable for a false return under section 2079, falsehood must be found in the statement of facts in the return.

5. If a return be false in fact, inadvertence or mistake is no excuse or protection to the officer, although no intentional deceit was practiced.

6. In an action for the penalty imposed for a false return the complaint stated, in substance: That an execution was placed in the sheriff's hands, and by him levied on the goods of the defendant therein named, which goods the sheriff kept locked up for several days; that defendant in the execution, at the time of the levy, demanded that his exemptions be allotted to him; that defendant paid the sheriff $2.50 in part of the execution, while his goods were held under the levy; that after keeping said goods several days and receiving the said $2.50, the sheriff returned said execution: "Levy made; fees demanded for laying off exemptions and not paid. No further action taken"; that said return was false in that it did not state that he had collected said $2.50 on the execution:

Held, that a demurrer to the complaint should be sustained, because there was no averment that the statement contained in the return was untrue, or that the demand by the sheriff for his fees was not made and refused.

7. Upon such a state of facts the failure to mention the payment of $2.50 in his return, made the return *defective*, but such an omission does not render the sheriff liable to the penalty imposed for a false return.

CIVIL ACTION against a sheriff to recover the penalty imposed (260) by section 2079, of The Code for a false return, tried before *Graves, J.*, at Fall Term, 1887, of CHOWAN Superior Court.

The defendant demurred to the complaint. Demurrer overruled. Appeal by defendant.

The action, begun by the issue of a summons on 21 March, 1887, is prosecuted by the plaintiff against the defendant for an alleged false return made by him as sheriff to an execution delivered into his hands in favor of John Smith against the plaintiff, and the recovery of the penalty given by section 2079 of The Code. The complaint filed is as follows:

The plaintiff, complaining of the defendant in this action, alleges:

1. That the defendant, James C. Warren, was duly and regularly elected sheriff of Chowan County at the regular election in November, 1884; that he qualified, according to law, on .... December, 1884; gave bonds, which were approved and accepted by the proper authorities; was inducted into and took possession of said office of sheriff, and became and continued from that date to be the duly qualified and (261) acting sheriff of Chowan County until his term expired, according to law, in December, 1886.

2. That at Spring Term of the Superior Court of Chowan County for the year 1885, in an action therein pending, a judgment was rendered, in all respects regular and valid, after due notice to this plaintiff, who was a party thereto, in favor of John Smith and against James A. Harrell (this plaintiff) for the recovery of a certain horse, described in the complaint in said action, or for one hundred dollars and interest on same from date of undertaking in said action, if delivery could not be had, and for the recovery of the sum of twenty-four dollars and fifteen cents, costs of said action, and that said judgment was regularly docketed in said Superior Court at said term.

3. That on 31 August, 1886, said judgment having before then been settled, except as to the costs, and only a part of said costs having been paid, an execution was issued from said Superior Court of said county, directed to the sheriff of said county, commanding him to cause to be made the sum of twenty-two dollars and fifteen cents of the goods and chattels, lands and tenements of James A. Harrell (this plaintiff), and

to return same with said execution to said Superior Court on the fourth Monday after the first Monday in September, 1886.

4. That said execution, a copy of which is hereto attached, marked "B" and made a part of this complaint, was delivered to said James C. Warren, sheriff as aforesaid, and that said Warren, under and by virtue thereof, on 2 October, 1886, levied upon the goods, wares and merchandise in a store in Edenton, in possession of said James A. Harrell (this plaintiff); locked said store; refused, on demand of Harrell, to have his exemptions allotted, and kept the keys of said store for several

(262) days, the goods in the meanwhile being locked up in said building.

5. That this plaintiff, on 6 October, 1886, paid to said James C. Warren, sheriff as aforesaid, on and in part satisfaction of said execution, the sum of two dollars and fifty cents.

6. That, after keeping said Harrell's goods, wares and merchandise in his custody for several days, and after being paid by Harrell on said execution the sum of two dollars and fifty cents, as stated, the said Warren, sheriff as aforesaid, returned said execution to said Fall Term of Chowan Superior Court, which began on 4 October, 1886, with a return endorsed thereon, signed by him as sheriff, in the following words:

"Levy made; fees demanded for laying off exemptions, and not paid. No further action taken.

(Signed) J. C. WARREN, *Sheriff.*"

7. That said return made by said Warren as sheriff on said execution was a false return, in that it did not state that he had collected any money on the same.

8. That this plaintiff, James A. Harrell, is the party aggrieved by said false return as he still appears by said return as owing the full amount of said execution, and therefore he brings this suit to recover the penalty prescribed of five hundred dollars.

9. That before bringing this action he demanded of said Warren payment of said sum, and that said Warren refused to pay the same.

Wherefore, plaintiff demands judgment against said defendant for the sum of five hundred dollars and for costs of this action.

The defendant demurred as follows:

(263) "The defendant demurs to the complaint in this action because the facts therein set out do not constitute a cause of action, for that:

"1. It does not appear that the return of the sheriff is false in fact.

"2. It does not appear that the return of the sheriff was not a due return in the meaning of the act.

"3. That if any cause of action is set out in the complaint the penalty recoverable for the same is less than two hundred dollars, and this court has no jurisdiction of the same.

"Wherefore, defendant demands judgment that he go without day and recover his costs."

The court adjudged that the demurrer of the defendant be overruled and that the defendant be allowed to answer, and that the plaintiff recover of the defendant the cost of the term. From this judgment the defendant appealed to this Court.

John Devereux, Jr., for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the facts: The case has not been argued for defendant, and besides the specific grounds assigned in the demurrer we meet at the threshold the question whether any cause of action upon the facts stated accrues to the plaintiff, and this objection has been disposed of in cases heretofore before the Court.

In *Martin v. Martin,* 5 Jones, 346, it is decided that any person may sue for the penalty, and he need not mention the other party to whom the statute gives one moiety of the recovery. The same point was made and though not specially mentioned in the opinion was necessarily overruled in the judgment rendered for the plaintiff in the later case of *Peebles v. Newsom,* 74 N. C., 473.

Nor is the objection taken in the demurrer to the jurisdiction (264) tenable, based upon the suggestion that only $100 are recoverable according to section 1112 of The Code, the claim to which must be made in a justice's court.

The present action is not brought under that section which belongs to the chapter entitled "Crimes and Punishments," but to enforce the enactment contained in section 2079, which has long been the law, and which this Court decided, in *Martin v. Martin,* 5 Jones, 349, was restricted to civil process and false returns made thereto by sheriffs. At the time of this ruling the penalty of $100 imposed for false returns made to criminal process was restricted to constables, and forms part of the chapter (section 118) devoted in the Revised Code to crimes and punishments. In its transfer to the present Code its scope has been enlarged and made to embrace sheriffs, constables and other officers, state or municipal, but is still confined to criminal process delivered to such officer as is bound to execute it. There is, therefore, no unauthorized assumption of jurisdiction, and the suit is brought in the proper court.

The main and essential matter is, Has a false return been made? Not an *insufficient return*—for this is punished less rigorously and in a more summary way. There must falsehood in the statement of facts be found in the return in order to incur the $500 penalty, and for this inadvertence or mistake furnishes no excuse and no protection to the officer.

So it is held in *Tomlinson v. Long,* 8 Jones, 469; *Albright v. Tapscott, ibid.,* 473; *Finley v. Hayes,* 81 N. C., 368, and in *Peebles v. Newsom, supra.*

It appears from the plaintiff's allegation that the defendant refused, on demand of the plaintiff, who was defendant in the execution, to separate from the stock of goods levied on and assigned to the plaintiff his exempted part thereof, the reason for not doing which is set out in the sheriff's return. There is no averment in the complaint that the statement is untrue or that the demand of the sheriff for his fees (265) was not made and refused, and that in consequence the sheriff did not proceed further. There is so far as shown no falsehood in this part of the return, and no action can be maintained for the statutory penalty given for a *"false return."*

The numerous adjudged cases fully sustain this interpretation of the enactment and of its purposes, as will be seen by a reference to some of those most pertinent to the present inquiry.

A sheriff's return, "Not to be found in my county," was declared to be false when no effort had been made to find the party, because "not to be found" implies and means that a search has been made, and this is untrue. *Tomlinson v. Long,* 8 Jones, 469.

"Too late to execute" was so held in *Lemit v. Freeman,* 7 Ired., 317, where the process passed into the sheriff's hands more than ten and less than twenty days before the term of the court to which it was to be returned.

In *Lemit v. Mooring,* 8 Ired., 312, the sheriff sought to excuse the neglect to execute the writ, and returned in substance that himself and his deputies were officially and so constantly employed as to be unable to serve it after it was received; in reference to which *Ruffin, C. J.,* remarks, in regard to incurring the penalty, that "to have that effect it (the return) must be *false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion."*

But the subject is very clearly discussed and the true meaning of the statute, in its application to these officers, ascertained and declared by the late Chief Justice in the opinion delivered by him in *Martin v. Martin, supra,* from which we quote, instead of further comment of our own, as settling the law:

" 'Not satisfied' is an *insufficient* return to a writ of *fieri facias,* for the reason that it does not set forth the ground upon which the (266) officer has failed to make the money. But it may, nevertheless, be a *false* return. For instance, suppose the officer made the full amount required by the execution, and returned it 'not satisfied.' Such a return is clearly false; it may be he has made only a part of the amount, and without any reference to the part received returns it 'not

satisfied'; it would not be a false return, because, taking it literally, the execution is not satisfied, and the return may have referred to that part merely. But when, as in our case, the return is made in reference to the part received, and *sets forth a payment in January, and another in March, suppressing the fact of the other payment in February,* then 'not satisfied' is used in the sense of *not satisfied as to the residue,* and is necessarily false in respect to the payment suppressed."

This is a very lucid exposition of the enactment and dispenses with further observations from us.

Assuming as we must, for the purpose of the demurrer, the truth of every averment of fact contained in the complaint, there is no conflict between it and the return that brands the latter with falsehood, and such repugnance is essential to the action.

The defendant, in order to a full and proper response to the writ, ought to have made mention of the small payment made him, and in this particular the return is defective, yet he says nothing to the contrary, nothing false in fact; and the omission to do what ought to have been done in making his return does not bring the sheriff under this condemnation of the statute—an enactment so severe as not to excuse when there is a mere mistake and no intentional deceit practiced. *Peebles v. Newsom, supra.*

There is error. The judgment must be reversed and the demurrer sustained.

Error. Reversed.

Cited: Mfg. Co. v. Buxton, 105 N. C., 75; *S. v. Berry,* 169 N. C., 372.

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(267)

J. L. GRUBB v. M. A. LOOKABILL AND F. H. LOOKABILL AND OTHERS.

Judicial Sale—Parties—Executors and Administrators—Section 1492 of The Code—Judgment Against Deceased Party—Ejectment.

1. In an action brought by the personal representative of an obligor in a bond for title to subject the land to the payment of the purchase money, the heirs at law of the obligor are necessary parties, in order to a valid judicial sale of the land.

2. Perhaps if the bond had been recorded, as required by section 1492, and that section had been complied with in all other respects, a sale would be valid, although ordered in an action to which the heirs at law of the vendor were not parties.

3. Where, in such an action, the personal representative and one of the heirs at law of the vendor are plaintiffs, and the vendee is defendant, a sale made under a consent judgment, passes the equitable estate of the vendee, and that portion of the legal estate which was vested in the heir at law who was plaintiff.

4. When the record contains no notice or suggestion of the death of a party, a judgment rendered against such deceased, after his death, is not *void*, but only *voidable*.

5. Plaintiff being owner of the equitable estate of the obligee in a bond for title, and of a one-fourth share of the legal title, can recover possession in an action of ejectment against persons claiming under such obligee.

ACTION OF EJECTMENT, tried before *Gilmer, J.*, at March Term, 1887, of DAVIDSON Superior Court.

The plaintiff claimed title under a judicial sale made in an action to which one F. D. Lookabill was a party defendant.

The defendants are the widow and one of the heirs at law of said F. D. Lookabill.

There was judgment that plaintiff recover the possession of the land in controversy from the defendants. The other facts are stated by the Chief Justice as follows:

The title to the land, for the recovery of which this action is prosecuted, belonged to Thomas P. Allen, who sold the same to one
(268) F. D. Lookabill, executing to him a title bond and taking from him a certain note for the purchase money. Allen died, leaving a will, in the spring of 1875, and Wiley J. Loftin, his administrator *de bonis non*, with the will annexed, instituted suit against Lookabill, the purchaser, for the purchase money, and that the land mentioned in the contract should be sold for its payment. To this suit Ambrose D. Allen, one of the four heirs at law of the deceased vendor, was alone of them made a codefendant with said F. D. Lookabill in the action. The latter gave his written consent to the sale, and accordingly it was so ordered, the land sold, and report thereof made and confirmed, and judgment rendered directing a deed of conveyance to be made to the purchaser, H. E. Wylde, for whom was afterwards substituted Elizabeth Wylde, on payment of the sum bid. The commissioners, under the order, made a deed for the land to the substituted purchaser, and she afterwards conveyed it to the present plaintiff. F. D. Lookabill died on 25 September, 1880, soon after the term of the Superior Court of Davidson County held in that month had expired, during which the decretal order of confirmation and for title was entered. At Fall Term, 1882, an order was made allowing certain counsel to appear in the cause for the heirs at law of Thomas P. Allen, of whose action no mention is

found in the record, except as may be inferred from the action of the court at the next succeeding term in entering the following order: "It appearing that all the parties and their representatives are before the court, and the purchase money has not been paid or title made to the land, it is therefore ordered, by consent, that judgment be entered against Elizabeth Wylde for the sum of $964, of which sum $800 is principal money, with interest on said principal money till paid, and upon payment of said amount to W. J. Loftin, the commissioner, he shall make title to her, provided she pays the same on or before 15 June, 1883; but should she fail to so pay, then the said commissioner shall resell the land for cash, and make title to the purchaser (269) and report his proceedings to the next term of this court.

"J. F. GRAVES, *Judge Presiding.*"

The order has the signature of counsel for plaintiff Ambrose Allen and Elizabeth Wylde also, and under the title of the plaintiff against "F. D. Lookabill and other defendants."

At Fall Term, 1883, the cause appears on the docket in a similar form, except that the defendants are designated as F. D. Lookabill's heirs and others, and the decretal final order is consummated by the report of the plaintiff Loftin that full payment of the purchase money, $976, has been made to him by the said Elizabeth Wylde, and that he has executed to her a deed in fee simple of the premises, and this report was confirmed.

The plaintiff further exhibited in evidence a transcript of a certain proceeding instituted by the administrator against Henry Garner and wife, Maria J., Ambrose P. Allen, Charles P. Allen, Emily P. Wilkie and L. P. Wilkie, executor of Thomas P. Allen, in which, by petition before the clerk, he sets out, among other matters, his reception as administrator of the $976, proceeds of sale of land, and showing a balance to be still due of the original purchase money on Lookabill's contract, and praying for a settlement of the estate of the testator, Thomas P., including a charge against him therefor to the extent of the amount received. To this petition answers were put in, that of Charles P. Allen admitting the same, that of M. J. Garner denying the allegations, while E. P. Wilkie, one of the heirs at law, failed to file any answer. The disposition of the cause is not stated in the record, so much of which is shown as discloses the fact that said moneys went into the general administration account.

Upon this state of facts it was contended by defendants that (270) no title passed to plaintiff because three at least of the heirs at law of said Thomas P. Allen, to wit, Charles P. Allen, E. P. Wilkie and M. J. Garner, had not been made parties to the action by said Wiley J.

Loftin aforesaid, against F. D. Lookabill, nor the heirs of F. D. Lookabill, and because of no description of land in the complaint, but his Honor was of the opinion that the heirs of the said Thos. P. Allen were not necessary parties to said action, and that the heirs of said F. D. Lookabill were presumed to be parties in said action of Wiley J. Loftin, administrator, against F. D. Lookabill, and after the death of said Lookabill continued against F. D. Lookabill's heirs, and that there was a sufficient description of the land, and directed a verdict to be entered in favor of the plaintiff. Defendant excepted and appealed.

E. E. Raper for plaintiff.
W. H. Bailey (Levi Scott also filed a brief) for defendants.

SMITH, C. J., after stating the facts as above: We do not concur in the opinion of the court that the heirs of the vendor, Thomas P. Allen, to whom upon his death the land embraced in his contract with Lookabill descended, assuming it not to have been devised, since the legal estate was in them, are not necessary parties to the action in order to a full relief and the divesting and transferring the same to the purchaser. "Before the passing of the act of 1797" (The Code, sec. 1492), says *Nash, C. J.*, "Where a vendor entered into a bond to make title and died before so doing, his heirs were the proper persons on whom the purchaser had the right to call for the necessary conveyance. If they refused to convey the title the person was driven into a Court of Equity, and to such a suit the heirs were necessary parties." *Osborne v. McMillan,* 5 Jones, 109.

(271) For a similar reason when the personal representative of the deceased vendor seeks to subject the land to the payment of the debt contracted in the purchase, he must make the heirs of his intestate parties in order to an effectual sale of the descended legal estate.

The action seems to have been prosecuted upon a construction of the statute referred to, that inasmuch as the administrator of the vendor could himself make title upon payment of the purchase money, his presence in the action was sufficient to accomplish the double object of securing the money and passing the estate to a purchaser, when sold for that purpose. Perhaps this view is admissible if the bond had been proved and registered as required under the intimation expressed in the opinion in *Hodges v. Hodges,* 2 D. & B. Eq., 72, and *White v. Hooper,* 6 Jones Eq., 152, without the presence of the vendor's heirs if, in other respects, the provisions of the statute had been complied with. For the form of the proceeding adopted aims at the same thing, the enforcement of the contract by subjecting the land to the debt incurred in its purchase, and the debtor not only makes no objection but gives his consent

to the sale, and the sale has at least the effect of passing his *equitable estate* in the premises, and also the part of the legal estate which vested in the said Ambrose D. Allen.

Again, as to the objection that Lookabill's heirs were not introduced into the action in his place after his death, it may be observed that certain counsel were expressly authorized to appear for them, and the style of the case was immediately changed, as if they had become parties under that general designation, and so it is declared in the decretal order of the ensuing term in the recital "that all the parties and their representatives are before the court."

The only further action in the cause, after the death of the vendee, was to substitute a new purchaser in place of the first, and when the terms of the decree for title were reported as having been complied with and a conveyance executed, to confirm the report. (272)

But if the heirs were necessary parties after the ancestor's death to give efficacy to an order which was made in his lifetime, and when carried out passed the title as of that date, as ruled in *Vass v. Arrington,* 89 N. C., 10, it is held, at least when the record contains no notice or suggestion of the death of a party, that a judgment rendered after such death is irregular and voidable, but not void in the absence of any action to make it so. *Lynn v. Lowe,* 88 N. C., 478.

There is no force in the objection that the land is not sufficiently described in the petition for a settlement of the estate.

It is clear that the full equitable estate in the land and a fractional part of the legal estate is vested in the plaintiff, and this warrants a recovery.

There is no error, and we affirm the ruling and judgment of the court.

No error. Affirmed.

MARY H. SHAW v. A. B. WILLIAMS.

Evidence—Restricted Agency—Deed; Recital of Receipt of Purchase Money In.

1. Where defendant relies upon a payment made by him to plaintiff's agent, as possession of authority by the agent is essential to the defense, and must be shown, so restrictions imposed upon the agent's authority may be shown as essential parts of it; and such restrictions can be proven, although they were never communicated to the defendant.

2. A., B. and C., jointly owned a parcel of land. A. and B. orally empowered C. to sell the land at a fixed price to defendant. C. made the sale, and afterwards A., B. and C., executed a joint deed to the defendant,

which contained the usual recital of receipt of the purchase money. The deed, with the assent of all, was delivered to defendant by B. The defendant paid A's share of the purchase money to C., who never paid it to A. A. had instructed C. not to receive her share of the money, but to leave it with defendant until she called for it. Defendant did not know of these instructions: *Held*, that A. could recover her share of the purchase money from defendant. *At law*, a recovery cannot be had of purchase money, the receipt of which is recited in a deed. But in equity, this obstacle is removed when the recital results from inadvertence, and was inserted under a mistake of its legal effect, without any intention of the parties that it should bar a recovery of the purchase money.

(273) CIVIL ACTION tried before *Clark, J.*, and a jury at May Term, 1887, of CUMBERLAND Superior Court.

Judgment for plaintiff. Appeal by defendant. The facts appear in the opinion.

R. P. Buxton for plaintiff.
N. M. Ray for defendant.

SMITH, C. J. The plaintiff, her sister, Jane S., who had intermarried with one W. W. Graham, and her brother, John W. Jenkins, being tenants in common of an estate in fee in a house and lot in the town of Fayetteville, the latter, with the consent and by the verbal authority of the others, contracted with the defendant for the sale of the premises to him for the sum of nine hundred dollars. A deed bearing date 3 September, 1883, was executed and delivered to the defendant some two years thereafter, conveying the lot, and in the usual form acknowledging payment of the consideration and releasing the defendant therefrom.

The plaintiff, not having received her share of the proceeds of sale, on 3 May, 1884, instituted this action to recover the same, alleging
(274) in her complaint that while she authorized her brother to make the contract, and did not now repudiate it, he was not to receive her third of the purchase money, and that this restriction was put upon his power to act in her behalf when it was conferred.

The answer of the defendant denies his liability, alleging that he paid the plaintiff's portion of the purchase money to the said Jenkins, as well as his own, and went into possession, and continued to occupy the premises under the contract from the time it was made until the execution of the deed on 10 November, 1883, recognizing the full agency of said Jenkins to consummate the contract, including his receipt of the money due to the plaintiff, and without any communication with her about the matter or information of any limitation upon his authority.

The defendant relies also upon the acknowledgment of the payment of the consideration and his release therefrom, contained in the recitals

in the deed. Issues were drawn from the pleadings and submitted to the jury which, with the several responses, are as follows:

1. Was Jenkins authorized by plaintiff to receive the purchase money as her agent? Answer: "No."

2. Was the purchase money paid by defendant to Jenkins? Answer: "Yes."

3. Did plaintiff ratify such payment to Jenkins? Answer: "No."

4. Was the signature of plaintiff to deed procured by defendant by ignorance and surprise? Answer: "No."

5. Is plaintiff indebted to defendant by way of counterclaim; if so, how much? Answer: "No."

The plaintiff testified on her own behalf. Having stated that in the year 1881 she authorized her brother to sell the house and lot to the defendant for $900, but not to receive her share of the purchase money, she was asked what were her instructions to him in regard to her share of the money. The question was objected to by defendant's counsel on the ground that the limitations upon the agent's authority (275) proposed to be shown were not communicated to him. The objection was overruled, and the witness answered: "My instructions to my brother John were to leave my share of the purchase money on interest with Mr. Williams until called for."

1. To this ruling the first exception is taken. As the possession of authority to conclude the sale and receive the funds belonging to the plaintiff is essential to the defense, and must be inferred or directly shown, so its intent under imposed restrictions may be an essential part of it. If proof be given of the conferring of any authority to act, it must, to be full and complete, admit evidence of the limitations put upon its exercise. The answer was, therefore, admissible, whatever may be its effect upon the defendant, to whom the limitations were not communicated; and this is quite another question not involved in the admission of the answer.

2. The witness further testified that on 10 November, 1883, she went, at the request of her brother, to his house, four miles distant from her own, where she found him, his wife, one James M. Smith, the father of the latter, and J. B. Smith, a justice of the peace, and the deed, which had been executed by W. W. Graham and wife in September previous, lying on the table. It had just been signed by her brother and his wife, and she herself then signed it, saying to him, "I want you to go with me next Tuesday to Mr. Williams to get my money." He promised to do so, but never came for her; nor has she ever received any goods or provisions, nor had her brother any right to take up any for her of the defendant, or make a debt of any kind with him on her account.

The witness was then asked by her counsel if she knew, when signing the deed, the legal effect of the clauses acknowledging payment and acquitting the defendant of liability therefor. The answer that
(276) she did not was received solely as bearing on the issue as to surprise. To the reception of this evidence was also interposed an exception.

It was competent for this limited purpose and pertinent to the inquiry contained in the fourth issue. Upon cross-examination she stated that she knew that the deed conveyed her title to the land to the defendant which had been sold to him two years before, and during that time she had not called or sent to him for purchase money. John frequently bought groceries for her, but she always furnished him the money—the money she principally derived from rents, which he would collect for her, and she would hand him back money to buy groceries for her; that he had collected for her, for many years, rents on this and other property as her agent.

J. B. Smith, the justice, was present when she signed the deed; he witnessed it and took it off with him.

On re-examination plaintiff said she had received no part of purchase money from either defendant or Jenkins, and she had never assented to, authorized, or ratified any payment to Jenkins.

W. W. Graham, witness for plaintiff, testified that he lived in Richmond County and was the brother-in-law of Mrs. Shaw, the plaintiff, having married her sister Jane. That he and his wife consented to the sale of the property to Mr. Williams in 1881, at the price of $900.

That in September, 1883, he and his wife signed the deed in Richmond County, and he came to Fayetteville and delivered it to Mr. Williams, who seemed satisfied, and asked John Jenkins, who was with me, if he should pay me. John said yes. And he paid me $300 and interest, making $341 and some cents, being one-third of $1,024, the consideration expressed in the deed.

On a subsequent visit to Fayetteville Mrs. Shaw mentioned to me that she had never received her money, and to ask Mr. Williams for it. I met him on the street and told him what Mrs. Shaw had said.
(277) He replied that he had paid Jenkins. I told him that would not do, that Mrs. Shaw wanted her money and had requested me to ask him for it. He said he had paid it once and would not pay it again, and walked off.

DEFENDANT'S EVIDENCE.

J. B. Smith, witness for defendant, testified: I was present as a witness when Mrs. Shaw signed the deed. There was no influence used to get her to sign, and there was nothing said about money in my hearing.

Cross-examined by plaintiff's counsel:

I am a justice of the peace and went out to the house of John McL. Jenkins, at the request of A. B. Williams, to witness the signatures and to take the private examination of Mrs. Jenkins, which I did. John sent off after his sister, Mrs. Shaw. She came before I left and signed the deed. I witnessed it and carried it to Mr. Williams.

A. B. Williams, defendant, testified: John McL. Jenkins sold the property to me in 1881 at the price of $900.

I paid W. W. Graham $300 and interest when he handed to me the deed executed by himself and wife in September, 1883. I paid Jenkins the balance of the purchase money. During two years plaintiff did not call for the purchase money, and she never called for it. I first heard through her counsel, shortly before this suit, that she claimed the money had not been paid.

Defendant's counsel proposed to prove by this witness, by acts and declarations of Jenkins, that for a series of years Jenkins was receiving for Mrs. Shaw rents of this and other property, as tending to show a general agency. Evidence excluded, on objection by plaintiff, as the agency must be proved *aliunde*. Defendant excepted.

Cross-examined by plaintiff's counsel:

Jenkins was indebted to me for money advanced and goods sold along during the two years—but mostly for money. In this way the purchase money was all paid before Mrs. Shaw signed the deed. I have never paid Mrs. Shaw anything personally. She was never in- (278) debted to me for goods, and I made her no advances in money.

John Jenkins is now insolvent; he was at that time; it was not generally known, but I had reason to apprehend it.

No demand was made upon me for the money until after Jenkins became insolvent and left.

I had no acquaintance with Mrs. Shaw. She never told me that Jenkins was her agent to sell this property, and she never told me he was not. I had no communication with her at all.

I took possession in 1881, and soon bargained off a portion of the property for $800, retaining a small portion which adjoined my home place.

William T. Taylor, witness for defendant, testified: In 1874 or 1875 I bought a piece of land from Jenkins, acting for Mrs. Shaw, and paid the money to Jenkins. She signed the deed and made no claim on me for the money.

There were no special instructions in writing asked for by the defendant's counsel.

Among other things the court charged the jury that an agency to sell land did not necessarily imply the right to receive the purchase money;

but that whether or not Jenkins was the plaintiff's agent to receive the purchase money was a question of fact for the jury to find from all the evidence in the case, and in doing that the jury could consider whether or not plaintiff had held Jenkins out as her general agent or not; that the deed (by defendant's witness) had been carried to defendant by the justice of the peace, etc., and all the surrounding circumstances of this transaction. That if plaintiff had made Jenkins her agent to receive the purchase money or held him out so defendant reasonably acted on that belief, and she had not received the money, it was her misfortune to have chosen a dishonest agent. But if defendant trusted to
(279) Jenkins as representing himself as her agent, if it turned out to be untrue, then defendant was the victim of his own credulity. Defendant excepted.

Upon the third issue the court charged the jury that if plaintiff received from Jenkins the purchase money or any part of it, or if, knowing he had received it, she assented to or made no dissent, so defendant could get it back from Jenkins, that would be ratifying the payment to Jenkins.

Upon the verdict of the jury the defendant asked the court for judgment in his favor, as the jury had found against the plaintiff upon the fourth issue as to ignorance and surprise. This was refused by the court. Defendant excepted.

The defendant then moved for a new trial upon the other issues, for error in the charge and exceptions to the evidence, which being refused and judgment rendered for the plaintiff on the verdict, the defendant appealed.

If the testimony of the plaintiff be accepted by the jury as a correct statement of what transpired when the agency in respect to the sale was created, and this it belongs to them to determine, the authority to collect the money for the plaintiff was expressly withheld, and Jenkins was only empowered to make the contract. The extent of his authority seems not to have been inquired into, nor its limits communicated to the defendant at the time of making the contract or afterwards and when the deed had been executed. It is further manifest that in giving her signature and seal to the instrument, to give it efficacy as a conveyance, the plaintiff asserted her right to be paid for what she was conveying, and expressed her intention to call on the defendant and get her money. Unless, therefore, she had before permitted her brother to assume and exercise the functions of a general agent in conducting her business, and thus held him out as invested with such general authority to act for her, so as to reasonably induce the defendant to believe in his
(280) possessing the right to take her money, and he did act upon that belief, she could not repudiate his authority and fall back upon

limitations of which the defendant had no knowledge and compel the payment a second time.

In this aspect the case was presented to the jury, and it was as favorable to the defense as the appellant could rightfully demand. This brings up the consideration of the release relied on.

A series of decisions in this Court has established the proposition that a recovery cannot be had at law in an action for the recovery of the purchase money, though never paid in fact, when such payment is acknowledged in the deed and the claim therefor released, nor will evidence be heard to contradict the recital. *Brocket v. Foscue,* 1 Hawks, 64; *Graves v. Carter,* 2 Hawks, 576; *Spiers v. Clay's Admrs.,* 4 Hawks, 22; *Lowe v. Weatherly,* 4 D. & B., 212; *Mendenhall v. Parish,* 8 Jones, 105. While such is the effect given to the recital in this State, in which the ruling in the English courts is followed, it is generally held in our sister States that the recital does not constitute an estoppel, and is but *prima facie* evidence, open to disproof, of the fact stated. The authorities will be found in the note to section 26 of the first volume of Greenleaf's Work on Evidence.

But in a Court of Equity the obstacle is removed when the recital results from an inadvertence, and was inserted under a mistake of its legal effect and without any intention of the parties that it should so operate as to preclude a recovery of the purchase money.

In *Crawley v. Timberlake,* 1 Ired. Eq., 346, a bill was filed to get rid of the release upon an allegation that it was ignorantly inserted in the deed and its execution obtained by surprise, inasmuch as it was not founded on the consideration imported in it, namely, the payment of the purchase money, nor any other valuable or meritorious consideration, and there does not appear to have been any *intention in the plaintiff to abandon or extinguish his demand,* thus obviously (281) just.

In delivering the opinion upon the effect of simply setting up to an impeached release the release itself, without meeting the assailing averment or showing an actual consideration, *Chief Justice Ruffin* uses this significant language: "A Court of Equity does not sustain these shorthand bars, such as a release, a stated account and the like, unless they be pleaded as not only existing instruments, but also as being *fair and true* and proper to be equitably enforced." In the further discussion he quotes, with approval, the words of *Lord Redesdale* to the effect "that the plea of release must set out the consideration upon which it was made if impeached on that point."

And so every release must be founded on some consideration, otherwise fraud must be presumed. 2 Dan. Ch. Prac., 766; Story Eq. Plead., secs. 766 and 797.

The jury find—and there is no complaint of the absence of sufficient evidence to warrant the finding—that the agent had no authority to receive the plaintiff's money; never did pay it to her, and that as his act was never ratified, the payment by defendant is not a satisfaction of her claim, and he is still exposed to her demand. It is not our province to examine the evidence and pass upon its effect, but if we were at liberty to do so, we could not say there was none to show a mutual understanding, that the purpose of the execution of the deed was only to pass the title and not to acquit of the liability for the unpaid purchase money, while no specific issue was framed to raise the question.

The defendant insists, however, that the finding that the plaintiff's signature was not affixed to the deed procured by the defendant by ignorance and surprise leaves the release in full force, and is a bar to the claim.

(282) The issue is not put in a form to have this effect. There is no pretense that the plaintiff was surprised into making the deed or was ignorant of what she was doing. It is manifest that she executed it with full knowledge that it passed her estate in the land, and such was her purpose. The true inquiry should have been whether it was the intent to exonerate the purchaser from his obligation to pay the consideration money by the introduction of this recital, and if this was not the understanding, though erroneous, of both; in other words, a common mistake in both. The finding falls short of this, and therefore does not obstruct the rendering of judgment upon the verdict.

The difficulty we meet is as to the disposition of the appeal, and whether the cause should or should not be remanded for the trial of an issue upon this point. But as no actual replication is necessary under our present system, and the matter set up in the answer is deemed controverted unless it be a counterclaim, we consider the sufficiency of the release as open to proof as to its binding force, and as the defendant was content with the issue as drawn up and passed on, and the finding upon it is insufficient to reinforce the defense as constituting a bar to the demand, we conclude to affirm the judgment, based upon so much of the verdict as declares the debt unpaid.

There is no error and the judgment is

Affirmed.

Cited: Barbee v. Barbee, 108 N. C., 584; *Willis v. R. R.,* 120 N. C., 513; *Marcom v. Andrews,* 122 N. C., 225; *Boutten v. R. R.,* 128 N. C., 341; *King v. R. R.,* 157 N. C., 52; *Patton v. Lumber Co.,* 171 N. C., 839.

(283)

JOHN F. DAVIS v. TIMOTHY ELY AND OTHERS.

Complaint; Prayer for Relief in—Fragmentary Appeal—Submitting to Nonsuit; When Proper—Practice; Reserving Questions of Law Encouraged.

1. Under the C. C. P., the prayer for relief is most obviously a material part of the complaint. But *semble* that failure to insert such prayer is not fatal.
2. After the jury was empaneled and the pleadings read, the defendant moved to dismiss the action, upon the ground that it did not contain a statement of facts sufficient to constitute a cause of action. This motion was refused, the judge remarking that a cause of action was stated, but not such a cause as would entitle plaintiff to the relief he insisted on in the argument of his counsel. Thereupon, plaintiff submitted to a nonsuit, and appealed. No evidence was introduced by either party: *Held*, that there was no ruling to justify plaintiff's course, as there were no admitted facts, or facts that might be found upon proofs, upon which a practical ruling could have been made, and the appeal would not be entertained.
3. Fragmentary appeals will not be allowed when the subject-matter could be afterwards considered and error corrected, without detriment to the appellant. But this rule does not apply to interlocutory orders, the granting or refusal of which may produce present injury or loss, as these come within section 548 of The Code.
4. When a nonsuit is asked at the end of plaintiff's evidence, it is the better practice for the judge to reserve the point until after verdict.

CIVIL ACTION tried before *Graves, J.*, and a jury at Fall Term, 1887, of CAMDEN Superior Court.

Plaintiff, upon an intimation of opinion by the court, submitted to a nonsuit and appealed. The facts appear in the opinion.

E. F. Aydlett for plaintiff.
Harvey Terry for defendants.

SMITH, C. J. This action is instituted to reform and enforce (284) the specific performance of a contract, the terms of which are alleged to have been arranged and agreed on between the defendants and the father of the plaintiff acting on his behalf verbally, and which contract, by means of the false and fraudulent representations made by the defendant Terry, acting for his associates, as to the provisions of the oral agreement, was put in its present form, as shown in the accompanying exhibit. The variation, it is asserted, consists in substituting for

the Hall tract of land, containing 3,000 acres, which the plaintiff was to have, in addition to the share to be allotted in the division of the great Parker estate, an indefinite portion of 1,300 acres adjoining that share, the correction and amendment required being to bring the matters in harmony with the parol contract. It is only necessary to say that the answers of the defendants deny the imputations and enter into an explanation of the facts of the transaction inconsistent with the charges in the complaint.

The complaint, after a statement of the facts that constitute the cause of action, concludes with no demand for specific relief except for costs, adding, "and for such other and further relief as to the court may seem just."

As the essence of a bill in equity for relief lies in the recital of facts and the demand for redress, it ought to be shown therein what is demanded, and under a prayer for general relief, if that specified cannot be given, some other may be, consistent with the structure and objects of the bill. *Whitfield v. Cates,* 6 Jones Eq., 136.

The office of a complaint which, under The Code, takes the place of the bill, is to set out the facts out of which comes the cause of action, and as the summons, which begins the suit, notifies the party on whom it is served to answer the charges to be preferred against him "or the plaintiff will apply to the court for the relief demanded in the complaint," The Code, sec. 213, most obviously this becomes a mate-
(285) rial part of the pleading.

But waiving this defect, which we do not declare to be fatal, we proceed to the consideration of the case presented in the appeal.

The record shows that after the jury had been empaneled and "the complaint and answer read," as we understand, that the matters in issue might be seen from the conflicting allegations (for no issues in form appear in the record), the defendants moved to dismiss the action for an insufficient statement of facts in the complaint. This motion was denied, the court at the same time remarking that while a cause of action was stated in the complaint sufficient to warrant the rescission of the contract, if sustained by the proofs, it could not be reformed, and as corrected specifically enforced, as insisted on by the plaintiff in the argument. In submission to this intimation of opinion the plaintiff suffered a nonsuit, and from the judgment appealed.

The opinion expressed was, under the circumstances, purely hypothetical and contingent upon the results of evidence that had not been heard, and was to be passed upon by the jury. The trial was then entered upon, and the case not in a condition to authorize any practical and effectual ruling upon the point. Such a speculative opinion, open

to change upon a reconsideration up to the time when the cause was ripe for judgment, does not authorize an abrupt termination of the action in the midst of its progress, and we have often announced that such an appeal, fragmentary and inconclusive, would not be entertained. In answer to the suggestion that if the opinion were upheld it would dispose of the cause and save the delay and expense of further litigation, it may be said that this would be equally true of a motion to dismiss the action, and yet in a multitude of cases, when disallowed, it has been held that an appeal would not lie, and this because no right, if exception to the ruling be noted, is lost, and the exception may be reviewed upon an appeal from the final determination. *Crawley v. Wood-* (286) *fin,* 78 N. C., 4, and numerous cases cited in Clark's Code, p. 332 *et seq.*

The policy of the new practice is to bring litigation to an early close, and hence the rulings that an error leading to no present injurious consequences, and capable of correction after trial on appeal, will not be suffered to interrupt the proceeding unnecessarily.

On the other hand the inconveniences might be very serious if in the ruling there was found to be no error, and the same had to go back to be prosecuted from the point of interruption, with all the increased expense and consequent delay, when as in our case the jury were empaneled and the witnesses present to be examined. The trial ought, therefore, to have gone on, and the failure of the plaintiff to make good his allegations would have rendered the opinion, when it was to pass into a ruling, entirely immaterial.

It has been repeatedly and distinctly held that appeals, fragmentary in their character, could not be allowed when the subject-matter could be afterwards considered, and any erroneous ruling corrected as well, without detriment to the appellant. *Hines v. Hines,* 84 N. C., 122; *Comrs. v. Satchwell,* 88 N. C., 1; *Jones v. Call,* 89 N. C., 188; *Lutz v. Cline, ibid.,* 186.

The rule does not, of course, apply to interlocutory orders made from time to time, the granting or withholding of which may produce present loss or injury and need prompt action to prevent, for these cases come within the words of section 548 of The Code.

Under the former practice this method was disapproved, and though allowed, it was suggested as a proper course of action, when a nonsuit was asked at the close of the plaintiff's evidence, not at once to rule upon the point, but to reserve the question and let the case proceed to a verdict, so that if it was against the plaintiff, the reserved point would be put out of the way, and if for him, the ruling upon it, adverse (287)

to the defendant, when erroneous, could be corrected, and in either case the cause terminated. *Kirby v. Mills,* 78 N. C., 124.

What has been said has reference to premature appeals upon rulings actually made, or upon an intimation of an opinion when about to be made in a condition of the case admitting it, to avoid which a nonsuit is suffered; but even this state of facts is not before us now.

Our decision rests on the fact that there was no ruling, nor could be, so that it would be avoided by a nonsuit, to call for the action taken by the appellant, inasmuch as there were no admitted facts or facts that might be found upon proofs upon which a practical and sufficient ruling could have been made.

For these reasons we should dismiss the appeal and allow the cause to proceed in the court below, but that such would not be the result in this case because of the nonsuit which ends the action, and this action was in deference to the intimated ruling. We therefore remand the cause that the nonsuit may be set aside and the action proceed. And it is so adjudged.

Error. Remanded.

Cited: S. v. Warren, post, 494; *Tiddy v. Harris,* 101 N. C., 592; *Lambe v. Love,* 109 N. C., 306; *Hoss v. Palmer,* 150 N. C., 18; *McKinney v. Patterson,* 174 N. C., 489; *Lumber Co. v. Johnson,* 177 N. C., 44; *Cement Co. v. Phillips,* 182 N. C., 440.

T. C. OAKLEY v. C. M. VAN NOPPEN.

Judgment—Undertaking—Execution—Appeal.

1. Upon the affirmance by the Supreme Court of a judgment of the Superior Court in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal; and such affirmance is conclusive of the liability of the sureties.

2. No particular form is required for an undertaking to stay execution upon appeal—and if words are inserted in such undertaking repugnant to its intent, they will be rejected as surplusage.

(288) MOTION heard by *Philips, J.,* at March Term, 1887, of DURHAM Superior Court, for judgment in accordance with the opinion of the Supreme Court, which had been duly certified, against the defendant and Eugene Morehead, his surety, upon an undertaking

to stay execution of the judgment theretofore rendered in this case at Spring Term, 1886, of Durham Superior Court, and which judgment, on appeal by defendant, was affirmed by the Supreme Court. *Vide,* 95 N. C., 60.

The undertaking was as follows: "Know all men by these presents that we, C. M. Van Noppen and Eugene Morehead, are held and firmly bound unto T. C. Oakley in the sum of sixteen hundred dollars. Witness our hands and seals, this 29 March, 1886.

"The condition of this bond is such that, whereas C. M. Van Noppen has appealed to the Supreme Court from the refusal of the Superior Court judge to allot and set aside and declare invalid, as against defendant's right of homestead, the alleged lien of T. C. Oakley filed in the Superior Court clerk's office against the house and premises of said Van Noppen: Now, then, if upon said appeal the said ruling is affirmed and said alleged lien declared and held to be valid as aforesaid, and the said Van Noppen shall then and in that case fail to pay the judgment of $805.90 against him in this action, then this bond shall remain in force; but if in such event it is paid, the bond is void."

This undertaking was signed and sealed by C. M. Van Noppen and Eugene Morehead.

The defendant and Eugene Morehead opposed the motion because, first, the contingency upon which said undertaking was to be payable had not happened, and secondly, at Fall (October) Term, 1886, of Durham Superior Court, the judge had made an order in an (289) appeal in said court depending, from the return of the appraisers of the homestead of defendant under an execution issued in this action, directing sale of defendant's house and lot and the payment to him of one thousand dollars in money in lieu of a homestead, from which order and judgment the defendant had appealed to the Supreme Court, where his appeal was still pending and unheard.

His Honor rendered the following judgment:

"The judgment and opinion of the Supreme Court having been filed, and it appearing that the judgment of the Superior Court is in all respects affirmed: Now, on motion of plaintiff, it is adjudged that plaintiff Oakley recover of defendant Van Noppen and Eugene Morehead, his surety on his undertaking for stay of execution, the sum of sixteen hundred dollars, the penalty of said undertaking, to be discharged upon the payment of $805.90, with interest," etc.

From this judgment the defendant and Eugene Morehead appealed.

J. W. Graham and Jas. Manning for the plaintiff.

E. C. Smith and W. W. Fuller for defendant.

DAVIS, J. At the March Term, 1886, of the Superior Court of Durham, there was a judgment in favor of the plaintiff against the defendant, Van Noppen, for $805.93, from which the said defendant appealed to the Supreme Court, and it was to stay the execution of the judgment appealed from that the undertaking set out in this proceeding was executed. The undertaking is not in the usual form in appeals from judgments directing the payment of money, but contains a condition upon which the appellants insist that their liability depends, and that the contingency upon which they were to pay has not happened. They further object because of what transpired at the Fall Term, 1886,
(290) of Durham Superior Court.

The liability of the obligors rests entirely upon the judgment of the Supreme Court rendered upon the appeal, and the second ground of objection to the motion for judgment upon the undertaking cannot be considered by us. No exact form of undertaking is required; and we are to consider whether there was such an affirmation by the Supreme Court of the judgment appealed from as to entitle the plaintiff to judgment upon the undertaking given.

The case as reported in 95 N. C., page 60, is made a part of the case on appeal, and from it appears, as material for our consideration, that the plaintiff's action was for the recovery of money alleged to be due for the erection of a house by agreement for the defendant; that the defendant failing to pay, the plaintiff filed a lien upon the house and lot on which it was built, and he demanded judgment for the amount alleged to be due, and that the "judgment be declared a lien upon said house and lot." The defendant denied the plaintiff's right to recover. He also denied the right of the plaintiff "to file or have a lien upon defendant's property," etc., and set up a counterclaim. Issues were submitted, with the assent of both parties, and upon the first the jury found that the defendant was indebted to the plaintiff in the sum of $805.93, and upon the second that the plaintiff was not indebted to the defendant.

In the statement of the case it is stated that "the defendant in his answer alleged that the lien was invalid as against his homestead, and prayed that the court might so determine, and objected to the judgment unless it contained a clause declaring the lien invalid as against his homestead." After a statement of other facts, *Ashe, J.*, delivering the opinion of the Court, says: "The only exception presented for our consideration by the record is to the judgment, because it did not declare the lien invalid as against the defendant's homestead. The excep-
(291) tion cannot be sustained for several reasons"; and after stating them he says: "Our conclusion is there was no error, and the judgment of the Superior Court is affirmed." If the defendant, Van Noppen,

failed to have the question of his right to a homestead properly presented, it seems to have been from no error in the "ruling" or judgment of the Superior Court, to which he excepted and from which he appealed, and that judgment having been affirmed by the Supreme Court, no subsequent proceedings affecting or declaring the rights of the defendant, Van Noppen, to a homestead could vary or change the liability of the obligors in the undertaking on appeal. That liability became absolute when the *ruling* of the court below was affirmed, and the exception "to the judgment, because it did not declare the lien invalid as against the defendant's homestead," overruled.

There is no error and the judgment is affirmed.

The foregoing opinion was filed at October Term last of this Court. During that term a motion in behalf of the defendant for a reconsideration was filed, and the case was reheard at this term.

SMITH, C. J. We have carefully reconsidered the opinion and the conclusion to which it leads upon the defendant's application, and in the light of the adjudications to which we have been referred, and find no sufficient ground for changing the result.

The judgment, from which the appeal is taken, is rendered in the usual form of a simple money demand, and its silence as to the existence of the lien, asserted and sought to be enforced in the complaint, must be deemed a denial of the claim and an adjudication against it, and the subsequent proceedings under execution, in the recognition and allotment of the debtor's homestead in the land, uncontested, shows such to be the construction put upon the judgment and its legal effect by the parties. (292)

There is no ground, therefore, for an appeal by the defendant from the ruling of the court and the refusal to insert a clause in it declaring the priority of the homestead right over that of the statutory lien upon the premises, for the adverse decision as to the latter leaves the premises, when being subjected to the execution, open, as in the other cases, to the claim for exemption, to be asserted in the mode prescribed by law. There is, consequently, no just cause of complaint afforded to the defendant for his appeal, for the proposed modification of the judgment would have been of no advantage to him.

The complaint, when there is no just reason for it, comes from the defendant alone, and the appeal is his alone, prosecuted solely to redress a supposed wrong done to him and correct a ruling from which it is alleged to result, and the undertaking, put in the form of a penal bond with conditions, is in his *interest* and for *his relief*, and the surety thereto comes collaterally and contingently into the action, in support

and aid of the debtor, in effecting a reversal or correction of the ruling for his relief and benefit. The recitals in the bond show its aim and purpose to be to subordinate the lien to the homestead by direct declaratory terms, and its end is obtained when this result is reached.

The objection of the appellants in the present appeal to the rendition of the judgment rests upon the introduction into the condition, upon which the liability depends, the further words, "and said alleged lien declared and held to be valid as aforesaid," a contingency which has not occurred, since no such adjudication was made. But this provision is not only repugnant to the clause immediately preceding, for the *affirming of the ruling* precludes the making any such inconsistent declaration, and both conditions cannot co-exist, but is contrary to the entire scope and object for which the undertaking was given, as shown by its terms. There is then no alternative, and these inadvertent words
(293) must be rejected on account of such repugnancy, or the bond is a nullity. We are constrained, therefore, to eliminate them, or give such a construction to the instrument as will make it conform to the statutory requirement, and the other provisions meet this and render it, what all parties meant it should be, a security for the debt, if there was no error found in the action of the court.

In this connection it may be remarked that the very object of the appeal, a judicial determination of the question of the relations between the lien and the exemption in favor of the debtor, would be defeated if this condition now insisted on is essential to the liability, so that the appellant will extricate himself from his bond by losing the very interest his appeal was intended to secure.

The clause which makes the difficulty has no proper place in the instrument, and it is complete under the statute with the clause omitted, since the allegation becomes operative by the *affirming* of the judgment in the appellate court, and so itself and the statute alike provide. The Code, sec. 554.

As then the liability, before contingent, becomes absolute when "the judgment appealed from or any part thereof is affirmed or the appeal dismissed," and it has been affirmed, we think, notwithstanding the interpolation of the repugnant matter, the bond imposed the obligation of payment on the surety, and it was properly so adjudged. We have examined the cases cited, so far as accessible to us, and they do not contravene the principle of this adjudication, and that of *Crist v. Burlingame,* 62 Barb., 351, rather gives it support. It cites with approval what is said by *Shaw, C. J.,* in *Burt v. Hartshorn,* 1 Met. (Mass.), 24, as follows: "The rule, as in other cases, must be to look at the whole instrument and the circumstances and relation in which the parties

stood to each other at the time of entering into the contract, and therefrom ascertain the intention of the parties; and the intent, when thus ascertained, must govern the construction of the contract." (294) And in the present case we give effect to the maxim, *ut res magis valeat quam pereat,* so often quoted in the adjudications of this Court.

We therefore leave undisturbed our former ruling, and find no error in it.

Affirmed.

H. H. COOK, ADMINISTRATOR, v. WM. E. MOORE, EXECUTOR.

Amendment—Judgment of Supreme Court.

1. Except upon an application to rehear, or because of "mistake, inadvertence, surprise or excusable neglect," as provided by statute, the Supreme Court has no power to amend its regular judgment, regularly entered, at a preceding term; but it can amend a judgment improperly entered, or enter one which was not entered, or not properly entered, at a former term, when the Court intended and ought to have entered it.

2. It manifestly appearing that this Court, at a former term, determined to reverse a judgment of the court below, but inadvertently an order of affirmance was made at the foot of the opinion filed by one of the Justices, for the Court, this Court will strike out that order and enter one of reversal.

MOTION to amend a judgment of the Court inadvertently entered at October Term, 1886 (95 N. C., 1.).

R. B. Winborne for plaintiff.
R. B. Peebles for defendant.

MERRIMON, J. The plaintiff moved at the present term to strike from the records of this Court an entry made by mistake, as suggested, that purports to be a judgment in its nature final here in this case, granted at October Term of 1886, affirming the judgment of the court below, and to enter of record *nunc pro tunc* the judgment re- (295) versing that judgment which the court had determined upon and intended to enter but failed by inadvertence so to do.

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. *Murphy v. Merritt,* 63 N. C., 502; *Mabry v. Erwin,* 78 N. C., 45; *Moore v. Hinnant,* 90 N. C., 163, and cases there cited; *Sebbald v. United States,* 12 Pet., 488; *Bank v. Moss,* 6 How., 31; *Bronson v. Schulten,* 104 U. S., 410.

It is just as well settled, however, that the Court has authority upon application, or *ex mero motu,* at all times in term, and it is its duty to amend and correct its records so as to make them speak the truth and be consistent, and to make proper entries *nunc pro tunc* that were certainly intended but omitted to be made by mistake, accident, or inadvertence of the Court. Such authority is essential. Courts are not infallible; they, like all other earthly tribunals, are liable to make mistakes of fact that cannot be corrected in the ordinary course of procedure, and it would contravene every principle of reason and justice if they could not in some way correct them. The law contemplates that each court can itself the better, the more certainly and accurately correct such its own mistakes than another court, whether appellate or not. But such power should be exercised with great care and caution, and only upon clear and satisfactory proof, because, when entries are made in the course of the business of the court, they are presumed to have been made upon careful consideration and to be correct; and, moreover, they import absolute verity while they are allowed to remain. *Farmer v. Willard,* 75 N. C., 401; *Wall v. Covington,* 83 N. C., 144; *Scott*
(296) *v. Queen,* 95 N. C., 340; *Strickland v. Strickland,* 95 N. C., 471; *Brooks v. Stephens, post,* 297; *Matherson v. Grant,* 2 How., 263; *Sheppard v. Wilson,* 6 How., 260; 2 Tidd's Pr., 932; 1 Will. on Exrs., 762, 763; 3 Chit. Gen. Pr., 101.

The mere entry in writing on the minutes of the proceedings of the court from which the record is made up when need be does not itself constitute the judgment; it is only evidence of it, and imports verity while it remains. But the judgment is the conclusion of the law, as determined and applied by the court to the case before it, and it remains in the mind of the court until it shall be truly entered of record. When the conclusion of the law in a case is thus reached the court cannot, after the term at which it was entered, interfere with it. At the end of the term it passes beyond the control of the court. But the entry of record must embody and be what the court determined, decided, and what it intended should be so entered; otherwise, the judgment will not have been entered of record, and the court may, at a subsequent term, enter it correctly *nunc pro tunc.* The court cannot, at a subsequent term, amend, modify, or interfere with a regular judgment regularly entered of record at a preceding term; it can correct, amend, or modify such a

one improperly entered or enter one which through accident, mistake of fact or inadvertence of the court was not properly entered or not entered at the former term, when the court intended to enter and ought to have entered it.

In the case before us it is manifest from the opinion of the court filed, prepared by the late *Justice Ashe,* that the Court had determined, and it was its mind and purpose, to reverse the judgment of the court below and grant a new trial, and to enter judgment accordingly. It also so appears from the memorandum made by the Court at the time the case was decided in conference of the Judges. The order of affirmance, made at the foot of the opinion, was a clear inadvertence of the Court, and cannot be allowed to prejudice the plaintiff. Through such (297) inadvertence of the Court its judgment was not entered, and it must be now.

