NORTH CAROLINA REPORTS

VOL. 101

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1888

THEODORE F. DAVIDSON
REPORTER

ANNOTATED BY
WALTER CLARK IN 1909
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(2D ANNO. ED.)

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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

SEPTEMBER TERM, 1888

PETER S. WILLIAMS v. R. T. WEAVER ET AL.

Amendment—Process.

The Supreme Court has power to allow an officer, to whom its process has been delivered for execution, to amend his return thereof by the correction of errors caused by inadvertence or honest mistake.

MOTION for leave to amend return upon execution, heard after due notice and upon affidavits at September Term, 1888, of the Supreme Court.

In this case an execution was issued from this court, directed and delivered to the sheriff of the county of Hertford, made returnable to the October Term of 1886 thereof. The sheriff failed to note thereon the date of its delivery to him as required by the statute. The Code, sec. 100. In his return of the same, by inadvertence he set forth that he did not collect the sum of $8.40, which sum, as stated in the return, "was deducted and allowed by Attorney-General," whereas he should have said, "was deducted and allowed by the clerk of the (2) Supreme Court."

The present application is made by the sheriff to be allowed to amend his return, so as to specify on the execution the time when it went into his hands; and also that he failed to collect the sum of $8.40, as therein required, because it "was deducted and allowed by the clerk of the Supreme Court."

B. B. Winborne for the sheriff.
No counsel contra.

MERRIMON, J., after stating the case: The power of this Court to allow the sheriff or other officer to amend and correct his return of its process as to errors occasioned by mere inadvertence or honest mistake, so as to make it speak the truth as to what was done, or omitted to be done, by the officer in its execution, is essential and inherent, but it should be exercised with care and much caution. The Court should be fully satisfied that the application to amend is made in good faith, and that the proposed amendment is warranted by the facts. It is ever the purpose of the law, in the course of its application, to ascertain and establish the truth in its judgments and proceedings, and to this end its courts, in their nature, have ample power, which they will exercise as far as they can consistently with rules of just procedure and the rights of parties. Such power has oftentimes been exercised here, and the frequent exercise of the like power by the Superior Courts has been scrutinized and affirmed by many decisions of this Court. *Smith v. Daniel,* 3 Murph., 128; *Davidson v. Cowan,* 1 Dev., 304; *Purcell v. McFarland,* 1 Ired., 34; *Dickinson v. Lippitt,* 5 Ired., 560; *Williams v. Sharpe,* 70 N. C., 582; *Peebles v. Newsom,* 74 N. C., 473; *Walters v. Moore,* 90 N. C., 41.

(3) The evidence fully satisfies us that the sheriff omitted to mark the entry on the execution, and made the mistake in his return, which he asks leave to correct, by excusable inadvertence. The entry and correction cannot prejudice the substantial rights of any party.

Leave, therefore, is granted to make the amendments.

Cited: Luttrell v. Martin, 112 N. C., 604; *McArter v. Rhea,* 122 N. C., 618; *S. v. Lewis,* 177 N. C., 557.

BENJAMIN SAUNDERS v. W. O. P. LEE ET AL.

Fraud—Notice—Purchaser—Evidence—Burden of Proof.

1. A conveyance made with an intent to defraud creditors, is nevertheless valid against the maker and all others, except creditors and those who purchase under a sale made for their benefit; and until the title thus conveyed is divested by some proceeding instituted by the creditors, it is sufficient to support an action for the recovery of the land and damages for its detention.

2. A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the fraudulent grantor.

3. The party who alleges fraud in the execution of a deed, must prove it; and upon the production and proof of the deed, the burden is upon him who assails it to prove the facts which may vitiate it.

THIS is a civil action which was tried before *Montgomery, J.,* at Spring Term, 1888, of GATES Superior Court.

William H. Lee, under whom the parties to the action claim, on 12 September, 1867, by deed, and for the recited consideration of sixteen hundred dollars, conveyed the tract of land described in the complaint to Mills H. Eure, who, on 8 May, 1880, for the alleged consideration of twenty-five hundred dollars, in the like manner conveyed to Benjamin Saunders. Shortly thereafter the latter entered upon the premises, and held possession until his death, when the plaintiff, his son and only heir at law, took and delivered possession to a tenant who (4) remained until the expiration of his term in January, 1883.

During this occupancy, and while the tenant was temporarily absent from his family, who continued to occupy the dwelling-house, John P. Lee moved upon the premises and there remained until his death, as have his children, the defendants in this action, since his decease.

The present action was instituted on 23 September, 1885, to recover possession and damages for withholding it.

The answer of the defendants denies the allegations made in the complaint of title in the plaintiff, and any wrongful withholding from him, but admits that they have, since their father's death, retained possession of the land with no title thereto. At the April Term, 1887, W. D. Pruden made application to be admitted into the action as a codefendant, supported by an affidavit, wherein he states that one Gatling having a debt against said William H. Lee, after the conveyance to Eure, but before his conveyance to Saunders, sued for and recovered in the Superior Court of Gates County judgment therefor, which was afterwards transferred to said John P. Lee, who after the death of the former, proceeded against the debtor's heirs at law and caused execution to issue upon a sale, under which affiant became purchaser and took the sheriff's deed conveying the land in April, 1886; that the deed to Eure, as affiant is advised and believes, was made with intent to defraud creditors, and is void, and that since the defendants have attorned to him and become his tenants.

The motion had been disallowed, but on the filing of the affidavit was granted, and thereupon the said Pruden filed his answer to the complaint, in which he reiterates the statements in the affidavit in regard to the rendition of judgment and the proceedings thereunder, terminat-

ing in the purchase and conveyance of the land to him, and repeats the averment that the deed to Eure was without any consideration
(5) and fraudulent.

The plaintiff replies to these allegations, and says that the said William H. Lee was adjudged a bankrupt and duly discharged of his debts, including the said judgment, whereby the proceedings to enforce the same were rendered null and void; that the deeds under which he claims were both bona fide and for value, and that if that to Eure were fraudulent, his vendee, the plaintiff's father, purchased and paid for the land in good faith, and took the deed therefor without notice of the fraud or fraudulent intent of said Lee and Eure, and his title is unaffected thereby.

Upon the trial the deeds relied on by the plaintiff were exhibited in evidence, but he produced no proof other than the recitals contained in them of the consideration of either. The defendant introduced no evidence, and the court charged that the plaintiff was not entitled to a verdict, whereupon the plaintiff submitted to a nonsuit and appealed.

L. L. Smith and E. F. Aydlett for plaintiff.
W. D. Pruden for defendants.

SMITH, C. J., after stating the case: The case stated on appeal is very vague, but we understand from it and the course of the argument here that the instruction proceeds upon the assumed necessity of the plaintiff's offering further proof of the consideration of the deeds in order to a verdict in his favor.

If there were no error in this view of the law, it is plain the plaintiff was entitled to recover against the original defendants, who are admitted to be trespassers in the unlawful possession of the land, damages for the use and detention up to the period of the purchase and conveyance to the defendant Pruden, as he could give no protection to them by attornment or otherwise, when he had no claim to the land himself.
(6) This results from the rule that a conveyance made to defraud creditors is effectual against the bargainor, and all others, except creditors seeking to subject the property to their demand, and such as may buy under a judicial sale consequent upon such proceedings, and in the latter case the title is divested by and after such sale.

As the direction to the jury is unqualified and declares, as we interpret the language, the plaintiff entitled to no relief, in submission to which the nonsuit was suffered, we should be compelled to grant a new trial for this error, if there were no other in the ruling.

But aside from this, and without passing upon the proposition argued with earnestness before us, that the recital is prima facie sufficient evi-

dence of the valuable consideration passing between the parties to the assailed deed, the present plaintiff avers his ancestor to have been a purchaser for a full and valuable consideration without notice actual or constructive, of the fraud imputed, and that his title is consequently unaffected by the unknown presence of the vitiating element in the transaction, and as the validity of the conveyance, as such, to the bargainee Saunders, is not called in question, unless he had notice of the fraud, the recital is sufficient to sustain the consideration of the deed to him without other proof. The question is thus raised, upon whom of the parties to the suit devolves the burden of showing notice, or such facts as would put the vendee on inquiry as to the bona fides of the deed to Eure?

The principle is well settled in a series of adjudications in this State, as elsewhere, that one who buys from a fraudulent grantee, for a valuable consideration and without notice, acquires a good title against the creditors of the original fraudulent grantor. *Martin v. Cowles,* 1 D. & B., 29; *King v. Trice,* 3 Ired. Eq., 568; *King v. Cantrel,* 4 Ired., 251; *Young v. Lathrop,* 67 N. C., 63; *Wade v. Sanders,* 70 N. C., 270.

The general rule which requires one who alleges fraud to prove (7) it, would seem, upon the production and proof of the deed, to call on the defendant to show the facts that plant the infectious element in the instrument and warrant the jury in finding its presence. But the proposition finds support, not only in the reasonableness of it, but is recognized in adjudged cases in this Court.

In *McGahee v. Sneed,* 1 D. & B. Eq., 333, it is held that when a purchaser from a fraudulent grantee seeks relief on the ground that he is an innocent purchaser without notice, he must deny notice, and so he must in an answer when he sets up the same defense to the bill of an impeaching creditor; and *Gaston, J.,* delivering the opinion, after thus stating the rule, adds:

"The want of notice is an essential part of his equity in the one case, and of his defense in the other, and it is a general rule in pleading, that whatever is essential to the right of the party must be averred by him.

"But when a plaintiff would convert a purchaser into a trustee, and seeks to charge him because he bought with notice, and therefore *mala fide,* if the allegation of notice is not admitted, *the plaintiff is bound to prove it.* Should the answer be silent, or not sufficiently explicit in this respect, the plaintiff may except to the answer, and require one more full and perfect. But if he does not except, *and cannot prove the notice, he must fail because a material part of his equity is not established.*"

The defendant occupies a similar relation to the plaintiff, and if he did impeach the deed to Saunders, he has offered no evidence to support the charge.

But a more effectual answer is found in the fact that while the first deed is assailed for fraud in its execution, the second is not attacked in any way in the answer, and is, moreover, vindicated in the replica-
(8) tion, and any notice of the fraud expressly denied.

There is therefore error in the instruction given to the jury that "the plaintiff was not entitled to recover"; that is, has not furnished evidence of his title sufficient to warrant a verdict from the jury, and the nonsuit must be set aside and a new trial given.

Error.

Cited: Cox v. Wall, 132 N. C., 737; *Morgan v. Bostic, ibid.,* 749; *Pierce v. Stallings,* 163 N. C., 107.

THE NORFOLK SOUTHERN RAILROAD COMPANY v. TIMOTHY ELY.

Draining Low Lands—Condemnation of Land.

1. Upon an application to condemn lands for the purpose of drainage, the issues of fact raised by the pleadings should be framed and settled by a jury; they cannot be raised or considered upon exceptions to the report of the commissioners appointed to assess damages.

2. The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside.

THIS is an application to condemn land for drainage, heard upon exceptions to commissioners' report, by *Montgomery, J.,* at Spring Term, 1888, of PASQUOTANK Superior Court.

The plaintiff, a corporation formed and operating under a law of this State, has acquired a right of way and constructed a portion of its railway upon and over a parcel of low land belonging to the defendant, and known as the Great Park Estate, in the county of Pasquotank. It alleges in its petition filed before the clerk that formerly the surface water accumulating on the roadbed was carried away by a ditch, called the
(9) Hall ditch, and flowed upon land of a lower level on the east, whereby the road-bed was relieved; that the defendant has obstructed the ditch so that it can no longer serve as a means of drainage, and the track is exposed to inundation from falling rains to the great inconvenience of the public, and obstructing the safe and sufficient operations of the road as a carrier of persons and property. The proceeding is under chapter 30, of the 1st volume of The Code, and is prosecuted

to obtain a right of drainage over the defendant's land, as it has been heretofore exercised until interrupted by the defendant. The application is resisted by the defendant, who in his answer, denies most of the allegations contained in the complaint, and, as a defense, insists that relief could be obtained by the opening of a ditch leading in another direction form the plaintiff's road. Certain issues were thereupon framed and transmitted to the Superior Court for trial, at term time, whereof the only one passed on by the jury was in this form:

Is the land of the plaintiff, mentioned in the petition, so located that it is liable to inundation, and not susceptible of being conveniently drained except by cutting a ditch through the land of the defendant?

To this inquiry the jury responded, "Yes."

Thereupon the clerk proceeded to appoint commissioners to enter upon and view the lands described in the petition, and lay off the draining ditch along the Hall ditch from the petitioner's land to the low land in which its waters are emptied, and to ascertain and award damages therefor. This was done and report made to the clerk, to which exceptions were entered, supported by the affidavit of defendant's agent, as follows:

"First. Because the plaintiff in this action is not entitled to the right of laying off a drainage through the defendant's land, and the commissioners have no authority to so report in favor of the plaintiff's right to have the ditch so laid off.

Second. Because the commissioners have reported that the same (10) (to wit, the railroad track and roadbed of plaintiff) cannot be conveniently drained except through the lands of Timothy Ely, whereas the commissioners refused to examine or pass upon another direct outlet urged upon them by the defendant as the most direct and natural drain for the waters collecting on the track of said railroad, claiming that they had no authority to examine or select any other route or way than by the Hall ditch.

Third. That the amount of the assessment of damage is infinitely nothing in comparison to the real damage inflicted."

The clerk overruled the exceptions and gave judgment confirming the report, and granting the relief asked, from which the defendant appealed to the Judge, who, upon hearing the appeal, dismissed it on petitioner's motion, and from this ruling an appeal is taken by the defendant to this Court.

L. D. Starke for plaintiff.
Harvey Terry for defendant.

SMITH, C. J., after stating the case: Whatever issues of fact are made in the pleading should have been framed and settled by the jury,

and it was too late to raise them after the verdict upon the one inquiry agreed on by the counsel of the respective parties at the trial before the judge.

The exceptions are themselves untenable, at least at the stage in the proceeding at which they were filed:

1. No issue was made as to the plaintiff's title when the aid of the jury was required, and the form of that submitted assumes the plaintiff's ownership of the right of way over the land to be relieved, and the testimony set out is confined to that issue. No objection appears to have been taken to the clerk's order appointing the commissioners, and this
(11) is necessarily predicated upon the relations of the parties to the action as landowners, for it could not be made unless the petitioner had land to be drained.

The second and third exceptions are matters belonging to the commissioners, whose finding of fact must stand, as would a jury verdict, unless set aside, and then they would have to go over their work again. The exceptions cannot now be heard.

The appeal therefore to this Court cannot bring up for review the errors now assigned, inasmuch as the proper time for noting the exceptions, if any there were, was not made use of, and the appeal is improvidently taken. But inasmuch as dismissing it and affirming the judgment produce the same result in leaving the judgment in full force, it is not necessary to pass upon the particular disposition of the case and the right of appeal at this stage of the proceeding, which has progressed upon the assumption of the respective ownership of the adjoining tracts to a final result.

We therefore affirm the judgment.

Cited: R. R. v. Parker, 105 N. C., 249; *Skinner v. Carter,* 108 N. C., 108; *Hanes v. R. R.,* 109 N. C., 493; *Porter v. Armstrong,* 134 N. C., 454.

W. C. MOORE AND WIFE ET AL. v. M. L. EURE, ADMINISTRATOR OF JAMES SEARS.

Administration—Executors and Administrators—Devastavit.

1. Good faith, and the exercise of ordinary care, and reasonable diligence are all that is required of executors and administrators in the execution of their trusts.
2. The statute—The Code, sec. 1543—authorizing executors and administrators to pay funds, belonging to the estates which they are administering, into the office of the clerk of the Superior Court is not mandatory.

3. Where an administrator, a resident of Virginia, found, at the time of his qualification, a considerable sum to the credit of the estate in a bank in Virginia of good repute for solvency, and from time to time added other funds to the deposit, but paying out the moneys as rapidly as those who were entitled would receive it, and the bank failed: *Held* that he was not guilty of a *devastavit*. *Collins v. Gooch*, 98 N. C., 190, *distinguished*.

THIS is a civil action brought in the Superior Court of GATES (12) County by the distributees and devisees of James Sears, against his administrator *de bonis non cum testamento annexo* for an account and settlement of the estate.

At Spring Term, 1887, the cause was referred for an account, and was heard upon exceptions to the referee's report by *Montgomery, J.*, at Spring Term, 1888.

The following are the facts agreed upon, and upon which the referee based his account:

"1. James Sears died in 1870, domiciled in Gates County, leaving a will, in which his widow, Mary A., was named and qualified as executrix.

2. Mary A. died in 1884, domiciled in Gates County, N. C., and letters of administration *de bonis non cum testamento annexo* were only issued to the defendant on 24 January, 1884.

3. At the time of her death the said Mary A. had on deposit, in her name as executrix, in the Exchange National Bank of Norfolk, Va., the sum of $1,560.38, belonging to the estate of her testator, and also had in the bank of Burruss, Son & Co., of Norfolk, Virginia, the sum of $771.47, belonging to said estate.

4. Shortly after the death of Mary A., and the qualification of the defendant Eure, he had the fund in the Exchange National Bank transferred to his own name in that bank as administrator of James Sears, and on the same day drew the fund from the bank of Burruss, Son & Co., and deposited the same, with other funds of the estate, in the Exchange National Bank with the fund already there in his name as administrator as aforesaid, and this account and the funds of the estate were kept separate from any other money of the said Eure, and at the (13) time of the failure of said Exchange National Bank, on 2 April, 1885, he had in the bank to his credit on this account the sum of $2,439.50.

5. That at the time the said Eure opened his administrator's account at said bank, and continuously thereafter to its failure, it was regarded as one of the safest, best managed, and most solvent institutions of the kind south of the Potomac. No one doubted its solvency, and it was used as the place of deposit by the leading and most cautious business men and capitalists in Virginia and Eastern North Carolina, and the defendant so regarded it; and had then, and had had for several years, his

individual bank account at said bank, and sustained considerable private loss by its failure, he being a resident of Norfolk, Virginia. The firm of Eure, Farrar & Co., of which the defendant was a member, also kept an account at said bank, and at times had considerable money on deposit there.

6. Prior to the qualification of the said Eure as administrator of said estate, Uriah Vaughan, of Murfreesboro, had been appointed receiver of the estate of the plaintiffs; and in less than thirty days after the said Eure qualified and had the funds in the Exchange Bank transferred to his name as administrator, and made the deposit of the funds from Burruss, Son & Co. at said bank, he wrote to Vaughan and informed him that he had the funds on hand in bank, and desired to pay them to him as receiver. The said Eure did not receive any answer to his letter, but shortly thereafter saw Vaughan in Norfolk, and stated to him that he had the money in bank and desired him to receive it for the plaintiffs, and Vaughan replied that he did not want to be troubled with it, and that he, Eure, could take care of it as well as he could.

(14) 7. At the time of the qualification of Eure as administrator all of the plaintiffs, except Victoria, were minors, and prior to the failure of the bank Eure had paid off the indebtedness of the estate known to him, and paid to Victoria the amount charged in the account against her, which was approximately her part of the funds collected up to that time.

8. Shortly before the failure of the bank plaintiff Henrietta became of age, to wit: January, 1885, but was married February, 1883, and still is under coverture, and Eure paid to her the sum of $300, in part of her share, and offered to pay her another $100, but she stated that she did not need it at that time. All the other plaintiffs were minors at the time of the failure of the bank.

9. The money in said bank, at the failure, belonged to the plaintiffs in this action under the will of the said Sears."

The plaintiffs excepted to the report and account filed by the referee, for that "he charges the defendant with the amount received in dividends from the receiver of the Exchange National Bank only, when he ought to have charged him with the full amount, $2,477.03, on hand at the date of the failure of said bank, 2 April, 1885, with interest on the same to that date."

The exception was overruled by the court, and judgment rendered in accordance with the report, from which the plaintiffs appealed.

Pruden & Vann (by brief) for plaintiffs.

L. L. Smith for defendant.

DAVIS, J., after stating the case: The single question presented for our consideration is as to the liability of the defendant administrator for the loss sustained by the failure of the Exchange National Bank.

The case shows, and it is conceded, that the defendant acted in perfect good faith, but the counsel for the plaintiffs insist:

1. That it was the duty of the defendant when the receiver (15) Vaughan declined to receive the money to "take proper steps to make him do so, or pay the amount into the clerk's office, in discharge of his obligation, in accordance with the provision of The Code, sec. 1543."

This is authorized by the statute, but it is not required—the statute is not mandatory—it only declares that "it shall be competent for any executor, administrator or collector, etc., . . . to pay into the office of the clerk of the Superior Court," etc. It is not made his duty to do so, and there may sometimes be reasons for not doing so.

2. It is further insisted for the plaintiffs that the defendant committed a *devastavit* in carrying the money out of the State and beyond the jurisdiction of our courts, and to sustain this position *Collins v. Gooch,* 97 N. C., 186; *Lucas v. Wasson,* 3 Dev., 398; *Pitt v. Petway,* 12 Ired., 69; *Wicker v. Grim,* 80 N. C., 343; *Strauss v. Crawford,* 89 N. C., 149; *Havens v. Lathene,* 75 N. C., 506, are cited and relied on.

The case of *Collins v. Gooch* is unlike this. In that case the receiver was acting for minors under the appointment of the Court, with duties clearly and well defined in the order appointing him. While no intentional dereliction of duty was imputed to him, for it appeared that he acted in perfect good faith, yet the order under which he was acting made it his duty to make annual returns to the court to be passed upon and audited, in the cause thus pending, by the presiding judge. This he failed to do. He was, as was said by the Court, a *quasi* guardian; and it was further said, that if he had reported the deposit, as it was made his duty to do, and been sustained by the Court, he would have been protected. The other cases cited by the counsel for the plaintiff (except the last) are cases in which it is held that one tenant in common of personal property cannot carry the common property beyond the limits of the State without the consent of his cotenant; and if he does so, it is a conversion for which an action will lie. Tenants in common have an equal right to the possession of the common property, and we (16) fail to see the analogy between the cases cited and that before us.

The administrator is appointed by the court, and is required to take an oath and give the bond required by law, and a nonresident who does this is not included in the disqualifications of The Code, sec. 1377. Administrators, whether resident or nonresident, are required to give bond,

and so are executors who reside out of the State—The Code, sec. 1515—and these bonds are for the protection of those interested in the estate committed to their charge against loss resulting from bad faith or negligence. Good faith and the use of ordinary care and reasonable diligence are all that can be required of executors and administrators, whether resident or nonresident. They are not insurers. *DeBerry v. Ivey,* 2 Jones Eq., 370; *Nelson v. Hall,* 5 Jones Eq., 32.

Even guardians, whose duties in regard to investments are prescribed, while held to the highest degree of good faith, are not bound as insurers. *Covington v. Leak & Wall,* 67 N. C., 363; *Atkinson v. Whitehead,* 66 N. C., 296.

The "hard rule upon public officers," enunciated in *Havens v. Latham,* has never been held to apply to executors and administrators. There is no error.

Affirmed.

Cited: Gay v. Grant, 101 N. C., 209; *Smith v. Patton,* 131 N. C., 397; *Fann v. R. R.,* 155 N. C., 140; *Batchelor v. Overton,* 158 N. C., 398; *Marshall v. Kemp,* 190 N. C., 493.

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(17)

J. C. MEEKINS, SR., v. ABRAM NEWBERRY.

Contract—Parol Evidence.

When the parties to a contract reduce their agreement to writing, and it can be seen therefrom that it has such definiteness as to comprehend the subject matter, in the absence of an allegation of fraud or mutual mistake, parol evidence will not be admitted to contradict, add to or explain it.

THIS is a civil action, which was tried before *Connor, J.,* at Spring Term, 1888, of TYRRELL Superior Court, brought to recover damages occasioned by the alleged failure of the defendant to keep and perform his contract with the plaintiff, set forth in the complaint.

The following is a copy of so much of the case settled on appeal for this Court as need be reported here.

The plaintiff introduced in evidence the following paper writing:

"Received of J. C. Meekins, Sr., three dollars, in part payment for 1,300 juniper mill logs, 900 of which is now on the bank and in the water at Lewis Island, and balance (400) in my swamp near by, on sound

shore. Now I agree to raft said logs properly for towing by steamer, and when said Meekins sends a steamer, or other vessel, to tow them I am to take the captain's receipt for such number as may be delivered to him from time to time, and when said 1,300 logs are thus delivered to said vessel said Meekins is to pay the undersigned $500, deducting the amount as above advanced, and such other advances as he may make from time to time as said logs may be towed. ABRAM NEWBERRY."

The execution of this paper was admitted by the defendant.

The plaintiff introduced evidence tending to show that he had (18) fully complied with his part of the contract, and that the defendant had failed to deliver the logs. He also introduced evidence tending to show his damage, and thereupon rested his case.

The defendant proposed to show by parol evidence that, in addition to the contract set out, there was made at the same time, and before the signing thereof, a contract, by the terms of which the plaintiff was to furnish to him the necessary rafting gear for properly rafting said logs; that plaintiff failed to furnish the rafting gear, and that on account of such failure the logs were not delivered. The plaintiff objected to the testimony, for that it tended to vary the terms of the written agreement. The court overruled the objections and the plaintiff excepted.

The court instructed the jury, that if upon the whole evidence they should find that the plaintiff agreed to furnish rafting gear, as alleged by the defendant, and failed to do so, they should find the first issue for the defendant. To this the plaintiff excepted."

The jury rendered a verdict in favor of the defendant, and the court thereupon gave judgment in his favor, from which the plaintiff appealed.

E. F. Aydlett for plaintiff.

W. D. Pruden for defendant.

MERRIMON, J., after stating the case: It is a settled rule of law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake properly alleged, parol evidence cannot be received to contradict, add to, modify or explain it. It must be treated and interpreted as it appears by the writing. This is so because the parties agree that the writing shall be evidence—the surer and better evidence of it. If, however, the writing does not by its terms or nature embrace the whole agreement, but only a certain part or (19) parts of it, then parol evidence will be received to prove such distinct parts thereof as are not embraced by the writing. But if particular parts or branches of it are reduced to writing, it must be taken

that the paries put in writing all they intended in such respect, unless it appears otherwise in the writing or by just implication from it.

If this were not so the writing, as evidence, might easily be evaded and rendered nugatory. 1 Grenlf. Ev., 76; *Twidy v. Saunderson,* 9 Ired., 5; *Manning v. Jones,* Busb., 368; *Kerckner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57; *Ray v. Blackwell,* 94 N. C., 10; *Nicholson v. Reves, ibid.,* 559; *Parker v. Morrell,* 98 N. C., 232.

The paper writing, put in evidence on the trial to prove the contract alleged in the complaint, purports by its terms and the nature of the things agreed to be done, to embrace the whole agreement of the parties.

It implies completeness; the terms are not exceptive, nor do they express condition or suggest by their nature or application that some part of the contract mentioned is omitted—on the contrary they are comprehensive and absolute—express what the parties agreed to do without qualification or condition. Particularly the defendant agreed by the writing, "to raft said logs properly for towing by steamer," etc. This is a positive stipulation in respect to a constituent material part of the agreement; it is complete in itself; plainly implies that the defendant would "raft said logs"—not upon condition, not when and if the plaintiff should do some precedent act, not when and if he should supply the "necessary rafting gear"—but that he would "raft said logs," doing in that connection whatever might be necessary and incident to such service. This is the plain import of the terms used in the absence of qualifying words or some word or words suggesting at least that some part of the contract, or something in that connection, had been omitted
(20) from the writing. So that the defendant cannot be allowed to prove by parol that the plaintiff agreed, as part of his contract, to "furnish to him (the defendant) the necessary rafting gear for properly rafting said logs." This would be to modify—substantially change the agreement of the parties in a respect as to which they reduced it to writing.

It cannot be said that the writing contained only what was agreed to be done by the defendant. The plaintiff, on his part, agreed to send "a steamer or other vessel to tow them"—the logs—and when they were "thus delivered to said vessel," he was to pay the defendant the stipulated price. It was not necessary that he should sign the writing—by accepting and recognizing it he became bound by it as his agreement in writing. As illustrating further the rule of evidence here applied, if the defendant had delivered the logs as he agreed to do, and had brought his action to recover the price the plaintiff agreed to pay, the latter could not be allowed to prove on the trial by parol evidence that by the agreement he was to pay the money *twelve months* after such delivery, because, by the writing, he agreed to pay the same at once on the delivery.

We are, therefore, of opinion that the court improperly admitted the evidence objected to. The plaintiff is entitled to a new trial, and we so adjudge.

Error.

Cited: Bank v. McElwee, 104 N. C., 307; *Harris v. Murphy,* 119 N. C., 35; *Jones v. Rhea,* 122 N. C., 726; *Cobb v. Clegg,* 137 N. C., 157; *Knitting Mills v. Guaranty Co., ibid.,* 569; *Bank v. Moore,* 138 N. C., 532.

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(21)

C. M. BELL AND R. H. BERRY, EXECUTORS OF B. C. BELL, v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

Damages—Condemning Land—Eminent Domain.

Where a railroad company in constructing its road crossed the "lead ditch" of an adjacent tract, and in consequence of the erection of its necessary embankments and cutting of side ditches, the lead ditch was unable to carry away the excess of surface water, which overflowed the adjacent lands, and it appeared that the land so used had been properly condemned and damages paid to the owner: *Held,* that the company was not liable for the damages thus produced.

THIS is a civil action, commenced by the testator of plaintiffs, to recover damages alleged to have been caused by the flooding of his land by the act of the defendant company in constructing its roadbed, tried before *Montgomery, J.,* at Spring Term, 1888, of CURRITUCK Superior Court.

By consent, the issue: "What damages has the plaintiffs sustained?" was submitted to a jury, and as to all other issues and facts a jury trial was waived, and it was agreed that they might be passed upon by the court.

The response to the issue submitted to the jury was "$700," and the court found the following facts, to wit:

The plaintiff's testator owned the land and lead ditch described in the complaint. The defendant in locating and constructing its roadbed, cut across said ditch and also cut ditches by the side of its roadbed to get dirt for the roadbed, and also to drain the roadbed. In constructing its roadbed the defendant cut across the embankment or dirt on the side of the lead ditch. By means of the locating and constructing of said roadbed more water was drained into plaintiffs' ditch than it could carry off, and the plaintiffs' land was flooded and injured thereby. The

water thus carried by the defendant's ditches was surface water, except occasionally after heavy rains the water from the Dismal Swamp
(22) would spread out over the surface from the ditch. There was no natural or artificial drain for these waters.

The "lead ditch" was sufficient to drain plaintiffs' land till defendant constructed its road.

The lands of plaintiffs' testator, over which the defendant constructed its roadbed and ditches, and also a section or part of the lead ditch had been condemned by regular proceedings under the statute and damages for the land taken, and the legal incidental damages to the lands not taken had been assessed and paid to him by the defendant.

The defendant did not locate and construct its roadbed or dig any ditch outside or off the lands which had been condemned and paid for.

The ditches cut by defendant were necessary for the purpose of the roadbed, for the road and for the safety of travel over the road, and the roadbed could not have been drained in any other way.

The plaintiff could have obviated the difficulty or relieved his land of this increased volume of water, drained into his lead ditch, by cutting the same deeper.

The plaintiff, upon the above facts and issue, moved for judgment for $700 and costs.

The court refused the motion, and upon defendant's motion, granted judgment for defendant. The plaintiffs excepted, and from the rulings and judgment appealed.

E. F. Aydlett for plaintiff..
L. D. Starke and Pruden & Vann, by brief, for defendant.

DAVIS, J., after stating the case: There is no error. It is found as a fact that the ditches, of which the plaintiffs complain, were necessary for the purposes of the roadbed; that the roadbed could not have been drained in any other way, and they were not outside or off of
(23) the land which had been condemned and paid for by the defendant, including "the legal and incidental damages to the land not taken."

Every one has the right properly to use his own, and without this drainage for the surface water, the defendant's right of way, for which the plaintiff has been paid, would have been of no value, and if, as an incidental consequence of the lawful and rightful use of its easement by the defendant company, the surface water damages the land of the plaintiffs' testator it is *damnum absque injuria,* and for which he cannot recover as for a tort. *R. & A. Air Line R. R. v. Wicker* and others, 74 N. C., 220.

It is no infringement of the maxim, *"Sic utere tuo ut alienum non lædas."* Washburn's Easements and Servitude, 453.

It was said in *Willey v. R. R.*, 98 N. C., 263, speaking of the condemnation of the right of way: "Everything necessary and incident, to the original making and subsequent operating the road, must be intended to have passed as against the owner of the condemned land," and the right to cut such ditches on the condemned land as will protect the roadbed against accumulating surface water is a necessary incident.

The water drained by the defendant's ditches was all surface water, except occasionally, after heavy rains, the water from the Dismal Swamp would spread over the surface of the ditch. There was no natural or artificial drain to the Dismal Swamp and the ditches were not designed to drain it, and the overflow was none the less of surface water, which, we apprehend, could not have been caused or prevented by the ditches. In *R. R. v. Wicker, supra,* a distinction is taken between diverting or obstructing a natural or artificial drainway, and one by which surface water is drained.

In the latter, in measuring the compensation to the landowner, the resulting damage should be estimated, and this was one of "the legal incidental damages," which has been assessed and paid for (24) as found by the court.

In the former, it is the duty of the company, in constructing its roadbed, to provide for the discharge of the waters through its ascertained drainway, whether natural or artificial.

Affirmed.

Cited: Parks v. R. R., 143 N. C., 295; *Bell v. R. R.*, 163 N. C., 180.

C. V. NORMAN v. A. G. WALKER, EXECUTOR OF W. W. WALKER AND H. P. ALEXANDER.

Guardian and Ward—Executors and Administrators—Limitations—Parties.

1. A guardian qualified in July, 1876; his ward come of age in September following: the guardian died without having settled his trust or making any of the returns required; in 1887 the ward made a demand upon, and brought suit against the sureties on the bond: *Held*, that his action was barred.

2. Actions upon the bonds of guardians, administrators, executors and collectors must be brought in the name of the State.

NORMAN *v.* WALKER.

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

The following are the facts agreed upon:

"1. 6 July, 1872, V. B. Norman qualified in the proper court of Tyrrell County as guardian of the relator, with W. W. Walker and H. P. Alexander as sureties, his bond being, as set out in the complaint, in the penal sum of $1,040. He made no returns whatever of his guardian account. He died a few years after his qualification intestate, and no administration has ever been appointed on his estate.

2. The said guardian received for the relator, on 6 July, $169.43, and has failed to pay the same over to the relator.

3. C. V. Norman (relator) came of age September, 1876, after
(25) the death of the guardian, and made demand of the defendants on the day of the beginning of this action, 8 October, 1887.

W. W. Walker died in August, 1885, and A. G. Walker qualified as his executor in October following."

The action was brought and prosecuted in the name of the plaintiff.

The defendants relied upon the three years' statute of limitations. The Code, sec. 155.

There was a judgment for the defendant, and the plaintiff appealed.

W. D. Pruden for plaintiff.
No counsel for defendants.

DAVIS, J. The action on the guardian bond should have been in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. *Carmichael v. Moore,* 88 N. C., 29; *Williams v. McNair,* 98 N. C., 232.

No final account, or any other account, was filed by the guardian who was principal on the bond declared on, and counsel insist that "no statute began to run against the plaintiff till the final account was filed," and for this he relies on section 154 of The Code.

That section fixes the limit of six years "after the auditing of his final account by the proper officer, and the filing of such audited account as required by law," as the bar to actions against executors, administrators, collectors or guardians on their official bonds, but the defendants were *sureties* on the bond, and sec. 155, subsec. 6, of The Code, fixes a different limit as a bar to actions against them, and provides that "an action against the *sureties* of any executor, administrator, collector or guardian on the official bond of their principal," shall be commenced "within three years after the breach thereof com-
(26) plained of."

It was the duty of the guardian within three months after his appointment to exhibit an account, upon oath, of the estate of his ward to the clerk of the Superior Court, and to make annual return. The Code, secs. 1577, 1580.

It appears from the case agreed, that he made not returns whatever. This was a breach of his bond. It further appears that he died before his ward (the plaintiff) came of age. The plaintiff came within the exceptions mentioned in section 163 of The Code, and could have brought his action against the *sureties* on the bond within three years after attaining the age of twenty-one years, but this action was not commenced till more than ten years after the plaintiff became twenty-one years of age.

As we have seen, this action comes under the provisions of section 155, subsection 6, of The Code, and not under the sections referred to in *Williams v. McNair,* 98 N. C., 336, cited by counsel. In that case Caroline McNair was a *feme covert,* and had been under disabilities to sue. There is no error.

Affirmed.

Cited: Kennedy v. Cromwell, 108 N. C., 2; *Koonce v. Pelletier,* 115 N. C., 235; *Self v. Shugart,* 135 N. C., 186.

JAMES A. WOODARD AND C. A. WOODARD v. W. C. PAXTON.

Judgment—Execution—Limitations.

A judgment rendered by a justice of the peace becomes dormant at the expiration of a year from its rendition; and docketing it in the Superior Court after that period, does not restore its vitality; it can only be revived by a new action before a justice of the peace.

THIS is a motion for leave to issue an execution, which was (27) heard, upon appeal from the judgment of the clerk of the Superior Court of CHOWAN County, by *Montgomery, J.,* at Spring Term, 1888.

The plaintiffs, on 23 December, 1877, recovered judgment against the defendant before a justice of the peace for a sum within his jurisdiction, on which he issued execution on 9 February following. Execution issued 30 September of the same year, and was returned with the officer's endorsement, "nothing to be found."

The judgment was docketed in the Superior Court of Chowan 13 January, 1879, since which no execution has issued.

On 19 December, 1887, notice issued and was served on the defendant two days thereafter, of the plaintiffs' intended application to the clerk for leave to issue execution, and their motion was accordingly made, supported by the affidavit of one of them that the judgment remains unsatisfied, specifying the sum due. To the granting the motion the defendant interposed the defense of the statute of limitations, and the clerk, sustaining the objection, refused the leave demanded, and dismissed the proceeding. Upon plaintiff's appeal, the judge presiding at the next term reversed the judgment of the clerk and allowed the motion with costs, and from this judgment the defendant appeals to this Court.

No counsel for plaintiffs.
W. D. Pruden for defendant.

SMITH, C. J., after stating the case: In our opinion there is error in the ruling which awards execution, and the motion should have been denied.

(28) The period during which final process may be issued by a justice of the peace to enforce his judgment is limited to one year after its rendition, and it must be returnable sixty days thereafter. The Code, sec. 840, Rule 14. The judgment not having been docketed within this period, had therefore become dormant, and could only be given efficacy by a new action upon it, prosecuted before a justice of the peace. The Code, sec. 844. Its lost vitality could not be restored by a transfer to the docket of the Superior Court merely. It is there, if rightfully there at all, in an unchanged condition, and with all its infirmities adhering, as expressly decided in *Williams v. Williams*, 85 N. C., 383.

In the opinion in this case the right to transfer and docket a justice's judgment that has become dormant, in its present condition, and, without a reviving adjudication, incapable of enforcement by direct final process was questioned, and an adverse intimation given, the court using this language:

As the purpose of the removal allowed by the statute is to afford the creditor "the more efficient and far-reaching executions and process of the Superior Court," as well as the advantage of the immediate lien on the debtor's land, as declared in the opinion in *Broyles v. Young*, 81 N. C., 315; it may admit of question whether, if such results are to follow, the transfer should not be made before the dormancy supervenes, so that as the judgment could be enforced by process from the

justice *before and at the time of transfer,* it was in a condition to be enforced at once upon the docketing, by the appropriate remedies afforded in the court to which it is removed. Our further reflections satisfy us that this is a sound interpretation of the law and resolve the doubt there expressed. Unless this restraint is put upon the right of removal, and if an effect is to be given to the docketing to impart life and activity to the judgment, which had been lost by neglect, we see no reason why the transfer may not be allowed, when six and seven years have elapsed, and thus its life be prolonged for the full (29) further period of ten years, a consequence giving a justice's judgment advantages not possessed by one rendered in court. We therefore hold that the removal must take place before the justice's judgment has become dormant, so that only a change is made in the tribunals having cognizance, none in the nature of the judgment itself, and for this reason the docketing is inoperative, and does not warrant the present proceeding. The plaintiffs' remedy is, therefore, to be sought in an action based upon the judgment itself and prosecuted to a renewal. *Vide Broyles v. Young,* 81 N. C., 315.

The removal does not vacate the justice's judgment, but leaves it in full force as such, except that any process to enforce it must, after docketing, be sued out of the Superior Court, and this pursues the law applicable to judgments originally rendered in that court. *Morton v. Rippy,* 84 N. C., 611; *Cannon v. Parker,* 81 N. C., 320.

We do not see the pertinency of the plea founded on the long lapse of time, since the docketing for the case was not rightfully constituted in the Superior Court, and admitted of no such relief as demanded. There was error in the ruling which awards execution, and the judgment of the clerk dismissing the proceeding should have been affirmed.

Reversed.

Cited: Cowen v. Withrow, 114 N. C., 559, 560; *Lowdermilk v. Butler,* 182 N. C., 506.

(30)

J. C. CARTER ET AL., TRUSTEES OF THE SWAN ISLAND CLUB, v. W. H. WHITE ET AL.

Grant—When and How Vacated—Descriptions in.

1. A description in a grant as "a tract of land, containing 67½ acres, lying and being in the county of Currituck, known by the name of Walker's Island," was followed by a further and particular description, giving beginning and the courses and distances of the various lines, which did not

include all the land on Walker's Island: *Held*, that the specific descriptions by metes and bounds must prevail over the general designation, and only the lands embraced in the former passed by the grant.

2. The remedy provided by The Code, secs. 2785 and 2787, for persons aggrieved by the issuing of grants is only available to a senior against a junior grantee.

THIS is a civil action to vacate a grant tried before *Montgomery, J.*, at Spring Term, 1888, of CURRITUCK Superior Court.

On 5 December, 1832, a grant from the State issued to D. W. Dunton, under whom, by a succession of conveyances, the plaintiffs claim title for a tract of land, described as follows: "A tract of land containing sixty-seven acres and a half, lying and being in the county of Currituck, known by the name of Walker's Island, beginning at a creek called Ben Hall, it being the southeast corner of James Brabble and Maxmillian Tatem's line; thence running south five degrees, west forty-six chains and fifty links, to a post; thence north thirty-eight degrees, west thirty-seven chains, to the marsh; thence along the marsh north seventy-three degrees, west five chains and twenty-five links; thence north fifteen degrees, west one chain, to the mouth of Walker's Creek; thence along said creek and James Brabble and Maxmillian Tatem's line, to the beginning."

On 21 June, 1886, a grant issued to the defendant W. H. White, through whom the associate defendants claim for a tract of land
(31) therein described, in these terms: "A tract of land containing twenty-eight and forty-one one-hundredths (28 41/100) acres, lying and being in the county of Currituck, on Walker's Island, beginning at a stake on the west side of Walker's Island, running south three and a half degrees, west seven chains, binding the waters on Little Walker's Creek; thence south nine degrees, east nine chains; thence south thirty-three degrees east, binding the sound seven chains; thence south forty-eight degrees, east along the south side of Walker's Island binding the sound five chains; thence south sixty-three, east binding the sound five chains; thence south twenty-two, east binding the sound four chains; thence north sixty and a half, east along the marsh, to the mouth of a little creek, five chains and twenty-five links, to the Dennis Dunton line; thence with said line north thirty-eight degrees, west twenty-six chains; thence north seventy-three degrees, west five chains and twenty-five links; thence north fifteen degrees, west one chain to the beginning."

The complaint based upon the act of 1798 (The Code, sec. 2786), alleges that this junior grant embraces land within the boundaries of that issued in 1832 to the estate in which they have succeeded, was procured by the grantee W. H. White, with a knowledge of the fact of

the interference, unlawfully and fraudulently, and if permitted to stand is a cloud upon their title, and ought to be removed. To this end the plaintiffs demand that the same be adjudged and declared null and void, and the shade thus cast upon their title dispersed as authorized by the statute.

The answer controverts these averments, and the parties consenting to a trial of the facts by the judge, in place of the jury, he finds, besides the conveyances already recited, these further facts material to the solution of the controversy raised in the pleadings:

That Ben Hall Creek, the marsh, Walker's Creek, Little (32) Walker's Creek and the Sound, mentioned in the grant, are natural objects and were located; that Walker's Island contains more in area than 67½ acres of land, and that the lands covered by defendant's grant are a part of Walker's Island—but are not included within the courses and distances of plaintiff's grant.

It was admitted by plaintiffs that there was no evidence that the defendants obtained their grant by fraud, false suggestions or surprise, and that there was no evidence that the defendants knew or had reason to know that the plaintiffs, or those under whom they claim, had any grant which covered the land contained in the boundaries of defendants' grant or that the land contained in defendant's grant had ever been granted by the State, except the fact that one line of defendant's grant called for Dennis Dunton's line.

The plaintiffs' grant was registered.

Upon the foregoing facts and admissions, the plaintiffs moved for judgment, upon the grounds that the grant under which they claimed conveyed the whole of Walker's Island, and that the whole of Walker's Island having been thus granted to them, it was "against law" for the defendants to take a grant for the same land.

The defendants also moved for judgment upon the grounds, that all of Walker's Island was not conveyed in plaintiffs' grant, but only such portion of it as was contained in the boundaries "beginning at the creek called Ben Hall, the corner of James Brabble and Maxmillian Tatem's line," etc., and that as it was found as a fact that the land conveyed in defendant's grant was not within the boundaries of plaintiffs' grant, the said land was the subject of entry and grant by the State to the defendants. The defendants further insisted, that the description in the will of D. W. Dunton was too indefinite and vague. The defendants further insisted, that there being no evidence that defendants obtained their grant by fraud, false suggestion, (33) or surprise, or that defendants knew or had reason to know that the land had theretofore been granted to plaintiffs, that it was not "against law" for them to procure a grant for the land, even if it had

been theretofore granted to plaintiffs; that plaintiffs' remedy was by action for recovery of land, or for trespass.