The motion must be allowed, and it must be declared that there is error. The judgment of the court below must be reversed and further proceedings had in the action there, according to law. To that end the clerk will certify this opinion, and the opinion of the Court as delivered heretofore, except the memorandum at the foot thereof, to the Superior Court, and direct the clerk of the latter court to return to the office of the clerk of this Court the certificate purporting to be the certificate of the judgment of this Court.

It is so ordered.

Cited: S. v. Farrar, 104 N. C., 703; *S. v. Willis,* 106 N. C., 804; *Summerlin v. Cowles,* 107 N. C., 441; *Scroggs v. Stevenson,* 108 N. C., 262; *Solomon v. Bates,* 108 N. C., 322; *Bernhardt v. Brown, ibid.,* 711; *James v. R. R.,* 123 N. C., 306; *Board of Education v. Henderson,* 127 N. C., 9; *S. v. Marsh,* 134 N. C., 187; *Durham v. Cotton Mills,* 144 N. C., 714; *Nelson v. Hunter,* 145 N. C., 337; *Mann v. Mann,* 176 N. C., 370.

MARY C. BROOKS, WIDOW OF J. W. SHACKELFORD, v. C. STEPHENS, R. W. WARD AND OTHERS, CREDITORS OF J. W. SHACKELFORD.

Record—Amendment.

A judge has the power to amend a record, so as to make it speak the truth, at any time; and, by consent of parties, he may hear the evidence for that purpose, and make the order of amendment in a county other than that where the record is.

BROOKS *v.* STEPHENS.

APPEAL by the plaintiff from an order made by *Connor, J.,* at Chambers in Wilmington, in April, 1887, amending a judgment rendered by Clark, J., at Fall Term, 1886, of the Superior Court of JONES County, to which the proceeding had been moved, by consent of parties, from Onslow.

The facts sufficiently appear in the opinion.

(298) *S. W. Isler for plaintiff.*
Clement Manly for defendants.

SMITH, C. J. There is no error assigned in this appeal, which is taken from the action of the judge in correcting a mistake made in rendering a judgment in the cause at a previous term, and at a place outside the county wherein it had been pending.

The subject-matter of the amendment was in the plaintiff's claim to dower in a fund which had been produced by the sale of what is called the Miller land, in which her husband had acquired the equity of redemption, subject to two incumbering mortgages, the debt secured in the latter having been assigned to him. The proceeds of the sale were insufficient to discharge the secured debts.

In the first judgment the plaintiff was declared to be entitled to one-third in value of the other lands left by her husband, but that she "is not entitled to dower or provision in lieu of dower in the fund or money arising from the J. K. Miller land, as set forth in the third, fourth, and fifth articles of the complaint." The amendment consisted in substituting, for the descriptive words following the word "entitled," "to dower in the land set forth in the complaint as the J. K. Miller land, nor the provision in lieu of dower therein." The change was entirely unnecessary, a distinction without a difference, as the land had been sold under proper proceedings to foreclose, and a claim could only attach to the money fund into which the land had been converted by the sale, if it had any validity in law.

The amendment, the result of overcaution and to prevent a possible future misconstruction of the terms of the judgment, was allowed upon full evidence of the intent of the former judge, furnished by himself and the attorney, who by his direction put his ruling in writing and inadvertently left out the words now supplied, and at a place and time agreed on by counsel of both parties. There is no ground for any
(299) complaint on the part of appellant in thus putting the judgment in proper form, as it was verbally pronounced at the original rendering. The validity of the action of the court in hearing and passing upon the application to amend at the place fixed upon is sus-

tained by the cases of *Hervey v. Edmunds,* 68 N. C., 243; *Harrell v. Peebles,* 79 N. C., 26, and others subsequently decided.

The power and the duty of making the record speak truly the ruling of the court and the action taken in a cause is supported by abundant authority.

The court may, for the purpose of ascertaining the facts, hear evidence, *S. v. Swepson,* 83 N. C., 584; may supply an omission, *Perry v. Adams,* 83 N. C., 266; *Walton v. Pearson,* 85 N. C., 34, and may do this without regard to lapse of time, *Long v. Long,* 85 N. C., 415.

Any matters of law involved in the action, if before us upon exception, would not require consideration, as they have been passed on in the case of *Shackelford* (then the name of the plaintiff) *v. Miller,* 91 N. C., 181, where the claim to dower in the fund was asserted and denied by the court.

There is no error and the judgment is affirmed.

No error.

Cited: Cook v. Moore, ante, 296; *S. v. Farrar,* 104 N. C., 703; *Beam v. Bridgers,* 111 N. C., 271; *Bank v. Gilmer,* 118 N. C., 670; *Murray v. Southerland,* 125 N. C., 178.

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(300)

D. F. CANNON, J. W. CANNON (AND OTHERS), TRADING AS CANNON, FETZER & WADSWORTH v. WESTERN UNION TELEGRAPH CO.

1. Plaintiff had contracted to deliver in New York 100 bales of cotton in December, and 500 in February following. On 3 November, at 9:30 A. M., he handed to defendant's agent, a telegraph operator, a message, *in cipher,* on the usual blank of the company, directing plaintiff's agents to buy, if market was firm and advancing; and at 11:45 another, also in cipher, and on the printed blank, ordering them to buy without condition. The messages were sent by different connecting lines, the first at 11:15 A. M., and reaching New York at 1:20 P. M., and the second at 12:35 P. M., but reaching New York three minutes earlier than the other. The cotton exchange closed at 3 o'clock, and the messages, which were not repeated, were delivered an hour and a half before, but plaintiff's agent, on account of the confusion of the orders, did not buy. The next day was a holiday, and the day after cotton futures had risen several points. In an action for damages, the judge instructed the jury, that they might give as damages, the difference between the prices on the 3d and the 5th: *Held,* that there was error.

2. If a telegraphic message be in the form of a proposal to buy or sell on certain terms, its importance appears on its face; but if its importance

is not thus disclosed, and the sender does not have it repeated, when thereby a mistake could be avoided, it is at his own risk, in the absence of gross negligence of the servants of the telegraph company.

3. Whatever the analogy between common carriers of goods and public carriers of messages, the loss of a bargain, from which profit would have resulted, cannot be visited in damages upon the carrier, unless informed of the purpose or importance of the message.

(General responsibility of telegraph companies for erroneously delivering, and delay in delivering messages, discussed by SMITH, C. J.)

CIVIL ACTION tried before *Gilmer, J.*, at January Term, 1887, of the Superior Court of CABARRUS.

(301) There was a verdict and judgment for plaintiffs, and defendant appealed.

The plaintiffs, Cannon, Fetzer & Wadsworth, cotton merchants, engaged in business at Concord, in this State, had entered into contracts with persons in New York to deliver to them respectively one hundred bales of cotton in December, 1879, and five hundred in February of the next year. In order to provide for fulfilling said contracts, in the forenoon of the 3d day of November preceding they placed in the hands of the defendant's agent and operator a message, to be transmitted over the wires to Tannahill & Co., their agents in New York, in this form:

"If market is firm and advancing, narrator."

At a later hour the same morning, about the hour 11:45, and after receiving a telegram giving the state of the market on that day, a second message was sent, containing the simple word "Narrator," and omitting the prefacing conditions of the first. Neither of these dispatches had upon them any marks indicating the hour at which they were delivered to the operator, but each was endorsed by the operator with the hour at which it was sent, showing the first to have been started at 11:15 a. m. and the next at 12:35 p. m.

There being no direct single telegraphic wire connecting these points, it was necessary to transmit such communications, when required, to what are denominated relay offices, where the message was received and, by repeating, forwarded to its destination, one of them, used at Concord, being at Charlotte, and the other at Greensboro, and messages were sent indifferently by the one or the other, whichever less pressed with other business could most speedily forward them.

The first of these messages passed through the Charlotte office and thence was sent on to Richmond, where it could not be immediately forwarded in consequence of the bad working of the wires from atmospheric or other disturbing cause and the consequent accumula-

(302) tion of business in the office, and suffered some delay, reaching New York at 1:20 p. m.

The later message, passing through and stopping at Greensboro, with the greater facilities afforded then by that route, arrived and was delivered three minutes earlier than the first.

There being nothing upon the face of either to show its priority in time, and the market not indicating a tendency to advance, the agents forbore to proceed, and did not carry out the instructions, exercising their judgment, as authorized in the first forwarded and last received dispatch.

The Cipher Code, as the book is designated, in which unexplained, and unmeaning without, words are used by the plaintiffs to convey directions, unintelligible to others than those who have learned it, contains, according to the testimony of one of the plaintiff firm, 180 pages, with about 20 ciphers on each, and 35 such on the page whereon the word *"narrator"* is found. The telegraph operator had before been in the plaintiffs' service and seen the book, but, as he declared when giving in his testimony, did not know its cipher import nor understood the importance of the communication, though as the plaintiff J. W. Cannon, who handed in the first message at 9:30 a. m. swore, that in doing so he informed the operator, W. H. Holt, of his wish for the prompt sending off of it in order that it might reach New York if possible before the opening of the cotton market that day.

The dispatches reached that city and were delivered to the agents, Tannahill & Co., one hour and a half before the closing of the cotton exchange, which is at 3 p. m., and they were proceeding to make the purchases under the unconditional order when they were stopped by the first order, the filling of which was dependent on the state of the market, which was not firm, and funds of the plaintiffs sufficient for the purpose in their hands.

On 3 November cotton futures, deliverable in December, were (303) selling at 11.01, and in February at 11.27. The next day the exchange was not opened, it being a legal holiday, and on 5 November the price had advanced for these deliveries, as it did further on the day succeeding, to 11.39 and 11.65, respectively.

The messages were sent on printed forms, in the upper part of which (and to this attention is called in a memorandum at the foot in large capital type) is the following clause:

"All messages taken by this company are subject to the following terms":

"To guard against mistakes or delays the sender of a message should order it repeated—that is, telegraphed back to the originating office. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission

or delivery, or for nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of the lines, or for errors in cipher or obscure messages.

"And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination."

Then follows a clause providing for insuring the correct transmission of the message over the lines of the company at an additional charge of 1 per cent for 1,000 miles or less, and 2 per cent for a greater distance.

(304) It does not appear that the plaintiffs, by their agents or otherwise, made any contract for the purchase of cotton to meet their own future deliveries at the enhanced or at any price, and under the directions of the court the jury were allowed to estimate the damages at the difference in price on the article on the third and fifth days of the said month, the advance between those dates being found by the jury to be $855 on the entire lot, with the liberty of allowing interest thereon, which the jury did give at the rate of 6 per cent per annum. To this instruction as well as to many others given, or refused when requested by defendant's counsel, exception was entered, which we do not find it necessary to examine, nor indeed to determine the effect upon the defendant's liability for the alleged negligent delay in transmitting the message.

Jno. Devereux, Jr., for plaintiffs.
P. D. Walker for defendant.

SMITH, C. J., after stating the case: Without passing upon the question of the plaintiffs' own culpability in sending off a second so near the first message without any intimation upon its face that a previous one had been sent, which the last was intended to modify, and with no allusion whatever to it, a fact which seems to have caused the perplexity in the minds of the agents as to what ought to be done, and in consequence they did not act at all; or upon the indifference of the agents themselves in not at once inquiring by telegraph the meaning of the conflicting communications and regulating their conduct by the information thus obtained, we think it was but a reasonable requirement that the importance of the message and of its speedy as well as accurate transmission should have been known to the receiving operator, so as to stimulate his activity in forwarding it, in more distinct and direct terms than those

testified to by the partner. The message itself speaks no certain sound, and conveys to the reader unacquainted with the new (305) meanings affixed to words in the code no suggestion as to its real significance, as it did not, as the operator swears, to himself. This is but a reasonable requirement on the part of the company, and if the sender chooses to speak in unintelligible language to those who are to pass it over the wires, it is due to the company, if it is to be held responsible for serious damages, that the information of its importance should be given to the sending operator, in order that he may communicate it to an intervening agency employed in forwarding, and thereby diligence and care be secured from each. If the message be in the form of a proposal to buy or sell on certain terms, so that, in case of concurring minds, a contract would result, its importance would appear on its face; if not thus disclosed and a party chooses to send a single unrepeated message, liable to be misunderstood and erroneously conveyed in passing through other offices, when at small additional expense the mistake could be avoided, it should be at his own risk, in the absence of gross and inexcusable negligence on the part of the company and its servants.

Such is the import of the ruling in *Lassiter v. Tel. Co.*, 89 N. C., 334, where the plaintiff assumed the hazard of a single communication and acted upon it.

There are decisions which hold an analogy between public carriers of goods and public carriers of messages, and put the same rigid responsibility upon each. The supposed analogy is repudiated by others, as a message transmitted has not a property value like goods, requiring safe custody and delivery.

But assuming some such similar relation to have been formed between them and the person employing their services, it by no means follows, in either case, that the loss of a bargain made or which might have been entered into, from which profit would have resulted, can be visited in damages upon the carrier uninformed of the purpose (306) or importance of the communication. Thus in *Horne v. Mid. Rail. Co.*, L. R. 7, C. P. 583, a case commented on in Wood's May. Dam., sec. 34, p. 40, the plaintiff had contracted to deliver a lot of shoes in London on 3 February, 1871, intended for the use of the French army, and on delivering them to the company for transportation he gave the information to the latter that the contract required a delivery on that day, but did not state the special nature of the contract. In consequence of the delay in the carriage the contract could not be complied with, and the goods were refused. The market price had not varied between the day when the shoes were due and that on which they were received, but

it was below the contract price, of which the company was ignorant. It was held that the company was not liable for this difference, it not having been advised of the special circumstances which led to the special loss.

And so in *Sanders v. Stuart,* 1 C. P. D., 326, noticed in the next section of that work, the rule was extended to a telegraph company. The plaintiffs intrusted the defendant with a message in cipher to be sent by telegraph to America, which was not delivered, and the plaintiffs lost considerable profits in consequence which otherwise would have been made. The message was unintelligible to the defendant, and so intended to be, giving him no clue as to the special loss that might result from his negligence. It was held that no more than nominal damages could be recovered. But a more serious obstacle in the way of the plaintiffs' recovery of substantial damages is presented in the fact that they made no contract from which either profit or loss could come, did not buy (the agents acting for them) at the advanced rates beyond what the cotton might have been bought for on the day of the reception of the messages, and for aught that the case shows they might have
(307) bought at a subsequent time before they were required to deliver at the same or at a reduced rate. However this may be, no actual loss is proved *to have been incurred,* and the loss is merely of an opportunity of making a bargain, which would have been profitable had the goods been sold on the 6th day at the market price then prevailing. It is not shown that any loss was sustained upon the plaintiffs' contract from their being compelled to pay a higher price than that which ruled on the 3d.

But the very point now under consideration came before the Supreme Court of the United States at a recent term, *W. U. Tel. Co. v. Hall,* 124 U. S., 444, and the opinion of *Mr. Justice Matthews* is so full and his reasoning so conclusive that we are content to refer to it as a controlling authority and decisive of the case before us.

The defendant in error, plaintiff in the court below, at 8 a. m. 9 November, 1882, sent from Des Moines, Iowa, by the company's line of telegraph a message, upon a similar form as ours, to Charles I. Hall at Oil City, in Pennsylvania, as follows: "Buy ten thousand, if you think it safe. Wire me." The message was forwarded, and from negligence and want of care reached Oil City at 11 a. m. the same day, leaving out the name of the person to whom it was addressed. Had it been given, Hall would have received it at 11:30 and would have bought the petroleum, meant in the message, at $1.17 per barrel, the market price.

When the name was ascertained and the dispatch delivered to Hall at 6 p. m. the exchange was closed, and at the opening next morning the

price had advanced to $1.35 per barrel, and in consequence, it being left to his judgment, Hall did not buy. The action was to recover the difference in price, to wit, 18 cents per barrel.

After an elaborate examination, following a full and exhaustive argument, with a large number of cited cases, the court came to the conclusion that the plaintiff could only recover the cost of (308) transmitting the message. The Court say: "Of course, where the negligence of the telegraph company consists not in delaying the transmission of the message, but in transmitting a message *erroneously,* so as to mislead the party to whom it is addressed, and *on the faith of which he acts in the purchase or sale of property,* the actual loss, based upon changes in market value, are clearly within the rule for estimating damages"; "neither does it appear," the opinion proceeds to say, "that it was the purpose or intention of the sender of the message to purchase the oil in expectation of profit to be derived from an immediate resale."

Brought to the test of this ruling it is plain that there have been sustained no damages for which the law will give redress upon the defendant beyond a nominal sum. Had the goods been bought on the day of receiving the message it was not with a view to sell on the day when the price had risen, but to provide for existing engagements, and it does not appear that it could not have been bought on as favorable terms afterwards in time to fulfill those engagements; and if so, the loss would be of expected but uncertain profits.

The rule is thus stated in a note at page 242 (332) in Ewell's Evans' Agency: "In this country the telegraph company is also liable (having referred to cases in which it is held that the liability is to the sender only in England) to the person to whom the message is transmitted, upon delivery thereof, in case of an error in transmission, attributable to the fault of the company, *"when the error is attended with damage to the person receiving it,"* referring in support of the proposition to Big. Torts, 277; Big. Lead. Cases on Torts, 619, 621, and several adjudged cases. Unquestionably the same liability will arise when the damage results from an erroneous communication of the terms of a dispatch.

We have avoided an expression of opinion upon the numerous other exceptions taken at the trial, and will only repeat what was said, in substance, in *Lassiter v. Tel. Co., supra,* in reference to the (309) difficulties incident to a correct communication of intelligence over wires, and the reasonableness of a rule which, to insure entire accuracy, requires the message to be repeated: "The electric ticks to be given at one end of the line and to be interpreted and read at the other are not articulate sounds, like those of the human voice, and are much

more liable to be misunderstood, and the individual handwriting of the sender himself and his meaning may be misunderstood." And again, quoting the words of *Chief Justice Bigelow:* "The unforeseen derangement of electric apparatus, a breach in the line of communication at an intermediate point not immediately accessible, occasioned by accident or by wantonness, or by malice, the imperfection necessarily incident to the transmission of signs or sounds by electricity, which sometimes renders it difficult if not impossible to distinguish between words of like sound or orthography, but of different signification; these and other similar causes, the effect of which the highest degree of care could not prevent, make it impracticable to guard against errors and delays in sending messages to distant points."

These suggestions point strongly to the reasonableness of the requirement of a *repeated* message by which, at an inconsiderable expense, the error in a dispatch would be avoided, and that the company's responsibility should be made to depend upon its observance, especially where the cipher form is adopted, which furnishes to the operator no means of ascertaining its import.

But, for the errors pointed out, the judgment must be reversed and a new trial had in the court below.

Error. *Venire de novo.*

Cited: Brown v. Tel. Co., 111 N. C., 191; *Williams v. Tel. Co.,* 136 N. C., 89; *Helms v. Tel. Co.,* 143 N. C., 393; *Williamson v. Tel. Co.,* 151 N. C., 227; *Davis v. Davis,* 184 N. C., 108; *Hardie v. Tel. Co.,* 190 N. C., 49.

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(310)

FRANK DEBERRY v. CAROLINA CENTRAL RAILROAD COMPANY.

Damages—Contributory Negligence—Issues—Evidence—Expert Testimony—Judge's Opinion as to Facts.

1. Though under chapter 33 of the acts of 1887, a defendant in an action for damages, who relies on *contributory negligence* on the part of plaintiff, must allege it in the answer, it is not error to fail to submit a special issue, as to such contributory negligence, when there is an issue, whether plaintiff sustained injuries by the negligence of defendant, under which the question might be considered; certainly not when the defendant declined to submit such issue when requested.

2. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen.

3. A remark by a judge, in the hearing of the jury, when he permitted, in his discretion, a witness to be recalled and asked a question to impeach his credibility, that if he had known counsel intended to ask that question, he would not have allowed the witness to be recalled, is not an expression of opinion about the facts, in violation of the Act of 1796.

CIVIL ACTION to recover damages for injuries alleged to have been received by the plaintiff through the negligence of the defendant company, tried before *Connor, J.*, at September Term, 1887, of RICHMOND Superior Court.

The plaintiff was a brakeman on the defendant's road and alleges that the injury complained of was sustained while he was engaged in the discharge of his duties as such by reason of the negligence of the defendant, in that it failed to provide a safe and secure platform for the brakeman to stand on while engaged in putting on the brakes. The *defense* of contributory negligence is set up in the answer, as required by chapter 33 of the Acts of 1887, but, though discussed in this Court, there is no question involving that issue presented in the record, and only so much of the case is stated as is necessary to present the questions that are raised by the appeal. (311)

The plaintiff was a witness in his own behalf, and testified as to the manner in which he fell from the platform, and on cross-examination, among other things, that "the signal was blown just below the crossing when he was at the brakes; he then put on brakes and stepped on the platform of the next car and had hold of the wheel when he fell. There are iron braces under the platform, and if the iron was under the step out to the edge it would not split; some of them do not come out by one inch and a half or quarter; he got his foot on the platform . . . the platform was 2 feet long and 6, 7, or 8 inches wide; he does not know whether the iron braces were under the step or platform or not, but only knows that when he steppod on it it gave way."

Elias Baldwin, a witness for plaintiff, testified, among other things, "that he did not see the plaintiff when he fell, but saw him a minute before he broke . . . he saw the strip that was shivered off the platform, and it looked like an old split; the piece shivered off was about one and one-half inches wide; . . . the braces did not come to the edge of the platform."

Samuel Etheridge, a witness for the defendant, testified "that in 1883 he was foreman of the car repair department in defendant's shops at Laurinburg, and remembers the time the plaintiff was hurt; the steps on brake platform are constructed now as they have always been—22 inches long on two iron braces; the plank is from 1⅛ to 1½ inch thick, and projects one-half inch for a rounded edge or finish; there has been

no change in the construction since 1878." The witness is a car builder, and has been a car inspector for the defendant for many years. The witness stated that he heard plaintiff's testimony.

(312) The defendant then asked the witness the following question: "If the jury should find that the car step or platform was built or constructed as the plaintiff described it, and the plaintiff stepped on it as he testified, could plaintiff have fallen as he testified, or could the platform have split?" The witness answered that the platform could not have split and the plaintiff could not have fallen as he described.

The witness was then asked: "If the platform was constructed as the witness had described it, could the plaintiff have fallen in the manner described by him?" The witness answered that he could not, even if the step had been split, for the braces would support it.

The plaintiff objected to these two questions, and his Honor at first overruled the objection and admitted the testimony. Afterwards his Honor excluded the testimony. The defendant's counsel said nothing.

Before the defendant had closed its testimony the defendant's counsel requested his Honor to be allowed to recall the witness Elias Baldwin, for the purpose of impeaching his credibility as a witness. The request was granted.

When recalled the witness was asked by defendant's counsel was he not brought from the jail to the courthouse? The witness answered "Yes." The plaintiff's counsel then asked the witness for what offense had he been committed to jail and he replied for assault and battery; that he had been fined $5 and adjudged to pay the costs, and that he could not get any one to pay it for him or go his security.

The plaintiff objected to the testimony.

His Honor then remarked, in the presence and hearing of the jury, that if he had known that the defendant's counsel intended to ask that question he would not have allowed the witness to be recalled.

The following issues were tendered and accepted:

(313) 1. "Did the plaintiff sustain injuries by the negligence of the defendant, as alleged?" Answer: "Yes."

2. "If so, to what damage is he entitled by reason of the same?" Answer: "Two thousand dollars ($2,000)."

At the conclusion of the argument the court inquired of the defendant's counsel if they desired the second issue submitted, and they responded that they thought the whole question involved in the first issue and they did not think the second issue necessary.

The defendant's counsel requested the court to charge the jury:

That even if the step or platform was split or cracked, as testified by the plaintiff, yet if before he stepped upon it he saw its condition, and that it was not safe to step upon it, he was guilty of negligence.

The court declined to give the instruction, but instructed the jury: "That even if the step or platform was split, yet if a prudent man knowing its condition would not have stepped upon it, the plaintiff was guilty of negligence provided he knew, or could by the exercise of reasonable care and caution have known, the condition of the platform before he stepped upon it."

The defendant excepted to the refusal of the court to charge as requested and to the charge as given.

The court instructed the jury as to the duty of the defendant to furnish safe machinery for the use of the employees, to which no exception was taken. The court then charged the jury:

"That if they believed the plaintiff and Elias Baldwin were playing or boxing, and plaintiff fell while so engaged and not in the performance of his duty as brakeman, the jury should answer the first issue in the negative; that the burden of proof was on the plaintiff to show that he was injured by the negligence of the defendant."

The court charged the jury as to the measure of damages, to (314) which no exception was taken.

The jury found the first issue in the affirmative, and assessed plaintiff's damages at two thousand dollars.

The defendant made motion for a new trial:

1. Because the court excluded the testimony of Samuel Etheridge, as stated above.

2. Because of the remark made by the judge when the witness Baldwin was recalled, as above stated.

3. Because of the refusal to give the instructions prayed for by the defendant, and because of the instruction given.

Rule discharged. Judgment for the plaintiff and appeal by the defendant.

J. A. Lockhart for plaintiff.
John Devereux, Jr., for defendant.

DAVIS, J., after stating the facts: It was insisted in this Court that, inasmuch as chapter 33, Acts of 1887, requires the defendant, if contributory negligence is relied on, to set it up in his answer, thereby making it of necessity an issue, it ought to have been submitted to the jury, and that it could not be waived even by consent. We think differently. Doubtless the purpose of the act was to require the defendant to set up the defense of contributory negligence in the answer, when relied on, so as to remove all doubt and enable the plaintiff to know with certainty the defense relied on; but whatever may have been the purpose of requiring it to be set up in the *answer* in the case before us,

the defendant was content to submit the question upon the first issue (under which it might be considered, *Scott v. R. R.*, 96 N. C., 428).

When the attention of counsel for the defendant was directed to it, not only was no request made that the issue should be submitted, but they said "they thought the whole question involved in the first
(315) issue," not only making no objection, but affirmatively acquiescing, and the defendant cannot for the first time except in this Court, even if he had not acquiesced in the court below. Having not only failed to tender the issue in the court below, but virtually declined it when suggested, he cannot now be heard to complain. *Kidder v. McIlhenny*, 81 N. C., 123; *Curtis v. Cash*, 84 N. C., 41; *Oakley v. Van Noppen*, 95 N. C., 60; *McDonald v. Carson*, 95 N. C., 377; *Simmons v. Mann*, 92 N. C., 12.

His Honor charged the jury that if they believed the evidence in regard to contributory negligence they should find the first issue in the negative.

The first exception presented in the record is to the exclusion of the testimony of Etheridge as an *expert* in respect to the questions asked.

All the evidence offered by the plaintiff, so far as it bears upon the questions and answers which were excluded by the court, is set out, and we are not only unable to see that it warrants the hypothetical questions put, but there is nothing in the plaintiff's evidence involving any matter of skill, or science, or peculiar knowledge about which any juror of fair intelligence might not form as correct an opinion as the supposed expert. "The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen." 1 Greenleaf Ev., sec. 440-a.

The second exception is to the remark made by the judge when the witness Baldwin was recalled and asked a question for the purpose of impeaching his credibility as a witness. We are unable to see how the remark, though made in the hearing of the jury, could be construed into an expression of opinion by the court upon any issue or question to be passed upon by the jury. The recalling of the witness was a matter entirely within the discretion of the court, and when the character of the impeaching question was made to appear, it was simply a declaration not of an opinion as to any fact to be passed upon by the
(316) jury, but that he would have exercised his discretion differently if he had known the nature of the question asked. It was not a violation of the act of 1796; The Code, sec. 413.

The third exception is to the refusal to give the instruction asked by the defendant and to the instruction given instead.

The instruction asked was properly refused, because there was no phase of the evidence that warranted it. There was no evidence that the

plaintiff saw the condition of the platform before he stepped upon it or that he saw that it was not safe. The instruction given in lieu of that asked was as favorable to the defendant as the evidence in respect to the instruction asked warranted.

No one of the exceptions presented by the record can be sustained, and there is no error.

Affirmed.

Cited: Burwell v. Sneed, 104 N. C., 120; *S. v. Jacobs,* 106 N. C., 696; *S. v. Howard,* 129 N. C., 661; *S. v. Baldwin,* 178 N. C., 690; *Shaw v. Handle Co.,* 188 N. C., 233.

M. J. PEMBERTON AND OTHERS v. ELLEN SIMMONS AND OTHERS.

Power of Attorney—Mortgage—Presumption of Payment—Pleading.

1. A deed from A., dated 8 June, 1866, appointing B. his attorney in fact, with authority to sell a house and lot, unless by 1 May, 1867, he should pay all the debts for which B. was liable as his surety, and adding: "With this power of attorney, I do hereby convey and assign to said B. and his heirs such an interest in said house and lot as shall not be revocable by me, or by my death, but shall be in said B., as an estate in trust to pay said debts, and to dispose of and convey to the purchaser." In October, 1866, A., by his attorney B., executed to C. a deed, purporting to convey a fee-simple title for the lot, B. covenanting, for himself, to warrant the title, but not undertaking to convey any title he had in the land: *Held,* that the deed of June, 1866, was a *mortgage,* with power of sale in B., and being registered, and the deed to C. being executed before its condition was broken, C. could not claim more than to hold subject to A's rights as mortgagor.

2. In such case, the mortgagor having remained in possession over ten years after the condition of the mortgage was broken, there arose a presumption of the payment of said debts, and the legal estate vested in the mortgagor, under Rev. Code, ch. 65, sec. 19.

3. In an action to recover possession of land by purchaser from mortgagee, before condition was broken, against the mortgagor in possession, an answer by mortgagor, "that the plaintiff has not brought his action within the time prescribed by law, and the same is barred by the statute of limitations," is sufficient to set up the defense of *payment* presumed after ten years, under section 19, chapter 65, Rev. Code.

CIVIL ACTION for recovery of land, tried before *Clark, J.,* at (317) March Term, 1887, of the Superior Court of CUMBERLAND.

It is admitted that the plaintiffs are the widow and heirs at law of E. L. Pemberton, deceased. They bring this action to recover the land

specified in the complaint, and claim to derive title thereto through their ancestor from George D. Simmons, now deceased.

The defendants are the widow and heirs at law of the last-named person.

It appears that on 8 June, 1866, the above named George D. Simmons executed to George W. Wightman a deed, whereof the following is a copy:

STATE OF NORTH CAROLINA—CUMBERLAND COUNTY.

Know ye that I, George Simmons, of the county and State aforesaid, do hereby appoint George W. Wightman, of the town of Fayetteville, in the county and State aforesaid, my true and lawful attorney in fact; and I do hereby authorize and empower him to sell and dispose of my house and lot in the town of Fayetteville, where I now reside, being the same sold to me by I. W. Powers, 5 June, 1858, either for cash
(318) or on credit, at his pleasure, unless I shall, on or before 1 May, 1867, pay off and discharge all the claims for which the said George W. Wightman is now liable as my surety, or where I am indebted to him or to Sinclair Vanderbilt, whose effects have been assigned to said Wightman in trust, the whole of my said indebtedness being seven hundred dollars or thereabouts; and with this power of sale I do hereby convey and assign to the said George W. Wightman and his heirs such an interest in the aforesaid house and lot as shall not be revocable by me or by my death before 1 May, 1867, but shall be in the said Wightman, as an estate in trust, to pay the said debts and to dispose of and convey to the purchaser, I hereby confirming the same.

Given under my hand and seal, 8 June, 1886.

(Signed) GEO. D. SIMMONS. (Seal.)

Witness: A. B. SMITH.

This deed was duly proven and registered on 8 June, 1866.

On 10 October, 1866, George D. Simmons, above named, executed by his attorney, G. W. Wightman, to Edmund L. Pemberton, now deceased, the husband of the plaintiff widow and ancestor of the other plaintiffs, a deed purporting to convey to him the fee simple in the land embraced by the deed above recited, and the said Wightman signed the deed for himself as to the covenants of warranty therein, but he did not undertake by the deed to convey any title in him to the land.

The said George D. Simmons continued to have possession of the land embraced by the deeds mentioned above ever after the execution of the same until his death, and the defendants, his surviving widow and heirs at law, have had like possession of the same ever since his death.

The defendants on the trial requested the court to instruct the jury "That upon the whole evidence they must find a verdict for (319) the defendants, and relied especially on the plea of the statute of limitations and the fact that Wightman attempted to sell the land before the time fixed for payment of the debt had expired under power of attorney." But the court instructed the jury to render a verdict for the plaintiffs, if they believed the evidence. They rendered a verdict for the plaintiffs; there was accordingly judgment in favor of the latter, from which the defendants appealed to this Court.

D. Rose for plaintiffs.
N. M. Ray for defendants.

MERRIMON, J., after stating the facts: It seems that the deed above recited was treated in the court below as simply a power of attorney. This we think was a misapprehension, and leaves out of view its chief purpose. It is very informal and disorderly in its provisions, but it has all the essential elements of and the parties to it intended it to be and it was, in legal effect, a mortgage, coupled with a power of sale in the mortgagee. Its purpose was to convey the title to the land to the mortgagee, to secure the payment of the debts mentioned in it within a period of time specified, and in case of default by the mortgagor in this respect, then to give the mortgagee authority to sell the land and apply so much of the proceeds of sale as might be necessary to the liquidation of the mortgage debts.

Thus the legal title was in Wightman, the mortgagee. He did not purport to execute his own deed to Pemberton, the ancestor of the plaintiffs, under whom they claim, but to execute a deed to him in the name of Simmons, the mortgagor, by himself as attorney. The authority of the mortgagee to sell the land did not contemplate such a sale and conveyance. The sale was made before the condition of the mortgage was broken, and the deed purported to be executed by the (320) mortgagor by his attorney. Granting, for the present purpose, that Pemberton got such interest as the mortgagee under the circumstances could convey, and that the latter was estopped to deny the title of Pemberton, the latter took whatever interest he got by the deed with notice of and subject to the rights of Simmons, the mortgagor, because the deed of mortgage was registered, and therefore there was notice of it to everybody; and, indeed, it would seem that Pemberton had actual notice of the deed of mortgage. He claimed by virtue of the power contained in it and probably saw it.

The mortgagee never had possession of the land in question. The mortgagor continued to have possession thereof until his death; and

ever thereafter, until this action began in 1884, the defendants, his widow and heirs at law, have had possession of the same. It does not appear that the mortgage ever was foreclosed by a sale, as contemplated by it or by the decree of any court. It does appear, however, that more than ten years elapsed next after the time when a failure to pay the mortgage debts would be a breach of the condition thereof. This lapse of time raised the presumption under the statute applicable (Rev. Code, ch. 65, sec. 19) that the debts were paid at the time mentioned, and thus the mortgage was discharged and the legal estate revested in the mortgagor, he, until the time of his death, and the defendants, his heirs, having had possession of the land as above stated. *Powell v. Brinkley,* Busb., 154; *Roberts v. Welch,* 8 Ired. Eq., 287.

As the mortgage was thus discharged the ancestor of the plaintiffs, under whom they claim, got no title as against the mortgagor, and hence none descended to them. The title, so far as appears, is in the defendants, heirs of the deceased mortgagor.

(321) The defendants do not formally plead payment of the debts secured by the mortgage at the time therein specified and the consequent discharge of the mortgage, but in the answer they allege "that the plaintiffs have not brought their action within the time prescribed by law, and the same is barred by the statutes of limitation," etc. Taking the whole of the pleadings together we think the statute—not of limitations, but of presumption—above cited is sufficiently referred to to indicate their purpose to rely upon payment presumed as provided by it.

There is error for which there must be a new trial. To that end let this opinion be certified to the Superior Court. It is so ordered.

Error. *Venire de novo.*

Cited: Strause v. Cohen, 113 N. C., 352; *Lassiter v. Roper,* 114 N. C., 20; *Threadgill v. Comrs.,* 116 N. C., 628; *Duckworth v. Duckworth,* 144 N. C., 622.

JOHN H. ANDERSON v. TABITHA E. RAINEY, EXECUTRIX, AND OTHERS.

Sale of Land—Deficiency in Quantity Sold—Pleading—Fraud Must be Alleged—Res Adjudicata—Caveat Emptor.

1. Where two successive contracts for title and a deed were made at intervals, for a tract of land, describing it by courses and distances, and as containing 893 acres, *more or less*, and the vendee, after remaining in pos-

session many years without informing himself as to the number of acres in the tract, brought an action to enjoin a sale under a mortgage given for the purchase money, alleging that the tract contained only about 793 acres, and that the vendor made false representations as to the quantity, but not that vendor knew them to be false: *Held*, that fraud not being positively charged, it should not be found by implication.

2. To entitle a vendee of land under such contract or deed to relief, because the tract contains a less quantity than vendee supposed, he should allege and show that false and fraudulent representations were knowingly made by vendor, with intent to deceive; or the discrepancy must be so great as to warrant a correction of the instrument on the ground of mistake.

3. Whatever the representations made by vendor to induce vendee to buy, when, in an action brought by vendor to collect the purchase money, vendee asked an abatement of the amount claimed, on account of alleged inability of the vendor to make title to part of the land, and asked a survey of the tract, and the action was compromised upon terms set out in the judgment, and a deed executed accordingly: *Held*, that the plea of *res adjudicata* applies to an action by the vendee for relief because of an alleged deficiency in the quantity of land—such plea applying not only to the points which the court was required to adjudge, but to all others which properly belonged to the subject of the issue and which the parties, exercising diligence, might have brought forward.

4. If, in a contract for the purchase of land, a party fails to avail himself of the sources of information, readily within his reach, and relies upon representations, which, though not true, were not made with any false and fraudulent intent, the maxim of *caveat emptor* applies.

APPEAL by the plaintiff from the refusal of *Gilmer, J.*, to grant (322) a motion made at Chambers, on 30 July, 1887, to continue an injunction restraining the sale of the land mentioned in the pleadings until the final hearing of the cause, and also upon exceptions (reserved) to the rulings of Boykin, J., previously made in the cause, which is pending in the Superior Court of ROCKINGHAM.

Graham & Ruffin for plaintiff.
Scott & Mebane for defendants.

DAVIS, J. The relief demanded by the plaintiff is of an equitable nature, and it is necessary to a clearer understanding of the questions involved to give a condensed statement of the material facts set out in the voluminous record sent to this Court. (323)

On 2 July, 1873, John G. Rainey and Tabitha, his wife, contracted with the plaintiff to convey to him in fee, with covenants of warranty, a tract of land in Rockingham County known as the "Hobson tract," the boundaries of which, with courses and distances, are given, containing eight hundred and ninety-three acres, more or less, at the

price of $8,930, for the payment of which two bonds were executed—one for $1,000, to be paid on or before 1 January, 1879, and the other for $7,930, to be paid on or before 1 January, 1879, each bearing interest from 1 January, 1874. It was also agreed that the purchaser should have "the privilege to bargain and sell any portion of the land described by the mutual consent of the parties as to the price, provided the purchase money to be paid to the said Rainey and wife to be entered as a credit" on the bond of the purchaser, who was to have possession on 1 January, 1874; but if he failed to pay the bond to become due on 1 January, 1874, on or before that day, he was to surrender possession to Rainey and wife, retaining the right to gather and hold the growing crop; and there was a like provision that if he failed to pay the $7,930 on or before 1 January, 1879, he was to surrender the possession. On 27 January, 1879, another agreement was executed by the parties "in lieu" of that of 2 July, 1873, by which the plaintiff Anderson executed his bonds to Rainey and wife for $9,775.50, to be paid as follows: one for $1,000, 1 June, 1879; one for $1,000, 1 June, 1880; one for $1,000, 1 June, 1881; one for $1,000, 1 June 1882, and one for $5,775.50 to be paid 1 June, 1883, all bearing interest from 27 January, 1879; and the said Rainey and wife were to convey the said land to the said Anderson upon the payment of the said bonds and interest, excepting and reserving, however, a portion thereof within specified boundaries, the (324) number of acres to be ascertained by survey, for which a credit of $10 per acre was to be entered as of 27 January, 1879, on the bond to become due on 1 June, 1883. The number of acres so excepted was ascertained to be 227½, making the credit $2,275.

It was also stipulated that if the said Anderson should fail to pay promptly the respective sums as they should become due, then Rainey and wife were to have a lien on and be entitled to take from the premises one-third of all the crops made on said land, to be credited at the market price on the bond falling due at time the crop is so taken, and if the one-third of the crop should exceed the amount of the bond so due, the excess was to be credited on the bond next to fall due.

There were other stipulations not material to be stated.

At the Fall Term, 1882, of Rockingham Superior Court, Rainey and wife brought an action against the said Anderson, alleging in their complaint that he had failed to make payment in accordance with the terms of the agreement referred to, and that, being in default, they had made application to him for one-third of the crop, as stipulated, to be applied to the payment of the bond past due, and that he refused to allow them to take possession of the same, alleging, as a reason for the refusal, that one of the lines called for in the agreement did not run where he sup-

posed it did, which, the plaintiffs in that action alleged, was a mere pretense, as the boundaries were distinctly set forth in the agreement, and the defendant had continually imposed upon them by making promises to fulfill his obligations. They also alleged that he had no property in excess of his exemptions other than his interest in the land, and they demanded judgment for possession and the appointment of a receiver of the rents and profits.

The defendant in that action (the plaintiff in this) answered, averring, among other things, "that while it is true, perhaps, that the boundaries of the tract as set out in the agreement are correct, (325) yet the plaintiffs, in negotiating with him for the sale, undertook to point out to him the different lines, and in that portion adjoining the 'Brodnax land' they were careful to designate exactly where the line was, calling attention to the fertility of the land and making representations in relation thereto by which he was induced to enter into said contract of purchase, and matters thus stood till about August, 1881," when a portion of said land, embracing 25 or 30 acres, of great and special value, for reason stated, was claimed by the devisees of E. T. Brodnax, and the possession surrendered to them by the direction of the plaintiffs. He further averred that besides the payments of large sums specified he had put permanent improvements upon the land (enumerating them) exceeding $1,100 in value, and asked by way of relief that the agreement be rescinded, and that he recover of the plaintiffs (Rainey and wife) the several amounts paid by him and the enhanced value of the land, etc., or that he have an abatement of the purchase money by reason of the inability of the vendors to make title to the 25 or 30 acres referred to.

A replication was filed denying the statements in the answer relative to the line and land adjoining the Brodnax land, averring title to the land claimed by the devisees of E. T. Brodnax, and that the surrender thereof was not by their direction, and that the alleged improvements, with slight exceptions named, were made prior to the contract of June, 1879, as also were the payments made on the first contract.

An order was made by Shipp, J., on 5 September, 1882, appointing a receiver, and subsequently, upon motion of the defendant (present plaintiff), an order was made by Gilmer, J., for a survey of the land mentioned in the contract and of the Brodnax land adjoining it.

On 29 April, 1884, the action was compromised, the plaintiff agreeing to allow "a deduction on the purchase money of the land sued for of one of the bonds of $1,000 and its interest" and other credits (326) agreed on, and there was a judgment dismissing the action at the cost of the defendant Anderson.

To carry into effect the compromise, the following agreement was entered into on 14 May, 1884:

"John H. Anderson and Jonn G. Rainey and wife, Tabitha, having this day come to a full and complete settlement of all their land difficulties, heretofore the subject of suit between them, the sum of $6,490.66 *are* ascertained to be due from said Anderson to said Rainey, which sum is to be paid and secured, respectively, as follows:

"On Friday, the 16th, at Wentworth, the sum of $1,700 *are* to be paid by said Anderson to said Rainey. For the balance two bonds are to be executed by said Anderson to said Rainey, drawing 8 per cent interest from 1 May, 1884, the first of which is to be in the sum of $790.66, and due six months from 1 May, 1884; the second, in the sum of $4,000, and due twelve months from 1 May, 1884. These bonds are to be secured by a deed of trust upon said land, with privilege to sell in default of payment in either case when due, said deed of trust to also secure all cost attending the same. This deed of trust is to be executed between now and the 16th, Rainey and wife having first, or simultaneously, made said Anderson a deed to said land.

"In addition to the above it is further agreed that said Anderson shall convey, in said deed of trust, one-third part of his entire tobacco crop, to be grown during this year (1884), as an additional security to the said bond of $790.66.

"And it shall be lawful for the trustee in said deed of trust to take charge of said one-third part of tobacco crop and manage as he may think best, applying the proceeds, when collected, to the payment of the said bond of $790.66, provided the same shall be then unpaid in whole or in part.

"In the event that said Anderson shall pay the said bond of (327) $790.66 at its maturity, then, and in that event, the said trustee shall have no power or authority to take charge, as above, of said one-third of tobacco.

"It is further agreed between parties aforesaid that if the said Anderson hereafter find a receipt covering 25 bushels of wheat, as bought 1880, and $100, of the spring of 1880, claimed by him to have been paid, or if he shall offer legal or sufficient proof of either of the said payments claimed as aforesaid, then he shall have credit therefor on above bonds."

On the same day the said Anderson, by deed, conveyed the land so purchased of Rainey and wife to P. B. Johnson, trustee, etc., in accordance with the agreement.

John G. Rainey died on ....., 188...., leaving a will, which was duly proved, and Tabitha Rainey, the executrix named therein, qualified as such. He also left six children who, with Tabitha Rainey, were the

devisees of his real and personal estate. At the request of the executrix P. B. Johnson advertised the land conveyed to him in trust to be sold on 29 April, 1887.

On 14 April, 1887, J. H. Anderson commenced this action against Tabitha Rainey, executrix of J. G. Rainey, and the devisees of said Rainey and P. B. Johnson, the trustee.

The complaint, after setting out the substance of the agreements of 2 July, 1873, and of 27 January, 1879, and the settlement of May, 1884, and alleging certain payments, further alleges:

"7. That at the time of making the original contract on 2 July, 1873, and when the same was modified and changed on 22 January, 1879, and at the time of making the deed on 15 May, 1884, although the metes and bounds of said lands were given in each of said contracts and in said deed, and although said purchase was by the acre and not per the tract, yet there was no actual survey to ascertain the number of acres in said tract because this plaintiff was induced to believe there were 893 acres in said tract of land by the assurances and representations (328) of the said John G. Rainey, who was then in the actual possession thereof and had been for some twenty-five years, and plaintiff avers that he did not have a survey of said land made to ascertain the number of acres because of the positive representations and assurances of the said John G. Rainey that it contained 893 acres at the time said contracts were made.

. . . . . .

"10. That the plaintiff, relying upon the representations and assurances of the said John G. Rainey that said tract of land contained eight hundred and ninety-three acres, was induced not only to execute the said contracts and to give the deed of trust to the said P. B. Johnson, trustee, to secure the balance of the purchase money, but was induced thereby to pay several thousand dollars of the purchase money to the said John G. Rainey during his lifetime, and to his personal representative since his death, and that said plaintiff, at the time of said payments and when executing said contracts and deeds, believed that said tract of land contained 893 acres, when in fact plaintiff avers that said tract of land did not contain more than 793 acres, being one hundred acres less than the number represented by the said John G. Rainey.

"11. That this plaintiff avers that, having occasion to have a portion of said tract surveyed, which he had sold to the defendants or some of them, he ascertained for the first time that said tract did not contain by one hundred acres or thereabouts the number of acres which the said John G. Rainey represented and assured plaintiff that said tract contained, and plaintiff avers that he was induced by such representations

and assurances to buy the same, and that such representations and assurances, at the time they were made, were false and untrue, but plaintiff will not say that John G. Rainey knew them to be false and
(329) untrue, but having the deeds and knowing the number of acres in his original purchase and the amount of land he had sold, plaintiff says he was grossly negligent and careless, so much so as to be guilty of fraud and wrong to this plaintiff, to make such representations and assurances to plaintiff, and thereby inducing him to buy and pay three-fourths of the purchase money without first correctly ascertaining the number of acres in said tract, and such representations and assurances, in the absence of knowledge or putting plaintiff on his guard, is fraudulent, and the injury to the plaintiff will be great and irremediable without the aid of the court.

"12. That as soon as the plaintiff ascertained that there was such an error in the number of acres in said tract he advised Tabitha E. Rainey, executrix of John G. Rainey, of the same, and offered to have said land surveyed and to pay for all the land in the tract, and claiming that there should be an abatement of the purchase money as to so many acres as upon survey were found wanting, and plaintiff avers that he is entitled to a credit for this amount, and that the plaintiff was then and is now ready, willing and able to pay whatever balance may be found due from him, after giving him his first and proper credits and making abatement for the said deficiency in said land."

After other allegations of the threatened sale, his right to credits, etc., the complaint concludes with the following prayer for judgment:

"Whereupon the plaintiff demands judgment that an account be taken by the clerk of this court of all payments made by the plaintiff to John G. Rainey during his life, or to his personal representative and executrix since his death; and second, what abatement, if any, of the purchase money the plaintiff is entitled to on account of any deficiency in the number of acres in the land sold him, and in order to ascertain this deficit may there be a survey of said tract of land in order to
(330) ascertain the number of acres therein. And that in the meantime, during the pendency of this action, the defendant P. B. Johnson, trustee, be restrained and enjoined from selling said land or any part thereof, or further proceeding under said deed of trust until the further order of this court. And may the court grant to the plaintiff such other and further relief as the nature of his case may require."

The defendant Tabitha Rainey, whose answer is adopted by the other defendants, in answer to the complaint, alleges:

"1. For a defense to the said action and in bar of relief therein sought: That the plaintiff ought not to be admitted to institute or main-

tain this action, nor to have the relief sought by him, and is estopped so to do, for that all matters in controversy touching the sale of land mentioned in the complaint were fully and finally settled and adjudicated in a certain action heretofore begun and determined in this court, wherein John G. Rainey, now deceased, and Tabitha E. Rainey, this defendant, were plaintiffs, and J. H. Anderson (the present plaintiff) was the defendant, which said action was so finally disposed of and ended under a judgment of this court, duly had and rendered at Spring Term, 1884, thereof, which judgment was based upon the written terms of compromise and settlement, duly signed by the parties and their attorneys on 14 May, 1884, as may be fully seen by inspection of the papers and proceedings constituting the judgment roll in said action, and of which record a complete exemplification will be attached hereto if and when required, and to which record is now attached a copy of said written agreement, marked Exhibit 'A,' judgment thereupon, marked Exhibit 'B,' and of the order of survey therein, marked Exhibit 'C'; and this defendant claims the benefit of this her plea in bar as fully and amply in all respects as if it had arisen upon demurrer."

Further answering, among other things, she denies that the (331) sale of the land was by the acre as alleged, but says it was a "sale of 893 acres, more or less, at the price of $8,930.00 "as may be seen by reference" to the contract.

. . . . . .

"5. That it is true, as alleged in article 7, that no actual survey of the land was had at the time of the contract referred to, but she doth aver that it would have been had if required, and that John G. Rainey made no representations than such as were proper and usual in such transactions, and she expressly denies the inferential statement of imposition in said article pleaded by *innuendo*.

"6. That as to the allegations of article 10 she could not answer of her own knowledge as to whether the same are true or not, but doth aver that the plaintiff is estopped, as hereinbefore pleaded, to bring in question the quantity of land.

"7. That the allegations and charges of fraud contained in article 11 are expressly denied, and she doth aver that the allegations therein as to the plaintiff's first knowledge of a deficiency are inconsistent with his answer in the original suit above referred to, and are immaterial under the defendant's plea of estoppel in this cause.

"8. That the allegations of article 12 are not true as stated, and the defendant avers that she, having heard that the plaintiff was setting up claims of deficiency in quantity, sent him word to come and see her and let her know whether the report was true, but he failed to do so, and it

is not true that he offered to have the land surveyed as alleged; and she denies, upon information and belief, that the plaintiff is ready, willing and able to comply with his contracts and agreements, and she doth charge that this plaintiff hath brought this suit, with its disingenious and unfair pleadings, for mere purposes of delay.

. . . . . .

"11. That this defendant is advised that this action of the
(332) plaintiff is inequitable, unjust, illegal and not fit to be entertained by the court; and is further advised that at all events the plaintiff's prayer for an account, a survey, and for a continuous injunction cannot, in equity, be heard or allowed only upon the condition that the compromise and settlement and judgment thereon (based as they were upon an abatement of one thousand dollars from the purchase money due) be set aside, and the said original suit brought forward on the docket and set down for hearing so as to place the parties and privies to said action *in statu quo* under their original right."

Whereupon the defendant demands judgment:

1. That this action be dismissed, or

2. That the original suit be reinstated on the docket and set down for hearing upon the pleadings therein, and

3. To such other and further relief as she may be entitled unto.

On 30 May, 1887, the case was heard before Boykin, J., at Chambers, "upon the pleadings, proofs and exhibits adduced, the verified complaint and answers being treated as affidavits, duly made for the hearing," who found as facts that:

"1. The allegations of fraud set forth in the complaint are not true.

"2. That the judgment rendered at Spring Term, 1884, of Rockingham Superior Court by his Honor, A. A. McKoy, upon the terms of compromise therein referred to in the case of John G. Rainey and wife against J. H. Anderson, touching the subject-matter involved in the suit now before the court, was and is a final and complete determination of the rights of the parties up to the date of said judgment; and the plaintiff in the present action is by the said judgment in said former cause estopped from asking any relief as to the quantity of the land sold by Rainey and wife to Anderson, and as to any transactions had or payments made before and up to the date of said judgment; and the
(333) court further finds that there was no agreement to sell said land by the acre, but the contract was for the sale by the quantity."

It was referred to James M. Anderson to take and state an account of all payments, and report. The plaintiff excepted.

"The cause being heard again by Gilmer, J., at Chambers at Wentworth, on 30 July, 1887, the parties having agreed to the credits to

which the plaintiff is entitled and avoiding an account, and the plaintiff moving his Honor to continue the injunction until the final hearing of the cause, upon consideration of the proofs, the same being those adduced before Boykin, J., his Honor refuses to further continue the injunction, to which plaintiff excepts and appeals, giving notice thereof, which was accepted by defendants."

It is conceded by the able and learned counsel for the plaintiff that there was no warranty as to the quantity of the land, and he bases his equity upon the alleged fraud practiced upon him by John G. Rainey in representing that the tract contained 893, when in fact, as alleged, it contained only about 793; that the sale was made at $10 per acre and not *in solido,* by the quantity, "and that the representations and assurances" in regard to the quantity were false. He does not charge that the vendor "knew them to be untrue"; on the contrary he seems careful not to so charge, for he states in his complaint that he "will not say that John G. Rainey knew them to be false and untrue," and the only grounds upon which the charge of fraud is based are set out in paragraphs 7, 10 and 11 of the complaint, and it is insisted by his counsel that by reason of the representations and assurances of the vendor, upon which the plaintiff relied, he was thrown off his guard, and was induced to purchase without demanding a survey.

It is conceded—the written contracts and deeds all show—that the boundaries of the land, with courses and distances, were given, (334) and it was within the easy power of the plaintiff to ascertain the quantity embraced within those boundaries, and whether it was *"more or less"* than 893 acres. It is also to be supposed that the muniments of the vendor's title were of record and accessible to him, and if the record had disclosed a variance, whether as to title or quantity, from the representations of the vendor, he should have known it—it was his duty to have known it, for he is charged with a knowledge of the record—and as he accepted a deed giving the boundaries and calling for 893, "more or less," it would seem, nothing more appearing, that so far from the vendor being so "grossly negligent and careless" in regard to the representations as to be guilty of fraud, the plaintiff himself was grossly negligent and careless in failing either to inform himself as to whether the quantity is more or less or to require the vendor to warrant that it was at least not *less;* and it is too late, after a delay of more than thirteen years, during all which time he was in possession, to ask the court to find, by implication, that there was fraud, when the plaintiff himself will not charge that the party making the representations knew them to be false, but only that he induced him to buy, and received a portion of the purchase money, "without first correctly ascertaining the

number of acres in the tract." Fraud should be positively charged, and not by implication. *McLane v. Manning,* Wins. Eq., 60.

In the substituted contract of 27 January, 1879, the consideration is put at $9,775.54, and though it does not appear, it is probable that that was the amount then due on the original contract of purchase, increased by interest; and assuming it to be so, it serves to show that it was to be paid for "893 acres, more or less," as indicated in the first contract, and that while $10 per acre was the guide or estimate by which the aggregate was arrived at, it was not within the contemplation of the parties that the price should be varied from that named in the deed, if there should prove to be more or less than 893 acres. It will
(335) hardly be insisted by the terms of the contract, if upon a survey made within a reasonable time, in the absence of any agreement other than those set forth, the land should have been found to contain 10 or 20 acres more, the vendor could have demanded $100 or $200 more, or if it should have been found to contain 10 or 20 acres less, the purchaser could have claimed an abatement of $100 or $200, in the absence of any fraudulent representation or act of the vendor, and to make such representation fraudulent it must have been false and known to be so, and made with the intent to deceive; or unless the discrepancy should be so great as to warrant a correction of the contract or deed upon the ground of mistake, as in *Wilcoxon v. Calloway,* 67 N. C., 463; *Gentry v. Hamilton,* 3 Ired. Eq., 376; *Leigh v. Crump,* 1 Ired. Eq., 299; *Newsom v. Bufferlow,* 1 Dev. Eq., 379; *Pugh v. Brittain,* 2 Dev. Eq., 34; *Pharr v. Russell,* 7 Ired. Eq., 222, and like cases.

But whatever may have been the character of the representations made by Rainey to the plaintiff at the time of the first contract of sale in 1873, and assuming that they continued to operate upon the mind of the plaintiff, and that the substituted contract of 1879 was entered into under the continuing misapprehension as to the quantity, and that the discrepancy was so great as to have entitled him to have the deed corrected, no such claim could avail him, after the compromise of the action instituted in 1882, to enforce compliance with the contract of January, 1879. In that action the very question of quantity was raised by the answer of the then defendant, the present plaintiff, and he asked for an abatement of the purchase money by reason of the alleged fact that the vendor could not make title to 25 or 30 acres claimed by the devisees of Brodnax, and at his instance there was an order of survey. This action was compromised upon the terms set out in the record, and it would test the credulity of the most simple and confiding, after reading the answer of the plaintiff to that action, to suppose that he would continue
(336) to be misled and deceived by the representations of Rainey, and

that when he entered into the compromise, and the original contract price was abated by $1,000 and interest for an alleged but controverted failure of title to 25 or 30 acres, he was still to get 893 acres, and as it is alleged that he gets only 793, a further abatement of $1,000 is claimed.

No deed was executed by Rainey and wife to carry the contract into execution until, and in pursuance of the compromise, and the deed and deed of trust give the same boundaries and courses and distances as the original contract, and describe it as containing "893, more or less"; and assuming that the plaintiff, when he accepted the deed, thought that he was getting 893, and not *less,* it is mathematically certain, and he is obliged to have known, that he was not to pay for it by the acre, at $10 per acre, for $1,000 having been abated from the price, reduced it to less than $9 per acre.

But it is insisted that the $1,000 abated at the time of the compromise, had no reference to quantity, but was on account of failure of title to the land claimed by the devisees of E. T. Brodnax, and the following statement is presented by counsel to show the wrong and injustice to which the plaintiff will be subjected, if the judgment below shall stand:

"893 acres @ $10 per acre, as estimated by parties, gives	$8,930.00
Deduct cash payment	1,000.00
	$7,930.00
Deduct abatement on account of Brodnax land	$1,000.00
	$6,930.00
227½ acres resold to vendors @ $10	2,275.00
	$4,655.00
Deduct cash paid prior to 1 May, 1884	700.30
	$3,954.70
242 acres resold to vendor's sons @ $10	2,420.00
	$1,534.70."

And he insists that, taking the number of acres to be 793, and (337) applying the credit of $1,000 for the deficiency, it will leave a balance of only $535 of principal money, instead of $1,534.70, as above. This is erroneous. Deducting the $1,000 and interest, abated on account of the Brodnax land, from the contract price, and $7,930 are left, which would reduce the price, per acre, of 893 acres, to less than $9. But the

plaintiff alleges, in his complaint, that he has paid three-fourths of the purchase money, but it appears, as is alleged by the defendants, that much the greater portion of this was by a resale of the land at $10 per acre, and the $1,000 abatement on account of the Brodnax land; so, assuming that he will get, after deducting the quantity resold, only 373 acres, as insisted, he will get it at a cost of less than $10 per acre.

But after remaining in possession for about fourteen years, under a contract and deed giving the boundaries, and after failing to meet his obligations first entered into, and entering into a new or substituted contract, and after litigation in an action brought against him to enforce that contract, in which the very defense set up raised the question of boundary and quantity, which could have been settled by the survey, which was ordered by the court at the instance of the present plaintiff, and when, by ordinary diligence and care, any mistake or fraud might have been detected and exposed, and after a compromise of that action, the plaintiff is precluded, and is not entitled to the relief sought in this action. The very question could have been disposed of in the action of Rainey and wife against the plaintiff, which was compromised, and it is against the policy of the law to allow a multiplicity of suits about the same matter, and, as was said by *Ruffin, J.*, in *Tuttle v. Harrill,* 85 N. C., 456, "the plea of *res adjudicata* applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have
(338) brought forward." See, also, *Wilson v. Western N. C. Land Co.,* 77 N. C., 445; *Yates v. Yates,* 81 N. C., 397.

If, in a contract for the purchase of land, a party fails to avail himself of those sources of information readily within his reach, and chooses to rely upon representations which, though not true, were not made with any false and fraudulent intent, the maxim of *caveat emptor* applies, as it does to personal property, and courts will not aid the purchaser. *Walsh v. Hall,* 66 N. C., 233.

There is no error.

Cited: Woodbury v. Evans, 122 N. C., 781; *Shankle v. Ingram,* 133 N. C., 257; *Turnage v. Joyner,* 145 N. C., 84; *Woodbury v. King,* 152 N. C., 681; *Ludwick v. Penny,* 158 N. C., 109; *Colt v. Kimball,* 190 N. C., 171.

BANK OF STATESVILLE, BY J. B. CONNELLY, RECEIVER, v. EMMA WADDELL.

Payment in Equity—Assumpsit.

1. S. was the executor of W., and trustee under his will, of funds for defendant's benefit. S. was also cashier of a bank. S. placed to his credit, as such trustee in said bank about $1,400, and gave the defendant permission to draw at her pleasure upon the bank. Defendant drew checks repeatedly, which were always paid by S., as cashier, up to his death. S. died without revoking the permission he had given to defendant, and, after his death, she drew two checks, aggregating less than the balance then to the credit of S., as trustee. These checks were paid by the cashier who succeeded S., with the intention of charging them against the said balance to the credit of S., trustee, but they were never actually so charged on the books of the bank. After these two last mentioned checks had been paid, the bank being insolvent, went into the hands of a receiver, who brought this action to recover the money paid out on them: *Held*, that in equity the money to the credit of S., trustee, belonged to defendant, and the acts of S., as detailed above amounted in an indirect way to a payment thereof to her, and the receiver could not recover it from her.

2. The promise upon which the action of *assumpsit* rests is implied, and arises *ex æquo et bono*, and money paid to the equitable owner under no mistake of fact and coupled with no implied promise for its return cannot be recovered.

CIVIL ACTION, pending in IREDELL Superior Court, and heard (339) and determined by *Clark, J.*, at Chambers, in Salisbury, 29 August, 1887.

Judgment was entered for the plaintiff. Defendant appealed.

This action, at the instance of the receiver of the Bank of Statesville, whose effects are in course of distribution in a creditor's suit, was brought before a justice of the peace, and from his judgment, in favor of the plaintiff, carried, by the defendant's appeal, to the Superior Court of Iredell County. It is prosecuted, to recover the sum of one hundred and fifty dollars, alleged to have been unlawfully drawn by the defendant from the moneys on deposit in the bank, and appropriated to her own use. The defendant denies her responsibility in the premises.

At February Term, 1887, a reference was made under The Code, to two commissioners named, who were directed "to decide and determine all questions of law and fact, and report to the next term."

The report was made at August Term, 1887, with the following:

To the judge of said court:

1. The undersigned, referees in said case, beg leave to report that they find, as facts in said case, that R. F. Simonton, at the time of his death,

which occurred in February, 1876, and for some considerable time previous thereto, was and had been executor of the last will and testament of David Waddell, deceased, and trustee of the funds arising under said will for the benefit of the defendant, which amounted to more than the sums of money hereinafter mentioned as drawn by the defendant, and that the said R. F. Simonton was, during all the said time, and up to his death, cashier of the Bank of Statesville.

2. They further find as facts, that some time previous to the death of the said Simonton, he had entered upon the books of the bank a credit to himself, as executor of the said David Waddell, of the sum of
(340) fourteen hundred and sixty-six dollars and sixty-five cents, which credit stood on the books of the bank, undischarged and unreduced, at the time of the death of the said Simonton, and at the time of the drafts, hereinafter mentioned, as made by the defendant on the said bank.

3. They find as facts that said Simonton previous to his death had given to the defendant permission to draw at her pleasure upon the bank, and upon the said credit of fourteen hundred and sixty-six dollars and sixty-five cents, and that defendant had repeatedly in his life-time drawn checks of various sums upon said bank under said permission, which had been honored and paid by said Simonton as cashier, and that said permission to draw was unrevoked at the time of the death of said Simonton.

4. They further find as facts, that, after the death of said Simonton, the defendant, relying on said permission to draw, and acting thereon, on 3 March, 1876, drew a check on said bank for the sum of $100, and on 27 April, 1876, drew another check for $50 on said bank, both of which said checks, on the days on which they were respectively drawn, were honored and paid by the new cashier of said bank, C. A. Carlton, or by his assistant cashier, W. K. Howell.

5. They further find as facts, that when defendant drew the said checks, respectively, she intended to draw them upon the said fund, standing on the books of said bank to the credit of the estate of David Waddell, and under the permission given her to draw by said Simonton in his lifetime; and that there was due her from R. F. Simonton, as trustee aforesaid, at that time, more than the amount of both said checks; and that at the time the said checks were paid by said Carlton, cashier, or by W. K. Howell, assistant cashier, it was the intention of the said Carlton or Howell, whichever made the payments, to charge the
(341) amount of said payments against the said credit of $1,466.65, standing on the books of the bank to the estate of David Waddell, which, however, was never done, and the bank was never reimbursed for the payment of said checks.

Upon these facts the referees find as matters of law:

1. That the permission given by said Simonton in his life-time to defendant to draw upon said fund, standing on the books of the bank to the credit of the estate of David Waddell, was revoked by the death of said Simonton.

2. That by the death of said Simonton, said sum of $1,466.65 passed to the control of an administrator *de bonis non* and trustee of the estate of David Waddell, whenever one was appointed, and until such appointment, was in abeyance, and no one had a right to meddle with it.

3. They therefore find as a matter of law, that any payment made by C. A. Carlton, cashier, or W. K. Howell, assistant cashier, out of said fund to the defendant, or any payment attempted to be made by either of them, was void and without authority of law.

They therefore find that the plaintiff is entitled to recover of defendant the sum of fifty dollars ($50), and interest thereon at 6 per cent from 17 April, 1876, up to this date, and the sum of one hundred dollars and interest thereon at the rate of six per cent from 3 March, 1876, up to this date—in all the sum of one hundred and fifty dollars principal, and the sum of one hundred and two dollars and thirty cents interest, and the costs of this action.

Respectfully submitted,

ARMFIELD & BURKE, *Referees.*

The defendant then excepts, by her attorneys, to the report of the referees, in the following words and figures:

The defendant excepts to the report of the referees filed in (342) this cause:

That the referees erred in their conclusions of law in paragraphs 1, 2 and 3, in that they charge defendant one hundred and fifty dollars, with interest on the same, checked out by her after the death of R. F. Simonton.

McCORKLE, BINGHAM & CALDWELL,
Attorneys for Defendant.

The exception, after argument, was overruled, the report confirmed, and the plaintiff adjudged to recover of the defendant the sum of $252.30, whereof $150 is principal, and costs, from which the defendant appeals to this Court.

D. M. Furches for plaintiff.

B. F. Long (M. L. McCorkle also filed a brief) for defendant.

SMITH, C. J., after stating the facts: We do not concur in the opinion of the Court, which seems to have been controlled by the rules governing actions at law, and to ignore the admixture of equitable elements in the present system, under which ultimate results are reached in a single proceeding. It appears from the report that R. F. Simonton, at the same time being executor of David Waddell and cashier of the bank, having trust funds in his hands derived from the testator's estate for the benefit of the defendant alone, or in association with another, made a deposit thereof in the bank in his capacity as such executor, in the sum of $1,466.65, and gave the defendant the liberty of drawing upon said credit at her pleasure.

This authority she repeatedly exercised during the lifetime of Simonton, and after his death, in February, 1876, she drew other sums in a similar manner, to the extent of the judgment rendered against her.

This fund, so deposited and showing the trust upon which it was
(343) held, or at least one-half of it, beyond which the defendant had not gone, in equity belonged to her, and was in this indirect way paid to her by the executor and the trustee, as it was meet should be done.

Assuming that, upon strict legal principles, the money would be recoverable only by the personal representative of the depositor (or the administrator of the testator *de bonis non* perhaps), it is plain that a Court administering the rules that are recognized in equity, as do our courts as well under their present constitution, would not permit a trust fund like this to be collected from the equitable owner and applied to the general indebtedness of an insolvent corporation. And if this were not permitted, still less could it when it reached the hands of the rightful owner, be taken from such owner to be misapplied and lost. The old action of assumpsit was, in some of its features, an equitable proceeding, and the promise upon which the action rests is implied, and arises *ex æquo et bono*. 2 Greenl. Ev., sec. 102.

The equitable right of the holder of a bond, to whom it has been transferred and delivered unendorsed by the payee, in whose name suit has been brought and judgment recovered, to receive the money when collected, is decided in *Hoke v. Carter,* 12 Ired., 324, in which *Pearson, J.,* thus explains the relations between the parties: "The legal effect of the contract of sale and delivery of the bond was to constitute the testator an agent of Fleming (the obligee) to receive the money. But the *money vested in the testator as legal owner* the moment it was received; for the chose in action, of which Fleming was the legal owner, was extinguished by an act which he had authorized to be done, viz., the reception of the money, and the money vested in the testator, as legal owner, by

force of the contract of sale, which thereby became executed in the same way as if Fleming had himself received the money and handed it to the testator in execution of the contract."

This ruling recognizes the right of an *equitable owner* of an (344) unendorsed sealed security for the payment of money, to take and hold the money paid under it against the claim of the *legal owner* of it; and such is very much the relation occupied by the defendant in the present controversy; and the defendant's position is strengthened by the new practice, which allows the party who is entitled to the money and to receive it, unconditionally to assert the right in his or her own name in an action instituted to recover it. If the executor did not need the fund in process of administration, but was bound to pay it over to the *cestui que trust,* as would be his administrator, in discharging the attached trusts, why should such *cestui que trust* be required to surrender it when voluntarily paid to her by the officers of the bank, and use it for the benefit of the creditors of the latter?

And again, if it could not have been recovered by the defendant in an action prosecuted against the bank, or the executor trustee, yet it was in fact paid to her as the owner, under no misapprehension of the fact; and no implied promise to return or to account for the money, except as a payment in part, can arise out of the transaction, and most unquestionably no right of action can accrue to the bank or to the receiver, who is its representative. *Devereux v. Ins. Co.,* 98 N. C., 6.

It must be declared there is error in not sustaining the defendant's exception, and to this end the judgment is reversed, and the court below will proceed in accordance with this opinion to render a judgment for the defendant.

Error. Reversed.

(345)

TRADERS NATIONAL BANK v. MANUFACTURING COMPANY.

Corporation, Mortgage Executed by—Estoppel.

1. *Vide Bank v. Mfg. Co.,* 96 N. C., 298.

2. A mortgage deed executed according to the provision of the Revised Code, ch. 26, sec. 22 (The Code, sec. 685), is the act of the corporation alone, and not that of the corporation officers, by whose agency the deed is executed; and it will not operate as an estoppel to prevent them from asserting any claim they may have to a security it provides.

CIVIL ACTION, heard upon exceptions to a referee's report. The case is fully reported in 96 N. C., 298, in which this Court directed a re-reference of the account, to be stated upon the basis of the opinion then delivered.

W. P. Bynum for plaintiff.
P. D. Walker and C. B. Watson for defendant.

SMITH, C. J. Upon the coming in of the report made by the referee, in obedience to an order entered on the hearing in this Court, exceptions are taken by the defendant, which have been argued and will now be considered.

First Exception: The said defendant excepts, for that the debt due him for money loaned is not assigned a place among the old debts, to be paid as such, but has its origin in the new obligation, created by the execution of the last bond and the mortgage given to secure it on 30 March, 1882. Of this, we have only to say, that this point was fully considered and disposed of upon the former hearing and from the ruling then made, for the reasons assigned, we are not disposed to depart.

Second Exception: The exceptions to the allowance of the debts due and enuring to the Traders National Bank, the National Bank of Chester, A. C. Lineberger, the Bridesburg Manufacturing Com-
(346) pany, A. B. Titman, D. F. Foley Bros & Co., and of Buckingham & Pardson, as constituting liens upon the property of the Woodlawn Company, have also been passed on, and their preferential claim over that of the Fries debt to be satisfied out of the corporate property, under the statute recognized and determined.

Third Exception: The exception based on the alleged equity of the defendant Fries, to be substituted in place of the officers of the company, A. C. Lineberger, J. M. Lineberger and C. J. Lineberger, and to take their shares of the fund to be distributed, by reason of the execution of the mortgage of the corporation by them, as president, secretary and stockholder, with covenants operating as an estoppel upon them to assert a claim against him and the security it provides.

This exception must be also overruled, as are the others.

The mortgage deed is the act of *the corporation alone,* done in pursuance of the statute, Rev. Code, ch. 26, sec. 22, and in no just legal sense, that of the corporation officers and stockholders, by whose agency the corporation conveys its real estate. The instrument, upon its face, professes to be such, and to be made by virtue of, and in pursuance of, a "resolution of the stockholders of the Woodlawn Manufacturing Company in Gaston County, North Carolina, in convention assembled, on 29 March, 1882."

Moreover, the only covenant of the bargainor in the deed is, that the premises shall be kept insured to the amount of the bond, and that upon default, the mortgagee may enter and sell.

But if these obstacles to the assertion of the alleged equity were out of the way, the controversy about the disposal of the fund is not germain to the present action, nor is it presented in the appeal.

A somewhat similar effort was made in *Hulbert v. Douglas,* 94 N. C., 128, to introduce outside matters of dispute between the defendants, and it was not allowed, for reasons set out in the (347) opinion of that case.

The case is now before us upon the seame record, and for a revision of no errors except such as therein appear, or result from the action of the referee in executing the order of recommittal.

After the argument, which has been able and full for the exceptor, our former convictions remain unchanged and we must confirm the report and direct the distribution of the corporate funds of the company accordingly.

Report confirmed.

W. H. HUGHES, EXECUTOR OF W. T. STEPHENSON, v. S. P. BOONE.

Dismissing Appeal—Rule 2, Section 8.

Judgment was rendered in the lower court 28 January, 1888. Defendant appealed, but did not docket his appeal in this Court until 15 February, 1888, too late for argument at this term. On 20 February, 1888, appellee moved to dismiss the appeal under Rule 2, sec. 8. The motion was refused because not made until after the appeal was docketed and the call of the district concluded and no notice of the motion given appellant.

MOTION to dismiss appeal, heard by the Court at this term.

The facts are stated in the opinion.

No counsel for plaintiff.

R. B. Peebles for defendant.

MERRIMON, J. It appears that S. P. Boone obtained a judgment against W. H. Hughes, executor, etc., in the Superior Court of the county of Northampton on 28 January, 1888, from which the latter appealed to this Court; but he did not docket his appeal (348)

here until 15 February next thereafter, so that, in the order of the call of the docket, it could not stand for argument at the present term.

On 20 February the appellee moved to docket and dismiss the appeal, as allowed by Rule 2, sec. 8, suggesting that the appellant, on purpose, failed to bring up his appeal as promptly as he might and ought regularly to have done, the object being to delay the disposition of the appeal until the next term of the Court.

The motion cannot be allowed, because the appellant had docketed his appeal before the motion was made. *Barbee v. Green,* 91 N. C., 158. Moreover, the motion was not made until after the week of the term assigned to the argument of appeals from the district from which the appeal in question came, and there was no notice of the motion to the appellant or his counsel.

Motion denied.

Cited: Bryan v. Moring, 99 N. C., 17.

STATE EX REL. E. T. CLARK, ADMINISTRATOR OF S. G. BOONE, v. R. M. PEEBLES, ADMINISTRATRIX, AND W. W. PEEBLES.

Venue—Administration Bond.

A. qualified as administrator of B., in Halifax County, and gave bond there. Afterwards A. died in Northampton, and C. qualified as his administratrix in that county. C., administratrix, and D., one of the sureties on the bond of A., resided in Northampton, and were sued in Halifax County on the bond of A., by a resident of Halifax: *Held,* that the action was properly brought in Halifax, under section 193 of The Code.

MOTION to remove a case from Halifax County to North-
(349) ampton County for trial, heard before *Avery, J.,* at Fall Term, 1887, of HALIFAX Superior Court.

The facts appear in the opinion.

T. N. Hill for plaintiff.
W. W. Peebles for defendants.

SMITH, C. J. The present action, begun in the name of the State, on the relation of Edward T. Clark, administrator *de bonis non cum testamento annexo* of Solomon G. Boone, is brought upon an administration bond executed by J. T. Peebles, a former administrator (of

whom the defendant R. M. Peebles is administratrix), principal, and the defendant William W. Peebles, one of the sureties, the other being dead and his estate insolvent, to recover the trust estate in the hands of the preceding administrator, with which the bond sued on is chargeable. The summons was duly served upon the defendants in Northampton County, and at Fall Term, 1886, of Halifax Superior Court, to which the process was returnable, the plaintiff filed his complaint, to which a demurrer was entered. Issue being joined on the demurrer, the cause stood for trial at Spring Term, 1887, when leave was given the plaintiff to amend, and to the amended complaint the defendants put in their answer before the close of the term, and then applied for an order of removal, as follows:

Motion to remove the cause for trial, under section 193 of The Code, heard at Fall Term, 1887, of Halifax Superior Court, before *Avery, J.*

The facts are as follows: Solomon G. Boone died domiciled in Halifax County in 1865. At November Term of the Court of Pleas and Quarter Sessions, 1865, of Halifax County, William C. Boone qualified as his administrator with the will annexed. He died, and John T. Peebles qualified at November Term, 1866, as administrator (350) *d. b. n. c. t. a.* The said John T. was a resident of Northampton County, and died in that county in the year 1879, and R. M. Peebles qualified as his administratrix in November, 1879.

W. W. Peebles, the defendant, and one of the sureties of John T. Peebles, lives now and did live when the administration bond of John T. Peebles was executed, in Northampton County.

Rice B. Pierce, who is a surety on the bond of John T. Peebles as administrator, lived in Halifax County and died there, his estate being insolvent.

The defendants move the court for a change of *venue* to Northampton County. The motion, on objection by plaintiffs, and after argument of counsel, was refused, and the defendants excepted and appealed.

The statute pursuant to which the order of removal is demanded was not a part of the Code of Civil Procedure in its original enactment, but was introduced evidently as an amendment and qualification to section 192, which it succeeds in the transfer as section 193 of The Code, where, in its present form, it appears as follows: "All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county." The only material change of form undergone in the transfer is the substitution of *"official"* in the place of *"fiduciary"* before the word "capacity."

The preceding section, in broad, comprehensive terms, embraces all suits, the place of trial of which had not been before provided for, and directs them to be brought to and tried in any "county in which the plaintiffs or the defendants, or any of them, shall reside at the
(351) commencement of the action," and the effect of the added amendment is to withdraw from the sweeping terms the class of cases mentioned in the amendment.

The operation of this act, passed at the session of 1868-69, chapter 258, is manifestly confined to actions upon *official bonds,* unless, as appellants' counsel insists, its sphere is enlarged so as to apply to all actions brought against executors and administrators in their fiduciary and representative capacity upon a liability incurred by the testator or administrator in his life-time.

There would be force in the contention of the appellants as to the meaning of the act if the words "executors and administrators" are to be construed as severed from their place in the section, and without reference to their connection with other and restrictive words which serve to explain their import and show the legislative intent in passing the statute. What follows shows them to have been used in a restricted sense in requiring such actions to be instituted "in the county where the bonds shall have been given"—that is, the *bonds upon which the suit is brought,* and this in case any of the obligors, principal or any surety is (resides) in the county. Manifestly the section exempts from the operation of that preceding suits upon *official bonds,* and none other, and this appears in the fact that such bonds, as giving rise to the action, are mentioned three times in the section. In our opinion, the purpose was to require actions on official bonds to be brought in the county where they were given, whether against the obligors personally upon the contract or against the representatives of any of them who may have died; and for this purpose only, were these representatives specially designated, to the end that in either case the attaching jurisdiction should be in the court of the county wherein such letters were issued and the bond executed. So the act seems to have been interpreted when its provisions were applicable to the subject-matter of judicial investigation.

(352) "The object of the statute," says *Mr. Justice Reade,* speaking for the Court, "was to have suits against these persons, whether upon their bonds or not, in the *county where they took out letters* and where they make their returns and settlements and transact all the business of the estates in their hands. *Stanley v. Mason,* 69 N. C., 1; *Foy v. Morehead, ibid.,* 512; *Bidwell v. King,* 71 N. C., 287. And the same principle is recognized in reference to an action upon a

guardian bond in *Cloman v. Staton,* 78 N. C., 235, where the same eminent judge delivers the opinion also.

The present action is upon a bond executed in the county of Halifax, upon the appointment of the intestate of the defendant R. M. Peebles as administrator, and was required to be there instituted if any of the defendants had a residence therein. As neither of them did have such residence, the plaintiff's residence in the county determines the jurisdictional question, and the suit is in the proper county. The contrary view would lead to numerous difficulties in the practical enforcement of the law, as will readily occur to the professional mind. Suppose there are numerous sureties, who, residing in different counties, die, and letters there issue upon the estate of each, must a suit brought against all in one court, upon the application of each, be divided into as many fractional parts and sent to their different counties of residence? Or, to avoid this, must there be as many different actions brought to enforce the same single obligation against the separate obligors? Does the statute authorize or compel this unnecessary multiplication of actions to effect the same recovery?

Again, it is required, when a removal is directed, that "the clerk shall transmit to the court to which the same (cause) is removed a transcript of the record of the case, with the *prosecution bond, bail bond and the depositions and all other written evidences* filed therein." The Code, sec. 198.

How is this practicable, in case there are several orders of (353) removal, and how can the same original papers, that must accompany the record at the same time, be transmitted to different counties?

If this obstacle be sought to be put out of the way by the removal of the cause as an entirety to some one court, difficulties equally insurmountable are met. If a resident defendant's preference is of the place where the cause is pending, and another, a nonresident, wishes a removal, whose will is to prevail? Has not the one an equal right to prevent as the other has to have the proposed removal? Or, if, among several nonresidents, each wishes to have the cause removed to his own county, how are the conflicting demands to be adjusted?

If the right to have the transfer appertains to a defendant when he is sued, not upon his own bond, but upon an obligation of the deceased person whom he represents, it must be confined to cases where there is but himself; or when an associate unites with him in making the application, so that when jurisdiction is rightfully acquired over one, it is acquired over all the defendants; and a plaintiff has a right to bring all the defendants in a single action before one court of competent jurisdiction.

Our conclusion is that the court has jurisdiction and the cause was rightfully retained. There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Wood v. Morgan, 118 N. C., 751; *Alliance v. Murrell,* 119 N. C., 125; *Craven v. Munger,* 170 N. C., 426.

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(354)

J. H. SCROGGS, ADMINISTRATOR OF A. R. SIMONTON, v. J. H. STEVENSON, ADMINISTRATOR OF J. F. ALEXANDER AND OTHERS.

Practice—Exceptions to Report of Referee—Res Judicata—Advancements—Executors and Administrators, Commissions Allowed.

1. An exception to a referee's report, not considered by the judge below, cannot be considered by this Court on appeal; a ruling in the court below being necessary to confer jurisdiction on this Court. In such case, the cause will be left open in the lower court, that the exception may be passed upon there.

2. Where exceptions to the report of a referee are passed upon by a judge of the Superior Court, such exceptions cannot be reheard by another judge of that court. The matter is *res judicata.*

3. Upon the coming in of a referee's report, defendant filed exceptions, which were overruled and the case recommitted to the referee. Defendant excepted and appealed, but failed to perfect his appeal. When the second report of the referee was filed final judgment was rendered against defendant, who appealed again: *Held,* that this Court would review the rulings embraced in the first appeal, more especially as the former appeal would have been held premature, if perfected.

4. The point that a referee has not found the facts upon which he bases his report must be taken by a motion to recommit, and not by exception to the report.

5. Five per cent is the maximum commissions allowed administrators, and if the estate passes through several successive hands, whatever sum, not exceeding that limit, is allowed, should be apportioned among them according to their respective merits, and services rendered.

6. When a money balance is found due from a former administrator to his successor, if the last is allowed commissions on it, the amount so allowed must be deducted from the compensation of his predecessor.

7. A personal representative is entitled to commissions on money raised by a sale of the lands of his decedent, and coming into his hands for administration; also, upon a note or money obligation turned over to the

legatees or distributees; but commissions are not usually allowed on slaves, bank stock, and like property, specifically delivered to the parties entitled thereto.

8. The personal representative has nothing to do with the rents of lands belonging to decedent's estate, as between himself and the heirs at law or devisees.

9. A testator bequeathed his personal estate to be equally divided between his seven children, but requiring all of them to account for advancements. One of the legatees died without issue during testator's life; another legatee had been advanced more than an equal share of the estate left for division: *Held*, that the legatee who had been advanced more than an equal share should not be counted as entitled to any part, nor should the amount advanced to him be taken into the account. From the fund should be deducted the one-sixth, which would have been the share of the legatee who died before the testator. The residue should then be divided among the other five legatees. After this, the one-sixth, which would have gone to said dead legatee, should have been divided among said five legatees, excluding altogether said legatee who had been advanced.

CIVIL ACTION, heard upon exceptions to the report of a referee, (355) by *MacRae, J.*, at May Term, 1886, of IREDELL Superior Court.

The defendant M. M. Alexander, who was one of the legatees of Adam R. Simonton, appealed.

No counsel for plaintiff.
D. M. Furches and J. B. Batchelor for defendant M. M. Alexander.

SMITH, C. J. Adam R. Simonton died in the year 1863, leaving a will made in 1859, wherein he appoints Joseph F. Alexander executor, who, upon its probate and his own qualification, entered upon the discharge of his trusts. The executor died intestate in January, 1870, and the defendant J. Harvey Stevenson became his administrator, and in the same year letters of administration *de bonis non* with the will annexed issued to the plaintiff, James H. Scroggs, on the testator's estate. The present proceeding was begun in the probate court of Iredell against the said Stevenson, as administrator, and the (356) other defendants, devisees and legatees under the will, for an adjustment of the administration made by the deceased executor and for a general settlement of the testator's estate with the other defendants.

An account was accordingly taken before the clerk, acting in his capacity of probate judge, to which exceptions were entered at March Term, 1875, of the Superior Court, but it was recommitted, and, after taking further testimony, again reported, to which numerous exceptions were again filed. These were heard and passed on by the judge and the account again referred for reform and correction according to his rulings. From this an appeal was taken to the Supreme Court, but it

was not prosecuted and perfected, and a subsequent application to that Court to issue a *certiorari* to bring up the record was refused. *Scroggs v. Alexander,* 88 N. C., 64.

The reformed account was reported by the referee, the clerk, at May Term, 1886, and came on to be heard before the then presiding judge, the defendant M. M. Alexander insisting upon his passing upon all her exceptions heretofore ruled upon by the former judge as still before the court. The court held otherwise and refused to hear them, and rendered judgment confirming the report. In the case it is stated that upon making up the appeal the judge found an exception, to which he was not advertent during the argument upon the question of his entertaining jurisdiction of the previous series, as adjudicated, and in consequence this overlooked exception was not passed upon. From the refusal to hear that series and the judgment confirming the report the defendant Mary M. appealed.

The exceptions which the judge refused to *rehear,* because they had been heard and disposed of by a former judge, are as follows:

(357) 1. That the judge of probate has not found the facts upon which he bases his report.

2. That he has allowed commissions to J. F. Alexander, executor of A. R. Simonton, and also on the same to plaintiff as administrator *de bonis non.*

3. That the judge of probate has deducted from the general fund due the legatees the full amount of advancements made to J. B. Simonton, which exceeds his distributive share in said estate, and instead of dividing the whole distributive share amongst all the legatees except J. B. Simonton's heirs he has deducted the said advancements of $1,353.33, and also the full amount of the distributive share of the said J. B. Simonton, from the general fund.

4. That it having been shown to the judge of probate that J. B. Simonton's advancements exceed his distributive share, and this fact appearing from his report, he should have divided the general fund of $7,772.51 into five equal shares and to have excluded the distributees of J. B. Simonton from any *pro rata* of said estate.

5. That no legal notice was given when the account would be taken, nor when the report would be delivered, nor when the judgment would be rendered to this exceptant.

6. That he has allowed five per cent commissions to the plaintiff on land sales aggregating $3,289.56.

7. That the rents paid heretofore for lands belonging to the testator, by this exceptant, should be allowed to the extent of five-sixths part thereof to her, it not appearing that she used more than her proportionate part of said estate.

Exceptions of the appellant appear to have been taken after successive reports, and we may misapprehend the record in supposing that the foregoing list contains all that the judge upon final hearing declined to entertain, and his action on which is intended by the appeal to be considered. But, understanding these only to be before us, we proceed to examine them. There was certainly no error in the refusal to reconsider the rulings of the preceding judge upon the mat- (358) ters then before him, for they had passed into and become *res adjudicata,* and could only be reconsidered in a direct application to set them aside, reverse or modify; otherwise there might be inconsistent adjudications upon the same subject-matter in the record. *S. v. Evans,* 74 N. C., 324; *Mabry v. Henry,* 83 N. C., 298.

But it is quite a different question as to the appellate reviewing jurisdiction of this Court when error is alleged to have been committed at a previous stage of the proceeding, and exception thereto noted, and the more especially when an appeal then taken would have been deemed premature. *Mitchell v. Kilburn,* 74 N. C., 483; *Crawley v. Woodfin,* 78 N. C., 4; *McBryde v. Patterson, ibid.,* 412, and numerous other cases.

The exceptions there mentioned, notwithstanding the attempted and abandoned appeal, are prosecuted now, and must be examined as far as questions of law are involved, and no further. The first of these exceptions should have been taken in the form of a motion to recommit for a finding of fact, and this does not appear to have been done and exception made to a refusal.

2. The second exception is to the allowance of commissions both to the executor and the administrator *de bonis non* of the deceased testator, A. R. Simonton.

The exception is too indefinite in its terms for us to understand precisely its meaning. Undoubtedly, inasmuch as five per centum is the maximum of commissions allowed, if the estate passes through several hands, whatever sum not exceeding that limit is allowed should be apportioned among the representatives according to their respective merits and services rendered. This would usually happen when an uncollected debt passes over to a succeeding representative; but when a money balance is found due from one to another, if the last is allowed commissions, there should be a commensurate reduction in the compensation to be allowed the former; but this balance, in the (359) present case, is a very inconsiderable sum, at most; so that little harm comes from its not being heard for vagueness.

3 and 4. The rule involved in these two exceptions is the proper one to apply to the computation and apportionment of the fund. Inasmuch

as J. B. Simonton has been advanced largely in excess of his share, he should not be counted as entitled to any part of the fund, nor should the amount of his advancements be taken into the account. This excluded, the division should be confined to the other six and the fund distributed in that number of parts. This aggregate being reduced by the deduction of the share accruing to the distributees of A. Carlton, the residue will be apportioned in equal parts among the remaining five. The one-sixth due said Adeline Carlton will then be in like manner divided among the same five, who are her distributees, and the one-fifth added to the other one-fifth, excluding altogether the said J. B. Simonton, whose advancements are above both sums united.

5. The fifth exception stands upon the same footing as the first.

6. The court refused to allow commissions in any amount upon the value of the slaves and bank and railroad stock, but does allow the commissions upon the money received upon the several sales of the land of the deceased; and as a money fund, thus raised and coming into the plaintiff's hands for administration, we see no just objection to an allowance, or to the sum allowed. Property specifically delivered over in the course of distribution, as in this case of slaves and stock, is usually not burdened with such a charge, and yet a note or money obligation may be as a receipt, and so it is decided in *Shepard v. Parker,* 13 Ired., 103.

7. We do not see that rents or the value of the use of the lands previous to the sale enter into the account, nor should they, for
(360) that is a matter to be settled among the owners and occupants, with which the plaintiff has nothing to do.

The exception not considered at the trial is not before us, since there must have been a ruling upon it to give us an appellate jurisdiction. While, therefore, we are not at liberty to give an authoritative opinion on the subject-matter, it is not out of place to say, that the basis upon which all the charges for advances are made, that is, to compute interest after two years from the issue of letters testamentary, as upon all the debts due the testator, seems to us to be eminently fair and reasonable. There is no error in the ruling; but the cause must be left in the court below, to the end that the last exception of the appellant may be disposed of, and, if ruled adversely to her she may, if so advised, appeal and have that ruling authoritatively revised and decided.

No error. Affirmed.

Cited: Scroggs v. Alexander, 103 N. C., 164; *Scroggs v. Stevenson,* 108 N. C., 261; *Blalock v. Mfg. Co.,* 110 N. C., 102; *Alexander v. Alexander,* 120 N. C., 474; *Cobb v. Rhea,* 137 N. C., 298; *Tart v. Tart,* 154 N. C., 506; *S. v. Heavener,* 168 N. C., 164.

JOHN A. TYSON AND J. F. GADDY, EXECUTORS OF JOHN TYSON, v. JAMES M. TYSON AND OTHERS.

Jurisdiction of Supreme Court—Bill for Advice to Executors.

1. In an action brought by executors against the devisees and legatees of their testator, in the nature of a bill in equity, to obtain a construction of the will for the guidance and protection of the executors, only those questions will be determined by the court which are necessary to be settled in order to protect the executors in the discharge of their duties.
2. Disputes between the devisees, as to the construction of the will as bearing upon their rights, must be left to be settled in an action between them.
3. The appellate jurisdiction of this Court is limited to the correction of errors in the rulings below. Hence, when there has been no ruling thereon in the lower court, this Court cannot pass upon a question presented by the record. (See *Scroggs v. Stevenson, ante*, 354.)

CIVIL ACTION, tried before *Connor, J.*, at November Term, (361) 1887, of ANSON Superior Court.

The action was brought to obtain a construction of the will of plaintiffs' testator for the guidance of plaintiffs in the discharge of their duties.

A jury trial was waived and the court found the facts.

Both sides appealed.

The facts are stated by the *Chief Justice* as follows:

John Tyson died in February, 1885, leaving a will and therein appointing his son John A. Tyson and his sons-in-law J. F. Gaddy and Atlas D. Dumas his executors, of whom the first named two are the plaintiffs in the action, and the defendants are the heirs at law, devisees and legatees mentioned in the will, with the husbands of such as have intermarried.

The will is in these words:

I, John Tyson, of the county of Anson and State of North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament, in manner and form following, that is to say:

1. That my executors, hereinafter named, shall provide for my body a decent burial, suitable to the wishes of my relations and friends, and pay all my funeral expenses, together with my just debts, howsoever and to whomsoever owing, out of the moneys that may first come into their hands as a part and parcel of my estate.

2. I give to my beloved wife, Mary Tyson, 200 acres of land, more or less, on which I now live (for metes and bounds see papers in my possession), together with all outhouses, stock and cattle of all kinds.

with all supplies of corn, wheat, meat, etc., that may be on hand; also the growing crops on the place, with all household and kitchen furniture; indeed, everything on the place as it now is, for and during her natural life. At her death, the lands herein willed to my
(362) wife to go to Joanna B. Crump and her bodily heirs.

3. I give and bequeath to my eldest son, James M. Tyson (now in the West), six hundred dollars, which sum, together with former advances, will make a fair proportion of my personal estate.

4. I give to my son William G. Tyson (also in the West), six hundred dollars, which, together with former advances, will make him a fair proportion of my personal estate.

5. I give and bequeath to my son John A. Tyson, in addition to former advances, seventy-eight acres of land, being a part of the Watkins land in Stanly County, and lying on the waters of Pee Dee River, adjoining the lands of R. F. Tyson and W. H. Watkins (for metes and bounds see papers in my possession). I also give him six one hundred dollar shares in the Pee Dee Manufacturing Company; also my silver watch.

6. I give and bequeath to my son Robert F. Tyson, two tracts of land in Stanly County, known as the Watkins land, on Pee Dee River—tract No. 1, lying as above described, adjoining the lands of Jas. Smith and John A. Tyson, containing 73½ acres; No. 2 is also part of the Watkins land, on which he now lives, containing 76 acres, adjoining Wall and others. For metes and bounds see papers in my possession. I also give him six one hundred dollars shares in the Pee Dee Manufacturing Company.

7. I give and bequeath to Emeline J. Mills two tracts of land in Anson County—one on which she now lives, of one hundred acres, more or less, adjoining the lands of F. A. Clarke and others; the second tract, lying on the east side of Little Creek, known as the Frem George lands, adjoining Sibley land and others, containing 194 acres (for metes and bounds see papers in my possession), the herein described lands to be hers during her natural life, and then to her bodily heirs.
(363) I also give to the bodily heirs of Emeline J. Mills five hundred dollars, to be equally divided between them.

8. I give and bequeath to Mary H. Gaddy one tract of land in Anson County, on which she now lives, on the waters of Rocky River, known as the R. R. Bill Lee lands, containing 393 acres, more or less. The herein described lands to be hers during her natural life, and then to her bodily heirs.

9. I give to Frances E. Dumas two tracts of land in Anson County, on the waters of Brown Creek—the first a tract on which she now lives,

containing 143 acres, more or less, known as the George A. Smith lands, adjoining R. A. Carter and others; the second tract, on Brown Creek, above the mouth of Jack's Branch, containing 389 acres, more or less, adjoining the lands of Wm. Little and others. For metes and bounds see papers in my possession. The above described lands to be hers during her natural life, and then to her bodily heirs. I also give to her five hundred dollars in money.

10. I give and bequeath to my daughter Joanna B. Crump, in consideration of her taking care of her mother, two other tracts of land besides the one referred to in article two—one on which she now lives, of 181 acres; one other tract of 200 acres on Rocky River, in Anson County, known as the Turner lands, adjoining the lands of John R. Richardson. For metes and bounds see papers in my possession. The above described lands to be hers during her lifetime, then to her bodily heirs.

11. My will and desire is, that all the residue of my estate, after taking out the above mentioned, shall be sold and debts owing me collected, and my debts paid, and the surplus shall be equally divided between my six children, John A. Tyson, R. F. Tyson, Emeline J. Mills, Mary H. Gaddy, F. E. Dumas, and Joanna B. Crump.

12. I hereby appoint and constitute my son John A. Tyson and my sons-in-law J. F. Gaddy and Atlas D. Dumas my lawful executors, to all intents and purposes, to execute this my last will and testament, according to the true intent and meaning of the same, (364) and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

In witness whereof, I, the said John Tyson, do hereunto set my hand and seal, this 23 January, A.D. 1884. JOHN TYSON (Seal).

Signed, sealed, published and declared by the said John Tyson to be his last will and testament, in the presence of us, who, at his request and in his presence, do subscribe our names as witnesses thereto.

G. O. WILHOIT.

R. M. BILES.

The action is instituted to obtain the advice of the court as to the construction of certain provisions in the will, about which a controversy has sprung up among the defendants, as a guide to the plaintiffs in discharging their trust, and the interrogations propounded are as follows:

1. Who are "the bodily heirs of Emeline J. Mills, who is now fifty years of age, to whom is bequeathed a legacy of $500, in the 7th item?"

2. When and to whom is this legacy to be paid?

3. Can the shares of each therein be ascertained before the death of said Emeline?

4. From what time, if any, does this sum bear interest?

5. Does the death of Mary Tyson, during the testator's life, and some twenty days previous to his death, defeat the devise contained in the tenth clause and made "in consideration of her (Joanna B. Crump) taking care of her mother," either in the life estate given Joanna, or in the remainder "to her bodily heirs?"

(365) A jury trial being dispensed with, the court found the facts and declared the law applicable to the matters in contention in the following judgment:

This cause coming on for hearing before the court upon the complaint and answers, with the exhibits thereto attached, a jury trial being waived, the court, by consent, finding the facts:

1. That John Tyson, late of the county of Anson aforesaid, having first made and executed his last will and testament, in sufficient form, and duly attested, to pass real and personal property, died in the county of Anson on 19 February, 1885; a copy of said will is hereto attached as a part of this judgment. (For copy of will, see pages 3-6, "Exhibit A," of this record.)

2. That the plaintiffs, John A. Tyson and J. F. Gaddy (the defendant A. D. Dumas having renounced his right to qualify), presented the said will for probate in the court having jurisdiction thereof, on 9 March, 1885, and the same being duly admitted to probate, qualified as executors thereto, and at once entered upon the discharge of the duties of said office.

3. That the defendants, James M. Tyson, W. G. Tyson, Robert F. Tyson, Mary H. Gaddy, Frances E. Dumas, intermarried with A. D. Dumas, Joanna B. Crump, intermarried with Joseph A. Crump, Emeline J. Mills, intermarried with J. Q. Mills, and the children of said Emeline J. Mills, to wit, John Mills, Lucy Caudle, intermarried with Isaac Caudle, being of full age, and Mamie Mills, Albert Mills, and Edgar Mills, infants, and represented by their father and guardian *ad litem,* John Q. Mills—are the children and grandchildren of the said John Tyson, and are the legatees and devisees named in said will.

4. That Mary Tyson, the wife of said John Tyson, the person named in the second clause of said will, died on 31 January, 1885, and before the death of her said husband, the said John Tyson.

(366) 5. That said John Tyson was, at the time of his death, and at the time of making his will, very old, as was also his wife, the said Mary Tyson; that said Mary Tyson was, for several years prior to her death, in feeble health.

6. That the defendant Joanna Crump, together with the other children of said John and Mary Tyson, was kind and attentive to the wants of their said mother.

7. That the said John Tyson was a man of good estate, and supplied his family with such articles as were needed and suited to their comfort and condition in life, and by his will made ample provision for his wife, had she survived him.

8. That prior to his death, and in contemplation thereof, said John Tyson placed, in separate parcels, the title deeds to the several tracts of land devised to his children, and wrote their names on the parcels, covering the lands so devised. That the title deeds to the land mentioned in item ten of the will were so placed in a package, and the name of Joanna B. Crump written thereon.

9. That the plaintiffs executors have in their hands, after discharging the other trusts declared in said will, a sufficient sum to pay the legacy mentioned in item seven of the will.

10. That Emeline J. Mills was fifty years of age at the time of the death of John Tyson, and has had no children since that time.

Upon the foregoing facts, it is considered and adjudged by the court:

1. That the words "bodily heirs" of Emeline J. Mills, as used in the seventh clause of the will of John Tyson, are to be construed as meaning the children of said Emeline J. The language is not to be taken in its technical sense, but as describing a class of persons to whom the testator wished to bequeath the sum of money mentioned. He recognizes the fact that Emeline J. Mills is living, hence could have no bodily heirs, technically speaking, *Nemo est hæres* (367) *viventis;* see *Bullock v. Bullock,* 2 Dev. Eq., 307; *Ward v. Stow,* 2 Dev. Eq., 509; *Simms v. Garrot,* 1 Dev. & Bat. Eq., 393; The Code, sec. 1329.

2. That the children of said Emeline J., living at the death of the testator, are entitled to said legacy, "to be equally divided between them." *Simms v. Garrot,* 1 Dev. & Bat. Eq., 393.

3. That said legacy is to be paid at the end of two years from the qualification of the executors of John Tyson. The Code, sec. 1510.

4. That said legacy bears interest after one year from the death of John Tyson. *Hart v. Williams,* 77 N. C., 426.

5. That in regard to the effect of the death of Mary Tyson, the wife of said John Tyson, before his death, upon the devise to Joanna B. Crump, set out in item ten of the will, the court will not, in this proceeding, adjudicate the legal rights of the parties; but for the purpose of advising the plaintiffs executors in respect to their duties under the provisions of section 10 of said will, it is considered and adjudged, that it is not the duty of said executors to sell the said land

so devised to Joanna B. Crump and divide same, etc. That the plaintiffs will pay the costs of this proceeding out of the assets of their testator.

From the foregoing judgment the plaintiffs and the defendants, except the children of Emeline J. Mills, and Joanna B. Crump, appealed.

R. H. Battle and E. C. Smith for the various parties litigant.

SMITH, C. J., after stating the facts: The appellants have no interest in the solution of the question referable to the pecuniary bequests "to the bodily heirs of said Emeline J.," nor would we be dis-
(368) posed to differ with the judge in his rulings upon this matter, if it were before us.

The judge very properly declined to advise as to the devise of the land mentioned in the tenth item, and the effect of the words used in connection, "in consideration of her taking care of her mother," further than to say, it was not the duty of the executors, under the 11th residuary clause, to sell the land given to Joanna, and her bodily heirs after hear death, in the clause immediately preceding. Whether the devise failed because of the death of the mother before that of the father, the testator, was not an inquiry which the executors could make of the court, under the established rules of practice. *Tayloe v. Bond,* Busb. Eq., 15; *Little v. Thorne,* 93 N. C., 69; *Cozart v. Lyon,* 91 N. C., 282, and other cases, and for the simple reason that a question of law is raised among heirs and devisees, and must be settled in an action between the contending claimants to the land. The executors have nothing to do with this contention, and, as such, have no duty to perform, unless it devolves upon them, in one view of the case, to make sale; and this inquiry is answered.

Our appellate jurisdiction is limited to the correction of errors in the rulings below, and when there has been no ruling, that jurisdiction cannot be invoked or exercised.

Without intimation of an opinion upon a point not before us, it is not improper to refer to the recent case of *Burleyson v. Whitley,* reported in 97 N. C., 295. There is no error and the judgment is affirmed.

No error. Affirmed.

Cited: Balsley v. Balsley, 116 N. C., 476; *Baptist University v. Borden,* 132 N. C., 504; *Heptinstall v. Newsome,* 146 N. C., 504; *S. v. English,* 164 N. C., 509; *S. v. Heavener,* 168 N. C., 164; *Jordan v. Sigmon,* 194 N. C., 707; *Trust Co. v. Lentz,* 196 N. C., 404.

(369)

HENRY FARRIOR v. GEO. E. HOUSTON AND ANOTHER.

Levy of Execution—Sale of Land under Execution—Sheriff's Deed; recitals in.

1. A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy.
2. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be fully made known at the sale what property is being sold.
3. The recitals in a sheriff's deed are *prima facie* evidence as to his acts recited therein.

CIVIL ACTION of ejectment, tried before *Philips, J.*, at November Term, 1887, of DUPLIN Superior Court.

When this cause was before the Court, upon the defendant's appeal from a ruling, that under the pleadings, and upon an averment of title to the land in themselves, they could not be heard to controvert that of the plaintiff, by opposing evidence merely, the ruling was declared to be erroneous, the judgment reversed, and a new trial awarded. 95 N. C., 573.

Upon the last trial the plaintiff, who claimed the property under one I. B. Kelly, exhibited in evidence an execution issued in the name of the said Kelly, against the defendant, George E. Houston and Edward W. Houston, administrator, to Bland Wallace, sheriff of Duplin, under which, after a levy of the same, the premises claimed were sold and conveyed to said Kelly. The levy was endorsed thereon in these words:

"Levied this execution upon George E. Houston's interest in 679 acres of land, more or less, in Kenansville Township, adjoining the lands laid off to him as a homestead, and others.

B. WALLACE, *Sheriff.*"

It appeared from the testimony of one A. B. McGowen, that 182 acres were assigned for the debtor's homestead, and, that outside of this tract, the said George B. Houston then owned 679 acres of land in Kenansville Township, and no more, and that of these 679 acres, (370) 353 acres adjoined the homestead, and 326 acres, that are now in controversy, do not adjoin the homestead, and are two miles distant from it.

The sheriff's deed is as follows:

STATE OF NORTH CAROLINA—DUPLIN COUNTY.

Know all men by these presents, that the undersigned, sheriff of the county of Duplin, and State above written, by virtue of an execution

issued from the Superior Court of said county, in the case following, to wit, in favor of Isaac B. Kelly against George E. Houston and Edward W. Houston, administrator with the will annexed of Calvin J. Houston, deceased, and other executions and *ven. ex.*, as of record doth appear, having levied said execution or *fieri facias*, on the lands and tenements of the said George E. Houston, hereinafter described, on the 20th day of September, 1869—said lands being in excess of his homestead, which had first been duly laid off—and having made advertisement according to law, and sold said lands and tenements at public sale, for cash, on the first Monday of November, 1869, at the courthouse door in said county, when and where Isaac B. Kelly, of the county of Duplin, and State of North Carolina, became last and highest bidder, at the sum of three hundred and thirty dollars, which said sum has been paid to the undersigned, in accordance with the terms of said sale. In consideration of the premises, and in further consideration of the purchase money, paid as aforesaid by the said Isaac B. Kelly, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell unto the said Isaac B. Kelly and his heirs, all the right, title and interest of the said George E. Houston, as aforesaid, in and to the following tracts or parcels of land, levied on as aforesaid,
(371) situate in Kenansville Township, in said county of Duplin, and bounded as follows: 1st tract: Beginning at an ash in Dark Branch, and running S. 9 W. 44 poles to a pine at the road, same course continued to Neal's line; thence with his line N. 75 W. about 50 poles to a pine; thence with his other line S. 36¼ W. 249 poles to a pine in the calf pasture, N. 35½ W. 186 poles to a pine; thence N. 40 W. 40 poles to a pine; thence N. 14 W. about 96 poles to the run of Dark Branch; thence down the run to the beginning—containing 326 acres, more or less. Second tract includes all the land devised by George E. Houston, Sr., to said G. E. Houston, except 182 acres set apart and allotted to him as a homestead, and is bounded as follows, viz.: Beginning at a pine near the colored people's church, on the public road—McGowen's corner, formerly James Pearsall's—and the beginning corner of said George E. Houston's homestead tract, and runs with McGowen's line to Dr. I. C. M. Loftin's corner; then with his line to John A. Bryan's, formerly Oliver's corner; then with his line to the public road, west of the branch crossing the road; then along the road westerly to the foot of a cart-path at the turn of the road, the last corner of said G. E. Houston's homestead tract; then with his line to the beginning, supposed to contain ..... acres, more or less. To have and to hold said lands and premises, with all and singular the privileges, improvements and appurtenances to the same belonging, to him the said Isaac B. Kelly, his heirs and assigns,

in as full and ample a manner as the undersigned is empowered by virtue of his office to convey and assure the same. And the undersigned, sheriff as aforesaid, doth covenant, promise and agree to and with the said Isaac B. Kelly, his heirs and assigns, that he and they shall and may at all times hereafter, have, hold, occupy, use and possess said lands and premises, free and clear of, and from all incumbrances had, made or done by the undersigned, or by his order, means or procurement; and that the undersigned will forever warrant and defend said lands and premises to the said Isaac B. Kelly, his heirs and assigns, (372) so far as his said office of sheriff will authorize and enable him to do, and no further.