The court refused plaintiff's motion, and rendered judgment for the defendants.

Plaintiffs appealed.

L. D. Starke for plaintiffs.
No counsel for defendants.

SMITH, C. J., after stating the case: The statute which authorizes the present action provides that any person "aggrieved by any grant or patent issued or made since 4 July, 1776, to any other person *against law, or obtained by false suggestion, surprise or fraud,*" may proceed in the Superior Court to have the same "repealed and vacated," and as the complaint must allege, so the evidence must show, that the obnoxious patent issued against law, or was procured under the circumstances and conditions pointed out, or the action must fail. In the construction of the statute it is held that the remedy is open only to a senior against a junior grantee, inasmuch as none can be aggrieved unless he has an interest in the subject matter of the obnoxious grant when it issued, which a junior grantee has not, and that the purpose is to remove a cloud overshadowing a previously acquired title. *O'Kelley v. Clayton,* 2 D. & B., 246, following the elaborate discussion of the point by *Daniel, J.,* delivering the opinion in *Crow v. Holland,* 4 Dev., 417. It is not less necessary that the junior grant, sought to be vacated, must have issued "against law, or been obtained by false suggestion,
(34) surprise or fraud," to invalidate it as a conveyance, and put it out of the way of the aggrieved party. *Miller v. Twitty,* 3 D. & B., 14.

The facts ascertained by the court clearly fail to bring the case within the operation of the law, so as to entitle the plaintiffs to the relief they demand, unless, as their counsel maintain, their grant embraces the whole of Walker's Island, with its water boundaries, and is not circumscribed by the specific lines that follow the calls and general designation of that Island. For it is definitely found that if those lines are pursued the defendants' land lies wholly outside of them, and as there is no interference, the plaintiffs have no claim to possess an interest in the latter, and cannot, in the sense of the law, be an aggrieved party.

So the solution of the controversy depends entirely upon the construction to be put upon the descriptive terms contained in the grant to Dunton. Does the call of the land as "known by the name of Walker's Island," notwithstanding what follows as a specific designation by distinct and definite boundaries of its extent, control in the construction?

While the words recited, unconnected with others, will embrace a water-bound tract as an island is such, yet upon every well settled rule of interpretation, subsequent restrictive words, giving and defining its boundaries, must have the effect of qualifying the preceding general designation.

The Island determines, as does the mention of the county, the locality of the land granted; the particular description, what portions is intended, and thus the general and true intent is reached, and an apparent repugnancy avoided, and the deed rendered self-consistent.

It cannot be necessary to cite authority in the support of so manifest a proposition, and we refrain from prosecuting the discussion. As then, the land described in the defendants' grant, is not embraced in that of the plaintiffs; the latter have no standing in court to make complaint of the action of the grantee White, under the statute, as they have no claim to the land granted to him, nor was his (35) grant unlawful.

This being the only exception in the record of which we can take notice in the appeal, and it being untenable, it must be declared that there is no error, and we affirm the judgment.

Affirmed.

Cited: McNamee v. Alexander, 109 N. C., 246; *Cox v. McGowan,* 116 N. C., 135; *Wyatt v. Mfg. Co.,* 116 N. C., 282; *S. v. Bland,* 123 N. C., 739; *Peebles v. Graham,* 128 N. C., 221; *Henry v. McCoy,* 131 N. C., 588; *Modlin v. R. R.,* 145 N. C., 230; *Gaylord v. McCoy,* 158 N. C., 327; *Potter v. Bonner,* 174 N. C., 21; *Wearn v. R. R.,* 191 N. C., 583.

THE EASTERN LAND, LUMBER AND MANUFACTURING COMPANY v. THE STATE BOARD OF EDUCATION AND W. G. LEWIS.

Tax Title—Forfeiture—Evidence—Swamp Lands—Innocent Purchaser.

1. One claiming land under a tax sale, must show that the delinquent taxpayer was the owner of the land at the time of the sale (or when the lien for the taxes attached), that it had been duly listed and that taxes were assessed against and due thereon, and that all of the existing prerequisites to the sale were observed. The recitals in the deed, unsupported by evidence, *de hors*, in the absence of any statutory provision, are not evidence of these facts.

2. Forfeiture of an estate once vested will never be presumed.

3. An estate in lands did not become forfeited for failure to list and pay taxes under chapter 36, Laws of 1842-'43, until the State, or its representatives, had the facts, upon which the forfeiture depended, determined by some proceeding in which the grantee might be heard, or put upon notice, that the forfeiture was claimed; but now, under that act as amended, section 2522 of The Code, the State Board of Education may assert its title by reason of the forfeiture, by taking possession of or causing the lands to be surveyed.

4. A forfeiture will not be enforced against a purchaser for value, who had no notice of alleged default of those under whom he claims.

THIS is civil action which was tried before *Montgomery, J.*, at June Term, 1887, of PASQUOTANK Superior Court.

The object of the suit is to restrain the defendants from expelling the plaintiffs, their agents and servants from the lands in con-
(36) troversy (under sec. 1121 of The Code), and to remove cloud upon their title.

The following are the material parts of the "case agreed" and submitted to the court for its judgment thereupon:

"The land in controversy was granted by the State to John Gray Blount, 7 September, 1795.

On 24 March, 1873, the heirs at law of said John Gray Blount, for a consideration of $1,014, conveyed their interest in said land to B. F. Sikes, with special warranty only.

B. F. Sikes executed a deed to Baird, Roper & Co., in March, 1873, for said land, and thereafter, by a regular series of conveyances, it came to the plaintiff, a duly incorporated company, by deed dated 31 May, 1887.

The land is of the character known as 'Swamp Lands,' and was not cultivated, or actually occupied, by any one up to 24 March, 1873. Very shortly after that, to wit, 15 May, 1873, Baird & Roper commenced to work and occupy the same, and continued so to do constantly till plaintiff brought this action in 1887.

Since 1873 these lands, under the boundaries set forth in the complaint, have been in the actual possession of plaintiffs and those under whom they claim.

Prior to March, 1873, no one had actual possession thereof.

The defendant, the State Board of Education, show a deed, as part of their claim to this land, signed 'James Hoskins, sheriff of Tyrrell County, N. C., to Nathaniel Alexander, Governor,' purporting to convey the said land for taxes due by Thomas Fitts, as property of Thomas Fitts, which is dated 26 October, 1807.

The original thereof is now on file in the Secretary of State's office, pasted in a book marked 'Old Deeds, Lands Sold for Taxes.'

It is admitted that, on 10 March, 1801, John G. Blount executed a deed to one William Orr for 6,375 acres of land, in which deed, in describing the land conveyed therein, a call is made 'to a pine, Fitts' and Blount's corner,' 'then with Fitts' line,' etc. This (37) land, so conveyed to Orr, is a part of the Blount grant before named, but is no part of the land in controversy in this action, nor is it any part of the land described in the deed from Hoskins, sheriff, to Alexander, Governor.

The lands in controversy, and described in the Blount grant, were never listed for taxation by John Gray Blount, or any other person, from the year 1817 up to his death, in 1833, nor did he ever pay any taxes thereon during that period nor were any taxes levied thereon.

There is no evidence as to whether he listed them and paid thereon prior to 1817, or not.

The tax lists of Tyrrell County are in existence since 1817, and up to 1874, and the lands do not appear as listed thereon. The tax lists prior to 1817 are not in existence.

Since Baird & Roper purchased the lands in March, 1873, they regularly listed them in Dare County and paid taxes thereon.

The said lands formed a part of Tyrrell County until Dare County was formed, pursuant to an act of the Legislature, when they became a part of Dare County.

After the death of John Gray Blount, in 1833, his heirs at law, under whom plaintiff claims, never listed said lands for taxes, and never paid any taxes thereon. The heirs of John Gray Blount never claimed the lands, nor any part thereof, until March, 1873, when they conveyed their interest to Sikes, as hereinbefore stated. John Gray Blount, nor his heirs at law, never made any effort to redeem said lands if they were forfeited.

The defendant Board commenced to survey these lands, to wit, the said Blount grant for 90,000 acres, in September, 1887, and surveyed all the land lines of the grant, and, knowing the water lines, finished the survey by 1 November, 1887.

In December, 1867, the defendant Lewis, then agent for the (38) Literary Fund, and under its instructions, started with a proposed purchaser to inspect and sell these lands, but owing to high water did not succeed in reaching them.

These lands were commonly known and designated in the neighborhood and in Tyrrell County as 'State Lands,' and were generally so called, but Baird & Roper, and those claiming under them, never knew of it.

Baird & Roper, and those who succeeded them, paid valuable consideration for the lands, and had no notice of the alleged title of the

defendants, other than the registration of the 'Hoskins Deed,' if that be notice; and plaintiffs had no actual notice of that deed when they bought.

There is no deed on record or in existence, so far as the parties hereto know, from John Gray Blount to Thomas Fitts.

Baird & Roper, and those succeeding them, paid no arrearages of taxes prior to March, 1873.

The defendant, 'The State Board,' claims the lands in controversy:

1. Under the tax sale and deed by Hoskins, sheriff, to the Governor.

2. That these lands were forfeited to the State under act of 1842, ch. 36, and became vested in the defendant Board by the Legislature, because they were never listed for taxation from 1817 to 1873, and no taxes paid thereon, and no claim made by the heirs of the grantee Blount, during that time.

3. If judicial process be necessary to declare a forfeiture, that the said lands be now declared forfeited.

It is admitted that the plaintiff owns the lands in controversy through a regular chain of title from the State, unless the same is defeated by the claims of the defendant Board, as hereinbefore set forth.

There is no evidence of any other survey or actual entry by (39) the defendant or its predecessors, except as herein stated."

Upon the facts as stated in the case agreed, the court was of the opinion that plaintiffs are the owners of the land in controversy, and gave judgment accordingly.

Defendant excepted, and assigned as error, that upon the facts, as stated, judgment ought to have been given for defendants, as prayed for in their answer, and according to their various claims as stated in the case agreed.

Exception overruled, and defendant appealed.

W. D. Pruden and L. N. Bangs for plaintiffs.

Attorney-General (and Geo. H. Brown, Jr., by brief), for defendants.

MERRIMON, J. On the argument the counsel for the appellant properly conceded that the plaintiff, appellee, shows apparently title to the land in controversy, because it shows a grant therefor from the State to John Gray Blount, dated 7 September, 1795, and that it derives title from him through sundry *mesne* conveyances, the regularity and sufficiency of which, as to order and form, are not questioned.

But the appellant contends first, that the grantee Blount conveyed the land before 1806 to Thomas Fitts, and that the deed mentioned of the sheriff, executed to the Governor, purporting to convey the land to him for unpaid taxes of Thomas Fitts for that year, had the effect to vest the

title thereto in the State, and therefore the *mesne* conveyances relied upon by the appellee passed no title to; and, secondly, that by the force and effect of the statute (Acts 1842-43, ch. 36; The Code, sec. 2522), the land was forfeited, and became forfeit to the State for unpaid taxes, and because the same was not listed for taxation from the year 1817 to 1873.

First, as to the effect of the deed from the sheriff to the Governor. It does not appear from any competent evidence that Fitts ever owned the land described in it, or that he was liable to pay taxes on that account, or that it was listed by him, or another for him (40) for taxation, or that taxes were assessed against or levied upon it as to him or any other person for the year 1806. Nor does it appear that any of the prerequisites to a sale of land to pay taxes, as required by law at the time of the supposed sale, were in any respect observed and complied with by the sheriff and other officers connected with the public service in respect to taxes. The recitals in the sheriff's deed, in the absence of statutory provision making them such, were not evidence that they were complied with, without evidence *de hors* the deed that they were; the deed itself was wholly ineffectual for the purpose contemplated by it. This, as to such deeds, is too well settled to admit of question. *Register v. Bryan,* 2 Hawks, 17; *Fox v. Stafford,* 90 N. C., 296, and numerous cases there cited; Bailey's *Onus Probandi,* 276, *et seq.*

It was suggested on the argument that the statutes (Acts 1885, ch. 177, sec. 42; Acts 1887, ch. 137, secs. 73, 74), which provide that a sheriff's deed for land sold to pay taxes shall be presumptive evidence of certain material facts essential to render such deed effectual, might apply in this case. They certainly do not apply in terms, but they have reference to sales of land for taxes made as provided in, and in pursuance of them. There is nothing in them going to show by implication that they were intended to have a retroactive operation, nor have they such effect. They do not apply in this and like cases that arose before they were enacted.

It was further contended on the argument, that the deed of the sheriff was an ancient deed, and proved itself, and it was therefore evidence of title in the State. The rule invoked does not apply. There was no question that the deed was or was not executed; that it was, was not denied, and it so appeared; but, accepting it as proven, it was in and by itself ineffectual as a conveyance, and as evidence of title, and, for reasons already stated, it did not pass the title to the (41) State. Moreover, if the deed were ancient and treated as color of title, it does not appear that the State, or any agency of it, ever had

possession of the land claiming under it, nor is there any evidence of acts of ownership of it, continuous or otherwise, by the State or any of its agencies, until 1887, when the appellant had it surveyed. Possession under this deed, in any aspect of it, was necessary to give it effect as an instrument of conveyance. *Plummer v. Baskerville,* 1 Ired. Eq., 252; *Davis v. Higgins,* 91 N. C., 382.

Secondly, as to the alleged forfeiture: It does not appear that the original grantee, or other person, listed the land in question for taxation from the year 1806 until the time of his death in 1833, nor that he or any other person paid taxes on account of the same during that, or any part of that time, nor did he or any other person during that time have actual possession of it, or exercise authority actively over it by acts of ownership of any kind, nor did his heirs after his death, until 24 March, 1873, when they conveyed the same by their deed to B. F. Sikes, through whom the appellee claims and traces its title. The grant passed the title to the land from the State to the grantee, and, notwithstanding the latter's default as to the payment of taxes on account of it, in the nature of the matter he had, and continued to have, the title to and actual or constructive possession of the land during his life-time ever after the execution of the grant, until he parted with such title and possession by a proper conveyance, or until some other person took and held actual possession of the land adversely to him, for such length of time under such circumstances as gave the trespasser a good title to it, or until he perfected his title thereto, and it became forfeit to the State; and at his death such title and possession descended to his heirs, or passed to his devisees, if he left a will, and they, respectively, had the like title and possession, notwithstanding their like default
(42) as to the payment of taxes, until they in like manner and for like causes parted with the same.

So far as appears, the grantee did not, in his life-time, voluntarily part with his title to the land, by any conveyance thereof, nor did his heirs after his death, until in March, 1873, nor did they lose such title and constructive possession by the adverse possession, with color of title or otherwise, of a trespasser. Nor did the mere failure of the grantee, or that of his heirs after his death, to list the land for taxation and to pay taxes on account of the same, divest the grantee in his life-time, or divest his heirs after his death, of such title and possession, unless the land became forfeit to the State by the mere force and effect of the statute (Acts 1842-43, ch. 36), without any interference on the part of the State or any of its agents by acts of ownership, or by any action or judicial proceeding to ascertain and declare a forfeiture of the land to the State.

The appellant contends that the act just cited had such effect, because it in broad sweeping terms so provides, as follows: "That any person or persons who have heretofore at any time obtained a grant or grants from the State for any swamp lands in this State, and who, or their heirs or assigns, have not regularly listed the same for taxation and paid the taxes due thereon to the person or persons entitled to receive the same, such person or persons so having obtained such grant or grants, their heirs or assigns *shall forfeit* and lose all right, title and interest in the said swamp lands, and the same shall, *ipso facto,* revert to and be vested in the State, unless such person or persons, his heir or their heirs or assigns shall, within twelve months from the passage of this act, pay to the sheriff of the county in which said lands lie all the arrearages of taxes due on the said lands, with the lawful interest thereon from the time said taxes ought to have been paid." The appellee, on the contrary, insists that this statutory provision, properly interpreted, fairly implies that the prescribed forfeiture (43) cannot take effect and revest the title to the land in the State until the latter shall, in some way, take proper action to ascertain, declare and give effect to the alleged forfeiture, giving the defaulting party opportunity to be heard in his defense; and that if this is not so, then the provision is unconstitutional and void, because it affords the defaulting party no opportunity to be heard in defense of his right before a judicial or other tribunal.

The strong presumption is that this statute harmonizes with the Constitution, and is valid; but we are not called upon to decide that it is or is not so, because this Court interpreted in *Phelps v. Chesson,* 12 Ired., 198, and expressly decided that inasmuch as neither the State nor its assigns (the immediate predecessor corporation of the present defendant appellant) had taken any proceedings, or in any way signified an election to defeat the estate of the alleged defaulting party, it was still in him, and he was entitled to maintain his action.

The counsel for the appellant seemed to question the correctness of that interpretation. We think it is reasonable and just, and it seems to us fully warranted, certainly by the spirit and reason of the statute. It is not to be presumed or merely inferred, that the Legislature intended to deprive the grantee of his estate without affording him opportunity, in some affirmative way, that actively puts him on notice to defend his right, if he shall see fit, and an intention to do so could only appear by clear and explicit terms, leaving no doubt as to such intent, and we forbear to say here whether such an enactment would or would not be of force for any purpose. The reasonable inference is that the Legislature intended to allow such opportunity, and it suffi-

ciently appears that it has done so. The court said in the case last cited, with much point and force, that "the law books teem with
(44) cases fixing the principle that an estate once vested cannot be defeated by a condition or forfeiture, without some act on the part of the grantor or his heirs by which to take advantage of the condition or forfeiture, even when the words of the condition are, "the estate shall therefore be void and of no effect," which words have the same legal import as *ipso facto* void. In this act, after the emphatic declaration that the land shall *ipso facto* revert to and be vested in the State, there is the qualification, unless such grantee, his heirs or assigns shall, within twelve months pay the taxes, etc. This shows conclusively, that it was contemplated to have some proceeding on the part of the State or its assignees, the president and directors of the literary board, so as to give the grantee, his heirs or assigns, "a day in court," an opportunity to show that the arrearages of taxes had in fact been paid within the year." And we may add that the strong words, "shall *ipso facto* revert to and be vested in the State," are used to imply that the grant need not be canceled, and that no deed of conveyance shall be necessary to revest the title in the State—the statute had such effect when and as soon as the forfeiture is made complete by some sufficient act of its own or some adequate proceeding to that end. Moreover, it is not declared in the statute that the land shall at once be *forfeit* to the State on such failure to list the land for taxation and to pay the taxes due on account of it, or at the end of twelve months next thereafter.

The interpretation thus given is in harmony with the statute (Acts 1850-51, ch. 102, sec. 2), declaratory of the meaning of the statute interpreted. While this declaratory statute could not determine the meaning of that to which it refers—that being the province of the courts—still it goes to show that the Legislature was satisfied with the decision of this Court. Repeatedly, since it was made, the Legislature has acted upon the subject to which it relates, and the law, as
(45) settled by it, has not since been disturbed. It may, and should be regarded as settling the meaning of the statute to which it refers, and in a way entirely satisfactory to the legislative branch of the government. We are not at liberty, nor are we in the least inclined to disturb the decision or to doubt its correctness.

Neither the State nor the defendant, nor "The President and Directors of the Literary Board of North Carolina," nor any agency of the State ever after the alleged forfeiture of the land in question took possession of it, or surveyed it, or brought any action, or took any proceeding whatever, or did any act whereby to enforce such forfeiture, or to make the same complete and effectual, or to signify the intention

of the State or its assignees to defeat the estate of the grantee in his life-time, or that of his heirs after his death, or that of those claiming under them, and caused the land to "revert to and be vested in the State" until 1887, when the defendant caused the same to be surveyed. This survey was not made until about fourteen years next after Baird, Roper & Co., through whom the appellee claims, purchased the land from B. F. Sikes. During all that time they, and those claiming under them, including the appellee, respectively, regularly listed the lands for taxation and paid the taxes due on account of the same, and they had no notice of the alleged title of the defendants.

It is contended that the survey thus made was sufficient notice of the purpose of the State, through the defendant and the State Board of Education, to insist upon the forfeiture of the land, and perfect the same so as to cause the land to "revert to and be vested in the said board (The State Board of Education), upon the same trusts as they hold the other swamp lands," etc., as provided by the statute (The Code, sec. 2522). We cannot think so. The statute contemplates that the forfeiture shall be made complete and effectual with reasonable promptness. Until it is thus perfected the grantee or his heirs or his assigns, accordingly as one or the other of them may (46) have the title to the land, continue to have it, and can pass the same to any person who may buy it in good faith. The statute does not contemplate a forfeiture as against such purchaser in good faith. It does not so provide in terms, or by just and necessary implication, and a forfeiture is not intended unless it so appears by express words in the statute or by such implication. Forfeitures are never created, and do not arise by mere inference. The statute appears, substantially, now as it did when it was at first enacted and amended, and it provides that *"Any person, his heirs or assigns,* having at any time obtained a grant from the State for any swamp lands which *have been surveyed or taken possession of* by the State Board of Education or their agents, and shall not have regularly listed the same for taxation and paid the taxes due thereon to the person entitled to receive the same, and *such grantee and his heirs or assigns* shall forfeit," etc. It will be observed that the forfeiture is limited, and extends only to the *grantee and his heirs or assigns;* it does not embrace the purchasers of the land from them *bona fide;* it is not declared that the latter shall forfeit the land for the default of the former, nor that the lands shall be forfeited for such default, while the title thereto is in the innocent purchaser, nor can the Court *infer* that the Legislature so intended.

By the term "assigns," as used in the statute, is not meant *purchasers* of the land from the grantee or his heirs after the grant had issued,

but persons to whom the grantee had assigned his right to have the grant before the same issued, and to whom it was issued by virtue of such assignment. It frequently happened that persons would take proper steps—make proper entries of swamp lands, and as well other lands, and having acquired a right to have a grant for the land so entered, could sell and assign such right before it was issued, and
(47) the assignee would obtain the grant from the State. The purpose of the statute was, and is, to embrace such "assignees." It would be unreasonable and unjust to make the forfeiture apply to the land when and after the title thereto had passed to innocent purchasers. There is no provision in the statute that implies such purpose—the contrary appears, in that it is expressly declared that the forfeiture shall apply only to "swamp lands which have been *surveyed or taken possession of,*" etc. Such manifestations of purpose on the part of the State to enforce the forfeiture is intended to give notice of its purpose, not only to the "grantee and his heirs or assigns," but as well to all other persons who may wish to purchase or have anything to do with the land.

Hence the survey made by the appellant in 1887, fourteen years after the heirs of the grantee had sold and conveyed the land to the purchasers, who had no notice or knowledge of the forfeiture unperfected, could not affect adversely such innocent purchaser. The agencies of the State failed to comply with the requirements of the statute in apt time, that is, within the time prescribed by law, and while the title to the land remained in the grantee and his heirs. As they failed to do so, neither the statute nor the State will allow them, after the lapse of many years, to disturb the rights of innocent purchasers, who have regularly listed the lands for taxation and from time to time have paid the taxes due on account of the same.

It is admitted that the appellee has shown "a regular chain of title from the State, unless the same is defeated by the claims of the defendant (appellant) board." We are of opinion that the title of the appellee thus admitted has not been overthrown by anything shown by the appellant, and therefore the judgment must be

Affirmed.

Cited: Parish v. Cedar Co., 133 N. C., 481; *Board of Education v. Remick,* 160 N. C., 566.

(48)

JOSEPH B. SPIVEY ET AL. v. THOS. J. HARRELL ET AL.

Judgment—Fraud—Irregularity—Contract—Trust.

1. Judgments are conclusive against all parties thereto until they are duly reversed or set aside for fraud or irregularity.
2. Where the action or proceeding, in which a judgment has been rendered is ended, the remedy for any fraud therein is by an independent action, but where it is sought to be avoided for irregularity, the remedy is by a motion in the cause.
3. Where the defendant alleged in his answer that the plaintiff, at a judicial sale of land, had bid off the property under a parol promise that he would convey it upon the defendant's repaying the purchase money, and a little advance: *Held*, that no trust or contract, which a Court of Equity would enforce was created.

THIS was a civil action for the recovery of land, tried before *Avery, J.*, at Fall Term, 1887, of BERTIE Superior Court.

The following is so much of the case settled on appeal as is material to the questions decided:

"The plaintiffs put in evidence the record of a special proceeding entitled *A. Wilson et al. v. T. J. Harrell.* It was admitted to be the record of the Superior Court. It was admitted by all parties that the four defendants (other than T. J. Harrell) who are mentioned in the pleadings, owned each one undivided twenty-fifth of the land in controversy, and that at the sale under said special proceedings, defendant T. J. Harrell, was made a party, and assented to the sale by virtue of said proceeding, but he alleged that he assented to the said sale on the parol agreement set up in the answer, and which is denied by plaintiffs.

The defendant Harrell moved the court to submit an issue as to whether the plaintiffs agreed to purchase and reconvey to him, as alleged in the answer. Plaintiffs objected on the ground that the parol agreement set up was not sufficiently definite in alleging that plaintiff was to repay the purchase money, with 'a little advance.' Defendant Harrell insisted that the jury should also ascertain on (49) an issue submitted, what was 'a little advance.' The court refused to submit either of the issues asked, and defendant Harrell excepted. The court submitted the issue whether the plaintiffs were the owners in fee simple of twenty-one undivided twenty-fifths of the land in controversy when the action was brought. He instructed the jury on said issue, among other things, that the defendant Harrell was concluded by the record in the special proceedings from claiming any interest in the land sold under said proceeding, as against plaintiffs.

Defendant Harrell excepted. There was a verdict for the plaintiffs. The defendant T. J. Harrell appealed, on the ground that the court erred in refusing to submit the issue proposed, and in the instructions given."

No counsel for plaintiffs.
J. E. Moore for defendant.

MERRIMON, J., after stating the case: Unquestionably the appellant is bound by the judgment in the special proceeding mentioned, and will continue to be until, and unless it shall be set aside for irregularity, or declared void for fraud. The court, in that proceeding, had jurisdiction of him and the subject matter thereof, and moreover, he consented to the judgment.

The answer of the appellant to the complaint is very indefinite, and it is not at all clear whether his purpose by it was to attack the judgment in the special proceeding for fraud, or whether his purpose was to allege a parol agreement, by which the appellees were to purchase the land mentioned in the proceeding at the sale thereof, made in pursuance of the judgment mentioned, and then convey the same to him for a stipulated consideration, and insist that thereby a parol trust was created in his favor, but we think that whether his purpose be the one or the other the judgment must be affirmed.

(50) If the purpose be to attack the judgment in the special proceeding for fraud, as that proceeding is ended, this must be done by an independent action for that purpose. If the judgment is for any cause irregular, it might be set aside by a proper motion in the proceeding. *Fowler v. Poor,* 93 N. C., 466, and the cases there cited; *Brickhouse v. Sutton,* 99 N. C., 103.

If the purpose was to allege an agreement and a parol trust created by it in favor of the appellant, then we concur with the court below, in the opinion that no sufficient agreement is alleged. The allegation of the answer in this respect is that "prior to the alleged sale he (the appellant) had an agreement with Spivey, that said Spivey was to buy the land and let defendant have it, said Spivey agreeing to do so, this defendant paying him a little advance upon it, or a little more than he should give," using the word "little."

It is not alleged that the appellees purchased the land for the appellant, or that the latter supplied the money to purchase it—on the contrary, the appellees were to purchase it for themselves, and afterwards sell it to the appellant at a "little advance"—whatever that might mean—upon the price they paid. The agreement specified no certain price to be paid, nor one capable of being reduced to a certainty. At

most, the appellee agreed by parol to sell to the appellant a certain interest in land at a price not fixed. This created no trust, and no contract that a court of equity will enforce.

No such issue as that proposed by the appellant was raised by the pleadings, and the court properly refused to submit it to the jury.

Affirmed.

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(51)

J. K. AND P. L. REA v. WILLIAM H. HAMPTON AND JAMES B. NICHOLS.

Constitution—Statute——General Assembly—Fisheries—Navigable Waters—Nuisance—Injunction.

1. The Legislature has complete authority to regulate the manner of exercising the common right of fishing in the navigable waters within this State, and to make provision for the removal of any obstruction and nuisance thereto.
2. The statute—The Code, sec. 3383—making it unlawful for persons to fish with Dutch or Pod nets in certain waters, and authorizing the sheriff to remove them, when so employed, is not in conflict with the Constitution.

THIS was an appeal from a judgment of *Graves, J.*, rendered at February Term, 1888, of BERTIE Superior Court, granting a perpetual injunction restraining the defendant from removing the stakes of the plaintiff under section 3383 of The Code.

The plaintiffs, in substance, alleged that they were the owners of certain traps and lawfully and rightfully engaged in fishing in the waters of Albemarle Sound, near the Bertie shore, and were operating certain traps for taking fish, called Long Island Fish Traps, and that the defendant threatened to tear down and destroy said traps, and unless restrained great and irreparable damage will be sustained by the plaintiffs, and they ask for an injunction.

The answer of the defendants admits that the plaintiffs were the owners of certain traps, but deny that they were Long Island Traps, or that the plaintiffs were rightfully and lawfully fishing in Albemarle Sound, and say that they were using Dutch or Pod nets, and fishing with traps, and within the distance from the mouth of Roanoke River prohibited by section 3383 of The Code.

The following is the case settled on appeal:

The defendants had applied to the sheriff of Bertie County to remove the nets, etc., of the plaintiffs, in accordance with (52)

section 3383 of The Code, alleging the nets of plaintiffs to be Dutch nets or Pod nets, and that they were fished within two miles of the mouth of Roanoke River, and they were proceeding to remove the same.

Thereupon the plaintiffs brought this action to restrain the defendants, and the same coming on to be heard, and it appearing that there were two questions of fact arising in the case, his Honor empanelled a jury to ascertain the same for his information, and submitted to them the following issues:

Were the nets fished by plaintiffs Dutch or Pod nets?

Were the nets fished within two miles of the mouth of Roanoke River?

To both of said issues the jury responded, Yes.

Thereupon the plaintiffs moved for judgment for a perpetual injunction, notwithstanding the findings of the jury, and the defendants moved for a judgment dissolving the injunction.

His Honor rendered judgment as prayed by the plaintiffs, and the defendants appealed.

Pruden & Vann filed a brief for plaintiffs.

George V. Strong (and J. E. Moore filed a brief) for defendants.

DAVIS, J., after stating the case: By section 3383 of The Code, it is made "unlawful for any person to set or fish a Dutch net or Pod net in Roanoke River, Cashie or Middle River, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle Sound, . . . and all persons who shall set or fish any such net in said sound, shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any Dutch
(53) net or Pod net in said sound, in violation of this section, he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars to be recovered by any person in the Superior Court of the county in which the offense shall be committed. And the sheriff of such county shall, when requested, remove any portion of such nets set or fished in violation of this section, at the cost of the violators," etc.

The facts found show that the plaintiffs were fishing in Albemarle Sound with Dutch or Pod nets, and within two miles of the mouth of Roanoke River, in violation of section 3383 of The Code, under which the defendants claimed the authority to have plaintiffs' nets removed, but counsel for plaintiffs insist that the last clause of section 3383 is in violation of section 17 of Article I, of the Constitution, and if so

they had a right to enjoin the defendants. This presents the question: Were the defendants threatening or about to deprive the plaintiffs of any liberty, privilege or property contrary to the law of the land?

Albemarle Sound being navigable, the plaintiffs had no right to a several fishery in its waters, and the State had the undoubted right to regulate the exercise of the common rights of fishing therein, and to impose such limitations and restrictions on the exercise of the rights as it might deem wise and just.

The Constitution of the State, unlike that of the United States, contains limitations on, and not grants of, legislative power. Albemarle Sound being navigable, is not subject to entry, and every citizen of the State has the liberty and privilege of fishing therein, subject to such *regulations* of the right as the Legislature may establish. *Cready v. Virginia,* 94 U. S. Reports, 391; *Skinner v. Hettrick,* 73 N. C., 53; *Hettrick v. Page,* 82 N. C., 65, and cases cited. Unless the plaintiffs have some right, privilege or property in these waters, or some right to obstruct others in the use of them for fishing purposes, (54) under rules and regulations and by methods allowed by law, we fail to see what right they have to complain, unless that right be to invoke the Constitution as a protection to them in violating the law.

The relief sought in *Hettrick v. Page, supra,* was not unlike that sought by the plaintiff in this action. It was, like this, an application for an injunction to prevent the removal of stakes or any obstruction of the plaintiffs' in their use, which the defendants were threatening to do, under chapter 115 of the Acts of 1875. (The Code, sec. 3383.) In that case the stakes were put up for operating Pod nets in violation of the act, and they were required to be removed by the day named. The *Chief Justice* said: "The presence of them (the stakes) in the sound after that date is a public nuisance, and this Court is asked to assist him (the plaintiff) in maintaining it in violation of his duty under the law, and to prevent its being obeyed. The proposition is a novel one, and no court will listen to such an application."

While it is true, as insisted by the plaintiff, that an action will not lie against a person unlawfully obstructing a highway at the instance of one who has sustained *no special damage,* and redress must be sought for the public wrong on behalf of the public, it by no means follows that a person obstructed, or indeed, any one else, may not himself, remove the impediment to his passing without incurring personal liability to the owner of the property removed."

The question of the constitutionality of the act was not raised in *Hettrick v. Page,* as in this, and we are referred by counsel to *Hoke v.*

Henderson, 4 Dev., 1, and to *Vann v. Pipkin,* 77 N. C., 408. We fail to see the analogy between those cases and this. They only decide that a person holding an office has a property in his office, of which he cannot be deprived while the office remains, without violating the
(55) Constitution—it is property of which he cannot be deprived "but by the law of the land."

The counsel also cites Cooley Const. Lim., 362, *et sequiter, Ames v. Port Huron Co.,* 11 Mich., 139; *Rockwell v. Moring,* 35 N. Y., 302, and *Wynham v. The People,* 3 Kernan, N. Y. Court of Appeals, 378. It is said in Cooley Const. Lim., "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. . . . Nor can a party, by his misconduct, so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice, would be void, as not having due process of law. . . . And if the Legislature cannot confiscate property or rights, neither can it authorize individuals to assume, at their option, powers of police which they may exercise in the condemnation and sale of property against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners. And a statute which authorizes a party to seize the property of another without process or warrant and sell it without notification to the owner for the punishment of a *private trespass* and to enforce a penalty against the owner, can find no justification in the Constitution."

As the Legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no *right* to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the *law* to protect them in its violation.

They had put their stakes and used their nets where it was unlawful to put and use them. The stakes and nets were unlawfully
(56) there by the act of the plaintiffs, and not against their *"consent,"* as were the trespassing animals in *Rockwell v. Moring,* cited by *Cooley, J.,* and if they did not remove them and thus abate the nuisance themselves, they could be removed and the nuisance abated in the mode prescribed in the act regulating fishing in the sound. *Cooley, J.,* in discussing the police power of the State, says "that each state has com-

plete authority to provide for the abatement of nuisances, whether they exist by fault of individuals or not." He also says "the State has the authority to make extensive and varied regulations as to the time, mode and circumstances in and under which parties shall assert, enjoy or exercise their right without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property." Const. Lim., 596.

Upon a careful examination of the authorities cited by the learned counsel for the plaintiff, we do not think that they warrant the conclusion that the act in question is unconstitutional. The plaintiffs had no such "vested rights" as were contemplated in the citation of counsel from Cooley's Const. Lim.

The case of *Ames v. The Port Huron Log Driving and Booming Co.,* 11 Mich., 139, in which an act of incorporation which gave to the defendant company extensive powers over the logs and lumber of others on the Black River, a navigable stream, was held to be unconstitutional, would seem to support the plaintiff's position, but it will be found upon examination, that it violated the Constitution of Michigan, which declares that "no navigable stream in this State shall be either bridged or dammed without authority of the board of supervisors of the proper county, under the provision of law. No such law shall prejudice the right of individuals to the free navigation of such streams." The act of incorporation was in violation of that provision.

In *Rockwell v. Moring,* so much of an act of the Legislature (57) of New York relating to animals running at large, as authorized the seizure and sale of animals trespassing within private enclosure without notice to the owner, and without any judicial process, and as a mere penalty for a *private* trespass, was declared unconstitutional. That case has no analogy to the case before us, neither has the case of *Wyneham v. The People,* which was discussed at great length, and in which the Court was singularly divided, and in which it was declared that an "Act for the prevention of intemperance, pauperism and crime," which made no discrimination between liquor owned when the act took effect and that which might afterwards be manufactured or imported, was unconstitutional.

It is said that the "cost" of removing the stakes and nets is left arbitrary—the answer is, that depends upon the labor and expense attending the removal, and must of necessity be uncertain, but the cost must be reasonable, and if excessive charges are made the owner is not obliged to pay more than what may be adjudged to be just and reasonable. Doubtless the stakes and nets are valuable, and it would be the duty of the sheriff to remove them with as little injury and cost as

practicable. If owners of nets and stakes wish to avoid any question as to the *quantum* of costs, etc., which they are not precluded by any law from doing, they can do so by removing them themselves.

There is error in the judgment of the court below.

Reversed.

Cited: S. v. Woodard, 123 N. C., 711; *S. v. Young,* 138 N. C., 572; *Daniels v. Homer,* 139 N. C., 222, 223, 244; *S. v. Sermons,* 169 N. C., 287; *Bell v. Smith,* 171 N. C., 118.

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(58)

JOSEPH BUNCH ET AL. v. ROBERT M. BRIDGERS ET AL.

Evidence—Possession—Color of Title—Res Gestæ.

1. Where the issue in an action to recover land was, whether the defendant had been in adverse possession for a sufficient time to ripen his title and defeat a recovery, it was competent for the defendant to show, as a part of *res gestæ* and explanatory of the character and extent of his possession, that one under whom he claimed had expelled a third party from the disputed land, and his accompanying declaration that the land belonged to him.

2. Where a part of a conversation is offered in evidence the whole of it, so far as it is pertinent to the inquiry, should be admitted.

CIVIL ACTION tried at Fall Term, 1887, of BERTIE Superior Court, before *Avery, J.*

The complaint in this action, commenced on 20 October, 1886, asserts title in the plaintiffs to the tract of land therein described and the wrongful withholding of a part thereof by the defendants and demands judgment for the recovery of possession. The allegations are severally denied in the answer.

The parties derive their conflicting claims of title to the land from James Mitchell, a former owner; the plaintiffs under his deed of 9 May, 1834, to Nehemiah Bunch, who died in 1844 intestate, leaving a son, Nehemiah J. Bunch, to whom the land descended, and thence upon his death to the plaintiffs, his children and only heirs at law.

The defendants in support of their claim of title in the defendant Wiley J. Bridgers, exhibited to the jury an execution and sheriff's deed upon a sale made thereunder against said James Mitchell to one John D. Thurston, dated 9 November, 1835, and a deed from the latter executed 17 August, 1836, to the said Wiley J. Bridgers, of whom the defendants are heirs at law.

It will thus be seen that the defendants' deeds are posterior to (59) that of the plaintiff's ancestor, and moreover it recognizes the line of the latter as one of its boundaries.

The title to the land embraced in the deed to Nehemiah Bunch having been transferred to him and transmitted to the plaintiffs, unless the defendants have shown a hostile occupation under color of title derived from the sheriff's deed of a part of the lap, as they contend, the question is, as to the sufficiency of the evidence of these facts to defeat the plaintiff's right thereto. The controversy is narrowed then to the single point of the alleged divesting of the title by the means and in the manner aforesaid.

There was much and discordant testimony as to the position of the black oak, the beginning corner in plaintiffs' deeds. The defendants offered to prove that Wiley Bridgers, their ancestor, finding a negro woman over on the disputed land claimed by him, forced her to leave and go to the east side of the old path, telling her that it was his land and she must remove from it. To this evidence plaintiffs' counsel objected on the ground that it would be evidence coming from Wiley Bridgers on his own behalf, but consented to his proving what was said by the negro woman to him. The conversation was at the time of her starting to move from the premises. The objection was sustained and the defendants excepted.

There was a verdict for the plaintiffs, and from the judgment thereon defendants appealed.

J. E. Moore for plaintiffs.
No counsel for defendants.

SMITH, C. J. We think the testimony was competent, as explaining the act of expulsion done under a claim of ownership, and in the exercise of an assumed right over the territory.

It was part of the *res gestæ,* and while not receivable to show title by a declaration, should have been received as qualifying and giving character to the act, as an assertion of a right claimed to the possession. The objection is not met by the proposal to allow proof (60) of what the woman said to him, while what he said to her was excluded. The conversation, so far as it is pertinent to the matter in dispute, was all of it receivable or none, for without the whole its true import and meaning might be entirely misunderstood and be misleading. *Overman v. Clemmons,* 2 D. & B., 185; *Green v. Cawthorne,* 4 Dev., 409.

As the error entitles the defendants to a new trial, it is unnecessary to consider the subject matter of the instructions as asked and given.

If the plaintiffs' land is located as they contend and the defendant's deed does not profess to encroach upon it, but is arrested when it meets the plaintiffs' boundary, the defendant's possession has not the support of color of title, and must continue for such a length of time, and be of such a nature as itself to divest the plaintiffs' title and transfer it to them or one or more of them. In this view the directions given to the jury seem reasonable and fair though their correctness is not intended to be adjudicated in our present disposition of the appeal.

There is error and the verdict must be set aside and a *venire de novo* awarded.

Error.

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(61)

THE STATE ON THE RELATION OF W. J. GATLING v. THOS. D. BOONE.

Election—Evidence—Issues—Verdict.

1. The return of the pollholders of an election, to the board of county canvassers, are evidence of the result of such election, but they are not conclusive; and if for any reason they cannot be used as such, any other competent evidence is admissible to show what vote was really cast and who was elected.

2. Where immaterial issues are by consent submitted to the jury with others which are material, and it can be seen that the immaterial ones do not affect the proper ones, nor mislead the jury, the verdict will not be set aside, but judgment should be entered upon the finding upon the material issues, though that upon the others is inconsistent.

SMITH, C. J.; dissenting.

THIS is a civil action to try the title to the office of clerk of the Superior Court of HERTFORD County, tried at the Fall Term, 1888, thereof, before *Montgomery, J.*

The relator alleged that he received a majority of the votes cast for clerk of the Superior Court of the county of Hertford at the regular election held in the year 1886, and was then lawfully elected to that office for the term thereof then next ensuing.

The defendant denied the material allegations of the complaint and alleged that he was duly elected to be such clerk and is rightfully in office.

The case was before this Court by a former appeal and a new trial was granted. *Vide Gatling v. Boone,* 98 N. C., 573.

At the second trial the parties agreed upon and the court submitted to the jury the issues, which, with the responses thereto, are:

1. Did the relator Gatling receive, at the election in Novem- (62) ber, 1886, for clerk of the Superior Court a greater number of votes than the defendant Boone, and was he elected?

Answer: Yes.

2. Were the returns of the votes for clerk of Superior Court from St. John's Township properly rejected by the board of county canvassers?

Answer: Yes.

3. Were the returns of the votes for clerk of the Superior Court from Winton Township properly rejected by the board of county canvassers?

Answer: Yes.

The relator introduced the returns made by the judges of election and registrar at the precincts of Winton and St. John's, and also offered evidence that these precincts were not counted, but rejected. Evidence was also offered by the relator, tending to show that at St. John's precinct there were 905 registered voters and that at the election of 1886, 321 votes were cast for Gatling and 274 votes for Boone, making Gatling 47 majority, and tending to show that there was a difference of 2 or 3 votes between the votes cast in the county box and the number by the list of voters kept by the judges of election, and in the Legislature box, 55 more votes were cast than appeared on the list.

The relator also offered evidence tending to show that at Winton precinct he received 404 votes and the defendant 112 votes, making the relator's majority 312 votes, and that at said box, one man by mistake voted who was not registered, and that the polls were closed five minutes under the mistaken belief that the sun was down, but were again opened and two persons, the only persons appearing, were permitted to vote and that the poll boxes and books remained during the said five minutes in the presence of and custody of the judges.

It was admitted by both parties that all the votes cast in the (63) county, for clerk of Superior Court, were counted, except those of Winton and St. John's, and that Boone's majority was 11.

It was further admitted, that if the votes of either Winton or St. John had been counted, that Gatling would have had the majority, and that to exclude both said precincts, Boone had the majority.

The court instructed the jury that if they believed the evidence to return "yes" to the first issue, and "no" to the second and third issues as their verdict. The jury rendered their verdict, upon which the defendant moved for judgment in his favor, and the court declined to grant it and the defendant excepted.

The relator then moved for judgment upon the verdict in his favor, and the court declined and plaintiff relator excepted.

The court then made the following order:

Verdict set aside, because the findings of the jury are inconsistent, and no judgment can be rendered thereon. From which both the plaintiff and the defendant appealed to this court.

B. B. Winborne for plaintiff.
E. C. Smith for defendant.

MERRIMON, J., after stating the case: These appeals are separate and distinct from each other, but it is convenient to consider them together, and our opinion will suffice to dispose of both of them.

It was the province and duty of the board of county canvassers to receive the returns of the election in question and ascertain from them who received the votes cast thereat for clerk of the Superior Court, who received the highest number of votes and to declare the result of the election. In doing this they had authority to examine and scrutinize the returns, to determine whether they were such, whether they
(64) were sufficient or otherwise, and from such as were accepted by them as proper ones to ascertain the result as above indicated. But their action as to the sufficiency or insufficiency of the returns in determining the result was not final or conclusive. It simply settled prima facie the right of the defendant to be inducted into and to exercise the office of clerk and to receive the emoluments thereof. This was the whole extent of their authority. The right of the relator or any other person claiming to have been elected clerk was left open to be litigated without prejudice in a proper action brought to ascertain and determine the true result of the election without reference to the action of the board of county canvassers further than that they settled prima facie the right of the defendant. No appeal lay from their decision to the Superior or other court, nor could their action be reviewed and their errors corrected, as such, by an appellate tribunal. In the action brought at the instance of a party the court would not be restrained or controlled by the action of the board of county canvassers in deciding that a return was sufficient and valid or otherwise; it would decide any such question as if no decision had been made by that board. This was decided in *Gatling v. Boone,* 98 N. C., 573, and *Roberts v. Calvert, id.,* 580. Hence any inquiry in this action as to whether the board of county canvassers properly or improperly rejected the returns from St. John's Township was wholly immaterial and could serve no just purpose.