In testimony whereof, the undersigned, sheriff aforesaid, hath hereunto set his hand and seal, this 3d day of May, 1878.

BLAND WALLACE, *Sheriff.* (Seal.)

Signed, sealed and delivered in the presence of
R. W. HAEGRAVE.

The court being of opinion that the plaintiff was not entitled to a verdict upon his proofs of title, and having so intimated, he submitted to a nonsuit, and appealed.

W. R. Allen for plaintiff.
H. R. Kornegay for defendant.

SMITH, C. J., after stating the facts: The only question presented is, whether the alleged imperfect description of the land in the levy invalidates the subsequent proceeding to sell, and renders the sale and sheriff's deed void.

There have been numerous cases in which defects were alleged to exist in a levy upon land made under an execution from a justice of the peace, the imperfect description of the land being held to be too vague to warrant further proceedings for a sale.

The necessity of a reasonable certainty in ascertaining and identifying it, grew out of the fact that the process, with the levy, were required to be returned to the County Court where issued and order made to the sheriff to sell the land so levied on. A levy was therefore a necessity in such cases, and of course the land must be sufficiently described to enable the sheriff, under the *venditioni exponas,* to know what he was to sell, and that bidders might understand what they were buying, and yet very imperfect descriptions have been upheld. Thus, a levy "upon all the lands of the defendant lying on Queen's creek," was held to be fatally defective without evidence of identity, but a levy "upon (373) all the lands of the defendant lying on the head waters of

Ketchum's mill pond, adjoining the lands of said Ketchum," was held to be sufficient to warrant the sale. *Huggins v. Ketchum,* 4 D. & B., 414.

Again, in *McLean v. Paul,* 5 Ired., 22, *Ruffin, C. J.,* says that a constable's levy upon land in this form: "This day levied on the legal and equitable interest of Abraham Paul to 450 acres of land, more or less, in Robeson County, adjoining the lands of Giles S. McLean, Dugal McCallum, John McLean and others," is not objectionable upon its face so as not to admit of proof or identity.

In *Judge v. Houston,* 12 Ired., 108, the sheriff, with a writ of *fieri facias* in his hands, endorsed on it: "Levied this execution upon the land of Stephen M. Houston, on the east side of North East River, adjoining the lands of Stephen M. Grady and others, and, after due advertisement, sold the land levied on," etc. There were two tracts of land, on one of which the defendant lived, and had cultivated for several years, in turpentine; the other, which did not adjoin the first, but was two miles from it. The defendant in the action, who was defendant in the execution, objected to the levy, for its vagueness and uncertainty, and that it could not embrace the second tract, which did not touch the lands of Stephen M. Grady, as was conceded. In noting the objections, which were overruled in the Superior Court and brought up for examination by the defendant's appeal, *Pearson, J.,* uses this language: "The defendant's counsel did not advert to the difference between such a levy, which need not be returned, and the levy of a constable, which creates a lien, and must be returned, and must have a certain degree of particularity, *so as to identify the land and enable the sheriff to know which land to sell under the venditioni exponas,* and of which, notice must be given. It is not easy to perceive," he adds, "why a levy is required when the land is sold under the *fi. fa.*"

(374) Still less reason exists for a levy upon land under the new practice, by which, the command of the writ in the nature of a *venditioni exponas* is to sell, in the absence of any personal estate which can be seized by the officer, the real property belonging to the debtor when the judgment was docketed in the county, or acquired by him thereafter. The Code, sec. 448, par. 1.

Accordingly, in answer to an exception to the absence of any levy, this Court say: "There would seem to be little, if any, advantage, and certainly *no necessity,* for making a levy on the real property of the debtor under the present system of practice, which makes a lien, etc. . . . The only effect of a previous levy is, the specific appropriation of the property on which it is made, out of other equally liable to the plaintiff's debt, and may confer an equity on others to have the property first levied on sold and exhausted before resorting to the other real property

of the debtor." *Surratt v. Crawford,* 87 N. C., 372; and the proposition is reiterated in *Barnes v. Hyatt,* decided at the same term, and reported at page 315. All that is essential is, that the requirements of the law be observed, and that it be fully made known what property, describing it with sufficient certainty, is exposed to sale, and what the bidder, who may purchase, acquires. The sheriff's deed, whose recitals as to his own acts are *prima facie* evidence of the facts recited, expressly declares that the sale was made on the day and at the place specified by law, of the lands and tenements of the said George B. Houston, levied and "hereinafter described," and the boundaries of each tract are definitely set out in the deed. *McKee v. Lineberger,* 87 N. C., 181; *Miller v. Miller,* 89 N. C., 402.

We must, therefore, declare there is error, and reverse the judgment; and it is so ordered.

Error. Reversed.

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(375)

JOHN R. TURRENTINE v. WILMINGTON AND WELDON RAILROAD COMPANY.

Warehouseman; degree of diligence required of—Bailee without profit.

1. A railroad company, the carriage over its road being complete, had in its possession, as warehouseman, the goods of plaintiff, upon which the freight had been paid. The goods were retained in the warehouse at plaintiff's request. A fire broke out near the warehouse, but not on the property of the company. While the fire was burning, plaintiff asked permission to remove his goods. This was refused, because, in the opinion of the company's officers, if the warehouse were opened much of the property stored therein would be stolen, and also because they did not think at that time there was danger of the warehouse taking fire. The company made every effort in its power to prevent the communication of the fire to the warehouse, and, after it was plain that such efforts would prove fruitless, had the doors of the warehouse broken open and as many goods removed therefrom as possible. The company had property of very great value so located that it must have been burned before the warehouse could take fire, and the utmost diligence was used to remove this property. If such efforts had been successful, the danger of the warehouse taking fire would have been greatly reduced: *Held,* that it was not the duty of the company to act upon the suggestion of plaintiff, or strangers, as to the best method to save the goods in the warehouse. That if it used all means at its command and acted upon the *bona fide* judgment of its employees as to the best method to prevent the destruction or loss of the warehouse and goods therein, it was not liable for the destruction of plaintiff's goods.

2. The custodian of another's property, who uses the means which, at the time of danger, appear to him best for its preservation, is not to be held responsible for failing to adopt measures, which subsequent events show would have produced better results. An honest and reasonable effort made in the exercise of an honest judgment is all the law requires of him.

CIVIL ACTION, tried before *Shepherd, J.*, and a jury, at January Term, 1888, of NEW HANOVER Superior Court.

Judgment for defendant. Plaintiff appealed.

This action is prosecuted to recover in damages the value of a (376) lot of hams and bacon transported over the defendant's road to its terminus, the point of delivery, at Wilmington, in this State, which, while in the warehouse of the company, were on the 21st day of February, 1886, destroyed by fire. The complaint attributes the loss to the negligence of the company and its failure to make proper efforts for the safety of the goods, or to allow the plaintiff himself to remove them to a place beyond the reach of the advancing flames. The defendant denies the imputation of negligence and want of due care and diligence in an effort for their preservation; and the issue, drawn from the conflicting averments contained in the pleadings and put in form and passed on by the jury, was as follows:

Were the goods lost or destroyed by the wrongful act or default of defendant? Answer: No.

It was admitted at the trial that on Sunday, 21 February, 1886, the defendant (the carriage over the road being completed) had in its possession, as warehouseman, the goods whose loss is the subject of the suit, whereof the hams had been therein stored for seven or eight days, and the bacon, received later, for two days; that the plaintiff knew of the arrival of the goods and of their deposit in the warehouse, and he had given directions for their delivery when called for, having paid the freight charges thereon; that the warehouse was consumed, with a large amount of goods, besides those of the plaintiff, by an accidental fire that originated elsewhere, on the premises of others some distance away, and that, in its progress and before reaching the warehouse, many buildings and much property were burned; that the fire occurred in the afternoon of the day mentioned and caught the Champion compress, which was burning from a half to an hour, according to differing witnesses as to the time, from which due north was located the warehouse, and that a strong wind was then blowing from the southwest to the north- (377) east. With these concessions, the testimony bearing upon the question of the defendant's negligence and responsibility for the loss, was as follows:

The plaintiff, whose evidence alone on his own behalf is given in the case upon this point, testified that, while the compress was on fire and a

half or three-quarters of an hour before the warehouse caught, he saw Captain Divine, the general superintendent of company, and said to him, "if you will open the doors of the warehouse all the goods can be saved"; that Divine refused to open the doors, saying there was no danger, that the warehouse was fire-proof, and if the doors were opened, more goods would be stolen than saved. That shortly after, he saw Mr. Bridgers, the president of the defendant, and said to him, that if the doors were opened the goods could be saved. Mr. Bridgers replied that the warehouse was fire-proof; to which plaintiff said, "fire-proof, *hell,* with wooden doors"; Bridgers said, "you had better see Divine"; plaintiff replied, he had seen Divine, who had refused to open the doors. Bridgers then said, "Oh for a head for this concern!" That he could have saved everything in the warehouse if the doors had been opened; that the fire was a large conflagration, and burned up a large portion of the city. There was great excitement, and a large number of people of all classes were about the fire, and all very much excited. It was the custom for the railroad company to allow goods to remain in the warehouse after payment of the freight, without charge for storage, to suit the convenience of the consignees to take them away, and the goods sued for were left in the warehouse under that custom. When the warehouse was crowded and they wanted room, they would notify us to move the goods. This was done for convenience of consignees. That the warehouse was a pretty substantial brick one, with slate roof and wooden doors. That there was always danger at fires of goods being stolen; generally the case at large fires that a crowd gathers to plunder.

It was also in evidence, on the part of the plaintiff, that the (378) officers of the defendant did not permit the warehouse to be opened until the warehouse of the W., C. & A. R. R., the building next to the defendant's warehouse, had been so far consumed that its roof had fallen in. That then the locks of the doors were broken, the doors opened, and a considerable amount of goods saved, by removing them from the warehouse. That Superintendent Divine, when requested by plaintiff to open the doors, gave as his reason for refusing, that the warehouse was in no danger, and that the goods would be stolen.

R. R. Bridgers, for defendant, testified that he had no recollection of the plaintiff having had the conversation with him as testified to by the plaintiff; that he was very sure he would have remembered such a conversation, if it had taken place.

James F. Post, for defendant, testified that he was in the employ of defendant at the time of the fire as transfer agent; that the space between the W., C. & A. Railroad warehouse and the warehouse of defendant was full of cars; there were over 150 cars there, most of them

full of very valuable merchandise; that the bridge over the river at Hilton, on the W., C. & A. Railroad, had broken down, and trains couldn't pass; there were four trains at least delayed here, and all these cars were between the two warehouses; there was a car load of powder, some 6,000 or 8,000 pounds, that came in Saturday night before the fire, on the track between the two warehouses, about midway the train; the employees of the defendant were all absent, it being Sunday, and we had no engine fired up; I went to work, as soon as I got there, to get the powder out; if it had been left there, there would have been great damage to life, probably fifty persons would have been killed. I got an engine fired up, and went to work before the compress caught, to
(379) clear the track, and hauled the powder out of the city; the greater part of the railroad's accommodation to move freight was there between the two warehouses, fully 150 cars; these cars were filled with cotton, naval stores, and valuable merchandise; the spring goods were then going South, and goods of immense value were in these cars; the cars belonged to defendant, and were worth over $400 apiece; all these cars were in much greater danger than the warehouse, because they would have burned before the warehouse; it was necessary to remove these cars to save the warehouse.

Harry Walters, for defendant, testified that he was general manager of the Atlantic Coast Line; when he got to the fire, it had not reached the compress; the offices of defendant were directly east of the compress, and warehouse directly north; the wind was blowing strong from southwest to northeast; the offices were burned, and many of the records of the company; he went below from the offices and saw fire engine—the water had given out—and tried to get it to go down to the river to put the hose in, but they refused; there were a large number of cars between the W., C. & A. R. R. warehouse and the warehouse of defendant; I went there and saw that if we could get the cars out, we could save the warehouse; if we could get these cars out, there would be no danger; we got all the cars out but a few; the lines became so blocked with cars we could not get an engine down; got all the hands we could, and went to pushing the cars out by hand; we got all past the warehouse but one car, which we pushed up to the end of warehouse, but we couldn't push it any further; then I ordered the locks to be broken, and the doors to be opened—we did not have the keys to the doors; the warehouse caught from that one car, and if it could have been moved out, the warehouse would have escaped; the wind was blowing obliquely across, and fire only struck the east end of warehouse; that car was at east end of warehouse, and set fire to it; we saved about $6,000 of goods by
(380) moving them away on lighters, and paid out a large amount for

lighters and labor in saving the goods; the instant we saw we could not save the warehouse, we broke open the doors; there is generally a large accumulation of freight on Sunday, and at that time Hilton bridge was broken down, and five or six trains delayed here; there was a very large amount of goods in the warehouse and cars; the offices and records burned before the warehouse; we could not concentrate all attention at any one point; we used all the means at our command; the offices, the warehouses, the passenger sheds, machine shops, cars, etc., of the defendant were all in jeopardy from the fire at the same time; there was about $125,000 of goods in the cars between the two warehouses, and including the two warehouses and the cars, about $175,000 or $200,000; the defendant had property in danger from the fire worth about $500,000. I did not open the doors of the warehouse sooner, for two reasons: I did not think it was in danger, and the goods would have been stolen.

John F. Divine, for defendant, testified: I was general superintendent of defendant at time of fire; there was a heavy wind, and fire made way rapidly; we had a large amount of freight accumulated here at the time; there were 150 to 200 cars on the tracks between the two warehouses; we got all the cars out except a few next to the defendant's warehouse, got hands and pushed these out, all but one or two; the warehouse caught from this car; if this car could have been pushed out of the way the warehouse would not have burned; I gave my whole attention to moving out these cars, as the best means of saving the warehouse; there was a quantity of powder in one of the cars, but don't know how much; as soon as I thought the warehouse was in danger, I broke locks of the doors, and opened them; the wind was blowing towards the east end of warehouse, and it caught there; after the doors were opened, we got out all the goods we possibly could, and saved them by means of (381) lighters; I had no conversation with the plaintiff on that day, as testified to by him.

Mr. Meares testified, that during the fire he saw persons running, and heard them say there was powder there.

During the examination in chief of the plaintiff, his counsel proposed to prove by him the facts submitted in the following questions, which he propounded to the witness: "Were not the people at the fire saying that the warehouse would burn, and was not that the general belief of the bystanders?" The defendant objected, and the objection was sustained. The plaintiff excepted.

The plaintiff proposed to prove by another witness, that the defendant has settled the claims of other parties whose goods were lost at the same fire, and under similar circumstances. The defendant objected; the objection was sustained, and the plaintiff excepted.

The plaintiff prayed the following instructions:

1. Defendant being custodian of plaintiff's goods, was bound to exercise such care and diligence in saving them, as a person of ordinary prudence would exercise with reference to his own property. *Neal v. R. R.*, 8 Jones, 482.

2. If defendant refused or failed to open the warehouse, and attempt to save the goods, or permit them to be saved, when the warehouse was in danger, the fire threatening, and there was good reason to apprehend destruction, it was guilty of gross negligence, and the first issue must be found in the affirmative.

3. If, when the compress was burning, there was a high wind blowing in the general direction of the warehouse, it was negligence for the defendant to refuse to try to save the goods, or permit them to be saved, and the first issue must be found in the affirmative.

4. If, when the fire was raging, the circumstances were such as to cause a person of ordinary prudence to believe that the warehouse would burn, or was in danger of burning, it was the defendant's duty
(382) to try to save the goods, and its failure to do so, until the other warehouse was burning, was negligence, and the first issue must be found in the affirmative.

5. If the defendant refused, or failed to try to save the goods as soon as it could be seen that they were in danger from the approaching fire, it was gross negligence, and the first issue must be found in the affirmative.

6. To establish gross negligence on the part of the defendant, it is not incumbent on the plaintiff to show any fraudulent purpose or conduct. Jones on Bailments, page 21, note; Parsons Contracts, 2d vol., page 88.

7. If the defendant was guilty of negligence, it is not exonerated by reason of the fact that its own goods were in the warehouse with the plaintiff's. Parsons, 2d vol., 91, and note.

8. Even though there was reason to apprehend that opening the warehouse would result in confusing goods, miscarriage in delivery, or theft, this did not excuse defendant for its refusal to permit plaintiff to save his goods, if plaintiff demanded them.

The first, sixth and seventh were given as prayed for. The others were not given as asked; but, after stating the case, the court charged the jury as follows:

It is conceded by the plaintiff, that the defendant is not liable as a common carrier, but he contends it is liable as a warehouseman. That the defendant was a warehouseman, is conceded; and the question is, whether the defendant is liable for the loss of the goods, occasioned by what is conceded to have been an accidental fire, originating elsewhere

than on defendant's premises, and without any fault on its part. If the jury believe that the goods were stored by defendant in a brick warehouse with slate roof, which was its usual place for the storage of its freight not taken away by consignees; that the fire was accidental, originating on the premises of others; that when the defendant's (383) property was threatened with danger by the fire, the defendant exerted all the means in its power to save the warehouse, by removing the alleged intervening box cars, and the alleged car load of powder, and other efforts, and by these means decreasing the danger of the said warehouse, and notwithstanding these efforts the warehouse and goods were destroyed; then, nothing further appearing, the defendant is not liable.

The plaintiff denies that the defendant used all the means in its power. First, he says that if the doors of the warehouse had been opened, the goods could have been saved, and that there was sufficient force present to have saved them. The court charges you, that the defendant was not bound to act upon the suggestion, or offers of bystanders, as to the particular manner in which it should endeavor to save its property, or that which is under its control, but that it is its duty to avail itself of all the means within its reach to save such property; and upon this question the jury may consider the alleged offer of assistance, the opportunity of employing force, and all the circumstances in evidence, and if, at the time when danger threatened the warehouse, the defendant had the means at hand, and could, by their employment, have saved the goods in the warehouse, the defendant failed or refused to employ these means, it would be liable. But if the jury believe that the fire was raging, and many buildings in different parts of the city were in flames; that there was a heavy wind blowing from the southwest to northeast; that the warehouse was due north of the compress; that a large number of persons of all classes and conditions were gathered together in the vicinity of the warehouse, and that there was danger of theft; that a car loaded with a large quantity of powder was blocked in on the track near the warehouse, with a number of cars in front of it; that the fire was on Sunday, when all of the employees of the defendant were off duty and away; that there was a large quantity of very valuable freight in the cars and the warehouse; that many cars—one hundred and fifty in num- (384) ber—were standing on the track between the two warehouses; that the efforts of the superintendent and manager were principally directed in removing the powder first, and then the cars; that these were near to the fire, and in greater danger than the warehouse in which were stored the plaintiff's goods; that several buildings of the defendant, including its offices, containing all of its records, at different points were on fire, and that property to the value of about $500,000, belonging to

the defendant and under its charge, was in danger, and threatened by the fire; and if the jury further believe that, by reason of these alleged circumstances, all of the available force at the defendant's command was being used to move the intervening cars and powder, and in other efforts to remove inflammable matter between the fire and warehouse, and that by throwing open the doors of the warehouse the goods therein would have been exposed to a promiscuous crowd and in danger of theft, then the defendant would not be guilty in failing to open the doors of the warehouse.

The plaintiff contends that without regard to this, he is entitled to recover because, after danger threatened, he requested the defendant to open the doors of its warehouse in order that he might remove his goods. This request is denied, and the burden of proof is on the plaintiff to show that he made such request. If you find there was such a request, then the court charges that it was the duty of persons having freight in such warehouse to apply for its delivery during business hours and on business days (counsel conceded at this stage of the charge that the demand, if any, was made on Sunday, and that Sunday was not a proper day for the delivery of freight by defendant in the ordinary course of business), and if, when such demand was made to open the doors, all of

(385) the available force of defendant was engaged in protecting its property, and that of others in its custody, which was in more imminent danger, and that, under the circumstances, it had not the proper force to make a safe delivery of the plaintiff's property in the warehouse, and that opening or breaking open the doors, the key not being there, it is alleged, and allowing the plaintiff to remove his goods, would have exposed a large amount of goods in said warehouse to theft or miscarriage, and defendant was, in good faith, using all of its available means in protecting property in more imminent danger; that the fire was raging and many buildings in different parts of the city were in flames; that there was a heavy wind blowing from the southwest to the northeast; that the warehouse was due north of the compress; that a large number of persons of all classes and conditions were gathered together in the vicinity of the warehouse, and that there was danger of theft; that a car loaded with a large quantity of powder was blocked in on the track near the warehouse with a number of cars in front of it; that the fire was on Sunday, when all of the employees of the defendant were off duty and away; that there was a large quantity of very valuable freight in the cars and the warehouse; that many cars, one hundred and fifty in number, were standing on the track between the two warehouses; that the efforts of the superintendent and manager were principally directed in removing the powder first, and then the cars; that these were

nearer to the fire and in greater danger than the warehouse in which were stored the plaintiff's goods; that several buildings of the defendant, including its offices containing all of its records, at different points, were on fire, and that property to the value of about $500,000 belonging to the defendant and under its charge, was in danger and threatened by the fire, and if the jury further believe that by reason of these alleged circumstances all of the avilable force at the defendant's command was being used to move the intervening cars and powder, and in other efforts to remove inflammable matter between the fire and the (386) warehouse, then the defendant was under no obligation to open its doors to the plaintiff.

But if, under the circumstances, you believe that the defendant had the means to have safely delivered to the plaintiff his goods, or that opening the door and permitting him to receive the same, would not, under the circumstances, have probably exposed the other property stored in the warehouse to theft, then the defendant is liable.

There was a verdict in favor of the defendant, and the plaintiff moved for a new trial.

1. Because of the exclusion of testimony—see exceptions.
2. Because of the refusal of the court to give instructions as asked.
3. Because of errors in the charge as given.

The motion was overruled, and judgment rendered in favor of the defendant; the plaintiff appealed.

D. L. Russell and T. R. Purnell for plaintiff.
George Davis for defendant.

SMITH, C. J., after stating the facts: The aspect of the case, pressed with most earnestness in the argument here, grows out of the fact that the plaintiff, at a time when the goods could have been removed with safety, was not allowed to enter the warehouse and take possession of his own for that purpose, and it is assigned as error, that the instruction numbered 2, in those requested by the plaintiff to be given to the jury, was refused. The others following, and denied, are substantially embodied in that, and need not be separately considered. In place of these, the charge of the court is fully set out, and seems, to us, to more fairly present the merits of the controversy, as developed in the evidence, to the minds of the jury. The law is there laid down, both carefully and with much accuracy, well calculated to aid and guide the jury to a just verdict. It certainly does not necessarily follow, that a (387) want of due regard to the rights and interests of the plaintiff is manifested, in the refusal, at the time of the conflagration, under the

attendant circumstances, when it was hoped the efforts then made to stay the progress of the fire would be successful, and the warehouse and what it contained be saved, to throw open its doors and expose them to increased hazard from entering sparks and depredation of others. The defendant owned no less a duty to others than to the plaintiff, and its efforts, with all the forces at command, seemed to have been directed to the preservation of all the goods in its custody.

The plaintiff was present to look after his, but other owners were not there; and it was not an unreasonable apprehension, that opening the house and giving indiscriminate access to the goods therein deposited, would result in a much greater loss.

There were, moreover, as is proved, a large number of cars blocking up the way, one hundred and fifty or more, and a large quantity of gunpowder in some of them, and the efforts of the men, under the direction of the officers, were mainly made to remove them, so that the flame passing along them might be arrested before reaching the warehouse, and this was well nigh accomplished, only one or two left, which it was found impracticable to move in time, and through these, the fire was communicated to the warehouse. According to the superintendent, if the cars could have been removed, the warehouse would not have been burned. It is unnecessary to repeat the testimony, as it is set out in full, but it tends to show energetic and well directed efforts to save the large property of others in its hands and its own, from the spreading and consuming element that was devouring houses all around, and we do not see any error in the charge of the court in regard to its responsi-

(388) bility. It must not be forgotten that one's judgment, under such trying circumstances, is not as calm and deliberate in determining what then ought to be done, as afterwards upon a retrospect would have promised better results, and this severe rule of liability does not rest upon the custodian of another's property. If an honest and reasonable effort is made, suggested, at the time, as the best line of action to be pursued, and this in good faith, and of this the peril to the defendant's property gives full assurance, it exonerates from liability for loss. The warehouse, built of brick, and its roof slate covered, seems to have been deemed well nigh fire-proof; and even now, in reviewing the past, it is not clear that the plaintiff should have been permitted to take away his goods, and thereby endanger, if not insure the destruction of the other goods; and if it were otherwise, and that the servants of the company erred in their action, it could hardly be imputed as negligence in them to so act upon an honest, though it may turn out to be a mistaken, judgment.

But the law is so fairly left to the jury in the charge, that nothing is required of us in support of its correctness. But little aid can assuredly be derived from adjudged cases, as the facts are seldom, if ever, the same, and the question of culpable neglect must, in each case, depend upon its own facts. It must be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Lyman v. R. R., 132 N. C., 725; *Whitley v. Powell,* 191 N. C., 476.

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(389)

H. H. BURWELL, JOSEPH BURWELL AND OTHERS, TRADING AS BURWELL BROS. & CO., v. W. H. S. BURGWYN.

Contract—Usury.

1. A contract whereby a banker agreed to pay tickets issued by a tobacco warehouseman out of moneys deposited by the latter with him, and keep an account of their transactions, for a compensation of one-fourth of one per cent for his services, including collection of buyers' drafts, and if warehouseman's funds were not in hand, but sums so paid by banker should be replaced by 10 A. M. of the following day, the banker was to have one-half of one per cent, and if not so replaced, he was to have the further sum of one and one-half per cent per month (or 18 per cent *per annum*) on the overdrawn sums, is *usurious* as to the excess of the charge for overdrafts above the legal rate of interest allowed for the loan of money.

2. The nature and terms of a contract determine its character and purpose, and if it be usurious in itself, it must be taken to have been so intended, and the parties cannot be heard to the contrary.

CIVIL ACTION, heard before *Merrimon, J.,* at Spring Term, 1887, of the Superior Court of VANCE.

The action was brought by the plaintiffs, warehousemen of the town of Henderson, who, having become indebted in sums advanced to them by the defendant, a broker of that town, from time to time for several years, alleged charges of usurious interest, and demanded that the defendant be enjoined from selling certain real property belonging to the wife of one of the plaintiffs which had been mortgaged to the defendant to secure a certain sum which was alleged to be part of the money charged by the defendant against plaintiffs' firm, that an account between plaintiffs and defendant be taken, etc.

The defendant's answer set up a contract between him and the plaintiffs, under which he had advanced the money: denied usury, etc.

The action was referred to J. R. Young, the clerk of the court,
(390) and he having filed his report, the case was heard upon the exceptions of the plaintiffs.

His Honor overruled the exceptions and gave judgment according to the report, from which some of the plaintiffs appealed.

The other facts sufficiently appear in the opinion.

W. R. Henry and E. C. Smith for plaintiffs.

A. C. Zollicoffer, R. H. Battle and S. F. Mordecai for defendant.

SMITH, C. J. The plaintiffs firm, Burwell Bros. & Co., consisting first of H. H. Burwell, Joseph Burwell and W. B. Boyd, and changed afterwards by the substitution of Walter S. Clark in place of the last named, retaining, however, the partnership name, were, in November, 1882, engaged in the business of warehousing tobacco at Henderson, in this State, and the defendant had then opened a banking house in the name of W. H. S. Burgwyn & Co., and afterwards known as the Bank of Henderson. At the time mentioned, a contract was entered into between the parties, as found by the referee to whom had been referred the matters of account in controversy, whereby the latter was to pay off tickets issued by the former for tobacco, out of moneys deposited with him, and keep an account of their transactions, for which the said Burgwyn was to have one-half of one per cent upon sums so paid out, as compensation for his services, inclusive of the collection of buyers' drafts given upon sales.

This arrangement continued in force until superseded by a modification that took effect after January following, under which the said Burgwyn was to receive for his services one-fourth of one per cent when the plaintiff had funds on deposit sufficient to meet the demand; and if not, he was to have the former sum of one-half of one per cent advances, provided they were replaced by the hour of ten a. m. of

the day following. If the moneys were not restored on that day,
(391) the plaintiffs were to pay a further sum at the rate of one and one-half per cent per month, the equivalent of eighteen per cent per annum, on the overdrawn amounts, measured by the time of delay as shown by the daily balances in the account.

Upon this basis the referee states the account reported in monthly rests, and exception is taken to so much of the charges for the additional one and one-half per cent per annum as exceeds the rate of interest

allowed by the law, and an abatement of five-ninths on each of these debits, as the usurious excess over the legal rate of interest allowed upon the loan of money.

The referee, while finding the contract to be as before set forth, reports also that the additional sum mentioned, as consequent upon delay in reimbursing advances, covers interest at eight per cent, and that the ten per cent was for expenses and services in the assumed agency, adopted by the parties as the most convenient way of arriving at their value, and was a fair and proper charge therefor.

The principle of the exception runs through the series of monthly statements rendered by the referee, and these extend over several years, and if the charge be erroneous, for the reason given, the correction will be necessarily coextensive with the account, and require a correction of all the items into which the obnoxious element enters.

This exception must, we think, be sustained, and for the reasons given, and this notwithstanding the referee's conclusion, that the additional *per centum,* over eight, was intended to be remunerative only for services to be rendered, for such an inference is unwarranted by the terms of the agreement.

The compensation is provided independently, and is fixed first at one-half of one per cent, and afterwards, at the reduced rate of one-fourth of one per cent, when there are funds of the plaintiffs in hand to meet the demands upon it—increased to the original sum if there are not, but the deficiency is made good early on the next (392) day, and these are the fixed rates to be allowed for clerical labor, collecting drafts deposited and every other form of service to be rendered. Thus far, the amount is compensatory merely, and covers the demand for what the defendant may do pursuant to their contract. The additional sums to be charged, in case the sums advanced are not reimbursed within the specified time, is for the use of the moneys of the defendant, which is, in a legal sense, the interest agreed on for the advanced sums thence up to the time of replacement. Interest is the sum that accrues on money loaned, or the value of the use of it for any given time, and is fixed at six per cent per annum, in the absence of any agreement as to the rate, and a conventional rate is allowed up to eight per cent per annum on the principal sum. The Code, secs. 3835, 3836. Usury consists in taking a larger rate, and an agreement to take such larger rate is a usurious agreement, the effect of which is forfeiture, when insisted on, of all interest.

Most clearly, the contract before us is of this kind, for the sum to be paid has no consideration whatever, except the advance of the money and forbearance of the lender, and is measured by a rate of eighteen

per cent per annum upon the amount while it remains unpaid. What else can it be, when an agreed price is set upon the personal services to be given, and this is to be paid solely for indulgence in the moneys paid out for the plaintiffs' use while an outstanding debit against them?

The nature and terms of the contract determine its character and purpose, and if usurious in itself, it must be so understood to have been intended by the parties, and they cannot be heard to the contrary. As was said in reference to fraud, in *Cheatham v. Hawkins,* 80 N. C., 161 (164), "If a person does, and intends to do that which from its consequences the law pronounces fraudulent, he is held to intend (393) the fraud inseparable from the act. So the parties to a contract usurious upon its face, understandingly entered into, must be deemed to have intended to provide for the payment of a rate of interest in excess of that allowed by law, and that is itself a usurious contract. The inference drawn by the referee, to sustain the charge, is repugnant to the agreement, as he ascertains and reports it, and does not suffice to vindicate it from the inherent infectious element, which the law declares and adjudges to be present in the transaction, and the adverse ruling in the court below, in this respect, is erroneous. The entire forfeiture of this compensation is not demanded, nor would it in equity be allowed; and therefore, from these sums must be stricken out all of the eighteen per cent above eight per cent, that is, a deduction of five ninths must be made from these various items, and a correspondent rate of interest, so that the plaintiffs will be charged with the remaining four-ninths and legal interest thence on each of their debits.

The other exceptions are untenable, and we sustain the action of the court in overruling them.

To reform the account in accordance with this opinion, the matter is recommitted to the referee, Young, as most familiar with the case, to make the required corrections.

Error. Report recommitted.

Cited: S. c., 105 N. C., 503, 507; *Bank v. Bobbitt,* 108 N. C., 536; *Churchill v. Turnage,* 122 N. C., 430; *Owens v. Wright,* 161 N. C., 131; *Bank v. Wysong & Miles Co.,* 177 N. C., 291; *Bank v. Wysong & Miles Co., ibid.,* 389; *Waters v. Garris,* 188 N. C., 307; *Ripple v. Mortgage Corporation,* 193 N. C., 424.

M. J. YOUNG AND OTHERS v. P. B. KENNEDY AND OTHERS.

(*Vide Young v. Kennedy*, 95 N. C., 269.)

CIVIL ACTION, heard upon exceptions to a referee's report. The case is fully reported in 95 N. C., 265, in which the court directed a reference to the clerk of this Court, to reform the account (394) in accordance with the opinion.

R. F. Armfield for plaintiffs.
D. M. Furches and J. B. Batchelor for defendants.

DAVIS, J. This action was before this Court at the October Term, 1886, and was then heard upon the exceptions to the report of the referees and the rulings thereon by the court below. These exceptions, and the disposition made of them, appear in the case reported in 95 N. C., 265. As will be seen, by reference thereto, it was referred to the clerk to reform the account in accordance with the opinion then filed. This was done by the clerk, and his report was filed at February Term, 1887.

In this report he states that in reforming the account he did not make a new statement of each special item in the long account on file, but, taking the aggregate receipts and credits in that account, he added or subtracted such others as the court directed.

In passing upon the second exception of the plaintiff (page 268 of the report) it is stated that in the division of the slaves between the tenants in common the share allotted to M. J. Young was $550 in excess of the other two shares, and she was charged therewith. This excess, instead of being paid by M. J. Young to the other two tenants in common, who were then infants, and each entitled to one-half thereof, was in fact not paid at all, but was entered as a credit by the administrator as a part of $655 allowed to M. J. Young as a year's support, and that, being so, the administrator should have been charged therewith; but in the distribution of the estate, Thomas M. Young and Mary Young (or J. M. Howard, her administrator, she being dead) were entitled to receive the whole of that amount (the $550 and interest) as so much due to them, in order to make them equal to M. J. Young in the division of the slaves. (395)

This result is attained in the account, as reformed by the clerk, by adding the said sum of $550 and the interest thereon to the sum charged, making the balance in the hands of the administrator, after deducting the credits, $3,689.74, which, as the referee reports, "is to be divided between M. J. Young, T. M. Young and Mary Young

(or J. M. Howard, her administrator), after which one third of $1,391.13, the amount of the excess, with interest thereon, received by M. J. Young in the division of the slaves, is to be deducted from her share and added, one-half each to the shares of T. M. Young and Mary Young, whereby they will receive the whole of the said $550 and interest, making $1,391.13, as they have already received two-thirds in the division of the estate." The defendant, Kennedy, excepts to the report: "first, for that the referee erred in adding two-thirds of $550 and interest paid M. J. Young for the equality of partition of slaves by A. L. Young, administrator, without first deducting the whole amount, $1,391.13, which had been before allowed them, thereby duplicating this charge against defendant, and making it greater instead of less, as he understands the ruling of the court to intend, as applied to plaintiff's sixth (second) exception, and defendant's second exception."

This is a misapprehension. The defendant is credited by $550 and interest thereon, making $1,391.13 as a part of the item of $655 paid to M. J. Young (the widow), as her year's support, when in fact it was not paid in money out of the estate of his intestate, but was the amount due from the widow, M. J. Young, not to the estate, but to T. M. Young and Mary Young, to make them equal in the division of the slaves; and by the process reported by the clerk the same result is arrived at as if M. J. Young had paid directly to T. M. Young and Mary
(396) Young the amount due to them from her. The administrator, instead of paying to her $550 (to be added to $105 paid in cash to make the amount of her year's support), allowed her to offset that amount by the sum due from her to T. M. Young and Mary Young in the division of the slaves, and thus the administrator, instead of M. J. Young, became the debtor to them.

Strictly speaking, the item of $550 to make the division of the slaves equal, should not have gone into the administration account at all, but as the administrator received credit for it, in paying the year's support to the widow, he should be charged with it, but in the settlement of the estate, T. M. Young and Mary Young (or her estate) should receive the benefit of it; and this is the result of the account as reformed. This will appear from a simple calculation, as follows: By charging the administrator with $550 and interest thereon, the balance in his hands, as appears from the account, is $3,689.74; this, divided into three parts, will give to each $1,229.91; but in this division, M. J. Young received one-third of $1,391.91 (included in the account), to which she was not entitled; deducting this one-third of $1,391.13—$463.71—from $1,229.91, and we have $766.20, and by adding one-half of it to each of the other shares, it will make each $1,461.76, one-half which is the result as arrived at in the report.

Now, if you deduct the $1,391.13 (the whole of which is due to T. M. Young and the estate of Mary Young) from $3,689.74, it will leave $2,298.61, to be equally divided between M. J. Young, T. M. Young and the estate of Mary Young, giving to each $766.20—one-third—and then adding one-half of $1,391.13 to each of the shares of the last two (to the whole of which they were entitled), they have each $1,461.76—one-half—which is the same result as that arrived at in the report.

The second and third exceptions of the defendant are founded, in part, upon the same misapprehension as to the effect of the reformed account, just referred to, and, in part, as the effect of the opinion (95 N. C., at page 269), overruling the plaintiff's fifth exception. (397) In the settlement with J. M. Howard, administrator of Mary Young, the defendant will be credited by the sums advanced to the half brother, J. H. Stewart, as one of the distributees of Mary Young, and in the settlement of her estate, J. H. Stewart will be charged with the sums so advanced, and, as was said, "as her administrator is before the court, to be bound by what is done," the subdivision of her share of her father's estate may be had in this action, and the distributive portion of J. H. Stewart charged with the expenditures made in his behalf. In the distribution of the share of Mary Young, in the hands of J. M. Howard, her administrator, J. H. Stewart will be required to account for $445.09, the sum found to be so expended.

The distribution and settlement will be made in accordance with the report as reformed, and the opinion of the Court in passing upon the fifth exception, 95 N. C., at page 269.

J. L. ALLEN v. THE CAPE FEAR AND YADKIN VALLEY RAILROAD COMPANY AND ANOTHER.

Demurrer Ore Tenus—Damages—Libel—Privileged Communications—Carriers—Section 1963 of The Code.

1. A complaint set forth in substance: That defendant was a railroad corporation and common carrier; that plaintiff was a merchant and manufacturer, and a patron of defendant, receiving and shipping freight over its line in the conduct of his business; that defendant, through its superintendent, caused a notice to be sent to all its agents, instructing them to ship no freight to plaintiff, except upon prepayment of all rates and charges for transportation, and also requested a connecting railroad company to issue a like notice to its agents; that defendant railroad

company was accustomed to receive and transport freight for all shippers without prepayment of charges, and up to the issuing of the above notice, plaintiff had been treated as all other customers of the defendant in that respect; that the notice applied to him alone, and was a discrimination against him; that upon its attention being called to said notice, defendant refused to change or modify it, though plaintiff so requested; that defendant *enforced* said order against plaintiff; that the issuing and enforcement of said order by defendant was, as plaintiff was advised and believed, wrongful and unlawful; that plaintiff, by reason of the said order, "wrongfully and unlawfully issued," and "wrongfully and unlawfully carried out and *enforced* and published against" him, was greatly damaged and injured in his business and in credit as a merchant, to wit: in the sum of $10,000: *Held*, that the complaint failed to state facts sufficient to constitute a cause of action, in that: (1) It does not show that defendant, in fact, refused to receive or transport goods offered for shipment to plaintiff, or that any inconvenience, expense or delay was caused plaintiff, or that the order was acted on and *enforced to plaintiff's damage;* (2) If the order is claimed to be libellous, the complaint fails to charge that it was intended to injure plaintiff in his business; (3) it appears on the face of the complaint, that the order was a privileged communication, and it is not alleged to have been made maliciously.

2. A common carrier has a right to demand the prepayment of charges for transportation, before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Section 1963 of The Code recognizes this right.

(398) CIVIL ACTION, tried before *Clark, J.*, at May Term, 1887, of CUMBERLAND Superior Court.

Judgment for defendant dismissing the action, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The point was raised by motion to dismiss, in the nature of a demurrer *ore tenus*. Plaintiff appealed.

The facts appear in the opinion.

(399) *W. A. Guthrie, T. H. Sutton and N. M. Ray for plaintiff.*
G. M. Rose and D. Rose for defendants.

SMITH, C. J. The plaintiff sued out a summons against the defendant company, on 14 May, 1884, and, upon the return of service, set out his cause of action in the following complaint filed:

1. The above-named plaintiff, complaining, says, that the above named defendant, "The Cape Fear & Yadkin Valley Railway Company," is, and was at the time hereinafter mentioned and referred to, a corporation, duly created and existing under and by virtue of the laws of North Carolina, and, as such, was acting as a common carrier in the

transportation of passengers and freight to and from the town of Fayetteville, in said county of Cumberland, and exercising and enjoying all the rights, powers and privileges appertaining to railway corporations as common carriers and warehousemen.

2. That the defendant James S. Morrison was at the time hereinafter mentioned and referred to, in the employment of said corporation defendant as engineer and superintendent of said railway.

3. That the plaintiff, J. L. Allen, at the time hereinafter mentioned and referred to, was engaged in business in said town of Fayetteville as a merchant and dealer in furniture and other merchandise, and also as a manufacturer of furniture and sash, blinds, doors and other building material.

4. That as such merchant, dealer and manufacturer the plaintiff was a patron of said railway and was accustomed to use the same in the transportation of goods and materials to his said place of business and manufactory, and also in the shipping of furniture, goods, sash, blinds, etc., from his store and factory in said town of Fayetteville, using the said road as merchants, dealers and shippers of all kinds were and are accustomed to do. (400)

5. That on or about 6 May, 1884, the defendant James S. Morrison caused to be issued from his office an order as follows, viz.: "6 May, 1884. To Agents: From this date you are instructed to ship no lumber or merchandise of any description to Mr. J. L. Allen, of Fayetteville, N. C., except when all freight and charges are paid. J. S. Morrison, Engineer and Superintendent," and caused the same to be sent to all the agents on the line of said railway, and also requested Major Winder, who is the superintendent of the Raleigh & Augusta Air Line Railroad, to give the same instructions to agents on his road. The said R. & A. A. L. Railroad was at that time the only railroad that connected with the C. F. & Y. V. Railway and delivered freight to or received freight from the C. F. & Y. V. Railway.

6. That said C. F. & Y. V. Railway Company was accustomed to receive and transport goods, merchandise and freight of all kinds for all shippers without requiring prepayment of freight and charges, and up to said 6 May, 1884, the plaintiff had been treated as all other customers in that respect; but the aforesaid order was a discrimination against the plaintiff specially, and was not made to apply to the other customers or patrons of said corporation generally.

7. That the said corporation defendant, upon its attention being called specially to said order by the plaintiff, refused to change or modify it, and said corporation has enforced said order against the plaintiff.

8. That the issuing and enforcement of said order by said J. S. Morrison and by the C. F. & Y. V. Railway Company, as plaintiff is advised and believes, was wrongful and unlawful.

9. That by reason of the aforesaid order, wrongfully and unlawfully issued by said J. S. Morrison and wrongfully and unlawfully carried out and enforced and published against the plaintiff by said J. S. (401) Morrison, chief engineer and superintendent, and by said C. F. & Y. V. Railway Company, the plaintiff has been greatly damaged and injured in his aforesaid business and in his financial standing and credit as a merchant, dealer and manufacturer, viz.: in the sum of ten thousand dollars. Whereupon the plaintiff demands judgment, etc.

The defendants put in their answer, in which they admit the material facts set out in the complaint, and among them the issue of the order to the agents of the company to require payment of all goods consigned to the plaintiff, and this they justify on the ground of his repeated refusal and delay in paying freight bills when presented, and the inconvenience and embarrassment resulting therefrom, and his disregard of notice given of the intended action of the company.

On defendants' motion to dismiss the action, the following judgment was rendered:

This cause coming on to be heard upon the complaint and answer, and after argument, it is now, on motion of defendant's counsel, as upon a demurrer *ore tenus,* that the complaint does not state facts sufficient to constitute a cause of action, ordered and adjudged that this action be dismissed and that the defendant recover judgment against plaintiff for costs, to be taxed by the clerk.

From this ruling, and the judgment consequent on it, the plaintiff appealed.

On examining the complaint it will be seen that it does not show that the company or any of its agents ever in fact refused to receive or transport any goods offered for transportation to the plaintiff, or that any inconvenience, expense or delay has been incurred by reason of the issue of the order, or that it has been acted on and enforced to the plaintiff's detriment or damage. The gravamen of the complaint is that the order itself is personal and discriminates between him and other persons who may wish to use the road for transportation (402) purposes in requiring of him an advance payment when goods are sent, which is not required in the case of others; and the allegation is that this is not allowable, because the company is a public corporation and a common carrier. Still the fact remains, or at least the contrary is not averred, that the order is still without practical results of which the plaintiff can complain and until it is put in force it is no more than a declaration of intention and not a cause of action.

In the argument before us it is insisted, and such seems to have been the object in view in framing the complaint, that the order is a libellous publication, hurtful to the plaintiff's credit as a business man, who has frequent occasion to use the road, and implies, at least, a charge of impaired credit, if not an approaching insolvency. If this be a reasonable inference from the terms of the order, it should have been charged, in direct terms, that such was its meaning, so that, upon the face of the complaint, it could be determined whether a cause of action is set out, or it would be exposed to a demurrer. But assuming this obstacle to be out of the way, the alleged libellous matter consists merely in a direction given by the company to its subordinates, for the regulation of their conduct, and a request given to the superintendent of a connecting road which interchanges freight with the defendant company, and seems to be clearly, unless malicious (and malice is not imputed), a privileged communication, proper in itself, and essential to the harmonious working on the road.

In *Wakefield v. Smithwick,* 4 Jones, 327, *Pearson, J.,* thus lays down the law upon this subject: "The defense, under the doctrine of privileged communication, is much broader, and much more favorable to the defendant" (referring to a plea of justification), "for if he succeeds in proving such a relation between himself and the person to whom the communication is made, as authorizes him to make it, the burden is upon the plaintiff to prove that it was not made *bona fide,* in consequence of such relation, but out of malice, and that the (403) existence of such relation was used as a mere cover for his malignant designs. When, however, the plaintiff shows that the matter communicated was false, the question of *bona fides* becomes an open one, and the defendant is called on for some explanation to meet the inference arising from the fact that he had communicated false information."

The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them sent the auctioneer a notice not to pay over the proceeds of the sale to the plaintiff, saying, "he having committed an act of bankruptcy," this was held to be a privileged communication, as being made in the honest defense of defendant's own interest. Odgers on Libel, 226, citing *Blackham v. Pugh,* 2 C. B., 611, and 15 L. J. C. P., 290.

Again, it may be asked wherein consists the alleged libellous matter? The order assuming it to have been issued in the interest of the company, real or supposed, to withdraw from the plaintiff a privilege which hitherto he had enjoyed in common with other patrons of the road, is

but the exercise of the right to demand of every one, that upon all freight conveyed the charges must be paid in advance, and we do not perceive any legal wrong done to one to whom credit may not be given because it is given to others; it may be because of their punctuality in paying bills whenever they are presented. The statute recognizes the right, for it compels the company to furnish transportation, not generally, but *"on due payment of the freight or fare* legally authorized therefor." The Code, sec. 1963. And, therefore, the exaction of payment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if, in fact, it be not enforced, against all dealers.

(404) The complaint is fatally defective in failing to set out facts necessary to constitute a cause of action against the defendant, and departs most widely from any of the approved forms in use in civil suits for libellous publications.

We concur, then, in opinion with the court and affirm the judgment dismissing the action.

No error. Affirmed.

Cited: Randall v. R. R., 108 N. C., 613; *Berry v. R. R.,* 122 N. C., 1004.

ARTEMUS McNAIR AND OTHERS v. J. T. POPE AND OTHERS.

Parol Trust, Quantum of Proof to Establish.

1. Where land is purchased at an execution sale, or a sale under a deed of trust, under an oral agreement with the debtor whose land is sold, that he shall be allowed to redeem, a valid trust is created which will be enforced. But to engraft such a trust upon the legal title the proof must be strong and convincing.

2. Under our former practice, an equity could not be set up in opposition to a positive denial, unless supported by more than one witness. While this rule no longer holds, it affords an analogy as to the *quantum* of proof, necessary to establish the existence of a denied equity.

3. Where the only evidence offered to support an alleged trust is, that the land in question was purchased by the alleged trustee at a price somewhat below its value, and the alleged trustee positively denies the existence of such trust in his sworn answer: *Held,* that such evidence was wholly insufficient to establish the trust, and, defendant having demurred to such evidence, the court properly instructed the jury to respond in the negative to an issue as to the existence of the trust.

CIVIL ACTION, tried before *Clark, J.*, and a jury, at January Term, 1887, of ROBESON Superior Court.

Duncan McNair being indebted to John McCallum in a considerable sum, for which he had given his notes to assure and provide for the payment thereof, on 20 January, 1869, conveyed by deed of mortgage to the latter three several tracts of land, containing (405) in the aggregate more than eleven hundred acres, and conferring a right to sell in case the debts were not paid on or before the first day of January, 1874. Early in the year 1871, the said McCallum died, having made a will, wherein he appoints Alexander McRae and John McRae executors, who, after proving the will, accepted the trusts and took the prescribed oaths as such.

The will vests no power in the executors to dispose of the real estate of their testator, notwithstanding which they assumed to exercise the authority conferred in the mortgage, and undertook to sell the lands therein mentioned. The sale was accordingly made on 9 March, 1875, at which the defendants became the purchasers at the price of $3,092.18, the amount due on the secured debts, and a deed was executed to them by the executors. On 18 April, 1876, Duncan McNair himself executed a deed to the defendants, conveying all his estate and interest in the lands, for the same alleged consideration as that mentioned in the deed of the executors, increased by the amount some over six hundred dollars, due from two of the sons of Duncan McNair to the defendants, and assumed by him. The previous sales by the executors are therein mentioned and recognized, and the sum paid them recited, as, with the additional amount specified, the consideration of his confirming the deed. Duncan McNair thereafter died intestate, and the plaintiffs, who are his children and heirs at law, on 19 March, 1885, instituted this action to charge the lands so held by the defendants, with a trust for redemption, growing out of an understanding and agreement made between the parties at the time, by which it is alleged, that upon the repayment to the defendants of the moneys so due by their ancestor, the lands should be reconveyed to him. The complaint, after stating the making the several deeds mentioned, alleges that the lands were so bought by the defendants and the title secured to them, under an express agreement, that they might be redeemed on the pay- (406) ment of the moneys due, and as set out in the deed of 18 April, 1876, and that all the debts assumed by their father and due from two of them, as well as a large part of the debt due to the testator and discharged by the payment made to the executors by the defendants, have been paid to the defendants during the lifetime of the said Duncan McNair.

The complaint further alleges, that the lands were of great value at the time—worth $12,000; that their ancestor remained afterwards, as before, in the possession and use of the land up to his death, as have the plaintiffs since.

The relief demanded is the enforcement of the parol trust, and the taking of the necessary accounts preliminary thereto.

The defendants deny explicitly that any agreement was made between them and the said Duncan, by which he was to be allowed to redeem, and aver that he was present at the sale by the executors, and neither then nor afterwards expressed any dissatisfaction with what was done, or asserted any claim to redeem the premises. They further answer, in reference to the continued use and occupation of the premises, that it was under a contract of lease, for which rent was paid to them; and they deny that any advantage was taken or fraud practiced by themselves on the deceased, in securing his deed of release and confirmation of the executors' sale.

Two issues were submitted to the jury, as follows:

1. Did the defendants buy under an agreement with Duncan McNair, that they would hold the land only for the purpose of securing the purchase money?

2. Was the deed of 18 April, 1876, fraudulent and void?

The issues, under the charge of the court, were responded to in the negative.

Upon the trial, and to show the great inadequacy of price purporting to have been paid for the lands in the deed from McNair to the defendants in 1876, the plaintiffs introduced, as a witness, one (407) D. Sinclair, a physician of thirty years practice, who knew the lands and estimated their value in 1876 at eight or ten dollars an acre. He said that he knew of the sale by the executors in 1875, which had been advertised at two or more places in the neighborhood, and that it was generally thought to be a fair sale; lands were then low, and he did not know why more was not bid.

The residue of the testimony offered by the plaintiffs (the defendants introducing none), was as follows:

W. H. Graham introduced by plaintiffs: Knew the land; had known it for more than twenty years; lived for that length of time in a mile of the land. In his opinion the land was not worth more than $5,000; don't think in 1876 that the land would have brought more than five dollars per acre; might not have brought that; four or five dollars per acre was, in his opinion, all it was worth in 1876; wouldn't say that it would have brought five dollars at a fair sale in 1876; might have brought less.

J. B. Rowland, introduced for plaintiff, testified: In his opinion the land would not have brought more than seven dollars in 1876; certain it would not have brought more than seven; it might have been put up at fair sale in 1876, and brought a great deal less than seven; all he meant to say was, that it would not have brought *more* than seven.

The defendants demurred to the evidence, as insufficient to warrant any findings in favor of the plaintiffs upon the issues; and the court being of opinion that there was none, so instructed the jury, and they answered the inquiries put to them in the negative.

To this ruling the plaintiffs excepted, and from the judgment rendered on the verdict appealed.

T. A. McNeil for plaintiffs. (408)
D. H. McLean and W. F. French for defendants.

SMITH, C. J., after stating the facts: In *Mulholland v. York,* 82 N. C., 510, it is held, that where one purchases land at an execution sale, under a verbal agreement with the debtor whose land is sold, that he shall be allowed to redeem on payment of the purchase money, a valid trust is created between the parties which will be enforced, and the authorities are, in the opinion, freely examined and discussed, and the reasons in support of the principle stated. The same rule is held applicable to a sale under a deed in trust of the debtor's land, in *Tankard v. Tankard,* 84 N. C., 286, and is affirmed generally in *McLeod v. Bullard, ibid.,* 515; *Cheek v. Watson,* 85 N. C., 195; *Gidney v. Moore,* 86 N. C., 484, and other cases.

But to engraft such a trust upon the legal estate, the proof of its formation should be strong and convincing; and such is not the case now presented. It is expressly controverted in the answer, coming from the very persons who were parties to the alleged agreement, and must be cognizant of all the facts that transpired at the sale. Under our former practice an equity could not be set up in opposition to a positive denial, unless supported by more than the testimony of a single witness, and the Court, in such case, would refuse to interfere. *Gaither v. Caldwell,* 1 D. & B. Eq., 504 *Speight v. Speight,* 2 D. & B. Eq., 280; *Hill v. Williams,* 6 Jones Eq., 242; *Longmire v. Herndon,* 72 N. C., 629. While the rule does not now prevail, it affords an analogy in the quality of the proof, and its sufficiency to set up and establish a denied equity, when the controversy is about its existence. There is, indeed, no evidence of it furnished in the pleadings, and as little in the testimony of the witnesses. The most that is proved is, that the lands were bought at a price somewhat below their real value, and this fact is

wholly insufficient to show any agreement upon which the trust can be raised, and the court properly instructed the jury, in deference to which, the verdict was rendered. The *quantum* of evidence (409) required to set up the equity was wholly inadequate, under the rule in which relief was granted in the superceded courts of equity, whose principles however remain, and there is no error in the ruling. The judgment is affirmed. *Ely v. Early,* 94 N. C., 1.

No error. Affirmed.

Cited: Hinton v. Pritchard, 107 N. C., 137; *Hamilton v. Buchanan,* 112 N. C., 471; *Faison v. Hardy,* 114 N. C., 60; *Wilson v. Brown,* 134 N. C., 405; *Avery v. Stewart,* 136 N. C., 431; *Taylor v. Wahab,* 154 N. C., 223; *Lefkowitz v. Silver,* 182 N. C., 349; *Gillespie v. Gillespie,* 187 N. C., 41.

(410)

STATE v. JAMES GUEST.

Fornication and Adultery—Evidence—Arrest of Judgment—Description of Defendant in Indictment.

1. Where a man and woman were indicted for fornication and adultery, and the female defendant pleaded guilty, and the male defendant was tried on the plea of not guilty, the husband of the woman was competent as a witness for the State.
2. It is competent to offer testimony as to acts committed by a defendant in an indictment for fornication and adultery more than two years before the bill was found, for the purpose of enabling the jury to determine whether he had committed the offense within two years; and for the purpose of enabling them to find whether he had committed the offense in the county where the bill is found, they may hear evidence of his acts elsewhere.
3. It is no ground for arrest of judgment that a married woman who was indicted with a man for fornication and adultery is described in the bill as "spinster."

THE defendant and one A. E. Wilson were indicted in the Superior Court of Transylvania County for fornication and adultery. The female defendant pleaded guilty, and the defendant Guest was tried upon a plea of not guilty, before *MacRae, J.,* at Spring Term, 1888, of said court.

One W. P. Wilson, the husband of the female defendant, was offered as a witness on behalf of the State, and objected to on the ground that he

was incompetent. The court held that the wife having already pleaded guilty, and not being on trial, he was competent. The defendant excepted.

"Witness testified that the defendant Guest commenced coming to witness' house four or five years ago." Defendant objected, and the court instructed the jury that they could only consider testimony as to the acts committed previous to two years before the bill was found, for the purpose of enabling them to determine whether the defendant had committed the offense charged within two years. Defendant excepted.

Witness testified that the defendant continued to visit his house; that they had been friends, but the suspicions of the wit- (411) ness were aroused by the frequency of the defendant's visits, and he forbade defendant coming to his house; that he continued to come; he would stay away awhile, and then come back again; he stayed all day at witness' house after being forbidden; witness sent him a written notice to stay away, and soon afterwards, during last fall, the two defendants went off together, and were gone for two months, when they were arrested and brought back.

John Lewis, a witness for the State, testified to carrying defendants in a wagon together to Hendersonville, and to their sleeping together at that place; that he was paid by defendant Guest for carrying them.

One Lowe testified that he went to Atlanta last fall with a State's warrant, and had both defendants, whom he found living together as man and wife, arrested and brought back to this county. Defendant objected to the testimony of witness as to acts of adultery in Atlanta; and this testimony was admitted, for the purpose of enabling the jury to determine whether the defendant had been guilty of the offense charged against him in Transylvania County. Defendant excepted.

After other testimony, the court instructed the jury that, as to acts testified to as having taken place outside the county, or at a period of time more than two years prior to the finding of the bill, they could only consider such testimony for the purpose of enabling them to determine, whether the defendant was in the habit of having sexual intercourse, with the other defendant, in this county within two years.

There was a verdict of guilty.

The defendant moved in arrest of judgment, on the ground that the *feme* defendant is described in the indictmet as a "spinster," whereas it appears, by the proof, that she is a married woman.

Motion denied, and the defendant excepted. (412)

Judgment, and appeal by defendant.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: The first exception is, to the competency of the husband of the codefendant, to testify against, not his wife—for upon her plea of guilty, there was an end of the trial as to her—but against the defendant Guest, who alone is upon trial. It is settled, that persons indicted for fornication and adultery, may be tried separately, and though, from the very nature of the offense, one cannot be convicted after the acquittal of the other, nor, when tried together, can one be convicted and the other acquitted, yet when tried alone one may be convicted and punished, and even when tried together and convicted, and one of them appeals, judgment may be had against the other. *S. v. Lyerly,* 7 Jones, 158; *S. v. Parham,* 5 Jones, 416, and cases cited.

In the case of *S. v. Phipps,* 76 N. C., 203, a *nol. pros.* was entered as to the female defendant, and she was allowed to testify, and prove the offense charged against the other defendant. We think the husband was a competent witness, and his evidence could not militate against his wife. He was not testifying against her.

The exceptions to the evidence of acts anterior to the period when the statute would bar, and acts beyond the limits of the county of Transylvania, though within two years, may be considered together.

"When the fact of adultery is alleged to have been committed within a limited period of time, it is not necessary that the evidence should be confined to that period, but proof of facts anterior to the time
(413) alleged may be adduced in explanation of other acts of the like nature within the period. Thus, when the statute of limitations was pleaded, the plaintiff was permitted to begin with proof of acts of adultery committed more than six years preceding, as explanatory of acts of indecent familiarity within the time alleged." 2 Greenleaf's Ev., sec. 47. In our own reports, *S. v. Kemp,* 87 N. C., 538, and *S. v. Pippin,* 88 N. C., 646, are conclusive as to the admissibility of antecedent acts, as shedding light upon acts within the time limited; and acts committed without the limits of the county are admissible for the same purpose. As evidence, they can only be considered by the jury in determining the character of the acts committed within two years, and within the county of Transylvania, of which there must have been some evidence. They must convict or acquit, as the facts alleged are or are not proved beyond a reasonable doubt to have been committed within two years, and within the county, and the evidence was admissible in this point of view and no other, and, under the instructions of the court, it was properly submitted to the jury.

The motion in arrest of judgment was properly refused. The indictment clearly charges the offense, and that the defendants were not united in marriage. The use of the word "spinster," after the name of the

woman, could not mislead. To arrest the judgment would be an exceeding "refinement," and under section 1183 of The Code, an absolute mockery. *S. v. Tally,* 74 N. C., 322; *S. v. Lashley,* 84 N. C., 754; *S. v. Newmans,* 2 Law Rep., 74.

There is no error.

Judgment affirmed.

Cited: S. v. Wheeler, 104 N. C., 894; *S. v. Guest,* 107 N. C., 887; *S. v. Stubbs,* 108 N. C., 776; *S. v. Dukes,* 119 N. C., 783; *S. v. Raby,* 121 N. C., 683; *S. v. Beard,* 124 N. C., 814; *Kenney v. Guest,* 149 N. C., 326; *S. v. Wynne,* 151 N. C., 645; *Powell v. Strickland,* 163 N. C., 397; *S. v. Wade,* 169 N. C., 308.

(414)

STATE v. SAMUEL B. PEARSON.

Farming out Prisoners—Prison Bounds.

1. The Superior Court has not power, at a term subsequent to that at which one convicted for an affray was sentenced to imprisonment in the county jail for twelve months and be discharged upon payment of costs, to grant an order for him to be hired out by the county commissioners. Only the judge before whom he was tried had the power to authorize his being farmed out, under the statute.

2. The provisions of the statute in reference to "prison bounds" for persons *committed* for misdemeanors and crimes, other than treason and felony, does no apply to one *in execution* as a punishment for a criminal offense.

MOTION in behalf of the defendant who had been sentenced to jail at Fall Term, 1887, of the Superior Court of BURKE, heard before *Merrimon, J.,* at Spring Term, 1888, of said Court.

At the Fall Term of 1887, of the Superior Court of said county, the appellant was convicted of an affray and sentenced "to be imprisoned in the common jail of Burke County, for twelve months, and be discharged upon payment of costs"; and he was in execution.

At the Spring Term, 1888, of the same court, he made application to the court to be allowed the benefit of "prison bounds," or to be hired at labor, etc., and moved as follows:

"Wherefore affiant prays the honorable court to grant him prison bounds for his health's sake, being that his offense is not felony, and failing that, that the court grant an order for his being hired out by the county commissioners, upon time to be prescribed by the court."

The court denied the motion, as follows:

"Upon hearing which motion, and argument of counsel, and the consent of the solicitor being shown to the court, that either relief might be granted, as in the judgment of the court might seem best, and (415) with a full statement of all the circumstances in the case, the court is of the opinion, that sufficient merit has been shown to entitle the prisoner to one or the other relief prayed for in the motions above set forth, but adjudges, that both motions be refused for the want of power of the court to grant the relief. And from this judgment declaring a want of power in the court to grant either motion," the prisoner appealed to this Court.

Attorney-General for the State.
J. C. L. Harris for defendant.

MERRIMON, J., after stating the facts: It is clear that the court, to whom the application was made, had no authority to make an order authorizing the county commissioners "to farm out" the appellant as allowed by the statute (The Code, sec. 3448), because the *proviso* of the section cited, expressly provides that "it shall not be lawful to farm out any such convicted person, who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court, *before whom the trial is had,* shall in its judgment so authorize." It seems that such permission is intended to be annexed to, and become part of the judgment, and to be allowed only in the discretion of the court, and the judgment could not be disturbed at a subsequent term of the court. The purpose of the statute is to give the particular court—judge—before whom the party convicted was tried, and who had the better opportunity to hear the facts of the aggravation or mitigation of the offense, authority to grant *permission* "to farm out" the convicted person. There is no statutory provision that confers upon the court authority to *direct* such convicted person to be farmed out. *S. v. Norwood,* 93 N. C., 578; *S. v. Johnson,* 94 N. C., 863.

(416) We also concur in the opinion of the court below, that it had not authority to grant to the appellant the benefit of "prison bounds," as allowed in certain cases by the statute. (The Code, sec. 3466.) That section provides, that "For the preservation of the health of such persons as shall be *committed* to jail, the board of commissioners of each county shall mark out such a parcel of the land as they shall think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner, not *committed* for *treason* or *felony,* giving

bond, with good security, to the sheriff of the county, to keep within the rules, shall have liberty to walk thereon out of the prison, for the preservation of his health, and, on keeping continually within the said rules, shall be deemed to be, in law, a true prisoner; and that every person may know the true bounds of said rules, they shall be recorded in the county records, and the marks thereof shall be renewed, as occasion may require."

The county commissioners are thus empowered "to mark out such a parcel of the land as they shall see fit, not exceeding six acres, etc.—that is, the land so marked out must adjoin the jail, be such as the commissioners have exclusive control of, and adapted, not only to the purpose of the exercise of the prisoner, but as well to prevent, as far as practicable, his escape—it must be certainly, definitely, and distinctly marked out, so that the prisoner may see and know the rules and keep within the same, and others may see that he does so. The boundaries, thus established, are for all legal and practical purposes, merely a further extension or enlargement of the prison walls, in order that the prisoner's health may be preserved and subserved; his confinement, thus enlarged, he is not deemed to be out of prison—out of jail—but he remains therein in contemplation of law, and his imprisonment is only rendered the more tolerable, while he remains within the rules. He is, "in law, a true prisoner," as the statute expressly declares.

But this statutory provision does not apply in favor of persons (417) who have been convicted of criminal offenses, and sentenced to imprisonment by the judgment of the court. It applies to prisoners who, in civil cases, are committed to jail on *mesne* process, or on final judgment, and in criminal cases, when the prisoner is committed to jail for lack of bail, in order to secure his presence before the appropriate court, to answer the criminal charge preferred against him.

The present statute, as recited above, has undergone no essential change in the scope of its provisions since its first enactment in April, 1741, although it has been repeatedly reënacted. (Rev. Stats., ch. 90, sec. 11; The Code, sec. 3466.) The title of the statute, as originally enacted (Ired. Rev., ch. 18, sec. 3, p. 83), indicates its purpose, and the extent of its application, as follows: "An act for the building and maintaining of courthouses, prisons and stocks in every county within this province, and appointing *rules for each county prison for debtors.*" The main purpose was to extend the clause in respect to "prison bounds" to debtors, who, as the law then, and for more than a hundred years thereafter, prevailed, might, in certain cases, be imprisoned for debt; but its terms embraced persons *committed* to answer for criminal offenses other than "treason or felony." The statute has been thus uniformly applied

and interpreted in the past, so far as appears from the decisions of this Court. *Wynn v. Buckett,* Tay., 140 (87); *Brown v. Frazier,* 1 Murph., 421; *Ex parte Bradley,* 4 Ired., 543; *Northam v. Terry,* 8 Ired., 175; *Whitley v. Gaylord,* 3 Jones, 286. And so far as we know or can learn, no prisoner in this State was ever allowed the benefit of "prison bounds" while he was in execution for a criminal offense. If the right to such enlargement had belonged to such prisoners, it certainly would have been claimed and allowed in very many cases before the present time.

The statute does not in terms apply to persons convicted of criminal offenses. The words used, descriptive of classes, are "such persons as shall be *committed* to jail," and "every prisoner not *committed*
(418) for treason, or felony," etc. The word *committed* has a technical sense in criminal procedure. It implies sent to jail or other proper prison, to be there detained and held to answer for a criminal offense preferred, or to be preferred against the party in the course of procedure, until he shall be discharged according to law. 4 Bl. Com., 296-309; Chit. Cr. Law, 107, 108; Bouvier's Law Dic., words, "To commit, Commitment"; Bur. Law Dic., word "Commitment." A person is *committed* to jail by a proper tribunal to answer for a criminal offense; upon conviction, he is sentenced by the judgment of the court to be imprisoned in jail as a punishment, and when put in jail, he is then in execution of the judgment. The word *"committed,"* is used in the statute in its technical sense, certainly, in its application to prisoners charged with criminal offenses.

Moreover, it is altogether improbable that the Legislature would, by such provision, interfere to mitigate or qualify the punishment imposed by the courts upon criminal offenders; and if it had intended to allow such enlargement to persons in execution for criminal offenses, it would most probably, have conferred express authority upon the courts to allow or disallow it in their sound discretion. As this is not done, strained inference and unreasonable implication cannot be allowed to confer such authority upon the courts or the sheriff.

The court, therefore, properly held that it had not authority to grant the motions of the appellant. There is no error, and the judgment must be affirmed. Let this opinion be certified to the Superior Court according to law.

It is so ordered.

No error. Affirmed.

Cited: S. v. Young, 138 N. C., 573.

STATE v. CALVIN J. GREEN.

Variance; what is, and how determined—Justices' Courts not Courts of Record—Evidence; oral of proceedings before Magistrate—Fructus Industriales; parol exception of—Perjury; form of indictment for.

1. What is a variance is a question of law, and, the facts being admitted or proven, must be determined by the court. But if the determination of the question depends upon an issue of fact, it must be passed upon by the jury, with instructions from the court as to the law.
2. Where defendant is charged with perjury, in falsely swearing in an action entitled A. *v.* B., tried before a magistrate, and it is shown by the summons that the action was against B. and C.: *Held*, that upon oral proof that C. was *nol. prossed* and released before the case was tried, it was proper to instruct the jury that there was no variance.
3. The court of a justice of the peace is not a court of record, and the rules of evidence established for the proof and authentication of the proceedings of courts of record do not apply to such courts.
4. Growing crops, being *fructus industriales*, are presumed to pass with the title to land on which they are growing, but they may be excepted or reserved by parol when the land is sold, and oral evidence is admissible to prove such exception or reservation.
5. An indictment for perjury charged, "the said B. justice of the peace, as aforesaid, having then and there competent authority and power to administer the said oath to the said C. G.," and it was admitted that the justice had jurisdiction of the action in the trial of which the alleged perjury was committed: *Held*, that a motion in arrest of judgment for that the indictment failed to allege that the oath was taken before a court of competent jurisdiction was properly overruled.

THIS was an indictment for perjury, tried before *Shepherd, J.*, at the October Term, 1887, of the Superior Court of DURHAM.

The perjury alleged to have been committed was upon the trial (420) of an issue joined in a civil action, tried before G. A. Barbee, a justice of the peace for the county of Durham, in which the defendant was plaintiff and A. M. Rigsbee was defendant.

The following is the case on appeal sent to this Court:

"The only record evidence introduced as to the action before the justice of the peace was the summons, from which it appeared that the defendant brought a suit against A. M. Rigsbee and John H. Shipp.

The suit was for the recovery of the value of a crop of oats and other crops, of the value of fifty dollars, raised in 1887, on land owned by the defendant Green. This land had been conveyed in trust to J. A. Long,

to secure a certain indebtedness, and was duly sold under said trust by said Long, on 14 May, 1887, C. A. W. Barham acting as agent and auctioneer of said Long, A. M. Rigsbee being the purchaser.

The justice of the peace testified that when the case was called the plaintiff released Shipp, and that the case was *nol. prossed* or dismissed as to him.

The witness did not remember whether he made such an order before or after the trial.

A. M. Rigsbee testified that such an order was made by the justice before the trial was entered upon between defendant and himself. The defendant testified that the trial was between himself and Rigsbee. There was no evidence that such an order was entered in writing before the trial commenced.

It was in evidence that defendant testified that, at said sale, Long, trustee, and Barham, auctioneer, announced as a part of the terms of the same, that the crops (including the oats) of 1887, thus growing on said lands, were reserved and should not pass to the purchaser with said land, but that they were reserved to the defendant, C. J. Green, and should remain his property.

(421) There was also evidence tending to show that said testimony was wilfully and corruptly false.

There was no objection to the admission of the parol evidence as to what occurred on the trial before the justice.

The defendant asked the court to charge that there was a variance, because the summons showed that the suit was against two defendants, to wit, Rigsbee and Shipp.

The court charged the jury that if, before the trial commenced, the justice made an order, by plaintiff's consent, *nol. prossing* the defendant Shipp and discharging him from all liability, then there would be no variance; but if no such order was made before the trial, there would be a variance, and the defendant should be acquitted. The court also charged that it was not necessary that the justice should have at once reduced the order to writing; that if he announced it as his order, it would be sufficient for the purposes of this trial. The defendant excepted.

The defendant also asked the court to charge that, as the trustee, Long, executed a deed without reservation to the said Rigsbee, it could not be shown by parol that the crops were excepted, and that such exception would be of no avail; that the alleged facts testified to by the defendant were, therefore, immaterial and the defendant should be acquitted.

The court declined to so instruct the jury, and the defendant excepted.

There was a verdict against the defendant, who moved for a new trial on the exceptions taken. The motion was overruled, and the defendant moved in arrest of judgment, for that the indictment did not allege that the oath was taken before a court of competent jurisdiction.

Motion overruled. Defendant excepted." Judgment and appeal.

Attorney-General for the State.
J. Manning and E. C. Smith for defendant.

DAVIS, J., after stating the facts: 1. The first ground of exception (422) was to the refusal of the court to charge that there was a variance between the indictment and the proof.

What amounts to a variance is a question of law, and the facts being admitted or proven, must be determined by the court. The cases of *S. v. Raiford,* 2 Dev., 214, and *S. v. Isham,* 3 Hawks, 185, cited by counsel for the defendant, were issues joined on pleas of *nul tiel record,* and were properly tried by the court, and not by the jury; but if the determination of the question depends upon an issue of fact, it must be passed upon by the jury, with instructions from the court as to the law, as was done by the court in this case and this is not in conflict with *S. v. Harvell,* 4 Jones, 55. There was, in fact, no variance, as upon the finding of the jury, under instructions from the court, the action before the magistrate in which the perjury is alleged to have been committed was dismissed as to Shipp, and the cause was at issue only between Rigsbee and the defendant. *S. v. Collins,* 85 N. C., 511.

But as the summons was issued against two, it was insisted that parol evidence was not competent to show that the action was dismissed as to one. This is a misapprehension. The court of a justice of the peace is not a court of record, and the rules of evidence established for the proof and authentication of the proceedings of courts of record do not apply to such courts. *Reeves v. Davis,* 80 N. C., 209.

2. The second exception is, that the alleged fact testified to was immaterial, because it could be of no avail, as the deed passed the crop with the land, and the parol reservation was of no effect. This, also, is a misapprehension. Growing crops may be excepted or reserved by parol in the sale of land, and when so reserved do not pass by the deed conveying the land. "The reason is," as was said by *Bynum, J.,* in *Bond v. Coke,* 71 N. C., 97, illustrating the distinction between those chattels, which become merged in the land, and those which, though annexed to the land, do not pass with it, "that they are *fructus* (423) *industriales,* and, for most purposes, are regarded as personal

chattels, even before they are severed from the soil." *Brittain v. McKay,* 1 Ired., 265, and *Lewis v. McNatt,* 65 N. C., 63.

Crops growing on land are presumed to pass with the title, but this presumption may be rebutted. *Walton v. Jordan,* 65 N. C., 170.

3. The motion in arrest of judgment was properly overruled. It is not denied that the justice of the peace had jurisdiction of the action, in the trial of which the alleged perjury was committed, and it is charged in the usual form, that the oath was duly administered, "the said G. A. Barbee, justice of the peace, as aforesaid, having then and there competent authority and power to administer the said oath to the said C. J. Green." *S. v. Davis,* 69 N. C., 495.

There is no error.

No error. Affirmed.

Cited: Bailey v. Hester, 101 N. C., 540; *S. v. Griffis,* 117 N. C., 715.

STATE v. F. L. DULA, JESSE DULA AND JOHN DULA.

Justices of the Peace; jurisdiction and practice in criminal cases—Resisting an Officer—Special Deputation of Officers under section 645 of The Code—Warrant; when must be shown—Evidence of Notice.

1. The judgment of a justice of the peace that a defendant charged with an offense of which a magistrate has final jurisdiction is guilty, and imposing a fine, is not void because of irregularity in the warrant, when defendant failed to appeal.

2. Where defendants, adjudged guilty and to pay a fine and costs, promised to pay the same within ten days, and upon such promise were permitted to go at liberty, it was within the power of the magistrate to order their arrest upon their failure to make such payment at the time agreed on.

3. In such a case the fact that the defendants had been arrested on the original warrant by the same specially deputized officer, who had in hand the second order of arrest, was some evidence that they had notice of the capacity in which he was acting when he attempted to arrest them under the second order.

4. A known officer need not show a warrant when he makes an arrest. An officer appointed for a special purpose must show a warrant, if it is *demanded* of him, but not otherwise.

5. Although justices of the peace are the sole judges of the "extraordinary cases" provided for in section 645 of The Code, yet it is well that they should set out in the special deputation that it is done for the want of a regularly constituted officer.

STATE *v.* DULA.

THIS was an indictment for an assault with deadly weapons, (424) and resisting an officer, tried before *Clark, J.*, at March Term, 1888, of WILKES Superior Court. Verdict of guilty. Defendants appealed.

It was in evidence that H. Kendall was a justice of the peace for the county of Wilkes, and, as such, on 10 March, 1886, upon the affidavit of one W. L. Dula, issued a warrant against the defendant, F. L. Dula, for trespass upon the lands of said W. L. Dula. The warrant does not state that the trespass was "after being forbidden" or "without license therefor." Written on the warrant was the following: "I depute G. B. Walsh to execute this process, this 10 March, 1886. (Signed) H. Kendall, J. P. Executed and returned by G. B. Walsh, deputy, 13 March, 1886.

Fine	$1.00
Justice's cost	1.50
Officer's cost	3.40
Witnesses' cost	3.00
	$8.90

On 7 April, 1886, the following was issued: (425)

"STATE OF NORTH CAROLINA—WILKES COUNTY.
JUSTICE'S COURT.

STATE AND W. L. DULA *v.* F. L. DULA.

WHEREAS, judgment was rendered against F. L. Dula, in the above entitled cause, on 19 March, 1886, for the sum of $1 fine, $7.90 costs, and the said Dula was given 10 days to discharge said fine and cost, and the said F. L. Dula and Mrs. Dula signed a written agreement to the aforesaid effect, and then failed to comply with said agreement, the time being out and expired. These are, therefore, to command any lawful officer to arrest or apprehend the said F. L. Dula, and bring him before the undersigned justice of the peace, that he may be dealt with as the law directs."

Signed and sealed by H. KENDALL, J. P.

The following is endorsed thereon:

"Depute G. B. Walsh to serve this process on 7 April, 1886.
H. KENDALL, J. P."

The judgment in the magistrate's court, signed by H. Kendall, is as follows: "Upon the oath of W. L. Dula, setting forth that F. L. Dula cut his timber and defaced his line a warrant is issued against the said F. L. Dula, and was delivered to G. B. Walsh, a deputy officer of said county, to be executed on 10 March, 1886. Warrant returnable this 13 March, 1886. Executed. Whereupon, the defendant was produced in court, and the following proceedings had: Case postponed till 19th instant. Parties appeared and trial coming on, the testimony (426) being considered, it is adudged that he pay a fine of $1, and all costs of the action, amounting to $7.90."

There was evidence tending to show that the proceeding before the magistrate against F. L. Dula was for entering upon land after being forbidden; that the magistrate "deputed" Walsh to execute the warrant; that the second process (after the judgment of the court imposing the fine and adjudging costs against F. L. Dula) was issued, and placed by the magistrate in the hands of Walsh, with the deputation endorsed; that Walsh took the process, and, in company with three others, went to the "farm of the defendants where they were at work, and attempted to arrest Lafayette Dula"; told him they had come to arrest him and take him before the magistrate to pay the bill of costs, etc. Dula said, "where is your officer?" Walsh said, "I am the officer"; (he, Walsh), walked up near to the defendant Lafayette Dula, who drew back his axe "in a threatening attitude, and said, he would kill him if he tried to arrest him." He was within striking distance. The defendants, Jesse and John Dula—the former ran in between them—threatening to use a knife, and the latter a pole, which he had in his hand drawn back. Walsh did not show the process under which he was attempting to make the arrest, or tell the defendants that he had such process.

"Counsel for defendants asked the court to charge the jury, that the proceedings before a justice of the peace were void and did not authorize the issuing of the process which Walsh had at the time of the alleged assault, and that the process itself was void. His Honor declined to so charge the jury, but told them, as the defendants did not appeal from the judgment therein rendered, the process authorized the arrest of the defendants." Defendants excepted.

The court was then asked to charge the jury, "that it was the duty of the deputed officer, Walsh, to either have shown the said process, or have told the defendants that he had such process in his possession." (427) His Honor declined to so instruct the jury, but told them that "if the defendant knew that the said Walsh had such process and resisted the process in the manner described by the witnesses, they would return a verdict of guilty against all the defendants, who assisted in resisting the arrest." Defendants excepted.

Attorney-General for the State.
No counsel for defendants.

DAVIS, J., after stating the facts: The original warrant, issued by the justice of the peace, does not state that the trespass on the prosecutor's land was after being forbidden or without license, and was very irregular, but no exception was taken on this account, and if it had been, the magistrate could have amended it, and, as he had jurisdiction of the subject-matter tried before him, his judgment was not void. In *S. v. Curtis,* 1 Haywood, 471 (Battle's Edition, 543), it is said: "If a justice of the peace issue a warrant for a matter within his jurisdiction, although he may have acted erroneously in the previous stages, the officer should execute it. . . . If the officer be a known officer of the district in which he is acting, he need not show his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to show his warrant, *if demanded.*"

In *S. v. Garrett,* 1 Winst., 144, it is said that one who is not a known officer ought to show his warrant, and read it, if *required,* but even when required, as was done in that case, he is not made a trespasser *ab initio* if the party to be arrested knew he had the warrant.

The magistrate having adjudged that the defendant, Lafayette Dula, should pay the fine and costs, his agreement to pay it within ten days, and the assent thereto by the magistrate, did not operate as a discharge of the judgment, and it was competent for him to issue the warrant to enforce the judgment, and, being within his jurisdiction, the officer was justified in executing it. The fact that Walsh was the (428) same special officer who first executed the process, was some evidence of notice of the capacity in which he was acting.

We were not favored with an argument for the defendants in this Court, and we take occasion to say, that while justices of the peace must be the judges of the "extraordinary cases" mentioned in section 645 of The Code, in which they are authorized to issue precepts or mandates to persons other than a regular officer, it is always well to state that the person specially appointed or deputed, is so appointed for the want of a regularly constituted officer, and we believe that such has been the practice. The statute does not contemplate the appointment of special constables, except in "extraordinary cases."

We think that neither of the exceptions to the ruling of his Honor can be sustained, and there is another view of the case, fatal to the defendant.

The assaults were with deadly weapons. Can there be any doubt, that if Walsh had been killed, under the circumstances testified to, the de-

fendants would have been guilty, at least, of manslaughter? It has been said, that "when the facts of a case of homicide constitute the crime of manslaughter, if no killing ensue, the same state of facts will necessarily make the case of an assault and battery." *S. v. Leary,* 88 N. C., 615; *Braddy v. Hodges,* 99 N. C., 319.

There is no error.

Affirmed.

Cited: S. v. Sykes, 104 N. C., 701; *S. v. Armistead,* 106 N. C., 641, 644; *S. v. Wynne,* 118 N. C., 1209; *S. v. Beal,* 170 N. C., 767.

(429)

STATE v. STEPHEN FREEMAN.

Rape; declarations of Prosecutrix—Evidence; former consistent declarations of Witness—Juror under ch. 63, sec. 19, L. '85, and sec. 1722, The Code—Alibi—Sec. 413, The Code.

1. A juror drawn on a special *venire*, under chapter 63, sections 19, Laws 1885, is competent, under section 1722, The Code, although not a freeholder.
2. The refusal to reject an incompetent juror cannot be assigned for error, if the prisoner fails to exhaust his peremptory challenges.
3. *Semble*, that when a man is charged with rape the full particulars of a complaint, made by the woman raped against him to other persons, in his absence, too long after the perpetration of the crime to be part of the *res gestæ*, may be given in evidence by the prosecutrix.
4. When a witness is subsequently impeached it is not error to allow him to testify, when first examined, as to consistent statements made by him to other persons. The admission of such statements before the witness is impeached, although inopportune, is not more detrimental to the prisoner than it would have been if permitted at a later stage of the trial.
5. The refusal to permit a proper question to be asked cannot be assigned for error if the fact embraced in the question is afterwards permitted to be shown.
6. In a prosecution for rape it is error to refuse to allow the defendant to show by the prosecutrix, on cross-examination, that she had formerly given birth to a bastard.
7. The judge, in summing up the evidence of the prosecutrix, said, "Whether her testimony be true or false, she testified most positively that the prisoner was the man who committed the rape upon her," and was about

to proceed to consider the other testimony, when prisoner's counsel called attention to his failure to state that the prosecutrix had said that she did not know the woman C. G., to which the judge said, "Yes, I believe that she did say that": *Held*, that such remark was a sufficient response to the request of prisoner's counsel, and did not convey an opinion of the judge in violation of section 413, The Code.

8. While the doctrine that when an *alibi* is relied on as a defense the burden is shifted to the prisoner to establish it, is not sanctioned, yet, if the jury are so instructed, the effect of the instruction is done away with, if followed by an instruction that the State must prove, *beyond a reasonable doubt*, both the *corpus delicti* and its perpetration by the prisoner.

INDICTMENT for rape, tried before *Meares, J.*, at November (430) Term, 1887, of the Criminal Court of NEW HANOVER County.

The facts are set out in the opinion.

Attorney-General for the State.
Thomas W. Strange for defendant.

SMITH, C. J. The prisoner is charged with having committed a rape upon the body of one Addie Sellers, and upon his trial in the Criminal Court of New Hanover County at November Term, 1887, was found guilty by the jury, and from the judgment rendered upon the verdict, appealed to this Court. The prosecutrix, a married woman, of the age of twenty-three years, and residing alone with a young child in the city of Wilmington, her husband being at work in Georgia, testified as follows:

In the afternoon of the day preceding the night on which the outrage was perpetrated, while the witness was in conversation with one Mary Jones, a colored woman, who had come to her house, which contains but a single room, the prisoner came to the door and asked witness if she had any empty bottles to sell, remaining but a few moments, and then inquired if witness lived there alone; witness replied "yes," and that her husband had gone to Georgia. She did not at the time know the name of the prisoner, but she noticed that his voice was a very peculiar one. Later in the night, between the hours of 1 and 2 o'clock, while alone with her child, a person knocked at the door and asked to be let in. On her refusal in positive terms to admit him, he inquired if there were any fast girls in the neighborhood, and witness told him of a house where it was said lived women of that class, and he went away. In a little time he returned and again asked to be admitted, adding that he would not hurt her. Being again refused, he said there were then four men outside and if she did not open the door they would break in, to which witness replied, that she would shoot him if he forced the door (431)

open. He then leaving the front door went to a window and tried to break it open, at the time firing a pistol. Whereupon she was frightened and screamed in a very loud voice. He then went to the back door and tried to force an entrance, which she resisted by pushing against it, but he overcame her resistance and forced the door open and entered the room. Thereupon she retreated towards the front door screaming with all her might, when he advanced, seized her by the throat and choked her with such severity as to suppress her cries, threw her down upon the floor, dragged her out to a fence a few feet from the house, and still holding her by the throat accomplished his purpose. He then inquired if she knew him, and she, fearing that he would take her life if she did know him, answered "no" she did not know him, and she gave the answer in fear for her life, while she could recognize and identify him both from his appearance and unusual voice, but did not then know his name, nor did it occur to her that he was the same man who had called the day before and learned about her being alone, but after the rape was consummated, she called to mind the coincidence. When he effected an entrance there was a bright light burning in the room and she had a good look at him and has no doubt whatever of the identity of the prisoner as the person who committed the crime. Very soon after, afraid to remain, she went alone to the house of one Robert Skylock, an elderly colored man, who resided in the neighborhood in a house of his own, part of which is rented and occupied by one Smith, an elderly white woman, to obtain shelter and protection, and after telling him of the criminal assault, requested him to go and nail up the doors of her house, which was done. There was corroborative testimony from others who heard the cries after midnight and the report of the pistol, and there were many witnesses who swore to the presence of the prisoner at
(432) his own house with his wife on the night in question, and tend to show that he remained at home during the period within which the criminal assault was made. It is not deemed necessary to set out the evidence in detail, which is voluminous and extends over more than twenty pages of law cap, in order to a proper understanding of the rulings to which exception is taken by the prisoner.

1. The first exception is to a disallowance of a challenge of one S. S. Mitz, a juror tendered to the prisoner, for that he was not a freeholder, and to the refusal of the court to permit an inquiry into the fact of this alleged disqualification. The juror was one of the number of the special venire drawn from the jury box under the directions of the act of 1885, ch. 63, sec. 19, which requires the jurors to be taken from the box prepared by the board of county commissioners, and to possess the qualifications of jurors in the Superior Courts. Hence, such as would be compe-

tent, and whose names are directed to be put in the jury box, from which, in the Superior Courts, the regular panel is formed according to section 1722 of The Code, are competent to serve in the Criminal Court, as they are drawn in the same manner, and among the required qualifications is not that of having a freehold estate. *S. v. Wincroft,* 76 N. C., 38.

But if there were error in the ruling, it is removed by the fact that the juror was peremptorily challenged, and a jury of good and lawful men constituted without exhausting the number of jurors allowed to be peremptorily challenged, with which the prisoner was content. *S. v. Arthur,* 2 Dev., 217; *S. v. Hensley,* 94 N. C., 1021.

2. The second exception is to the admissions of the declarations made by the prosecutrix to Skylock and Mrs. Smith, soon after the occurrence, when she went over to their house, and in which she gave a minute and particular account of what transpired at her own house. Testimony was received from her of what she said to others, at different times, when detailing the occurrence.

The objection is not to her making complaint of the outrage, (433) for this is corroborative of her testimony at the trial, and tends to repel the inference drawn, from silence and inaction, of the connection having been with her consent, but that the particular facts cannot be given in evidence to support her credit, unless it has been *assailed.* Such seems to be the law, as laid down in the decisions of the courts, and thence derived by recognized and approved writers on the subject.

The rule which thus shuts out the words in which the complaint is made, and early arrests the testimony so that it cannot be seen *what kind of complaint was made,* and its import, as corroborating the charge, seems, notwithstanding its general acceptance, not to commend itself, for sufficient and satisfactory reasons, to the judicial mind. Accordingly, in a foot note, appended to the subject of rape in the third volume of Greenleaf's Evidence, are found these words: "Mr. Stephens also, in his note 5 to article 8, states that the practice of admitting particulars of the complaint, is in accordance with common sense, and cites the language of *Park, B.,* in *Regina v. Walker,* 2 M. & Rob., 212 (to which we have not had access), where he says *the sense of the thing* certainly is, that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and *all that she then said.* But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of the complaint by cross-examination." "It is said," proceeds the note, "that Baron Brom-

well, of the English Court of the Exchequer, was in the habit of admitting the complaint itself." In this country the practice has been to admit only the fact that a complaint was made, unless the com-
(434) plaint was made so soon after the offense as to be part of the *res gestæ*. The comments of Baron Park are mentioned, but not with entire approval, by the author of another valuable treatise, Best on Evidence, p. 471, notes. Again, we find this statement of the ruling in a recent case, *Regina v. Wood,* 14 Cox, C. C., 46, also not in our library: "When a man is charged with committing a rape, the full particulars of the complaint the woman made against him to other persons in his absence, some time after the alleged offense, may be given in evidence"—by whom, is not stated.

This is in consonance with adjudications in this State, which, whenever the witness is impeached and in whatever manner, even if it be done in the cross-examination, permits his credit to be sustained by proof of declarations made to others similar to the testimony given in and assailed, and these may be proved by the witness who made them. *S. v. George,* 8 Ired., 324; *March v. Harrell,* 1 Jones, 329, and subsequent cases; *vide S. v. Whitfield,* 92 N. C., 831. As any mode of assailing the truthfulness of a witness warrants a resort to the necessary means of repairing the injury to his credit, and reinstating it before those who are to pass upon its weight, so a witness may be surrounded by circumstances tending to impair his credit, such a conspirator testifying against his associates in crime, who comes before the jury under a cloud, which would seem to admit of its dispersion by evidence in support of his credit, and if the rule be thus extended, it would be difficult to put the prosecutrix testifying to an outrage on her person, to which, most commonly, she is the sole witness, outside the sphere of its operation.

But, in enumerating the difficulties attending the general rule, we do not find it necessary to declare that the narration of the particulars of the crime, so near the time of its commission, was proper to be received; there was abundant impeaching and contradictory evidence
(435) offered, subsequently, to render that in dispute, if heard afterwards, competent; nor do we see in what manner its being offered at an inopportune time could be, for that reason, more detrimental to the prisoner's defense than it would have been if heard at a later stage of the trial. These views have more or less application to all the confirmatory declarations of the prosecutrix, made to different persons, descriptive of what transpired.

3. The next exception is to the ruling out of the question asked by the prisoner's counsel, on the cross-examination of the prosecutrix, as to whether she had ever given birth to a bastard child? The ruling was

clearly erroneous, and would have led to a new trial, but that the fact was afterwards proved and admitted both by the solicitor and the prosecutrix, recalled for the purpose of testifying to the fact, with a brief cross-examination of the prisoner's counsel, and this in unequivocal terms.

4. The judge, while recapitulating the testimony of the prosecutrix and commenting thereon, used this language: "The prosecutrix testified that she was certain that the prisoner was the man who came to her house on the afternoon before the rape was committed upon her, and while Mary Jones was in her house, and asked if she had any bottles to dispose of; and also inquired if she lived there alone; and that he was the man who came to her house and effected a forcible entrance and committed a rape upon her on the night in question. Whether her testimony be true or false, she testified most positively that the prisoner was the man who committed the rape upon her." The court, having concluded the recapitulation of the testimony of the prosecutrix, was about to proceed to consider the other testimony, when the prisoner's counsel called attention to the failure to state, that the prosecutrix, replying to a question of the solicitor, had said that she did not know the woman Celia Gardner; to which the court, in a distinct voice said, "Yes, I believe that she did say that." This, as an insufficient response (436) to request of counsel, forms the subject of another exception.

In this we see no invasion of the principle contained in the act of 1796, The Code, sec. 413, which forbids the judge to give any opinion, "whether a fact is fully or sufficiently proven." He but states what was sworn to by the witness, and the positive manner in which she declared her recognition of the prisoner as the author of the assault upon her, with which the omitted part seems to have no very clear connection; nor is there indicated, so far as we can see, any inclination of the judge's own mind upon the question of identity.

5. The following portion of the charge is also excepted to as an erroneous statement of the law, following instructions bearing upon and applicable to the facts testified to:

"The general rule applicable to all criminal cases is, that the burden rests upon the State to establish the guilt of the prisoner (accused) beyond a reasonable doubt, and, applying it to the facts of this case, the law requires that the State must establish two facts beyond a reasonable doubt in order to convict the prisoner. In the first place, the State must establish the fact, beyond a reasonable doubt, that a rape was committed on the person of the prosecutrix, on the night in question, by some man; and in the second place, that, if a rape was committed on the person of the prosecutrix on the night in question, the prisoner at the bar is the

man who committed it. And, therefore, if the State fails to establish either one of these facts, beyond a reasonable doubt, in the minds of the jury, the prisoner should be acquitted." The objectionable part is in the words that follow: "The prisoner denies the existence of both of these facts. He denies, in the first place, that any rape has been committed on the person of the prosecutrix; and, in the next place, denies that he was present if one was committed upon her.

(437) One of the defenses set up by the prisoner is that of an *alibi;* that is, he asserts, that at the time of the alleged rape, he was at home, on his bed, in another part of the city, and, therefore, it was impossible for him to have committed the rape. The rule of law is, in a case of this kind, where the prisoner sets up the defense of an *alibi,* that is, that he was at some other place at the time when the crime was committed, the burden of proof rests on the prisoner to establish the fact to the satisfaction of the jury that he was not present, but was at some other place when the crime was committed. If the jury is satisfied from the evidence that the prisoner remained at home on the night in question, this would be an end of the case, and the prisoner should be acquitted. But if they are not satisfied of the truth of the *alibi,* then it is for them to say whether they are satisfied, beyond a reasonable doubt, that the rape was committed upon the person of the prosecutrix by the prisoner, as alleged by the State."

We reproduce, at length, the instruction to which exception is taken, in order that it may be understood, and the sufficiency of the grounds upon which it rests be determined.

While we do not assent to what is said about the shifting of the burden of proof, when the proof offered by the prisoner tends to show his absence from the place where the offense was perpetrated, and his *presence elsewhere* at the time, yet the charge in general is so clear and explicit, as to what is required of the State in order to a conviction, that it could not be misleading to the jurors, fairly considered.

The defense known as an *alibi* is operative as disproving the charge, and impairing, if not destroying, the credit of the witnesses who testify to the identity of the party accused, an essential element in the case. It is testimony against testimony in reference to the identity, in the present instance, and opposing evidence which, if believed to be true, defeats the prosecution and vindicates the prisoner's innocence of

(438) the charge. Its force and effect, as such, were fully presented to the jury, and they were told that it was necessary to a conviction, that the State should prove, *beyond a reasonable doubt,* both the perpetration of the crime, and that it was perpetrated by the prisoner. At the same time they were told, that if his absence was shown, it was a full and complete defense.

We think, therefore, the unnecessary suggestion to which we have referred, is so explained in the instruction that it could not tend to mislead the minds of the jury. Taken as a whole, the charge is unexceptionable.

It must be declared, therefore, that there is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: S. v. Anderson, 101 N. C., 759; *S. v. Morton,* 107 N. C., 893; *Burnett v. R. R.,* 120 N. C., 518; *S. v. Maultsby,* 130 N. C., 665; *S. v. Register,* 133 N. C., 751; *Ives v. R. R.,* 142 N. C., 137; *S. v. Nowell,* 156 N. C., 649; *S. v. Neville,* 157 N. C., 597; *S. v. Broadway, ibid.,* 601; *S. v. Bryant,* 178 N. C., 707; *S. v. Hall,* 183 N. C., 806; *S. v. Steen,* 185 N. C., 773.

STATE v. JOE JONES.

Justices of the Peace; Jurisdiction of—Criminal Proceedings before Magistrate—Constitution, Art. IV, sec. 27—The Code, secs. 1132, 1139, 1144—Recognizance.

1. A justice of the peace has no power to allow a party accused of an offense of which he has not final jurisdiction to give bail during the postponement of the examination. The Code, secs. 1132, 1139, 1144, does not warrant such a proceeding. If any delay in the examination is necessary, the accused must be kept in the custody of the sheriff or other officer of the law until the examination is resumed.

2. A bond or recognizance for the appearance of one accused of larceny before a justice of the peace at a fixed time and place, that an examination of the charge may be had, is void.

3. A justice of the peace can only exercise such powers as are conferred upon him by the Constitution, Art. IV, sec. 27, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction; nor can he adopt methods of procedure not strictly allowed by law.

4. A bond with conditions, signed and sealed by the parties, is good as a recognizance.

PROCEEDINGS by *sci. fa.* against bail, heard by *Merrimon, J.,* at (439) Spring Term, 1888, of HENDERSON Superior Court.

The State appealed.

It appears that one Joe Jones was arrested on 18 April, 1887, in the county of Henderson, under a State warrant, charging him with the crime of larceny, and taken before the justice of the peace, who issued the warrant, to be examined in respect to that charge against him, and committed, held to bail or discharged, according to law. He was not prepared to complete the examination on that day, and for cause assigned, requested that the further examination be postponed until the 28th of the same month, at a place designated, and that in the meantime he be allowed to have bail. The justice of the peace so postponed the further examination, and took the bond of the said Jones and Mary A. Jones surety, payable to the State, in the sum of $1,000, conditioned that the said Joe Jones would appear before the justice of the peace at the time and place specified therein, to be further examined upon the warrant and charge.

Afterwards, the justice of the peace being present at the time and place specified in the condition of the bond, the said Joe Jones was duly called and failed to appear, as he was bound to do; and such failure and default was duly noted by the justice of the peace, and he thereupon certified the whole proceedings, including the bond mentioned in the matter of the said State warrant, to the Superior Court of the
(440) county named. That court directed that a writ of *scire facias* issue, commanding the said Joe Jones and Mary A. Jones to appear therein and show cause, etc., and such writ was issued.

At the Spring Term of 1888 of that court the sheriff returned that he had served the said writ on Mary A. Jones, and that Joe Jones could not be found. Mary A. Jones pleaded *nul tiel record.* The court, upon hearing the writ read, and seeing the bond mentioned, and the proceedings in connection therewith, "dismissed" the *scire facias.* The solicitor for the State having excepted to the judgment of the court in that respect, the State appealed to this Court.

Attorney-General and John Devereux, Jr., for the State.
No counsel for defendant.

MERRIMON, J., after stating the facts: If the justice of the peace had authority to take the bond in question, it was, in legal effect, a recognizance, although not so in form. *S. v. Edney,* 2 Winst., 71; *S. v. Houston,* 74 N. C., 174; *S. v. Houston, ibid.,* 549. But we are of opinion that he had no such authority.

The Constitution (Art. IV, sec. 27) recognizes and establishes the office of justice of the peace, and prescribes the jurisdiction of that officer in certain respects, but it expressly leaves it to the General Assembly to prescribe regulations to be observed in the exercise of the

authority conferred, and the jurisdiction may, to a limited extent, be increased by statutory provision. The jurisdiction thus conferred, and that may be conferred, is special—not general—and the officer is limited in the exercise of his authority by the regulations and methods of procedure prescribed by statute, subject to the constitutional provision. That is, a justice of the peace can only exercise the powers conferred upon him by the Constitution and statutes in harmony with it; his jurisdictional authority is not enlarged by principles of law applicable only to courts of general jurisdiction; nor can he adopt methods (441) of procedure, or exercise his authority in ways not strictly allowed by law—he may do only what the statute allows him to do, and his official acts will be upheld, however informal, if they embody the substance of the thing or purpose intended.

Now, the statute (The Code, secs. 1132, 1139, 1144) provides that certain classes of officers, including justices of the peace, "shall have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred by this chapter" (that in respect to criminal proceedings), and that "the magistrate before whom any such person shall be brought, shall proceed, as soon as may be, to examine the complainant," etc., and that "if the offense charged in the warrant be not punishable with death, such magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense shall be alleged to have been committed." And how such recognizance shall be certified to the court is prescribed. There are divers provisions permitting such magistrates to allow bail and take recognizances, but there is none that allows them to do so pending the postponement of the examination by them of a person charged with a criminal offense, with a view to holding him to answer for the offense charged before a proper court, if there shall appear to be sufficient cause. If it was intended that they should allow bail in such a case, why the omission to so provide? And why make special provision conferring authority as to some cases and not as to that last mentioned, similar in its nature to them? The strong inference is, that it was not contemplated or intended that such authority should be exercised.

When a person charged with a criminal offense is apprehended, it is intended that the proper magistrate, before whom he is taken, "shall proceed, as soon as may be, to examine the charge," and that the accused party shall remain before him or in the custody of the (442) sheriff, or other officer who arrested him, until he shall be committed, let to bail, or discharged. Bail is not deemed necessary or allowable during the examination. The magistrate shall proceed as promptly

as the nature of the case will allow, to complete the examination, but he may take reasonable time for the purpose, and may, in the meantime, direct the officer to continue the person charged in his custody in some convenient, clean, suitable, safe place, as the jail, "guard house," or other place of safety, so that he may be forthcoming when the examination shall be resumed. Such has generally, if not uniformly, been the practice in such respects in this State in all the past, and such, substantially, was the practice in England, whence the law and practice in this State were derived. The practice in England, however, was modified by statute (11 & 12 Vict., ch. 42, sec. 21) so that a justice of the peace there may now let the accused party to bail and take his recognizance with surety, pending the postponement, if need be, of the examination. 1 Arch. Cr. Pr. & Pl., 37, 38 (6 ed.); 1 Chit. Cr. Law, 73, 74.

As the justice of the peace in this case had no authority to allow the accused party to give bail during the postponement of the examination, he could not lawfully take the "bond" in question. It was therefore inoperative and void.

The court, in effect, sustained the appellee's plea of *nul tiel record.* There is no error. Let this opinion be certified to the Superior Court according to law. It is so ordered.

No error. Affirmed.

Cited: S. v. Wynne, 116 N. C., 985; *S. v. Jenkins,* 121 N. C., 641; *S. v. Bradsher,* 189 N. C., 407.

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(443)

STATE v. GREEN HORTON.

Section 415 of The Code—Special Instructions—Chapter 248, Laws 1885—Seduction—Evidence; Exhibiting Child to Jury—Jury, Province of.

1. Under section 415 of The Code, the judge may disregard oral prayers for special instructions.
2. On an indictment under chapter 248, Laws of 1885, for seduction under promise of marriage, it being proven that prosecutrix had a child which resembled defendant; that defendant had admitted a promise of marriage, but said in his admission that he only did it for "devilment," and that prosecutrix's character for virtue was good, there was no error in the refusal of the court to charge that there was no evidence to support the charge contained in the indictment.

3. It is not error to permit a child to be exhibited to the jury that they may trace a resemblance to one charged with having begotten it; and such evidence is admissible on an indictment for seduction, as it tends to prove the fact of sexual intercourse between prosecutrix and defendant.

4. The defendant asked a special instruction, beginning, "If the jury believe the testimony of S. W.," etc. The judge gave the instruction thus: "If the jury believe *from* the testimony of S. W.," etc.: *Held*, that it was proper to insert the word "from," because it is the province of the jury to interpret and determine what is proved by a witness.

5. The statute, chapter 248, Laws of 1885, contemplates a seduction by means of a promise of marriage in the nature of a deceit. Consent is no defense if seduction is proven. Sexual intercourse procured by *force* is not within the statute.

INDICTMENT for seduction under promise of marriage, under Acts of 1885, ch. 248, tried before *Clark, J.*, at November Term, 1887, of ROWAN Superior Court.

Verdict of guilty. Appeal by defendant.

The facts are stated in the opinion.

Attorney-General and Theo. F. Klutz for the State. (444)
R. F. Armfield and L. S. Overman for defendant.

SMITH, C. J. The defendant is charged with violating the Act of 6 March, 1885 (chapter 248), which is in these words:

"That any man who shall seduce an innocent and virtuous woman, under promise of marriage, shall be guilty of a crime, and upon conviction thereof, shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the penitentiary not exceeding the term of five years: *Provided, however,* that the unsupported testimony of the woman shall not be sufficient to convict: *Provided further,* that marriage between the parties shall be a bar to further prosecution under this act."

The indictment, pursuing substantially the terms of the enactment, charges that the defendant, at the time and place mentioned, "did, unlawfully, willfully and feloniously, seduce one J. S. Wilkerson, an innocent and virtuous woman, under the promise of marriage, against," etc., and the accused being tried upon his plea of not guilty, was convicted by the jury. The testimony before the jury was to this effect:

The prosecutrix testified that she was twenty-eight years of age, and was living with her father, as she had lived with him during her whole life, except when she was with a married sister, Mrs. Barnhardt, taking care of her small children, during which interval, about two years since September last, she first met and formed the defendant's acquaintance;

that in about two weeks afterwards she met him again, and at his first visit to her an engagement to marry was entered into, to wit: on 24 February, and the marriage was to come in the spring following; that witness was to go to the house of Goodman, another married sister, and thence with the defendant proceed to Statesville and be married, and that she carried her clothes to the place in order to carry the agreement into effect, but defendant failed to come; that in January or
(445) February, 1887, after the arrangement, she first submitted to his embraces, and they had sexual connection; that this was accomplished in a room at night, no one else there, though her parents were in an adjoining room, while witness was sitting in a chair, and he, at the time, saying there was no harm in it, as they were engaged.

On cross-examination, she stated that the defendant was upon his knees, with one hand over her mouth and the other around her person; that it occurred twice in the same way, and in each case against her will, and she was told by him to keep it a secret; that a child was born, the result of their intercourse, about the first of October, and he was the father, as she had "never had anything to do with any other man at any time in her life"; that his visits to her were about every two weeks for some two months, and afterwards he came to her father's house for several weeks.

The corroborative evidence offered by the State was, in general terms, as follows:

The justice of the peace, who issued the warrant, detailed a similar statement of facts made to him as to the marriage agreement—the time when made and to be performed, and the time and manner of the seduction.