The single material issue raised by the pleadings in this action was, did the relator receive a majority of the votes cast at the election mentioned for clerk of the Superior Court? The first issue submitted to the jury, though not precise, embodied and involved that inquiry. The

returns of the election is sufficient as such, were evidence, though not necessarily conclusive, to prove or disprove the affirmative of that issue. If for any cause they or any of them were not sufficient and therefore not evidence, then any competent evidence might have (65) been received tending to prove what the vote cast really was at any particular voting place in question, and this was so without reference to what the board of county canvassers may have decided in respect to any return. The true inquiry on the trial was not what the board mentioned decided, but what was the true result of the election as to the relator. This was the leading, and one of the chief purposes of the action.

The second and third issues submitted to the jury were wholly immaterial and improperly submitted. They involved no pertinent or material inquiry. If the relator received a majority of the votes cast he was elected and entitled to be inducted into office, whether the board mentioned rejected the returns of the election of the township mentioned or not. In no proper sense did their decision as to these returns determine or affect the number of votes cast in those townships, or in any way affect the result to be ascertained and determined by this action. Their decision did not determine, nor was it evidence of the number of votes really cast. As we have seen, it was not their province to ascertain the result of the election otherwise than by the returns received by them. They could not go behind the returns, and make inquiry as to the actual number of votes cast and thus determine the result of the election.

We are therefore of opinion that the court ought to have disregarded the second and third issues and the verdict of the jury upon them, and that it ought to have given judgment for the relator upon the verdict responsive to the first issue.

It follows that the defendant was not entitled to have the judgment which he asks the court to give in his favor.

It was contended on the argument for the defendant, that inasmuch as the parties agreed upon the issues submitted to the jury, the second and third ones should be treated as material in some possible aspect of them, and that the judgment appealed from should be (66) affirmed. But, as we have seen above, these issues were not pertinent in any sense, and were wholly immaterial. If they had served any pertinent purpose, and in their nature could have effected the issues properly raised by the pleadings and submitted to the jury, then it might be otherwise, as was the case in *Porter v. R. R.*, 97 N. C., 66. There some of the issues agreed upon were immaterial, but they were such as bore upon and affected the issues raised by the pleading, and

probably misled the jury, and thus brought about a verdict of contradictory findings of fact. That was not so in this case. Here the immaterial issues did not bear upon the material one, nor was the verdict inconsistent and contradictory, nor, moreover, did the immaterial one probably mislead the jury as to the first issue; it does not so appear in the controversy; it seems they did not regard the action of the board of county canvassers in rejecting the returns as having any bearing upon, or as having anything to do with the votes actually cast at the election. They found that the relator received a majority of the votes cast, and this they could not have done, as appears from the facts stated in the case settled on appeal, if they had disregarded the votes cast at the voting places, the returns from which were rejected by the board.

It does not appear that the submission of the immaterial issues prejudiced the defendant, and as it does not, that they were submitted, is not ground for a new trial—certainly, when the party complaining agreed to submit them. *Porter v. R. R., supra; Cumming v. Barber,* 99 N. C., 332; *Rigsbee v. Durham,* 99 N. C., 341.

There is error. Let this opinion be certified to the Superior Court, to the end that judgment may be entered there in favor of the relator according to law. It is so ordered.

Error.

(67) SMITH, C. J., dissenting: If I were to put the construction upon the issue and responsive findings of the jury which other members of the Court put upon them, I would concur in the disposition made of the appeal. But I think they fairly bear a very different meaning, as understood and acted on in the court below.

The answer, controverting the allegations in the complaint, declares, in its sixth article, that votes returned from the two precincts mentioned were not counted, because the election held at each "was null and void, and that the returns from these precincts were invalid and void."

To meet this conflict in the pleading, the several issues were agreed upon and submitted to the jury, and as the proper inquiry to be made in the action was, in substance, whether the returns were so vitiated as that, in law, they ought not now to be counted in the pending investigation, or should be rejected, involving, not so much the power of the canvassing boards to exclude, as the correctness of the action itself to be passed on by a court in whom such power is vested. Were the reasons for excluding the returns which determined the conduct of the canvassing board sufficient to warrant their exclusion at the present trial? Thus understood, the findings upon the second and third issues are repugnant to the finding on the first. For if the relator did receive

a majority of the votes cast in the county, the votes in the two precincts, which reduced the number of the relator's votes to a minority, ought not now, in determining the rights of the contesting claimants, to be taken into the computation; then the action of the canvassing board, though outside of any authority conferred by law, was, if such authority had been possessed, correct in itself, and should guide and control in the court.

Taking this view of the verdict, the judge was left no other course, except to set aside the verdict and recommit the matter to another jury, and in this he committed no error. Such was the action of the Court, under similar circumstances of irreconcilable findings of the jury in *Mitchell v. Brown,* 88 N. C., 156, and this is a proper (68) precedent.

Cited: Barnett v. Midgett, 151 N. C., 3.

JAMES W. COOK v. JOSEPH COBB.

Laborer's Lien.

It is essential to the validity of a laborer's lien, that the "claim," or notice, which he is required to file, shall set forth, in detail, the times when the labor was performed, its character, the amount due therefor, and upon what property it was employed; and if it is for materials furnished, the same particularity is required. Defects in these respects will not be cured by alleging the necessary facts in the pleadings in an action brought to enforce the lien.

CIVIL ACTION, tried before *Graves, J.,* at April Term, 1888, of EDGECOMBE Superior Court.

The plaintiff alleged in the complaint that he labored during the year 1886 on the farm and crop of William Cook, who owed him for such labor the sum of $76.40, and that he had a laborer's lien on the crop then produced on the land, in part by his labor; that the defendant, claiming to act as sheriff by virtue of a proper warrant, seized and sold the same crop, when gathered, to satisfy a debt due to John F. Shackelford for money and supplies advanced to his employer to make the crop, which debt, as alleged by the defendant, constituted a lien on the crop subsequent in date and effect to his own, etc. The defendant denied that the plaintiff had such first, or any lien, upon the crop and

(69) property so seized by him. The following is a copy of the "claim" of the plaintiff and notice thereof, filed in the office of the nearest justice of the peace:

"William Cook to James W. Cook, *Dr.*

"1886.

"Dec. 8. For labor on farm for 8 months and 4 days, at $10 per month $81.46

Cr. by cash 5.00

$76.46

"Laborer's lien filed and sworn to before me the 8th day of December, 1886. JAMES W. COOK.

"J. M. SPRAGINS, J. P."

There was a verdict and judgment for the plaintiff, and the defendant appealed, assigning as error that the court erred in adjudging that the magistrate's docket exhibited a valid lien in favor of the plaintiff against the lien of Shackelford.

John L. Bridgers (by brief) for plaintiff.

George V. Strong for defendant.

MERRIMON, J., after stating the case: The statute, The Code, sec. 1781, gives the laborer a lien on any kind of property, real or personal, including the crop produced on a farm, to secure the payment of the debt due to him for his labor on the same. But in order to create such lien and render the same effectual, the statute, The Code, sec. 1784, further provides, that "All claims against personal property of two hundred dollars and under, may be filed in the office of the nearest justice of the peace, or if over two hundred dollars, or against real estate or interest therein, in the office of the Superior Court (70) clerk in any county where the labor has been performed or the materials furnished, but all claims shall be filed *in detail,* and specifying the materials furnished or *labor performed,* and the time thereof."

The obvious purpose of this requirement is to give public notice, in the offices designated, of the plaintiff's "claim"—his debt—the amount of it, the materials supplied or the labor done, when done, on what property, on what farm or crop, and when, specified with such detail and certainty as will give reasonable notice to all persons of the character of the "claim," and the property to which the lien, on account of the same, attaches, and of the lien thereby established.

Otherwise, such filing of the claim and notice thereof and the lien, would serve no useful purpose, and it would be practically nugatory. The purpose is to give the laborer—a very meritorious creditor—an important advantage as to his debt due on account of his labor done on the property to which the lien attaches over the ordinary creditor, but to obtain that advantage, he must comply strictly—certainly substantially, in all material respects, with the requirement of the statute—it so requires, and it is but reasonable and just that he should do so. If he is to have such advantage other creditors should know the fact, and the extent of it, to the end they may have just opportunity the better to determine what extent of credit the employer should have, and what property of his they might expect to subject to the payment of their debt against him.

The plaintiff's claim and notice of lien is not only very informal, but is clearly not a sufficient compliance with the requirements of the statute in two other respects, and hence no lien arose in his favor. It does not appear from it, as it should do to be effectual, at what time he began to labor and when it ended, nor on what farm he labored, nor particularly that he labored on the crop of his employer, on which he intended to obtain a lien. The date affixed to the claim only indicates the time he reduced it to writing and filed it.

It is not sufficient to allege in the pleadings the time of the (71) labor, and that it was done on a particular crop which the plaintiff seeks to charge with a lien. This must appear substantially in some way in the claim, for the reasons above stated. *Wray v. Harris,* 77 N. C., 77; Phil. on Mech. Liens, secs. 349, 350; Kneel on Mech. Liens, 202 *et seq.*

The appellant is entitled to a new trial.

Error.

Cited: Moore v. R. R., 112 N. C., 241; *Cameron v. Lumber Co.,* 118 N. C., 268; *R. R. v. Stroud,* 132 N. C., 415; *Fulp v. Power Co.,* 157 N. C., 160; *Jefferson v. Bryant,* 161 N. C., 407; *Lumber Co. v. Trading Co.,* 163 N. C., 317.

MARY E. BRIDGERS AND MARCUS J. BATTLE v. JOHN L. BRIDGERS.

Account—Reference—Consideration—Married Woman—Contract.

1. A plea in bar of an action for an account must be determined before ordering a reference, notwithstanding there may be other matters alleged in the pleadings arising subsequently to the matter pleaded in bar, as to which account may be necessary.

2. While a married woman, during coverture, can enter into no contract or obligation which will be enforced against her, nor will such contracts or obligations constitute a sufficient consideration to support an agreement made after the disability ceases, yet, if the consideration upon which the obligation was based, enure to the benefit of her separate estate, she will not be permitted to repudiate it.

THIS is an appeal by the defendant from an order of *Graves, J.*, directing a reference for an account, made at Spring Term, 1888, of the Superior Court of EDGECOMBE County.

The defendant, in his answer, alleged a settlement between
(72) the *feme* plaintiff and himslf, made 17 March, 1885, of all the matters in controversy up to 7 June, 1884, and tendered the preliminary issue in bar of the demand for an account: "Was there a settlement on 17 March, 1885, of the matters in controversy?"

The *feme* plaintiff insisted that the admission and facts appearing in the record were sufficient to entitle her to an account, and his Honor being of that opinion, the order of reference was made.

The record is voluminous, and it is necessary to state only the substance of so much of it as bears upon the question presented by the appeal.

The complaint alleges that the *feme* plaintiff, M. E. Bridgers and the late John L. Bridgers, who died in the county of Edgecombe in the year 1884, intermarried in the year 1867, having previously thereto executed a marriage settlement, in which the plaintiff Marcus J. Battle, was appointed trustee; that in January, 1878, the trustee purchased a farm called "Strabane," containing 1,675 acres in trust to pay off certain incumbrances thereon, and then for the sole and separate use of the *feme* plaintiff, her heirs and assigns, subject to the provisions contained in the marriage settlement; that from the time of the purchase of said farm till the death of the said John L. Bridgers in 1884, the defendant, as agent of the *feme* plaintiff and her said husband, had charge and control of said farm, and as such, received the rents and profits therefrom, which were very large; that from the death of the husband of the *feme* plaintiff in January, 1884, to 1886, the defendant, who was and is an attorney at law, was the confidential attorney and agent of the *feme* plaintiff, and had the management and control of her business; that said farm was very valuable and productive, and each and every year during the agency of the defendant, has yielded a large crop of cotton, of which a large portion was due the plain-
(73) tiff, and was raised by the defendant as her agent, for which he has never fully accounted, and that upon an account and settlement he will be largely indebted to her, and she asks for an account.

The answer admits the marriage, the marriage settlement, the death of the husband and the purchase of the "Strabane" farm, and states that at the death of the husband no contracts had been made for the employment of a superintendent and laborers for the cultivation of the farm, and at the request of the *feme* plaintiff the defendant assisted her in making contracts with the superintendent and laborers for the farm for 1884 and 1885, and at her request furnished the means for operating the farm for both those years, and by her request and direction sold such of the crops raised thereon as were sent to him, for that purpose, and received the proceeds of such sales, but he denies that he ever was her attorney. He also denies that he had any charge or control of the farm, or that he received the rents and profits therefrom except as stated in the answer. He denies that he received the proceeds of the crop or any part thereof for the years 1878 and 1879, and says that in the beginning of the year 1880, the *feme* plaintiff borrowed from the Bank of New Hanover the sum of $4,500, with which to carry on the operations of her farm for that year, and the proceeds of the sales of the crops for that year were placed in his hands, with which to discharge said indebtedness, and there was a balance left of $329.35, which was credited on her account for 1881.

The answer further alleges that the defendant, as agent for the *feme* plaintiff, made payments for her upon various accounts of large sums of money in the years 1880, 1881, 1882 and 1883, and received on her account during those years large sums, which were placed to her credit, which are set out in the answer. He also sets out a statement of divers sums paid for the plaintiff for money borrowed for her use and used in the production of the crops for the years named.

That on 7 June, 1884, there was a large sum due the defend- (74) ant, and that he was also indebted to the plaintiff in sums named, and on that day he made up his accounts for the year mentioned, which, with the vouchers for the payment, were fully and carefully explained to the *feme* plaintiff; that she held the same under consideration till 17 March, 1885, frequently discussing the matter with the defendant in the meantime, and on that day she informed him that she was entirely satisfied with the accounts, and was willing to settle by them, and therefore gave the defendant her note for the balance as it appeared, which was credited by the sum of $724, as of the day the note was given, by reason of a double charge, which was not discovered at the time by either the plaintiff or defendant.

Included in the account were large sums derived from insurance policies, of which $5,266.13 was not originally taken for the benefit of the plaintiff, but which was transferred to her upon the understanding stated in the answer. The defendant pleads the settlement of

17 March, 1885, of the transactions embraced in the account to 7 June, 1884, in bar of plaintiff's demand for an account as to them.

The transactions for the years 1884 and 1885 and the counterclaim in relation thereto, are not for our consideration in determining the question before us.

The *feme* plaintiff in her reply admits the signing of the note, but insists that it was without consideration, because the balance and the notes alleged to have been borrowed for her by the defendant, which made up the sum of said notes, was made and executed while she was a married woman, and for which she was not liable; and further, that the defendant was her confidential agent and adviser, and that she acted upon and accepted his statements and representations and made no inquiry into the truth of them because of her confidence in the said adviser, who was also her step-son.

(75) The defendant in his rejoinder denies that he was the confidential adviser of the *feme* plaintiff, and says that his relation to her was only that of agent to assist her in getting necessary means to support her family and carry on her farming operations, and that in this way the indebtedness of the plaintiff arose; that the money borrowed was for the use of the *feme* plaintiff, her family and property; he denies that he represented the plaintiff, that in law she was bound for the debts mentioned; admits that he was her step-son, and sets out at length facts in relation to the transaction.

T. N. Hill and R. O. Burton for plaintiffs.
A. W. Haywood for defendant.

DAVIS, J., after stating the case: The general rule that a plea in bar of an account must be passed upon and determined before ordering a reference is well settled, and though the plea in bar does not cover all the matters involved in the pleadings it should be first passed upon, although an account of transactions subsequent to the settlement alleged in bar may be necessary. *Quarles v. Jenkins,* 98 N. C., 258; *Clements v. Rogers,* 95 N. C., 248, and cases cited.

We do not understand the plaintiff as controverting this rule, but she insists that the defendant has no right to have his alleged settlement as a plea in bar passed upon, but that she is entitled to an account because of the admissions and facts of record—and that these show that there could have been no settlement by which she was barred, and this upon two grounds:

First. The note given by her upon the alleged settlement was for balances alleged to be due upon notes and transactions entered into while she was a married woman and not warranted by the terms of the mar-

riage settlement, and which, for this reason were *void,* and could not constitute a consideration for the notes given by her to the defendant on 17 March, 1885, and the note was therefore without consideration and *void.*

Conceding, as is undoubtedly the law, that the *feme* plaintiff (76) while covert could have entered into no contract or obligation that could have been enforced against her; and that any note that she may have given or obligation into which she may have entered, while under coverture, was void as such, and could not in themselves furnish any valid consideration for a note or other obligation executed by her when discovert and acting *sui juris;* yet if the consideration upon which the void note was given or the void obligation entered into, during coverture, enured to the benefit of her separate estate, it would in equity constitute a good consideration for the note, not by reason of any contract or obligation entered into, except as authorized by statute, by her which would be void, as such, but by reason of the fact that she or her property derived the benefit of the consideration. The defendant says that the money paid out by him was for her benefit—was on account of, or for the benefit of her property, and that he owed her sums with which she was credited. The action is brought for an account and settlement. The *feme* plaintiff says that the defendant was her agent and she asks for an account. If there were any transactions between the *feme* plaintiff and the defendant which entitled her to an account and settlement when discovert, it would be a curious result if the defendant could not make a valid settlement or one by which she would be barred.

The very able argument of the learned counsel for the plaintiff, whose brief evinces much research and learning, applies rather to the controverted questions of fact presented by the pleadings and the law applicable to them upon which must rest the determination of the defendant's plea in bar for or against him than to the question now before us. The defendant alleges that there was a settlement of all transactions up to a given date, at which time the plaintiff executed her note to him for a balance due to him; the *feme* plaintiff admits the execution of the note, but says it was void for want (77) of consideration. The defendant does not admit this; he does not admit that the void notes and acts of the *feme* plaintiff during coverture constituted the only consideration of the note, and an issue is raised which he has a right to have passed upon by a jury under the instructions of the court before a reference is ordered.

Second. But the further objection to the submission of the plea in bar is that the plaintiff is not bound by the settlement because of the relation of confidential adviser and attorney which the defendant sus-

tained to the plaintiff, which induced her to accept his statements without inquiry. This is denied by the defendant, who says that the accounts and vouchers for the payments made by him were fully and carefully explained by him to the *feme* plaintiff, who held them under consideration from June, 1884, till March, 1885. The invalidating allegations in regard to the settlement as affected by the relation of the parties tending to impeach its fairness on the one side and the denials on the other, are to be considered in passing upon the defendant's plea in bar, and he has a right to have them passed upon before the reference.

There was error in ordering the reference before the issue tendered by the defendant was passed upon.

Error.

Cited: Williams v. Walker, 111 N. C., 613; *Bell v. McJones,* 151 N. C., 90.

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(78)

O. C. FARRAR ET AL. v. H. L. STATON.

Jurisdiction—Action to Impeach and Review Judgments—Fraud—Petition to Rehear—Supreme Court—Constitution—Bill of Review.

1. Under the Constitution of the State the jurisdiction of the Supreme Court to review and revise its final judgments is confined to the power to rehear, as regulated by the statute—The Code, sec. 966; Rule 12— and to relieve a party from a judgment rendered against him by his mistake, excusable neglect, or surprise. The Code, sec. 274.
2. After the expiration of the time within which those remedies may be invoked, a final adjudication in matters formerly cognizable in equity, in the Supreme Court, can only be reviewed by a new action, in the nature of a bill of review, impeaching the judgment for fraud, or other sufficient cause, instituted in the Superior Court.
3. An action, in the nature of a bill of review, can only be maintained upon three grounds: (1) For error apparent on the face of the decree; (2) for new matter discovered since the decree was rendered; and (3) for fraud.
4. In such an action it is not competent to look into the evidence to ascertain if any fact was misconceived, or that the decree was based on an erroneous statement of facts.

THIS is a civil action which was tried by *Graves, J.,* a trial by jury having been waived, at Spring Term, 1888, of EDGECOMBE Superior Court.

There was judgment for the defendant, from which the plaintiffs appealed.

The facts are stated in the opinion.

George Howard and George V. Strong for plaintiffs.
John Devereux, Jr., for defendant.

SMITH, C. J. At Spring Term, 1887, of this Court, the sub- (79) ject matter in controversy in this action, and between the same parties, in a reversed relation, involving the contested right to the surplus proceeds of the cotton crop conveyed in the first mortgage after satisfying the secured debt, was considered and decided. The decision then made was reconsidered upon an application to rehear, and, at the term next succeeding, affirmed. *Weathersbee v. Farrar,* 97 N. C., 106; 98 N. C., 255.

The ruling by which the excess was given to the second mortgage was based upon the finding of the referee, to which no exception was shown in the record to have been taken, that the crop was conveyed in both mortgages, and the proceeds of the sale by the prior mortgagee being more than sufficient to pay the secured indebtedness, it was held that the excess belonged to the second mortgage, and would not be diminished by advances made to aid in the cultivation and preparing of the crop for market, in the absence of any lien perfected under the provisions of the statute. The Code, sec. 1782.

The ruling in the court below, while there made irrespective of the presence of the crop in the second mortgage and upon equitable grounds, was affirmed upon both hearings in this Court, so that there have been three concurring adjudications upon the conflicting claims to the fund. The facts are fully reported, and the reasons given in support of the conclusion reached set out in the cases, so that it is unnecessary to repeat them here.

The present suit is brought for a revisal of the judgment thus deliberately rendered upon the record then before us, and which now, as we understand from the argument, is admitted to be consistent with the ruling upon the ground that the crop, notwithstanding the referee's findings, was not included in the enumeration of the property assigned in the posterior mortgage, and that it was so understood and acted on in the court below, both by counsel and the judge; and upon the trial of this action in the court below, the judge, by consent, (80) finds as follows:

"This cause coming on to be heard, a jury trial being expressly waived, upon the pleadings, the affidavit of Judge Shepherd and the

papers in the original cause, and the same being heard, his Honor finds, in addition to the facts admitted on the pleadings, the following facts:

1. That the referee made his report in the original suit to the Fall Term, 1884, of Edgecombe Superior Court. At said term, on affidavits filed, the defendants in that suit moved to set aside said report and remove the referee, which motion was continued to Spring Term, 1885, at which time it was heard and denied.

2. At Spring Term, 1885, motion was made by the defendant in said suit for leave to amend his answer, and by consent, said motion was continued until Spring Term, 1886.

3. That at Spring Term, 1886, on the trial before Judge Shepherd, from whose judgment the original suit was carried by appeal to the Supreme Court, the motion for leave to amend was again asked; that it was conceded that Mrs. Weathersbee's mortgage did not cover the crop, and that the judge tried the case on that theory; that in giving judgment the judge struck from the account, as allowed by referee, the cotton and cotton seed sold at the sale, because he desired to find the proceeds of the sale of the personal property included in mortgage, as distinguished from the crop; that the case was decided by him, upon no misapprehension as to whether the crop was covered by Mrs. Weathersbee's mortgage, but entirely upon the idea that it was not, that no amendment was actually made.

4. That cotton and cotton seed which were sold (for $446) at the sale and charged against plaintiff in the account of the referee, were part of the crop in controversy, contained in O. C. Farrar's
(81) mortgage, and that in the testimony there was not evidence of any other crop or that the crop was in Mrs. Weathersbee's mortgage.

5. That before the case was called in the Supreme Court, by consent of counsel, the motion for leave to amend, therein set forth was marked "allowed."

6. That the mistake was made by plaintiff of supposing that the record as sent up and amended in Supreme Court, showed that the case was tried by Judge Shepherd, on the concession that Mrs. Weathersbee's mortgage did not cover the crop.

7. That on 29 June, 1886, Mrs. Weathersbee assigned for value her interest to L. L. Staton, who has been made a party to this suit.

It appearing that L. L. Staton has purchased and had assigned to him the interest of Sallie F. Weathersbee, in this action, on motion it is ordered that he be made a defendant in this case; and now upon consideration of the foregoing findings of fact and all the matters above set out, it is adjudged that the defendant go without day and recover

of the plaintiff his cost to be taxed by the clerk and that the plaintiffs take nothing by their action."

The action now prosecuted seeks to have the judgment reversed, not for that it is erroneous, pronounced upon the facts ascertained and reported, and as contained in the record, but because in the court below it was tried upon the general understanding that the crop was not, and in fact it was not, conveyed in the second mortgage, and that the ruling was upon this basis, in which there was error, while, by inadvertence, the case on appeal upon which the decision was made in this Court states that the crop was embraced in the second subject to the first mortgage deed.

The first suggestion that occurs to us is the novelty of this mode of procedure to rectify an error after successive *final* adjudications, and the absence of any precedents referred to or found by us to sanction the procedure, either in our own or other courts. (82)

At law and under our former system the final judgment, except by writ of error sued, concluded the cause and after the term was irreversible. In equity the cause could be reheard before the enrollment of the final decree upon the decree itself, or upon any immediate orders, when an application was made in apt time, and could after enrollment be reconsidered upon a bill of review. In this State the ruling in a court of law or in a court of equity was reviewable by appeal substituted in place of the other remedy. But the distinction between final decrees based upon the enrollment has been obliterated and the form of procedure for a reviewal is the same.

As the appellate court and its jurisdiction were formerly the creature of the statute, it was held in the *American Bible Society v. Hollister*, 1 Jo. Eq., 10, that the Supreme Court could not entertain an original bill to review one of its own final decrees, and that such a procedure was admissible only in the court of equity of the county. But such jurisdiction, authorizing the rehearing of its own decrees upon a proceeding begun within five years after they have been entered, has been conferred upon the Supreme Court by an act of the Legislature, and was exercised up to the recent constitutional changes. Rev. Stat., ch. 32, sec. 17.

The present Court derives its jurisdiction from the Constitution, and combining in one the functions of both courts, by its rules and the statute, may now review and correct any errors found to be in its final judgment, upon an application to rehear made within twenty days of the next term following the rendition, as it may also upon newly discovered evidence. The Code, 966; Rule 12 in 92 N. C. Rep., 849.

Besides this power of correction of its own errors after the determination of the cause, it is also invested with the authority conferred upon

(83) the Superior Court by The Code, sec. 274, to relieve a party from a judgment taken against him through his *mistake, inadvertence, surprise or excusable* neglect. *Wade v. New Bern,* 73 N. C., 318; *Horne v. Horne,* 75 N. C., 101.

These seem to indicate the extent and the limitations put upon the exercise of the power to interfere with the final adjudications of this Court after the expiration of the time when they are rendered, except by a new action impeaching the judgment for fraud or other sufficient cause, and this must originate in the Superior Court, even when the final determination is in this Court, as decided in *Kincaid v. Conley,* Phil. Eq., 270. We do not of course refer to amendments and the correction of irregularities in the proceedings for the making of which no definite limits of time are fixed. As the suit first instituted was one appertaining to matters cognizable in the court of equity in the former system of divided jurisdiction, we must look into its rules and practice to see how far, and under what circumstances, interference with its final decrees was allowed for errors committed in rendering them, and whether any support is given to the present proceeding.

"After a decree has been enrolled," it is said in 2 Dan. Ch. Prac., 1232, "it can only be altered on a bill of review or by an appeal to the House of Lords."

And so *Mr. Justice Story* remarks, "There are but two cases in which a bill of review is permitted to be brought and these two cases are settled and declared by the first of the ordinances in Chancery of *Lord Chancellor Bacon* respecting bills of review, which ordinances have never been departed from." Story Eq. Pl., sec. 404.

These two cases are stated to be for the correction of "error in law appearing upon the face of the decree," sec. 405, and "that you cannot look into the evidence in the case in order to show the decree to (84) be erroneous in its *statement of fact,*" and this is declared to be *"established doctrine."* Section 407.

The second case is "upon the discovery of new matter, such for example as the discovery of a release or receipt which would change the merits of the claim upon which the decree was founded." He adds that leave to file the bill of review for this cause will not be granted without an affidavit "that the new matter could not be produced or used by the party claiming the benefit of it in the original cause." Section 412.

The same general exposition of the rule in reference to bills of review is found in Metf. Ch. Pl., 78 and 79, in 2 Mad. Ch. Pr., 539, and in other authorities, as well as the decisions of our own Court.

"A fact misunderstood," says the second author, cited at page 539, "and not introduced into the decree, may be a ground for an appeal *but not for a bill of review."*

"The only two grounds upon which a bill of review can be entertained," remarks *C. J. Taylor,* "are, first, for error apparent on the face of the decree; second, for new matter discovered since." *Simms v. Thompson,* 1 Dev. Eq., 197. To same effect are *Barnes v. Dickinson, id.,* 326, and other cases.

It is equally well settled that a decree may be impeached and annulled for *fraud* which vitiates whatever it enters into in the transactions and dealings of men with each other.

A bill for this purpose, original, yet in the nature of a bill of review, will be entertained when the decree has been obtained by fraud or imposition, "for these will infect judgments at law and decrees of all courts; but they annul the whole in the consideration of courts of equity." Story Eq. Pl., sec. 426; *Kincaid v. Conley, supra.*

Mr. Story mentions no other grounds, except that arising out of a fraud practiced in procuring a decree by imposition or other means, nor have the researches of counsel, nor our own, discovered any case of recognized authority to warrant the impeachment of a (85) final decree upon other grounds. It would very much impair confidence in the integrity of judicial proceedings if the sanctity of the judgments of its courts could be reviewed upon other grounds.

The present action springs from no such imputation, for it does not appear, nor is it alleged, that any fraud or imposition was practiced, or that the court labored under any misapprehension of the facts set out in the record in arriving at a determination of the cause, or that the ruling, based upon such facts, is erroneous. The appeal was argued and decided upon these facts, and not upon the evidence, for the parties consented to the reference and to the conferring upon the referee the power which he exercised. The difficulty grows out of the failure of the appellant to place before the Court the case as decided below, the ruling in which is affirmed, and if a reformation under these circumstances, or a reformation of the judgment were tolerated, the great maxim so conducive to peace and so long recognized, *interest rei publicæ ut sit finis litium,* would be practically abrogated, and controversies would have no certain ending. This maxim is recognized in many of our own adjudications. *Teague v. Perry,* 64 N. C., 39; *Peebles v. Horton, ibid.,* 374; *Atkinson v. Cox, ibid.,* 576; *Bledsoe v. Nixon,* 69 N. C., 81.

It is no answer to this to say that there should be a remedy for every wrong or erroneous decision, for it devolves upon parties to the litigation to see to it that the wrong or error is not committed, and this at the proper time. There is no remedy for the results of a want of care and attention bestowed upon the case at the hearing, except as provided

in the statute, when it comes from excusable negligence, and then the relief is in the discretion of the Court, and this is not a case of the kind, nor is the relief asked in the mode pointed out. The appellants seek to review a decree rendered after full argument, and reheard and affirmed upon the sole ground of a false statement of a fact
(86) found by the referee and not excepted to, and we are asked to go behind that finding and review it upon evidence which, though sent up, was not properly before us at the hearing, and of which both parties had the full knowledge furnished by the record.

The absence of any case sustaining the application tends strongly to prove it has no foundation in the law and practice of the courts, and is an innovation.

We, therefore, affirm the judgment rendered in the court below.

Affirmed.

Cited: Hunter v. Nelson, 151 N. C., 185.

W. H. KITCHIN v. C. W. GRANDY ET AL.

Contract—Application of Trust Fund—Reference.

1. The findings of fact by a referee are, when there is any evidence to support them, conclusive.
2. All papers executed, letters written and delivered, and memorandums made and acted upon in the negotiations which precede a contract, may be considered in determining what was the agreement entered into by the parties.
3. Where several notes, due at different dates, are secured by a deed in trust or mortgage, wherein it is provided that upon default in payment of any one of them the trustee may sell, and he does sell after the first note but before the others become due, the proceeds of sale must be applied ratably to all the notes remaining unpaid.

CIVIL ACTION, heard before *Graves, J.,* upon exceptions to referee's report, at March Term, 1888, of HALIFAX Superior Court.

This action, instituted to have a trust fund in the hands of the defendant R. H. Smith, properly administered, after the pleadings
(87) were filed, was referred to James M. Mullen with the direction, "to hear and determine all matters of controversy in the same arising."

The referee made his report at Fall Term, 1886; so much of his findings of fact as is necessary to a proper understanding of the controversy and the rulings in the court below, brought up for review, is as follows:

On 21 December, 1880, Joseph J. Edmundson, having purchased a tract of land lying in Martin County and described in the deed therefor executed to him by Burton H. Spruill and wife Laura K., on the same day paid $200 of the purchase money, and gave to the said Laura K. his five several notes, under seal, for the residue, one in the sum of $500, due with accruing interest, at eight per cent on 1 October, 1881, and the other four each in the sum of $575, with like interest, due on the first day of the same month in the successive years from 1882 to 1885, inclusive. To secure the deferred installments at the same time, the vendee Edmundson reconveyed the land to the defendant Richard H. Smith, trustee, vesting in him the right and imposing an obligation in case of default in the payment of said notes or any one of them, on the request of the holder, to advertise and sell said land for cash, and requiring him, after deducting the expenses and costs attending the execution of the assumed trust out of the funds thus arising, to apply the residue "to the amount remaining unpaid upon said note or notes, with interest accrued, and the balance, if any, he shall pay to the said Joseph J. Edmundson, his heirs and assigns."

Before the maturity of these notes they were transferred to and became the said Burton H. Spruill's property.

On 15 January, 1884, the said Burton H. entered into a contract with defendants, Grandy & Sons, for an advance to him of $1,500 to secure the payment whereof, as also other stipulations contained in it for the consignment to them, as commission merchants to sell, of eight bales of cotton for each $100 advanced, and the payment of (88) $1.50 for each bale deficient, he gave them his written obligation and further assigned to them as collateral security, in his deed of 22 January, of the same month, the four notes of $575 each, upon the first of which had been paid $300, and conveying also "all of his crops to be grown during the year on the Cypress Swamp Farm, in Halifax County, which the said Spruill had theretofore bought from the plaintiff, and his carts, wagons and farming implements," with the power of disposing of the property in case of a failure to comply with his contract to refund the moneys to be advanced, and for which he had also given his separate written obligation due by the first day of December of the same year.

At the time of excuting these papers the plaintiff and one Mrs. Neems held a mortgage security on the Cypress Swamp Farm, on which were to

be grown the crops that were under the defendants' lien, amounting then to about $4,000, originally due to the plaintiff alone, whereof he had passed to Mrs. Neems about $1,100, that she then held. The said defendants had no notice of this encumbrance when the transaction with Spruill was consummated, but ascertained the fact a few days afterwards. They then declined to make further advances until assured that Spruill would not be disturbed in his possession, but permitted to proceed in the cultivation of the crop for their benefit, and this determination was early in February communicated to the plaintiff by their attorney, to which the following is his answer:

"Spruill is now in my office badly upset. I have no note due against him and cannot sell if disposed to do so, and certainly I would not sell if I could. Mrs. Neems holds one note for $1,100 now due, and she is the one to apply to, to not sell. If she does not sell there will be no sale. I could not guarantee that if sold the purchaser would charge no rent, but the fourth is all any one could charge, and it seems to me that the other three-fourths, his part, in case of a sale, together with
(89) the notes you have, would be ample security for $1,500. If Grandy will advance no more than that on the crops and notes, and will hold them after paying his $1,500, advance for me, with Spruill's consent, he can have all the crops if the land should be sold, provided I bought it; and I certainly will buy it unless it should bring over four thousand dollars cash, which it will never do in this age and generation. I should be compelled to do it in self-defense. I have just agreed with Spruill that he is to convey to me all his interest in the notes you have and all his crops, subject to Grandy's lien of $1,500, and $100 more if I say so. Now if this is satisfactory to you, I will guarantee that Spruill shall not be disturbed nor his crop, until Grandy gets his money out of the crops and notes, at which time Grandy is to deliver the notes to me. I will stop the sale, or buy it if Mrs. Neems should attempt to sell."

This paper was communicated by the attorney to the defendants, and they then addressed a letter to their said attorney in these words:

"If we understand about the farm that Mr. Spruill bought of Mr. Kitchin, it stands as follows, viz.: All of Spruill's indebtedness on account of said farm is to Kitchin, except first note of $1,100 to Mrs. Neems. If Kitchin will place his notes in your hands as a guarantee that Mrs. Neems shall not sell the land, and in case she does, he will buy it, and the mortgage made to us shall not be disturbed, we think that would be safe. If Mrs. Neems sold the land, and land is worth it, we would bid enough on same through you to protect our interest. In case of sale, and Kitchin not doing as promised, forfeits the notes that

he will place in your hands. If this is agreeable all round, and Mr. Spruill desires it after we are paid—principal, interest, and commissions on cotton he is to ship us, we have no sort of objection to Mr. Kitchin having the Edmundson notes in our hands. This will be done of course, you advising it. We have been (as Kitchin says (90) Spruill is) 'upset' entirely in statements made to us (as we understood them) to act very judiciously in this matter, and hence it is that we call on you."

On 21 February, 1884, the plaintiff addressed to the said defendants a communication in these terms:

SCOTLAND NECK, N. C., 21 February, 1884.

Messrs. C. W. Grandy & Sons.

DEAR SIRS: I will see that your lien for the present year on the crop of B. H. Spruill, on the Cypress Swamp Farm, shall not be disturbed or subjected to any of the debts of said Spruill, secured by mortgage or trust on said farm, and will save you harmless on account of the same, to wit, said debts secured by said mortgage or trust.

W. H. KITCHIN.

Contemporaneously with the making the last-mentioned communication, and as a condition thereof, the plaintiff required the said Spruill to assign to the plaintiff, as a collateral indemnity in subordination to that of the defendants, and as a security for the payment of the purchase money yet due for the Cypress Swamp Farm, the four notes held by the defendant, which transfer, in writing, the said Spruill made, stipulating therein that the defendants held them for supplies only, which did not exceed $1,500 in amount. This instrument was never registered, nor its existence and contents known to defendants or their attorney until after the beginning of the present suit.

The defendants claim as due them under their contract the aggregate sum of $1,790.79, to be reduced by the net proceeds of the cotton sent to them and sold ($420.17) to the sum of $1,370.62, their demand being made up from the sum advanced, $1,500, with interest, $104.70, the sum of $21 paid their attorney, and $165 for the deficiency (91) in the number of bales of cotton to be sent to them.

On 30 September, 1885, the trustee Smith, on the demand of the other defendants, sold the land under the provisions of the deed from Edmundson to the plaintiff for $1,864.88, the net proceeds, after deducting charges, being $1,771.64, of which bid the plaintiff has paid but $1,500, and $98.24, the cost incurred in making the sale, and he

refuses to pay more, claiming, after the payment of the $1,500 advanced to defendants, his right to the excess under the assignment of Spruill, and also a reduction of the sum demanded by and paid to the defendants by the trustee to what is legally due them, the difference being also claimed by the plaintiff. This $1,500 payment to them was made with the plaintiff's consent.

The $500 note heretofore mentioned, was assigned before maturity, and for value, by Spruill to N. M. Lawrence, on which was due 30 September, 1885, the day when the land was sold, $324.33, and on the other four notes then due at the same time, $2,687.88.

When the loan contract between Spruill and the defendants was made, the latter had no knowledge of the note held by Lawrence against Spruill, the latter representing that the four notes passed to them were all. Soon after hearing of it, on 2 December, 1884, they purchased it from Lawrence, paying therefor $304.20, and still hold it.

The first maturing of the four assigned notes was, at the time of the assignment, in possession of W. A. Dunn, held as a collateral security for a debt owing him by Spruill, of which the defendants then knew nothing, and when informed they paid Dunn the debt due him by Spruill, with plaintiff's consent, which payment is included in the charge for advancements and constitutes part of the $1,500, and the note was delivered to them. This was previous to the registration of Spruill's mortgage to them.

(92) The debt of Spruill to the plaintiff, secured by the mortgage of the Cypress Swamp Farm, has never been paid in full, though it has been sold and the proceeds applied thereto, the residue unpaid amounting, with interest, to the date to which the computations of the other debts have been brought, to the sum of $1,482.85.

Spruill was, at the time, and ever since, has been totally insolvent.

Upon these facts the referee declared that the plaintiff is not entitled to recover; that the transaction occurring in Virginia is governed by its laws of usury, of which no evidence has been offered, and the defense itself is only open to parties to the contract and privies, and that defendants are entitled to recover of the fund in the trustees's hands, $1,457.22 and interest from 15 December, 1884, for advances, and $324.33 amount paid Lawrence, and of the plaintiff $271.64, with interest from sale and costs.

The plaintiff filed numerous exceptions to the report, of which two only were sustained, and it was recommitted for reformation. The referee accordingly made a second report, in which, correcting the former, he finds as follows:

That the communication made to the defendants when they declined to make further advances, and which led to their resumption, was trans-

mitted to them with the plaintiff's guarantee, and thus they acquired their only information upon that point. The referee therefore rules as before, in reference to the defendant's right to the funds in the trustee's hands, and further, their right to recover of the plaintiff $191.26, on account of the note obtained from Lawrence, and also of the plaintiff $164.84, with interest at 8 per cent from the day of sale, and to judgment for the resale of the lands, to make up the deficiency in the first sale. The reformed report was excepted to by both parties, and their exceptions are as follows:

Plaintiff's exceptions to the reformed report.

The plaintiff excepts to the second reformed report of the referee herein filed for the following reasons:

1. Because he finds, as a conclusion of law, that the defendants, (93) C. W. Grandy & Sons, are entitled to receive of the proceeds of the land the sum of $1,457.22, on account of advances, etc., and $191.26 on account of the note purchased by them from N. M. Lawrence.

2. Because he finds that the defendants Grandy & Sons, are entitled to recover of the plaintiff the sum of $164.84, with 8 per cent interest thereon from 30 September, 1885, and costs.

3. Because he does not find, as a conclusion of law from the facts found, that the plaintiff is entitled to receive of the net proceeds of the land sold the sum of $319.58.

4. Because he does not find that the plaintiff is entitled to receive of the proceeds of the land sold by Smith the sum of $516.27.

The defendants, C. W. Grandy & Sons, except to the reformed report of the referee, and for cause of exception, allege:

1. That he did not find that the defendants are entitled to recover of the plaintiff the sum of $271.67, with 8 per cent interest from 30 September, 1885.

2. That he fails to find that the defendants are entitled to recover of the plaintiff $324.33 and 8 per cent interest thereon, on account of the note purchased by them from N. M. Lawrence, and find that he is only entitled to recover $191.26.

3. That he finds that the defendants are only entitled to recover of the plaintiff the sum of $164.84 and 8 per cent interest from 30 September, 1885.

5. That he refused to admit as evidence letters of T. N. Hill to C. W. Grandy & Sons, dated 6 February, 1884.

Thereupon the court rendered the following judgment:

This cause coming on to be heard, and the former judgment of this court upon the first report of the referee being considered, and the reformed report of the referee made in obedience to said (94)

judgment, with the exceptions thereto filed being considered, it is now adjudged by the court:

1. That the first exception of the plaintiff to the reformed report be sustained, so far as it complains as follows: "Because he finds as a conclusion of law that the defendants Grandy & Sons, are entitled to receive of the proceeds of the lands $1,457.22, on account of advances, etc." The remainder of this exception is overruled.

2. That exception two of the plaintiff be sustained.

3. That the third and fourth exceptions of the plaintiff be overruled.

4. That exceptions one, two, three, four and five of the defendants be overruled.

5. And it appearing from the report of the referee that the net proceeds of the land left in the defendant Smith's hands after paying commissions and expenses was $1,771.64, and that the entire amount of the notes secured on the land sold was $3,012.21, that of this sum $2,687.88 was due on the Spruill notes mortgaged to Grandy, and that $324.33 was due on the Spruill note purchased by Grandy & Sons from N. M. Lawrence, and his Honor Judge Avery having held by his rulings on the first report of the referee that these notes were entitled to share ratably in the proceeds of the land, and the court now being of opinion on the coming in of the reformed report that the defendants Grandy & Sons are not entitled to collect the sum of $165.00, being the amount of damages charged for nonshipment of cotton, and of the notes mortgaged to them by Spruill as against the plaintiff, it is adjudged that the defendants Grandy & Sons are entitled to receive of the proceeds of the land sold the sum of fourteen hundred and seventy-three dollars and fifty-seven cents, being $191.26 on account of the note purchased of Lawrence and $1,283.31 on account of notes mortgaged by Spruill.

And it further appearing that the plaintiff was the purchaser
(95) of the land sold by Smith, trustee, and that he has only paid the commissions and expenses of sale and the sum of $1,500 which he paid over to Grandy & Sons, and that Grandy & Sons were paid $26.43 too much, it is adjudged that the plaintiff recover of the defendants Grandy & Sons the sum of twenty-six dollars and forty-three cents, and the cost of this action to be taxed by the clerk. And this judgment will bear interest from 30 October, 1885, the date of the sale of the land.

From this judgment the defendants Grandy & Sons appealed, assigning the following errors:

1. That he sustained exception one of the plaintiff to the reformed report of the referee so far as it sets forth as follows: "Because he finds

as a conclusion of law that the defendants Grandy & Sons are entitled to receive of the proceeds of the lands $1,457.22 on account of advances, etc."

2. That he sustains exception two of the plaintiff.

3. That he overruled exceptions one, two, three, four and five of the defendants C. W. Grandy & Sons.

4. That he holds that C. W. Grandy & Sons were not entitled to collect the sum of $165 damages for nonshipment of cotton out of the notes mortgaged to them.

5. That he holds that the defendants C. W. Grandy & Sons were only entitled to secure $1,473.57, being $191.26 on account of the note purchased by Lawrence and $1,282.31 on account of the notes mortgaged to Spruill.

6. That he finds that the plaintiff has overpaid these defendants $26.43 too much.

7. That he holds that the plaintiff recover of these defendants said sum of $26.43, with interest from 30 October, 1885.

8. That he holds that the plaintiff recover of said defendants the cost of this action.

9. That he does not find that the defendants, C. W. Grandy & Sons, are entitled to recover two hundred and seventy-one dollars and sixty-four cents, with eight per cent interest from 30 September, (96) 1885, the amount found due them by the original report.

10. That he does not find that said C. W. Grandy & Sons are entitled to recover $164.84, with eight per cent interest from 30 September, 1885, the amount found due them in the reformed report.

That he does not hold that the plaintiff pay the cost.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
Thomas N. Hill for defendants.

SMITH, C. J., after stating the case: While the exceptions are very many in number, there are but few rulings involved which we are called on to consider.

1. The appellants' objection to the ruling that sustains the plaintiff's first exception to the referee's first report in reference to the time of transmitting, with the guarantee, the paper of the defendants' attorney, setting out the terms on which it is given, involves a matter of fact and is not subject to review in this Court, when there is any evidence to support the finding.

2. The second has reference to the sustaining the plaintiff's exception to the finding that the defendants are entitled to be paid out of the

proceeds of sale of the land, not only $1,457.22, the amount advanced, but also the sum of $324.33 paid for the note held by Lawrence.

This raises an inquiry into the effect upon the liability incurred under the plaintiff's guarantee by the contemporaneous transmission to the defendants of the verbal communication of plaintiff to their attorney reduced to writing, and forwarded to them.

We think, most manifestly, the latter paper must be considered between the contracting parties as a qualification or condition of
(97) the plaintiff's undertaking to protect the defendants from any claim upon the crops growing out of the incumbrance upon the farm, or interference with Spruill while making them.

As Spruill had assigned, subordinate to the assignment to the appellants, his interest in the notes held by them, the plaintiff, in waiving any claim to priority in the crops and insuring Spruill uninterrupted cultivation in that communication to them, uses these words:

"I have just agreed with Spruill that he is to convey to me all his interest in the notes you have, and all his crops subject to Grandy's lien of $1,500, and $100 more, if I say so. Now, if this is satisfactory to you, I will guarantee that Spruill shall not be disturbed, nor his crop, until Grandy gets his money out of the crops and notes, at which time Grandy is to deliver the notes to me. I will stop the sale or buy, if Mrs. Neems should attempt to sell."

The guarantee was accepted on these terms, and most clearly it limits the claim of the defendant upon the notes and crops to $1,500, and excludes all above that sum. It cannot be necessary to refer to authority for the proposition that papers executed at the same time or acted upon conjointly, together constitute the contract, and ascertain the respective relations and obligations of the parties to it. These exceptions being overruled, the defendants file others to the amended report:

1. For that the referee does not find the appellants to be entitled to the unpaid residue of the purchase money.

2. Nor entitled to recover of the plaintiff the amount ($324.33) paid to Lawrence, but only ($164.84) part thereof.

3. Nor to recover of plaintiff a larger sum than $164.84.

To the rulings of the judge they excepted also:

For that he disallowed the sum of $165, claimed for the deficient consignments of cotton.

For that he denies their right to the sum found due in the first report, to wit, $265.64.

(98) For that he does not allow them the sum ($164.84) ascertained to be due in the reformed report.

For that he adjudges due plaintiff's $26.43, paid the defendants out of the sale above, what was due them, and awards costs of suit against them.

While, in our opinion, the notes given on the purchase by Edmondson are, under the terms of the trust deed, whether due or not, entitled as such, to share in the proceeds of the sale, the deed so directing, and the payment to Edmundson of any excess, it is evident this latter was not intended to exclude such as were not matured, and thus to withdraw the security from them, and such is the meaning of the language used; yet the sum to be received by the defendants was, under their contract with the plaintiff, not to exceed $1,500, the excess from these pledged securities belonging to him.

The item of $165, claimed for damages for the deficient cotton, while not allowable to affect the plaintiff's rights, was, we think, under the findings, a proper charge against Spruill.

In *Arrington v. Goodrich,* 95 N. C., 462, where the point of the usurious character of such a provision in a mortgage deed came before the Court, but was not necessary to be passed on in determining the appeal, as it is not now, since we do not know that a usurious taint is, by the law of Virginia, thus imparted to the contract, and the debtor does not controvert his liability upon such ground, and for these reasons we pass it by without an expression of opinion as to the effect of such a provision under our law. Whether in law it must be declared to be usurious in the absence of other evidence of illegal intent as a means of evading the condemnation of the law relating to the taking of usurious interest, we shall not undertake to decide.

But the ruling of the Court is, that this sum is not a just charge against the plaintiff, inasmuch as the four notes, not to (99) exceed $1,500, were alone to be provided for, and subject to the lien of that sum only, were to belong to the plaintiff. The appellants having received in excess of what those notes are entitled to, out of the securities provided for their discharge, the sum of $26.43, it is correctly ruled that they are liable therefor to him.

It must be declared there is no error in the ruling complained of by the appellant, and the judgment is

Affirmed.

Cited: Whitehead v. Morrill, 108 N. C., 68; *Kiger v. Harmon,* 113 N. C., 407; *Kerr v. Sanders,* 122 N. C., 636; *Gore v. Davis,* 124 N. C., 235.

LEWIS WEBB v. GEORGE BISHOP AND JOHN HUTCHISON.

Contract——Mistake—Usury—Interest.

Where a bond executed for the repayment of borrowed money in February, 1875, was infected with an usurious element, and in December following another bond was executed and substituted therefor, with a further usurious consideration: *Held*—

1. That under the statute in force at the time of the execution of the first bond the interest accruing thereon was forfeited, though if any part thereof had been paid, the obligor could not recover it back.
2. That under the statute in force at the time the second bond was executed it was void; but the obligee might fall back upon the first bond and recover the amount of the principal thereon, reduced by any credits to which it was entitled.
3. The contract is not affected by an usurious element if it is incorporated by mistake; it is the intent to take more than the law permits which vitiates it.

THIS is a civil action, tried before *Graves, J.*, at May Term, 1888, of CRAVEN Superior Court.

The action is upon a note under seal executed by the defend-
(100) ants to the plaintiff on 21 December, 1875, wherein they covenant to pay him twelve hundred and nineteen dollars and 91/100 with interest at the rate of 8 per cent per annum, and the complaint alleges to be due thereon, on 30 January, 1883, the sum of five hundred and twenty dollars and 63/100 and interest from that date for which judgment is demanded.

The defendants admitting these general allegations, set up in their answer the defense of usury, alleging that a large sum of unlawful interest enters into the bond, purged of which they aver their readiness to pay any balance that may be found to be lawfully due on the obligation.

The parties, waiving a trial by jury, consented that the judge might upon the evidence ascertain and determine the facts, and he finds as follows:

On 24 June, 1870, the defendants borrowed from the partnership firm of Rountree & Webb (the last named being the plaintiff) and as *principals* gave their note for the sum of fifteen hundred dollars. On 18 February, 1875, the note was taken up and two others substituted in its place, each in the sum of $1,181.70, one of which was drawn payable to Thomas J. Latham, cashier, at thirty days. Endorsements subsequently made on it show four several payments of interest, the last being up to 1 December, 1875.

This note assigned to him, as the plaintiff's separate share of the joint fund, was replaced by the bond sued on and described in the complaint, and is in this form:

$1,219.91. For value received we, George Bishop and John Hutchison, both principals, promise to pay to Lewis Webb or order, the sum of twelve hundred and nineteen 91/100 dollars with eight per cent interest from date. Witness our hands and seals 21 December, 1875.

GEORGE BISHOP. [Seal.]
JOHN HUTCHISON. [Seal.]

Upon this bond several credits are endorsed by the plaintiff, all of them as partial payments, or in general terms as receipts, to wit:

On 22 October, 1877, $200; on 6 November, 1877, $10; on (101) 4 August, 1879, $694; on 4 August (same date), $119.96; on 25 October, 1880, $100; and on 30 June, 1883; $81.67, which is the last payment.

Upon these facts his Honor gave judgment for the plaintiff, from which the defendants appealed.

H. R. Bryan filed a brief for plaintiff.
M. D. W. Stevenson for defendants.

SMITH, C. J., after stating the case: It will be seen by a computation that in the division of the first note principal and interest at six per cent accrued up to the giving the note of 18 February, 1875, the latter is in excess of the sum due by some $226, or thereabouts, and in the absence of evidence of any other consideration must be deemed an additional consideration for the further indulgence of the debt.

This excess constitutes the alleged usury in the execution of the second note, and constitutes an element with interest affecting the bond in suit.

In making computation of the amount due on the second note, the interest on which was paid up to 1 December, 1875, it would appear that the last instrument, the bond, was given for a sum in excess of what was due at the date of its execution by about $25.

The statute in force when the first two notes were given provides that "if any person shall agree to pay a greater rate of interest than six per cent per annum when no rate is named in the obligation or a greater rate than eight per cent when the rate is named, the interest shall not be recoverable at law." Bat. Rev. Ch., 114.

When the bond in suit was executed the law had undergone a change, and it was declared that "all bonds, contracts and (102)

assurances whatsoever for the payment of any principal or money to be lent or covenanted to be performed upon or for any usury whereupon or whereby there shall be reserved or taken above the rate of six dollars or eight dollars on the hundred as aforesaid shall be void," etc. Acts 1874-75, ch. 84.

This statute, which went into effect on 24 March, 1875, declares in express terms (unnecessarily, perhaps, but to avoid misinterpretation) that it shall not "apply to any existing contract," but it is applicable to the last security taken in December of that year.

In our opinion, the sum entering into the note of 18 February, 1875, above the principal and legal interest then due on the former note is usurious, and under the law was not recoverable, and so much of that sum, as being unpaid, enters into the bond in suit is not recoverable, the interest, however, paid on the second note must, so far as it partakes of the usurious sum be eliminated and not be counted in the reduction, because, though not recoverable, it has *been paid. Bank v. Lutterloh,* 81 N. C., 142.

That the second note is usurious to the extent specified by the incorporating into it a sum exceeding what was due on that of which it is a renewal, is sustained by both reason and authority. There is no essential difference in taking the usury by discounting and inserting in it a larger sum than is legally due. In either case the contract has the taint. *Ehringhaus v. Ford,* 3 Ired., 522; *Dawson v. Taylor,* 6 Ired., 225; *Comrs. v. R. R.,* 77 N. C., 289.

This result of course presupposes an intent to take more than the law allows, for forbearance in making a loan and not to the case of a mistake in calculating the sum due, when no such intent exists.

(103) But the last instrument is rendered void by the statute compelling the creditor to fall back on the preceding note, ignoring the existence of the other, except as showing payment upon the indebtedness.

The plaintiff may recover on this, upon the authority of *Rountree v. Brinson,* 98 N. C., 107, to which the pleadings may, by amendment, be made to conform in the court below.

There is, therefore, error, in the ruling, and the judgment must be set aside in order that upon the basis of this opinion the legal sum recoverable, if any, may be ascertained and judgment given accordingly.

Error.

Cited: Moore v. Beaman, 112 N. C., 561.

G. W. GWATHNEY ET AL. v. GEORGE A. SAVAGE AND F. M. GARRETT.

Attorney and Client—Excusable Negligence—Judgment—When Vacated.

Where the defendant, residing in a county of the State distant from that in which the action was pending, retained an attorney, who practiced in the courts where the suit was, to represent him, and furnished him with the facts necessary for his answer, but the attorney failed to make the proper defenses, or notify defendant that his presence was necessary, by reason of which judgment for want of answer was rendered, and this was not communicated to defendant for some time afterwards: *Held*, that the neglect was that of the attorney and not of the client, and the latter was entitled to have the judgment set aside.

THIS is an appeal from a judgment of *Graves, J.*, rendered at Spring Term, 1888, of HALIFAX Superior Court, setting aside for excusable neglect a judgment theretofore rendered in the cause.

The action in which the judgment, which the defendant Garrett moves to have set aside was rendered, was instituted by the (104) plaintiffs to foreclose the defendant Savage of the equity of redemption in certain lands conveyed by him to secure the payment of the debts to the plaintiff mentioned in the complaint.

The following summary of facts as found by the court will be sufficient to present the question raised by the appeal:

The defendant Garrett is now, and has been, since 1 January, 1888, a resident of Little Rock, Ark. In January, 1876, he, as trustee for his wife and C. W. Garrett, conveyed to the defendant Savage the land mentioned in the pleading and took, in consideration therefor, eleven notes payable to C. W. Garrett, in cotton, the cotton for the first note to be delivered on 1 December, 1876, and that for the other ten notes to be delivered on 1 December of each of the following ten years; and eleven notes payable to T. M. Garrett, trustee, etc., to be paid in cotton on the same dates as the notes to C. W. Garrett. To secure the payment of these notes the defendant Savage executed a deed of trust to T. M. Garrett, trustee, on the said land, with power of sale in default of the payment of any one of said notes. The deed was duly registered.

On 1 December, 1882, the defendant Garrett, having become the owner of all the notes secured by the trust, and the said Savage having made default in the payment of the notes falling due in 1879, 1880 and 1882, the said Garrett agreed to grant an extension of said notes (payable in cotton) and in lieu thereof took three notes for $212.80, payable respectively 1 December, 1887, 1888 and 1889, and to secure the

same the said Savage on the same day executed to Garrett the mortgage deed set out in the complaint.

After the institution of this action the defendant Garrett employed James E. O'Hara, an attorney, practicing in said court, to defend his interest in said action, and sent to him during May Term, 1887,
(105) by the hand of L. Vinson (his son-in-law) the unpaid cotton notes and the money notes, and the said Vinson handed to the said O'Hara, with said notes, a statement of the amount due on the cotton notes and money notes, with a reference to both mortgages or deeds in trust securing the same, and also letters from Savage to Garrett, and the original mortgage of 1 December, 1882, which described the other mortgage.

The defendant Garrett was then living in Cumberland County, N. C., and did not visit Halifax in several months thereafter. O'Hara asked for time to file an answer, which was refused, and the plaintiff's counsel moved for judgment, which was also refused, with the statement that defendant had the whole term to answer. O'Hara then filed an unverified answer (the complaint was verified), admitting all the allegations of the complaint, except as to the payment of interest. O'Hara had no consultation with Vinson about the case, except that Vinson, when he handed him the papers, asked him to represent Garrett in the cause, and the answer was filed by O'Hara, with the papers before him, without further assistance from his client, and without opportunity to confer with him during the time.

On 26 September, 1887, O'Hara, in reply to a letter of inquiry from Garrett, among other things, said: "I claim interest for your entire debt, which have (has) been conceded by Gwathney & Co. They, G. & W., will move for execution on this judgment on the third Monday in next month."

On 10 December, 1887, he wrote, in reply to a letter from Garrett: "I beg to state that, at the last term of the court, Gwathney & Co. recovered judgment (against) Savage for their debt, and judgment was accordingly taken—first, your debt to be paid out of power of sale, after that Gwathney & Co. . . . Savage is confident that he will be able to pay your note past due, and accrued interest, and also
(106) satisfy the G.'s debt within the seventy days. His attorneys tell me they have arranged to raise the money."

On 19 December, 1887, O'Hara wrote to Garrett as follows: "In reply to yours of the 15th inst., I beg to state that I intended to say, that your secured debts against Savage, with all *accrued interest,* must be paid before Gwathney & Co. could come in, and that I had so stated."

"Garrett did not come to November Term of the court, and judgment was rendered against him for want of an answer at said term. The said O'Hara is insolvent. Garrett never received any notice of the provision of the judgment till after January Term, 1888, of the court, viz.: about 2 February, 1888. Said attorney never called upon him to verify any answer, and he never saw the unverified answer placed on the files, nor did he ever see the other pleadings, or know of the filing of an unverified answer.

There is due on said cotton notes about $1,300 or $1,400. [This finding is provisional, for the purpose of this motion, only.]

The mortgage from said Savage to W. W. Gwathney & Co. was given 27 January, 1885, and duly recorded."

Upon the facts found, it was ordered and adjudged, that the judgment against the defendant Garrett be set aside for the excusable neglect of said Garrett, and that he be allowed to answer, subject to the limitations contained in the judgment.

T. N. Hill for plaintiffs.
R. O. Burton for defendants.

DAVIS, J., after stating the case: The defendant Garrett had employed an attorney practicing in the courts of Halifax; he had furnished his said attorney with the facts material for his answer, and he had reason to suppose that, with the facts before him, his attorney would not neglect to put in an answer and protect his interest. The complaint was verified, and no verified answer was put in. This was neglect—whose neglect was it? Was it the neglect of the defendant, (107) and if so, was it excusable?

The plaintiff says that it was the duty of the defendant to have been at court, and that it was his neglect, and inexcusable. The defendant lived in a distant part of the State; he had employed an attorney, duly licensed to practice in the courts; furnished him with all the data necessary to protect his rights and interests in the action, and he was presumed not to know himself what answer to make or how to make it; but he had a right to assume that his attorney would not neglect to file his answer and protect his interests, and to inform him if it was necessary to make any affidavit verifying the same.

The distinction between the neglect of parties to an action and the neglect of counsel is recognized in our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not to counsel, and in which the attorney is made to act as the agent of the client, to perform some act which should be attended to by him, the client is held to be excusable

for the neglect of the attorney to do those things which the duty of his office of attorney requires. It was the duty of the attorney to file the defendant's answer; if it required verification, as it did, it was his duty to inform his client of the fact.

The client is not presumed to know what is necessary.

"When he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf." *Whitson v. R. R.,* 95 N. C., 385.

The distinction between neglect of counsel taken in *Griel v. Vernon,* 65 N. C., 76, has been followed by a number of cases since, and may be regarded as settled. *Ellington v. Wicker,* 87 N. C., 14, and the cases there cited.

In the case before us the neglect was that of the counsel, and (108) we concur in the ruling of his Honor below, that it was excusable neglect on the part of the defendant.

The counsel for the appellee Garrett moved to dismiss the appeal, "upon the ground that the undertaking on appeal was not filed in the time prescribed by law."

It appeared from the record that the motion to set aside the judgment was heard by consent at the April Term of Northampton court. It also appeared from the record that the case on appeal was filed on 25 May, 1888, and that the appeal bond was filed on the same day. The counsel for appellant filed an affidavit, in which he makes oath, "that the facts were found and the amount of the appeal bond fixed by the judge on 25 May, 1888, and thereafter, on the same day, the bond was executed and filed."

By consent, the motion was heard at Northampton court. It does not appear from the record on what day the judgment was filed, but the case on appeal was filed on 25 May, and the appeal bond filed on the same day, and, as we find upon the affidavit of Mr. Hill, on the same day the facts were found and the amount of the bond was fixed by the judge. The motion was heard and the judgment rendered out of term, by consent, and the bond was filed within ten days after notice thereof. The motion to dismiss cannot be allowed.

Affirmed.

Cited: Phifer v. Ins. Co., 123 N. C., 409; *Koch v. Porter,* 129 N. C., 136; *Pepper v. Clegg,* 132 N. C., 316; *Schiele v. Ins. Co.,* 171 N. C., 431; *Grandy v. Products Co.,* 175 N. C., 513.

(109)

THE STATE ON THE RELATION OF THE COMMISSIONERS OF THE TOWN OF WARRENTON v. SAMUEL P. ARRINGTON AND WILLIAM A. JENKINS.

Official Bonds—Parties—Demurrer—Estoppel.

1. Relators in actions upon official bonds are the real plaintiffs and miscalling them will not impair their right to recover when it is patent from the pleadings that they have a good cause of action.
2. The misjoinder of parties plaintiff is not fatal to the action, as judgment may be rendered for those who are entitled to it.
3. The obligors in an official bond made payable, in terms, to the person for whose benefit it is required, cannot, when sued for a breach thereof, be heard to say that it cannot be enforced because not executed to the State.

THIS is a civil action which was tried before *Graves, J.*, upon complaint and demurrer, at Spring Term, 1888, of WARREN Superior Court.

The summons issued and served upon the defendant calls upon them "to answer the complaint of the State of North Carolina *ex rel* the commissioners of the town of Warrenton which will be filed in the clerk's office," etc., and at the return term the complaint was filed, alleging in substance:

That James S. Boyd, who died in Warren County on the ..... day of August, 1887, was duly elected by the board of commissioners of the town of Warrenton, in the county of Warren, constable of said town, on 14 June, 1886, to fill the unexpired term of J. J. Loughlin, who had been elected constable of the said town of Warrenton on the first Thursday in May, 1886, the said term to continue until the first Thursday in May, 1887; and on 3 July, 1886, the said Boyd duly qualified, and filed his bond as constable, with the defendants Arrington and Jenkins as sureties, with the board of commissioners of said town, and the same was accepted by them; that the bond, payable to the town of Warrenton in the sum of twelve hundred and fifty dollars, was for the faithful collection of and accounting for the taxes of (110) the town of Warrenton, and the full performance of his duties as constable aforesaid, during his term of office, or his continuance therein; that after the execution of the bond a copy of the tax lists of the town of Warrenton, made out and assessed in all respects according to law, levied for the year 1886, was delivered to the said Boyd, constable, as aforesaid, for collection, and he received the same for that purpose; that the said Boyd, constable, was by law compelled and required to settle with and pay over to the treasurer of said town of

Warrenton, whatever of said taxes were unpaid by him, and which he had collected, or ought to have collected, on the tax lists in his hands, on the first Monday in February, 1887, less the amounts to be allowed him by the commissioners of said town for insolvents and errors; that Boyd failed and refused to settle with the treasurer, and failed and refused to pay to him a large amount of said taxes due at that time and unpaid by him, which he ought to have collected and paid over as aforesaid, and that he did not pay the same up to the time of his death, but continued to refuse so to do; wherefore, the plaintiffs demand judgment against the said defendants for the sum of $1,250, the whole penalty of the bond, that being the amount of the penalty of the bond, and being less than the defalcation of their principal, the said James S. Boyd, constable as aforesaid, and interest and costs.

The bond sued on is in this form:

Know all men by these presents, that we, James S. Boyd, S. P. Arrington and W. A. Jenkins, are held and firmly bound unto the corporation of the town of Warrenton in the sum of twelve hundred and fifty dollars ($1,250), to the payment thereof well and truly to be made, we bind ourselves jointly and severally, our heirs, executors and
(111) administrators, firmly by these presents, signed and sealed this 25 June, A. D. 1886.

The condition of the above obligation is such that, whereas the above bounden James S. Boyd was, on 14 June, 1886, duly elected constable in and for the town of Warrenton, in said county of Warren, to take effect from 3 July, 1886, to fill the unexpired time of J. J. Loughlin, who resigned, to take effect from 3 July, 1886. Now, if the said James S. Boyd, as constable, shall well and truly and diligently collect the taxes which may be levied by the proper authorities of said town, and which may be placed in his hands for collection during his said term of office, and shall truly and faithfully pay over the amount or amounts collected by him according to law, and shall in every respect faithfully and fully perform and discharge all of the duties as constable aforesaid during his term of office or continuance therein, then the above obligation to be void and of no effect; otherwise to remain in full force and effect.

JAMES S. BOYD. [Seal.]
S. P. ARRINGTON. [Seal.]
W. A. JENKINS. [Seal.]

Witness: J. GRAY MCCANDISH.

The defendants demurred to the complaint, and alleged as causes of demurrer, first, "that the relators are not proper parties to the suit as

it appears upon the face thereof; that the bond sued on was not executed to and payable to the State of North Carolina"; and second, "that it does not appear upon the face of the complaint that said bond was registered in the office of register of deeds."

The court, after hearing argument upon the questions of law presented, rendered judgment overruling the second cause of demurrer assigned, and sustaining the first cause of demurrer (112) assigned; that the defendants go without day and that they recover their costs of suit against plaintiff. From which judgment the plaintiff appealed.

R. H. Battle for plaintiff.
J. B. Batchelor for defendants.

SMITH, C. J. If the complaint be considered apart from the process and its heading, it will be seen that a cause of action is set out in favor of the commissioners of the town of Warrenton, or of the town itself, which they represent, and none in favor of the State. It is true, that in the process they appear *as relators* prosecuting in the name of the State, as upon an obligation incurred to it, as they do in the caption to their complaint, nevertheless, they are present in the complaint—which is the foundation of the action alone to be answered—as plaintiffs in their official capacity, and representing the obligee, the town itself, as sole prosecutors of the action, and in which the State is shown to have no legal interest.

In *State ex rel. Cox v. Peebles,* 67 N. C., 97, the caption following the summons was, *"State on relation of W. R. Cox, Solicitor, v. Nicholas Peebles, Edmund Jacobs and others,"* and the action was upon a guardian bond, to recover the estate of infants, and it was objected that the relator should be the infants for whom the solicitor was prosecuting the suit, and who could not properly himself, be a relator.

The court, after overruling the objection as coming too late after judgment, and remarking, that if taken in apt time "his Honor would have allowed an amendment had he deemed it necessary," concluded the opinion in these words: "But the court is of opinion that the action is properly brought, as *the complaint shows, that notwithstanding the caption, it is really in the name of the wards, against their late guardian and his sureties on the guardian bond."* This ruling shows that to find the parties plaintiff the complaint may be looked into, and those are relators who appear therein to be entitled to maintain the (113) action upon the cause of action set out.

Relators are those for whose benefit suit is brought on an official bond, and are substantially the plaintiffs demanding relief, and the miscalling

them cannot impair their right to recover, when this is patent upon the complaint. The State is not a proper party to the suit, and it has been decided, contrary to the former practice, that under the Code system the joining improper parties with the plaintiff is a harmless error, as judgment may be rendered in favor of such as are entitled, and therefore the proceeding is not vitiated. *Green v. Green,* 69 N. C., 394; *Burns v. Ashworth,* 72 N. C., 496.

Moreover, the demurrer is insufficient in form, and does not properly raise the question argued before us. It assigns as the ground thereof, that the relators, suing on behalf of the town, "are not proper parties to this suit," while it is plain that they (or the town) are the *only proper* parties to maintain the action, not as relators, but in their own right, and the State is an improper party, and this for the reason given in the demurrer that the bond "was not executed to and payable to the State." If the State were not the obligee, and the complaint averred that it was, the variance between the allegation and proof would be fatal at the trial.

We do not understand it to be contended that the bond is a nullity, and no recovery could be effected in an action brought to enforce its provisions by the obligee.

We do not propose to pursue the discussion of the point, because it is not necessary in disposing of the ruling brought up for review, further than to say, that no reason occurs to us for refusing to enforce such a bond in a suit at the instance of the present obligee, the town, which, acting in a public capacity, has taken a security for the
(114) faithful discharge of the trust assumed by the principal obligor, on an appointment legally conferred.

It would be a strange result if the defendants, accepting what has been done, and by becoming sureties enabling their principal to collect taxes under the conferred office, could disown what has been done and exonerate themselves from all liability upon their obligation.

We must overrule the demurrer for the reasons stated, and suggest to the court below, when the cause is again taken up for action under this opinion, if deemed necessary, such amendment merely be made as will make the record self-consistent and harmonious in its several parts.

The judgment must be reversed, and the cause proceed in the Superior Court of Warren.

Error.

Cited: Burrell v. Hughes, 116 N. C., 437; *Hines v. Vann,* 118 N. C., 7; *Tillery v. Candler,* 118 N. C., 889; *Cook v. Smith,* 119 N. C., 355; *Carter v. R. R.,* 126 N. C., 444; *Quarry Co. v. Construction Co.,* 151 N. C., 348.

B. H. VESTER, ADMINISTRATOR CUM TESTAMENTO ANNEXO OF CALVIN COLLINS, v. SIMON COLLINS.

Witness—Devise—Transaction with Deceased Persons—Evidence.

1. One who attests a will as a subscribing witness is not made incompetent to testify to the execution thereof, by reason of the fact that he is a devisee or legatee.
2. An executor or administrator *cum testamento annexo*, who is also a subscribing witness to a will, is competent to testify to the execution thereof; and the same rule applies to one who was competent at the time of the making of the will, but subsequently acquired an interest therein.
3. The act of attesting the execution of a will is not such a "personal transaction" with the deceased as is contemplated in the prohibition contained in section 590 of The Code. Such witnesses are the witnesses of the law, not of the parties.
4. Where a will was attacked upon the ground of undue influence of the wife and sole devisee, and evidence was offered by the caveators of declarations by the testator that he did not intend any of her family to have any part of his estate: *Held*, that it was competent to prove, in reply, the kind relations existing between the deceased and his wife, and that she had permitted him to use a fund which belonged to her.

THIS is an issue *devisavit vel non*, tried before *Avery, J.*, at (115) Spring Term, 1888, of the Superior Court of NASH County.

The issue was found in favor of the propounders, and from the judgment thereon declaring the will duly executed and ordering it to be recorded, the caveator appealed.

A paper writing or script purporting to be the last will of Calvin Collins, bearing date 2 September, 1859, and in form to pass his estate, was, after his death and in the month of March, 1885, exhibited in the Probate Court by his widow Nancy Collins, nominated sole executrix, and to whom his estate was given, and there proved *ex parte*. On 31 October of the same year a caveat thereto was entered by Simon Collins, a brother, and one of the next of kin of the deceased, whereupon such further proceedings were had that an issue as to the validity of the instrument was drawn up and sent to the Superior Court for trial before a jury in the following form:

Is the paper writing mentioned in the pleadings and offered for probate and every part thereof the last will and testament of Calvin Collins?

While the proceeding was pending the executrix died intestate and B. H. Vester, her brother and one of her next of kin and heirs at law, took out letters of administration *cum testamento annexo*, on the testa-

tor's estate, and in both his representative and personal capacity, became a party propounder to carry on the suit in her place.

Upon the trial the said B. H. Vester, who, on the death of
(116) his sister became entitled to a distributive share in her estate, enlarged by that given her in the contested will, though he was both a propounder and subscribing witness, was examined as a witness on his own behalf, and it was proposed to prove by him the due and sufficient execution of the will, when the caveators interposed an objection to the hearing of the testimony, upon the ground that it related to *"a personal transaction"* between the witness and the deceased, and was inadmissible under section 590 of The Code. The objection was overruled and the witness permitted to testify, to which the caveators except. A similar objection was made to the testimony of the other subscribing witness and disposed of by a like ruling; the only difference between the relations of the witnesses to the subject matter being that the former, as representative of the executrix, was, in this capacity, also a party to the proceeding, taking her place as a propounder of the testamentary script, so that a single ruling upon the point disposes of both exceptions.

Jacob Battle for propounder.
E. C. Smith for caveator.

SMITH, C. J., after stating the case: The present statute unlike that in force under the Revised Statutes, which invalidated the will unless it was attested by at least "two witnesses no one of whom shall be interested in the devise of the lands" as a means of transmitting the title therein to the devisees, in such case, applying to wills of both real and personal estate, avoids only the devise or bequest to such attesting witness and to his or her wife and husband and privies, and leaves the other dispositions made of the testator's property in unimpaired force and operation. The Code, sec. 2147. The concluding clause of the section in direct words declares "that such person so attesting
(117) shall be admitted as a witness *to prove the execution of such will or the validity or invalidity thereof."*

Before the fundamental change in the law of evidence introduced by the enactment made in 1866 and subsequent amendments, among which is that substantially embodied in section 590, it was decided that one appointed executor and propounding the will, though called a plaintiff to the issue, could nevertheless be examined as a witness by the caveator as he could be in support of the script. *Powell v. Scoggin,* 8 Jo., 408. In the opinion *Battle, J.,* speaking for the Court, uses this language: It is said "that to the issue of *devisavit vel non* there are strictly no parties, it being in the nature of a proceeding *in rem,"* but it has since

been declared in *Pepper v. Broughton,* 80 N. C., 251, that the contestants and parties are within the purview of the disqualifying section.

For stronger reasons must executors and attesting witnesses be now allowed to testify since incapacity, growing out of interest, has been entirely removed and parties to the action may be heard. If then the formal execution of the will *must be proved,* by the testimony of the subscribing witness, or at least by two of them if there are more than that number, unless when not produced "are dead or reside out of the State or are insane or otherwise incompetent to testify," section 2148, it might result in a total failure to establish a well executed will, if those who attest it are excluded by the general terms of the disabling section, and more especially because the very purpose of the law is to secure this testimony to be used, and which can only be used after the testator's death. If this were not so "the object of the statute," in the language of *Battle, J.*, delivering the opinion in *Powell v. Scoggin, supra,* "might always be defeated by making the person named as executor a party to the issue, a result which the courts are not at liberty to allow." The remark applies with equal force to an attesting (118) witness, competent at the time, upon whom an interest may afterwards devolve, to secure which he comes in to continue the prosecution of the cause.

Again, it is more than questionable whether a person present to witness an act of testamentary disposal of property, and who attests the act as such, is a party to such a "transaction" as is contemplated in The Code. One may prove a conversation between others which he overhears because he is not a party to it. *Halliburton v. Dobson,* 65 N. C., 88; *Gilmer v. McNairy,* 69 N. C., 335; *Treadwell v. Graham,* 88 N. C., 208. The conversation or transaction must be *personal* to fall within the inhibition.

But aside from this, we are clearly of opinion that the disqualifying enactment, directly repugnant to the law requiring the presence of attesting witnesses at the trial of an issue involving the validity of the will to prove its execution when accessible and mentally able to give evidence, does not comprehend this class of witnesses who are denominated witnesses of the law and not of a party, and who become such to establish the execution and validity of the instrument *necessarily after death.* It would be absurd to require persons to attest a will in order to prove it when the maker was dead, and then reject the testimony because of the death, under another part of the law, enacted at the same time.

Not less untenable is the exception to the admission of evidence of the kind relations subsisting between the testator and his wife, and her

permitting him to take and use the sum of $500, coming to her from the estate of a deceased brother, as tending to account for his giving his entire estate to her in answer to proof of declarations of the deceased, made after the execution of the will, that he did not intend that any of the Vester family (his wife being one of them) should have any of his property, and that he would prefer to see it burned up rather than fall into their hands.

It was also appropriate to repel the inference drawn from the (119) disparity in their ages that it was an unnatural donation and which was pressed in the argument for the caveators.

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

Affirmed.

Cited: Cornelius v. Brawley, 109 N. C., 549; *In re Young's Will,* 123 N. C., 360; *McEwan v. Brown,* 176 N. C., 252.

I. I. FULLER v. EMMA FOX, EXECUTRIX OF WILLIAM FOX.

Evidence—Handwriting—Submitting Papers to Jury.

1. Evidence as to handwriting, founded on a comparison of hands, is inadmissible.
2. It is not competent, upon an issue involving the genuineness of a paper writing, to submit others, proved or admitted to be genuine, to the inspection of the jury for purpose of comparison.
3. *Yates v. Yates,* 76 N. C., 142, is commented upon and distinguished.

CIVIL ACTION, tried before *Avery, J.,* at September Term, 1888, of the Superior Court of VANCE County.

The plaintiff alleges that in 1883 he made a loan of $450 to W. Fox, who executed his note therefor, as follows:

"On or before 22 February, 1887, I promise to pay to I. I. Fuller four hundred and fifty dollars, with eight per cent interest, for value received. 19 February, 1883.

(Signed) T. W. FINCH. W. Fox."

That Fox died in 1887, leaving a last will and testament, which was duly proved, and the defendant, the executrix therein named, qualified as such. He demands judgment for the amount alleged to be due, with interest.

The defendant admits the death of Fox; that he left a will, in which she is named executrix, and that she qualified as such; but says, as to the other material allegations of the complaint, she has no knowledge or information thereof sufficient to form a belief, and (120) she denies them.

The following issue was submitted to the jury:

"Did the defendant's intestate (testator) execute the note sued on?" To this issue they responded, "Yes."

There was evidence tending to prove the execution of the note by proving the handwriting of the subscribing witness Finch, and of Fox, and there was evidence tending to prove the contrary. It was in evidence, on behalf of the defendant, that certain papers marked 1, 2, 3, and 4, with the signatures of W. Fox thereto, were genuine, and were signed by him, and that the signatures to these papers were not in the same handwriting as that to the note sued on.

The defendant offered to exhibit to the jury the papers marked 1, 2, 3, and 4, for their inspection.

On objection, the court refused to allow it, and the defendant excepted. The papers marked 1, 2, 3, and 4, were then read to the jury. There was a verdict for plaintiff, and from the judgment thereon the defendant appealed.

T. M. Pittman and L. C. Edwards for plaintiff.
A. C. Zollicoffer for defendant.

DAVIS, J., after stating the case: The only exception in the record presented for our consideration, is the single question: Was there error in refusing to permit the jury, for the purpose of comparison, to inspect the papers which had been testified to as genuine?

The counsel for the defendant concedes that it has been held to be the rule in this State, that it was not competent, in passing upon questions of this character, to submit writings, such as were offered to the inspection of the jury, for the purpose of comparison by them, but he insists, with earnestness and ability, that the rule is not in harmony with more recent decisions in many of the states of the Union, and with the case of *Yates v. Yates,* 76 N. C., 142, and that the (121) court should not withhold from the jury the inspection of writing admitted or proved to be genuine, but should permit such writings to be submitted to the jury for the purpose of comparison, and thus to aid them in coming to a correct verdict.

The law, as it exists in the different states, is not uniform. In many of them it has been regulated by statute, and in some of them it has been made to conform to the rule insisted on by counsel for the de-

fendant. Rogers on Expert Testimony, 190. But in most of the states, and with rare exception, where there is no statutory regulation upon the subject, the law is held to be as laid down by *Gaston, J.*, in *Pope v. Askew,* 1 Ired., 16; Rogers, Ex. Tes., 192; Lamson, Ex. and Op. Ev., 400.

It will be found, upon examination, that in *Powell v. Fuller,* 59 Vermont, 688, and in most of the cases relied on by counsel for defendant, the papers permitted to go to the jury for inspection and comparison, were such as were in evidence in the cause for other purposes, or such as were first passed upon by the court and adjudged to be genuine.

We think the case of *Pope v. Askew,* 1 Ired., 16; *Outlaw v. Haigh,* 1 Jones, 150; *Otey v. Hoyt,* 3 Jones, 407; *Watson v. Davis,* 7 Jones, 178; *Burton v. Wilkes,* 66 N. C., 604, and *Tuttle v. Rainey,* 98 N. C., 513, settle the law in this State to be that testimony as to handwriting, founded on what is properly called a comparison of hands, is inadmissible, and that "a jury cannot decide by a comparison of handwriting." Jurors are not generally experts in handwriting, and such evidence, for the many reasons given in the cases cited, would often tend to confuse and mislead them.

The case of *Yates v. Yates* is not in conflict with these authorities. In that case the witness, after examining the signature of John Elber to a deposition, admitted to be genuine, and his signature as a (122) witness to the deed in controversy, was permitted to give it as his opinion that the latter signature was not genuine. The witness, as an expert, was allowed to compare the signature admitted to be genuine with the signature in dispute, but the paper was not submitted to the inspection of the jury, and the comparison was not made by them, and though there is a *dictum* of *Rodman, J.,* and reference to some authorities which seem to sustain the position of counsel for the defendant, the point decided is in perfect harmony with the authorities cited.

In fact *Rodman, J.,* in admitting the testimony sustaining the ruling of the judge below, says: "This was permissible under the decision of *Outlaw v. Hurdle.*

There is no error.

Affirmed.

Cited: Tunstall v. Cobb, 109 N. C., 320; *Forbes v. Wiggins,* 112 N. C., 126; *S. v. DeGraff,* 113 N. C., 694; *Abernethy v. Yount,* 138 N. C., 345; *In re Shelton's Will,* 143 N. C., 226; *Martin v. Knight,* 147 N. C., 570, 575; *Nicholson v. Lumber Co.,* 156 N. C., 66; *Boyd v. Leatherwood,* 165 N. C., 616; *Bank v. McArthur,* 168 N. C., 54; *Newton v. Newton,* 182 N. C., 55.

T. E. MACE v. THE PROVIDENT LIFE ASSOCIATION.

Contract—Insurance—Evidence—Fraud—Issues.

1. Issues are not required to be in any particular form, but they should be so framed as to clearly present the controverted facts.

2. The submission of an immaterial issue, unless it can be seen it misled the jury, is not ground for a new trial.

3. D made an application for a policy of insurance upon his life, three-fourths of which was to be payable to M, whom he alleged in the application to be his first cousin, and the remainder to his wife. Before delivering the policy, the company informed D that M did not have an insurable interest in his life, unless he was indebted to M and was dependent upon him for support, in reply to which the applicant wrote, "M is both a creditor and a friend, upon whom I am dependent." Thereupon the policy was delivered, promising to pay "M, a creditor, $2,250," and the wife $750. The policy contained a clause stipulating that all statements made in the application were deemed material, and if any of them were false, or if any material fact was suppressed the contract should be void. M was a creditor of D, but the latter was not dependent upon him. In an action to enforce the contract the company alleged that the policy was procured by false and fraudulent representations, and offered the letter of D, in respect to his connection with M, in evidence as a part of the contract: *Held* (1) That the letter was not a part of the contract, but was evidence to go to the jury upon the question of fraud; (2) M being a creditor of D gave him an insurable interest in the former, and whether D was dependent upon M became immaterial, and a false representation in that respect did not avoid the contract: (3) the opinion and belief of an officer of the company as to the reasons which induced the issuance of the policy were irrelevant and incompetent.

CIVIL ACTION, tried before *Graves, J.*, at Spring Term, 1888, (123) of the Superior Court of CRAVEN County.

It is alleged in the complaint, in substance, that the defendant company is an incorporated insurance company doing business in this State; that by a policy of insurance duly executed, and dated 7 September, 1885, upon the life of G. W. Dickinson, it contracted, upon the conditions and stipulations contained in the policy, to pay in the event of the death of Dickinson, the sum of $2,250 to the plaintiff and the sum of $750 to the wife of the said Dickinson; that all its stipulations to be performed by the assured and said G. W. Dickinson have been complied with; that at the time the policy was issued the plaintiff had an insurable interest in the life of said Dickinson, which continued till his death; that he was a creditor of Dickinson; that Dickinson died in July, 1886, and the proofs and requirements of the policy in case of

death have been furnished and complied with; that the sum of $2,250 has been demanded and payment refused.

The answer admits the execution of the policy, but alleges that the contract of insurance was obtained by fraud and false representations, and is of no binding force and effect; denies that the plaintiff had any insurable interest in the life of Dickinson, or that he was a creditor;

(124) that the stipulations to be performed by the plaintiff and Dickinson had been complied with; and that the plaintiff furnished the proofs required. It admits the demand and refusal, and alleges that nothing is due by reason of the frauds and misrepresentations of plaintiff.

The defendant for further answer sets out at length the conditions contained in the application and policy, one of which requires a statement of the extent and character of the claimant's interest in the policy; another provides that "if any statement contained in the application . . . be in any respect untrue," the policy shall be null and void; another provides that "if there has been any suppression or omission of any fact by the party making this application, or if any untrue or fraudulent allegation be contained therein, or in the foregoing answers . . . the policy and membership made on the faith of this declaration and above answers and proposals shall become null and void."

There is a further provision that the application for the policy is made a part of the contract of insurance, and "each of the statements made therein which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as their own, admits to be material, and warrants to be full and true, and to be the only statement on which this contract was made."

The answer further alleges in substance that, in the application it was represented that the plaintiff was the first cousin of Dickinson; that the application was refused on that ground, and in reply to a letter of the secretary of the defendant to the effect that the plaintiff had no insurable interest in the life of Dickinson "unless the said Dickinson was indebted to the said plaintiff and dependent on him for support," the defendant by due course of mail received a postal card of which the following is a copy:

NEW BERN, N. C., 14 September, 1885.

(125) SIR:—Mr. T. E. Mace is both a creditor and my friend on whom I am dependent. You will please let the application go through. Yours truly,

GEORGE W. DICKINSON.

That, upon the faith of the statement contained in said postal and the other representations contained in the application, the policy was issued; that the representations contained in said postal were false and made by the plaintiff himself with fraudulent intent, etc., and that by reason of fraud and misrepresentation the policy was void.

The defendant tendered the following issues:

"I. Was said insurance purely speculative on the part of T. E. Mace?

II. Did T. E. Mace furnish to the insurance company additional proofs of said indebtedness of George W. Dickinson to him as required by said company in addition to the death proof?

III. Were the representations, in said postal card contained, true or false?"

Which were rejected, and the defendant excepted, and the following were then submitted to the jury, to which they responded as indicated:

I. Was the deceased, George W. Dickinson, *bona fide* indebted to T. E. Mace at the time said insurance was taken out in the sum of $2,250, as alleged in the complaint? Answer: Yes.

II. Was the deceased, George W. Dickinson, dependent upon T. E. Mace for support at the time said insurance was effected? Answer: No.

III. Did George W. Dickinson write the postal card to which his name is signed? Answer: No.

IV. Who wrote the postal card to the Provident Life Insurance Company signed George W. Dickinson? Answer: T. E. (126) Mace.

V. Was the postal card referred to written by the authority of George W. Dickinson, the assured? Answer: Yes.

VI. Did the plaintiff obtain the policy of insurance from the defendant by fraud and misrepresentation? Answer: No.

VII. Did the plaintiff comply with the conditions of the policy? Answer: Yes.

The other material facts are stated in the opinion.

Judgment being rendered upon this verdict for the plaintiff, the defendant appealed.

W. M. Clark for plaintiff.
W. E. Clark for defendant.

DAVIS, J., after stating the case: 1. The rejection of the issues tendered by the defendant presents the first exception in the record.

Issues should be so framed as to present clearly and fairly to the jury the questions of fact controverted, but no particular form is requi-

site, and every material question raised by the pleadings is presented in the issues submitted, and there was no error in rejecting those tendered. *Meredith v. Cranberry Coal and Iron Co.*, 99 N. C., 576; *Cuthbertson v. Ins. Co.*, 96 N. C., 480, and cases there cited.

2. During the course of the trial the defendant's counsel proposed to read the postal card referred to in the pleadings, insisting that it was part of the application, as if incorporated in the original application.