The additional supporting evidence under the statutory requirements was this:

John S. Wilkerson, the father of the prosecutrix, swore that the defendant came to his yard on the first Sunday in May, at sundown; would not come into the house, but called witness out as he said he wished to have some private talk with him; said he had heard that I was mad with him, and witness answered: "Horton, you know what is the matter; Sarah has caught cold, or is in the family way." Defendant replied, he knew what would relieve her; that he had learned it from a young doctor, and witness need not tell any one. He then gave the prescription, and "admitted having promised to marry
(446) Sarah, but said he did it out of devilment, as many other young men."

The prosecutrix was supported in her testimony about going to the house by the latter, and her purpose in doing so.

The child was then exhibited to the jury by Mrs. Yost, who testified to her knowing the defendant, and the resemblance it bore to him.

To the introduction of the child before the jury, defendant's counsel objected; but the objection was overruled, the court telling the jury that the resemblance was not evidence of a promise of marriage and seduction following it, but was merely corroborative of the fact of sexual connection between the parties, and thus only to be considered by them.

The defendant, examined on his own behalf, denied that he had ever promised to marry the prosecutrix, or had sexual intercourse with her; . . . admitted being at her father's house at the time stated by her, and remaining in the room after the father had gone to bed, the door not being shut; his visit to the latter in May, but he did not say he had agreed to marry his daughter.

The general character of the prosecutrix was admitted by the defendant to be good.

Defendant's counsel verbally asked a ruling that there was no evidence to go to the jury in support of the charge contained in the indictment. Under the rules of practice this request was disregarded.

Written instructions were then asked, as follows:

If the jury believe the testimony of Sarah Wilkerson, that the defendant accomplished his purpose upon her person by force, he having one hand upon her mouth to keep her from crying out, and the other around her body while sitting in the chair and all the time resisting, and she never consenting to the intercourse, defendant is not guilty.

The instruction was given with a single change in the insertion of the word "from" between the words "believe" and "the testimony," in the first line, and this addition: "If the defendant (447) committed a rape he cannot be guilty of seduction; but you are the judges of the testimony, and will give just such weight to each part as you think it deserves, and upon the whole evidence, say how the truth of the matter is. If she was seduced, or made only a slight resistance and then consented, relying on defendant's promise of marriage, and was an innocent woman, the defendant would be guilty. If there was no sexual intercourse, or if it was brought about by force, or she was not an innocent woman, in either of the cases he would not be guilty. The burden of proof is on the State to satisfy the jury beyond a reasonable doubt (1) that the defendant procured the carnal intercourse; (2) that he did so under a promise of marriage, and (3) that she was an innocent woman.

By the words an innocent woman, the law means a woman who has never had previous illicit intercourse with any man.

If the jury are satisfied of these three facts, beyond a reasonable doubt, they will find a verdict of guilty; if not so satisfied beyond a reasonable doubt as to any one of them the verdict should be an acquittal."

The jury were the sole judges of the evidence, and the credit to be given to it, the court having no right to intimate any opinion as to the fact. The defendant was convicted, and after the denial of the motion for a new trial upon the errors assigned, and noted in the record and judgment pronounced on the verdict, the defendant appealed.

This somewhat extended rehearsal of the evidence and of the charge is deemed necessary to an intelligent presentation of the alleged errors upon which we are requested to pass.

1. The refusal to give the unwritten charge. It is expressly provided in The Code, sec. 15, that instructions requested shall be put in writing and signed, and if not, "the judge may disregard them." This was the course pursued, and the counsel had opportunity to put the (448) proposed charge in writing, and remove this impediment out of the way. But if it be supposed that the statute applies not to criminal, but to civil suits only, there is no error in the refusal to give the instructions demanded.

There was evidence, not only that coming from the prosecutrix only, but from other sources, in support of hers, and that in all of the essential particulars constituting the offense defined in the act. The birth of the babe proved the intercourse with some one, and its features and general appearance point to its paternity.

The defendant admitted his promise to make her his wife, and his denomination of his conduct as a piece of "devilment," such as many young men practice, is an implication, at least, that he had effected his purpose by means of the promise.

The virtuous character and conduct of the prosecutrix was proved and conceded, so the testimony of the injured was not *"unsupported,"* but derived confirmation from that of others, as the statute prescribes.

2. The second exception is to the exhibition of the person of the child for the jury to see, and trace any likeness it bore to the defendant.

This precise objection was made to the court's telling the jury "that they could take into consideration the appearance of the child, and give it whatever weight it thought it entitled to," in *S. v. Woodruff*, 67 N. C., 89, and this Court declared that there was no error in this part of the charge. This was said in a bastardy proceeding upon a question of paternity, and upon the same issue the child was introduced in this case.

3. The last exception is to the modification of the instruction given at the instance of the accused, and in one view is entirely groundless.

It is the province of the jury to interpret and say what is proved by the witnesses, and this is the result of the interpolation of the preposition "from," nor was the law incorrectly laid down in (449) what follows:

The statute plainly contemplates a seduction, brought about by means of a promise of marriage, in the nature of a deceit. The testimony fully warrants this inference, for the defendant induces assent by what he said about their contract relations, and his statement to the father, that this was resorted to to overcome her reluctance as a chaste and upright maiden. 2 Whar. Cr. Law, secs. 2073 and 2078a. Consent too, if seduction be proved, is no defense, nor that natural unwillingness a virtuous woman feels against such self-abasement of which he speaks, when, in fact, it at last yields to the importunity of one expected soon to be a husband.

The court satisfactorily presented the case to the jury in this aspect of it, and no just grounds of complaint are furnished to the accused.

There is no error, and the judgment is

Affirmed.

Cited: S. v. Ferguson, 107 N. C., 849, 851; *Lee v. Williams,* 111 N. C., 203; *Hood v. Sudderth, ibid.,* 220; *S. v. Crowell,* 116 N. C., 1057; *S. v. Ring,* 142 N. C., 601; *S. v. Raynor,* 145 N. C., 473; *S. v. Malonee,* 154 N. C., 202; *Scott v. Henderson,* 169 N. C., 660; *S. v. Tucker,* 190 N. C., 713.

STATE v. W. H. HOWE.

Indictment Under a Statute, Form of—Gambling Table—Section 1045, The Code—Section 1003, The Code.

1. Ordinarily, it is sufficient to describe an offense in the words of the statute.

2. A statute may be so inaccurately penned, that its language does not express the whole meaning of the Legislature, and by construction its sense is extended beyond its words. An indictment under a statute of this kind must contain averment of such facts as will bring the case within the true meaning of the statute. Bat. Rev., ch. 32, sec. 95, is an instance of such a statute.

3. But where a statute makes a particular act an offense, and describes the act by terms having a definite and specific meaning, without

specifying the means of doing the act, an indictment need only charge the act itself, without its attendant circumstances. Section 1045 of The Code is an instance of such a statute.

4. An indictment under section 1045 of The Code, for keeping a gambling table, is good without any averment that the act was done "willfully and unlawfully," or that games of chance were played at such table for money or other property.

(450) THIS was an indictment for keeping a gambling table, at which certain games of chance were played, tried before *Meares, J.*, at January Term, 1888, of the criminal court of NEW HANOVER. The facts appear in the opinion.

Attorney-General for the State.
J. D. Bellamy for defendant.

DAVIS, J. There were two indictments, and the defendant made a motion to the effect that the solicitor should be required to elect and try only on one. This was refused, and the court ruled that the two indictments should be treated as two counts in one indictment.

The first charged, that the defendant, "on the first day of January, etc., . . . in a certain house of him, the said W. H. Howe, and in a certain car of him, the said W. H. Howe, with force and arms, at, and in the county aforesaid, did establish, use and keep a certain gaming table, the said table not being a faro-bank, but commonly called "Lotto," at which table certain games of chance were played, against the form of the statute," etc.

The second charged that the defendant "did wilfully and unlawfully establish, use and keep, and maintain a certain gaming table, not being a faro-bank, but commonly known as the game of Lotto or Keno, which said games of Lotto or Keno are games of chance at which money is bet, against the form of the statute," etc.

(451) The defendant moved to quash the indictment for that:

"1. The first count is fatally defective, because it does not charge that games of chance were played for money or other property.

"2. The first count is defective, because it does not charge that the offense was committed unlawfully and wilfully.

"3. The second count is fatally defective, because it does not charge that games of chance were played at said table."

The defendant is indicted under section 1045 of The Code, which declares that, "If any person shall establish, use or keep any gaming table (other than a faro-bank), by whatever name such table may be called, at which games of chance shall be played, he shall on conviction thereof be fined," etc.

The indictment before us follows the language of the statute, but the defendant says that the first count is defective, because it does not charge that games of chance were played "for money or other property," or that the "offense was committed unlawfully and wilfully," and he says the second is defective, because it fails to "charge that games of chance were played at said table." Whether in the statute *"gaming tables"* does not, *ex vi termini,* mean a table at which games of chance or hazard are played for money or other thing of value, it is not necessary for us now to determine, though Bishop on Statutory Crimes, sec. 860, says: "Even the word gaming, without the prefix unlawful, seems usually to imply something of an unlawful nature, as betting on the sport," etc., nor need we determine what is necessary to constitute the "establishing, using or keeping" a gaming table.

Is it sufficient in this case to charge the offense in the language of the statute?

In *S. v. Liles,* 78 N. C., 496, it is said to be a "well settled general rule that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute." Where the words of the statute are descriptive of the offense they, or words equivalent, must be used to charge the described offense. *S. v. Morgan,* 98 N. C., 641; *S. v. Whiteacre,* 98 N. C., 753. (452)

S. v. Simpson, 73 N. C., 269, is, as are some others cited, an exception to the general rule, and is undoubtedly predicated upon the inadvertent omission of the Legislature to insert the words "unlawfully and wilfully," or some equivalent word, or words to *create* the offense intended. The proper construction of the statute, under which Simpson was indicted, rendered the insertion of some such words necessary. They were necessary to *describe* the act intended to be made an offense by the statute, which declared that "if any person shall kill or abuse any horse, cow, hog, etc., the property of another, in any inclosure, not surrounded by a lawful fence, such person shall be deemed guilty," etc.

Pearson, C. J., said: "It is apparent from the nature of things, that these words are too broad and go beyond the meaning of the lawmakers . . . common sense forbids the idea that it was the intention of the General Assembly to send to jail every person, who, by accident, kills, etc., . . . can any one suppose it was the intention of the General Assembly to make such acts indictable? Yet, they come within the words of the statute, which shows the necessity of adding the words "unlawfully and wilfully" in order to take such cases out of the operation of the statute. That these, or equivalent words were omitted by inadvertence on the part of the draftsman, and must be added by construction, in order to express the meaning of the act, can be seen," etc.

So in *S. v. Stanton,* 1 Ired., 424, *Ruffin, C. J.,* said: "A statute may be so inaccurately penned that its language does not express the whole meaning the Legislature had, and by construction, its sense is extended beyond its words. In such a case the indictment must contain such averments of other facts, not expressly mentioned in the statute as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been (453) used in the statute, if the Legislature had expressed therein their precise meaning. . . . But where a statute makes a particular act an offense, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is sufficient to charge the act itself without its attendant circumstances."

S. v. Parker, 81 N. C., 548, and *S. v. Allison,* 90 N. C., 733, follow the ruling in the case of *S. v. Simpson,* and for the same reason, and it will be observed that the Legislature subsequently amended the Act of 1868 by inserting the words "wilfully and unlawfully" before the word "kill," so as to make the act express the true intent of the Legislature. (See The Code, sec. 1003.)

Does the language used in section 1045 of The Code express the true intent of the Legislature, or was there an inadvertent omission of the words "unlawful and wilful," which must be supplied by construction as was the case in the Act of 1868?

The language is precisely that of the Revised Code, ch. 36, sec. 72, and the words "wilfully and unlawfully" are also omitted in the Revised Statutes, ch. 36, sec. 64. It was no oversight of the draftsman. The language is absolute, and the act prohibited cannot be lawfully done, and therefore it was not necessary to charge in the indictment that it was done "unlawfully and wilfully." If done at all it was unlawful.

In indictments for keeping a gaming house, at common law and similar offenses, the precedents in Wharton use the word unlawful. (See Precedents 736 *et seq.*). But, for keeping a gaming table under an Alabama statute, the form is given and the words "wilfully and unlawfully" are omitted. Form 755.

We conclude that the omission is not fatal under our statute, and there is no error.

Affirmed.

Cited: S. v. Watkins, 101 N. C., 705; *S. v. Covington,* 125 N. C., 643.

(454)

STATE v. W. E. LOGAN.

Chattel Mortgage, Description of Property in—Section 1089 of The Code—Buying Mortgaged Chattels.

A mortgage described the property thereby conveyed as follows: "My tobacco crop, to be grown this year on my own land and to contain eight acres, including one-third in the crop of G., to contain not less than three acres, and my one-third interest in J's crop, not less than two acres, all on my own land to be grown this year." The mortgage was dated May, 1885: *Held*, that the description was sufficient to convey all the crop of tobacco cultivated by the mortgagor in 1885, on lands for which he held a bond for title and which he claimed as his own, and also all the rents which would come to him from his tenants G. and J.; and one purchasing the tobacco made on mortgagor's land by himself, or that made by said G. and J., and paid to the mortgagor as rent, in violation of section 1089, of The Code, was properly convicted under said section.

INDICTMENT under section 1089, The Code, tried at the January Term, 1888, of the Inferior Court of BUNCOMBE County, and affirmed, upon appeal, by *MacRae, J.*, at March Term, 1888, of BUNCOMBE Superior Court.

The defendant is indicted for a violation of the statute (The Code, sec. 1089). It is charged in the indictment, that he purchased from James A. Revis, mortgagor, five hundred pounds of tobacco embraced by a chattel mortgage, executed by the latter to T. S. Morrison, to secure a debt therein specified; that he so purchased the tobacco with a knowledge of the lien created upon it, and with a view to hinder, delay and defeat the rights of the mortgagee, etc.

The property in question is described in the mortgage as follows: "Also my tobacco crop to be grown this year on my own land, and to contain eight acres, including one-third in the crop of T. J. Gentry, to contain not less than three acres, and my one-third interest in G. W. Jones' crop, not less than two acres, all on my own land, to be grown this year."

On the trial the defendant contended, as appears from the case (455) settled on appeal, "that the chattel mortgage was void on account of the vagueness of the description of the land on which the tobacco was to be grown. The court held the description sufficient, and the defendant excepted. The defendant contends that the description of the land, upon which the tobacco was to be grown, was so uncertain as to avoid the attempted conveyance or assignment of the tobacco. However this may be, as to the land, the court is of the opinion that

the interest of the mortgagor in the crop of his tenant is described with sufficient clearness, to open the door for parol proof, by which it may be rendered certain."

On the trial the mortgagor testified, "that he held a bond for a title to the tract of land, but that he had no deed for it; that he lived on the land, and that it lies near Morgan Hill, in Buncombe County; that he lived on the land when the mortgage was made, and was cultivating the tobacco referred to in the mortgage, and that he sold the tobacco after cutting and curing it, to the defendant; that all the tobacco sold by him to the defendant was grown on the land during the year referred to in the mortgage; that the said T. J. Gentry and G. W. Jones, whose names are mentioned in the mortgage, were tenants of his, living on and cultivating a part of said land during the year said crop was made; that he sold all of the tobacco raised by him and his tenants that year to the defendant," etc.

There was a verdict of guilty, and judgment against the defendant, from which he appealed to the Superior Court of Buncombe County, and the judgment of the Inferior Court being affirmed, he appealed to this Court.

Attorney-General for the State.
E. C. Smith for defendant.

MERRIMON, J., after stating the facts: The purpose of the description of property in a deed, or other instrument of conveyance, is to (456) designate and point out the particular property intended to be conveyed as distinct from other property, and particularly from other property of the same and like kind, so that it may be identified, when need be, by proper evidence. It is essential that the deed itself shall, in terms or effect, so designate the property intended to be embraced by it, else it will be void for uncertainty as a conveyance, although in some cases it might be sufficient as an agreement to convey. The deed, as such, can ordinarily operate only on separate and distinct things.

The description is sufficient when it in terms, or by reasonable implication arising from the facts stated in respect to its circumstances, relations and connections, designates the property, so that it can be certainly seen or ascertained. Moreover, such just interpretation must be given to the description as will effectuate the intention of the parties, if this can be done consistently with the rules of law.

Now, applying what we have said, we think the description of the tobacco in question in the deed mentioned was sufficient. It was designated as *"my tobacco crop,* to be grown *this year on my own land";*

that is, *all the* tobacco crop to be grown by the mortgagor on the land he cultivated and claimed as his own that year. The land and the crop were further designated by the further reference to "my (his) land," part of which he had leased to his tenants, Gentry and Jones, the same year, "all on my (his) own lands."

Although the mortgagor had but a bond for title to the land, he was not a mere lessee of some other person; from the nature of the matter, and the manner of reference to it, he treated and claimed it as his own, and that was sufficient to designate "my (his) tobacco crop."

The deed of mortgage upon its face plainly, in effect, as it seems to us, designates the mortgagor's crop of tobacco to be grown by him, during the year specified, on the land claimed by him as his own, part of which he leased to the tenants named, and also the rents (457) that would come to him from them, as the property conveyed. The mention of the number of acres to be cultivated, was a mere stipulation that the crop would probably be quite as much as contemplated by the parties, and so as to the rents; but whatever the crop and rents might turn out to be, the *whole* was certainly described as the property—the tobacco sold and conveyed.

The Attorney-General cited *Woodlief v. Harris,* 95 N. C., 211; *S. v. Garris,* 98 N. C., 733, as strictly in point; and so they are. There is no error.

Affirmed.

Cited: Brown v. Miller, 108 N. C., 398; *Weil v. Flowers,* 109 N. C., 216; *S. v. Surles,* 117 N. C., 123.

STATE v. W. A. POTTS AND SUSAN F. LINCKE.

Plea of Insanity — Plea in Abatement — Apt Time — Grand Jury — Special Venire, Sections 1726, 1739, The Code—Insanity as a Defense—"Dipsomania," "Moral Insanity," "Delirium Tremens"—Evidence, Opinions of Witness—Jurors, Qualification and Challenge of—Malice.

1. A defendant on trial for murder entered the following plea: "I admit the killing, but was insane at the time of the commission thereof; therefore not guilty." The court rejected all of the plea except that of "not guilty": *Held,* that such action was proper, as under the plea of not guilty every defense in repelling or mitigating and reducing the offense to a lower grade was admissible.

2. A plea in abatement, on the ground of the incompetency of one of the grand jurors, put in *after* pleading to the indictment, is not in apt time.

3. The partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn"; there was but one key and that was placed in the custody of the register and *ex officio* clerk to the board of county commissioners by the chairman of the board: *Held*, that a special *venire* drawn under the directions of the presiding judge from such boxes was legal. (See sections 1726, 1739 of The Code.)

4. The finding of the court below that a juror is indifferent cannot be reviewed. Therefore, where, on a trial for murder, a juror states that he has formed the opinion that the prisoner is guilty, on report merely, and while it would require evidence to remove this impression, yet he could, on hearing the evidence from the witnesses and the law from the court, decide impartially: *It was held*, that, the court below having decided that he was indifferent, there is no review in this Court.

5. A juror related to the prisoner by affinity, within the ninth degree, is disqualified to sit in the cause, and was properly rejected upon the challenge of the State.

6. If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign it for error, if a jury is obtained before he has exhausted his peremptory challenges.

7. It is competent in all judicial trials for those who have had opportunities of observing a person to testify as to their opinions of his sanity or insanity, although such witnesses are not experts.

8. Experts alone can give an opinion based on facts shown by others, assuming them to be true.

9. Where the killing with a deadly weapon is admitted, the law implies malice, unless its absence is made to appear to the satisfaction of the jury.

10. A prisoner is assumed to be sane—that is, to have the degree of mind and reason required to constitute criminal responsibility for his acts. If insanity is relied on as a defense, the burden is on the prisoner to establish it to the *satisfaction* of the jury.

11. The law recognizes "delirium tremens" as a form of diseased mind, which excuses crime committed while the prisoner was laboring under it to a degree that dethroned reason. But "dipsomania" and "moral insanity" are not recognized by our law as defenses.

12. Some forms of insanity, when shown to exist, are presumed to continue, but "delirium tremens" does not come within that class, although chronic insanity produced by alcohol and assuming a permanent form, such as to undermine reason, does.

13. The prisoner's drunken condition at the time of the commission of a crime does not repel malice and reduce his crime to a lower grade.

14. The test of accountability for crime is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong.

STATE *v.* POTTS.

INDICTMENT for murder, tried before *Graves, J.*, at Fall Term, (459) 1887, of the Superior Court of BEAUFORT County.

Verdict of guilty as to W. A. Potts, who, alone, appealed.

Attorney-General for the State.
D. G. Fowle for defendant.

SMITH, C. J. The prisoner, W. A. Potts, and Susan F. Lincke, are jointly charged in the indictment with the crime of murder, committed in June, 1887, upon the body of Paul Lincke, the husband of the last named. Upon their arraingment in the Superior Court of Beaufort, they pleaded not guilty, and upon trial the prisoner Potts was, by the jury, convicted, and the said Susan F. acquitted of the charge, the first of whom, after sentence of death pronounced against him, appeals to this Court. The case comes before us in a very unusual and imperfect form, none of the facts developed in the evidence being set out, so that we can understand the character of the homicide, and its attendant circumstances, and the application to them of the rulings complained of, except in general terms. If there were any doubt left upon our minds as to the grade of the crime, or of its having been committed by a responsible agent, we should not be disposed to proceed, but to remand the cause, or direct the issue of a *certiorari,* to the end that the facts as depending on the evidence and the testimony, material to their support, and pertinent to the errors assigned, be sent up, instead of our having to consider and pass upon propositions of law merely speculative, and whose bearing is imperfectly understood, in a matter so serious and involving human life. But, feeling no hesitancy in passing upon the prisoner's exceptions presented in the record before us, we feel at liberty, in this case, to examine and decide (460) them.

First Exception. When called on to plead to the indictment, the prisoner answered, and proposed it should be so entered: "I admit the killing, but was insane at the time of the commission thereof; therefore, not guilty." The preliminary portion of the answer was rejected, and the plea entered in the usual form, divested of the irrelevant and impertinent surplusage; and this was entirely proper. The inquiry put to him required a direct and positive response, and this is contained in the plea, not guilty, under which every defense to the charge, in repelling, or mitigating and reducing the offense to a lower grade, was admissible.

The defendant, Susan F., proposed to enter a motion and plea in abatement, on the ground that one of the grand jurors who found the bill was incompetent, he having a case at issue pending at the term

in court. We are relieved of the duty of considering the merits of this motion or plea (for it is designated by both names), for the reason that it was *after* pleading to the indictment, and not in apt time—*S. v. Watson,* 86 N. C., 624—and became wholly unimportant by the verdict of acquittal.

Second Exception. The appellant objected to the order for the drawing of the jurors, to constitute the special *venire,* from the jury box, and its execution made by the judge, for the reasons appearing to him sufficient to warrant it under section 1739 of The Code.

We see no valid reason assigned against the order, and the only variations of the facts, proved and found by the court, from the strict statutory provisions are, that the key, of which there was but one, which unlocks both apartments, was put by the chairman of the county commissioners with their clerk, the register, for safe keeping, and he swears that it has been kept in his office ever since the last regular draw-
(461) ing of jurors, accessible to no one, and in that the apartments are marked, "Jurors drawn," and "Jurors not drawn," instead of being numbered, number one and two. Those of the special *venire* were drawn from the apartment labeled, "Jurors not drawn." The ruling is correct, and the deviation from a direction merely of the act is not a material matter, as its essential provisions for the security of the accused have been observed. *S. v. Martin,* 82 N. C., 672.

Third Exception. The next exception is, to the ruling of the prisoner's challenge of a juror for favor, that he was indifferent and competent, and the same ruling applied to seven other similar challenges for cause.

The juror, on examination, stated that he had formed the opinion that the prisoner was guilty on report merely, never having heard the witnesses speak of the matter, and that while it would require evidence to remove the impression, yet he could, on hearing the evidence from witnesses and the law from the court, disregard the opinion formed and decide impartially.

The court found as a fact that the juror was indifferent, and this is conclusive and unreviewable in this Court. *Branton v. O'Briant,* 93 N. C., 99; *S. v. Cole,* 94 N. C., 958.

Fourth Exception. A juror, challenged by the State for cause, that he was related to the prisoner by affinity within the ninth degree, was held to be disqualified to sit in the cause. The juror swore that "he believed he was nearly related to the prisoner by marriage; that his wife was kin—he did not know in what degree—it might be fifth cousin. The court found that the juror was related to the prisoner within the ninth degree. The ruling upon the sufficiency of the cause

of challenge is sustained in *S. v. Perry,* Busb., 330; *S. v. Baldwin,* 80 N. C., 390, and other authorities. But a further and complete answer to the exceptions, referable to all the jurors is, that there were twelve peremptory challenges remaining to the prisoner, and he could have stricken from the list a juror obnoxious to him, in the exercise of the right of peremptory challenge, and a satis- (462) factory and impartial jury was obtained, and this right to an impartial jury is all that is secured to the prisoner. This is ruled, without reference to older cases in our reports in *S. v. Hensley,* 94 N. C., 1021; *S. v. Gooch, ibid.,* 987 (1021) and in *S. v. Jones,* 97 N. C., 469.

The remaining errors assigned, grew out of instructions asked and refused, and instructions given to the jury in place of them. The principal defense set up for the prisoner, was an alleged want of mental capacity to commit a criminal act, brought on by excessive use of alcoholic stimulants. The testimony of witnesses introduced by the State, who had long known the prisoner, one of whom saw him on the night of the homicide, and another the morning after, as to his habits and condition, was to the effect, that, while he drank freely, there were no indications of a disordered mind, other than such as is common to drunken men, and all concur, that, in their opinion, he was not insane.

The prisoner excepted to any expression of the opinion of the witnesses, because they were not experts, as to the prisoner's mental condition. Ever since the delivery of the able and lucid opinion of *Gaston, J.,* in *Clary v. Clary,* 2 Ired., 78, it has been the settled law in this State, that one who has opportunities of knowing and observing a person whose sanity is disputed, may, whether expert or not, give an opinion, based on such knowledge or information, as to his sanity or insanity. *Horah v. Knox,* 87 N. C., 483, and other cases. Experts alone can give an opinion upon facts shown by others, assuming them to be true. *S. v. Bowman,* 78 N. C., 509.

Of the twelve instructions prayed, all but five were given in form or substance, and one of these was refused, because there was no evidence to which it was pertinent.

The fifth is embodied in the eighth, and is in these words: "If the jury believe that the prisoner was a *'dipsomaniac,'* and by reason of the influence of such disease, became so drunk as to become (463) unconscious of his acts, and the act was done while in this condition, then the presumption of malice would be rebutted, and the prisoner would be guilty of manslaughter only.

The remaining two refused instructions, the eleventh and twelfth, are 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 an acquittal; in the other, to the reduction of the grade of the offense to manslaughter.

The charge to the jury was full and explicit, meeting the different aspects of the testimony, as far as we can see from the meagre statements sent up, and we deem it necessary to reproduce only so much of it as is pertinent to the matters presented in the appeal.

The jury were directed, that a presumption in favor of innocence prevailed, until overcome by evidence of the truth of the criminal charge, and this must be such as to remove all reasonable doubt from the mind.

That when such proof of the homicide is presented, matters in excuse or mitigation must appear, or be shown, not beyond a reasonable doubt, but to the satisfaction of the jury. The prisoner admitting the killing by means of a shot from a pistol, that instrument, thus used, is a deadly weapon, and the law implies malice, unless its absence is made to appear, and this must be to the satisfaction of the jury.

The prisoner, to be responsible for his act, must have legal capacity at the time to distinguish between good and evil, and to know what he was doing, to comprehend his relations towards others, the nature of his act, and a consciousness of wrong. In the inquiry as to the prisoner's mental condition he is assumed to be sane, that is, (464) to have the degree of mind and reason required to constitute criminal responsibility for his acts, but he may prove the want of such legal capacity by evidence of the presence of insanity.

The law recognizes the existence of a form of diseased mind known as *"delirium tremens,"* induced by the excessive use of stimulating drink, and if the homicide was committed while the prisoner was laboring under it to a degree that dethroned reason, the act would be excused, although the diseased condition was temporary. Some forms of insanity, when shown to exist, are presumed to continue; but this does not apply to *delirium tremens,* brought on by one's own procurement, and passing away with the removal of its exciting cause. The law recognizes a chronic insanity; when produced by alcohol, it assumes a permanent form, and is such as to undermine the reason. This species of diseased mind, when found in a person, is presumed to continue until rebutted, and while existing renders him irresponsible for what would otherwise be criminal.

Voluntary drunkenness does not excuse crime, nor does our law recognize as excusing what is called *"dipsomania,"* or distinguish be-

tween an irresistible impulse for intoxicating drinks and a mere inordinate appetite for them, brought on by long continued indulgence.

The measure of criminal responsibility is this: If the prisoner at the time of the homicidal act was in a state of mind to comprehend his relations to others, the nature and criminal character of the act, was conscious that he was doing wrong, he was responsible; otherwise, he was not, and such should be the verdict.

The jury, acquitting the *feme* defendant, rendered a verdict of guilty against the appellant Potts.

We think the law was fairly laid down, and as favorable to the prisoner as he could ask. Indeed, it would seem in one particular, more so. The charge appears to admit of a construction that puts upon the State the proof of sanity, when it becomes a matter (465) of controversy, though it need not be such as to remove all reasonable doubt, but only sufficient to satisfy the minds of the jury. This burden, with this measure of proof, rests, however, upon the accused, according to the repeated adjudications of the Court. *S. v. Brittain,* 89 N. C., 481; *S. v. Payne,* 86 N. C., 609.

The charge is strictly in accordance with *S. v. Haywood,* Phil., 376. We find no authority in support of the proposition contained in the prisoner's eighth instruction, that the prisoner's drunken condition, while not absolving him from all guilt, might repel the malice and reduce his crime to a lower grade, though earnestly pressed in the argument on his behalf. The test of accountability for crime is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong. This is settled in *S. v. Haywood, supra.*

We have not allowed, as exempting from the consequences of crime, what is called moral insanity; that is, an alleged uncontrollable impulse to commit an act, with the mental faculties in full force, to comprehend its criminality and wrong. *S. v. Brandon,* 8 Jones, 463. Nor can we entertain, as a defense, the insatiable thirst, intensified by long indulgence, which is denominated dipsomania—a word requiring an explanation of its meaning to plain men, such as are usually found upon a jury. *S. v. John,* 8 Ired., 330; *S. v. Sewell,* 3 Jones, 245.

Upon a review of the defenses, we find none sufficient to interpose between the prisoner and the penalty he has incurred in taking the life of a fellow man.

No error. Affirmed.

Cited: S. v. Wilson, 104 N. C., 873; *S. v. Barringer,* 114 N. C., 841; *S. v. Fuller, ibid.,* 891; *S. v. Kale,* 124 N. C., 819; *S. v. Kinsauls,* 126 N. C., 1096; *S. v. Bohannon,* 142 N. C., 697; *S. v. Banner,* 149

N. C., 523; *S. v. Cloninger, ibid.,* 572; *S. v. Hancock,* 151 N. C., 701; *S. v. Murphy,* 157 N. C., 617; *S. v. English,* 164 N. C., 510; *S. v. Terry,* 173 N. C., 765; *S. v. Mallard,* 184 N. C., 673; *S. v. Levy,* 187 N. C., 586; *S. v. Trott,* 190 N. C., 678; *S. v. Jones,* 191 N. C., 759; *S. v. Ross,* 193 N. C., 27; *Butler v. Insurance Co.,* 196 N. C., 205.

(466)

STATE v. JOHN W. SMITH AND OTHERS.

Forcible Entry—Landlord and Tenant.

Where the prosecutor occupied with his family a house belonging to the defendant, several hundred yards distant from the defendant's dwelling house, but on his plantation, under a contract, by which for his services as a laborer the prosecutor was to have furnished him a dwelling place and a monthly allowance of meal and meat, with the privilege of cultivating a small strip of land for his own benefit, and the defendant, by threats and demonstration of deadly weapons and an array of numbers, against which resistance would have been useless, drove the prosecutor out of the house: *Held,* that the relation of lessor and lessee existed between the defendant and the prosecutor, and that the defendant and those aiding and abetting him were guilty of a *forcible entry.*

INDICTMENT for forcible entry, tried before *Shipp, J.,* at January Term, 1888, of the Superior Court of WAKE.

The defendants are charged in the indictment with a forcible entry into the dwelling-house of the prosecutor, Jacob Etheridge, and expelling him therefrom, and upon the trial of their plea of not guilty, the jury find the facts in the following special verdict:

That the defendant, John Smith, hired the said Jacob Etheridge to work for him during the year 1887, as a laborer, on his farm in Wake County, agreeing to pay for his year's work fifty dollars in money, to furnish him with one bushel of meal and fifteen pounds of meat during each month of service, and a house to live in, and all the crops on three acres of land, which said Smith agreed to plow, and do all the plowing necessary for the crops which Etheridge might plant thereon, and Etheridge to do the other necessary work in the cultivation of the crop on the three acres; that Etheridge should have one-half of every Saturday as his own; that under said agreement Etheridge

(467) was put in and allowed to occupy a house on Smith's plantation some 300 or 400 yards from, and separate from Smith's dwelling-house, and Etheridge continued to occupy the same until 29 September, 1887, on which day said Smith and the other defendants

went to the house so occupied by Etheridge, he and his wife being then therein, as were the other defendants, when said Smith notified said Etheridge to get out of the house, and to remove all his household goods therefrom, telling him that he, said Smith, intended to take possession by force, if it should be necessary to resort to force, in order to get possession; that Etheridge said he would get out of the house if he, Smith, would give him time, to which the other replied, "No, you have got to get out right now"; that thereupon Etheridge left the house with his wife, who got together the household goods, and defendants carried them off and put them down on the edge of the road, the said Smith saying, "don't you let me catch you on the premises again"; that said Smith had in his hands a double barreled gun loaded with small shot, while defendant James had a pistol about his person which was seen by Etheridge, when the entry was made into the house by the former; that the other defendants accompanying Smith were his servants, two of them being his sons, and all went at his command, but no threats were made or force used by them; that Smith went on the premises to use such force as might become necessary to put Etheridge out of the house, and the others to aid him, if necessary, in doing so; that Smith, prior to this, had discharged Etheridge from his service for neglecting his work, and had given him notice to vacate the house; that Etheridge cultivated the three acres of ground whereon the house stood, Smith doing the plowing in cotton, corn and peas and potatoes; the cotton and corn crop being gathered by Smith previous to the expulsion, and which he still has in possession; that Smith was, before the removal of Etheridge and at that time, indebted to the latter, and still owes him, for which Etheridge has since sued and recovered judgment for $40, from which an appeal was taken by Smith, (468) and the action is still pending in the Superior Court of Wake.

If the court, upon these facts, is of opinion that the defendants are guilty, then the jury find them guilty; and if the court be of opinion that they are not guilty, the jury so find.

This is the substance of the findings in the special verdict; upon which the court adjudged the defendants not guilty, and directed the verdict to be so entered, and the defendants discharged; from which ruling and judgment the State appealed.

Attorney-General and J. B. Batchelor for the State.
R. H. Battle and S. F. Mordecai for defendants.

SMITH, C. J., after stating the facts: The opinion of the court seems to have been controlled by the ruling in the case of *S. v. Curtis,* 4 D. & B., 222, in which there was also a special verdict, the facts

contained in which were supposed to be essentially the same as those found in the present special verdict.

In that case *Ruffin, C. J.*, expressed the opinion that the entry and expulsion were sufficient in law to constitute the offense, if the possession of the house was in the tenant so as to make the entry of the owner unlawful; but that the possession, according to legal intendment, was in the defendant Curtis, and that he had a right to remove the occupant, provided "he did so without injury to his person or other breach of the peace."

In that case it was found that Curtis was lessee, for a term of years, of a tract of land near to the city of Raleigh, whereon he kept a boarding school for boys. There were several large buildings on the land, in one of which he and his family resided, and others were used for the accommodation of his pupils. There was also a
(469) small outhouse, with two rooms, within the yard or curtilage enclosing the other houses, but not connected with them by a common covering or roof, but the door of which opened into the yard. The outhouse had been built and used for recitation rooms for the pupils, but was afterwards used for lodging rooms for servants attached to the establishment. The prosecutor Pope was hired as a servant and steward, for the residue of the year at monthly wages, and was to be provided with board and lodging, suitable to his station, in the family, and he had for ten years previous held the same position in the school kept by previous proprietors, and occupied one of the rooms in the outhouse, and this he was permitted to do after his employment by Curtis, the other room being occupied, until his expulsion in October, 1838, after being discharged as a servant, for violating the rules of the school, and ordered to leave the premises. It is needless to set out the manner of his expulsion, since the only matter in controversy was, whether the prosecutor's occupancy was such as to bring the violent entry of the lessee under the condemnation of the criminal law, as an invasion of the prosecutor's possession. The ruling was against the State, and it is based upon the legal proposition, that the possession of the outhouse was in the defendant and not in the servant, who was permitted to occupy it merely as such, and for the defendant.

We do not think, in this feature of the case, it is the same as that now before us. Etheridge occupied, with his family, a separate and distinct dwelling, several hundred yards from that of the defendant Smith, and under a special contract by which, for his services as a laborer, he was to have furnished him a dwelling place and a monthly allowance of meal and meat, as well as the privilege of cultivating a small strip of land for his own benefit. Under this contract he went

into possession, raised the crop, and, while in the occupancy of the house, was driven out, by threats and a demonstration of deadly weapons, and an array of numbers, against which resistance (470) would have been useless, and perhaps have put his life in peril.

There were created, in our opinion, the legal relations of lessor and lessee between the parties, which did not warrant this invasion of the prosecutor's possession of the premises, no more than if the house had been on other lands of Smith instead of the plantation whereon he lived.

In *S. v. Ross,* 4 Jones, 315, the question arose as to the criminality of an entry upon land, in possession of one who had conveyed the title, but who continued to occupy under a parol agreement that he was to remain there many years. The entry was upon portions of the premises by force and after being forbidden, but the occupants of the house were not ejected, nor their possession of it invaded, nor entry made within the enclosure; these acts were held not to constitute the offense, and referring to conflicting rulings as to an entry under the title upon premises occupied by one who had none, *Pearson, J.,* suggests that the apparent discrepancies may be, perhaps, reconciled upon this distinction: "One having a right of entry may at common law use force, provided it does not amount to an actual breach of the peace, whereas one not having a right of entry is guilty of a trespass, indictable at common law, if he enter with a strong hand under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace."

The tendency of such an invasion of the prosecutor's possession, as is shown in this case, was towards a breach of the peace, which obviously did not take place because of the hostile demonstrations and declared purpose of the defendants, which, with the means in their hands, over-awed opposition and forced a surrender; and this, too, when the prosecutor was to occupy the house during the year of his contract of service. (471)

We think the law does not tolerate this summary method of seeking self redress, and that the prosecutor had a possession to warrant the commission of the imputed criminal act.

There is error, and judgment must be entered upon the verdict.

Reversed.

Cited: S. v. Lawson, 101 N. C., 719; *S. v. Eastman,* 109 N. C., 811; *S. v. Joyce,* 121 N. C., 611.

STATE v. DUNCAN HAZELL.

Unlawful Sale of Liquor, under chapter 175, section 34, Laws 1885—Indictment; form of, under said Act—Special Verdict, does not aid defective bills.

1. An indictment for unlawfully retailing spirituous liquors, under chapter 175, section 34, Laws 1885, is fatally defective which charges a sale "by the measure less than a gallon," because it fails to so specify the offense as to show whether the defendant is charged under the first or second paragraphs of the section.
2. *Semble*, that an indictment under the second and third paragraphs of said section should negative the fact that the liquor sold was of the defendant's own manufacture and sold at the place of manufacture, or the product of his own farm.
3. A distiller licensed under the laws of the United States cannot sell liquor of his own manufacture in violation of the laws of the State.
4. A sale of liquor three or four hundred yards from the distillery, though on the defendant's own farm, is not a sale "at the place of manufacture," within the meaning of the statute.
5. The findings of the jury in a special verdict do not aid a defective bill of indictment.

INDICTMENT for unlawfully retailing spirituous liquors, by the measure less than a gallon, without license, tried before *Clark, J.*, at the Spring Term, 1886, of the Superior Court of ALAMANCE County.

The jury return a special verdict, as follows: "That in June,
(472) 1885, John Jeffries bought of the defendant, Duncan Hazell, one gallon of whiskey, at defendant's store, on his plantation in Alamance County; that defendant had no State license to retail spirituous liquors, but was a licensed distiller under the laws of the United States, and the whiskey sold was of his own manufacture; that defendant's distillery was 300 or 400 yards distant from the store where this whiskey was sold, but on the same premises, which was a farm of forty acres belonging to the defendant, and that he had no other place of retailing liquors, this being his sole place of business.

The jury say, for their verdict, that if the court is of opinion, upon this state of facts, that the defendant is guilty, they so say for their verdict; and if, upon said state of facts, the court is of opinion that the defendant is not guilty, they return for their verdict that he is not guilty."

The court being of opinion that the defendant was not guilty, the verdict was so entered, with judgment that the defendant be discharged; from which the State appealed.

STATE *v.* HAZELL.

The indictment charges that the defendant, in the county of Alamance, "to one John Jeffries, spirituous liquors by the measure less than a gallon, unlawfully did retail, the said Duncan Hazell not having then and there a licence to retail spirituous liquors by the measure aforesaid," etc.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: Chapter 175, section 34, Acts of 1885, relating to the sale of spirituous liquors, requires a license: "First, for selling in quantities less than a quart, etc. Second, for selling in quantities of *one* quart and less than *five* gallons, etc. Third, for selling in quantities of five gallons or more, etc. . . . Nothing in this section contained shall prevent any person selling the liquors or wines of their own manufacture, at the place of manufacture, or, (473) any person from selling spirits or wines, the products of his own farm, without the license prescribed in paragraphs two and three."

The special verdict finds that the defendant was a licensed distiller under the laws of the United States; that the whiskey was of his own manufacture, and that it was sold at his store, 300 or 400 yards from his distillery, but on the same premises.

The facts, that the defendant was a licensed distiller, and that the whiskey was of his own manufacture, affords no immunity, if he sells contrary to the regulations and requirements of the laws of the State. *S. v. Joyner,* 81 N. C., 534, and the cases there cited.

Nor is a sale made 300 or 400 yards from the distillery, though on the defendant's farm, made "at the place of manufacture," within the meaning of the statute. This is settled by *S. v. Whissenhunt,* 98 N. C., 682.

But the indictment charges a sale "by the measure less than a gallon," and the special verdict finds, substantially, that the defendant sold "one gallon of whiskey." It will be noted that the saving clause in the section does not apply to the first paragraph or clause—that is, for selling in quantities less than a quart—but only to the second and third; and the indictment is fatally defective, in that it fails to so specify the offense as to show whether the defendant is charged under the first or second paragraphs. Less than a gallon may be a quart, or a pint, or a gill, and the finding of the jury does not aid the indictment, and judgment ought to have been arrested.

We suggest, whether an indictment, whether drawn under the second or third paragraph, should not negative the fact that the liquor sold was of the defendant's own manufacture, and sold at the place of manu-

facture or the products of his own farm, as seems to have been
(474) done in *S. v. Whissenhunt, supra.* See *S. v. Stamey,* 71 N. C., 202; *S. v. Miller,* 7 Ired., 275, and *S. v. Loftin,* 2 D. & B., 31.

Let this be certified. Judgment arrested.

Cited: S. v. Sutton, post, 476; *S. v. Dalton,* 101 N. C., 683; *S. v. Burton,* 138 N. C., 577; *S. v. Tisdale,* 145 N. C., 424.

STATE v. FREELAND SUTTON.

Spirituous Liquors; Indictment for Sale of—Laws 1885, Ch. 175, Sec. 34, Laws 1887, Ch. 185, Secs. 31, 45—Repeal of Criminal Statute; Effect of—Repeal by Implication.

1. Section 45, chapter 135, Laws 1887, repeals the laws "imposing taxes" on the subjects "revised," but does not repeal the penalties imposed for a violation of the revenue laws.
2. The proviso in section 34, chapter 175, Laws 1885, in reference to sale of liquor by distillers, etc., applies to sales of *one quart or more,* but not to sales of *less* than a quart. Sales "in quantities of *one quart or less,*" are excluded from the benefits of the proviso in section 31, chapter 135, Laws 1887.
3. An indictment charging that defendant unlawfully sold to A. B., "spirituous liquors by the measure less than a gallon, to wit, by the quart . . . not having license to sell spirituous liquors by the measure aforesaid," is fatally defective, both under the Laws of 1885, ch. 175, and the Laws of 1887, ch. 135, for reasons given in *S. v. Hazell, ante,* 471.
4. If the Legislature enacts a law in the terms of a former law, and at the same time repeals the former, this amounts in law to a reaffirmance and not a repeal of such law; and it continues in force for all purposes, without intermission. A repeal of a statute by implication is not favored by the courts.

INDICTMENT for selling spirituous liquors without license, tried before *Gilmer, J.,* at Spring Term, 1888, of ALAMANCE Superior Court.

The facts appear in the opinion.

(475) *Attorney-General for the State.*
No counsel for defendant.

DAVIS, J. The indictment charges that the defendant "to one W. F. Morton, spirituous liquors by the measure less than a gallon, to wit, by

the quart, unlawfully did sell . . . not having then and there a license to sell spirituous liquors by the measure aforesaid, contrary," etc.

The jury returned the following special verdict: "That about the middle of the summer of 1886 the defendant sold spirituous liquors by the quart, and prior to this time by the pint and quart, within two years prior to the beginning of this inquisition, to W. F. Morton; that the defendant at the time of such sales was agent of Dan Sutton, a distiller of spirituous liquors, whose distillery was in operation 300 yards from the place of selling, a public road intervening; that the distillery of the said Sutton was situated on an acre of land, leased by the said Dan Sutton for the purpose, and had been run off and the boundaries ascertained by a survey, and that the liquor sold was manufactured at said distillery; that the land on which the grocery, where the said sales were made 300 yards down the road, was a separate tract of land, but adjoining, belonging to the defendant, but mortgaged for five years to Dan Sutton, who was in possession, though not paying nor under any agreement to pay rent."

The jury find the defendant guilty or not guilty, as the court may be of opinion upon the facts.

"Upon this special verdict his Honor adjudges the defendant guilty. Defendant moves in arrest of judgment for that the act under which the defendant was indicted has been repealed. Motion allowed. Judgment suspended (arrested)." Appeal by the State.

The repealing section in the act of 1887 (ch. 135, sec. 45) relied on by the defendant relates to and repeals the laws "imposing taxes" on the subjects "revised," and does not relate to the penalties imposed for a violation of the revenue laws. They are not embraced in (476) the language of the repealing section, and a repeal by implication is not favored. *Jones v. Ins. Co.,* 88 N. C., 499. The proviso in the repealing section shows the intended scope and purpose of it.

But if it were otherwise, simultaneous with the repealing section, the penalties for a violation of the provisions of the revenue laws are enacted in substantially the language of the act of 1885, to make these apply to the provisions of the act of 1887. Even if it were a repeal of the act of 1885, as insisted by the defendant, "if the Legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a reaffirmance of the former law, which it does not in legal contemplation repeal. The provision is continued without any intermission." Bishop on Statutory Crimes, sec. 181.

It will be observed that the defendant is indicted for selling spirituous liquors "by the measure less than a gallon, to wit, by *the quart.*" The act of 1885, ch. 175, sec. 34, prohibits the sale of liquors, etc., in "quan-

tities *less* than a quart" without a license, and the proviso in reference to a sale at the place of manufacture by the distiller, or the products of one's own farm, does not apply to sales of *less* than a quart, but does apply to sales in quantities of *one quart* or more.

The act of 1887, ch. 135, sec. 31, excludes from the benefits of the proviso sales "in quantities of *one quart* or *less*." The indictment seems to have been drawn under the act of 1887, but, by the finding of the jury, the sale was before the passage of that act, "about the middle of the summer of 1886," and whether drawn under the one or the other it is fatally defective for the reasons stated in *S. v. Hazell, ante,* 471.

Upon this ground there would have been no error in arresting the judgment.

Affirmed.

Cited: S. v. Dalton, 101 N. C., 682, 683; *S. v. Deaton, ibid.,* 730; *S. v. Massey,* 103 N. C., 359, 361; *S. v. Williams,* 117 N. C., 754; *S. v. R. R.,* 125 N. C., 673.

(477)

STATE v. NARROWS ISLAND CLUB.

Navigable Waters, What Are; and Obstruction of—Indictment for Obstructing Water Course, at Common Law and Under Section 1123 of The Code.

1. Waters navigable in fact are navigable in law and, to that extent and for that purpose, *publici juris.*
2. The bed of lake or water course may be private property, but if the waters are navigable in their natural state the public have an easement of navigation in them, which easement the owner of the soil cannot obstruct.
3. This ruling is not in contravention of *S. v. Glenn,* 7 Jones, 321, because in that case the river was ascertained to be *unnavigable.*
4. An averment that the obstruction charged was not "for the purpose of utilizing the water as a motive power," etc., is essential in an indictment under section 1123 of The Code.
5. But to obstruct a navigable water course, three or four hundred yards long and equally wide, capable of navigation by a sloop drawing three or four feet of water, is indictable at common law, and the common-law form of indictment is sufficient.
6. Iron posts from two to three inches in diameter, driven into the bed of a navigable water course and projecting several feet above the water, are a nuisance *per se,* and the putting them into such water course is indictable.

7. Upon the trial of an indictment for obstructing a navigable water course it is not necessary to charge or prove that actual damage or injury has been suffered by any vessel, etc. It is sufficient if the acts charged have rendered navigation less secure and expeditious.

INDICTMENT for obstructing a navigable water course, tried before *Graves, J.*, and a jury at Fall Term, 1887, of CURRITUCK Superior Court.

Verdict and judgment against the defendant, from which it appealed to this Court.

The bill of indictment was as follows:

"The jurors for the State upon their oaths present that the Narrows Island Club, a corporation under the laws of North (478) Carolina, in Currituck County, on 1 March, 1886, a certain part of Currituck Sound, known as the 'Big Narrows,' which sound leads and runs from the Albemarle Sound to the Black Water River, which is and has been a common highway for the citizens of said State and county with lighters, boats and canoes to navigate said sound, pass and labor at their will and pleasure, without any impediment or obstruction, unlawfully, wilfully and injuriously did erect, place and put in said Big Narrows and highway there certain iron pipes, and unlawfully and wilfully doth continue said obstructions and impediment, by means of which the free passage and navigation of, in, through and upon the said Big Narrows is greatly obstructed, so that the citizens of said county navigating, sailing, rowing and repassing with their lighters, boats and canoes upon said water course could not so get over, sail, row, pass and repass with their boats upon said water in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do, to the great damage and common nuisance of all the said citizens navigating, rowing, passing and laboring with their boats aforesaid, upon, to and through the said water, contrary to the statutes in such case made and provided, and against the peace and dignity of the State."

The defendant pleaded not guilty, and that it was the owner of the land on which the alleged obstructions were erected. It admitted the erection of the pipes or rods by it, and claimed that it had a right so to do.

It was conceded by the State that the defendant's claim of title is under a grant from the State to one Sanderson and *mesne* conveyances, in a regular chain, to the defendant corporation, and that the obstructions charged in the indictment were within the boundaries of the grant aforesaid.

On the trial it was shown by the State that the Big Narrows was a part of Currituck Sound and was three or four hundred (479)

yards long and equally wide. That a sloop drawing three or four feet of water had gone through it. That it was mostly used for battery boats, flat-boats and skiffs, drawing from eight to eighteen inches of water. That it had been used for navigation by such crafts for twenty years. That boats laden with melons, fish, game and other freight for market passed through it. That the obstructions put in by defendant were dangerous to and impeded navigation, although no actual injury had been done to any vessel thereby. The obstructions consisted of iron posts from two to three inches in diameter set in the earth under the water and standing perpendicularly through and several feet above the water. There were several of these posts, some of them in the deepest part of the water, in the course usually taken by boats, etc., passing through the Big Narrows. The posts were put up by defendant to mark the boundaries of its property.

The defendant asked for the following special instructions:

"That if the water known as the Big Narrows is included in the boundaries of the Sanderson grant and cannot be navigated by sea vessels, and the tide does not regularly ebb and flow in it, then said water is in a legal sense unnavigable, although in fact sufficiently wide and deep to be navigable by boats and flats and rafts, and under such conditions the land covered by the water of the Big Narrows was open to be appropriated by grant from the State under the entry law, and the defendant as owner of said land [would not be guilty of a misdemeanor in erecting pipes thereon]."

The court gave the instruction with the exception of the words embraced in brackets and the substitution of "is" for "as" in the line preceding the first bracket, and added to the instruction thus modified the following: "But if the land was covered by water of suffi-
(480) cient depth for the passage of skiffs, canoes, schooners, fishing boats, hunting boats and battery boats, and the public had used the water as a public highway, although the title to the land may be in the defendant, the public would have such right of user for purposes of transportation, but for no other purpose, such as fishing or hunting. And if the defendant placed obstructions in the way thus used continuously by the public the defendant would be guilty."

The defendant excepted to the refusal of the court to give the instruction as requested and to the instruction given in lieu of the clause stricken out.

The defendant also asked for the following special instruction: "That if the waters described in the indictment were navigable waters, yet if the obstructions described therein as having been erected by the defendant did not obstruct [the natural flow of] the water and retard or en-

danger the navigation thereof, then the defendant would not be guilty of a misdemeanor in erecting the rods described in the indictment."

The court gave the instruction with the exception of the words between brackets, which words were left out. Defendant excepted.

The judge, in his general charge to the jury, instructed them that the question whether the pipes or posts were an obstruction to navigation was a question of fact alone and exclusively within their domain.

Attorney-General for the State.
L. D. Starke for defendant.

MERRIMON, J. We need not decide whether the grant from the State, under which the defendant claims title to the land covered by the water called "Big Narrows," charged in the indictment to have been obstructed, was or was not void. The evidence produced on the trial went directly to prove, and the jury found by their verdict, (481) that the water was part of a navigable sound, and that it was in fact navigable for a large class of useful vessels, and had been used by the public for the purposes of navigation for a long while—twenty-five or thirty years and perhaps longer. If the water referred to was thus navigable the public had the right to use the same for the purposes of a highway and navigation, notwithstanding the defendant may have been the owner of the bed of the river or sound. In that case it was not material for the jury to inquire whether the defendant was such owner or not.