His Honor refused to allow it to be read as a part of the con-
(127) tract, "but permitted it to be read as evidence," and to this the defendant excepted.

The application for insurance, which contains numerous questions and answers and stipulations on the part of the applicant, was dated 2 September, 1885, and signed by Dickinson. The answer to the question, "In whose behalf or for whose benefit is the insurance to be effected?" is "three-fourths to T. E. Mace, New Bern, N. C.; one-fourth to Amelia Dickinson, New Bern, N. C. . . . Relation to the party to be insured, wife and first cousin."

Following the questions and answers is the following stipulation: "It is hereby declared that these are fair and true answers to the foregoing facts, in which there is no suppression of known facts, and every person whose name is hereto subscribed adopts as his or her own, and warrants to be full, complete and true, and to be the only statements given to the association in reply to its inquiries, which shall be the basis of the contract between the undersigned and the Providence Life Association."

The postal card was dated 14 September, after the application had been made and signed, and was written in answer to a letter from the secretary of the company in regard to the application, and it was clearly competent upon the question of fraud, as any other declaration or statement as an inducement to the contract and tending to show that the real transaction would be, but it was no part of the contract. The defendant says that, although the application is dated 2 September and the policy is dated 7 September, the latter was in fact not issued until 17 September, as the endorsement shows, and is admitted by plaintiff, and would not have been issued but for the postal card. In view of the finding of the jury in regard to the representations in the postal card in regard to the indebtedness of Dickinson to Mace, we fail to see how the postal card could invalidate the policy.

We are unable to see what possible effect the dependence of
(128) Dickinson upon Mace could have upon the application. If Mace had been dependent upon Dickinson, it might have been material

as giving the former an interest in the life of the latter, but with or without such dependence, the fact, as found, that Mace was a creditor, gave him an insurable interest in the life of Dickinson.

3. The defendant offered in evidence certain depositions which had not been passed upon by the clerk, but which it was agreed should be in evidence subject to plaintiff's objections. The following questions and answers, contained in the deposition of W. O. Nelson, secretary of defendant company, were, upon objection by the plaintiff, excluded, and defendants excepted:

Question 5. Please state whether said insurance on the life of said George W. Dickinson was agreed to in consequence of the representations in said postal card contained? Answer: Yes.

Q. 6. Would you have insured him, but for said representations in said postal card?

A. 6. Not upon that application and for Mace's benefit. We fully believed at the time that the postal card was written by Mr. Dickinson, and would not for a moment have thought of issuing a policy had we known the card had been written by Mace.

Q. 7. What relation must a party be to have an insurable interest in the life of another?

A. 7. Members of the same immediate family have an insurable interest in the lives of each other; but outside of that relationship, I do not think an insurable interest exists, except when a clear dependency of the insured upon the beneficiary is established. We regard an insurable interest to mean an interest in the continued life of the insured and not an interest in his death.

Q. 8. If a party desiring insurance on the life of another is a creditor, what amount of insurance do you allow him to take (129) out?

A. 8. We permit him to take out a sufficient amount of insurance to cover the debt, the interest accruing and the probable cost of sustaining the policy during the life expectancy of the insured. It is always understood, however, that the beneficiary, in a policy of this kind, will only be entitled to recover the actual amount of his claim at maturity of the policy.

Q. 9. Does your company allow a party to take out insurance for a greater amount than the amount due party from the one insured?

A. 9. Yes, as stated in my reply to interrogatory 8.

Q. 10. Does your company allow parties to take out speculative risks, merely, when the party insured is not indebted to the one applying for insurance?

A. 10. No, sir."

The excluded evidence was chiefly expressions of opinion, and irrelevant. There was no error in excluding it.

4. The defendant asked the court to give the following special instructions:

I. That any statement contained in the application or the postal card is as much a part of the policy as though written in the policy itself, and that if any statement therein contained be false the plaintiff cannot recover.

II. That said statements being made by the contract, warranties are made by the parties material to the risk, and if any are false, the plaintiff cannot recover.

III. That if the insurance company asked for a statement on the point of the extent and character of any indebtedness from the deceased to the plaintiff, and he failed to furnish it, the plaintiff cannot recover.

IV. The plaintiff can only recover, if at all, upon the amount he shows to be due, and if he shows that the deceased only owed
(130) him $1,000 in 1884, he can only recover that amount, with interest from 17 September, 1884.

His Honor refused to give these instructions, but gave the charge set out in the record, which, so far as it is material to the questions before us, is as follows:

"It will be your duty to find the truth of the matter thus submitted to you, from the evidence in the case. The first issue devolves upon you the duty of determining whether G. W. Dickinson was in fact indebted to the plaintiff at the time he made his application for assurance on the life of said Dickinson to the defendant. This is an inquiry into a matter of fact, and to ascertain how the truth of the matter is, it will be your duty to consider all the evidence bearing on the issue.

"The second and third issues are already, by agreement of counsel, answered 'No,' and fourth issue, 'T. E. Mace.' The fifth issue requires you to find how the fact is in regard to whether the plaintiff wrote the postal card, at the instance or by the authority of G. W. Dickinson, and to determine how this is, you will consider all the evidence bearing on that issue. What is called by the parties here the policy of insurance, purports to be a contract. Now, a contract is a proposal on the part of one party, assented to or accepted by the other party. If there is any fraud used in procuring the assent of one of the parties, then, as to the party misled by such fraud, or misrepresentation reasonably relied on, this vitiates the contract and makes it void as to the defendant or deceived party. It then becomes material to determine whether the defendant has been misled by false representation, or whether it was

induced by the fraudulent practices of the parties seeking benefit from the contract.

"Therefore, this issue is submitted to you. In passing upon the issues you are to consider all the testimony, and all the statements made in the application, which are warranted to be true by the very terms of the application. You are likewise to take into your consideration the postal, not as a part of the original application, but as (131) evidence of what was passing between the parties, and if it was written and received by the defendant before the defendant made the contract, then you are to give it such weight as you think it properly had in determining whether the defendant has been fraudulently induced to enter into this alleged contract. Of course, in considering the contents of that postal card, you will give the words the signification which they usually and commonly bear."

The first and second instructions asked for were properly refused, for the reason already given for refusing to allow the postal card to be read as a part of the original application. The instructions given by the court in regard to the postal card were proper.

The record does not disclose any evidence that would warrant the third instruction asked for.

It nowhere appears that the defendant company asked for a statement of the character and extent of the indebtedness of the deceased to the plaintiff, and the instruction was properly refused. The same can be said in regard to the fourth instruction asked for. Whether Dickinson was indebted to the plaintiff or not, and whether only in the sum of $1,000, or more, as claimed by the plaintiff, was properly left to the jury.

It does not appear from the evidence that the amount due was only $1,000, with interest from 17 September, and the jury find, as a fact, that it was $2,250. There was no error in refusing the instructions asked for.

5. After verdict, defendant moved for judgment on the verdict, because the jury answered issues numbered 2 and 3 in the negative, and issue numbered 4, "T. E. Mace."

As we have already seen, the answer to the inquiry of the defendant contained in the postal card, was not a part of the contract, but the inquiry to which it was an answer, and the fact that the policy, though dated 7 September, was not delivered till after the receipt (132) of the postal card, tends to show quite conclusively that, but for the statement in the postal card, that the plaintiff was a creditor of *Dickinson,* the policy would not have been issued, and the question, therefore, whether Dickinson was indebted to Mace became material,

because it was that alone, as appears from the record, which gave Mace an insurable interest in the life of Dickinson, and if untrue, would have been fatal to the plaintiff's claim; but whether Dickinson was dependent upon Mace or not, was in no way material—no more so than whether he was his "friend" or not.

The dependence of Dickinson upon Mace might have given the former an insurable interest in the life of the latter, but for the purpose of this action the second issue was entirely immaterial, and its answer, one way or the other, could neither aid nor prejudice either party, and the same may be said of the third and fourth issues.

The submission of immaterial issues, unless misleading, cannot be assigned as error. *Perry v. Jackson,* 88 N. C., 103; *McDonald v. Carson,* 94 N. C., 497; *Cuthbertson v. Ins. Co.,* 96 N. C., 480; *Cumming v. Barber,* 99 N. C., 332.

But it is insisted by counsel for defendant, that the verdict of the jury shows that the statement of the postal card was false in the particular named, and that any false statement vitiates the contract.

Undoubtedly any false statement as to any material fact contained in the policy or in the application, when it is taken as part of the contract of insurance, would vitiate it; and it is equally true that the parties will not be heard to say that any fact deemed of sufficient importance to be incorporated in the application and policy, as signed by the parties, is immaterial, but it could hardly be said that whether Mace was the "friend" of Dickinson, or whether Dickinson was "dependent upon Mace," or whether the postal was written by Mace by the
(133) authority of Dickinson, could have been material, or inducements in the issuing of the policy. No such requirements are indicated in the printed form for questions and answers. Upon the question of fraud, it was competent, as any representation tending to show the conduct of the parties in relation to the contract would be, and as such it was submitted to the jury as evidence.

The case of *Bobbitt v. Insurance Co.,* 66 N. C., 70; *Sugg v. Insurance Co.,* 98 N. C., 143; *Cuthbertson v. Ins. Co.,* 96 N. C., 480, and the numerous authorities which have been brought to our attention by the industry and research of counsel, establish the principle that a false statement made in the application, when the application constitutes a part of the contract, will render the policy void, and so will any representation of a material fact by which the company is misled, if falsely and fraudulently made; but in the case before us, the statement in the postal card did not constitute a part of the application, such as was required to be made and signed by the applicant, and it is found by

the verdict that the only material representations contained in it were true, and it was further found that the policy was not obtained by fraud and misrepresentation.

Affirmed.

Cited: Follette v. Life Asso., 107 N. C., 245, 247; *Ormond v. Ins. Co.*, 145 N. C., 142.

(134)

CURTIS H. GLOVER, ADMINISTRATOR D. B. N. OF BENNETT FLOWERS v. J. N. FLOWERS ET AL.

Joinder of Actions—Jurisdiction—Irregularity—Statute Limitations—Administration—Fraud—Evidence—Depositions—New Trial.

1. Where a special proceeding was instituted by an administrator for license to sell lands, and was transferred to the civil issue docket to be tried upon issues joined, and thereafter the plaintiff, without objection, was allowed to amend his complaint by alleging fraud in obtaining a former decree in another suit, where the defendants claimed title, and an amended answer was filed and issues also joined thereon, which were tried with the others: *Held*, that this procedure was very irregular, and ought not to have been permitted, but as there was no opposition to it and the court had jurisdiction, its action might be upheld.

2. Prior to the enactment of the statute—now The Code, sec. 1433—there was no statutory bar to proceedings against the heir to subject descended lands to the payment of the ancestor's debts. In this respect the administration of estates before July, 1869, is governed by the law then in force.

3. Where, in an action to set aside the judgment in a former suit for fraud, proof was offered tending to show that the maker of a deed in trust (which was the foundation of the judgment) was insolvent, that the debt secured was not bona fide, that part of the property was perishable, and the debtor was permitted to retain possession, that the parties secured were members of a family, and that the administrator of the debtor, who was a party to the suit was also a relative, and knew all the parties, and had an opportunity to ascertain the facts but made no resistance: *Held*, to be evidence, and strong evidence, to go to the jury on the issue of fraud.

4. Where there was a dispute between counsel as to whether there was evidence introduced on a controverted point, and the court could not remember how the fact was: *Held*, that it was not error to tell the jury that they might determine whether there was such evidence before them, and if there was they might consider it.

5. Exceptions to evidence taken by depositions should be passed upon before the trial.

6. To entitle a party to a new trial upon the ground of admission of incompetent evidence, it should appear that the objecting party suffered, or might have suffered, prejudice thereby.

7. The former ruling in this case—95 N. C., 57—is affirmed.

(135) THIS is a civil action, which was tried before *Avery, J.,* at February Term, 1888, of WILSON Superior Court.

Bennett Flowers died intestate, in October of 1867, in the county of Wilson, and in the same month Edwin Fulghum was appointed and qualified as administrator of his estate. The latter, without completing the administration, died in December of 1880, and the plaintiff was appointed administrator *de bonis non* of the estate of the intestate Flowers and qualified on 19 August, 1881.

In 1866 William Peel, as guardian of Kizziah Peel, held the single bond of Bennett Flowers for $800, with interest thereon from 26 May, 1860. The said Kizziah having become of age the bond became her property absolutely. She intermarried with D. B. Eatman, on 15 May, 1875, and afterwards, on 19 August, 1881, she obtained judgment against the present plaintiff administrator upon the bond mentioned for the amount thereof.

This is a special proceeding brought in the Superior Court named by the above mentioned administrator *de bonis non,* to obtain a license to sell the land of his intestate to make assets to pay the above mentioned judgment and any other debts of his intestate. The defendants are the heirs at law of the said intestate, except the husbands of certain of them, and his surviving widow.

In an amended complaint, it is alleged that on 28 December, 1866, the intestate, with the intent to hinder, delay and defraud his creditors, and especially the said Peel, guardian above named, executed a deed of trust to Alfred Thompson, whereby he undertook to convey a valuable tract of land and other personal property therein specified to secure the payment of a false and pretended debt therein described in favor of John W. Williams for the sum of $1027.69 due on 17 November,

(136) 1858; that the trustee mentioned refused to accept and execute the trust sought to be created by the deed, wherefore the said John W. Williams brought his suit in the late court of equity, in the county named, to the Fall Term thereof of 1867, against the heirs at law of the said intestate, Edwin Fulghum, administrator of his estate, and Alfred Thompson named in the deed as trustee. In his bill he alleged his debt, the deed of trust to secure the same, the property therein specified, that the administrator had received the rents and profits of the land and disposed of the personal property mentioned in

the deed, etc., and that the said Thompson refused to accept the trust created by the deed, etc., and he prayed that a trustee be substituted for him, etc. The defendants heirs at law answered admitting the debt—indeed all the allegations of the bill. The defendant Thompson answered saying that he never accepted the trusteeship and declined to do so, The defendant Fulghum, administrator, suffered judgment *pro confesso* to be entered as to him and made no defense whatever.

The court decreed that Henderson H. Williams be substituted as trustee, with power to execute the trust; that he was entitled to the possession of the land specified in the deed of trust and also the personal property; that the said Thompson and the said administrator convey to him the personal property and the increase thereof, and that the said Thompson and the heirs at law convey the legal title of the land to him, and that the decree operate as a conveyance, etc. John W. Williams was the father of the surviving widow of the intestate, and Henderson H. Williams, the substituted trustee, was his brother.

The substituted trustee sold the land—278 acres—for $278, on 18 September, 1868, and conveyed the same to John W. Williams, who conveyed the same to Virginia Flowers, the said surviving widow, on 6 August, 1869. It is alleged that the deed of trust mentioned in (137) the suit in equity and the decree therein, the sale of the land, the conveyance thereof, were "parts of one and the same fraudulent family arrangement, devised to defraud creditors," etc.; that all the property of the intestate was embraced by the said deed; that from the time of its execution until his death he was utterly insolvent, leaving out of view the property so conveyed; that the administrator Fulghum, in his life-time, never took any steps to sell the land mentioned to make assets to pay debts due from his intestate, although the personal estate was manifestly insufficient to pay the same, and that the land was worth $2,000.

The defendants deny all the allegations of fraud and plead the decree in equity appointing the substituted trustee, as an estoppel of record upon the plaintiff, and "for further defense the defendants say that no claim or demand was made for the debt of their ancestor within seven years next after his death; they therefore rely upon the statute of limitations for defense as well also upon the statute of presumptions."

On the trial the following issues were submitted to the jury, to which there was response as indicated at the end of each:

1. Was the trust deed described in the complaint, dated 28 December, 1866, executed by Bennett Flowers with intent to hinder, delay or defraud his creditors? Yes.

2. Was J. W. Williams a bona fide purchaser of the land in controversy for value, and without notice of any fraud on the part of said Flowers? No.

3. Was Virginia Flowers a bona fide purchaser of the land for value, and without notice of fraud? No.

4. Was the debt described in the complaint paid before the commencement of this action? Withdrawn from jury.

5. Was Edwin Fulghum, the administrator of Bennett Flowers, a party to the record in a suit in the court of equity of Wilson
(138) County, wherein Henderson H. Williams was appointed a trustee at the Spring Term, 1868, of said court, in place of Alfred Thompson, who was made trustee in said deed? Yes.

6. Was there a fraudulent agreement between the parties to said suit in equity, in pursuance of which the decree in said suit was entered? Yes.

7. Has any demand or claim for the debt sued on been made by the holder or owner of said debt on the personal or real representatives of Bennett Flowers within seven years after the death of said Bennett Flowers? No."

The appellant requested the court, among other special instructions asked for, to instruct the jury:

"That there is no evidence that there was any fraud or collusion on the part of Edwin Fulghum, administrator, in the equitable proceedings to substitute a trustee.

The court gave the instructions asked, except that numbered 4, and as there was a dispute between counsel as to whether certain evidence was given, and defendants admitted if there was such evidence the issues should be submitted, the court left it to the jury to decide what was the evidence. The judge had said at first, that the testimony relied on by counsel was not recollected by the court. The plaintiff's counsel had then insisted that there was evidence to show that Fulghum, Bennett Flowers, J. W. Williams and Virginia Flowers, belonged to the same family, and that was left to the jury to decide; plaintiffs' counsel insisted too, that all of the circumstances relied upon to show fraud as bearing upon the first three issues, also tended to show a family arrangement by virtue of which a decree was entered, especially that Fulghum should have been put on his guard by the terms of the trust deed.

The court instructed the jury, as the court was in doubt, that it was their province to say whether there was any evidence upon the disputed points as to the relationship of Fulghum, etc., and then to say whether it was shown to their satisfaction, or so as to produce entire belief

in their minds, that there was a fraudulent arrangement between (139) the parties by virtue of which said decree was made to carry out a fraudulent purpose; if they should find affirmatively on the first issue, and so to the second and third issues, the jury was instructed also, that if they should find 'No' to the first issue, it would not be necessary to pass on the other issues.

Defendant's counsel excepted to the refusal of the court to give instruction No. 4, as asked.

The defendant's counsel moved the court to set aside the finding of the jury on the sixth issue and grant a new trial as to that issue, on the ground that there was no evidence, or no legally sufficient evidence, to go to the jury in support of such finding. The motion was refused and the defendant excepted. Defendant's counsel moved for judgment on the grounds:

1. That the finding of the jury on the last issue should be held by the court to bar the action.

2. That the decree of the court of equity, the record of which is in evidence, operated as an estoppel. The motion was refused and defendant excepted."

The appellants—defendants—after verdict, also moved:

1. For a judgment in their favor, on the ground that the debt described in the complaint was barred by the seven years statute of limitations. (R. C., ch. 65, sec. 11.)

2. For a judgment on the ground that said suit in equity operated as an estoppel.

3. For the setting aside of the verdict as to the 6th issue, on the ground that there was no evidence to support the jury findings thereon.

These motions were refused, and judgment being rendered for plaintiffs, defendants appealed.

Jacob Battle for plaintiff. (140)
Hugh F. Murray for defendants.

MERRIMON, J., after stating the case: Such irregularity has been allowed to prevail in the course of this special proceeding as we think the court below ought not to tolerate, much less encourage.

Although it was begun in vacation before the clerk of the court, as it should have been, still, at once, upon the filing of the petition and answer, raising issues of fact, it was transferred to the regular civil issue docket, and treated continuously thereafter as an action brought to the regular term of the court. The plaintiff was allowed to file an amended complaint, and allege therein a cause of action distinct from

the purpose of the special proceedings proper, that ought to have been the subject of an independent action; that is, he was allowed, in aid of the purposes of the special proceeding, to directly attack, as by a separate action, the decree in a suit began, heard and determined in the late court of equity, for fraud in procuring it—to try all the issues of law and fact arising in that respect, and to determine the whole matter upon the merits. So far as appears, there was no objection to this on the part of the defendants or the court. The defendants filed their answer to the amended complaint, and the whole case thus constituted was tried as to all the questions raised in the special proceeding proper, and also as to the alleged fraudulent suit and the decree therein in the late court of equity. This is very objectionable, because it is irregular, inconvenient and confusing, and not in accordance with the course of procedure prescribed by law. Besides, it tends to impair the integrity and stability of regular methods of procedure essential to the due administration of public justice. It is a serious mistake to act upon the supposition that actions can be conducted in courts of justice without regard to established methods of procedure—that parties and courts may regard and disregard them, hoping thereby to save time and
(141) labor. It seldom happens that a departure from them fails to produce confusion and dissatisfaction, and not infrequently some parties suffer injustice by it.

Notwithstanding the irregularities in this case adverted to, we are of opinion that the action of the court must be upheld, because the court had jurisdiction of the parties and the subject matter of the litigation, and no objection was raised by the defendant to the disorderly course of procedure, and it had at least the implied sanction of the parties and the court. Very certainly it could not be upheld if objection had been made in apt time. *Southall v. Shields,* 81 N. C., 28; *Merrill v. Merrill,* 92 N. C., 665; *Costin v. Bryan,* 93 N. C., 302; *Ely v. Early,* 94 N. C., 1; *Clendening v. Turner,* 96 N. C., 416; *R. R. v. Smith,* 98 N. C., 509; *Peebles v. Norwood,* 94 N. C., 167; *Loftin v. Rouse, id.,* 508.

The defense relied upon by the defendants appellants that the bond of the intestate on which the judgment in favor of Kizziah Eatman was founded was, as to the administrator, barred by the statute of limitations, was settled adversely to the appellants by this Court in a former appeal in this case. *Glover v. Flowers,* 95 N. C., 57. It was not barred as to the administrator for the reasons stated in the opinion of the court in that appeal. Nor was there any statutory bar of it in favor of the heirs at law of the intestate. In the absence of personal assets the land of the intestate and ancestor remained liable to be sold to make assets

to pay his debts until they were all discharged. The estate of this intestate is governed and to be settled and his debts paid as required by law and statutory regulation as the same prevailed next before the first day of July, 1869. The Code, sec. 1433. *Glover v. Flowers, supra.* There was no statutory bar prior to that time as there is now in favor of the heir. If before the time mentioned the heir or devisee sold the land of the intestate or testator, within two years next after the probate of the will and the qualification of the executor or the granting of letters of administration on his estate, as the case might be, (142) such sale would be void as to creditors, the executor or administrator of the deceased debtor. (Rev. Stats., ch. 46, sec. 61.) If the heir or devisee should sell the land after two years the creditor or executor or administrator would be entitled to have the price realized by him for the land to pay debts of such debtor. *Hinton v. Whitehurst,* 68 N. C., 316; *S. c.,* 71 N. C., 68; *Moore v. Shields,* 70 N. C., 327; *Badger v. Daniel,* 79 N. C., 372. The court therefore properly decreed that the statute could not avail the appellants.

The court adjudged that the deed of trust, the decree in the suit in the court of equity mentioned, substituting a trustee, his sale of, and deed conveying the land to John W. Williams, and the deed of the latter conveying the same to the defendant, Virginia Flowers, were void for fraud. The appellants requested the court to instruct the jury that there was no evidence of the alleged fraud. We cannot hesitate to decide that the court properly declined to give such instructions.

There clearly was such evidence, part of it tending strongly to prove fraud, while another part of it, taken by itself, had less point and force, but the whole, taken together, unquestionably made evidence to be submitted to the jury. There was evidence going to show the insolvency of the intestate at the time he executed the deed of trust; that the debt intended to be secured by it was unfounded; that part of the property embraced by the deed was perishable, such as cows, fodder, pork and the like; that the intestate remained in possession of and used the property until his death; that he manifested much anxiety as to the bond held by Peel, guardian; the close relationship and connection of the principal parties connected with the alleged fraud; the exceptional character of the statements of fact and charges in the bill in equity—the exceptional provisions in the decree directing the (143) conveyance of the property, both real and personal, to the substituted trustee; that the administrator of the intestate made no defense to the suit in equity—there was such and like evidence—there were facts and circumstances in evidence that, of themselves, proved very little,

but which, all taken together in their just bearing upon each other, made evidence to go to the jury, the weight of which was to be determined by them.

We think, also, that there was evidence of collusive fraud on the part of Fulghum, administrator. The evidence went to show that he knew the parties charged with the fraud—their close relationship—the condition of the estate of his intestate; that he knew of the imputed fraud as to the deed of trust; that he made no effort to subject the land to the payment of the debt of his intestate; that he made no defense whatever to the bill filed against him in the court of equity, the decree in which required him to convey the title to the personal property to the substituted trustee. These facts and others, taken in connection with the other evidence, constitute some evidence of collusion on the part of the administrator, to be submitted to the jury.

It was contended, on the argument, that the court erroneously left it to the jury to determine *what was evidence* of the relationship of Fulghum, administrator, to the other parties to the alleged fraud. There is no assignment of error presenting this point; but if there were, we think the court did not leave it to the jury to be determined. There was a dispute between counsel as to whether certain evidence was given in that respect, and the court told the jury it did not remember whether there was or not, and that "it was their province" to determine whether there was such evidence before them, and if so, whether or not it satisfied them of the alleged fraudulent combination. The court did not remember whether the particular evidence in dispute was before them,

(144) and told them that they could and might determine whether there was or not. This seems to be substantially what the court said and intended, and no more. It did not intend to leave it to the jury to decide what was or was not evidence, or its competency. It does not so fairly appear.

The depositions of witnesses were read in evidence on the trial. Certain exceptions to the competency of parts of the evidence were noted in them at the time they were taken, and these, or some of them, were insisted upon on the trial These exceptions should have been disposed of before the trial, in the way pointed out in *Carroll v. Hodges,* 98 N. C., 418. But treating them as having been properly considered by the court, the evidence objected to by the appellants was of slight importance, and it does not appear that any stress was laid upon it in the course of the trial, or that it probably influenced the action of the jury. That such evidence was not excluded, though perhaps not strictly competent, is not ground for a new trial. To entitle the complaining party to a new trial, because of the admission of incompetent evidence of slight

importance, it should appear that he suffered, or might have suffered prejudice, by its admission. *May v. Gentry,* 4 D. & B., 117; *Wagoner v. Ball,* 95 N. C., 323.

We are, therefore, of opinion that the judgment should be Affirmed.

Cited: Powell v. Allen, 103 N. C., 50; *Jones v. Mizell,* 104 N. C., 14; *Brittain v. Dixon, ibid.,* 550; *Street v. Andrews,* 115 N. C., 422; *Strother v. R. R.,* 123 N. C., 199; *S. v. Bradley,* 161 N. C., 292.

J. H. TAYLOR, EXECUTOR OF CHARLES M. HARGROVE, v. T. L. HARGROVE ET AL.

Devise—Election—Contract for Sale of Land—Executors and Administrators—Specific Performance.

1. A deed made by an executor or administrator for lands contracted to be conveyed by the testator, or intestate, before the contract has been proved and registered, and the purchase money paid in full, is inoperative.

2. H. contracted to sell to T. certain lands and gave a bond to make title when the purchase money was paid and for which T. executed his notes. H. died leaving a will, bearing date prior to the contract for sale, in which he devised the lands embraced in the contract to T. and another. T. never took possession or paid any part of the purchase money, and declined to make any payment or accept a deed from the executor: *Held,* that this amounted to an election by T. to take under the will, and thereby the contract for the sale was superseded and could not be enforced.

THIS is a civil action, tried before *Avery, J.,* at February Term, (145) 1888, of VANCE Superior Court.

Charles M. Hargrove, the plaintiff's testator, on 25 August, 1885, entered into a contract with the defendant, Tazwell L. Hargrove, for the sale of certain lands at the price of eight dollars per acre, in pursuance whereof the testator executed his bond, therein stipulating to convey the title on payment of the purchase money, and the said Tazwell L. covenanted to pay the specified purchase money. The vendor Charles M., without any further steps taken to carry said agreement into execution by either party, died on 19 March, 1886, leaving a will properly executed and proved in the probate court, wherein by the 4th clause he devises said lands in these words:

"Item 4. I give, devise and bequeath to my brother, Hartwell W. Hargrove and his heirs forever, one-half of all the balance of my
(146) land not herein otherwise disposed of, and the other half of all the balance of my land not herein otherwise disposed of, to my nephew, Tazwell L. Hargrove, and his heirs forever."

The present action begun by the issue of a summons on 15 September, 1887, against the vendee, Tazwell L. (the devisee, Hartwell L. Hargrove, afterwards becoming a codefendant in the action) is prosecuted to recover the purchase money due from the vendee. The complaint alleges that the plaintiff, as executor, having caused the land to be surveyed and ascertained therefrom that it contained but 140½ acres, and not the large number supposed and mentioned in the contract, made and tendered to the said defendant a deed for the premises in form to pass the fee, and demanded payment of the amount of purchase money then due, but the defendant declined to accept the deed or pay any part of the debt.

The answer, not controverting the material allegations of fact, sets up as a defense, among other matters, that the devise of the lands carries along with it or extinguished the bond of said Tazwell L., and that in consequence no remedy can be sought upon the bond for a specific performance or otherwise. A jury was dispensed with, and the judge, by consent, passing on all the issues as well of law as of fact, upon the hearing, finds the facts to be as follows:

"1. That the land devised in the fourth item of the last will and testament of Charles M. Hargrove includes the land described in the bond for title executed by the testator, to the defendant Tazwell L. Hargrove.

2. That the will is dated 13 May, A. D. 1880; that Charles M. Hargrove died 19 March, 1886; and that the bond for title and the contract sued on are both dated 29 August, 1885, and were never registered.

3. That the personal estate of the testator, other than the con-
(147) tract sued on, is sufficient to pay all the indebtedness of said Charles M., and the charges of the administration of his estate.

4. That the defendant, T. L. Hargrove, has never taken actual possession of any part of the land, nor has he paid any portion of the purchase money for the same."

Whereupon the court adjudged that the devise in the fourth item of said will vested the legal estate in T. L. Hargrove and Hartwell W. Hargrove, the defendants, and conveyed to them whatever estate or interest the testator had at the time of his death, and discharged the defendant T. L. Hargrove from his obligation under the contract sued on, and that the plaintiff was not entitled to the relief demanded, thereupon the plaintiff appealed.

L. C. Edwards for plaintiff.
E. C. Smith for defendants.

SMITH, C. J., after stating the case: If the agreement of sale be deemed to be in full force notwithstanding the devise of the land (its subject matter), inasmuch as the executor could not make title under section 1492 of The Code, unless the bond *has "been proved and registered,"* as well as the purchase money paid in full, the offer to make the deed and its tender were ineffectual to pass the estate in pursuance of the testator's covenant, and were consequently inoperative. The devise itself, not repudiated by the defendant put the legal title in him to one moiety of the land as effectually as the testator's deed made in his life time could have done, and the other moiety in the defendant, the codevisee Hartwell W. Now, assuming that the former accepts the joint devise by claiming his portion of the estate under it, it is an assent to the disposition made of the other part, and this is inconsistent with the alleged continuance in force of the covenant entered into in the testator's lifetime. The said defendant could not hold the land (148) as a donation by the devise, and after thus disabling the executor to convey the estate, maintain an action for specific performance or for damages for a breach of the bond. This result follows from the act of the testator in making his devise, and it acceptance by the defendant, which, in legal effect, is the substitution of a new and superceding adjustment of the contract relations of the parties, and rests upon a well recognized principle, which forbids the assertion of a claim to a right secured in an instrument to a party, and a resistance to the other provisions affecting his interests prejudicially. He is put to his election. *Isler v. Isler,* 88 N. C., 581. The defendant, Tazwell L., sets up no claim to a conveyance of the estate under the contract, and as from our view he cannot, neither can the plaintiff maintain an action on the covenant in opposition to a subsequent adjustment proposed in the will, assented to by the devisee, and thus doing away the original agreement.

It would be manifestly unjust to permit the devisee, Tazwell L., to retain the share of the land given him as a bounty and at the same time hold the testator's estate responsible, and so it would be in the executor to enforce payment of the purchase money against the vendee. The rights of the parties under their agreement and reciprocal deed, the testator must have intended in the donation, for such it is, to exonerate the party to whom it is made from further liability to him, and this intent is consummated by the assent of the latter.

The elaborate and forcible argument for the plaintiff, presents his claim in a different aspect, and seems to ignore the fact that this is not,

a testamentary alienation attempted to be made to a stranger, which would be inoperative, but is a matter between the same persons, the consummation of which is brought about by the concurring acts (149) of themselves. In this respect the citations from our own reports, and from other authorities, do not affect the aspect of the case upon which our ruling rests.

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

J. W. PEACOCK v. HENRY STOTT ET AL.

Equity—Merger.

Where one who has an equitable title, subsequently acquires the legal title, so that they become united in the same person, the former is merged in the latter.*

THIS is a civil action, which was tried before *Shipp, J.*, at Fall Term, 1887, of NASH Superior Court.

The complaint alleges, upon information and belief, the following facts as constituting the cause of action:

Alvin Peacock, being the owner of the several tracts of land enumerated and described in the complaint, containing in the aggregate fifteen hundred and sixty-six acres, more or less, on 26 December, 1855, conveyed them to one J. M. Taylor, in trust, to secure certain mentioned debts, and with a power to sell in case of default in their payment, and to appropriate the proceeds to their discharge.

Pursuant to the provisions of this deed, the trustee sold the land to Wyat Earp, Redding Richardson, and A. J. Taylor, who were among the secured creditors, and became purchasers, under an agreement (150) with Peacock, that they would hold the title thereto until he could raise the amount of the purchase money, and upon reimbursement, would reconvey to him.

Sometime thereafter Alvin Peacock placed a sum sufficient to redeem in the hands of Levi Bailey to be thus applied, and under an agreement that the land should be conveyed to him and be held upon similar trusts as those that attached to the estate vested in his grantors.

During the year 1868, Bailey, being sued in the United States Court for a large demand, in order to prevent the subjection of the property thereto in the event of a recovery, conveyed the premises by deed for

*DAVIS, J., did not sit upon the hearing of this appeal.

all the land, except two separate parcels, to the defendant, his son-in-law, without a full and valuable consideration received therefor, the said Stott having at the time notice of the equities attaching to the estate vested in Bailey.

Judgment was recovered in the action against Bailey, under which an execution issued to the Marshal of the United States, and by virtue thereof he sold and conveyed the land to R. A. Hamilton, who, on 11 March, 1873, made a deed to the same to Alvin Peacock.

On 1 August, 1881, the plaintiff purchased all of Alvin Peacock's interest in the land, under a sale made by John W. Blount, commissioner appointed by the court, in certain proceedings for the foreclosure of mortgage, given by Peacock, and took his deed for the same.

During all this period Alvin Peacock remained in the quiet and undisturbed possession, using the property as his own.

Bailey died in September, 1873, and the defendant, denying the plaintiff's equity, refuses to carry into effect the trust upon which his grantor held the land, and which followed the transfer of the estate to him and adhered thereto.

The purpose of the action is to have the trust declared and enforced. (151)

The defendant, in his answer, denies every averment in regard to a trust or an agreement for a redemption upon the several transfers, alleging the respective conveyances to Bailey and from Bailey to the defendant, to have been for valuable consideration and unincumbered and absolute.

He further declares that he is a purchaser for a full and valuable consideration bona fide, and with no notice of any attaching trust, if such there was, and is entitled to hold the same exempt therefrom, and he further relies upon the lapse of time as a defense to the action.

Pending the suit the defendant Stott died, and the defendants, his heirs at law, have become such in his stead, and adopt his answer as their own. A series of issues drawn from the conflicting allegations made in the pleading, not necessary to set out, were submitted to the jury, pending the trial whereof, the plaintiff introduced evidence tending to support the case made in his complaint. In order to trace to himself the equity alleged to have vested in Alvin Peacock, the plaintiff introduced in evidence:

1. A mortgage from Alvin Peacock to R. A. Hamilton.

2. A mortgage from the same to Gay, Tyson & Co., both purporting to convey the premises.

3. An assignment of these mortgages to the plaintiff.

4. The record of the foreclosure proceedings of the plaintiff against Alvin Peacock in the Superior Court of Nash, under which the plaintiff bought and took the commissioner's deed for said Alvin Peacock's estate in the premises.

After the evidence was in the Judge stated to counsel that while he held the mortgage deed to Hamilton and to Gay, Tyson & Co., to have been executed as contended, and then to have been assigned to the plaintiff, and that the foreclosure proceedings were regular, in his opinion they do not operate to pass the parol trust alleged to be in the mortgagor, inasmuch as these deeds purport to convey lands while Alvin
(152) Peacock, on the plaintiff's contention, "and according to the allegations of his complaint, had only an equity therein."

Upon this intimation and after a refusal by the court of a request to review the point and allow the jury to pass upon the issues of fact, the plaintiffs submitted to a judgment of nonsuit and appealed.

No counsel for plaintiff.
R. H. Battle for defendants.

SMITH, C. J., after stating the case: This action is to establish by parol a trust attaching to the lands conveyed to Levi Bailey by virtue of the agreement stated in the complaint, to have been entered into between him and Alvin Peacock, and to follow and enforce the same against the ancestor of the defendants, and themselves succeeding to his estate. The plaintiff derives his title thereto under mortgages made by Alvin Peacock respectively, to R. A. Hamilton and to Gay, Tyson & Co., the latter of which has date 29 May, 1873, and was admitted to registration on 10 June, afterwards. The nonsuit was suffered upon the ruling that the alleged equity did not pass under a conveyance of the lands *eo nomine,* to which the alleged trusts adhered, and its correctness is the only matter argued by counsel on the appeal.

Taking the facts to be as represented in the complaint, the deed from Bailey to Stott, made to prevent creditors from reaching the land, or in other words, to defeat the purposes of the pending action and withdraw the property from execution was void, as against the suing creditor, and the sale afterwards made by the marshal passed to the purchaser, Hamilton, as well the several tracts mentioned in the fraudulent deed as the two tracts omitted from it, and thence the title to all was trans-
(153) mitted by his deed of 11 March, 1873, to said Alvin Peacock.

The legal estate and the alleged equity thus uniting in one person, the latter was extinguished, and said Peacock became sole owner in fee. There was, therefore, no equity incidental to the legal estate in Alvin Peacock, that could be conveyed in his mortgage deed, and to which,

under them, the plaintiff could succeed. Upon the plaintiff's own showing then, he has no such cause of action as he sets out in the complaint, nor is he entitled to the relief demanded. The ruling of the court that he has no such equity, not because of the structure of the mortgage, but for the non-existence of any equity to pass by means of it, must be upheld, because correct in itself. *Bell v. Cunningham,* 81 N. C., 83. We do not, upon the question of title decide upon plaintiff's right to recover the land, but only that upon his own averments he cannot maintain the action in its present form.

There is no error, and the judgment is

Affirmed.

Cited: S. c., 104 N. C., 154; *Conley v. R. R.,* 109 N. C., 696; *Odom v. Morgan,* 177 N. C., 368.

MARGARET HALL v. L. D. CASTLEBERRY ET AL.

Married Women—Privy Examination—Deed.

1. It is not necessary to the validity of the privy examination of a married woman in respect to her execution of a deed, that the husband shall go entirely out of the room where the examination is being made; it is sufficient if the husband and wife shall be so far separated as to leave the latter at liberty to express freely to the officer conducting the examination her will and desire in the matter.

2. Whether it is competent to attack the execution of a deed by a married woman, where all the requirements of the statute in respect to the privy examination have been complied with, by showing that in fact her assent was not freely and voluntarily given. *Quœre?*

THIS is a civil action, which was tried before *Merrimon, J.,* at (154) October Term, 1887, of WAKE Superior Court.

The plaintiff being the owner of a lot in the city of Raleigh, and her husband, Robert Hall, owning an adjoining lot, each containing a quarter of an acre, after their inter-marriage united with him in executing a mortgage deed to Addison Pulley, conveying said lots to him to secure an indebtedness contracted by him in the purchase of a horse. The probate thereof was, after what purports to be a private examination before the clerk of the Superior Court, in the form prescribed by law, and sufficient to pass her estate and inchoate right of dower in both lots, and the same has been duly registered. The deed bears date on or about 21 January, 1886, and under a power of sale

vested in the mortgagee to be exercised in case of default, and according to its provisions the mortgagee sold and conveyed the lots to the defendant, L. D. Castleberry, who entered into possession, and has continued his occupation since.

The plaintiff's husband, it is alleged in the complaint and not denied by Castleberry—who alone puts in an answer to the amended complaint in which the averment is contained—has deserted her and, living in another county, refuses to hold any communication with her, and refuses to assist her in prosecuting the present suit, for which reason he is placed among the defendants.

The gravaman of the complaint rests upon an allegation that the plaintiff's "privy examination was never taken according to law, by any person having power and authority to take examination of *feme coverts*," and that the mortgage is consequently ineffectual to divest her (155) estate in her own lot or her right of dower and contingent homestead in that of her husband.

The prayer is that the mortgage deed be declared null, and as such surrendered for cancellation; that she be put in possession of said lots, jointly with her husband as to his lot.

The only issue passed upon by the jury was: Is the plaintiff the owner and entitled to the possession of the tract of land described in the first paragraph of the complaint?—reference being made to that claimed by the plaintiff as her own.

The clerk of the court by whom the privy examination was made, testified that the plaintiff and her husband, with one Pulley, came into his office together; Pulley and the husband came behind the railing; the wife did not come behind at first; she signed the deed before she was examined; "I told him"—the husband—"to stand aside. He went outside of railing; I asked if she signed the deed for the purposes contained, and repeated the substance of the privy examination. I satisfied myself that the husband was out of hearing, or I would not have gone through the examination. At the time I asked plaintiff the questions her face was not in direction her husband went, but in the other direction. I remember the transaction distinctly; the deed was not read over to plaintiff in my presence."

The court charged the jury that, "the statute does not define how or to what distance from the husband the plaintiff should have been separated, but she should have been put in a position and place with respect to her husband to feel free to express herself under the examination as to her will and desire as to her execution of the deed."

The jury responded to the issue, "No."

Thereupon judgment was rendered against the plaintiff, from which she appealed.

J. B. Batchelor for plaintiff. (156)
J. N. Holding for defendants.

SMITH, C. J. Inasmuch as the husband is not in the action, and possession under a claim of dower can only be asserted after the husband's death, we see no basis for the demand of a judgment for the recovery of possession of the lot that belonged to the husband, and still less for a cancellation of the mortgage deed, which, as we have repeatedly said, should not be adjudged, as it may be a protection to others not in the suit, and besides, the destruction of a deed does not reconvey a divested estate in the lands.

But aside from these and other embarrassments in the way of prosecuting the present suit, the alleged irregularity connected with the plaintiff's execution of the mortgage and the manner of taking her private examination, the imputations charged in the most general terms but specified in the plaintiff's testimony, as impeaching the mortgage, are met and repelled by the verdict of the jury given under the instructions of the court.

The argument for the appellant made before us, proceeds upon the idea that it was the duty of the judge to pronounce upon the legal effect of the facts developed in the testimony, and to tell the jury what it was, and that in this respect it is erroneous in law.

No demand for instructions appears to have been made, and an omission to give such, as if asked, ought to have been given, it has been often said, is not an error assignable upon an imputed imperfection of the charge as transmitted with the record, for it is a settled rule to regard the record as intended to present so much of what transpired at the trial only as tended to present and explain the rulings complained of in the court below. *S. v. Hardee*, 83 N. C., 619; *Willey v. R. R.*, 96 N. C., 408, and numerous cases therein cited.

The exception to the charge is directed to that portion which begins with the words: "Now in this case did the clerk examine," (157) etc., but where terminating, except at the end of the charge, is not stated. The charge, proceeding from the words quoted are, "the plaintiff separate and apart from her husband." The statute does not define how or to what distance from the husband the plaintiff should have been separated, but the wife should have been put in a position and place with respect to her husband to feel free to express herself under the examination as to her will and desire in respect to the deed which, it is claimed by the defendants, she executed.

It was not necessary to the validity of the examination of the plaintiff, by the clerk, that her husband should have gone entirely out of the room. It was only necessary that he should have gone separate and apart

from the plaintiff, and so far as to leave the plaintiff free to express to the clerk her will and desire with respect to the alleged mortgage freely and voluntarily.

This is a fair interpretation of the requirements of the law in the conveyance of the real property of married women, and furnishes no ground of complaint, at least, to the appellant. We do not undertake to say to what extent these useful safeguards, provided for the protection of persons under coverture and their lands, observed and certified by officers authorized to take such acknowledgments and private examinations to assure the freedom and volition of the act, may be impeached, and the deed thus made and certified rendered invalid, by proof that the act was not voluntary, but under restraint and coercion, thus rendering title insecure and uncertain, nor whether such attempted repudiation, if tolerated would not be a fraud, against which coverture does not afford shelter. Most serious consequences, with temptations to fraud and perjury might follow the maintenance of such a proposition. But
(158) it is enough to say that in the conflicting testimony as to the fact and circumstances surrounding the present transaction, the jury find against plaintiff, and under the charge, the verdict settles the controversy adversely to the plaintiff.

There is no error, and the judgment must be

Affirmed.

Cited: Wynne v. Small, 102 N. C., 137; *Brite v. Penny,* 157 N. C., 111; *Forbes v. Harrison,* 181 N. C., 465.

JOHN EPPS AND WIFE v. ELIZABETH T. FLOWERS.

Dower—Amendment—Process—Married Women—Deeds—Infancy.

1. Where the summons in an action or special proceeding, of which the Superior Court has jurisdiction, to be exercised by its clerk, is made returnable to "term time" instead of before the clerk, the judge of the court may remand it with directions to amend the process so as to make it properly returnable.

2. A deed made by a married woman under twenty-one years of age is voidable, though executed with all the formalities required by the statute.

3. The presumption of the ratification of a voidable deed by long acquiescence, will not arise against a woman under the disability of coverture.

4. The privy examination of a married woman is not now, as was formerly, conclusive until set aside by some proceeding to impeach it; but is open to like defenses, and is upon the same footing as deeds made by other persons.

THIS is an appeal from an order made by *Merrimon, J.*, at October Term, 1887, of WAYNE Superior Court.

This action for the recovery of dower in certain lands alleged to have been owned by a former deceased husband of the *feme* plaintiff and subject to her right of dower, was begun by a summons made returnable and returned before the judge of the Superior Court (159) of Wayne, at the regular Spring Term thereof, in the year 1887.

The complaint alleges the *feme* plaintiff's marriage in May, 1874, with George W. Johnson, his death in November, 1876, and intestacy, his seizure in fee of certain lots, particularly designated, in the town of Mount Olive, and the possession of the different lots by the several defendants who claim title thereto, and their wrongful withholding.

It then proceeds to say:

"That during coverture her first husband made deeds of conveyance of said lots in the execution of which she joined and was privily examined, and under which the defendants claim title, but that at the time the *feme* plaintiff was under the age of twenty-one years, and that while the intermarriage of the plaintiff took place on 26 December, 1874, she did not attain her majority until December of the following year."

The defendants join in a demurrer to the complaint, and assign as the grounds thereof:

1. For that the Superior Court in term has no jurisdiction of the cause of action set out in the complaint, in that it is alleged the plaintiff is entitled to dower in certain lands, and there is no allegation of any equitable element entitling her to bring her action to the Superior Court in term.

2. For that the complaint does not state facts sufficient to constitute a cause of action in this Court, in that the plaintiff alleges she is entitled to dower in certain lands and does not allege any equitable element entitling her to bring her action in said court.

The complaint was afterwards, with leave of the court, amended so as to charge the defendants with the rents and profits received during their separate occupations by the defendants. The court, on the hearing of the issue made upon the demurrer, overruled it, and suggested to the plaintiff to obtain leave of the clerk to amend the summons so as to make it returnable before him in the Superior Court. From this judgment the defendants appealed. (160)

No counsel for plaintiff.
W. R. Allen for defendants.

SMITH, C. J., after stating the case: The order of remand, followed by the suggested amendment of the process, would, if allowable to be made, remove the jurisdictional impediment and place the cause before the clerk, acting for the Superior Court, as in case of a special proceeding. The Code, secs. 279, 2111.

In our opinion, there being but one Superior Court whose functions are in certain cases exercised by the clerk, this disposition of the case was proper, and warranted by the rulings heretofore made in this Court. *Cheatham v. Crews*, 81 N. C., 343; *Capps v. Capps*, 85 N. C., 408.

But, assuming the acquirement of jurisdiction, there is a further insuperable difficulty in the way of the defendants. The deed of Johnson and wife was made when the latter was alike under age and under coverture, so that she was incapable of making a valid and irrevocable deed, even though the forms prescribed for married women were strictly pursued. But this did not remove the disability from infancy, and before the latter terminated she entered into a second marriage, since which she has arrived at full age.

It is true that a long period elapsed after the deed was made, and a period of nearly ten years also after the *feme* plaintiff arrived at full age before the claim for dower in this suit was asserted, yet there has been no time when both disabilities were removed so that she was free to act, and time could be counted against her as required by The Code, secs. 148, 170.

The defect in the making of the deed, so far as it affects her,
(161) is that she was unable to relinquish her inchoate right to dower in the land, for the statute gives effect only to deeds executed by married women according to its provisions as to such deeds as are executed by others who must have attained the age of twenty-one years.

Now the deeds of infants, as such, are voidable, capable of ratification or of repudiation when that disability ceases, and this may be indicated by the acts of the parties, and perhaps by long and unreasonable acquiescence in the possession and enjoyments of the property by those claiming under the conveyance. But since the option of disaffirmance has been afforded, the plaintiff has been under a renewed disability, preventing the consequences ordinarily following a failure to exercise her option, and leaving her free to do so in the institution of her present suit. The only question then, the difficulties adverted to being out of the way, is as to the effect of the private examination of the *feme* plaintiff upon her claim of dower.

As the statute existed previous to the Revised Code, such an examination and action under it was held to be conclusive in the nature and with the force of a judicial determination, which could only be reached by a direct impeaching proceedings. But as modified in the Revised Code, it is declared that deeds made by married women, while strictly observing the prescribed form, stand *"upon the same footing and are open* to like defenses," as deeds made by persons who are *sui juris.*

The subject is fully considered in the case of *Jones v. Cohen,* 82 N. C., 75, and we are content with the simple reference to it without further comment.

As there has been no effectual act imparting validity to the deed because of a second coverture supervening before the *feme* attained full age, nor can it be inferred from her silence and inaction because of such coverture, we are of opinion that upon the face (162) of the complaint there is a sufficient cause of action stated, so that when placed in the rightful jurisdiction the cause must proceed. There is no error, and the judgment must be

Affirmed.

Cited: Wynne v. Small, 102 N. C., 137; *Simmons v. Steamboat Co.,* 113 N. C., 153; *Gaskins v. Allen,* 137 N. C., 429.

JOHN B. LEATHERS v. WILLIAM J. GRAY.

Wills—Devise—"Rule in Shelley's Case."

1. Where a testator employs words having a well known or technical meaning in the disposition of his estate, that construction will be given them unless it can be seen from the instrument itself, that he used them in a different sense; and if he used such words as will bring the devise within a settled rule of law, that rule must prevail, though it conflict with the real intention of the testator.

2. A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple, under the rule in *Shelley's case.*

3. The opinion of this Court, delivered in this case, reported in 96 N. C., 548, is overruled.

DAVIS, J., dissenting.

John W. Graham, J. B. Batchelor and John Devereux, Jr., for petitioner.

John Manning and A. W. Graham, contra.

MERRIMON, J. This is an application to rehear the case of *Leathers v. Gray,* reported in the 96th N. C., 548. The will of Joseph Armstrong, deceased, a clause of which was interpreted in that case, was executed on 23 May, 1839, and the testator having died in the meantime, it was proven in 1840.

The following is a copy of the clause in question of this will:
(163) "I also give and bequeath to my son, James W. Armstrong, the following property, to be received as soon as convenient, after the death or marriage of his mother, Peggy Armstrong, viz.: One-half of three tracts of land, all lying on the waters of Flat River. The first is the tract my father lived and died on, containing 220 acres; the second is the tract that I bought from Henry Berry, containing 17 acres, and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres," and also *"I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body forever,* one-half of the three tracts of land, all lying on the waters of Flat River," these tracts being the same above designated. This Court in interpreting the last recited clause decided that Parthenia Leathers took but a life estate in the lands devised to her, and that her children took and were entitled to the remainder in fee therein.

The petitioner in this application, who is the defendant in the action, assigns error and contends that the words of the clause, *"and after her death to the begotten heirs or heiresses of her body forever,"* are words of limitation, and not words of purchase, and therefore Parthenia Leathers took the absolute fee-simple estate in one-half of the lands so devised, and the same passed by her deed to the petitioner.

It is conceded that at the time the will before us became operative it was a settled rule of law, prevailing in this State that, whenever the ancestor of any gift or conveyance took an estate of freehold—an estate for life—and in the same gift or conveyance an estate is limited either mediately or immediately to "his heirs," or to the "heirs of his body," as a class, to take in succession as heirs to him, such words are words of limitation of the estate, and convey the inheritance—the whole property—to the ancestor, and they are not words of purchase. That is, in such case, the heir would take by descent and not by purchase,
(164) the ancestor would take the absolute property—the whole estate—with the right and power to dispose of it in any lawful way. *Shelley's Case,* 1; Coke Report, 104; 2 Bl. Com., 243; 2 Min. Inst., 241, 242; 2 Wash. R. P., 553; *Davidson v. Davidson,* 1 Hawks, 163; *Sanders v. Hyatt, id.,* 247; *Ham v. Ham,* 1 D. & B. Eq., 598; *Allen v. Pass,* 4 D. & B., 77; *Floyd v. Thompson, id.,* 479; *Hollowell v. Kornegay,*

7 Ired., 261; *Weatherly v. Armfield,* 8 Ired., 25; *Folk v. Whitley, id.,* 133; *King v. Utley,* 85 N. C., 59; *Mills v. Thorne,* 95 N. C., 362.

But it is seriously contended that this rule, commonly called *"The rule in Shelley's case,"* has no proper application to the clause of the will under consideration, because it sufficiently appears that the words thereof, "begotten heirs or heiresses of her body," were not used in a strict technical sense, but to imply simply the children, male or female, or both, of Parthenia Leathers, in which case her children would take as purchasers. We accepted this view as the correct one, giving effect to the intention of the testator, and made the decision, the correctness of which is now called in question. But after hearing the case re-argued, and having given the question raised much further consideration, we are of opinion that, although the intention of the testator may have been—no doubt was—such as we declared it to be, he failed to express his purpose consistently with a settled rule of law, which it is our duty to uphold and enforce.

When a testator employs words and phrases to express his intention in the disposition of his property, by will, that have a well known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words bring his intention so expressed, within a settled rule of law, the latter must prevail, although the effect may be to dis- (165) appoint the real intention of the testator.

Otherwise technical words would have no certain meaning or effect, and the rule of law would be subverted in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect, and so it must, but the real intention recognized and enforced by the law, is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it.

Moreover, a testator cannot ignore, displace and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole, or in part—the rule of law must prevail—he must make his disposition of his property, as allowed by and consistently with it; it determines the meaning and effect of his will, and its several parts, by the language employed in it, and not by what is intended, but not expressed, or not sufficiently expressed. He must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words the technical meaning must prevail, unless the same shall be qualified or modified by super-added words in the will.

The material part of the clause in question of the will before us is, "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body forever, one-half of the three tracts of land," etc. Omitting, for the present, from this clause the word "heiresses," the words thereof, "heirs . . . of her body," have a technical legal meaning, and it is clear—nothing else appearing—created an estate tail in the devisee named, which was converted by the statute (Acts 1784, ch. 204, sec. 5;

The Code, sec. 1325) into an estate in fee simple. That statute
(166) provides that "every person seized of an estate tail shall be deemed to be seized of the same in fee simple," etc., and applies to the will under consideration. *Hollowell v. Kornegay, supra; Weatherly v. Armfield, supra; Folk v. Whitley, supra.*

If there were words in the context clearly showing that the testator did not use the words "heirs . . . of her body" in their technical sense, but to imply children of the devisee, then in that case these words would be treated as words of purchase, and the devisee would have taken but a life estate, and her children would have taken the remainder. But, upon further reflection and scrutiny, we think there are no words of the context that can fairly, in view of numerous decisions of this and other courts, be construed as having such qualifying effect. Super-added words to have such effect, must have appropriate pertinency in meaning and bearing; the purpose to qualify and change the technical meaning of language used must appear with reasonable certainty. It seems to us that the words "or heiresses" used in the clause referred to, cannot have such, or any qualifying effect. In their direct connection the next preceding word, "heirs," imply and embrace "heiresses," and all they mean or can mean, in their connection—they are mere expletives and serve no useful purpose. The phrase, "her heirs or heiresses," means no more than that the testator devised the land to his daughter and the heirs of her body, male and female, and the course of descent is not changed in any degree from what it would be if the word "heiresses" did not appear, nor does that word suggest or imply children of the testator any more than the word "heirs." *Donnell v. Mateer,* 5 Ired. Eq., 7; *Coon v. Rice,* 7 Ired., 217; *Folk v. Whitney, supra; Worrell v. Vinson,* 5 Jones, 91; *Gillis v. Harris,* 6 Jones' Eq., 267; 2 Minor's Inst., 351; Wash. Real Prop., 274; note to *Shelley's case,* 1 Coke R., 262.

In our efforts heretofore to effectuate what seemed to us to be
(167) the real intention of the testators, we followed, to some extent, the case of *Jarvis v. Wyatt,* 4 Hawks, 227. In our further researches we find that case to be questionable authority. Indeed, it has in effect—not in terms—been overruled by numerous decisions. In

Chambers v. Payne, 6 Jones' Eq., 276, this Court commenting on it, say: "Of that case it is only necessary for us to remark that the point decided may be supported by the peculiar language of the will, or if it cannot be supported on that ground it must be considered as having been overruled by numerous cases since adjudicated upon the point, to several of which we have already referred."

It follows that under the devise in question Parthenia Leathers took the fee-simple estate in the land described in the pleadings, and that the plaintiff in the action was not entitled to recover.

The prayer of the petitioner must, therefore, be granted. The case must be reheard, and the judgment of this Court entered therein at the February Term of 1887, must be set aside, and judgment must be entered affirming the judgment of the Superior Court.

Prayer of the petitioner granted.

DAVIS, J., dissenting: By the use of the words, "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body, one-half of three tracts of land," etc. I think it manifest that it was not only the paramount intent, but the only intent of the testator to give the land to his daughter for life, with remainder to her children, sons and daughters, but under the rule in *Shelley's case,* that would not in the least alter the construction to be placed upon his will, if he used the words "the begotten heirs or heiresses of her body," as meaning simply *heirs* in the technical sense of that word, for I believe it will be conceded that the rule often, and in cases of wills written by unprofessional (168) persons, oftener than otherwise, defeats the intent, and the *single and only* intent of the testator; yet whatever may have been his intent, if he used the word *heirs* simply, without super-added words to limit or explain its meaning, the technical meaning would follow. From the whole clause of the testator's will it seems to me quite clear that he used the word, not in any technical sense (for the language shows that with him there could have been none) but as *descriptio personarum,* and his one *intent,* and *only* intent was to give the land to his daughter for life, remainder to her children. The rule in *Shelley's case* is based upon the idea that there is in the mind of the maker of the instrument, that comes under its operation two intents, one a *paramount* or *general,* or *legal* intent as it is called, and the other a *particular* or *prescribed* intent, and if both intents cannot have effect, the latter must yield to the former. See the question discussed by *Pearson, J.,* in *Ward v. Jones,* 5 Ired. Eq., 400. See the authorities cited in the case in 96 N. C., 548.

It is a rule of construction, that when technical words or phrases are used, nothing else appearing, they must be taken in their technical sense,

and when the word "heirs," or "heirs of the body" are used alone, without anything to show that they were not so intended, the technical meaning must prevail, because, standing alone, there can be no other certain meaning given to them, but it has been held and is settled in this State, that super-added words, "equally to be divided," and like qualifying words which show that they were not used in a technical sense, will prevent the operation of the rule in *Shelley's case. Mills v. Thorne,* 95 N. C., 362, and authorities there cited; *Chambers v. Payne,* 6 Jones' Eq., 276. Such words are not treated as surplusage, but as aids to show the true meaning of the testator. Suppose the testator in the case before us had added, by way of explanation, by "heirs and heiresses," (169) "I mean sons and daughters," it would clearly have shown that he did not use them in any technical sense, and I apprehend that in that case the rule in *Shelley's case* would not be insisted on, and yet, it seems to me that is clearly what he meant, and I cannot conceive of their use by him in a technical sense, unless you treat the word "heiresses" as surplusage, and if that word, in connection with other parts of his will, tend to show his meaning, I do not see why we should reject it.

I think we have no right to reject, as surplusage, any word or words used by the testator, that may tend to show or aid in showing what he meant. It is his will that must prevail, and if it is apparent that he uses a technical word, not in a technical sense, the meaning attached to it by him should govern in the construction of his will.

If it be said that by *"heirs* or *heiresses"* is meant nothing more than *heirs,* I think the answer is that it shows none the less conclusively that the words were not used by the testator in the technical sense, importing the class of persons who take indefinitely as *heirs.*

Whatever in the past may have been the value of the rule in *Shelley's case,* I think it should be strictly construed when otherwise it would defeat the manifest intention of the testator. I think the tendency of modern decisions in America is to limit its operation to cases that come strictly and technically within the rule, and in many of the states it has been abolished by statute. It is a rule by which the meaning of the testator is construed, and when this meaning is clear I do not see why it should be defeated by a too liberal *construction* of a rule of construction.

As much as the memory of Coke is to be venerated for his great legal learning, I think, with all his faults, if not crimes, while Attorney-General, his services in behalf of popular rights and civil liberty in resisting the encroachments and tyranny of the house of Stuart, entitle him to far more lasting fame than did his services in the legal war

carried on by the bench and the bar between the "Shelleyites" and (170) the "anti-Shelleyites."

The record shows that the merits are with the defendant, who purchased for value, and I regret the more for that reason that I cannot concur in the opinion of my brethren in reversing the former decision, and am glad that in this case, at least, a strict adherence to the rule is in the interest of justice.

Cited: Hodges v. Fleetwood, 102 N. C., 124; *Helms v. Austin,* 116 N. C., 755; *Nichols v. Gladden,* 117 N. C., 500; *Dawson v. Quinnerly,* 118 N. C., 190; *Chamblee v. Broughton,* 120 N. C., 175; *Wilkinson v. Boyd,* 136 N. C., 47; *Cooper, ex parte,* 136 N. C., 132; *Marsh v. Griffin, ibid.,* 335; *Tyson v. Sinclair,* 138 N. C., 24; *Wilkins v. Norman,* 139 N. C., 43; *Perry v. Hackney,* 142 N. C., 375; *Campbell v. Cronly,* 150 N. C., 469; *Bordeaux v. R. R.,* 150 N. C., 528; *McSwain v. Washburn,* 170 N. C., 364; *Cahoon v. Upton,* 174 N. C., 89; *Daniel v. Harrison,* 175 N. C., 121; *Kornegay v. Goldsboro,* 180 N. C., 441; *Wallace v. Wallace,* 181 N. C., 161; *Harward v. Edwards,* 185 N. C., 605.

JOHN W. LONG v. B. AND J. A. DAVIDSON.

Contract—Custom—Expert—Evidence.

1. When words, which by an established, uniform and general custom have acquired a specific meaning, are used in a contract, the courts will give them that interpretation, though some of the parties to the agreement were ignorant of the custom.
2. When such words or custom prevail among those who are engaged in a particular science, trade or calling, persons engaged in such science, etc., are competent to testify to the meaning of such words and the existence of such customs.
3. It is the province of the jury to ascertain what the contract was, but when ascertained it is the province of the court to interpret it.

CIVIL ACTION, commenced before a justice of the peace and carried, by appeal, to the Superior Court of ALAMANCE County, and tried before *Gilmer, J.,* at March Term, 1888.

The plaintiff's demand was for $163.86, as a balance due upon a contract with the defendants for building a house. The defendants answered that they had over-paid the plaintiff the sum of $7.53, for which they set up a counterclaim.

On the trial the plaintiff testified in substance that, he contracted with the defendants to build a brick house for them; that their
(171) express agreement was, he was to be paid $2.40 per thousand for laying bricks, to be estimated by "wall count, solid measure." Upon being asked what was meant by "wall count, solid measure," which was objected to by the defendants, the witness, after stating that he had been in the business of contractor and laying bricks and building brick houses for many years, was allowed to testify that "wall count, solid measure," had a certain meaning among brickmasons, and contractors for brick work, "which obtained universally, and especially in Alamance and Guilford counties," in which latter county defendants' house was built. The witness was further permitted to testify, after objection by defendants, that, among those skilled in laying brick and among contractors for such work, the words "wall count, solid measure," meant that "the walls of the building were to be estimated, without reference to windows or doors, as if the walls were solid work, and that the bricks were to be computed at the rate of eighteen (18) brick to every cubic foot in the wall. That, estimating the defendants' house by this rule, the number of bricks for which he was entitled to pay was 224,835, . . . that defendants had paid plaintiff on his work at divers times sums amounting to $380.05, thus leaving a balance due him of $163.80."

The defendant, Berry Davidson, then testified in substance that, the plaintiff agreed to lay the brick for $2.40 per 1,000. "That he asked the plaintiff whether he would charge for the doors and windows as if they were laid in brick, and was told that he would;" that with this understanding the contract was made; that at the time not one word was said about "wall count, solid measure;" that defendants purchased the brick with which the house was built; that there was only 155,219 used, which, at $2.40, came to $372.52, which was $7.53 less than he had paid the plaintiff; that he knew nothing of any such rule for counting as was alleged by the plaintiff to obtain among masons, con-
(172) tractors, etc., and that the first he knew of any purpose on the plaintiff's part to estimate the number of bricks by any such rule was after the work was done, when he objected, and insisted on ascertaining the number of brick by contract count."

Witness also testified that he was a builder and contractor, and had worked in stone and brick, and that the brick used were larger than the average size, being 8½x4¼x3, the usual size being 8x4x3.

J. W. Long testified to the same fact, and that owing to the size of the bricks it required from 34,000 to 37,000 less to do the work; that 18 bricks of the common size made a cubic foot, while 14½ of the size used made a cubic foot.

The plaintiff introduced other experts, who testified that the word "wall count, solid measure," had an established signification among brickmasons and contractors, and that they meant that the walls of the building were to be estimated as solid, without reference to windows and doors, and the brick to be computed at 18 per cubic foot; to all which defendants excepted.

Defendants then introduced T. C. Oakley and T. S. Christian, builders and contractors in brick work, who, in answer to the question as to how they estimated brick work and what was the usage in Durham among brickmasons and contractors, said it depended wholly on the contract; that sometimes parties would contract with reference to size of the brick, and when under the usual size it was usual to charge more per 1,000.

On cross-examination they testified that among brickmasons and contractors by "wall count, solid measure," would be universally understood to mean that the walls were to be estimated as if the doors and windows were laid solidly in brick, and the number of bricks computed at 18 per cubic foot, "wall count, solid measure," being terms of art amongst masons, contractors and others. (173)

The defendants insisted that the jury should find the terms of the contract as made by the parties, and that it was not competent for the plaintiff to offer evidence to explain the terms used by the parties, and that no custom or usage could be shown "unless the same was reasonable, certain, uniform and universal, and known to the defendants or brought to their knowledge at the time contract was made, and that the proper mode of counting the brick in the walls was made by actual count."

His Honor instructed the jury that when the terms of a contract are ascertained, its construction is a matter of law for the court, but that when, as in this case, the parties differ as to the terms of their contract, the plaintiff saying that it was expressly stipulated between them that the number of bricks were to be ascertained by "wall count, solid measure," while the defendants testified that no such agreement was made, then it devolved upon the jury to say what were the terms of the contract as entered into between the parties. That if they should find that no such terms as contended for by plaintiff, then the rule for computing the bricks in the wall would be by actual count. That if they believed that, according to the contract, it was agreed that the bricks were to be ascertained by "wall count, solid measure," then the jury must pass upon and determine the meaning of those terms, that is, if they should believe that such terms were words of art, and had a special signification among builders and contractors and others, but that

after they had ascertained the meaning of such terms, it was still the duty of the court to construe the contract. That if they should believe that the parties to this contract stipulated that the count of the brick was to be made by "wall count, solid measure," and that these terms were terms of art, and meant amongst contractors, builders and others that the count was to be made by ascertaining the number of cubic (174) feet in the wall and then multiplying that number by eighteen (18), as the number of bricks of average size needed to make a cubic foot, then they should find for the plaintiff. But, if they believed that no such terms as these were used, or that, if used, they had no such signification, or were not terms of art (and it was the duty of the plaintiff to satisfy the jury upon all these points by a preponderance of evidence), then they should find for the defendants.

To this charge the defendants excepted. There was a verdict and judgment thereon for the plaintiff, from which defendants appealed.

John W. Graham for plaintiff.
F. H. Whitaker for defendants.

DAVIS, J., after stating the case: Whether the contract was that the bricks were to be laid at $2.40 per thousand "wall count, solid measure," as insisted by the plaintiff, or whether nothing was said about "wall count, solid measure," and the number of brick was to be ascertained by actual count as insisted by the defendants, and about which there was conflicting evidence, was a question properly left to the jury, and all the exceptions of the defendants, both to the evidence and to the charge of the court, may be comprehended in the single question—if the contract was that $2.40 per thousand, "wall count, solid measure," were to be paid for laying the bricks—is it competent for the plaintiff to show what was meant by those words? Did they have a confined and limited local meaning, unknown to the defendant, and different from the ordinary meaning which the words would import? Or did they have an established, uniform and universal meaning amongst those who used them? Are there two meanings conveyed by the words, one limited and local, and the other general and universal? "A mere local usage," (175) as was said by *Ruffin, C. J.*, in *Jones v. Allen*, 5 Ired., 473, cited by counsel for defendant, "in a small part of the country, cannot change the law," but if there is an "established, general custom, that would in truth, be the law."

The question in that case was whether the hirer of a slave (who had employed a physician to attend the slave when sick) or the owner, was liable for the medical bill. There was no evidence of an established, general custom, but the plaintiff, in that case, proposed to show "that

in the section of the country where the hiring took place, it was the custom" for the owner to pay for medical attendance; this was not allowed, and the same was held to be law in *Cooper v. Purvis,* 1 Jones, 141.

If the contract was that the building was to be erected of brick at $2.40 per thousand, "wall count, solid measure," it must be that something was meant by the term used, and there is no conflict in the testimony as to what that meaning was, nor does it appear from the evidence that they had any other meaning. So far from being a local meaning, different from the general meaning, it appears from the evidence that they have one established meaning, universally understood among brick-masons and contractors. If the terms are only used in a particular trade or science or calling, the meaning must be gathered from the testimony of persons acquainted with the trade or science or calling in which the terms are employed, and it is for the jury to ascertain the meaning of the terms used; but when the terms of the contract are ascertained, the construction of the contract is a matter for the court. *Silverthorn v. Fowle,* 4 Jones, 362.

It is true the defendant says that no such contract as is alleged by the plaintiff was made, and "that he knew nothing of any such rule for counting brick as was alleged;" but if the terms of the contract were as alleged by the plaintiff, it was the misfortune of the defendant to have agreed to pay $2.40 per thousand, "wall count, (176) solid measure," in ignorance of the meaning, and the only meaning, as appears from the testimony, conveyed by the terms used in making of the contract, and without informing himself of the fact that they had, at least, one meaning.

Affirmed.

WILLIAM BOWLING v. A. J. BURTON.

Deed—Warranty—Easement—Pleading.

1. B. conveyed to C. all his interest in a tract of land, together with all his interest in certain mills, and his "right to erect dams . . . at said mills, with all and singular the hereditaments and appurtenances thereunto belonging," and covenanted to warrant and defend all his right, title and interest therein in" and to said premises, with the said hereditaments and appurtenances forever: *Held,* that the deed conveyed all the easements appurtenant to the lands and mills as they existed at the time of its execution, and the vendee could maintain an action upon the covenant of warranty for damages from failure of title to and eviction from such easement.

2. A defective statement of a cause of action is ground for demurrer (when the court may allow or require an amendment) but not for a dismissal of the action.

THIS is a civil action, tried before *Shipp, J.*, at August Term, 1888, of PERSON Superior Court.

The following is a copy of the plaintiff's complaint:

1. That on 28 March, 1883, by a certain deed, which is hereto annexed and asked to be taken as a part of this complaint, the defendant A. J. Burton and Nannie L. Burton his wife, for a valuable consideration therein stated, bargained, sold and conveyed to the plaintiff (177) a certain tract or parcel of land described as follows: "All of their interest (the said interest being one undivided half) in a certain tract or parcel of land upon the waters of Flat River, and known as the Burton Mill tract, containing by estimation forty-five acres, be the same more or less, and bounded as follows: . . . Together with all of their interest in the Burton Mills and their right to erect dams across the river at said mills, with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, suits, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part, either in law or in equity, of, in and to the above granted interest in the premises, with the said hereditaments and appurtenances: To have and to hold the above mentioned and described interest in the premises, with the appurtenances and every part and parcel thereof, to the said party of the second part, his heirs and assigns forever."

2. That among other things in said deed, the defendant did covenant with the plaintiff "to warrant and forever to defend the before granted interest in the premises, and every part and parcel thereof, now being in the quiet and peaceable possession of the said party of the second part, against parties of the first part, their heirs, executors, administrators and assigns, and against all and every other person or persons claiming or to claim the said interest in the premises, or any part thereof."

3. That plaintiff hath not at all times since the making of said indenture and deed been able to peaceably and quietly enjoy the said premises, but on the contrary he alleges that one Monroe Cash, who at the time of the making of said deed, and continually from that time up to 15 November, 1884, had and still hath a lawful title to the (178) land on both sides of said Flat River above and adjoining the land herein described, instituted an action in the Superior Court of said county and state, against this plaintiff and his cotenant J. I.

Cothran, for ponding the water on the lands of said Monroe Cash and injuring various springs of water on the lands of said Cash, and on 15 November, 1884, recovered judgment against the plaintiff and Cothran, for the sum of ninety dollars per annum for five years and the cost of the action.

4. That in accordance with the terms of said judgment, and in order to avoid the necessity of another suit, the plaintiff has been compelled to tear down the dam to his saw mill at least two feet at a very great cost, to wit: $75.00, which has very materially reduced the capacity of said mill and impaired its value.

5. That plaintiff has already paid the cost of said action, $144.68 and $252.50, said judgment for damages, and expended about $50.00 in a petition to have said judgment modified.

6. That by reason of the failure of the covenant of the defendant, plaintiff hath not only lost and been deprived of the premises as aforesaid, but has been obliged to expend, and has expended, a large sum of money, to wit: $502.50, in the payment of costs and charges recovered against him by the said Monroe Cash in the action aforesaid, for ponding water on his land and injury to the springs of said Cash, as well as to spend much time and labor in the defense of said action to the great damage of said plaintiff.

Wherefore the plaintiff demands that he recover of defendant the sum of $502.50, together with interest from 15 November, 1884, and the costs of the action to be taxed by the clerk.

The defendant having answered, the court gave the judgment following:

"In the above entitled action it is considered by the court that (179) the complaint does not state facts sufficient to constitute a cause of action. Whereupon the plaintiff being called and failing to appear is nonsuited, and the defendant will recover of the plaintiff the cost of this action to be taxed by the clerk."

From which the plaintiff appealed.

A. W. Graham for plaintiff.
No counsel for defendant.

MERRIMON, J., after stating the case: We do not doubt that the injured party can maintain an action in a proper case for a breach of the covenant of warranty of the title in a deed conveying a tract of land, on which is situate a mill and a dam connected therewith that embraces an easement as to ponded water, occasioned by such dam or back-water therefrom, on an adjoining tract of land of another person,

and like easements incident and necessary to the free use and beneficial enjoyment of the mill and dam conveyed, although such easements are not expressly mentioned in the deed or covenant. If the deed, in effect, though not in terms, embraced them, and the covenant is comprehensive enough to include them, a breach thereof, in respect to such easements, is actionable. This is so, because, in the nature of the matter—nothing to the contrary appearing—a party who conveys a mill and dam, or other thing, conveys whatever and all that he has or claims and purports to have, at the time of the conveyance, in connection therewith incident to and necessary to the just enjoyment of the thing he undertakes and proposes to convey. It is not to be presumed that a vendor sold property in a less complete condition, as to things incident and appurtenant to it, than it appeared to be at the time he sold it. Thus, if he sold a mill and dam and the site thereof, and he appeared and professed to have a right in connection therewith to pond water
(180) on the land of another, the deed, nothing to the contrary appearing, would be construed as embracing and conveying such easement as incident to and part of the mill, dam and site, to the extent and in the measure he appeared and professed to have and own it. Otherwise, he would sell a property different from and less valuable than that he professed to sell. The right to so pond the water might be essential to give the mill practical value. Indeed, it might be valueless without the easement, and it might be less valuable if the easement should not exist to the extent claimed by the vendor.

The easement being thus incident and appurtenant to the property sold, and constituting part of its value, it must be taken that the vendee paid for it. It, therefore, fully comes within the covenant of warranty of title, and the vendee would have his remedy for a breach of the covenant in respect to it. *Whitehead v. Garris,* 3 Jones, 171; *Everett v. Dockery,* 7 Jones, 390; *Adams v. Connover,* 87 N. Y., 422; Avy on Water Courses, sec. 153, *et seq.;* Gould on Water, sec. 303; Wash. on Easements, 133, *et seq.*

In this case, the terms and scope of the deed of conveyance relied upon by the plaintiff are broad and comprehensive. They certainly embrace the right to erect dams across the river at the mills mentioned, and to pond the water as and to the extent claimed and exercised by the vendor at the time he executed the deed. The covenant of warranty of title is correspondingly comprehensive. If the vendor, at the time he sold and conveyed the land and mills to the plaintiff, claimed and exercised the right to pond the water on the land of an adjoining owner, by the erection of dams across the river, then his deed to the plaintiff embraced that right, and so did the covenant of warranty

therein; and the plaintiff can, for the reasons already stated, maintain his action, if there was a breach of the covenant in respect to such right.

The assignment of the breach of covenant in the complaint is (181) very general and defective; it should have been made more specific and definite as to the extent and nature of the easement, and the breach of the covenant in respect thereto; but we think the complaint is not so defective in the respect mentioned as to warrant the court in forcing the plaintiff to suffer a judgment of nonsuit. A cause of action is defectively—imperfectly stated, and this might be ground for demurrer, but not for a motion to dismiss the action, because the complaint does not state facts sufficient to constitute a cause of action. The plaintiff might have been allowed to amend the complaint, and if the defendant would not require a better pleading, the court might, *ex mero motu,* have required him to make proper amendments. *Johnson v. Finch,* 93 N. C., 205; *Halstead v. Mullen, id.,* 252; *Warner v. The Railroad Co.,* 94 N. C., 250.

It seems, however, that the court was of opinion thet the plaintiff alleged no cause of action at all, and it therefore gave the judgment of nonsuit appealed from. There is

Error.

Cited: Mizell v. Ruffin, 118 N. C., 71; *Blackmore v. Winders,* 144 N. C., 216; *Latta v. Electric Co.,* 146 N. C., 298; *Bank v. Duffy,* 156 N. C., 87; *Dockery v. Hamlet,* 162 N. C., 122; *Blankenship v. Dowtin,* 191 N. C., 794.

J. R. LANE v. JESSE RICHARDSON.

Appeal—Interlocutory Orders, etc.—Parties—Exemptions—Vendor and Vendee.

1. The Supreme Court will not, before the final termination of an action, entertain an appeal from an interlocutory order making additional parties.
2. It is only where the granting of the interlocutory order affects some substantial right, that it is the subject of review before a trial upon the issues joined.
3. It is intimated that where one conveys property, which he would be entitled to have set apart to him as exempt from execution, the person to whom the transfer is made receives it with all the rights and equities which attached to it in the hands of the vendor, and may assert them against the creditors of the vendor.

(182) THIS is an appeal from the refusal of his Honor, *Shipp, J.*, to strike from the record in this action the names of certain parties and their pleadings, at October Term, 1888, of CHATHAM Superior Court.

The plaintiff's action is to recover the balance due on a note under seal for five hundred dollars executed to one J. B. Harris on 31 March, 1887, by the defendant Jesse Richardson, due one day after date, and bearing interest from date at the rate of eight per cent per annum and endorsed by the payee to the plaintiff J. R. Lane. Endorsed upon the instrument is a partial payment of one hundred and forty dollars made 8 October, of the same year.

The defendant admitting these allegations sets up a counterclaim consisting of two docketed judgments in favor of Sickel, Hellen & Co., against said Harris and assigned to the defendant of the aggregate amount of three hundred and thirty-seven dollars and thirty-one cents, and consents that judgment may be entered against him for the excess of the plaintiff's claim. To the counterclaim the plaintiff replies:

. . . . . .

"3. That at the time of the alleged transfer of the judgments to the defendant, Harris was entitled to a personal property exemption of five hundred dollars, and claims, as he always has claimed, that his exemption be allowed; and

4. That the plaintiff is entitled to be relegated to all the rights and defense which Harris could assert were he a plaintiff in the action."

Subsequently Harris was admitted a party defendant and filed an answer admitting to be true the allegations of the complaint and the existence of the judgment, but alleging, after setting up other

(183) defenses to the judgments:

"That at the time of the transfer of the note to Lane, this defendant did not possess fifty dollars worth of personal property in excess of the note, and he then regarded and elected and continues to regard this note as a part of his personal property exemption, and claims the same as such.

"Wherefore, defendant demands judgment, that the said note be allotted to him as his personal property exemption, to the use of the plaintiff, and for costs, etc."

The defendant then moved to strike from the amended replication certain designated parts which the court deemed and declared unnecessary because the objectionable parts were not allowed and formed no part of the pleading. He further moved to strike the answer of Harris from the files, which was refused, and then entered exception to the order allowing him to become a party and to the refusal to remove his answer from the files. From these rulings the defendant appealed.

J. H. Headen for plaintiff.
John Manning for defendant.

SMITH, C. J., after stating the case: We are unable to see how the presence of Harris in the action between his endorsee and the debtor and solely in aid of the latter in resisting the counterclaim can affect the controversy, since the transfer carries with it the rights and equities of the endorser in whose place the plaintiff stands. But without deciding the point we cannot entertain the appeal at this stage of the proceedings. Harris was allowed to become a defendant and put in an antagonistic answer to Richardson and in support of the plaintiff, after which ineffectual resistance is offered to the action of the court in the denied motion. We have repeatedly held that a cause cannot be thus arrested where no substantial right is impaired or affected by the ruling complained of, and this appeal belongs to that class. (184)

The case of *Merrill v. Merrill,* 92 N. C., 657, cited for the appellant is not an authority for the present appeal, for that case simply decides that when the action must fail and a plaintiff proposed to be substituted could not in law carry on the action, it would be error to allow such an amendment and retain the cause.

The appeal must therefore be dismissed as prematurely taken, and it is so adjudged.

Appeal dismissed.

Cited: Emry v. Parker, 111 N. C., 268; *Sprague v. Bond, ibid.,* 426; *Bennett v. Shelton,* 117 N. C., 105; *Bernard v. Shemwell,* 139 N. C., 447; *Spruil v. Bank,* 163 N. C., 45; *Joyner v. Fibre Co.,* 178 N. C., 635; *Farr v. Lumber Co.,* 182 N. C., 727; *Barber v. Cannady,* 191 N. C., 534.

VINA LEATHERS v. W. H. MORRIS.

Amendment—Jurisdiction of Justices of the Peace—Judgment—Estoppel.

1. In actions in the courts of justices of the peace, it is essential that the summons shall contain a statement of the sum or the value of the property sought to be recovered, and a defect in this particular will not be cured by the insertion of the necessary averment in the pleadings or other process.

2. Without such averment in the summons, the court acquires no jurisdiction, and any judgment rendered thereon is void, and may be collaterally attacked for that reason.

3. When, however, it is made to appear that the court would have jurisdiction if the summons had contained the proper allegation, but it was omitted by mistake or inadvertence, it may, pending the action, permit the necessary amendment.

THIS was a civil action, tried before *Merrimon, J.*, at January Term, 1888, of DURHAM Superior Court.

The plaintiff alleged that, in April, 1883, the defendant held a mortgage on the mule in controversy in this action, executed to
(185) him by one Sidney Jenkins; that after that time Jenkins exchanged the mule for a horse; that thereafter Jenkins gave to the defendant a mortgage on the horse, which mortgage plaintiff claimed was in satisfaction of the former mortgage on the mule; that thereafter one Ned Leathers, to whose right plaintiff has succeeded by assignment, became the owner of the mule, by an exchange with John Merritt, and that the value of the mule was one hundred and twenty-five dollars; that the defendant, by a foreclosure of mortgage on the horse, realized more than enough to satisfy his mortgage; that thereafter Ned Leathers, an ignorant man, and totally unaware of the foregoing facts, was sued by the defendant Morris in a court of a justice of the peace, for the possession of the mule, and recovery had against him on account of the legal title outstanding in Morris, and that by reason of that recovery had taken possession of and wrongfully detained the mule.

The defendant denied the material allegations of the complaint; and, for a further defense, alleged:

That on 24 April, 1885, he brought an action of claim and delivery before a justice of the peace in said county, of which action the justice had jurisdiction, against Ned Leathers, under whom the present plaintiff claims, to recover the mule, alleging that the mule was the property of the said Morris; that the said Ned Leathers was duly made a party to said action, and was present and defended the same; that the justice, after hearing the allegations and proofs of both parties, adjudged the mule, which is the subject of the present action, to be the property of said W. H. Morris, from which judgment the said Ned Leathers did not appeal, and said judgment is still subsisting and in force.

Therefore, the defendant says that the plaintiff is estopped to prosecute her present suit.

To sustain the estoppel, as above set forth, the defendant in-
(186) troduced the justice's docket and the original papers in the cause.

The summons was in the usual form, and demanded judgment "for the wrongful detention of one dark bay mule," without an averment of its value.

In an affidavit, upon which a requisition for the delivery of the mule was issued, its value was stated to be "about fifty dollars."

After introducing this evidence, the defendant asked his Honor to submit an issue, as to whether or not the plaintiff was estopped by said judgment in the magistrate's court to maintain her present suit, which the judge declined to do, upon the ground that the proceedings before the magistrate were a nullity. The defendant excepted.

There was a verdict and judgment thereon for plaintiff, from which the defendant appealed.

No counsel for plaintiff.
John Devereux, Jr., for defendant.

MERRIMON, J. The defendant relied upon a judgment in an action determined before a justice of the peace as an estoppel upon the plaintiff. The latter objected that the supposed judgment was a *nullity,* upon the ground that the justice of the peace had not jurisdiction of the subject-matter of the action. The court sustained the objection, and the appellant assigns this decision as error.

The action before the justice of the peace was brought to recover possession of a mule. The summons therein simply commanded the defendant "to answer the complaint of W. H. Morris for the wrongful detention of one dark bay mule." It did not specify the value of the mule, nor does this appear in the whole course of that action, or in the judgment therein, except that in the affidavit in the claim and delivery proceeding it is stated that "the actual value of said property (the mule) is *about* fifty dollars." The statute (The Code, sec. (187) 832) among other things provides that the *summons* issued in actions in courts of justices of the peace shall *"also contain the amount of the sum demanded by the plaintiff."* The important purpose of this requirement is to show by such demand that the limited jurisdiction of the court arises and attaches as soon as the summons shall be served. And it is deemed essential that such demand shall so appear, whether the cause of action be founded on contract or it be a demand for the possession of property or for its value. The Code, sec. 887; *Allen v. Jackson,* 86 N. C., 321; *Noville v. Dew,* 94 N. C., 43; *Singer Mfg. Co. v. Barrett,* 95 N. C., 36.

The statement of the value of the property in the affidavit mentioned to be *"about* fifty dollars" was not sufficient if this had been in the sum-

mons, because the demand must be for fifty dollars or a sum less than that to give rise to the jurisdiction. But a proper statement of the sum of money demanded in the affidavit, if it had been found there, was not sufficient to cure the defect of the absence of the proper demand in the summons; it has been so decided.

When however the cause of action, the sum demanded, was in fact within the jurisdiction of the court, and the demand was omitted by inadvertence or mistake from the summons, the court might, pending the action, allow a proper amendment to *show* the demand, not to *give* jurisdiction, but to make it appear in and by the summons from which it had been so omitted. Such amendment would relate back to the date of the summons and render it efficient; it could not in such case work injustice to the parties because in fact the jurisdiction existed; it only helped, cured defective process. *Noville v. Dew, supra; Singer Mfg. Co. v. Barrett, supra.*

As to the supposed judgment in question, it does not appear that the court of limited jurisdiction ever acquired jurisdiction of the subject-matter of the action in which it was given, and particularly a requirement essential to give that court jurisdiction does not appear in (188) the summons as the statute requires.

The court below, therefore, properly held that the judgment was null and void.

Affirmed.

Cited: Cox v. Grisham, 113 N. C., 280; *McPhail v. Johnson,* 115 N. C., 302; *Hauser v. Craft,* 134 N. C., 329.

M. R. SUGG v. JOHN H. WATSON.

Evidence—Payment—Verdict—When Special Instructions Should Be Asked—Trial.

1. In the absence of any directions from the debtor to the contrary, a creditor may apply a payment to any one of several debts he holds against the payor.

2. The objection, that there is no evidence, or not sufficient evidence to warrant a verdict, should be made when the testimony is all in, and the court should be requested to so instruct the jury; but if there is any evidence, and it is permitted to go to the jury without objection, the verdict will not be disturbed by the Supreme Court.

SUGG *v.* WATSON.

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

On 20 November, 1886, the plaintiff instituted two actions against the defendant in a court of a justice of the peace—one on a note for $250 dated 25 September, 1868, credited by $125, 22 May, 1869; the other on a bond for $180, dated 25 February, 1871.

There was a credit of $5 on each note, as hereinafter set out. The justice of the peace gave judgment in each action for the plaintiff, and the defendant appealed.

In the Superior Court the two cases were consolidated. De- (189) fendant admitted the execution of the notes, relied upon the statute of limitations, and the only issue submitted to the jury was, "Are the notes sued upon barred by the statute of limitations."

The plaintiff testified: "I am a brother-in-law of defendant; I went to him and told him he must pay me some money on these notes. He ran his hand into his pocket and pulled out $10 and handed me. I said this is not enough; I want more than this; defendant said, 'That is all I have now.' He then walked into the house, and I followed him and said, 'John, we must have a settlement, this has been standing long enough.' He did not reply to me. I then entered a credit of $5 on each of the notes. A few days after this I sent my son to defendant to tell him I wanted to have the notes closed up. He sent me word it was out of the question, that he couldn't pay me; I then sued him. Defendant did not owe me any other debt; I had done work for him in my shop, but I always made him pay cash, as I had so much trouble in getting him to pay these notes."

On cross-examination plaintiff stated that this transaction took place in July, 1886; that he said to defendant: "John, I want you to pay me some money, I want some." He then paid me the $10, and I told him I wanted some more, and he said he didn't have it. Watson afterwards went into the house and I followed him and told him we must have a settlement. I had the notes with me and put the credits on them as soon as I got home, where I had pen and ink. I entered $5 on each note, to bring them in date. I kept a wagon shop and frequently did work for Watson, but he paid for it, and owed me nothing but those notes when he paid me the $10. This was shortly before I went to a sale at Lawrence's."