Navigable waters are natural highways, so recognized by government and the people, and hence it seems to be accepted as a part of the common law of this country arising out of public necessity, convenience and common consent, that the public have the right to use rivers, lakes, sounds and parts of them, though not strictly public waters, if they be navigable, in fact, for the purposes of a highway and navigation, employed in travel, trade and commerce. Such waters are treated as *publici juris,* in so far as they may be properly used for such purposes, in their natural state. The public right arises only in case of their navigability. Whether they are navigable or not depends upon their capacity for substantial use as indicated. They can be so used only for the free passage of vessels; the public have only the right of navigation. The title to the bed of the river, lake or sound in such case, and all special privileges and advantages incident thereto vest and remain in the owner thereof, subject only to the public easement. He may use the land and whatever is incident to it, including the water over it, in such lawful way as he will, if in so doing he does not impede or interfere materially with navigation. The limited right of the public is para-

mount, and shall not be abridged. *Broadnax v. Baker,* 94 N. C., 675; *Hodges v. Williams,* 95 N. C., 331; Gould on Waters, secs. 86,
(482) 87, 90, 110; Wood on Nuisances, secs. 576, 577, 579, 580.

The learned counsel for the appellant pressed upon our attention *S. v. Glenn,* 7 Jones, 321, as an authority favoring strongly the absolute right of the owner of the whole bed of the river. This is certainly a misapprehension of the real meaning of that case. The river to which it referred was ascertained to be *unnavigable,* and the case does not contravene what we have here said. Indeed the court recognized the public right in case of the navigability of the stream. It said: "As the riparian proprietor of the land on both sides of the stream he is clearly entitled to the soil entirely across the river, subject to an *easement* in the public for the purposes of the transportation of lime, flour, and other articles in flats and canoes." It appeared that flat-boats were occasionally used in transporting the articles named.

It seems that the pleader intended that the indictment should charge an offense under the statute (The Code, sec. 1123) prohibiting the obstruction of water courses, but it cannot be sustained for such purpose because that statute provides that: "If any person shall wilfully fell any tree or wilfully put any obstruction, *except for the purposes of utilizing water as a motive power,* on any branch, creek," etc., and the indictment does not charge, as it should do, that the obstruction charged was not "for the purpose of utilizing," etc. Such charge is essential; without it, it might be, the obstruction was for a lawful purpose, and there would be no offense. *S. v. Norman,* 2 Dev., 222; *S. v. Tomlinson,* 77 N. C., 528; Arch. Cr. Pl., 25. Moreover, it may be doubted whether the statute was intended to embrace this and like cases.

But to obstruct a navigable water like that in question is indictable at common law, and we think the indictment should be upheld as sufficient to charge the common-law offense. *S. v. Parrott,* 71 N. C., 311.

We cannot doubt that the iron posts, from two to three inches
(483) in diameter, set in the earth under the water, and standing perpendicularly through and several feet above it, at the places and as described by the witnesses on the trial, were *dangerous per se* to the class of vessels that passed and repassed through the waters mentioned in the indictment. They were a standing menace to navigation, and though it did not appear in evidence that any vessel had suffered harm from them in the nature of the matter, many vessels might have done so, and the evidence tended so to prove, and the jury so found. It is not necessary that obstructions placed in the way of navigation should have actually interfered with and done it injury to render them a nuisance, it is sufficient to make them such if they rendered such navigation less

convenient, less secure, and less expeditious; it must be free and unobstructed by artificial impediments or dangers. Wood on Nuisances, secs. 607, 608, 613.

The court should have instructed the jury that if the iron posts were such as described, and were set in the way of navigation as charged in the indictment, they constituted a nuisance; but any error in this respect was cured by the verdict of guilty.

The instructions of the court to the jury were quite as favorable to the defendant as it was entitled to have, and the judgment must be affirmed.

No error. Affirmed.

Cited: McLaughlin v. Mfg. Co., 103 N. C., 108; *S. v. Pool,* 106 N. C., 700; *Bond v. Wool,* 107 N. C., 148; *Gwaltney v. Timber Co.,* 111 N. C., 560, 561; *Comrs. v. Lumber Co.,* 116 N. C., 732; *S. v. Baum,* 128 N. C., 602; *S. v. Twiford,* 136 N. C., 607.

(484)

STATE v. W. H. HARGRAVE.

Tales Jurors—Challenges to Jurors.

1. In respect to payment of taxes, the law as to the competency of regular jurors and tales jurors to serve is the same; and one who has not paid his taxes for the fiscal year preceding the first Monday in September next before the time he is called on to serve will be excluded on the challenge of either party.

2. A defendant, in an indictment for an offense other than capital, having only four peremptory challenges to jurors, cannot challenge a fifth juror peremptorily if he had first challenged one of the four for cause, which was properly disallowed.

INDICTMENT FOR LARCENY tried before *Connor, J.,* at February Term, 1888, of the Superior Court of ROWAN, whither it had been removed from the Superior Court of Davidson.

In selecting the jury the defendant challenged a tales juror tendered for cause who, upon his examination, stated "that he had paid his taxes for the year 1886, but had not paid them for the year 1887." That he had not paid his taxes for the last-mentioned year was assigned as cause of challenge. The court refused to allow it, and the defendant excepted. The defendant then challenged this juror peremptorily. He then challenged three jurors peremptorily, and challenged a fifth one without

assigning any cause of challenge, and the court disallowed this challenge, and the defendant again excepted.

On the trial there was a verdict of guilty and judgment accordingly against the defendant, from which he appealed to this Court.

Attorney-General for the State.
No counsel for the defendant.

(485) MERRIMON, J., after stating the facts: It is settled that a person selected and summoned as a juror, as provided by the statute (The Code, sec. 1722) is not eligible to be such if objected to, unless he shall have paid taxes for the fiscal year next preceding the time he was selected—that is the fiscal year next preceding the first Monday of September next preceding the time such juror shall be called to serve, because the statute cited provides that jurors shall regularly be selected on the Monday mentioned in each year. *S. v. Carland,* 90 N. C., 668; *S. v. Haywood,* 94 N. C., 847; *Sellers v. Sellers,* 98 N. C., 13.

And it has been repeatedly decided that a tales juror is not eligible, if objection be raised, if he has not paid taxes in like manner as jurors regularly selected. He is required to have the same qualifications as a regular juror, and in addition to these he must be a freeholder. He is eligible in that respect when he has paid such taxes as the regular juror is required to have paid to render him eligible and free from objection. *Lee v. Lee,* 71 N. C., 139; *S. v. Whitley,* 88 N. C., 691; *S. v. Carland, supra.*

Now the regular jurors of the panel that tried the defendant must regularly have been selected on the first Monday in September, 1887, and hence to be free from objection must have paid taxes for the fiscal year next preceding that time, which was the fiscal year 1886. *Sellers v. Sellers, supra.* The juror challenged was on a like footing as to the payment of taxes with regular jurors. He had paid taxes for the fiscal year 1886. The cause of challenge assigned was, therefore, unfounded, and the court properly disallowed it.

The second exception is without force because the defendant had exhausted his right to challenge four jurors peremptorily, as allowed by the statute (The Code, sec. 1190), before the last challenge noted was made.

There is no error. Affirmed.

Cited: S. v. Levy, 187 N. C., 586.

(486)

THE STATE v. CHARLES E. BULLARD.

Evidence—Proof of Character—General Reputation.

Where a defendant in an indictment offered evidence that his general character was good, it was inadmissible for the State to prove by the witness that there was a prevalent rumor that defendant had been guilty of a fraud named, which is wholly collateral to the issue before the jury.

INDICTMENT for obtaining goods under false pretensions, tried before *Meares, J.*, at November Term, 1887, of the Criminal Court of NEW HANOVER.

The indictment on which the defendant was tried and convicted in the Criminal Court of New Hanover charges him with having obtained from the prosecutor, Rufus W. Hicks, by means of false and fraudulent representations of the ownership of a large quantity of rosin by the partnership firm of C. E. Bullard & Co., he being a member thereof.

On the trial the State introduced as a witness William F. Melvin, the other partner, and examined him in support of the charge. On the cross-examination defendant's counsel, having first inquired of the witness if he was acquainted with the general character of the accused, and received an affirmative reply, asked what was his general character and to this the witness answered "that a majority of the people said that his character was good." Thereupon the solicitor said to the witness, "You say that the majority of the people say that the defendant's character is good, what do others say of his character?" The question was objected to but allowed, and defendant's exception to the ruling entered. The witness answered, "Others said that defendant is a hard case." The solicitor then put the further interrogatory to the witness: "Do you not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of Worth & Worth?" This was also objected to, and the objection being overruled and exception being taken to the ruling, the witness answered: "The defendant had some kind of an entanglement with the firm of Worth & Worth, and turned some some mules to them in settlement, and it was talked about." (487)

Attorney-General and J. D. Bellamy for the State.
D. L. Russel for defendant.

SMITH, C. J., after stating the facts: The only question we propose to consider in disposing of the appeal is raised by the exception to the last interrogatory and the response thereto.

The information elicited from the witness, in itself not very definite nor plainly prejudicial to the defendant, but taken in connection with the inquiry to which it responds, it cannot but be injurious to the defendant, and its import must be ascertained by their obvious relations.

The question is, in substance, Did not the defendant, according to report, practice a fraud upon the firm named? The answer is in a degree in the affirmative, called by the witness "an entanglement," to extricate himself from which he had it adjusted by letting the firm have mules. This, then, is a specific interrogatory as to another fraudulent act, wholly collateral to the issue before the jury, and though offered in disparagement of the defendant's character, was, we think, clearly inadmissible for that or any other injurious purpose as the case then stood, and there was error in its reception. It was not less so because resting in rumor than if supported by direct proof of the fact. In either case the imputation of the offense would be open to contradiction or explanation from the witness, and thus other distracting issues would be formed, well calculated to mislead the jury in determining the truth of the present criminal charge. Such discrediting information (488) may be sought from a witness under examination as to himself, because the inquiry stops with his answer, which is conclusive, and he may well be supposed to meet it when only addressed to himself. Such has been the general if not uniform practice in this State, and the rule is just and reasonable in the conduct of judicial trials, and supported by authority.

In *S. v. Boswell,* 2 Dev., 209, *Toomer, J.,* in delivering the opinion, thus lays down the rule of practice:

"A witness introduced to impeach the general character of another should not be permitted to give evidence of particular facts, nor repeat the mere hearsay of strangers to the witness whose testimony is intended to be discredited. He should only speak of the general moral character of the witness as known among his neighbors and acquaintances. The discrediting witness should not express an opinion founded on his knowledge of particular facts nor upon the hearsay of strangers to the witness intended to be discredited."

To this we may add, nor should the jury form an opinion based on such information or report.

In essentially the same language *Henderson, C. J.,* in *Barton v. Morphes,* decided at the next term and reported in the same volume at page 520, reaffirms the rule: "Where character is not in issue," he remarks, "but comes in question incidentally as that of a witness does, the rule is that specific charges of criminal or corrupt acts are not to be heard to impeach it. Two reasons are given for the rule, either of which I think is sufficient to sustain it. The first is the number of

issues such evidence is calculated to create, thereby consuming the time of the court and abstracting the mind from the main issue, the other is that both the party and witness would almost always be wholly unprepared to meet and repel the charges. But these reasons do not go to exclude proof of bad character by common report or reputation, for that is single in its nature, and but one issue can arise upon it." But the same reason does not apply to evidence disparaging to the (489) witness and drawn from himself, as we have already stated and as decided in *S. v. Cherry,* 63 N. C., 493.

The ruling in *S. v. Perkins,* 66 N. C., 126, where it is held that upon a cross-examination of one witness, who has testified as to the character of another, he may be asked to name the persons whom he heard speak in derogation of the character of the latter, is not in conflict with the other cases, for the question is general and but a means of finding out the extent of the bad repute and its value as discrediting evidence. To the like effect are the text-books on the law of evidence. 1 Whart. Cr. Law, sec. 814; 1 Green. Ev., secs. 448, 449.

The inquiry allowed in this case was of a specific act of deceit and fraud, and this resting on rumor only, and to what extent the rumor prevailed does not appear akin to that attributed to him in this indictment.

There is error, and the verdict must be set aside in consequence of it and a *venire de novo* awarded.

Error. *Venire de novo.*

Cited: Nixon v. McKinney, 105 N. C., 29; *S. v. Austin,* 108 N. C., 783; *S. v. Walton,* 114 N. C., 786; *Marcom v. Adams,* 122 N. C., 226; *S. v. Castle,* 133 N. C., 776; *Coxe v. Singleton,* 139 N. C., 362; *S. v. Arnold,* 146 N. C., 603; *S. v. Holly,* 155 N. C., 493; *S. v. Gouge,* 157 N. C., 607; *Edwards v. Price,* 162 N. C., 245; *S. v. Steen,* 185 N. C., 780; *S. v. Brodie,* 190 N. C., 557; *S. v. Adams,* 193 N. C., 582; *Hill v. Hill,* 196 N. C., 473.

STATE v. C. P. WARREN.

Recordari; Practice in Granting—Section 907 of The Code—Certiorari—Premature Appeal.

1. A justice of the peace, before whom a warrant for bastardy was returnable at 10 a. m., of his own motion changed the place of hearing to a point eight miles distant and in another township, and the hour of hearing to 1 P. M. The relator was not notified of the change of the place

of trial until 10 a. m. She protested against the place selected for the trial, on account of the distance and because she had no means of riding to it. The roads were in wretched condition, and it rained all day. The justice, however, went to the place appointed, tried the case, in the absence of relator and the State's witnesses, and discharged the defendant. Upon being notified of the discharge of the defendant, the relator gave the justice notice of appeal, and he promised her to send up the papers to the next term of court. He failed to do this, assigning as a reason that his fees had not been paid. The relator, finding out at court that the appeal had not been sent up, applied at that term for a writ of *recordari: Held*, that upon these facts the motion of the relator to put the case on the trial docket was properly granted.

2. Under section 907 of The Code, a justice is not authorized to remove the place of trial of a cause beyond his township.

3. An application for a writ of *recordari* as a substitute for an appeal need not contain an averment of merits when the appeal was lost by the conduct and neglect of the justice who tried the case.

4. It is not error to grant a writ of *recordari* as a substitute for an appeal without requiring security, when the execution is not stayed, and no legal default is imputable to the party seeking the relief; and the writ may be granted *in forma pauperis*.

5. In ordinary cases, when a writ of *certiorari* as a substitute for an appeal issues from this Court, an undertaking as upon appeal must be given in this Court or in the court below; but if the applicant would be entitled in law to appeal *in forma pauperis*, the writ may issue without any undertaking being given.

6. An appeal from an order of the Superior Court for the docketing of a case brought up from a justice's court by *recordari* is premature and will be dismissed.

(490) MOTION to docket a bastardy proceeding for trial upon the return of a writ of *recordari*, heard before *Phillips, J.*, at May Term, 1887, of DURHAM Superior Court.

The facts appear in the opinion.

Attorney-General and A. W. Graham for the State.
R. C. Strudwick for defendant.

SMITH, C. J. One Belle Graham having given birth to a bastard child, the paternity of which she charges upon the defendant, (491) on 18 January, 1887, sued out a warrant against him from Thomas Lipscomb, a justice of the peace, in the township of Lebanon, in Durham County, which was returned and came on for trial on the 27th day of the same month. On the affidavit of the defendant "that he could not get justice before the said Lipscomb," the cause was

transmitted to one J. G. Latta, a justice within the same township, to be taken up and tried at the hour of 10 a. m. on Saturday, two days thereafter. The parties appeared before him accordingly, the mother of the child, accompanied by her father, Richard Graham, when she was informed by the justice that the trial had been removed to Durham, outside the limits of Lebanon Township, and would be taken up and disposed of at 1 o'clock of the same day. Against this removal the said Richard, who was one of the witnesses in support of his daughter's evidence, warmly protested, declaring that it would be impossible for them to appear at Durham in that short interval, and that if said Latta persisted in his purpose and sent the case beyond the township limits and there decided against her, with his knowledge of their inability to be present, she desired an appeal to the Superior Court. When this transpired it had been raining, and after a short cessation the rain began again to fall, and so continued to do throughout the day.

Durham was seven or eight miles distant, the road leading thereto "in a wretched condition," and the complainants were without means of transportation of their own or money to procure it. These considerations did not influence the justice, who with the defendant proceeded to Durham and there, associating another justice with him, proceeded in the absence of the other party to hear and determine the action against the relator, and discharged the defendant. On the 31st of the month of January she, hearing what had been done, gave Latta notice of her appeal and requested him, and he so promised, to send up the papers to the next term of the Superior Court. The (492) papers were not transmitted, but on the second Monday of March, the first day of the next term of the said court, she learned that the excuse made for such neglect was the non-payment of the fee of thirty cents, to which the said justice was entitled.

These facts were found by the judge and are the basis upon which application was made and allowed for the issue of the writ of *recordari* at that term, which came on to be heard at May Term, following, upon the defendant's motion to dismiss the proceedings, which was disallowed, and the relator's motion to order the cause to be put upon the trial docket, which was granted, when the defendant appealed.

The irregular and unauthorized action of the justice in removing the place of trial beyond the limits of his township, in disregard of the provisions of the statute, The Code, sec. 907, and in the face of such considerations as were brought to bear upon his judgment, and such knowledge as he himself had of the inconveniences and difficulties of so early a hearing and at a point so difficult to reach on foot, savors very little of a disposition to have a fair and impartial trial of the charge against

the defendant, and fully entitles the relator or the State to the relief sought and awarded in the Superior Court.

The appellant here assigns as error, in the award of the writ to bring the record up to the Superior Court, that it issued in the absence of an averment of merit in the application. The answer to this objection is obvious. The controversy was *one of fact,* in respect to the paternity of the child, the testimony being in conflict. And this appears in the statement of the case itself. But here it was not necessary to show a ground of action as in cases of applications to this Court for the analogous writ of *certiorari,* under numerous rulings, since the *appeal was lost by the conduct and neglect of the justice* and his disregard of his promise to transmit the necessary papers on appeal to the Superior Court,

(493) as is held in *Collins v. Nall,* 3 Dev., 224.

It is further objected that a second undertaking is required, and the court had no power to dispense with it and allow the proceedings to be further prosecuted *in forma pauperis.*

But the suit originating before a justice of the peace, an appeal may be taken without security, unless when further action in enforcing the judgment is to be restrained; and the same principle governs when the writ is asked as a substitute for an appeal lost, with no legal default *imputable* to the party seeking the relief. *Estes v. Hairston,* 1 Dev., 354; *Brittain v. Mull,* 93 N. C., 490.

But in ordinary cases, where the writ of *certiorari* issues from this Court, the undertaking as on appeal may be given in the court below or it may be dispensed with, when it would not have been required at the taking of the appeal, under circumstances allowing it to be done *in forma pauperis. Stell v. Barham,* 86 N. C., 727; *Lindsay v. Moore,* 83 N. C., 444.

While then we see no error in the conduct of the court below in the particulars specified, we think the proceeding had not so far progressed as to warrant the interruption caused by the appeal, and the appeal must consequently be dismissed.

In *Spaugh v. Boner,* 85 N. C., 208, *Ruffin, J.,* speaking for the Court, expressed "serious doubts as to the point whether an appeal would lie from the refusal of the judge in the court below to dismiss it," an appeal returned by a justice in a case where the judgment was by default, and notice of appeal had not been given within the prescribed time.

In *West v. Reynolds,* 94 N. C., 333, it is said "that where the ruling complained of is made in the progress of a cause and its furtherance towards a trial upon its merits, there is no reason why we should be prematurely called on to exercise appellate power at once, as no

(494) injury results from the refusal."

It is needless to multiply authorities upon the point for the practice has been fully established, and is again declared at this term in *Davis v. Ely, ante,* 283.

There was no occasion for the present appeal and it must be dismissed.

Appeal dismissed.

Cited: Lambe v. Love, 109 N. C., 306; *S. v. Griffis,* 117 N. C., 714; *Hunter v. R. R.,* 161 N. C., 505.

STATE v. VAN JOHNSON.

Rape of Child Under Ten—Indictment Under Section 1101 of The Code; Form of.

1. Where an indictment for rape was in the usual form, charging the act to have been with force and *against the will* of prosecutrix, it was error to instruct the jury that if the prisoner unlawfully had connection with prosecutrix *with her consent*, she being at the time under ten years of age, he was guilty.
2. If a child under ten years of age is *forcibly* ravished, her age need not be set out in the indictment. If she *consents* to the connection her age must be charged.

INDICTMENT for rape, tried before *Avery, J.,* and a jury at Fall Term, 1887, of EDGECOMBE Superior Court.

The facts appear in the opinion.

Attorney-General for the State.
J. L. Bridgers for defendant.

SMITH, C. J. The prisoner is charged with committing a rape upon the person of Dilsey Ann Hyman, and, after his arraignment and pleading not guilty, was tried and convicted by the jury at Fall Term, 1887, of the Superior Court of Edgecombe. The form of the (495) indictment is as follows:

STATE OF NORTH CAROLINA—EDGECOMBE COUNTY.
Superior Court, Fall Term, 1887.

The jurors for the State, upon their oath, present: That Van Johnson, late of the county of Edgecombe, on 5 March, *Anno Domini* 1887, at and in the county aforesaid, with force and arms, in and upon one Dilsey Ann Hyman, in the peace of God and the State of North Caro-

lina, then and there being, violently and feloniously, did make an assault, and her, the said Dilsey Ann Hyman, then and there violently, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

GEO. H. WHITE, *Solicitor.*

It is unnecessary to enter into a consideration of the exception to the method of proving the character of the prisoner, which was put in issue by his own voluntary act, in becoming a witness in his own behalf—*S. v. Efler,* 85 N. C., 585—and we pass it by with the single remark that in our opinion it is without force, and proceed to an examination of the portion of the charge complained of after verdict and on the motion for a new trial. It is as follows:

1. If the prisoner at the bar unlawfully and carnally knew Dilsey Ann Hyman, forcibly and against her will, at any time before the finding the bill of indictment, he is guilty.

2. If the prisoner at the bar had unlawful and carnal knowledge of and abused Dilsey Ann Hyman, she being at the time a child under ten years of age, the prisoner is guilty, whether she consented or not.

As abstract propositions of law the charge is not open to objection,
(496) for rape may be committed upon a female of any age, as well when she is under ten years of age or more, the difference being that in the former case the crime is not mitigated by consent of the youthful victim of the outrage.

The indictment charges that the connection was brought about by force and against the will of Dilsey; and while an indictment or a count in it, properly framed, to which the charge would apply, would warrant its being given, the allegation of the use of force in consummating the criminal purpose must be followed with sustaining proof, otherwise the jury could not convict.

The indictment is sufficient in form to warrant the verdict, if force was in fact resorted to, without reference to the age of the victim of the prisoner's unrestrained lust, and this would be directly responsive to its averments. If, however, she did voluntarily assent to the intercourse, being under the age mentioned, although the offense would not be lessened thereby, and the prisoner could be convicted and punished under an indictment charging the statutory offense—The Code, sec. 1101—yet such is not the charge here preferred against the prisoner.

In *S. v. Farmer,* 4 Ired., 224, upon a similar indictment, it was held to be unnecessary to aver that the female was ten or more years of age, and *Daniel, J.,* rendering the opinion, remarks: "An indictment for rape never states the age of the female that has been ravished. If indeed

she be under the age of ten years, then *it is averred in the indictment* because, by force of the statute, abusing such a female is made felony, whether she consent or not."

A similar ruling is made in *S. v. Storkey,* 63 N. C., 7, wherein *Reade, J.,* says: "Nor is it necessary to state the age, except when the victim is under ten, *nor even then unless the act is with the child's consent.*"

This clearly implies the necessity of such averment as to age, if a conviction is to be had when there was consent, for a child has volition at such age as well as an adult, but it does not absolve from (497) guilt.

The error, then, consists in telling the jury that under this indictment they could convict the prisoner if the aggrieved girl was under ten years, and it was immaterial whether she consented or not to the prisoner's embraces.

The forms, so far as we have examined, in prosecuting for such abuse a female child under the statutory age, contain an averment as to the age, and in principle this seems to be necessary to let in proof of the crime. The evidence as to age was conflicting, but the direction to the jury to disregard the age, and if satisfied beyond a reasonable doubt of the commission of the act to convict, even if assented to, and she was, when it occurred, less than ten years of age, is error. In this there is error, and the judgment must be reversed and a *venire de novo* awarded.

Error. *Venire de novo.*

STATE v. J. H. LYLE AND OTHERS.

Eminent Domain—Forcible Trespass—Town Charter, Ch. 58, Sec. 16, Private Acts 1887—Condemning Land for Streets.

1. It is settled law of this State that private property may be taken, under authority from the State, for public uses, upon just compensation to be made to the owner. But compensation must be provided for to warrant the taking. This is a fundamental condition to the exercise of the right of eminent domain, although such a condition is not expressed in the organic law. A statute authorizing the seizure of private property, in exercise of the right of eminent domain, but making no provision for compensation to the owner, would be void.

2. The payment for need not precede the taking of property, under the right of eminent domain, nor is a jury indispensable in assessing the damages. The owner is confined to the special remedy given him by the statute under which his property is seized.

3. Where a town ordinance authorized private property to be taken for the opening, extension and widening of streets, and provided for compensation to be made after the taking: *Held*, that officers of the town who seized the property of a private owner, under an order of the town commissioners condemning it for a street, were not guilty of a forcible trespass, if they used no more force than necessary, although at the time of seizure the owner had not been paid and he was present, forbidding them.

4. Under the charter of the town of Reidsville, chapter 58, section 16, Private Acts of 1887, it is not necessary that the damages be ascertained and paid *before* taking private property for widening a street. It is the meaning of the act that the damages shall be ascertained and paid *after* the seizure.

5. A town charter authorizing the taking of private property for public streets provided that if the owner of the condemned land and the town commissioners could not agree on the damages the matter should be referred to arbitrators, of whom each party should choose one, the arbitrators to select an umpire in case of disagreement. It was made the duty of such arbitrators to ascertain the damages suffered by and benefits accruing to the landowner by opening the street, and both parties were allowed an appeal to the Superior Court. The damages agreed upon, or awarded, were directed to be paid "as other town liabilities, by taxation": *Held*, that such charter is valid and vests in the town commissioners plenary authority to pass an ordinance taking land from a private owner for street purposes.

(498) INDICTMENT for forcible trespass, tried before *Clark, J.*, and a jury at Spring Term, 1888, of ROCKINGHAM Superior Court.

Judgment in favor of defendant on a special verdict. Appeal by the State. The facts are stated in the opinion.

Attorney-General for the State.
No counsel for defendant.

(499) SMITH, C. J. The defendants, four in number, are charged in the indictment with a forcible trespass in entering upon the lot of C. J. Matthews, he being personally present and forbidding the same, and tearing down and removing a part of the enclosing fence; and upon trial of three of them, who come into court and entered the plea of not guilty, the jury returned a special verdict in these terms:

That C. J. Matthews was, on 11 October, 1887, owner of and in possession of a lot fronting on Main Street, in the town of Reidsville, N. C.; that shortly prior to that date the commissioners of that town, claiming to act under the authority of section 16 of their charter, Private Laws of 1887, ch. 58, had a survey made of said street, and passed an ordinance to widen the same to 60 feet; that to do so would

take in something less than two feet of the front of Matthews' yard, including his front fence; that an order was thereupon issued by the commissioners to the defendant Lyle, street commissioner of the town, to remove said fence, and he, with his co-employes, charged in the indictment, proceeded to do so; that the prosecutor came out and forbade the tearing down of the fence, but the defendants persisted and continued to do so; that Matthews had been given previous notice to the making of the order of removal, but there had been no other condemnation of the strip of land.

That the said order was in this form:

That the street commissioners be ordered to notify all parties having fences or palings encroaching upon the streets or sidewalks of the town, as defined by the survey of P. M. Fontaine, adopted this day, 8 June, 1887, to remove said obstructions within sixty days. If any party or parties fail to comply with the above, the street commissioner is hereby ordered to remove the same at expense of owner or owners.

That upon these facts, if the court is of opinion that the defendants in law are guilty, the jury find them guilty; if upon (500) these facts the court is of opinion that in law the defendants are not guilty, the jury find them not guilty.

The court being of the opinion that the defendants are not guilty upon the finding, the verdict was so entered, and from the judgment discharging the defendants, based upon said ruling, the State appeals.

The section in the charter incorporated in the verdict, by reference, and from which the commissioners derive their authority to pass and enforce their order, is as follows:

The commissioners shall have power to lay out and open and name any new street or streets within the corporate limits of the town, whenever by them deemed necessary, and shall have power at any time to *widen,* enlarge, change, or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the town, and shall have full power and authority to condemn, appropriate, or use any land or lands necessary for any of the purposes named in this section, upon making a reasonable compensation to the owner or owners thereof. But in case the owner of the land and the commissioners cannot agree as to the damages, then the matter shall be referred to arbitrators, each party choosing one, who shall be a freeholder and a citizen of the town, and in case the owner of the land shall refuse to choose such arbitrator, then the mayor shall, in his stead, select one for him; and in case the two chosen as aforesaid cannot agree, they shall select an umpire, whose duty it shall be to examine the land condemned and ascertain the damages sustained and the benefits accruing to the owner in consequence of the change; and the award of the arbitrators shall be conclusive of the

right of the parties, and shall vest in the commissioners the right to use the land for the purposes specified; and all damages agreed upon by the commissioners or awarded by the arbitrators shall be paid as other town liabilities by taxation: *Provided,* that either party may
(501) appeal to the Superior Court, as now provided by law.

Ever since the ruling in the case of the *Raleigh and Gaston R. R. Co. v. Davis,* 2 D. & B., 451, decided in 1837, after full argument and an elaborate and exhaustive discussion of the subject, it has been deemed and acted on as the settled law in this State that private property may be taken under authority of the State for public uses, upon just compensation to be rendered to the owner, to be ascertained in the mode prescribed by law, and that the payment need not precede such taking, nor is a jury indispensable in assessing the damages therefor. The principle is recognized by the Court in *Freedle v. N. C. R. R. Co.,* 4 Jones, 89, determined in 1856, but compensation must be provided for as well as the uses for which the property is taken be public to warrant the taking and appropriating. *S. v. Glen,* 7 Jones, 321. This is a fundamental condition, though not expressed in the organic law, underlying the exercise of the legislative right of eminent domain.

The controversy in the present case turns upon the construction of the charter, which has been recited in full, and whether, in providing the method for ascertaining the compensation to be paid the owner and the means by which this is to be done, a prepayment is necessary before the property can be taken, and this following the condemnation in the mode pointed out in the enactment.

Our examination of the statute and the terms in which the power to "widen, enlarge, change or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the town," is conveyed to the commissioners, satisfies us that it vests in them plenary and ample authority to pass the ordinance for widening the streets and taking the narrow strip from the front of the yard of the prosecutor required for the purpose.

We think, also, the manner in which funds are to be raised to
(502) make compensation, after the amount has been determined, implies that it may be made *after* the property is taken and applied to the use of the public. It is true that the condemnation, appropriation and use are only authorized "upon making a reasonable compensation to the owner," but this is not necessarily a condition precedent to any action in the premises on the part of the town authorities, but are inseparably incident to the full and complete exercise of the delegated power and obligation put on them. If strictly construed, payment would be required before it could be known what sum was to be paid, unless a voluntary agreement between the parties should fix it;

for the *condemnation* as well as use of the premises upon this interpretation alike is dependent on a previous compensation made. The very manner of raising the necessary funds by taxation presupposes the ascertainment of the compensation, since otherwise the commissioners could not know what sum to levy for the purpose.

The delays, attendant upon an inquiry upon this point, furnished strong reasons for not putting a meaning upon the words that would postpone all action, the public benefit, until the damages are paid. For whatever expedition might be used to determine the amount, an appeal, which is given first to the Superior and thence to the Supreme Court, might so prolong the proposed improvement, and this at the single instance of one of many equally interested and not resisting, until its practical advantages might become almost valueless. Could it be intended that such obstructions should, at the will of one discontented owner along the line of the street, be allowed to be put in the way to the disadvantage of all others? And do the words in which it is expressed reasonably admit, still less require, such an interpretation? We think they do not, and that the town authorities, as in the case of the railroad legislation, may at once proceed, when they have determined on the enlargement of a street, to have the work done, and no private owner can offer forced resistance for the sole reason that his (503) land has not been designated, condemned and paid for, and he must await his compensation when it can be raised in the statutory method by taxation, unless the funds are already in the treasury and can be lawfully thus applied.

"In the absence of controlling constitutional provisions," in the language of *Cooley, J.*, "it is competent for the State to authorize municipal corporations to take private property for public use *without first making payment,*" italicised in the text to give emphasis to the words. Const. Lim., sec. 480.

So where remedy or means of redress is afforded the owner of the land he must pursue that and can have no other action. *McIntire v. The W. N. C. R. R. Co.*, 67 N. C., 278, and as a corollary it is plain he could not seek redress by his own hands, nor legally resist those charged with the duty of making the removal. If, however, no remuneration were provided for, the seizure would be unlawful, and the statute, which purports to give authority, purely arbitrary, would be void. *S. v. Glen*, 7 Jones, 321.

As the persons indicted used no unnecessary force in carrying out the orders of the commissioners in enlarging the width of the street, they have not committed the illegal act charged, and were, unless the State desired to prefer other charges, entitled to their discharge.

There is no error. Affirmed.

Cited: Henderson v. Davis, 106 N. C., 94; *S. v. Jones,* 139 N. C., 619, 620, 637; *S. v. Wells,* 142 N. C., 594; *Comrs. v. Bonner,* 153 N. C., 71; *Jeffress v. Greenville,* 154 N. C., 496; *Luther v. Comrs.,* 164 N. C., 242; *R. R. v. Ferguson,* 169 N. C., 71; *Lang v. Development Co., ibid.,* 664; *Bradshaw v. Lumber Co.,* 179 N. C., 504; *Parks v. Comrs.,* 186 N. C., 498; *Long v. Rockingham,* 187 N. C., 203; *Rouse v. Kinston,* 188 N. C., 10.

(504)

STATE v. JIM (ALIAS GEORGE) GOINGS.

Appeal—Practice on Arrest of Judgment.

When a prisoner against whom a general verdict of guilty had been rendered on an indictment with two counts, charging offenses of different grades, moved in arrest of judgment, and upon refusal of his motion he appealed to the Supreme Court, where that judgment was reversed, and upon the opinion being certified to the court below the prisoner moved for his discharge: *Held,* that an order denying this motion was interlocutory and not appealable, it being open to the solicitor (1) to enter a *nol. pros.* as to one of the counts and try on the other; (2) to send a new bill before the grand jury and ask that prisoner be held until it should be returned; or (3) try upon the old indictment and elect, after the evidence was in, upon which count he would ask a verdict.

MOTION for the discharge of a prisoner in an indictment, in two counts, for larceny, and receiving a stolen horse, heard before *Clark, J.,* at January Term, 1888, of the Superior Court of ROCKINGHAM.

There had been a general verdict of guilty at the preceding term; the prisoner moved in arrest of judgment; the motion was refused, and judgment rendered against prisoner.

In this Court the judgment below was declared erroneous, and this decision being certified, defendant moved for his discharge. His motion was denied and prisoner again appealed.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. When this case was before us at the last term (*S. v. Goings,* 98 N. C., 766), we decided that the judgment therein was erroneous, and, in effect, that no judgment could be rendered upon the verdict, for the reasons then stated. The verdict was nugatory,
(505) and the court should have set it aside; but if it had done so, it would not have followed, as a necessary consequence, that the

prisoner should be discharged. The solicitor for the State might have entered a *nolle prosequi,* as to one of the two counts in the indictment, and tried him upon the other; or he might have sent a fresh bill of indictment before the grand jury, and have asked that the prisoner should be held until they could take action; or the prisoner might have been put upon his trial upon the present indictment, the court requiring the solicitor, at the close of the introduction of evidence on the trial, to elect upon which count of the indictment he would insist upon a verdict. *S. v. McNeill,* 93 N. C., 552.

The order of the court denying the motion of the prisoner that he be discharged, was simply interlocutory—it did not determine the action, because of the reasons stated above. He might have excepted to the order, if he saw fit, and had his exception noted in the record, so that, if need be, he could have the benefit of it upon appeal from the final judgment.

The action is pending before the Superior Court, to be disposed of in some such way as suggested above, and if this shall not be done in the course of procedure, the prisoner will have the right to ask to be discharged, upon the ground that the State fails to prosecute regularly and diligently as it should do.

The appeal was improvidently taken, and must be dismissed.

It is so ordered. Appeal dismissed.

Cited: S. v. Ford, 168 N. C., 166.

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(506)

STATE v. SAMUEL J. MORRELL.

Taxes—Peddlers.

The *proviso* to section 23 of the Revenue Laws of 1887 (chapter 135), exempting persons who sell goods of their own manufacture from payment of the peddler's license tax, does not apply for the benefit of one who merely mixes and boils certain drugs and medicines together and sells them under a deceptive name, as "Herbs of Life."

INDICTMENT for peddling without a license, tried before *Gilmer, J.,* at October Term, 1887, of the Superior Court of FORSYTH.

There was judgment on a special verdict for the defendant, and appeal by the State.

The defendant is charged with peddling without a license, in violation of the act of 7 March, 1887, entitled: An Act to Raise Revenue;

chapter 135, section 23, of which declares, "That every person, a citizen of the United States, authorized to do business in this State, who, as principal or agent, peddles nostrums, medicines or goods, wares or merchandise, of whatever name or description, shall pay a license tax as follows"—graduating the amount and prescribing how the license shall issue, etc. The concluding clause of the section is in these words: "*Provided,* that this section shall not apply to persons who sell goods of their own manufacture within the State, printers soliciting orders, spirituous liquors excepted."

Section 35 declares, "that every person, who shall practice any trade or profession, or use any franchise taxed by the laws of North Carolina, without having first paid the tax and obtained a license, as herein required, shall be deemed guilty of a misdemeanor, and punished," etc.

The defendant, on his arraignment, pleaded not guilty, and at the trial the jury rendered the following special verdict:

(507) The defendant carried on the business of selling medicines in this manner: He came to Winston, and, renting a house, engaged in the manufacture of medicine called the "Herbs of Life." He bought from the resident druggists alcohol, chloroform, tincture of capsicum, and other ingredients, and boiled them together, bottled the compound, and labelled it "Herbs of Life." He then leased vacant lots in different parts of the town, and held open air concerts, with music, dancing and minstrel performance. At intervals he would address the crowd, and extract teeth, while venders of the medicine passed through the audience, with the medicine in baskets, selling the same. He followed this business for several nights, and having been applied to by the sheriff of the county to pay a peddler's tax, and take out a peddler's license, he refused, whereupon was instituted the present proceeding (the issue of a warrant and his arrest, and being carried before an examining justice). He paid no tax of any kind.

The jury say, that if, in the opinion of the court, upon foregoing, the defendant is in law guilty, the jury so say; otherwise, they say he is not guilty.

The court being of the opinion that the defendant was not guilty, so adjudged, and directed him to be discharged; and from the judgment the State appealed.

Attorney-General and J. C. Buxton for the State.
R. B. Glenn for defendant.

SMITH, C. J., after stating the facts: The case presented in the verdict is clearly within the prohibitory words of the statute, from which we have quoted, since the manner of vending made him a peddler, and the

article thus disposed of is embraced in the statutory enumeration of those for which a license, preliminary to such peddling, is required by the law. This was conceded in the argument before us, and the controversy was, whether the mixture thus prepared and sold (508) were *goods* of the defendant's own manufacture, in the sense of the exempting and concluding proviso.

The contention on behalf of the State is, that inasmuch as the article peddled was a "nostrum, or medicine," and plainly the latter, after which, are enumerated "goods, wares and merchandise," the former constitute a distinct class, of which an unlicensed sale by peddling is forbidden, and when, in the process, the prohibition is removed from "goods" manufactured by the party himself, it has no application to the articles designated "nostrums, or medicines," and as to these, the act remains in force, unaffected by the exception in the proviso.

While there is force in the suggestion of such restricted operation in the proviso, and that the intention was to allow the sale of one's own manufactured or made goods, others than those denominated "nostrums, or medicines," as to which a license in all cases is required, we are not prepared to accede to such a rigid interpretation to a statute so highly penal, and to say that the term *goods,* used for brevity, and comprehensive enough, in its general meaning, to embrace the preceding articles also, yet, we think, the mere admixture of the drugs constituting the "Herbs of Life," the attractive and delusive name given to it, is not a process of manufacturing within the meaning of the exception. The mere fact, that the drugs were here mixed by the defendant, could scarcely have been intended to place them beyond the contemplated taxation, while the same mixture done by others would be subject to the tax. The distinctions could hardly have been contemplated by the enacting General Assembly. The mixing of ingredients is not the conversion of them into a new article, of which the process of manufacturing can be reasonably predicated. The process meant, was such as a conversion of rags into paper, ginned cotton into yarn or cloth, wood into articles of farm or domestic use, and the like. So that (509) a new article is formed, and this by the industry of man and expenditure of labor, which, by its increased value from labor thus bestowed, it was intended by the exemption to foster and favor.

Thus understood, the defendant cannot, by merely putting certain drugs together and boiling them, avail himself of the proviso and escape the tax.

There is error, and the judgment must be reversed, and upon the verdict, judgment entered against the defendant in the court below.

Error. Judgment reversed.

STATE v. WILLIAM KEENE.

Practice—Trial—Right to Open and Conclude—Testimony—Experts.

1. After the jury was empaneled, in a trial for murder, prisoner's counsel offered to admit that prisoner killed the deceased with a deadly weapon, averring that the killing was accidental, and thereupon claimed the right to open and conclude the testimony and argument; the court declined to permit the admission and directed the State to proceed with the proof: *Held*, that this decision was not reviewable, under Rule 6, in 92 N. C., at page 852.

2. Where a physician, an expert, had been present and heard the testimony of witnesses for the State as to the manner in which the deceased was shot by the prisoner, and their relative position at the time, it was proper for the State to ask the expert this question: "Assuming that the jury should believe that the prisoner and deceased were about the same height and that the pistol was fired by the prisoner in the manner and position testified to by the State's witnesses, what, in your opinion, would have been the range of the shot after entering the skull, taking into consideration the bone, muscles and other substances of the head?"

(510) THIS is an indictment for murder, tried before *Connor, J.*, at February Term, 1888, of ROWAN Superior Court.

Only two questions are presented for our consideration, and they are clearly presented in the case on appeal, as follows:

"The prisoner's counsel, after the jury was empaneled, and before the introduction of any testimony, informed the court that the prisoner desired to admit that he killed the deceased with a deadly weapon, averring that the killing was accidental."

The prisoner insisted that, upon such admission, he was entitled to the opening and conclusion of the testimony and the argument. The court declined to permit the admission and held that the State should proceed with the proof. The defendant excepted.

The State, among other witnesses, introduced Dr. J. J. Summerell, who testified: "I heard the testimony of the prisoner, I am a physician, graduated in 1844, have been practicing ever since. I was present at the coroner's inquest and examined the deceased. There was a hole about one and a quarter inches above the left eye, a little to one side. There was only one entrance into his skull. I probed the wound and found the inclination of the shot was slightly upward. I heard the testimony of the witness as to the manner of the shooting and the position of the prisoner and the deceased."

The solicitor for the State then proposed to ask the witness the following questions:

"Assuming that the jury should believe that the prisoner and deceased were about the same height, and that the pistol was fired by the prisoner in the manner and position testified to by the State's witnesses, what, in your opinion, would have been the range of the shot after entering the skull, taking into consideration the bone, muscles and other substances in the head?" Exception by defendant.

Witness answered: "I think the shot would have a slightly (511) upward tendency."

Verdict of manslaughter. Motion for new trial overruled. Appeal by defendant.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: 1. The first exception cannot be maintained.

The decision of the court below upon the question as to who should have the reply and the conclusion of the argument was "final and not reviewable" by this Court. By Rule 6, to be found on page 852 of 92 N. C. Rep., this is settled. *Brooks v. Brooks,* 90 N. C., 142; *Cheek v. Watson,* 90 N. C., 302; *Austin v. Secrest,* 91 N. C., 214.

"It is only when no evidence is introduced by the defendant" that the right of reply and conclusion belongs, of right, to his counsel, by Rule 3, to be found on page 851 of the same volume.

2. The second exception is also untenable. It is not denied that Dr. Summerell is an expert and this case is easily distinguishable from that of *S. v. Bowman,* 78 N. C., 509. In fact, the question put to Dr. Summerell was in strict compliance with the mode laid down for the examination of experts in *S. v. Bowman,* and the reasoning in that case, and the authorities cited therein, fully sustain the ruling of the court below. See, also, *Ray v. Ray,* 98 N. C., 566 *S. v. Cole,* 94 N. C., 959. There is no error.

Affirmed.

Cited: S. v. Anderson, 101 N. C., 760; *White v. Hines,* 182 N. C., 281.

(512)

STATE v. JAMES BYERS.

Homicide, Burden on Accused to Show Mitigating Circumstances—Evidence, of Relatives and Associates, Received With Caution—Manslaughter.

1. When killing with a deadly weapon is proven, or admitted by the prisoner, the burden of showing mitigating circumstances is on the prisoner, who must prove them, not by preponderance of testimony or beyond a reasonable doubt, but to the satisfaction of the jury. If the jury are left in doubt as to the mitigating circumstances, the case is murder.
2. Where a prisoner and his relatives, or an associate in the crime, testify on behalf of the prisoner, the law directs the jury to scrutinize their testimony carefully, because of their interest in the result; and the judge may so caution the jury, although a failure so to do is not assignable as error.
3. On a trial for murder the evidence introduced by the State showed that the prisoner was asked by deceased if the prisoner did not have a man who was with him under arrest, whereupon the prisoner immediately shot the deceased twice and killed him. The evidence on behalf of the prisoner showed that deceased met the prisoner in the road, called him a damned horse thief and at the same time dropped the muzzle of a loaded rifle upon prisoner's bowels; that prisoner caught the rifle and endeavored to wrench it from deceased, but did not succeed; that all during the scuffle deceased was trying to shoot the prisoner; that, not being able to disarm the deceased, the prisoner shot him twice with a pistol and killed him. The court instructed the jury that there was no element of manslaughter in the case as disclosed by the evidence; that if the State's evidence was believed, the prisoner was guilty of murder; if the evidence offered by the prisoner was believed, he was guilty of nothing: *Held*, that this charge was correct and proper.

INDICTMENT for murder, tried before *Clark, J.*, and a jury, at March Term, 1888, of WILKES Superior Court.

The facts are set out in the opinion.

(513) *Attorney-General for the State.*
No counsel for defendant.

SMITH, C. J. The prisoner, and one James Stone, are charged in the indictment with the crime of murder, committed upon the body of Henry Edwards, and upon the arraignment of the prisoner, who alone was on trial, he entered a plea of not guilty. He was convicted by the verdict of the jury of the crime imputed, and, from the judgment of death pronounced, after an ineffectual application for a new trial by his counsel, appeals to this Court. Two witnesses, present at the

killing, were examined by the solicitor, and gave evidence of the manner in which it was done, and it is, in substance, as follows:

B. F. Tugman testified that on the morning of 25 August, 1886, as he was on his way to the house of a neighbor to get a hog he had traded for, he met the deceased, who, as he was told by him, was going to D. M. Hall's (he being a justice of the peace), to obtain a process which would enable him to get possession of a mule belonging to the prisoner and which prisoner's wife was riding on a visit to some of her relations in the county; that he had been requested by the wife of one Lon Wyatt to get and hold the mule until the prisoner returned a horse which, on the morning before, the prisoner had borrowed of her husband and not sent back, as he had promised; that, proceeding on their way, they passed by the tobacco field of one William H. Key, who, having finished his work, at the request of the witness, went with him after the hog, and all three proceeded to the house of witness' grandfather and got dinner, and started home; that they stopped at the house of the justice, which was on their return route, and while there learned from the mail carrier that the prisoner had been arrested and was at Lon Wyatt's, and the horse had been recovered; that the deceased thereupon said he would go home, and they all left and went in the direction of home, the deceased carrying a rifle gun on his (514) shoulder, which he had not fired since they came together; that some half-mile from the house of Hall as they passed up a hill, the road there running a north and south course, they saw a man about 100 yards distant coming down the hill meeting them, who was not known to any one of them; that as they approached each other, the deceased walking in the middle with his gun on his shoulder, witness remarked, "yonder comes a man, maybe he comes from across the mountain and can tell us whether Wyatt has got his horse back and they have got a man under arrest"; that as they met said man one of the party said "howdy," and they all said the same, whereupon deceased said to the prisoner, "Did you come by Lon Wyatt's?" and the prisoner answered "I did," when deceased further inquired if they had a man there under arrest, to which prisoner replied, "What in the hell have you got to do with it?" drew his pistol and fired at the deceased as the words escaped his lips; that when the pistol went off the deceased was standing on the west side of the road, facing prisoner, with his gun on his shoulder, offering no violence to him whatever; that deceased, as soon as shot, slapped his right hand to his breast and staggered backwards, when witness and Key ran, and soon heard, when but a few steps off, the report of another shot; that returning they found the deceased lying on the lower side of the road upon his face, his feet stretched out and his head pointing

west, life extinct, and his gun under his body; that witness and Kee went immediately back to Hall's house, detailed the facts to him, and asked for a warrant of arrest, but as they could not give the name of the man who did the act it was not issued.

The testimony of Key was in substance the same as that of Tugman and that of several other witnesses introduced by the State, corroborative of what these witnesses swore as to antecedent matters.

(515) It was also in proof, from one D. F. Long, that he met the prisoner and Stone between 1 and 2 p. m. of the day of the homicide going in the direction of the place where it occurred, and prisoner seemed to be very mad; told him the circumstances about his having the horse and Edwards going after his mule, and inquired if witness had met him, at the same time giving a description of the person of these men, and representing the deceased as "a thick-set, chunky man, with red beard and hair," and he asked witness several times "what he would do in a case like that." The witness said he would let the law take its course, and repeated the same when again asked, as prisoner left and before being out of sight, he replied to the remark, "Oh, you are all right," and continued on.

A. P. Myers swore to his meeting with Stone and the prisoner about 2 p. m. about half a mile from the place of the homicide, and was asked if he had heard of deceased passing, and answered that he had, and that prisoner then said "that is spitting fire," and then went out.

It is not necessary to give more of the evidence of the State or in greater detail.

The prisoner, for himself and in his defense, said that he spent the night preceding the homicide at the house of his brother-in-law, James Stone; that two nights before he had borrowed the horse from Wyatt, intending to return it that evening, but went to one Bowers' house on business and remained there all night; that next morning he went to Stone's house, where he met Wyatt and the men who came after the horse and delivered him to Wyatt paying him one dollar for the trouble of coming after the horse; that after dinner, at Stone's house, he and witness started across the mountain to meet their respective wives; that witness was not very mad, but was not in good humor; when, being near the house of Hall, three men were seen coming abreast, one of whom punched the man in the middle with the gun, saying, "this is our

(516) man"; that as witness drew near he said "howdy," and turned to the left, and as witness did so the man in the middle asked him if he came by Lon Wyatt's, and when witness answered that he did, called witness a damned horse thief, at the same time dropping the muzzle of his gun upon witness's bowels, whereupon the latter caught the barrel

in both hands and tried to wrench it away, but could not succeed, the man trying all the time to shoot witness; that about this time witness thought of his pistol, and while holding the gun with one hand got the pistol out with the other and shot him; that the man, who was the deceased, began to weaken, when a second shot was fired, and he fell on his right side. After the first shot the men with him fled; that he did not hear the rifle discharge, and went on towards Hall's house, and after passing it met Stone's wife and told her what had occurred, and that he "never wanted to have to do this in this world, and had killed a man in self-defense, God knew."

The other witnesses, his sister, Julia Stone, Mrs. Buck Bangers, a daughter of prisoner's wife, and his wife, confirmed the prisoner's account of the occurrence, as now testified, and one of them represented him as weeping when he told of it.

There was no exception to the evidence, but there was to the refusal to give the instruction requested for the prisoner and to the charge as given.

Instructions asked and refused:

1. When there is no malice there could be no crime of murder.

2. Though when the killing is proved or admitted to have been done with a deadly weapon the law presumes malice, still if at the time the prisoner fired the fatal shot the deceased had assaulted the prisoner with the gun, and the prisoner had reason to believe and did believe that he was about to receive great bodily harm at the hands of the deceased, the case would be one of execusable homicide.

Instructions asked and given: (517)

3. If the deceased had assaulted the prisoner with the gun and was attempting to shoot him, then the shooting by the prisoner in resisting the felonious onset would be justifiable.

4. If they met suddenly and unexpectedly and a sudden altercation ensued, and in it the prisoner slew the deceased, the offense would be manslaughter.

The court said to the jury, among other things, that there was no element of manslaughter in the case, and the offense was murder or no crime; that if the jury believe the evidence offered for the State the prisoner is guilty of murder, while if they believed that offered for the prisoner he was guilty of nothing; 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; that in weighing the testimony of the witnesses the jury could consider their bias or interest in the matter, if they had any, in determining their credit, and where the prisoner and his relations went upon the stand the law directed the jury to scrutinize their testimony carefully because of their interest in the result; that however, notwithstanding such interest, the jury might believe all they said, or part of it, or none of it, according to the conviction produced upon their minds, of its truthfulness.

Such is a narrative, in abbreviated form, of the facts testified to at the trial, and the directions given by the court to the jury upon the different aspects in which the evidence may be considered by the jury in arriving at a verdict.

Upon the testimony of the State the case was one of unprovoked murder, with few or no palliating incidents, and but little im-
(518) paired in its force by the prisoner's own version of the occurrence, taken in connection with what the others present at the time testified. It certainly was as favorable as the prisoner could ask to tell the jury if his statement was accepted the homicide was committed in self-defense, and that in no view was it the result of sudden provocation and passion, constituent elements in the crime of manslaughter.

And so, in reference to the burden of proof of matters of mitigation, which may reduce the crime to a lower grade, the charge is in harmony with the repeated rulings in this Court. *S. v. Haywood,* Phil., 376; *S. v. Johnson,* 3 Jones, 266; *S. v. Ellick,* 2 Winst., 56; *S. v. Willis,* 63 N. C., 26; *S. v. Smith,* 77 N. C., 488; *S. v. Bowman,* 80 N. C., 432, and *S. v. Brittain,* 89 N. C., 481. In the last of which cases the opinion delivered by our late associate, *Mr. Justice Ashe,* contains an elaborate and exhaustive review of the rule.

The second portion of the charge, in reference to the credibility of witnesses testifying in behalf of one to whom they are nearly related or of an associate, is sustained by the cases of *S. v. Nash,* 8 Ired., 35; *S. v. Nat,* 6 Jones, 114; *Flynt v. Bodenhamer,* 80 N. C., 205; *S. v. Hardee,* 83 N. C., 619; *Ferrall v. Broadway,* 95 N. C., 551.

While a jury may be thus cautioned, the omission to give the caution is not assignable as error in law. *Wiseman v. Cornish,* 8 Jones' Law, 218.

We find no error in the rulings of the court, and the judgment is affirmed.

No error. Affirmed.

Cited: S. v. Cox, 110 N. C., 505; *S. v. McKinney,* 111 N. C., 684; *S. v. Rollins,* 113 N. C., 734; *S. v. Holloway,* 117 N. C., 733; *S. v. Col-*

lins, 118 N. C., 1204; *S. v. Graham,* 133 N. C., 653; *S. v. Clark,* 134 N. C., 706; *S. v. Dixon,* 149 N. C., 464; *Herndon v. R. R.,* 162 N. C., 324; *S. v. Vann, ibid.,* 541; *S. v. Fogleman,* 164 N. C., 462; *S. v. Lance,* 166 N. C., 413; *Ferebee v. R. R.,* 167 N. C., 298; *S. v. Wiseman,* 178 N. C., 796; *S. v. Barnhill,* 186 N. C., 451; *S. v. Smith,* 187 N. C., 469.