John H. Watson, defendant, testified: "Was sitting on my hotel porch with W. M. Sugg when plaintiff came and said he was going to Lawrence's sale next day, and wanted me to let him have a little (190) money to buy him some corn, that he didn't have it. I went into the house and got the $10 and gave him; not a word was said about note, debt, settlement, or anything of the kind. He asked me if that was all

I could let him have, and I said yes. I did not authorize him to enter any credit on the notes; I had forgotten he had them; he did shop work for me, and I was in the habit of paying him from time to time; I thought I owed him for shop work at the time."

On cross-examination defendant testified he would pay plaintiff for shop work sometimes, and sometimes he did not have it. "I owed him nothing but a little shop account; I don't know how much. At the time I paid the $10 I had lost sight of the notes; I know I had not paid anything except the credits endorsed on them."

William Sugg, a witness for defendant, testified: "I was on the porch with defendant; plaintiff came up, and whether he said 'you must pay me some money' or 'I must have some money' I do not recollect; said he wanted to go to Mrs. Lawrence's sale to buy some feed; defendant then paid him $10. Plaintiff said, 'I want more,' or 'you must pay me more than that'; defendant said, 'If you don't want that give it back.' They then went into the house, and plaintiff, my father, said, 'John, we must have a settlement before long.' I heard nothing said about making a payment upon debts or notes; I do not remember my father sending me to defendant after this to have the notes closed up."

There were no exceptions to the testimony and no instructions were prayed. The jury responded "No" to the issue, and defendant's counsel moved for a new trial, because there was not sufficient testimony to go to the jury of any consent on the part of defendant that the amount paid to the plaintiff should be applied to the payment of the debts sued on, or either of them, or that the defendant consented to the entries
(191) made on said notes. Motion denied, and defendant appealed to Supreme Court.

A. W. Graham for plaintiff.
Jno. W. Graham for defendant.

DAVIS, J., after stating the case: "The effect of any payment of principal or interest" on a debt otherwise barred by the statute of limitations is to take it out of the operation of the statute, at least as to the debtor making the payment.

In *McDowell v. Tate,* 1 Dev., 249, it is said "a payment is, by consent of the parties, either express or implied, appropriated to the discharge of a debt."

If a debtor, who owes a creditor a single debt, makes a payment to the creditor, it is a discharge *pro tanto* of that debt, but if a debtor, who owes to a creditor several distinct and separate debts, makes a payment, he has a right to direct the application of the payment to such debt as he chooses, and it is the duty of the creditor to apply it as directed, but

if this right is not exercised and the direction of the application made at or before the time of payment, the creditor may make the application to such of the debts as he pleases.

The controverted questions here are whether the defendant owed the plaintiff other debts, and whether the payment was made on the debts sued on.

Counsel for the defendant insists that there was not sufficient evidence to go to the jury to warrant the verdict rendered. Whether there is any evidence is a question for the court; if any, the weight and sufficiency of it is a question for the jury. This is well settled. It is also settled that where there is a mere *scintilla* of evidence the court ought not to leave the case to the jury.

In the case before us there was some evidence to which there (192) was no exception, and in regard to which no instructions were asked. If there is an exception to the sufficiency of the evidence to warrant the jury in finding an alleged fact, the objection should be made when the testimony is all in, and the court should be asked to charge the jury that there is not sufficient evidence to warrant a verdict, and if there is any evidence, and no instructions are asked, and it is permitted to go to the jury without objection, this Court cannot disturb the verdict. *Lawrence v. Hester,* 93 N. C., 79.

The judge below has the discretionary power to set aside a verdict, if against the weight of evidence, but this Court possesses no such discretionary power.

"An omission of the judge to instruct the jury upon a point on which, if he had been so requested, it would have been his duty to advise and direct the jury, cannot for the first time be assigned as error in this Court." *S. v. Nicholson,* 85 N. C., 548.

There is no error. Affirmed.

Cited: S. v. Kiger, 115 N. C., 750; *Young v. Alford,* 118 N. C., 220; *S. v. Harris,* 120 N. C., 578; *Purnell v. R. R.,* 122 N. C., 835; *Cox v. R. R.,* 123 N. C., 606.

J. H. McELWEE v. W. T. BLACKWELL, J. S. CARR AND J. R. DAY.

Res Judicata—Judgment.

1. Where in an action involving the title to property judgment was rendered that the plaintiffs were the owners and the defendant had never been the owner, and the defendant brought another action against those under

whom the plaintiffs claimed to recover for injuries done by them to the same property: *Held*, that the judgment in the first action was *res judicata* and a conclusive bar to the second.

2. It is suggested that the proper way to make the defense of another judgment for same cause of action available, is to offer the record in evidence to the jury, leaving the court to instruct them as to the effect.

3. *Blackwell Manufacturing Co. v. McElwee*, 94 N. C., 425, is commented upon and distinguished.

(193)

CIVIL ACTION tried before *Phillips, J.*, at August Term, 1888, of ROWAN Superior Court.

The plaintiff sued to recover damages for the unlawful appropriation and use by the defendants of a trade-mark to which he claimed the proprietary right.

The facts are stated in the opinion.

J. B. Batchelor and John Devereux, Jr., for plaintiff.

W. W. Fuller and Graham & Ruffin and Fuller & Snow, by brief, for defendants.

SMITH, C. J. The action was begun in the Superior Court of Iredell, thence removed to Rowan County, and terminated adversely to the plaintiff upon the defense of a previous adjudication of the same subject-matter in an action instituted afterwards by the Blackwell Durham Tobacco Company. The parties to both actions were adverse claimants to the right to use the same designation or trade-mark on manufactured smoking tobacco put up in bags or otherwise, and the purpose of each suit was to establish this alleged proprietary right against the other. The present plaintiff derives his title to the label or trade-mark under and by virtue of an original invention and appropriation made by himself and John R. Green in the year 1862, they being partners in the manufacture of such tobacco, and its exclusive vesting in the plaintiff surviving on the death of his copartner.

The defendants also derive title to the use of the trade-mark
(194) through the said John R. Green, who alone, it is alleged, was the owner thereof, and whose proprietary and exclusive right thereto was sold by his executor and purchased by the defendant Blackwell, with whom the other defendants became associated in the business, and its subsequent transfer to the corporate body, plaintiff in the second action.

Thus all the parties to the controversy claim from a common source, and the result depends upon the solution of the inquiry whether the deceased, John R. Green, was a separate and exclusive owner of the

trade-mark in his own right or, as a co-partner with the plaintiff, McElwee, had only a partner's interest and share therein. This appears to be the point in dispute in both actions, as developed in the pleadings, and the company suing in the latter action came in under the defendants, one or more, sued in the present action. It is manifest, therefore, that the establishment of the validity of the derived title asserted by the company concludes the question of title claimed by McElwee, *defendant in that and plaintiff in this action.*

If the superior and sole title to the trade-mark, as determined in the suit instituted against McElwee, vests exclusively in the company, under transfers commencing with Green, against McElwee's contention, how can he support his action against former proprietors from whom the company derives its title? If its title prevails in one suit over that set up by the present plaintiff, the same predominance must be accorded to the claim of a proprietary right *derived from the present defendants* for the plaintiff, upon the same identical ground, claims against each.

We are here met by what is supposed to be an antagonistic ruling in *Blackwell Mfg. Co. v. McElwee,* reported in 94 N. C., 425, where the right to recover upon a counterclaim was held not to be legally inconsistent with the subsequent assertion of the subject-matter of it in a new and distinct action brought by intermediate proprietors. (195)

In the present action a counterclaim had been set up in the answer of the defendants, and it was insisted that this being so, the action in behalf of the Blackwell Manufacturing Company was for the same cause of action, and stood upon the footing of a second suit for the same cause of action as the preceding suit. This objection was held to be untenable for the reason that the defendants, who may have this remedy when sued, are not obliged to resort to it, but may bring a separate action and there maintain the claim. Furthermore, the cause of action was not the same between the parties with reversed relations, for the defendants sued individually were liable in damages to the plaintiff, if liable at all, to the extent of their own wrongs, in infringing the plaintiff's asserted proprietary right, while the Blackwell Manufacturing Company was responsible only for its own acts. Again, this latter plaintiff was not precluded from seeking redress for injuries suffered by a continued alleged infringement of its right committed during its ownership, which could not be included in the other action. While the actions are thus dissimilar and damages in both could not be recovered in one suit, the rule that forbids a second pending a first action for the same redress and constituted between the same parties has no application.

The material and essential element in all the suits between the plaintiff and the successive claimants to the same trade-mark, through whom

the title is alleged to have passed, is as to the conflicting claims of title to the trade-mark, and this being conclusively settled against the plaintiff is a bar to his action, because it determines that the plaintiff has no title and the Blackwell Durham Tobacco Company has, and this necessarily involves title in those from whom it derives its own. The title is determined, and this effectually defeats the action.

It has occurred to us that perhaps the defense should be made (196) by producing the record before the jury upon the issue of title, and leaving it to the judge to instruct them upon it as conclusive proof in determining the verdict, but the parties seem to have left it to the judge to determine the effect of the record, so that his ruling results as would a verdict upon the issue rendered in submission to his direction, and so no harm comes to the appellant from the course pursued at the trial. As to the effect of a *res adjudicata* between the parties who attempt to reverse the *causa litis,* it can scarcely be necessary to refer to decided cases.

We refer to a few: *Armfield v. Moore,* Busb., 157; *Fanshaw v. Ferrebee, ibid.,* 166; *Rogers v. Ratcliff,* 3 Jo., 225; *Yates v. Yates,* 81 N. C., 397; *Tuttle v. Harrill,* 85 N. C., 456; *Sigmon v. Hawn,* 86 N. C., 310; *Gay v. Stancell,* 76 N. C., 369, and other cases. There is no error, and the judgment must be

Affirmed.

Cited: Moore v. Garner, 109 N. C., 159; *Turner v. Rosenthal,* 116 N. C., 441; *Jordan v. Farthing,* 117 N. C., 188; *Bidwell v. Bidwell,* 139 N. C., 411; *Lumber Co. v. Lumber Co.,* 140 N. C., 443; *Hunt v. Eure,* 189 N. C., 487.

JESSE A. NORRIS v. HENRY C. LUTHER AND WIFE.

Costs—Married Women—Mortgage—Trust and Trustee—Deed.

1. The prevailing party in an action may be adjudged to pay the costs incurred in an unsuccessful attempt to enforce his judgment.

2. In pursuance of an ante-nuptial contract real estate was conveyed to a trustee "for the sole and separate use of" the wife—subsequently she, by deed duly executed by her and her husband, mortgaged her estate in the property, but the trustee did not join therein. In proceedings to foreclose, the trustee was made party: *Held,* (1) that the mortgage was not invalid by reason of the omission of the trustee to join therein; and (2) that a sale under a decree of the court would vest in the purchaser the legal and equitable title to such interest as the wife had under the trust.

NORRIS *v.* LUTHER.

THIS was a motion in the cause heard and determined by (197) *Avery, J.*, at August Term, 1888, of WAKE Superior Court.

The plaintiff, claiming title to a parcel of land, brought his action against the defendants to recover possession. The defendants, in their answer, denied his right to said land, and set up divers other defenses against his demand.

Before being allowed to plead to the action, the defendants were required to give "an undertaking with good and sufficient surety under the provision of section 237 of The Code, in a sum not less than $200, to secure such costs and damages as the plaintiff might recover in the action"; being unable to give which they executed, in the prescribed forms of law, a mortgage deed to the plaintiff, conveying to him another tract of land belonging to the *feme* defendant, as separate estate, with condition of avoidance if the "defendant shall pay such costs and damages as may be adjudged the plaintiff," and in default thereof, vesting in the mortgagee a power of sale to raise the necessary amount, not exceeding $200. The Code, sec. 117.

At Fall Term, 1885, of the Superior Court of Wake the issues joined were tried, resulting in a verdict for the plaintiff.

Judgment was entered up according to the verdict, and under an execution issuing thereon to the sheriff, the plaintiff was put in possession of the premises, but the money needed to satisfy the recovery of damages and costs could not be made, and so the officer having it in hand made return at February Term of said court, next ensuing.

On 7 February, 1887, a notice, signed by the plaintiff and his counsel, issued to the defendant that at the term of the Superior Court next to be held on the last day of that month, a motion would be made for an order of sale of the land embraced in the mortgage security, to the end that $200 of the proceeds thereof be applied to the said judgment, and the sheriff, by his deputy, J. D. Lewis, in whose hands it was placed, made return endorsed thereon in these words: "Received 7 February, 1887. Served 9 February, 1887. J. Rowan Rogers, (198) Sheriff; by J. D. Lewis, D. S."

The defendants, not appearing, upon motion of plaintiff's counsel for judgment for foreclosure of mortgage and an order of sale of the land, the court, after reciting what had before been done in the premises, adjudged:

"That the defendants, Henry C. Luther and his wife, Elizabeth J., have until the first day of June, 1887, within which to pay the plaintiff, Jesse A. Norris, the sum of $200, in part of said damages and cost, and if they fail to pay the said sum by the first day of June, 1887, then that the land described in the mortgage, to wit:" (repeating the description)

"be sold by D. Reid Upchurch, who is hereby appointed a commissioner of this court for that purpose, at the courthouse door in Raleigh, for cash, and out of the proceeds of sale, after said sale has been confirmed by the court, the costs and expenses of this motion and of said judgment be first paid; that out of the residue, $200, be paid to Jesse A. Norris, and the residue, if any, be paid over to Henry C. Luther and his wife, Elizabeth J. Luther. Before selling said land the commissioner shall advertise the same for thirty days in the *Evening Visitor,* a newspaper published in Raleigh, N. C. Said commissioner shall report his action and sale under this judgment to the next civil term of the court following his making said sale, and await the confirmation of his report and sale before making title to the purchaser."

Underneath the record of this judgment, as sent up, is this memorandum:

"I am not now of counsel for the defendant.

T. P. DEVEREUX."

(199) The sale was accordingly made and the report thereof confirmed at August Term, J. J. Rogers being the last and highest bidder for the sum of $400, and no exception taken thereto. The judgment allows the commissioner for his services and making the deed $15, and directs title to be made to the purchaser, on payment of the amount of his bid, and directs how the fund shall be disposed of.

The land mentioned in the mortgage had been conveyed to one D. P. Teague, a trustee appointed in certain proceedings instituted in the Court of Equity of Chatham County to enforce and give effect to a marriage contract entered into between the said H. C. Luther and Elizabeth J. (then Teague) in September, 1851, just prior to such intermarriage, "in trust for the sole and separate use of the said Elizabeth J. and the heirs of her body in fee simple." The trustee had not been made a party to the action in which the mortgage was made, nor did he join in the execution of the mortgage itself.

Being advised by counsel of the defect in his title to the land sold by the commissioner, by reason of the absence from the proceeding for the foreclosure and sale of the trustee in whom the legal estate was vested, the purchaser, Rogers, during the same term, applied to the court to cause the said D. P. Teague to be made a party, and such action taken as would bind and conclude him, or to relieve him, the said Rogers, from his purchase. Thereupon summons was ordered to issue to the trustee, and at the succeeding term the plaintiff filed his complaint against him, setting out the facts of the case, and requiring him to show cause against the confirmation of the sale. The summons was first issued on 14 Sep-

tember to the sheriff of Durham, who was unable to find Teague, and upon its return an alias summons issued to the same officer, returnable to February Term, 1888, which was served on the 3d day of November preceding.

The trustee having failed to appear, judgment was entered, (200) which, after recitals of what had preceded, confirmed the report of sale and the antecedent action of the court in the premises, and substituted Charles D. Upchurch in place of the other commissioner, who had become incompetent, to proceed and execute the judgment.

At August Term, 1888, the said Rogers, who had paid the purchase-money and taken a deed for the premises, applied to the court for a writ of assistance to put him in possession, supported by his own and the affidavit of others of his effort to get possession and the resistance of the defendants thereto.

Notice was given of the intended application to be made (and which was made) to the court at that term, and having been placed in the hands of the sheriff, he makes this return:

"Received 16 August, 1888. Served by delivering a copy of the within notice to H. C. Luther and wife, this 16 August, 1888, at 9:09 o'clock. Read to H. C. Luther and wife on the date above mentioned.

J. ROWAN ROGERS, *Sheriff.*"

The *feme* defendant met this motion with an affidavit, in which she denied that the notice purporting to have been served on her on 9 February, and so returned and endorsed by the deputy, was ever served on her, or that she had knowledge or notice of the proceeding for foreclosure and sale under the mortgage, and that whatever was done in furtherance thereof, she insists, was irregular, invalid, and void, and the purchaser ought not to have the aid of the court in dispossessing her of the land.

At the hearing the said Rogers moved for the issuing of the writ whereof he had given notice to the defendants, and the defendants asked that the decree of sale and the sale itself be set aside and vacated.

To ascertain the facts about which the evidence was contradictory, at the instance and with the consent of counsel of all parties, (201) new issues were laid before the jury which, and the responses, are as follows:

1. Was the notice from Norris to Luther and wife, purporting to have been served by the sheriff through his deputy Lewis, in reality served on said day by Lewis on both by reading the paper to both? The answer is No.

2. Was the notice served on H. C. Luther by reading the paper to him? The answer is Yes.

In addition to the jury finding, after hearing the various exhibits and proofs and admissions of counsel, the court found the further facts:

1. That no copy of the notice filed in the record was ever served on or left with either of the defendants, except that the notice was read to the defendant H. C. Luther, as found by the jury.

2. That Elizabeth Luther had no notice of the motion for a decree of sale of the land mortgaged by defendants, nor of the rendition of said decree, or the sale in pursuance of the decree, until the service of notice of the motion for a writ of assistance on the .... day of ....., 1888.

3. That the land mortgaged was sold by virtue of said decree, and purchased by J. J. Rogers for the sum of four hundred dollars, but was then, and is now, in fact, worth more than five hundred dollars, and somewhere between five hundred and one thousand dollars.

4. That the purchase-money, four hundred dollars, has been paid by said J. J. Rogers, and is in the hands of the clerk of the court, and is held by him subject to the order of the court.

5. That D. P. Teague, trustee, had no notice of the decree or order for the sale of the land until notice issued to him after said sale, making him a party, but that said Teague had notice of the order confirming said sale. . . .

The court finds further that the land described in the mortgage
(202) deed was purchased with funds arising from the sale of lands held by D. P. Teague, trustee, in trust for the *feme* defendant, Elizabeth Luther.

Whereupon, it is ordered and adjudged by the court:

1. That the decree of sale heretofore made in this cause, of the land conveyed by mortgage deed by the defendants, be vacated and set aside, and that the sale made in pursuance of said decree be set aside.

2. That J. J. Rogers surrender to the clerk of the court the deed made to him for said land, and that the said deed be canceled, and that the purchase-money paid by said J. J. Rogers be returned to him.

3. That unless the defendants shall have paid or caused to be paid into court the sum of two hundred dollars on or before 1 December, 1888, to be applied to the payment of costs and damages recovered of them in this action, the clerk of the court, who is appointed a commissioner for that purpose, shall, after advertising the land described in said mortgage deed for four successive weeks, in some newspaper published in Raleigh, sell said land to the highest bidder for cash, at the courthouse in Raleigh, and pay the fund arising from said sale into court, to await the further order of the court.

It is further ordered and adjudged by the court, that the defendants recover of the plaintiff, Jesse A. Norris, the sum of ..... dollars,

costs that have accrued since the date of notice issued at the instance of said Norris, on the ..... day of February, 1888.

The court declined at the request of counsel, to adjudge and declare whether D. P. Teague, trustee, is concluded by decree, or any sale made in pursuance of said decree.

From the judgment, taxing him with the costs incurred in attempting to enforce the sale, the plaintiff appealed, and from the judgment, directing the land to be sold in the event the money was not paid (203) at the time ordered; the defendant appealed.

S. F. Mordecai for plaintiff.
Chas. M. Busbee for defendant.

SMITH, C. J., after stating the case: The controversy which has grown out of the action taken to enforce the mortgage security, has been essentially between Rogers the purchaser and the defendant, in the application for the writ of assistance. The record, without assigning any specific error, contains a memorandum with the words "Appeal also by the plaintiff" from the judgment of the court, and we can only entertain his complaint of the concluding clause, that taxes him with the costs specified therein.

In this we find no error, for it was plaintiff's own folly to proceed in the effort to uphold a sale which the court declares to have been improperly ordered and to be void. The plaintiff's appeal cannot, therefore, be sustained, and the ruling complained of by him is affirmed.

We now proceed to consider the exceptions to the rulings in the

DEFENDANT'S APPEAL.

These are: 1. For that the *land* described in the mortgage ought not to be sold, but only such estate, if any, which the defendants, or either, had therein; and 2. For that the trustee not having united with the defendants in executing the mortgage it is inoperative to pass the interest or estate of the defendants, and especially of the *feme defendant,* in the land, and it is void.

1. The first exception cannot be sustained, for the obvious reason that only such interest as the parties to the suit have in the land can pass under a sale pursuant to the judgment and the deed, though it use a descriptive word of larger import than the interest to be (204) conveyed, its operation would be restricted to that interest. In the present case, the trustee becoming a party in whom the legal estate resides, it is appropriate, to the divesting both the legal and equitable estates, and transferring them to the purchaser, for why should they

remain distinct, when the only purpose to be attained in having a trustee is to protect the separate estate of the *feme* during coverture, and the necessity for such trustee ceases alike when the coverture ceases, and when the trust estate passes to one who is *sui juris* and free from disability.

The remaining disability points to the assumed invalidity of the deed itself because the assent of the trustee to its being made is wanting.

The argument to sustain this rests essentially, as we understand it, on the ruling in *Hardy v. Holly,* 84 N. C., 661. That decision does not support the present contention. In that case the deed of marriage settlement transferred the estate of the *feme,* on the eve of her marriage, to a trustee, for her separate use and benefit after entering into coverture, "and subject to her exclusive control and disposition, as if she was a *feme* sole by order or other writing under her hand and seal and directed to said trustee," etc.

Its declaration of trust further provided that the *feme* should "have power in writing to direct, and when so directed, it shall be the duty of said trustee to exchange and convert the whole or any part of the trust fund into other property," etc., subject to the same trust, etc.

The court held, as the deed provided the mode in which the *feme* while *covert* might exercise control over the fund and direct its disposition, the power must be exercised in the manner pointed out in the deed, and a conveyance under the statute would be, and was, unauthorized and ineffectual. The subject was thoroughly discussed by our
(205) late able associate, *Mr. Justice Ruffin,* and the principle so announced.

The marriage contract and the deed made to carry it into effect in the present case, contains no direction as to the exercise by the *feme covert* of her power of disposition of the trust property. In the former the husband undertakes to relinquish all claim to her estate, and that it shall remain "for the use, behoof and benefit of her and the heirs of her body," adding, "to have and to hold to her, the said Elizabeth Teague and the heirs of her body, free from the power of alienation by him, the said Henry C. Luther, and exempt from the claims of his creditors."

The deed, made pursuant to the contract, to the trustee appointed in place of the husband, declared to be such, uses similar words in defining its trusts and the land purchased with the proceeds of sale of the land of the *feme,* owned at her marriage, as authorized by the court in another proceeding, from M. A. Rogers and wife, and conveyed in their deed of 9 December, 1879, to the trustee, Teague, defines the trusts as being *"for the sole and separate use of the said Elizabeth J. Luther and the heirs of her body,"* and the same terms are used in the *habendum* clause of the deed.

This is the land the defendants intended and undertook to convey in their mortgage deed, which is executed and acknowledged with the private examination, as required by The Code, sec. 1246, paragraphs 5 and 6.

While the terms of the contract and the subsequent deeds use words that would create an estate tail at common law and a fee simple under the Act of 1784, the decree declares the trust attaching to the deed to the trustee to be *"for the sole and separate use of said Elizabeth Jane and the heirs of her body, for, and during the natural life of said Elizabeth Jane, and at the death of said Elizabeth Jane, for the sole use of said Henry C. Luther and the heirs of the body of said Elizabeth Jane."*

It is not necessary to inquire in this discrepancy in the declaration of trusts, what is its legal effect upon the trust estate, and (206) whether the children of Elizabeth have any vested trust estate in the land since the sale made pursuant to the judgment, could only pass to the purchaser such title as the trustee and the defendants, parties to the proceeding, had in the premises respectively, whatever that may be.

There is no error in the judgment, in this regard, and so it must be affirmed in both appeals.

Affirmed.

Cited: Alexander v. Davis, 102 N. C., 20; *Kirby v. Boyette,* 116 N. C., 169; *S. c.,* 118 N. C., 265; *Cameron v. Hicks,* 141 N. C., 278; *Freeman v. Lide,* 176 N. C., 438.

JONATHAN T. GAY ET AL. v. WILLIAM GRANT, ADMINISTRATOR OF EDMUND JACOBS ET AL.

Administration—Executors and Administrators—Evidence—Will—Devise—Powers—Insolvency—Sales.

(DEFENDANTS' APPEAL.)

1. An administrator or executor will not be charged with a debt which came into his possession, in the absence of evidence of the solvency of the debtor; nor will he be, prima facie, chargeable with debts which he has inventoried as "doubtful."

2. Where administration was granted in 1862, and the administrator received bonds and other evidences of indebtedness due from persons who were then solvent, but who became insolvent by the results of the war, and it appeared that all the indebtedness of the estate had been discharged: *Held,* in an action by the legatees and distributees for account and set-

tlement, that owing to the disturbed condition of the country, and the obstacles in the way of making collections by the ordinary processes of the law, the administrator was not chargeable with negligence in failing to collect.

3. Where the personal representatives of a surety of a deceased administrator were sued by the legatees and distributees for an account and settlement of the estate which had been committed to their principal, and the defendants offered in evidence the record of a settlement had with the clerk of the Superior Court, in which some of the plaintiffs were parties, but others—infants—were not: *Held*, that under the particular circumstances of the case, this was an exception to the general rule, that the record of an action is only evidence against the parties thereto, and was competent against all the plaintiffs: *Held further*, that, in such an action, the burden was not upon the defendants to account for the absence of evidences of debt which their principal might have been charged with.

4. Where it appeared that nothing could be collected from a debtor by legal process, but that he had some property, and the administrator succeeded in collecting a debt due him individually from such debtor: *Held*, that the administrator was not liable for failing to collect the amount due his intestate.

5. Where an administrator was indebted to the estate of his intestate, and had ability to pay his indebtedness, though his property was not subject to legal process and he was thereby insolvent: *Held*, that he should have discharged his indebtedness, and his bond was liable for the amount thereof.

6. Executors and administrators cannot purchase at their own sales, and if they attempt to do so, they may be charged with the value of the property acquired by them at the time of the pretended purchase.

(PLAINTIFF'S APPEAL.)

7. A devise, "that all my landed estate shall be sold, and that the proceeds of sale shall be equally divided among all of my children," conferred no power upon the executor, nor upon an administrator *cum testamento annexo* to sell. The lands vested in the devisees to be sold and divided by them, or under the direction of the court. The statute—Revised Code, sec. 40, ch. 46—did not confer power to sell upon administrators, with the will annexed, where that power could not have been exercised by an executor.

DEFENDANTS' APPEAL.

(207) CIVIL ACTION, tried before *Shepherd, J.*, at June Term, 1888, of NORTHAMPTON Superior Court, upon exceptions to a referee's report. Both parties appealed from the judgment rendered.

Green Stancell died in January, 1862, leaving a last will and (208) testament, in which no executor was named, and at March Term, 1862, of the Court of Pleas and Quarter Sessions of Northampton County, S. T. Stancell and L. D. Gay were appointed administrators, with the will annexed, and executed bond in the sum of $125,000, with

Edmund Jacobs and J. M. S. Rogers as sureties. Both these sureties are dead and the defendants are their administrators.

S. T. Stancell died in 1873, and R. H. Stancell, one of the plaintiffs, is his administrator, and L. D. Gay, the surviving original administrator of Green Stancell, is also one of the plaintiffs in this action, which is brought by the devisees of Green Stancell, against the defendants, administrators respectively, of Edmund Jacobs and J. M. S. Rogers, sureties on the original administration bond, for an account and settlement of the assets of the estate of Green Stancell, which were collected, or ought to have been collected by his administrators, etc.

By an order in the cause it was referred to Robert O. Burton, Jr., Esq., to state an account of the administration of S. T. Stancell and L. D. Gay, administrators, etc., of Green Stancell, deceased, and to find all issues of law and fact arising on the pleadings in the cause.

The referee made his report, charging the defendants with divers notes and accounts set out therein. The defendants filed numerous exceptions to the findings of the referee, which were passed upon by the court below. Those that were overruled are brought to this Court for review.

R. B. Peebles for plaintiffs.
Thos. N. Hill and J. M. Mullen for defendants.

DAVIS, J., after stating the case: We deem it necessary to state only the findings of fact in reference to the overruled exceptions and the ground of the exception; such of the items of the account reported by the referee, as are similar in character both as to findings of (209) fact and the ground of exception, will be considered together.

First Exception.—Defendants are charged with bonds of Sol Deloatch, Brittain Edward, and A. R. Deloatch. With reference to these bonds the referee finds (as amended by the court as to the last) that they were inventoried without designation, and no evidence was offered as to the condition of the debtors during the war or since; no efforts were shown to have been made during the war or since to collect, except that suit was brought to Spring Term, 1867, of Northampton Superior Court, and judgment rendered.

The defendants say that, as those bonds were placed in the hands of an attorney, due diligence was shown, and the "judgments unsatisfied" show insolvency, and they ought not to be charged with them.

There are no unpaid debts outstanding against the estate of Green Stancell, and this is an action by the devisees and legatees, and as there were no means of collecting debts during the war except in Confederate

currency, and it appearing that no debts remain to be unpaid, the administrators would not be chargeable for not collecting in Confederate money, there being no necessity for so doing. It has been so held in *Green v. Barbee,* 84 N. C., 69, and other cases.

It has been often held that an administrator is not an insurer of the estate committed to his charge. If he exercises the diligence and care in collecting and securing the assets of the estate which a prudent and faithful man would in the management of his own property, and losses occur which he could not prevent, he will not be charged with such losses. He is only required to be honest, faithful and diligent. *Nelson v. Hall,* 5 Jones Eq., 32; *Hobbs v. Craige,* 1 Ired., 332; *Beall v. Darden,* 4 Ired. Eq., 76; *DeBerrey v. Ivey,* 2 Jones Eq., 370; *Keener v. Finger,* 70 N. C., 35; *Dortch v. Dortch,* 71 N. C., 224; *Moore v. Eure, ante,* 11.

In *Worthy v. Brower,* 93 N. C., 344, it was held that an ad-
(210) ministrator was not chargeable with bonds entered in his inventory and placed in the hands of an officer for collection, and it was also held in the same case that he was not to be charged with a debt in the absence of any evidence as to the solvency of the debtor. That case like the present had for its purpose the settlement of an administration account of transactions had during and just after the late war, and it is said that if the debt was good the collection of it was so obstructed "as to excuse the administrator for his delaying an effort to enforce payment, and if the debt could not have been collected, by reason of the debtor's insolvency, he is not of course responsible." See, also, *Grant v. Reese,* 94 N. C., 720.

The disturbed condition of the country during and after the war, the great loss in property and consequently in the value of credits, the obstructions interposed by legislation in the way of stay laws, the interference by military orders giving to debtors the opportunity of preferring such creditors as they might choose to favor, and like hindrances, etc., are matters of general knowledge, and it would be as contrary to right reason as to justice to ignore them in passing upon the accountability of fiduciaries who, by the exercise of the highest degree of good faith and diligence, were frequently unable to prevent losses which in ordinary times could easily have been prevented. Suits were brought against the debtors and the debts were reduced to judgments, and in the absence of any evidence as to the solvency of the debtors, the defendant ought not to be charged with those debts, and the first exception is sustained.

Second Exception.—The second exception embraces divers notes and accounts with which the defendants are charged, numbered 53, 54, 56, 57, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 73, 74, 75, 76, 78, 80, 81, 82, 83,

and 84, as to all of which the finding of the referee was that they were "inventoried without designation, and the bonds were not produced or their absence accounted for, and no evidence was offered (211) as to the condition of the debtors."

The exceptions of the defendants as to the report of the referee as to these items is as follows: "That he has charged the choses in action in full, without scaling them, when they should have been scaled as of the date when due. He should have applied the scale as of January, 1864, two years after the qualification of the administrators. And as to 62 to 69 inclusive, the absence of the bonds is accounted for by exhibit 'D,' which is ruled out as evidence against the infant plaintiffs to which defendants excepted."

Exhibit "D" referred to is an account of L. D. Gay and S. T. Stancell, administrators, etc., of Green Stancell, stated by N. R. Odom, "Clerk of the Superior Court and Judge of Probate of Northampton County," on 1 May, 1874, in proceedings instituted by S. T. Stancell and L. D. Gay, as administrators with the will annexed of Green Stancell, against the devisees and legatees of the deceased for the purpose of a final account and settlement. In that account (Exhibit "D") the debts referred to are included in the list of "Bonds due the estate of Green Stancell, deceased, not collected, the parties being insolvent."

As against the plaintiffs, who were infants, the court declined to admit the account contained in the record in the proceedings referred to because not having been properly made parties (*Stancell & Gay v. Gay*, 92 N. C., 462) they were not bound by any judgment or fact found in that record.

The ruling of the court below is undoubtedly in accordance with the well settled general principle that the record cannot be used as evidence against persons who were not parties to it, and who were in no way bound by it, but under the peculiar facts in the case before us we think the rule in its ordinary strictness does not apply: The defendants are the administrators of the surety on the administration bond of S. T. Stancell and L. D. Gay. Neither they nor their intestates were (212) ever charged with the custody and control of any of the bonds in question. Neither L. D. Gay, one of the administrators for whose default the plaintiffs are seeking to hold his sureties accountable, nor the administrator of his deceased coadministrator, is a party defendant, but both occupy adversary relations to the defendants, being plaintiffs in this action, and to them would properly attach the duty of accounting for the existence or nonexistence of the bonds with the custody and disposition of which the administrators with the will annexed of Green Stancell were properly chargeable. They might reasonably be expected

to be able to give some account of them; it is not to be presumed that the administrators of the deceased sureties, or that the sureties if living, would be able to do so without their aid. In addition to this, in the action and account in which the bonds in question are reported as not collected because of the insolvency of the debtors, the other plaintiffs in this action who were *sui juris,* were parties having an interest in common with the infants; and all these facts taken together are sufficient to reverse the ordinary rule which would devolve upon the defendants the burden of accounting for the bonds in question, and discharge them from liability therefor, in the absence of any affirmative proof that they were solvent or had been or could have been collected.

Recognizing in the fullest degree the fidelity, diligence and good faith to which the administrators and like fiduciaries are held, and recognizing further the general principle which would require them to account for all the assets which went into their hands, which general rule would require the administrators to account for the bonds in question, or show some sufficient reason for not doing so, or if they were solvent to account for the amount of them, unless they could show that due and reasonable diligence had been used; and they had failed to collect them,

(213) yet this general rule, which thus prima facie charges administrators, is only one of evidence, from which the presumption of fact is raised, that they collected, or ought to have collected the bonds, and devolves upon them the burden of showing the facts to be otherwise if they wish to discharge themselves from liability, but under the circumstances of the case before us, it would be unjust to apply this rule to the defendants, who are the administrators of the *sureties* on the administration bond, and though the estate of their intestate is liable for any default of the principal obligors, they ought not, in a case like this, to have thrown upon them the burden of accounting for the absence of bonds which have been or ought to have been, under the control of one of the plaintiffs, and of the intestate of another, and in the absence of any evidence as to the solvency of the bonds in question, the defendants ought not to be charged with them.

No exception is taken to the fact that neither the surviving administrator, with the will annexed of Green Stancell, nor the administrator of the deceased coadministrator are made parties defendant, but appear on the side of the plaintiffs in an action against the administrators of the deceased sureties on the administration bond, but it presents the anomaly of a suit by a principal on a bond against his sureties. *Smith v. Bryson,* Phil. Eq., 267.

The record shows that the administrator received and paid out money during the war.

The exception to the refusal of the court to apply the scale as of January, 1864, two years from the qualification of the administrators cannot be sustained.

Third Exception.—This includes items Nos. 51, 52, 66, 72 and 86, as to which the finding was as follows: "Inventoried without designation (as to solvency). No effort to collect during the war. Suit brought to Spring Term, 1867, of the Superior Court, and judgment rendered. No evidence of debtor's condition." The exceptions in regard to these items must be sustained, for the reason given in considering the (214) first exception.

Fourth Exception.—Defendants were charged with Nos. 60 and 61, bonds of W. B. Stubblefield. The finding of the referee is: "Has been insolvent continuously since the administrators qualified. Bonds inventoried without designation. Bonds not produced nor accounted for." Exception: "For that the evidence shows notorious insolvency." For reasons already given this exception must be sustained.

Fifth Exception.—This is No. 71, with which defendants were charged, and in regard to which the finding of fact, as corrected by the court, is as follows: "This bond inventoried as doubtful. Bond not produced, or its absence accounted for. The debtor was insolvent." For reasons already stated this exception must be sustained.

Sixth Exception.—This is No. 89, bond of J. T. Branch, in regard to which the following facts are found: "Bond inventoried without designation. Debtor was solvent to the end of the war, but had the reputation of owing a good many debts. Ever since the war has been insolvent, but had considerable property, four thousand dollars. Suit brought to Spring Term, 1867, of the Superior Court, and judgment rendered. S. T. Stancell individually, by splitting up a claim of $1,400 into notes of $100 each since the war, made the entire claim. Claim could have been collected by due diligence."

The defendants' exception was as follows: "That upon the finding the defendants ought not to be charged, and the facts show due diligence."

As has been already stated, and for the reasons stated, the administrators would not be chargeable in the absence for any necessity for so doing, for not collecting during the war, during which time the debtor was solvent. Could they have collected the claim by due diligence after the war? That is, could they have collected it by any legal process? The referee (whose findings is sustained by the court (215) below) seems to base his findings upon the fact that, though the debtor was insolvent, S. T. Stancell, one of the administrators, made an individual debt of $1,400 out of him, by having it split up into new notes of $100 each. This fact shows quite conclusively that the collection

of the $1,400 depended, not upon the power of S. T. Stancell to collect, but upon the willingness of the debtor to pay. He might be willing to pay one debt and not willing to pay another. Neither could be collected, as the delays of the law then were (we take judicial notice of this fact), out of an insolvent debtor who, though having property, might choose to pay one creditor in preference to another. Because the administrator collected an individual debt, which he was only able to do by the voluntary action of the debtor, must he be charged with a debt due from the same debtor to the testator, upon which he had to bring suit, and which he could not collect by law? If it be said that he should have used the same diligence in collecting the debt due the estate as his own, the answer is, that from the facts found, it did not depend upon his diligence or power, but upon the will of the debtor, and the administrator ought not to be charged, unless it was in his *power*, by due diligence, to collect. Would good faith forbid his collecting an individual debt (which he could not collect by suit) by the voluntary aid of the debtor, because he could not collect, without suit, a debt which he held in a fiduciary capacity? The delays thrown in the way of the collection of old debts by legislative discrimination, and by stay laws and ordinances, obstructed the power of the most diligent in collecting old debts; and though these ordinances and laws were unconstitutional, and so declared (*Parker v. Shannonhouse,* Phil. Law, 209; *Jacobs v. Smallwood,* 63 N. C., 112; *Greenlee v. Greenlee,* 63 N. C., 593), they still place it out of the power of the administrators to make an old debt out of an insolvent debtor, and the exception must be sustained.

(216) Seventh Exception.—This is to the charge of the account against E. C. Davis, No. 98, in regard to which the finding is as follows: "Inventoried without designation. Solvent during the war. Land sold in May, 1868, and has not had property sufficient to pay his debts since the war."

The defendants except for "that the finding shows that the defendants ought not to be charged."

For reasons applicable to this exception already stated, it must be sustained.

Eighth Exception.—Defendants are charged with a bond of N. Pruden, No. 102, in regard to which the finding is: "Bond inventoried doubtful. Bond not produced, or its absence accounted for." Defendants except, "For that upon the finding, they ought not to be charged."

This exception should have been sustained for reasons applicable already stated, and for the further reason that the bond, having been inventoried "doubtful," was not prima facie chargeable against these defendants.

Ninth Exception.—This includes bonds Nos. 103, 104 and 105, with which defendants are charged, and in regard to which the findings is as follows: "Inventoried without designation. Solvent during the war. Land sold by sheriff in May, 1868. Has not had property sufficient to pay since the war. No effort shown by administrators to collect, except suit brought to Spring Term, 1867, of the Superior Court, and judgment rendered. Bond not produced or absence accounted for."

Defendants except, "For that upon the findings of fact, they ought not to be charged."

For reasons already stated and applicable to this exception, it must be sustained. It should have been stated, as one of the reasons for the nonproduction or absence of bonds in all cases in which suits were brought and judgments obtained, the judgments themselves accounted for the nonproduction of the bonds. They ought to have been canceled and filed as "specialties" with the judgments. (217)

Tenth Exception.—This exception embraces notes and accounts (Nos. 107 of S. T. Stancell, the deceased administrator, with regard to which the finding was as follows: "They were inventoried without designation." S. T. Stancell was insolvent from 1862 until his death, but was able to pay these claims. $1,400 were collected for him after the war from Joseph F. Branch, and from $5,000 to $6,000 were collected out of him by executions since the war, and $5,500 of assets came into the hands of his administrator."

Defendants except, "For that, upon the finding, they ought not to be charged with S. T. Stancell's indebtedness."

This exception cannot be sustained. Though there seems to be some conflict in the findings of fact, it was the duty of the administrator, when he had funds in his hands, to have discharged these debts. He could not sue himself—other creditors made their debts out of him by execution—he could have paid, and he was clearly chargeable. The defendants must be charged with these debts.

Eleventh Exception.—The defendants are charged (No. 108) with the value of certain personal property bought at the sale, 22 December, 1862, by the administrators S. T. Stancell and L. D. Gay, scaled as of the day of sale.

The defendants excepted, "For that the scale was applied as of the day of sale, when it should have been applied as of the day when the sale notes became due and collectible"—that is, six months later.

This exception cannot be sustained. The administrators had no right to purchase at all, and having done so, they were properly chargeable with the value of the property purchased by them on the day of sale.

Twelfth Exception.—This exception relates to the proceeds of the sale of land made by the administrators, with the will annexed, of Green

Stancell, deceased, and though the writer had entertained a
(218) different view of the construction of the statute empowering administrators, with wills annexed, to sell land devised to be sold, that question has been settled by the judicial construction put upon the statute by this Court, and the defendants' exception in relation thereto is disposed of in the plaintiffs' appeal.

The account will be modified in accordance with this opinion.

Modified and remanded.

PLAINTIFFS' APPEAL.

MERRIMON, J. The exceptions of the appellants in this appeal are founded, for the most part, on the supposition and expectation that this Court will overrule the case of *Stancell v. Gay*, 92 N. C., 455, disregard the judgment in that case and treat it as a mere nullity. We are not in the least inclined to do so. No good reason is assigned why we should. On the contrary, further scrutiny and reflection serve to strengthen our conviction of the correctness of the decision in that case, and it must remain undisturbed. Acts 1868-69, ch. 113, sec. 96; Bat. Rev., ch. 45, sec. 147; The Code, sec. 1525; *Staley v. Sellars,* 65 N. C., 467; *Bumpass v. Chambers,* 77 N. C., 357; *Houston v. Howie,* 84 N. C., 349; *Johnson v. Futrell,* 86 N. C., 122; *Leach v. Railroad,* 65 N. C., 486; *Little v. McCarter,* 89 N. C., 233; *Peoples v. Norwood,* 94 N. C., 167.

The exceptions, other than those disposed of by what we have just said, are immaterial, inasmuch as we are of opinion, the grounds of which we will presently state, that the *administrators cum testamento annexo* of the will of Green Stancell, deceased, had no power or authority to sell the land of their testator.

It appears that Green Stancell died in January, 1862, leaving a last will and testament, without appointing any executor thereof, which was proven in the proper court, and thereafter, on 3 March, 1862,
(219) Samuel T. Stancell and Lewis D. Gay were appointed administrators *cum testamento annexo* of that will, and they qualified as such. By it the testator disposed of a large estate, both real and personal. It contains nine clauses, seven of which dispose of slaves only, and the following is a copy of the eighth and ninth clauses:

"Item. It is my will and desire that all my landed estate shall be sold, and that the proceeds of sale shall be equally divided among all of my children (my grand-children, S. T. and M. D. Long, to have one share).

Item. I wish all of my perishable property to be sold to the best advantage, and the proceeds of sale, together with what money I have and is due me, shall be equally divided among my heirs."

Professing and purporting to act under and in execution of the first of these clauses of the will, and the statute (Rev. Code, ch. 46, sec. 40), taken in connection therewith the administrators named undertook, on 22 December, 1862, to sell the real estate of their testator, and to execute deeds of conveyance to the purchasers at the sale thereof sufficient to pass the title of the land to them respectively.

The appellees contend that such sale and deeds of conveyance were absolutely void, upon the ground that neither the will nor the statute, nor the will and the statute cited taken together, conferred upon these administrators power to sell the land of their testator.

The inheritance descended to the heirs-at-law of the testator, subject to be divested when the land should be sold as directed in the clause of the will first above recited, because he did not devise or dispose of it as land to any person—he simply directed that it be sold, without saying who should sell it, and that the proceeds of the sale be equally divided among all his children named, two of his grand-children to take one share. *Wood v. Sparks,* 1 D. & B., 389; *Ferrebee v. Proctor,* 2 D. & B., 439.

The testator failed to appoint an executor of his will, but if he (220) had done so, in the absence of some statutory provision allowing him to do so, such executor could not have sold the land, because at common law he had nothing to do with the real property of the testator, and he could not have authority to sell it, unless it had been devised to him to be sold, or unless the will conferred upon him power to sell it, and this appeared expressly or by reasonable and just implication from what appeared in the will itself. *Foster v. Craige,* 2 D. & B. Eq., 209.