(519)

STATE v. W. H. BROWN.

Evidence—Remarks of the Judge—Section 413 of The Code—Examination of Witnesses; Judge's Discretion as to—Objection to be Made in Apt Time—Section 1113 of The Code; "Innocent Woman," "Incontinency," Defined.

1. On the trial of an indictment a witness, A., having testified to the good character of another witness, J., in answer to a question by the solicitor, said that he had allowed J. to visit his family, and, in answer to a question by the judge, said he still allowed such visits from J.: *Held,* that the effect of the questions, put by the solicitor and judge, was simply to ascertain A's estimate of a *good character,* and its value as evidence to the jury, and permitting the questions was not error.

2. On an indictment for slandering an innocent woman, a witness for defendant, in answer to question by the solicitor, said, prosecutrix's character was good. The defendant's counsel asked him if he had not heard one G. say that he had had sexual intercourse with prosecutrix? Thereupon the solicitor said to the court, that he would not object to the inquiry, if he would be allowed to prove that G., who was then in Texas, had denied making such statement. Defendant's counsel said he would object to such proof. The judge then asked defendant's counsel, in the hearing of the jury, if he thought "that would be fair?" *Held,* that the remark of the judge was no violation of section 413 of The Code.

3. The manner of conducting the examination of witnesses is left largely to the discretion of the judge, and can but seldom be the subject of review, even when not entirely approved by this Court.

4. An objection to remarks made by the judge, during the trial, must be in apt time. Such an objection made after verdict, is not in apt time.

5. The definitions of "innocent woman," and "incontinency," contained in *S. v. Davis,* 92 N. C., 764, and *S. v. Moody,* 98 N. C., 671, construing section 1113 of The Code, approved.

6. On the trial of an indictment under section 1113 of The Code, the following special instruction was asked by the defendant, and refused by the judge: That in passing upon her innocence, it is not requisite that the woman should commit a criminal act of sexual intercourse, but it is sufficient if the jury find such acts of indulgence in sexual propensities

and a willingness to submit to the embraces of a man, short of actual connection, which are inconsistent with innocence and purity; and that if she attempted to have such connection and it was ineffectual, not because of her repugnance, but of some physical defect in her person, she is not an innocent woman in contemplation of the statute: *Held*, that the refusal to give the instruction was proper.

(520) INDICTMENT for slandering an innocent woman, under section 1113 of The Code, tried before *Connor, J.*, and a jury at Fall Term, 1887, of BLADEN Superior Court.

The defendant is charged, under section 1113 of The Code, with attempting, in a wanton and malicious manner, to destroy the reputation of one Sue C. Smith, an innocent woman, by the speaking of the words set out in the indictment and imputing incontinency, he well knowing them to be false when so uttered. Upon his arraignment and plea of not guilty he was tried and convicted before the jury, and from the judgment rendered thereon appealed to this Court.

The prosecutrix, introduced by the State, testified that neither had the defendant nor any other man ever had sexual connection with her, though, having known him all her life, she had entered into a contract of marriage with him in 1886, since which he had once, when they were riding out, put his arms around her waist, and she had kissed him when bidding him good-bye the night before he started for Georgia, and that, excepting himself, no one else had taken liberties with her.

After proving the good character of the witness and the speaking the defamatory words charged, the solicitor rested.

The defendant, for himself, swore that their engagement and his promise to marry the prosecutrix was upon the condition that she became pregnant from her intercourse with him, which had taken place on four several occasions, but had never been "complete."

(521) Upon cross-examination he stated that, when testifying upon the subject in a court of a justice of the peace, he had said that the prosecutrix was the more willing of the two to the connection, and did not then say it had not been consummated; and further, that when the certificate of the two physicians who had personally examined her, that there were no indications of a loss of virtue, was read he pronounced it a forgery.

Thomas Jones, a witness for the defendant, swore to his having taken liberties with her and of his once attempting to have sexual commerce; and upon cross-examination that, in giving in testimony to the justice of the peace he had sworn to such illicit commerce as a fact which had taken place at different times, and not to an attempt which had failed, and this after hearing read the certificate of the physicians.

Resuming, the State introduced D. Vann who, having testified to the good character of the prosecutrix, was asked by defendant's counsel if he had not heard that his son Cam had had sexual intercourse with her, to which inquiry the witness responded that he had heard such a report through the defendant and Thomas Jones.

On redirect examination he was asked, without objection, if the witness had ever heard his son say anything about it, and he replied that he had received a letter from his son, then in Georgia, in which he announced the report false.

One counsel, a witness of defendant's, in answer to an inquiry from the solicitor, had testified to the general character of the prosecutrix as being good, and being re-examined for the defendant was asked by his counsel if he had not heard Harry Gillespie say he had himself had sexual intercourse with the prosecutrix. Thereupon the solicitor said to the court that no objection would be taken to the inquiry if the State would be allowed to show that Gillespie, at that time in Texas, had denied the charge. To this defendant's counsel remarked they would object, and the judge asked them if they thought "that (522) would be fair." Then the witness said he had heard Gillespie say that he had, four or five years ago, attempted to bring about such connection. Afterwards, before the testimony was concluded, defendant's counsel withdrew objection to the evidence, and the State introduced a letter from Gillespie denying that he had ever made such attempt or had ever told any one that he had made it.

R. P. Allen, having testified to the good repute of the witness Jones, was asked by the solicitor if he had allowed Jones to visit his family, and having answered in the affirmative, was asked by the judge if he would now allow him to visit his (witness's) family, to which he gave a similar affirmative answer.

The two examining physicians testified to the making two examinations of the person of the prosecutrix, a second being in consequence of a doubt expressed as to her identity, and in both found all the signs of a preserved virtue.

These instructions were requested by defendant's counsel to be given to the jury, which we give without needless verbiage:

1. An essential element in the offense is the possession by the prosecutrix of an unsullied character and of personal purity, both of which must be proved by the State beyond a reasonable doubt.

2. That by an innocent woman the statute means a virtuous woman, a pure woman, one whose reputation is without spot or blemish, and this the State must establish beyond a reasonable doubt.

3. That upon passing upon her innocence it is not requisite that the woman should commit a criminal act of sexual intercourse, but it is

sufficient if, from the evidence, the jury find such acts of indulgence in sexual propensities and a willingness to submit to the embraces of a man, short of actual connection, which are inconsistent with (523) innocence and purity, and that if she attempted to have such connection and it was ineffectual, not because of repugnance, but of some physical defect in her person, she is not an innocent woman in contemplation of the statute.

These instructions were refused, and instead of them the court charged the jury thus, in substance:

An innocent woman, as meant by the statute, is one who has never had illicit sexual intercourse with a man. If the jury are satisfied beyond a reasonable doubt that the prosecutrix was an innocent woman, and that the defendant, with intent to cause it to be believed that she was incontinent, impure, and thereby destroy her reputation, uttered the words charged in the indictment, and did so wantonly and maliciously—that is, with a bad, wicked intent and regardless of any injury or wrong which might be done to her, he is guilty and it is your duty so to find; otherwise, to acquit the accused.

In arriving at the intent the jury may consider the time, place, and circumstances and the number of times the words were repeated.

The court then inquired of defendant's counsel if there was anything further which they wished to be said to the jury, and they replied nothing.

After verdict a new trial was asked, because:

1. Of the inquiries made by the court of the witness Allen.

2. Of the remarks of the judge in regard to the declaration of Gillespie; and lastly,

3. Of the refusal to give the instructions asked and of those given instead.

The court declined to disturb the verdict, and from the judgment, as already stated, the appeal brings up the case for review.

Attorney-General for the State.
T. M. Womack for defendant.

(524) SMITH, C. J., after stating the facts: 1. The question put to the witness Allen, as to his permitting the witness Jones to visit in his family, after his voluntary disclosure of his own immoral conduct, is put to ascertain his estimate of a *good character* and its value as evidence to the jury, and for this, its obvious purpose, we see no just objection.

2. The exception to the inquiry of the judge, addressed to counsel of defendant, if it would be fair to permit a declaration of an absent per-

son imputing criminality to the prosecutrix to be given in, and refuse to hear his subsequent denial of the truth of the charge, was but an expression of a wish and purpose to have a fair trial, the natural impulse of an impartial and just judge conducting the trial. It is argued here as an indication of an opinion upon the merits of the controversy forbidden by the Act of 1796, The Code, sec. 413. It does not appear to us susceptible of any such interpretation, and at most as but an intimation to counsel that such a course, if pursued, would not be sustained in the ruling upon the matter. The judge presides at the trial and must see that it is fairly conducted and in accordance with the established practice; and if a suggestion, incidentally made to counsel during its progress, is to be allowed as ground for reversing a jury verdict because heard by them, it would greatly impair the efficiency of the courts in administering the law, and cripple the exercise of the functions that belong to the judicial office itself. The manner of conducting the examination of witnesses on a trial is left largely to the discretion of the presiding judge, and if not entirely approved, can but seldom be the subject of appellate revision. *Bost v. Bost,* 87 N. C., 477; *Perry v. Jackson,* 88 N. C., 103; *Malloy v. Bruden,* 86 N. C., 251.

But aside from these considerations it is a sufficient answer to the objection that it was not made until after the rendition of the verdict, and repeated adjudications have settled the rule that such must be taken in apt time and not after a disappointing issue of the (525) trial.

Of the instructions asked and refused as well as those given, it is only necessary to refer to the cases of *S. v. Davis,* 92 N. C., 764, and *S. v. Moody,* 98 N. C., 671, in the first of which it is decided that an *innocent woman* is one who has never had unlawful sexual commerce with any man, and in the other that incontinency has the same meaning. These cases cover the whole charge and sustain it fully.

There is no error. Affirmed.

Cited: S. v. Hinson, 103 N. C., 378; *S. v. Grigg,* 104 N. C., 885; *Osborne v. Wilkes,* 108 N. C., 665; *Posey v. Patton,* 109 N. C., 458; *S. v. Malloy,* 115 N. C., 739; *S. v. Hewlin,* 128 N. C., 572; *S. v. Harwell,* 129 N. C., 554; *S. v. Harrison,* 145 N. C., 414; *S. v. Lance,* 149 N. C., 555; *S. v. Hart,* 186 N. C., 601.

STATE v. ROBERT POWELL.

Appeal—Taxation—What Taxable—Privilege Tax.

1. When an objection, on a second appeal, might have been made in a former appeal in the same case, it is questionable whether it should be considered.
2. Uniformity must be observed in taxation, and a tax is uniform which is the same on *all* persons in the same class, as on innkeepers, on railroads, etc.; but it is in the discretion of the taxing power to graduate the tax according to the extent of the business taxed, or to impose a single tax on the occupation. Therefore, a tax by a municipal government of a certain sum on livery stable keepers, is constitutional.

CRIMINAL ACTION tried on appeal from the mayor of Morganton, before *Merrimon, J.*, at Spring Term, 1888, of the Superior Court of BURKE County.

The defendant was arrested under a warrant from the mayor for unlawfully carrying on the trade or business of keeping a livery stable without having first paid a privilege tax of $10, etc., in violation
(526) of certain ordinances of the said town of Morganton levying privilege taxes of different sums on general occupations, including keeping of livery stables, selling sewing machines, etc., and affixing a penalty for carrying on the business without first paying for license. The jury having found the defendant guilty, he was adjudged to pay a fine of $10 and cost, and he appealed.

Attorney-General for the State.
S. J. Erwin for defendant.

SMITH, C. J. When this cause was before us upon a former appeal, the ruling that no criminal offense as set out in the warrant, of which the mayor of the town could take judicial cognizance, was created in the ordinance, was declared erroneous and the Superior Court directed to proceed with the trial. It is now before us on the defendant's appeal, after verdict and judgment, for an alleged error in holding that the ordinance imposing the tax, so far as the required license applies to the keeping of a livery stable for pay, was valid and effectual. The objection was not specifically made at the first hearing, but it could and ought to have been then taken, and it is more than questionable whether, inasmuch as it was not, a second appeal is admissible to raise it now. If possessed of force it would have supported the action of the court in

refusing to entertain jurisdiction, as an adverse decision upon the point is involved in the reversal of the judgment dismissing or quashing the proceeding. The very objection which lies at the basis of the present appeal, though it is not specially noticed, is determined in that heretofore prosecuted. Still, as the former ruling was made *in limine,* and now the appeal is after judgment final, we have given careful attention to the reasons assigned by counsel for assailing the validity of the town enactment as affecting the class of delinquents to which the appellant belongs. (527)

In the brief before us the infirmity is said to consist in a disregard of the principle of uniformity which, though not expressed in the Constitution, is an essential and underlying condition of all legislation, State or municipal. *Gatlin v. Tarboro,* 78 N. C., 119.

Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation, but is it absent from the impeached ordinance? It is defined by *Mr. Justice Miller,* in the Railroad Tax Cases, 92 U. S., 575, and the definition accepted as correct by this Court in *Puitt v. Comrs.,* 94 N. C., 709, to consist in putting the same tax upon all of the same class—that is, while the same tax must be enforced upon *all* innkeepers, upon railroads, and so throughout, a tax discriminating persons of the same class, whereby some are required to pay more than others, would lack uniformity. It is unquestionably, however, in the discretion of the taxing power to graduate the tax according to the extent of the business so taxed, or to impose a single tax upon the occupation without regard to its extent.

The appellant complains that the tax upon livery stable keepers is not measured by the value of the property employed in the business nor the extent of their operations. This is a matter addressed to the sound discretion of those who make the assessment, and is not a usurpation of undelegated authority.

The error consists in regarding the tax as imposed *on property* in which both uniformity and the *ad valorem* principle must be observed. This is not a property tax but a tax upon an *occupation or vocation,* and is not less so because the appurtenances to a livery stable, necessary in conducting the business, may be horses, carriages and other property. Indeed these articles, though so used, are still subject to the *ad valorem* assessment as property.

As other trades, *purely personal,* without regard to the magni- (528) tude of the business carried on, may be subjected to a tax of a fixed sum, we see no reason why those which require the use of property may not be.

There is no error. Affirmed.

Cited: S. v. Stevenson, 109 N. C., 733; *S. v. Moore,* 113 N. C., 700; *Rosenbaum v. New Bern,* 118 N. C., 92, 94, 96; *Cobb v. Comrs.,* 122 N. C., 312; *Cox v. Comrs.,* 146 N. C., 585; *Noble v. Lumber Co.,* 151 N. C., 75; *S. v. Danenberg, ibid.,* 720; *Dalton v. Brown,* 159 N. C., 178; *Mercantile Co. v. Mount Olive,* 161 N. C., 124; *S. v. Snipes, ibid.,* 244; *Bickett v. Tax Com.,* 177 N. C., 437; *R. R. v. Lacy,* 187 N. C., 620; *S. v. Redditt,* 189 N. C., 176.

STATE v. W. T. BAILEY.

Special Instruction—Jury; Misconduct of.

1. The neglect or omission of the judge below to give a specific instruction, unless asked so to do, is not assignable for error.
2. Four jurors, after the case was given to the jury and they had retired to consider of their verdict, took a drink of whiskey furnished by one of the jury out of a flask he had in his pocket, but none of them became intoxicated. The paper charged in the indictment to have been forged by the defendant, and which the State had put in evidence, was in an unlocked drawer in the room with the jury, but none of them looked at it: *Held,* that upon these facts, there was no such misconduct as vitiated the verdict of the jury.
3. Upon a motion to set aside a verdict for improper conduct on the part of the jury, the refusal of the judge to hear affidavits of members of the jury, is not error.

INDICTMENT for forgery, tried before *Clark, J.,* and a jury at Fall Term, 1887, of IREDELL Superior Court.

The indictment charges the defendant with the forging, with intent to defraud, a certain written receipt, purporting to be an acknowledgment of the payment of money upon a debt due by him, in form as follows:

"Rec'd of W. T. Bailey eight hundred dollars on land, to be credited on his land note, this 15 May, 1883.

"Mr. Walton accept this. A. D. GAGE."

The defendant was tried upon his plea of not guilty at Fall
(529) Term, 1887, of the Superior Court of Iredell, and convicted by the verdict of the jury.

From the judgment of the court sentencing him to imprisonment in the penitentiary at hard labor for ten years an appeal is taken to this Court.

The prosecutor, W. W. Walton, into whose hands had come, as executor of A. D. Gage, the defendant's note, given to the deceased in his lifetime, in the sum of two thousand dollars, the balance due upon a sale of land and to which the writing has reference, testified that the testator died in March, 1885, in possession of the note, which bore date of 1883, and in December of the year of his death the defendant came to witness, asked him to compute the interest thereon, which was done, and the amount, $315, as well as $300 of the principal, was paid by the defendant, who then and repeatedly afterwards promised to pay the balance as soon as he could.

Early in January, 1887, witness was pressing for further payment when he received a letter from the defendant in these terms:

MR. WALTON.

DEAR FRIEND:—Mr. Henry Burke has failed in getting any money, and so has Mr. Tucker, so far.

Mr. Tucker has been riding 8 or 10 days trying to find a man that has the money, but has not found him yet. I have never seen such a time for money in my life. If they fail, I will not be able to pay you any before spring myself, but I will see you soon.

I will be away from home a few days. I will see you soon.

Yours truly, W. T. BAILEY.

10 January, 1887.

That about the first of the next month witness went out to see defendant, and when about to leave, defendant said he had a secret (530) to tell him, which was that Dr. Gage had given him a receipt for $800 on the note, and produced the writing described in the indictment; that the receipt and signature are neither in the deceased's handwriting, with which he is familiar, having married a granddaughter; and when shown witness the defendant said he had promised to keep it a secret until 1889 because the deceased had gotten the money to pay a colored woman with whom he had cohabited.

The witness said, when first seen, the paper was fresh and unrumpled, and when next seen it was much soiled and rumpled, and in support of his opinion that it was spurious pointed out similarities between it and defendant's handwriting, and the differences between it and that of the deceased.

Numerous experts of high character and accustomed to examine writings in business transactions, and who had long known the deceased, expressed an unhesitating opinion against its genuineness, and comparing it to the will of deceased, admitted to have been written by himself, declare their belief that the writing did not come from the pen of the same person.

One Jule Bailey, a witness for the defendant, swore that in the spring of 1883, on May 14th or 15th, while working in the meadow, Dr. Gage came down to the meadow and inquired for defendant, who was not there at the moment but soon arrived, and was greeted by the defendant, who asked, "How are you, doctor?" to which the reply was, "I am here yet." That witness, going off to his work, he heard them counting 1, 2, 3, 4, 5 twice over, and, being called up by the deceased, he saw a piece of money and Dr. Gage said, "Jule, there are eight new bills; did you ever see the like?" They then counted them over again four piles, and Dr. Gage remarked, "Jule, that makes $800; Mr. Bailey is a
(531) gentleman, he has met his payment before it was due," and explained why the payment was not to be mentioned as the money was to go to women of his color, etc. That the money, $800, was put in the buggy under the seat, and carried away by the doctor, before which he saw a small scrip of paper, the size of the receipt, and heard the defendant say it was scribbled up, and the answer was, "I've been sick, but Walton will receive it."

One John Fox testified to being present, saw the money, $800, paid, also a blue paper, said by the deceased to be a receipt.

One Edward Young, in May or June, 1883, as he testifies, in a conversation with the deceased, heard him say "that Bailey had paid him $800, and he had receipted him for it."

One J. H. Lackey swore that while building a house for defendant in the fall of 1883 the deceased came every day or two, and he heard a conversation in which deceased said, "That money you paid me, that $800, is nobody's business. You can pay over the balance to Mr. Walton. I don't want anybody to know it until I am dead and gone, it might scandalize me." Making some remark about women.

A. W. Jamieson testified to hearing Dr. Gage say, two or three years before he died, that Bailey had paid nearly all off, and the witness's impression is that he stated that he had gone or was going to Bailey's to get $800.

The defendant's own testimony is full and positive of the payment of $800 in new $20 bills at the time and place spoken of by other witnesses, of the giving of the receipt, of his objection to it, and the answer of deceased that it was all right, detailing all the particulars of the conversation that ensued and why the transaction was not to be mentioned. He further gives an account of the manner and for what the debt was contracted, and corroborates what other witnesses testi-
(532) fied to when he was present, and denies, unequivocally, the forgery charged.

The other testimony was mostly as to the good character of the various witnesses examined. It will be seen that the conflict in the evidence

is mainly between testimony of experts to the spuriousness of the writing and that of others to the fact of the payment of the money and the delivering of the written acknowledgment of it charged to be a forgery, upon the consideration of which the jury arrived at the conclusion adverse to the accused.

There was no exception to the ruling upon the reception or rejection of evidence, nor were any instructions asked nor those given objected to until after the rendition of the verdict.

The charge was to this effect: The jury are the sole judges of the weight, if any, to be given to the testimony of each witness. They may believe all or none of the testimony of each witness, according to the conviction produced on their minds of the truth or falsity of what each witness has sworn to. The presumption of law is that the defendant is innocent, and the burden is on the State to satisfy the jury of the defendant's guilt beyond a reasonable doubt. If the jury are satisfied, beyond a reasonable doubt, that the defendant forged the signature of A. D. Gage to the $800 receipt or procured it to be done, with intent to defraud, they will find the defendant guilty; if not thus satisfied, they will find the defendant not guilty. Three days after the rendering of the verdict a new trial was moved upon the following grounds:

1. For that the court did not tell the jury if the defendant paid the $800 to Gage, and he thereupon gave the receipt as and for a genuine one, the defendant would not be guilty, although neither the body nor the signature of the paper were in the handwriting of the deceased.

2. For that the court omitted to charge that if the jury found from the evidence that the defendant forged the receipt at the (533) time it bears date, to wit, 15 May, 1883, the offense was barred by the satute of limitations, and the jury should find the defendant not guilty.

The court was not requested thus to charge, and the second proposition alone was argued before the jury. The motion being denied upon the matters of law, it was renewed and the court asked to set aside the verdict for misconduct in some of the jurors, in support of which the affidavits of the sheriff in charge of the jury and of one of the jurors was read to the court. In reference to this matter the court finds the facts to be: That after the retirement of the jury one of their number took a flask from his pocket, and upon his invitation four drank of the whiskey it contained, the juror saying he had it for bowel complaint. None of the jurors were in any degree under the influence of the liquor, nor was the quantity taken sufficient to produce any sensible effect. The jury, while considering their verdict, remained at night in the court room; in a drawer, unlocked, in the room were left the receipt, deed

and magnifying glass used at the trial, but there was no evidence of their being seen by the jury. Upon these facts the motion was again refused, whereupon defendant's counsel proposed to offer other affidavits of the jurors, of whose evidence information had just come to him, showing that the jury had seen and inspected the papers with the glass. At the same time the solicitor asked, in the event of this evidence being received, to be allowed by the affidavit of other jurors, to prove the contrary. The court refused to hear the affidavit proposed, remarking that the law (against receiving affidavits from jurors to impeach their own verdict) had been settled from the case of the *S. v. McLeod,* 1 Hawks, 344, down to *Jones v. Parker,* 97 N. C., 33, and especially by the cases of *S. v. Smallwood,* 78 N. C., 560, and *S. v. Brittain,* 89 N. C.,
481, that the verdict of a jury could not be thus impeached, add-
(534) ing that on the previous day the court had heard the jurors' affidavit merely for information, but as the motion was not allowed no further testimony from this source for or against the application would be received.

After an ineffectual motion in arrest and for the case on appeal, the following errors were assigned:

1. The refusal to grant a new trial or to arrest the judgment.

2. The refusal to set aside the verdict for misconduct in the jurors. And

3. The refusal to hear the additional affidavits of jurors and to act upon them.

Attorney-General for the State.

R. F. Armfield and C. H. Armfield (and John Devereux, Jr., by brief) for defendant.

SMITH, C. J., after stating the facts: 1. It is a well understood rule of practice upon appeals, reasserted time and again by this Court, that error cannot be assigned and become the subject of review in an omission or neglect to give a specific instruction, even when proper in itself, unless asked and thus called to the attention of the judge in order that he may rule thereon. This is just to the court and opposing counsel and indispensable to a fair trial and to prevent surprise. *Simpson v. Blount,* 3 Dev., 34; *Brown v. Morris,* 4 D. & B., 429; *S. v. O'Neal,* 7 Ired., 251; *Arey v. Stephenson,* 12 Ired., 34; *Hice v. Woodard, ibid.,* 293, and more recent cases.

2. Upon the findings of fact by the judge there was no such misconduct as in law to vitiate the verdict, and the setting it aside upon other ground was a matter of discretion not reviewable here.

3. We find no ground for arresting judgment in the form of the indictment, and no defects have been pointed out in the (535) argument.

These being the only grounds contained in the record upon which in the appeal we are required to review the judgment, it must be and is

No error. Affirmed.

Cited: McKinnon v. Morrison, 104 N. C., 363; *Taylor v. Plummer,* 105 N. C., 58; *Bethea v. R. R.,* 106 N. C., 280; *Thompson v. Tel. Co.,* 107 N. C., 456; *S. v. Fleming, ibid.,* 909; *McFarland v. Improvement Co., ibid.,* 369; *Boon v. Murphy,* 108 N. C., 192; *Blackburn v. Fair,* 109 N. C., 465; *Emry v. R. R., ibid.,* 602; *Merrill v. Whitmire,* 110 N. C., 370; *S. v. Jenkins,* 116 N. C., 975; *Patterson v. Mills,* 121 N. C., 209; *Automotive Assn. v. Cochran,* 187 N. C., 25.

STATE v. A. R. HOLLINGSWORTH.

Indictment — Finding the Bill — Jurisdiction — Selling Spirituous Liquors—Local Option Election.

1. The statute, Code, sec. 1742, requiring the foreman of the grand jury to mark on the bill the names of witnesses sworn and examined, is directory, and its not appearing by endorsement on a bill that the only witness had been sworn and examined, is no ground for quashing the indictment or arresting the judgment.

2. Under chapter 417, Acts of 1887, the Superior Court of the county has jurisdiction of an indictment against one who sold spirituous liquors, etc., within two miles of either of the places in Henderson County named in the act.

3. A local option election, in favor of *license* in a town situate within two miles of a locality where the sale of spirituous liquors is prohibited by law, does not have the effect to abrogate that law (Code, sec. 3116).

THE defendant and one Allen were indicted for unlawfully selling spirituous liquors, and tried before *Merrimon, J.,* at the Spring Term, 1888, of the Superior Court of HENDERSON County.

The indictment contains two counts—the first for retailing without license and the second for unlawfully selling spirituous liquors within two miles of Mud Creek Baptist Church, contrary to the statute.

When the case was called for trial, and before the jury was empaneled, the defendant moved to quash the indictment "upon (536)

the ground that it did not appear from any endorsement upon the bill that the only witness, J. A. Bryson, had been sworn or examined before the grand jury."

It did appear that the grand jury had returned said bill in open court as "a true bill," and the name of the witness was endorsed on the back of the bill, and a record of said bill and return was duly made by the clerk. The motion was overruled, and the defendants excepted.

Defendants then moved to dismiss for want of jurisdiction, and insisted that the Revenue Act of 1887 conferred jurisdiction upon courts of justices of the peace in all cases where liquors are retailed without license in quantities less than a quart. Motion overruled, and defendants excepted.

The solicitor abandoned, in effect, entered a *nol. pros.* to the first count, and the defendants then entered the plea of not guilty, and were tried upon the second count alone.

It was in evidence that the defendants had sold liquor within three months prior to the trial (which was the term of the court at which defendants were indicted) in the town of Hendersonville, in a building occupied by them on main street near the postoffice.

It was also in evidence, "by surface measurement," a part of the town of Hendersonville, including the building where the defendants sold, was within two miles of Mud Creek Baptist Church.

It was also in evidence, on the part of the defendants, that on the first Monday in June, 1887, an election was held under the Local Option Act in the town of Hendersonville, at which election a majority of the qualified voters voted for "License."

It was insisted on behalf of the defendants "that being charged with selling spirituous liquors only within two miles of Mud Creek Baptist Church it was no longer necessary for them to exhibit a license (537) from the sheriff of the county, but only to show that under the provisions of the Local Option Act an election had been held in the town of Hendersonville, and that the result of that election was a majority "For license"; that the jury should, therefore, assume that license had issued. His Honor declined to so charge the jury, but charged that a sale of spirituous liquors within two miles of Mud Creek Baptist Church, if it included a portion or all of the town of Hendersonville, would make the defendants guilty. Defendants excepted.

There was a verdict of guilty as to Hollingsworth, not guilty as to Allen. Defendant Hollingsworth moved for new trial. Motion refused. Judgment and appeal.

Attorney-General and John Devereux, Jr., for the State.
No counsel for defendant.

DAVIS, J., after stating the facts: 1. The first exception is to the refusal of his Honor to quash the indictment. There is no error in this. The endorsements on the bill form no part of the indictment, and it has been held that the act of 1879, The Code, sec. 1742, requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury, is merely directory, and a non-compliance therewith is no ground for quashing the indictment. *S. v. Hines,* 84 N. C., 810. It constitutes neither ground for a motion to quash nor in arrest of judgment. *S. v. Sheppard,* 97 N. C., 401; *S. v. Baldwin,* 1 D. & B., 195; *S. v. Roberts,* 2 D. & B., 540; The Code, sec. 1183.

2. The second exception is to the jurisdiction of the court. This is based upon a misapprehension as to the misdemeanor charged.

The penalties imposed by the Revenue Acts of 1887 (ch. 135, sec. 35) are for violations of the revenue law in practicing the trades or professions, or using the privileges taxed by that act (among (538) them dealing in liquors), without first paying the tax and obtaining the license, and as these do not exceed fifty dollars fine or imprisonment for more than thirty days, the justice of the peace has jurisdiction; but chapter 417, Acts of 1887, makes it unlawful for any person to "sell any spirituous, vinous or malt liquors within two miles of . . . Mud Creek Baptist Church, . . . in Henderson County; it enacts further that the "person or persons so offending shall be deemed guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court." This is the statute under which the defendant is indicted, and the court has jurisdiction.

3. The third exception is to the charge of his Honor as to the effect of the vote of the town of Hendersonville at the election in June, 1887, upon local option. If there were any doubt as to the correctness of his Honor's charge it is settled by the Local Option Act under which the election was held, by which it is expressly provided that the election shall not "affect localities in which the sale of spirituous liquors are prohibited by law." The Code, sec. 3116. "Within two miles of Mud Creek Baptist Church" is a locality within which the sale of spirituous liquors is "prohibited by law," and it is therefore within the *proviso* of the Local Option Act, and there was no error in his Honor's charge.

Affirmed.

Cited: S. v. Sultan, 142 N. C., 572.

(539)

STATE v. T. A. IVEY.

Indictment—Finding the Bill—Motion to Quash.

Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court "a true bill," without a reëxamination of the witnesses upon this bill: *Held*, that it should be quashed.

INDICTMENT for removal of crops, tried upon a motion to quash at November Term, 1887, of the Superior Court of HARNETT, before *Merrimon, J.*

On Tuesday of the term of the court a bill of indictment was sent to the grand jury, and upon the examination of witnesses duly sworn before them they returned the same into court "a true bill."

The solicitor for the State conceded that this indictment was insufficient, did not charge the offense intended, and it was quashed by the court.

Thereupon a fresh bill was sent to the grand jury on Thursday of the term, which they returned into court "a true bill," without examining any of the witnesses endorsed upon the same, believing they had a right to do so, because they had already examined the witnesses on the first bill sent to them. These facts appearing, upon the motion of the defendant the court quashed the indictment and gave judgment for him, from which the solicitor appealed to this Court.

Attorney-General and J. B. Batchelor for the State.
F. P. Jones for defendant.

MERRIMON, J., after stating the case: In criminal procedure,
(540) properly speaking, a presentment by a grand jury is the official notice, taken by them, of any criminal offense from their own knowledge or observation, or the same from any member of their body or from the evidence of any competent witness duly sworn, given before them, or any proper evidence in the absence of a bill of indictment for the offense laid before them. It should be in writing and contain a summary of the accusation, the names of the person or persons presented, and the names of the witnesses who can give evidence of the facts of the offense. It is not necessary that it should be signed by all the grand jury or at all, though usually it is signed by the foreman, but it should be delivered to the court in their presence, by their foreman, who is their official organ. Thus returned it passes into the record of

the court and becomes effectual and the beginning of the prosecution. It requires no further authentication. It is such return into court, and putting it of record, that gives it efficient force. *S. v. Cain,* 1 Hawks, 352; *S. v. Cox,* 6 Ired., 440; 4 Bl. Com., 301; 1 Bishop Cr. Pr., sec. 731.

Usually a bill of indictment is framed upon the presentment by the solicitor for the State, and sent before the grand jury to be acted upon by them. The names of the witnesses to be examined are written on the back of the bill, and they must be sworn in open court or by the foreman of the grand jury, as allowed by the statute (The Code, sec. 1742) before they are examined.

But a presentment is not essential to a bill of indictment, nor is it necessarily initiatory to a criminal prosecution. The solicitor for the State, an important officer in whom reposes a high trust, may lay before the grand jury such bills of indictment as in his sound discretion he may deem proper, acting upon trustworthy information. He should carefully guard himself in the exercise of his office against imposition and persons who seek to gratify their spleen or malice.

The indictment is the formal written accusation of one or more (541) persons of a crime or misdemeanor preferred to and presented upon their oath by a grand jury. In strict legal parlance it is not so called until the bill has been found "a true bill" by the grand jury. Until then it is called simply a bill. 4 Bl. Com., 302; Arch. Cr. Pr. 1, 58, 59.

The action of the grand jury upon bills of indictment is very important to individuals and the public. On the one hand the safety, good order and well-being of society are to be affected for good or evil by it, and on the other a person should not be carelessly accused of crime. This should be done upon solemn accusation and for reasonably apparent cause; it may be of great consequence to the accused whether the accusation be well or ill founded. Such bills are not to be treated lightly, but seriously; the action of the grand jury must be based not merely upon conjecture, suspicion, mere information, what they or a member or members of their body may know, but upon the testimony of witnesses duly sworn or other evidence that comes before them, duly authenticated. If a grand juror has knowledge of facts material, he should be sworn as a witness and examined as such. *S. v. Cain,* 1 Hawks, 352.

The grand jury is an inquisatorial and an accusing body; they hear only the evidence on behalf of the prosecution. The finding of the bill of indictment is in the nature of an inquiry or accusation, which is afterwards to be tried, when the accused will have opportunity to make defense. They must inquire whether there be sufficient cause to call upon the accused party to answer, but such inquiry must be founded

upon proper evidence. They do not act in the light of evidence the accused may produce in his behalf upon his trial; but they should be satisfied of the truth of the charge contained in the bill of indictment, so far as their evidence goes. It is essential that witnesses should be sworn, and competent. In *S. v. Fellows,* 2 Hay. (340), 520, it was held that when the indictment was found upon the single testimony (542) of an incompetent witness it should be quashed. And it has been repeatedly held that the indictment should be quashed when the same was found upon the evidence of witnesses not sworn. *S. v. Cain,* 1 Hawks, 352; *S. v. Roberts,* 2 Dev. & Bat., 540; *S. v. Lanier,* 90 N. C., 714.

If, as in this case, the indictment be found to be defective, a fresh bill may be sent at the same term before the same grand jury that found the insufficient indictment, and they may act upon it. *S. v. Harris,* 91 N. C., 656. But they cannot do so, basing their action entirely upon what witnesses testified to when they had the first bill under consideration, without a re-examination of the witnesses or the examination of other witnesses, or hearing other proper evidence before them. This is so because the fresh or second bill is, as to them, a new and independent one, different in some of its features from the first indictment; it charges the offense in a different way, to a greater or less extent; it may charge a different offense altogether. The witnesses might testify differently from what they at first did, in view of the new bill; they might modify what they at first said; they might testify as to additional facts; they might have testified falsely at first; they might testify truly upon re-examination. As to the second bill, there was no evidence before the grand jury at all in contemplation of law. They must act upon evidence taken in respect to the bill of indictment before them. This is essential in the intelligent and fair discharge of their important duty—to give the evidence just application, point and force, and to identify the witnesses with and render them responsible for what they testify to in the course of the prosecution. They in this case did not testify as to the new bill.

It is said that the new bill was to be taken in connection with the first indictment—as an additional count in it—in accordance with what was said and held in *S. v. Johnson,* 5 Jones, 221. It appears that the (543) first indictment was quashed before the new bill was sent to the grand jury; but if this were otherwise, treating the new bill as an additional count, it was embodied in a separate and distinct bill, considered, acted upon, and presented by the grand jury at a different time. They could not consider it in connection with and as part of the first indictment; the latter was before the court and had passed into the record.

They might have ignored the new bill without reference to the first indictment. Moreover, treating a new indictment, curing defects in a former one, as an additional count in the latter, is allowed by a rule of practice that in no way applies to or affects the action of the grand jury.

There is no error. Affirmed.

Cited: S. v. McLain, 104 N. C., 897; *S. v. Wilcox, ibid.,* 850; *S. v. Coates,* 130 N. C., 703; *S. v. Mitchem,* 188 N. C., 610.

STATE v. JOHN MILLER.

Practice; Motion to Quash—Jurisdiction; Consent or Waiver Does Not Confer—Overseer of Road; Indictment of—The Code, secs. 1054, 2022.

1. Ordinarily a motion by the *defendant* to quash an indictment, must be made before the plea of not guilty, or it will not be allowed; but the court may, in its discretion, allow the motion after the plea of not guilty.
2. A motion to quash may be made by the State at any time before the defendant has been actually tried upon the indictment.
3. The point that the court has not jurisdiction may be made at any time by mere suggestion, or by motion to quash; or the court, *ex mero motu,* may take notice of it.
4. Neither consent nor waiver can confer jurisdiction, and the court will not proceed, when it appears from the record that it has no authority.
5. An indictment under section 1054 of The Code, for neglecting the duties imposed by law upon an overseer of the road, is fatally defective, if it fail to charge that defendant "*wilfully neglected,*" etc.
6. Under said section it is not necessary to specially charge in the indictment, that "it became, and was the duty" of the overseer to repair the road. But such a charge is necessary, when the indictment is for a violation of a *private statute,* making it the duty of a particular person, or several persons, to repair a particular road.
7. An indictment against a road overseer for neglecting to keep his road in repair, which does not charge a wilful neglect, cannot be supported under section 2022 of The Code.

INDICTMENT for neglect of duty as overseer of a public road, tried before *Clark, J.,* and a jury at November Term, 1887, of (544) ROWAN Superior Court.

The indictment was quashed on motion of the defendant, and the State appealed. The facts appear in the opinion.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The indictment charges, properly, that for a long while a specific part of a public road in the county of Rowan was in a ruinous condition and greatly out of repair, etc., and it further charges "that during all the said time John Miller was overseer of the said highway, from the corporation line of Salisbury to the township line of Salisbury Township, a distance of some three or four miles, the same constituting his section of said road, and then and there did unlawfully and negligently omit to mend and repair the said highway embracing his section as aforesaid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

(545) It appears from the case settled on appeal that "after the jury was empaneled and a plea of not guilty entered, on motion of the State a juror was withdrawn and mistrial ordered. The counsel for the defendant then moved to quash the indictment on the grounds: First, because it failed to allege the act as wilfully done; second, because the bill fails to allege that it was the duty of the overseer to work the road.

The court, after argument, adjudged that the motion be allowed, the bill was quashed, and the defendant was discharged. From this judgment the State appealed to this Court.

Generally and ordinarily a motion to quash the indictment made by the defendant should not be allowed, if made after the plea of not guilty, but such motion on the part of the State may be allowed at any time before the defendant has been actually tried upon the indictment. It seems, however, that the court has authority, to be exercised in its discretion, to allow the motion to be made by the defendant after his plea of not guilty, and there are cases in which such motion should be allowed at any time, as when it appears from the indictment that the court has not jurisdiction. This objection may be taken by mere suggestion or by motion, or the court may, *ex mero motu,* take notice of it. Neither consent nor waiver can give jurisdiction, and the court will not proceed when it appears from the record that it has no authority. *S. v. Eason,* 70 N. C., 88; *S. v. Benthall,* 82 N. C., 664; Arch. Cr. Pr., 62.

The defendant is indicted as overseer of a public road for a violation of the statute (The Code, sec. 1054), which provides that, "Every overseer of a road who shall *wilfully neglect* any of the duties imposed on

him by law shall be guilty of a misdemeanor." An essential element of the offense thus prescribed and defined is that the neglect shall be wilful—that is, not such neglect as is simply unlawful, but such as is aggravated by an obstinate, a stubborn, perverse disposition of the offender not to discharge his duties as overseer, but to *wilfully* neglect to discharge the same, as, for example, such disposition (546) not to repair the road when it is out of repair and in a ruinous condition, and he knows of this or ought to know of it, and make necessary repairs within his power. The road is in a lawful condition when it is in a proper state of repair in all material respects. It might be out of repair, and thus in an unlawful condition, and the overseer could not, under the circumstances, by reasonable diligence, promptly repair it, as in case of a road rendered out of repair by a protracted rainfall in mid-winter, as sometimes happens. In such case the overseer would not be indictable.

The term "wilfully" was not of the statute just recited until the enactment of The Code, and it seems to have been inserted there on purpose to add an additional essential feature to the offense, as indicated above. Mere neglect of an overseer of a road to discharge the duties imposed on him by law is not *wilful,* in the sense of the present statute, as it was in the one formerly prevailing. Hence it is necessary now to charge in the indictment that the overseer did *"wilfully* neglect," etc., else, for the reasons stated, no offense will be charged.

It is not necessary, in a case like the present one, to charge specially that "it became and was the duty" of the overseer to repair the road, because the general law makes it his duty to repair it.

It is otherwise when the duty of a particular person or of several persons to repair a particular road is imposed by a private statute. In such case it is necessary to charge that "it became and was the duty," etc., of the persons charged in the indictment. *S. v. McDowell,* 84 N. C., 798.

The Attorney-General suggested on the argument that the indictment might be upheld as sufficient under the statute (The Code, sec. 2022), which provides that "if any overseer shall fail to discharge any one of the duties imposed by this chapter he shall be guilty of a misdemeanor," etc. The chapter referred to prescribes, particularly, (547) numerous duties to be discharged by overseers, and the clause of it just recited has reference to a *failure* to discharge such particular duties. This chapter does not prescribe particularly that overseers shall keep their respective roads in proper repair, though this is in effect contemplated by it. The general law determines what proper repair shall be, except in particular respects regulated and prescribed by statute.

No doubt, however, an overseer might be indicted and convicted if he should "wilfully neglect" to discharge any of the duties prescribed by the chapter referred to above.

We are, therefore, of opinion that the indictment was properly quashed and that the judgment should be affirmed.

No error.

Cited: S. v. Flowers, 109 N. C., 845; *S. v. Burnett,* 142 N. C., 579.

STATE v. JOHN GREEN.

Variance—Perjury—Criminal Pleadings.

1. In an indictment for perjury, the defendant was charged with swearing falsely in a certain criminal proceeding against several persons named therein, including *John Green.* The State on trial offered in evidence a State's warrant in the criminal proceedings mentioned, in which the name *John Green* did not appear, but the name *G. Green* did: *Held,* that there was a fatal variance between the charge in the indictment and the proof, and the warrant should not have been admitted in evidence.
2. There was no necessity to describe the criminal proceeding with such particularity in the indictment; it would have been sufficient to refer to it in such way and terms as to designate it with certainty. But being described by a material distinguishing particular, appearing in it, the proof should have corresponded with the charge in all material respects.
3. The strict rules of pleading in criminal actions are wisely devised and must be adhered to.

(548) INDICTMENT for perjury, tried before *Meares, J.,* and a jury at January Term, 1888, of the Criminal Court of NEW HANOVER.

It is charged in the indictment that the false oath was taken in a criminal proceeding specified, pending before the Mayor of the city of Wilmington on 21 December, 1887, against several persons named therein, including the defendant, simply designated as *John Green.*

On the trial the State put in evidence the State's warrant in the criminal proceeding mentioned, in which the name *John* Green does not appear, but the name *"G.* Green" does appear, in the proper connection with the other names specified. The defendant objected to the admission of the warrant in evidence upon the ground that it did not support or tend to prove a material part of the charge against him. The court

overruled the objection, admitted the evidence, and the defendant excepted. There was a verdict of guilty and judgment against the defendant, from which he appealed to this Court.

Attorney-General for the State.
J. D. Bellamy for defendant.

MERRIMON, J., after stating the case: In our judgment the variance between a material part of the charge in the indictment and the warrant pertinent to it and received in evidence on the trial was fatal to the action. The indictment charged, with much particularity, that on a day specified the defendant, designated as "John Green," and several other persons, each indicated by his Christian and surname, "were in due form of law arraigned and tried upon a certain warrant, then and there pending against them, charging them with playing," etc. The part of the charge thus particularly made was important and material; it designated the certain warrant and proceeding in which the false oath was taken, and distinguished it specifically from others of similar kind and character. The defendant was thus carefully notified (549) of the charge; he was called before the court to answer, and the presumption was that he appeared before it prepared to meet and defend himself against that specific charge if he could, and not another or other like charges. It would be unjust to so charge him with a particular crime as to mislead him in his defense, or as to render it difficult for him to make his defense in case of a subsequent prosecution for the same offense. The law is careful to guard against this, and hence the strict rule of pleading in criminal actions that in some cases seem to be unnecessarily strict and to serve no useful purpose. They are wisely devised, and intended to prevent possible wrong and injustice in matters very important to every one who may be charged with serious offenses.

The charge, as to the warrant or proceeding, need not ordinarily to have been made with so much particularity; it would have been sufficient, as it seems to us, to refer to it in such way and terms as to designate it with certainty, but as it was described by a material distinguishing particular appearing in it, the proof should have corresponded with the charge, certainly in substance, in every and all material respects.

The warrant—the proof produced in this case on the trial—did not correspond with the charge in the indictment. The latter charge, that the warrant in the proceeding, in which the false oath was taken, charged *John Green,* the present defendant, and others, whose names are specified, with a criminal offense. The warrant put in evidence did not so charge *John* Green, but *"G"* Green and the others named. "G" does

not, in any sense attributable to it, imply or represent "John" by abbreviation or otherwise; it implies by its nature and ordinary application, in connection with surnames, some other person than *John*. "J," placed immediately before the name Green, might stand for and be (550) understood to represent John Green, but *"G"* would not, ordinarily. If it was intended to represent *John* Green in the warrant, and did so in fact, then it should have been charged in the indictment that John Green was charged in the warrant by the designation "G. Green," and on the trial the fact might have been proven by any appropriate evidence.

The warrant in evidence did not, as it appears in any view of it, import that John Green, the defendant, was party to it; it was therefore not the warrant charged and referred to in the indictment.

It might be that there was such a one, and if there was not, then the offense as charged could not be proven, and the defendant would be entitled to an acquittal. *S. v. Ammons,* 3 Murph., 123; *S. v. Harvell,* 4 Jones, 55; *S. v. Lewis,* 93 N. C., 581; Arch. Cr. Pr., 96; Roscoe's Cr. Ev., 820.

There is error. *Venire de novo.*

STATE v. SAMUEL SMITH.

Obstructing a Public Road—Action of County Commissioners; Cannot be Attacked Collaterally—Special Instruction—The Code, secs. 2014, 2038-40.

1. The actions and decisions of tribunals, having jurisdiction to accomplish a purpose contemplated and allowed by law, are not to be lightly treated and ignored. Jurisdiction attaching, the presumption is in favor of its having been properly exercised, and the action of the tribunal will be upheld, however erroneous or irregular in matters of detail, until set aside or reversed by proper authority.

2. The mere address of a petition is not of its essence: *therefore*, a petition for laying off a public road presented to the county commissioners, and definitely describing the terminal points of the road prayed for is sufficient in form and substance to support the action of the board in establishing the road, although such petition is addressed to the "Board of Supervisors of Public Roads."

3. Upon the presentation of a petition, such as is above described, the county commissioners made an order that the road be laid out as prayed for, particularly designating the terminal points. In obedience to such order,

a jury, summoned by the sheriff and sworn, laid out the road and made a report of their action to the commissioners, who confirmed the same, and ordered the road to be opened. This was done by the sheriff, who made return of his action: *Held*, that, although irregular in some particulars, the proceedings established the road, and one who obstructed it was indictable.

4. Upon an indictment for obstructing a public road, it is not error to refuse to charge, that "to constitute a public highway, it must be a public charge, and must, of necessity, have an overseer and hands to work it."

5. An indictment for obstructing a public road, which gives the *termini* of the road, and describes it substantially as it is described in the order of the county commissioners establishing it, is good; and a motion in arrest of judgment based upon the insufficiency of the description of the road, will be refused.

6. A prayer for a special instruction, not warranted by the evidence, must be refused.

INDICTMENT for obstructing a public road, tried before *Mac-* (551) *Rae, J.*, and a jury at Spring Term, 1887, of BURKE Superior Court.

The indictment charged the defendant with unlawfully and wilfully obstructing a public road "in Burke County, leading from the Shelby road to the Laurel road." The State put in evidence the record of certain proceedings had before the county commissioners to show that the road charged in the indictment had been laid off and opened as a public road.

The order for laying off the road described it as "commencing on the Shelby road, running via Huffman's mill, through Samuel (552) Smith's farm, to the Laurel road."

Defendant, admitting the obstruction, contended that the road was not a public road, and that he was not indictable for obstructing it, because there were irregularities in the proceedings laying it off. He further contended that the indictment did not sufficiently describe the road.

The defendant also insisted that the petition for establishing the road being, on its face, addressed to the board of supervisors, and only asking that a road be laid off between certain points, without specifying whether the same should be a cartway or a public road, the commissioners of the county had no jurisdiction to order the road, and consequently the proceedings under which it was established were void. The court ruled against the defendant on all these points.

A witness for the State testified that the road in question had never been turned over to the township supervisors, no overseer had been

appointed thereon nor hands assigned to work it; that no work had ever been done on it by the public, except that the sheriff had opened it by order of the county commissioners, and then only a portion of it.

After verdict there was a motion in arrest of judgment upon the ground that the indictment did not sufficiently describe the public road.

The other facts sufficiently appear in the opinion. Verdict of guilty. Appeal by defendant.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The statute (The Code, sec. 2014) confers upon the board of county commissioners "full power and authority within their respective counties . . . to order the laying out of public roads when necessary," and it further prescribes (The Code, secs. 2038, (553) 2039, 2040) in what case, and when and how, such roads shall be laid out and established.

Although the proceedings of the county commissioners in respect to the road in question are not, in all respects, regular, we are, nevertheless, of the opinion that they were sufficient to establish a public highway that the defendant and all other persons were bound to recognize and treat as such until such proceedings should be reversed, modified, or set aside in a proper proceeding for the purpose.

A petition in writing, signed by several persons interested in the proposed road, designating the terminal points, was laid before the commissioners of the county of Burke, and likewise a counter petition. Upon consideration the commissioners made an order that the road as prayed for be laid out, and that the sheriff summon a jury for that purpose. The order designated with particularity the terminal points of the road to be laid out. The sheriff summoned a jury who, in obedience to the order and summons, assembled and were sworn, and they laid out between the terminal points designated, with much particularity, the road in question, and made report of their action to the county commissioners, who confirmed the same, and then made an order directing the sheriff to open the road strictly as laid out by the jury; thereafter the sheriff did so, and made return of his action.

Thus a tribunal having jurisdiction over the subject of public roads, and having an application before it to establish such a road, took action in that respect and purported, in pursuance of the leading essential provisions of the statute applicable in such case, to establish the road in question. The proceedings of that tribunal may have been erroneous; they were, as we can see, in some respects not essential to the jurisdic-

tion of the commissioners, irregular, but they were not necessarily void; on the contrary they were valid until reversed. The actions and decisions of tribunals having jurisdiction to accomplish a purpose (554) contemplated and allowed by law, are not to be treated lightly, ignored and disregarded by whoever may see fit to do so. When it appears that the jurisdiction attaches, the presumption is in favor of the proper exercise of it, unless the contrary clearly appears, and the action or determination of such tribunal will be upheld, however erroneous or irregular in matters of detail, until corrected, modified, or reversed by the proper authority. *Little v. May,* 3 Hawks, 599; *S. v. Spainhour,* 2 D. & B., 547; *Woolard v. McCullough,* 1 Ired., 432; *Welch v. Piercy,* 7 Ired., 365; *S. v. Davis,* 68 N. C., 297.

It was contended by the defendant's counsel in the court below that the petition for the road was addressed to the "Board of Supervisors of Public Roads" in a particular township, and not to the board of county commissioners, and therefore the proceedings to establish the road were void. This contention is unfounded. The mere address was not of the essence of the application. The allegations of the petition plainly implies that the petitioners demand a road—a public road—not a "cartway"; nothing is said of the latter in terms or by implication. The petition and counter petition were laid before the commissioners, and the allegations of them respectively showed that the commissioners had jurisdiction of the subject-matter of them and the supervisors did not.

The defendant requested the court to instruct the jury that to "constitute a public highway it must be a public charge, and must of necessity have an overseer and hands to work it." The court declined to give this instruction, and this refusal is assigned as error.

The instruction thus asked was argumentative; it referred to what is generally an incident of a public highway, and is consequent upon its establishment; it was not pertinent to the issue before the jury and the court was not bound to give it. (555)

The court was further requested to instruct the jury that if they found from the proceedings to establish the road, on the evidence, that the purpose was to establish a "cartway," then the commissioners had no jurisdiction, and the proceedings were void. The Court properly declined to give such instructions because there was no evidence that warranted it. Nothing was said in the proceedings, or by any witness examined on the trial so far as appears, in respect to a "cartway."

The motion in arrest of judgment was properly denied. The road, charged in the indictment to have been obstructed, is described substantially as that designated in the order of the commissioners and the report of the jury in establishing it. From the indictment the court

could see that a particular offense was charged, and the defendant could see with what offense he was charged and make his defense, and he could make proper defense in case of a subsequent prosecution for the same offense. This is sufficient.

There is no error. Affirmed.

Cited: S. v. Eastman, 109 N. C., 788; *S. v. Wolf,* 112 N. C., 894; *S. v. Joyce,* 121 N. C., 611; *S. v. Yoder,* 132 N. C., 1114; *S. v. Godwin,* 145 N. C., 464.

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1. In proceedings in attachment, one who interpleads under section 331 of The Code, is *an actor*, upon whom rests the burden of proving his title to the property he claims. And this is so although the property was in his possession when seized by the sheriff. *Wallace v. Robeson*, 206.

2. When killing with a deadly weapon is proven, or admitted by the prisoner, the burden of showing mitigating circumstances is on the prisoner, who must prove them, not by preponderance of testimony or beyond a reasonable doubt, but to the satisfaction of the jury. If the jury are left in doubt as to the mitigating circumstances, the case is murder. *S. v. Byers*, 512.

3. Where an issue is submitted to the jury and the party upon whom rests the burden of proof refuses to offer any evidence, it is proper for the judge to direct the jury to answer the issue in favor of the other side. *Wallace v. Robeson*, 206.

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