In this case the will conferred no authority in terms nor by implication on the executor, if one had been appointed, to sell the land. It was not to be sold, nor was it necessary to sell it, to pay debts of the testator, nor was it to be applied or disturbed in the ordinary course of the duties of the executor; nor were the proceeds of the sale directed to constitute any part of a common fund to arise from the sale of real and personal property to be distributed or administered by the executor, if one had been appointed. On the contrary, one distinct clause of the will directed a sale of the land, and another directed a sale of the personal property, the two distinct funds to be so raised to be distributed as directed in the will. There is nothing in the will that suggests that the executor, if one had been appointed, should sell the land.

Nor was there any statutory provision prevailing at the time the will took effect that would have allowed an executor of it to sell it. That cited above (Rev. Code, ch. 46, sec. 40), did not confer such power.

It provided that "when *part* of the executors of any person making a will of lands, *to be sold by his executors,* die or refuse to take upon them the administration; or when *all* the executors die, or refuse to take upon them the administration; or when there is *no executor* named in a will *devising lands* to be sold, or to be sold by executors; in every such case, such executors as qualify, or having qualified, do survive, or the (221) administrator, with the will annexed, may sell such land," etc. As to executors, this provision embraces cases in which the will directs land *to be sold,* first, by *executors,* and *part* of them *die,* or *refuse* to take upon them the administration; secondly, in which they *all die* or *refuse* to take upon them the administration; thirdly, in which the will directs the *executor* or the *executors* to sell the land, and *none* are appointed. No one of these classes embraces the case before us. As we have seen, the will did not direct the executors to sell the land, if one or more had been appointed, nor could they have done so, for reasons already stated. The purpose of the statute was to provide for executing the power to sell land in cases where the will directed the *executors to sell it,* and part or all of them would not or could not join in the execution of the power conferred upon them, and where the executor or executors were empowered to sell it, but none were appointed to execute the power. The object was to supply the absence of the executor or executors in cases where they *were charged with the execution of a power* to sell land of the testator. *Hester v. Hester,* 2 Ired. Eq., 330; *Smith v. McCrary,* 3 Ired. Eq., 208.

It was no part of its purpose to authorize the administrator, *cum testamento annexo,* to execute a power the executor could not execute, if he were living; he could execute such power only in the cases where the executor or executors were all dead, and where the executor or executors were empowered to sell the land, and none were appointed to execute the power. It is not probable, nor to be merely inferred, that the Legislature intended that the administrator should execute powers not conferred upon the executor. This would, in effect, be to create a power and have it executed not created or contemplated by the testator. Moreover, when the will simply directs the sale of land, it descends to the heir, and the legal implication is, that he shall execute the power, if need be, (222) under the superintendence and direction of the proper court. *Foster v. Craige, supra.*

It is suggested that one clause of the statute recited above, declares, in terms, that "where there is no executor named in a will devising lands to be sold, or to be sold by executors," the administrator shall execute the power. In view of the connection of this clause, the inconvenience and evil to be remedied—its extent and nature, and the clear purpose

of the statute, the fair and reasonable interpretation of it is, that it is, to some extent, elliptical, and that, in effect, it should be taken as if it read, in terms, thus: "Or when there is no executor *named* in a will devising lands to be sold (*by the executor*), or to be sold by executors." If this is not the correct interpretation, then the case, where land was devised to be sold by the *executor,* and none was appointed, was not provided for, while the other cases were provided for with care and precision. If the purpose of the statute was to give the administrator authority in all cases to execute the powers of wills directing lands to be sold, in which no executor was named, then wherefore were the words, "or to be sold by executors," used at all in the clause just mentioned? Were these words inapt, pointless, mere surplusage, and intended to serve no purpose? This is not at all probable.

In adverting to the statute under consideration in *Vaughn v. Farmer,* 90 N. C., 607, the *Chief Justice* said: "It is true the amendment confers the power when no executor is named in a will devising lands *to be sold, or to be sold by executors;* but a larger operation given to these words than those used previously, which vest the power in a part of the executors, when the will directs land *to be sold by executors,* would result in the bestowal of more power upon the administrator than could be exercised by the executors, and this cannot be deemed the meaning of the law." The like view was expressed in *Council v. Averett,* 95 N. C., 131.

It thus appears that if the testator had appointed executors (223) of his will, they could not have executed the power to sell the land therein directed to be sold, and, therefore, the statute did not confer upon the administrators, *cum testamento annexo,* authority to sell it, and the sale thereof which they undertook and purported to make was inoperative and void.

Both the plaintiffs and defendants appealed. This is the plaintiffs' appeal from so much of the judgment as overruled certain of their exceptions to the report of the referee. As to these exceptions the judgment must be affirmed, and it must be modified in accordance with this opinion, and what is said and decided in the appeal of the defendants in the same case. To that end let this opinion be certified to the Superior Court according to law.

Affirmed.

Cited: S. c., 105 N. C., 481; *Saunders v. Saunders,* 108 N. C., 331; *Farabow v. Green, ibid.,* 343; *Gay v. Grant,* 116 N. C., 100; *Wool v. Fleetwood,* 136 N. C., 467; *Speed v. Perry,* 167 N. C., 129; *Broadhurst v. Mewborn,* 171 N. C., 402.

THE CHEMICAL COMPANY OF CANTON v. D. T. JOHNSON AND C. M. BUSBEE, TRUSTEE.

Contract—Evidence—Judge's Charge—Issues—Trust and Trustee—Costs.

1. Where a written contract is uncertain in its terms, or where it is disputed which of several papers executed by the parties embodies it, it is competent to prove what was done and said in the preliminary negotiations in order to arrive at the agreement.
2. If there is no material conflict in the evidence offered upon the trial of an issue, it is not erroneous to instruct the jury that, if believed, a verdict should be rendered accordingly.
3. Where the parties agree to the submission of an issue, they will be concluded by the verdict, though the issue may not be such as ought to have been submitted.
4. A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the fund to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property.

(224) THIS is a civil action which was tried before *Shipp, J.*, at April Term, 1888, of WAKE Superior Court.

On 17 January, 1885, the plaintiff, by its agent, one Vick, and the defendant Johnson, signed, in duplicate, the paper hereinafter set out as Exhibit A.

Johnson testified, however, that the portion printed in italics was erased—"scratched out"—in the copy retained by him, and this was done with the consent of the plaintiff's agent. Upon the receipt by plaintiff, at its place of business in Baltimore, of the copy forwarded them by its agent, it prepared and sent Johnson the paper set out as Exhibit B, as a more satisfactory form of the agreement. Johnson signed this, after erasing the provision therein similar to the one he alleged had been eliminated in Exhibit A.

Johnson testified that at the time he returned this last paper, he wrote the plaintiff stating his reasons for refusing to transfer the notes and mortgages he might take from his customers as collaterals.

The plaintiff denied having ever received such letter.

The correspondence resulting from the negotiations between the parties, and which is herein set forth, was admitted in evidence against the objection of defendant, who contended that it was in conflict with the stipulations in Exhibit B, and that the promise made or implied therein being

without consideration, could not be made the basis of a contract. They also objected to the admission of Exhibit A, as being too vague, etc.

The incorporation and organization of the plaintiff was admitted, as was also that the defendant Johnson received 40 tons of guano from the plaintiff, under the contract between them, and that he sold the same. He subsequently executed a deed of assignment to the de- (225) fendant C. M. Busbee, in trust to sell and apply the proceeds of sale to certain debts therein mentioned, and it appears that the defendant Busbee now has in his hands, as such assignee, the sum of $965.54 in money, and some notes, proceeds derived from the sale of guano shipped defendant Johnson by plaintiff, and sold by said Johnson as aforesaid.

After hearing the evidence, his Honor charged the jury as follows, viz.: "If the jury believe the testimony in this case, taking it altogether, the plaintiff is entitled to recover a verdict declaring Mr. Busbee to be a trustee for the benefit of plaintiff," to which charge the defendants excepted.

The following issue was submitted to the jury, viz.: "Does the defendant, C. M. Busbee, hold the fund arising from the sale of the guano, mentioned in the complaint, in trust for the plaintiff?" who, for their verdict, answered, "Yes."

EXHIBIT "A."

RALEIGH, N. C., 17 January, 1885.

We have this day sold to Mr. D. T. Johnson, of Raleigh, N. C., the following brands of fertilizers, on terms and conditions below, viz.:..... tons of Baker's Standard Guano at $29.50 per ton, 2000 lbs. Delivered at Raleigh, N. C., in carload lots, or as much additional as may be mutually satisfactory.

We will deliver the above goods free on board at Raleigh, N. C., in bags, bbls. Settlement to be made by note, payable 15 November and 15 December, 1885, at Baltimore.

On 1 May, next, or sooner if possible, agrees to deliver to us or our order, notes of all purchasers to whom sales of these goods may have been made, and for the gross amount of the sales of the same, to be held by us as collateral security for payment of notes as stated above, and all of the above mentioned goods as well as the proceeds therefrom are to be held in trust by....., for the pay- (226) *ment of ....., notes to us. And all proceeds of said goods as collected must first be applied to the payment of..... notes due us, whether the same have matured or not.*

He is to pay for all goods shipped on his orders to amount mentioned in contract, and we to be at no expense whatever after delivery of goods as agreed.

The collaterals will be returned in time for collections. In sending the same to the company, place nominal value of $25 on each package. This contract subject to suspension by fire or unavoidable accident at seller's works, or storage warehouses.

The above contract subject to approval of home office.

(Signed in duplicate.)

CHEMICAL CO. OF CANTON,
Per S. W. VICK, *Agent.*

I accept the terms and conditions of above contract.

D. T. JOHNSON.

EXHIBIT "B."

BALTIMORE, 17 January, 1885.

We have this day sold to Mr. D. T. Johnson, of Raleigh, N. C., the following brands of fertilizers, on terms and conditions named below, viz.: 10 tons of "Baker's Standard Guano," at $29.50 per ton, 2,000 lbs., or as much additional as may be mutually satisfactory.

We will deliver the above goods free on board at Raleigh, N. C., in bags. Settlement to be made by notes, payable 15 November and 15 December, 1885, at Franklin Bank, of Baltimore.

D. T. Johnson to pay for all goods shipped on his orders to amount mentioned in contract, and we to be at no expense whatever after delivery of goods as agreed.

The collaterals will be returned in time for collection. In send-
(227) ing same to the Company, place nominal value of $25 on each package.

This contract subject to suspension by fire or unavoidable accidents at seller's works or storage warehouses.

Relative to this contract, no agreement or provision outside of these embodied in the contract is recognized or confirmed, unless it is a matter of arrangement signed in writing.

The above contract subject to approval of home office.

(Signed in duplicate.)

CHEMICAL CO. OF CANTON,
C. G. Heim.

I accept the terms and conditions of above contract.

D. T. JOHNSON.

EXHIBIT "C, No. 1."

RALEIGH, N. C., 19 January, 1885.

Chemical Company, Canton:

GENTLEMEN: I assigned a contract with your Mr. Vick which you doubtless have ere this, which, if satisfactory, you can assign and return.

The only difference is in the sending of notes to you. I have no objection at all, only some I sell on open account and take no notes. Am willing to send what I have. I do not expect to sell but a small quantity. Hoping to hear from you soon. I am respectfully yours,

D. T. JOHNSON.

BALTIMORE, 21 January, 1885.

D. T. Johnson, Esq., Raleigh, N. C.:

DEAR SIR: We have your favor of 19th inst., and note contents. We have the contract made with our Mr. Vick, but it would be more satisfactory to us if you would sign and return to us the contract we sent you for ten tons of "Baker's Standard Guano." In regard to the notes, you can send us what you take, and assign us a list (228) of the open accounts which will be satisfactory to us. Yours truly,

CHEMICAL CO. OF CANTON.

K.

RALEIGH, N. C., 26 January, 1885.

Chemical Company of Canton:

Yours in regard to contract to hand. We will try and carry out the spirit and letter of contract—do not expect to make large sales, but will do what we can with parties who we consider entirely safe.

The balance due by D. T. J. & Co., will be paid on or about 15 February. We have granted an indulgence on some paper due, until that time; the weather has been so bad, business has been at a stand still. It seems to be clearing up now. Yours, D. T. JOHNSON.

BALTIMORE, 28 January, 1885.

Mr. D. T. Johnson, Raleigh, N. C.:

DEAR SIR: We note your favor of the 26th inst. You may not fully have considered our last letter to you. What we requested was that you sign and return to us the contract that we sent to you from this office—we would then send back to you the one you gave Mr. Vick. The contract we sent you is for ten tons, or as much more as may be mutually satisfactory, while Mr. Vick's is for no quantity at all, and virtually no contract. Your compliance will oblige. Yours respectfully,

CHEMICAL CO. OF CANTON.

A.

BALTIMORE, 2 February, 1885.

Mr. D. T. Johnson, Raleigh, N. C.:

DEAR SIR: Your contract properly signed is to hand. There is one thing about it we can't agree to, you have crossed out that portion (229) which says you are to give farmers' notes as collaterals. The contract you made with Mr. Vick and also last year's, called for collaterals; so we have crossed out your scratches and expect you to send what farmers' notes you take, and those from whom you take no notes we will want a list of. Your car will be shipped tomorrow.

Yours truly, CHEMICAL CO. OF CANTON.

RALEIGH, N. C., 7 February, 1885.

Chemical Co. of Canton, Baltimore:

GENTS: Please ship to Capt. B. M. Collins, Ridgeway, N. C., twenty (20 tons) Baker's Standard Guano, and oblige,

D. T. JOHNSON.
W.

BALTIMORE, 9 February, 1885.

Mr. D. T. Johnson, Raleigh, N. C.:

DEAR SIR: Your favor of the 7th to hand. We have booked your order for 20 tons and we will give it our attention. We suppose you have received ours of the 2d, and note what we say about collaterals.

Yours truly, CHEMICAL CO. OF CANTON,
MARSDEN.

BALTIMORE, 10 February, 1885.

Mr. D. T. Johnson, Raleigh, N. C.:

DEAR SIR: We inclose corrected contract which agrees with our mutual understanding of the same. Please sign and return to us. We regret to trouble you in this; you will remember that contract signed by you was altered by crossing out a portion of it. Your prompt attention will oblige. Yours truly, CHEMICAL CO. OF CANTON,
W. J. D.

(230)

BALTIMORE, 14 February, 1885.

Messrs. D. T. Johnson & Co., Raleigh, N. C.:

GENTLEMEN:—As previously directed by you we have today drawn on you at sight for $301.97, the balance due on your note that matured 1 January, 1885. Please protect same and oblige. We sent to you a few days since for your signature our contract for this year drawn in

a more regular form and more comprehensive than previous one. Would you kindly sign and return it to us as requested in our letter that enclosed the same. Yours respectfully,

CHEMICAL CO. OF CANTON.

RALEIGH, N. C., 18 February, 1885.

Chemical Co. of Canton:

GENTLEMEN:—Yours to hand and noted. Will honor draft. We told your Mr. Vick that we would not sign a contract to deliver farmers' notes as collateral for what we sold, and gave as a reason this: that we sold a good deal on open account and did not take notes, hence, not having notes, we could not give them; told him and you that we would send you what we did take and give you a list of purchasers. Hoping this will be entirely satisfactory. I remain, as ever,

D. T. JOHNSON.

BALTIMORE, 19 February, 1885.

Mr. D. T. Johnson, Raleigh, N. C.:

DEAR SIR: Your letter of the 18th inst. to hand, stating you would send us what notes you did take and give list of purchasers of balance. This is satisfactory, and we have attached this letter to the contract. Awaiting further favors, We are yours truly,

CHEMICAL CO. OF CANTON,

W. J. D.

Judgment was rendered on the verdict for the plaintiff, from (231) which the defendant appealed.

A. W. Haywood and E. R. Stamps for plaintiff.

A. Jones, F. H. Busbee and C. M. Busbee for defendant.

MERRIMON, J. The plaintiff alleges, in its complaint, the written agreement set forth above as "Exhibit B," as modified by the other writing set forth above as "Exhibit C, No. 1"; and its alleged cause of action is founded on that agreement and alleged breaches thereof in respects specified. The defendants deny the agreement as alleged, and the evidence produced on the trial bore mainly on the issue raised by the pleadings in that respect.

The exceptions to the admission in evidence of the orginal paper writing and letters, cannot be sustained. They were competent evidence of the principal parties themselves to show that they executed, accepted, assented to and acted upon the agreement as alleged. Each of these

writings tended more or less strongly to prove that the parties did so, and the mere fact that they went to show how, when and why the parties came at last to assent and consent to such agreement, cannot destroy their competency as evidence. The first agreement, "Exhibit A," was not acceptable to the parties—the objections to it tended to show that these were obviated in the substitution and adoption of "Exhibit B," as modified by "Exhibit C, No. 1," and the letters went to show the nature and extent of the objection on both sides, and that these were removed and the agreement was accepted and concluded.

The evidence of the defendant Johnson was not in any material respect in conflict with that produced by the plaintiff; on the contrary, it was substantially in harmony with it. He testified as to his objection to "Exhibit B," and other evidence—the correspondence—showed
(232) that his objection was removed, and he expressed his willingness to do as he said in "Exhibit C, No. 1," he would do.

There was no material conflict in the evidence. Accepting it all as true, the agreement was as alleged in the complaint, and in all material respects as alleged it had been interpreted and its meaning and effect settled by this Court in *Chemical Co. v. Johnson*, 98 N. C., 123.

The issue submitted to the jury was very general in its bearing upon the pleadings, and scarcely a proper one; but as there was no objection to it, it must be taken that it was submitted by consent of the parties; they were content to reach the merits of the matters of fact at issue through and by it, and they must be concluded by the verdict.

The instruction of the court to the jury was very broad and comprehensive, but it does not appear to be erroneous. Taking the evidence altogether as true, the verdict was a proper one. It was not such in its bearings upon the issue as required that it be presented to the jury in various conflicting views of it; it was in substance consistent and harmonious, and fit to be considered and taken altogether as true or false.

The exception to the instruction is very indefinite—quite as broad as the instruction, and comprehensive as the issue. No particular error is assigned. It is questionable whether or not it could be considered.

Judgment affirmed.

PLAINTIFF'S APPEAL.

The court in its judgment allowed the appellee, Busbee, certain commissions for selling the guano to which there was no objection, and also, "the sum of one hundred dollars to pay counsel fees," to be paid out of the fund mentioned. To this allowance the plaintiffs excepted and appealed.

This court decided in *Chemical Co. v. Johnson,* 98 N. C., 123, that the plaintiff sold the guano mentioned to the defendant Johnson, coupled with the trust, that the latter would sell it and apply the (233) proceeds of the sale to the payment of his several promissory notes made to the plaintiff, coming due successively at different times, for the purchase money thereof. Johnson therefore had no right or authority to sell the guano to the appellee, Busbee, trustee, for the purposes specified in the deed of trust made to him; and so neither the guano nor the proceeds of the sale thereof became affected by the trust created by that deed, nor did they become part of the trust fund to be administered by the trustee; but they were to be applied to the payment of the plaintiff's notes mentioned above.

The plaintiff did not desire that the appellee trustee should have or sell or in any way interfere with the guano. On the contrary, it opposed his interference with the claim to it, and insisted upon its right to have it applied to the payment of its claim against Johnson. The appellee denied its claims, and thus drove it to bring this action to assert its rights. The appellee made defense in good faith, not at the request or instance of the plaintiff, but against its will, and for the benefit of those creditors of Johnson whose debts were provided for and secured by the deed of trust, and to prevent and defeat the plaintiff's recovery. The counsel employed and paid by the appellee were employed for that express purpose, and in no sense for the benefit or advantage of the plaintiff. Shall the latter be thus required to pay the counsel of the defendant to defeat its right and its action?

But it is said it was the duty of the trustee to resist the plaintiff's demands, and he ought in doing so to be allowed his reasonable outlay for counsel. This may be granted, but at whose cost? Surely not at that of the plaintiff, whose right he was contesting, but plainly at the cost of the creditors interested in increasing the trust fund out of which their debts were to be paid.

The appellee in good faith, under a misapprehension of his (234) right to do so, sold the *guano,* and had in hand the proceeds of the sale. For his services in selling it, he was allowed compensation, and the plaintiff did not object, upon the just ground, no doubt, that it ought to pay for such services as it had the benefit of, but such proceeds of sale were no part of the trust fund, nor were they affected by the trust the appellee was charged with by the deed, certainly, as they were insufficient to pay the claims of the plaintiff.

We cannot hesitate to decide that the allowance complained of was unwarranted, and the judgment must, as to it, be reversed.

It is further assigned as error, that the court directed the trustee to pay his part of the costs of this action out of the fund in his hands referred to above. We do not so understand the judgment: it directs such costs to be paid out of any funds in his hands as trustee of the deed of trust. Otherwise, there would be error. The appellee is not a trustee of an express trust as to the plaintiff in this action, and is not entitled, as against him, to the benefit of the statute. The Code, sec. 535. There is Error.

Cited: R. R. v. Goodwin, 110 N. C., 176; *Love v. Gregg,* 117 N. C., 469; *Wool v. Bond,* 118 N. C., 2; *Nelson v. Ins. Co.,* 120 N. C., 305; *Woodbury v. Evans,* 122 N. C., 781; *Knights of Honor v. Selby,* 153 N. C., 208; *Roberts v. Dale,* 171 N. C., 468.

JOHN F. SPENCE AND GEORGE W. ROSS v. JOHN B. SMITH AND WILLIAM E. SMITH.

Contract—Assignment—Purchaser.

S. and M. entered into a contract whereby the latter sold and conveyed to the former the right to make and vend a patented article within certain prescribed territory, with a provision that if S., after using due diligence failed to realize therefrom a certain sum by the time the notes given for the purchase money became due, the contract should be void, and thereupon S. executed the notes, which, before maturity, M. assigned to the plaintiffs without endorsement: *Held*, that the assignees took the notes subject to the contract, and all equities arising therefrom.

(235) THIS is a civil action, which was tried before *Connor, J.,* at Spring Term, 1886, of GUILFORD Superior Court.

The defendants executed to W. H. McDaniel their two single bonds, each for $65, dated 10 August, 1882—one of them to come due nine months, and the other twelve months from the date thereof. The plaintiffs became the owners of these bonds without endorsement thereof. They were executed in connection with and as part of an agreement in writing under seal, between the said McDaniel and the defendant, John B. Smith (the other defendant was surety to the bonds), whereby the said Smith purchased a *patent right bee hive,* and agreed to make and sell such bee hive within a specified territory, and, among other things, the parties mutually covenanted as follows: "And it is agreed that the party of the second part (the defendant, John B. Smith) is to use due diligence in the manufacture and sale of said bee hive, with the right

of use for the same, and the county for the same, and on failure to make one hundred and ninety-five dollars by the sale of said patent by the time said notes become due this contract is null and void. And the deed of said territory, with all other papers, with what has been made by selling said patent, are to be delivered to the party of the first part, and said notes or one hundred and ninety-five dollars in cash shall be delivered to the party of the second part."

This action was begun by the plaintiff in the court of a justice of the peace to recover from the defendant the money alleged to be due upon the two single bonds above mentioned. In the Superior Court formal pleadings were filed. The defendants in their answer, admitted the execution of the bonds; alleged the agreement mentioned; that the defendant John, had in all things on his part faithfully ob- (236) served and performed its provision and requirements; that he had made diligent effort to sell the patent right, etc., etc., and the said McDaniel and the plaintiffs, his assignees, had not, etc., etc.

The issue, of which the following is a copy, was submitted to the jury, to which they responded as indicated at the end thereof: "Did the defendant use due diligence, under the contract, in the manufacture and sale of the bee hives and the patent therefor?" Answer: Yes.

To sustain the issue the defendants introduced the defendant, John B. Smith, as a witness on his own behalf, who testified as follows:

"I signed the notes; this contract was made at the time the notes were given as a part of this contract; the members of the firm of McDaniel & Co. were all present, and Cartland, one of the firm, and the secretary, signed the contract in their presence.

"I did not go to Amherst County, Virginia. I did not go because McDaniel told me I need not go. I went to Rockingham County and Guilford and tried to sell. These counties had not been sold. He (McDaniel) said to sell in territory that was not sold, and if I could not make the money to return the papers. It was about one and a half or two months after the contract before I came here to commence work. I went to Rockingham County and was there a week, and I made no sales. I told Mr. McDaniel that I could not sell, and he said go and try again. I went, and when I came back he was gone. I have not seen him since. I saw Cartland; he said McDaniel had taken the notes off and sold them. I made no bee hives. I had three bee hives. I had one in Rockingham. I bought them. Had one at my father's; one in the upper end of Guilford. I took one with me to Rockingham. I brought it back. I carried it to Reidsville and other places to show."

W. E. Smith testified that he signed the notes as surety for his son, and was present when the contract was signed. John B. (237)

Smith went from home and was gone, as he said, for the purpose of selling the hives and patent.

The foregoing testimony of John B. Smith and William E. Smith, and the contract attached to the answer signed by the parties, was all the evidence offered, the plaintiffs having offered no evidence except the notes themselves.

Plaintiffs, by way of demurrer to the evidence, insisted that taking all the evidence offered and put in by the defendants to be true, and plaintiffs admitted that it was all true, that as a matter of law the defendants had not used due diligence in the manufacture and sale of the bee hives and in the sale of the patent, and that his Honor should so instruct the jury, and direct them to return their verdict in the negative to the issue.

This his Honor refused, and plaintiffs excepted.

His Honor then instructed the jury that it was for them to decide from all the evidence and facts in the case whether the defendant had used due diligence. Plaintiffs excepted.

Judgment was given for defendant, and plaintiffs appealed.

F. W. Whitaker (L. M. Scott, filed a brief) for plaintiffs.
No counsel for defendant.

MERRIMON, J., after stating the case: The plaintiffs took the bonds sued upon without endorsement before they matured, and hence they hold them subject to the rights of the defendants, under the agreement mentioned, on which they rely, and such equities as they may have in respect to the bonds.

The plaintiffs having on the trial admitted the evidence to be true, it may be granted that the court should have instructed the jury that the principal defendant had or had not exercised "due diligence in
(238) the manufacture and sale of bee hives," etc., accordingly as it may have been of opinion one way or the other, but any error in this respect was cured by the verdict of the jury to the effect, that he had exercised such diligence. Fairly interpreting the evidence, this defendant was reasonably, and therefore duly, diligent. He prepared himself with three specimen bee hives for exhibition in his offorts to make sales. He made such efforts in two counties. In one of these counties he did so for the time of a week—had with him a specimen hive—exhibited it at several places—failed to make sales at all, and reported this fact to McDaniel, who instructed him to "try again." He did so without success, and when he returned McDaniel "was gone," and he learned from one of his firm that "he had taken the notes off and sold them." We think that such effort to make sales, accompanied with

such discouragement, was due diligence as contemplated by the agreement. It would have been worse than idle for the defendant to manufacture "bee hives" when he could not sell them. Surely he was not expected to make fruitless efforts indefinitely. *Spence v. Clapp*, 95 N. C., 545.

The evidence showed that active, diligent effort was made by the defendant. If the appellants intended to insist, as it seems they did, that the detail of such effort would show the contrary, then they should have cross-examined the defendant when he was examined on the trial in his own behalf, and they might have produced other evidence to the contrary, if they could.

Taking the evidence as produced, and the just inferences that might justly be made from it, there was due diligence.

Judgment affirmed.

(239)

GRAY WASHINGTON v. RALEIGH & GASTON RAILROAD COMPANY.

Common Carrier—Negligence—Agency—Contract.

1. A common carrier who enters into a *special contract* to transport passengers or freight to a point beyond its own line which can only be reached by another line, thereby constitutes the latter its agent in the performance of the contract, and will be held liable for any damages resulting from the negligence of such agent.

2. Where, for the purposes of facilitating transportation, connecting lines of common carriers enter into a general arrangement whereby they mutually become forwarding agents, the liability of the several carriers for damages resulting from negligence is confined to such as may occur by the conduct of its own agents or servants on its own line.

THIS is a civil action, which was tried before *Shipp, J.*, at Spring Term, 1888, of WAKE Superior Court.

On an application to an authorized agent of the defendant company by C. W. Hoover, in behalf and by authority of the members of a colored fire association, known as the Bucket and Ladder Company of the city of Raleigh, to engage an excursion train to run from said city to the town of Warrenton and return, the following answer was received bearing date 25 May, 1887:

"C. W. Hoover, Esq., Box 329, Raleigh, N. C.:

"DEAR SIR: In response to your favor of various dates, 1887, we will charter you three passenger coaches and one baggage car to run by special

train, to run between Raleigh and Warrenton, leaving Raleigh on 13 June, 1887, returning leave Warrenton on 13 June, 1887, for $200 (two hundred dollars), to be paid, $30 on or before 25 May, 1887, and $170 13 June, 1887, before departure of train from Raleigh. The conditions on which this charter is made are as follows: No greater
(240) number than sixty people are to go in ony one car, nor will you be permitted to sell tickets at any point except Raleigh, said sales to be good only on your excursion; nor will you be permitted to sell any ticket on your return trip. Excursionists must return by same train or car in which they are carried, otherwise full fare will be charged. If special train is run the railroad company does not agree to adhere to any special schedule unless notice is given when this contract is signed in time to enable proper schedule to be prepared; nor will this company be held responsible for the baggage of your passengers. Upon return of this letter with your signature accepting conditions as above, accompanied by $30 forfeit (as a guarantee that you will carry out your part of this agreement), arrangements will be completed as noted.

"F. W. CLARK,
"General Passenger Agent."

"I accept the above conditions and enclose $30.

"C. W. HOOVER."

"If convenient to furnish additional coaches, charge will be $26 each, to be paid before departure of train from Raleigh. F. W. C.
"B."

"Received the $30 forfeit as herein mentioned. F. W. C.
"B."

"25 May, 1887. J. B. MARTIN,
"Auditor."

The defendant railroad does not run to Warrenton, but connects at one of its stations nearest to the town with an independent line,
(241) known as the Warrenton Railroad, which runs thereto over a track of three miles in length.

During the pendency of the negotiations for the excursion, and previous to the day of its departure, a correspondence took place between the agents of these companies which, and the result arrived at as seen therein, were as follows:

"RALEIGH, N. C., 11 May, 1887.

O. P. Shell, Warren Plains:

We wish to contract for an excursion, Raleigh to Warrenton. Will the management of your road accept $5 for engine and $5 per coach for train passing over Warrenton Railroad from Warren Plains to Warrenton and return? F. W. CLARK."

"WARREN PLAINS, N. C., 19 May, 1887.

To F. W. Clark:

President of Warrenton Road accepts your terms of $5 per car, but directs me to say that our engine can haul only three passenger coaches at once, hence would like for you to send your engine through to Warrenton. O. P. SHELL."

"RALEIGH, N. C., 7 June, 1887.

W. J. White, Warrenton Railroad, Warrenton, N. C.

DEAR SIR:—Referring to my telegraphic correspondence of 19 and 24 May with Mr. Shell, of your road, I presume Mr. Shell conferred with you in regard to the excursion discussed. We have arranged with the colored fire company of Raleigh to run an excursion train, consisting of three passenger coaches and one baggage car, Raleigh to Warrenton and return, on 13 June next. These parties also have an option on four coaches in addition to the above mentioned, and the train may consist of from four to eight coaches. It has been arranged by (242) the superintendent of the R. and G. road to handle this train only between Raleigh and Warren Plains, since it is deemed unsafe for our engine to go over your road. In making this charter we have been governed by the telegram from Mr. Shell under date of 19 May, and will report collections to you at the rate of $5 per car for such number of coaches as may constitute the excursion train. This amount to cover the transportation of not more than sixty persons to the car, two persons under twelve to be considered as one. Captain Smith will confer with you in regard to the matter of schedule, and I ask you that you advise me that the necessary arrangements will be made for the handling of this train between Warren Plains and Warrenton.

Yours truly, F. W. CLARK, G. P. A."

"WARRENTON, N. C., 8 June, 1887.

F. W. Clark, G. P. A., Raleigh, N. C.

DEAR SIR:—Your favor of the 7th is received today. Mr. Shell conferred with me relative to the intended excursion, and I now confirm his

telegrams to you. We can haul three coaches at a time, but as our road is only three miles long, we can soon put them here and back to Warren Plains. Yours truly, WM. J. WHITE,
President W. R. R."

"R. AND G. R. R. SPECIAL TIME TABLE

To be run between Raleigh and Warren Plains, 13 June, 1887, to take effect Monday, 13 June, 1887, 7:45 a. m."

The plaintiff, under these conditions, became a passenger on the excursion train, and while in a coach on the track of the Warrenton Railway suffered the injury, for the redress of which he brings this action against the defendant, caused, as he alleges and as the jury find,
(243) by mismanagement and negligence of the officers and servants of that company, without that concurring negligence on the part of the plaintiff which would exonerate it from liability therefor. The controversy is as to the responsibility of the defendant company, under these arrangements, for the misconduct (and consequent damage) of the officers and agents of the short connecting line, and the instructions asked for the defendant all proceed upon the idea of a sole responsibility resting upon the latter. The instructions asked and refused, in substance and condensed in form, are these:

1. If the companies are separate and independent corporations, the disaster having occurred on the Warrenton Railroad, managed by its officers, the first issue, "Was the plaintiff injured by the default and negligence of the defendant?" should be answered by the jury, "No."

3. That there is no evidence of negligence on the part of the defendant's employees, or of any injury resulting therefrom.

4. If the contract was that the defendant should run the train to Warrenton, it did not impose on it a liability for the negligence of the connecting company.

5. There is a fatal variance between the allegations in the complaint and the facts in proof.

8. One company can only become responsible for the defaults of another by express agreement, and the issuing of a ticket securing a passage over another line is not evidence of such agreement, and none has been offered.

9. If the injury was suffered on the Warrenton Railroad, the jury must say to the first issue "No."

. . . . . .

14. It is the duty of the railroad company to exercise the highest degree of care in providing for the safety of passengers over its own

track, yet this duty terminates when they are delivered to an independent connecting line, and there is no evidence that defendant's em-
ployees had any right to look after or run the train on the War- (244)
renton road.

17. There is no evidence of defendant's culpability, and if held to be culpable in law, the damages recoverable are only for a breach of the contract to convey the plaintiff to Warrenton, and no damages have been shown.

20. If the plaintiff bought his ticket from Hoover or from the fire company, the plaintiff must look to him for compensation, and not to defendant.

It was in evidence that the passengers were all safely conveyed to Warren Plains station, and there it became necessary to divide the train and carry the coaches in separate sections to Warrenton; that while the first section was at Warrenton, stationary, the second section came at a speed of twenty-five or thirty miles an hour, and there being no air-brakes on it nor brakemen sufficient to arrest its rapid motion, it came in violent collision with the first, both being smashed, and the plaintiff was injured.

The testimony was conflicting as to the condition of the plaintiff from drinking, and whether he was in any default or wanting in self-care by which the injury could have been averted.

The instructions asked for the defendant and given are substantially as follows:

1. The defendant's giving authority to Hoover to sell the plaintiff a ticket for carriage to Warrenton and back does not constitute a contract with the plaintiff that defendant would be responsible for the negligence of the other company.

6. If defendant's agent told Hoover his company could not carry the excursion farther than to Warren Plains, and at Hoover's request the agent made a contract with the Warrenton company for the additional transportation, the issue of negligence must be found in favor of the defendant.

7. If the understanding with Hoover was that defendant should (245)
manage the train on its road, and the other company manage it after passing upon its track, and thus complete the carriage to the terminus agreed on, the defendant is not liable.

15. While Shell may be an agent of the defendant at that station, to receive freight and issue tickets, he might also exercise an agency for the other company, and his acts in the latter capacity would not be binding on the defendant, and there is no evidence that, in what he did in

respect to the excursion train in entering upon and passing over the Warrenton track, he was acting for the defendant.

21. If any one warned the plaintiff of his danger and advised him to go into the other coach where, if he had been, he would have avoided injury, then he did contribute to his own injury.

The court further charged that if the jury shall believe from the evidence that C. W. Hoover, acting for the said fire company, contracted with the defendant for the excursion train to run from Raleigh to the town of Warrenton and return, and that the defendant made a special contract with the Warrenton Road to take the excursion train from Warren Plains to Warrenton and return, and that the said Warrenton Road acted as the agent of the defendant in carrying said excursion train from Warren Plains to the town of Warrenton and return, and the plaintiff was injured by reason of the negligence of the said Warrenton Road, then the plaintiff is entitled to recover, provided plaintiff did not contribute to his own injury. The defendant excepted because there was no evidence of any partnership or agency to bind the defendant.

There was a verdict for plaintiff, and from the judgment rendered thereon, the defendant appealed.

(246) *Armistead Jones for plaintiff.*

J. B. Batchelor, John Devereux, Jr., and E. C. Smith for defendant.

SMITH, C. J., after stating the case: The exceptions are intended to comprehend all the instructions which, when requested, the court declined to give, and such as were given outside of them without a specification of the errors they are supposed to contain.

In our opinion the charge was quite as favorable to the defendant as its counsel could reasonably require, and in some particulars more so. But as the plaintiff, having secured a verdict, does not complain, we shall not review them.

The principal contention, and to this central inquiry the various matters in controversy all tend, is as to the scope and effect of the contract for the excursion beyond the defendant's own line, and its liability for the consequences of negligence upon another connecting line.

While it is true that an arrangement entered into among roads, which by their union form a route between distant *termini* to facilitate transportation, each acting as forwarding agent for the others at their points of connection, does not of itself, and especially when the common liability is disclaimed in the freight bill or passenger ticket, render each liable for the default of the other, as is held in *Phifer v. R. R.*, 89 N. C., 314; *Weinberg v. R. R.*, 91 N. C., 31; *Knott v. R. R.*, 98 N. C., 73, it is

not less well settled that where there is a *special contract* to transport to a point beyond the contracting *company's line,* the companies whose services are required in the execution of the contract become an agency, severally, of the first in fulfilling its terms and giving it effect.

In a note to the case of *Queenby v. Vanderbilt,* quoted from 17 N. Y., 306, in Thompson, Carriers of Passengers, at page 423, in which it is decided that one of several connecting lines may bind itself for a safe transportation over the other lines, and whether such is (247) the contract must be determined upon the evidence, the author adverting to repugnant rulings in different courts, says: "The weight of authority is that if a carrier *undertakes to carry* a passenger and his baggage to a certain destination, he is responsible for his safety and that of his baggage as carrier throughout the whole distance, whether the franchise and means of conveyance, where the injury or loss occurs, be owned or controlled by him or some other carrier," and a very large number of cases are referred to as so ruling. This liability is the legal result of a special contract to convey between two designated points, and to provide adequate means of conveyance over the route between them, and such, in our opinion, is very clearly the contract in the present case, and so it seems to have been understood between the parties.

A single charge is made for the whole trip, and the train is to pass over both roads in reaching the agreed terminus—the defined conditions attached to the entire route—a separate arrangement is made between the two companies for the carriage by the Warrenton company over its short line, and a price stipulated to be paid by the other for this necessary service. Besides these evidences of the common understanding of the contract, its terms are direct and specific themselves, and as the defendant agreed to run the train to Warrenton, necessarily it must make some arrangement with the other line in order to fulfill it.

The defendant's liability, therefore, commensurate with their agreement, covers the entire transportation, and the Warrenton company and its agents become *pro hac vice* the defendant's agents in consummating it.

It was, therefore, entirely proper to charge in the complaint the disaster as proceeding from the defendant's negligence, the negligence of the employees being in law the negligence of the employer.

So, too, the common law imposes upon a common carrier con- (248) veying passengers under a special contract, which admits to the coaches such as may pay, an obligation to carry safely and to use proper care and vigilance in the management of the train.

We find no error, and must affirm the judgment.

Affirmed.

Cited: White v. R. R., 115 N. C., 635; *Carleton v. R. R.,* 143 N. C., 50.

T. E. YELVERTON v. DEMAS COLEY.

Reference—Exceptions—Trial by Jury.

Either party to a compulsory reference has a constitutional right to have any issue of fact, which was or ought to have been passed upon by the referee, submitted to a trial by jury; but to avail himself of this right he should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined.

CIVIL ACTION tried before *Shipp, J.*, at April Term, 1888, of the Superior Court of WAYNE County.

The action was brought for the possession of personal property to January Term, 1888, of the Superior Court of Wayne. At March Term, following upon a suggestion of the plaintiff and admission of the defendant that its trial would require the examination of a long account, the judge presiding, against the opposition of the defendant, made a compulsory reference for the trial thereof to a referee under The Code. At April Term, 1888, the referee having filed his report, the plaintiff moved for judgment confirming the same. The defendant opposed the motion of the plaintiff, and made to the court the following written motion and exceptions:

"The defendant excepts to all the findings of the referee on the issues of fact arising on the pleadings in this action except that whereby
(249) it is found that the defendant is entitled to the possession of the horse, colt, cotton planters and plows mentioned in the pleadings and report of the referee. And as to all the other issues of fact, the defendant hereby respectfully demands that the same may be tried by a jury." This was signed by counsel for defendant. His Honor refused to grant the motion of the defendant, unless he would specify the particular item or items of the account accompanying the report objected to by the defendant, or state what issues he wanted to submit to the jury arising on the exceptions. The defendant declined to modify his motion, and insisted upon the alleged right to have the issues of fact arising on the pleadings submitted to a jury. His Honor thereupon rendered judgment confirming the report. Defendant excepted to that part of the judgment which adjudged that the plaintiff recover of the defendant the corn, fodder, cotton and cotton seed specified in this action, and the costs of this action, and appealed therefrom.

W. R. Allen for plaintiff.
No counsel for defendant.

DAVIS, J., after stating the case: It was admitted that the examination of a long account would be required in the trial of the action, and it was within the power of the court, under section 421, subsec. 1 of The Code, to order a compulsory reference, but this compulsory reference could not deprive either party of his constitutional right to have the issues of fact arising on the pleadings tried by a jury, unless waived; and a construction has been put upon section 421 which makes it harmonize with the constitutional right of trial by jury, by declaring that, although a compulsory reference may be ordered, yet when the report of the referee is made, and the material issues are eliminated by the exceptions thereto, "the issues of fact thus joined by the pleadings, report and exceptions, shall be submitted to the jury if demanded in apt time." *Atkinson v. Whitehead,* 77 N. C., 418, and the (250) cases there cited.

The purpose of the reference is to facilitate the trial, and any exception to a finding of fact by the referee presents an issue which either party under a compulsory reference has a right to have passed upon by a jury. *Currie v. McNeill,* 83 N. C., 176, and cases cited.

If this were not so, the tedious delay and confusion attending the investigation and examination of a long account by a jury, which it was the purpose of the reference to avoid, would be as great after the reference as before, thus rendering the reference a mockery.

Either party to a compulsory reference has a right, by definite and specific exceptions, to have any issue of fact passed upon by the jury, but these exceptions must be definite, and present distinctly each finding of fact by the referee to which exception is taken, and they must be confined to such controverted facts as were passed upon or required to be passed upon by the referee.

In this way every constitutional right of trial by jury is secured in perfect harmony with the provision in section 421 of The Code. *Overby v. Fayetteville B. and L. Assn.,* 81 N. C., 56; *Carr v. Askew,* 94 N. C., 194.

Affirmed.

Cited: McDaniel v. Scurlock, 115 N. C., 298; *Driller Co. v. Worth,* 117 N. C., 520; *Ogden v. Land Co.,* 146 N. C., 445; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *York v. McCall,* 160 N. C., 279; *Keerl v. Hayes,* 166 N. C., 555; *Baker v. Edwards,* 176 N. C., 231; *Armstrong v. Polakavetz,* 191 N. C., 734.

(251)

J. M. BREWER AND R. S. BREWER v. H. R. CHAPPELL AND L. WOODLIEF.

Lien—Landlord—Mortgage.

1. The lien of the landlord for rents, advancements, etc., provided in The Code, sec. 1754, takes precedence of all other liens.
2. An agricultural lien, created to secure advances made to one who is in possession of the land as mortgagor, in the absence of any agreement to the contrary with the mortgagee, is subject to the mortgage, and the mortgagor may take the crops to the exclusion of the holder of the lien.

CIVIL ACTION tried before *Avery, J.*, at August Term, 1888, of WAKE Superior Court.

The parties agreed upon and submitted to the court for its judgment thereupon the following statement of facts:

1. That on 8 February, 1887, defendant Chappell was seized and possessed of a tract of land in Wake County, on which defendant Woodlief held registered mortgages amounting to the value of the land, executed prior to that date.

2. That on 8 February, 1887, defendant Chappell executed to plaintiffs, Brewer & Co., a lien bond, which was duly registered, for supplies to be furnished Chappell during the year 1887, to be used in making the crop on Chappell's land, and plaintiffs furnished supplies to the amount of $100, one-half before and the balance after the registration of the deed, hereinafter mentioned, to Woodlief.

3. That in January, 1887, Woodlief notified Chappell of his purpose to foreclose the mortgages, the power of sale having become absolute, held by him, and on 23 March, 1887, Chappell and wife executed a deed in fee for said land, which was duly registered 7 April, 1887, and immediately thereafter Woodlief rented said land to Chappell for one-fourth of the crop, and as landlord furnished him with a horse and sup-
(252) plies to make the crop on said land, amounting to $300.

4. The crop on said land was planted after the execution of the deed to Woodlief and the establishment of the relation of landlord and tenant between Woodlief and Chappell, and the three bales of cotton, to recover which this action was brought, taken by Woodlief, were a part of the crop made on the land as above stated, and was not sufficient to pay Woodlief's claim for rent and advancements.

5. It is agreed plaintiffs are entitled to the personal property, and if Woodlief is entitled to three bales of cotton under his claim as landlord, plaintiffs shall recover no cost of L. Woodlief.

6. That the value of the whole of said crop did not exceed three hundred dollars.

After argument, the court rendered judgment for the plaintiff, from which the defendant appealed.

N. Y. Gulley for plaintiffs.
T. R. Purnell for defendant.

MERRIMON, J., after stating the case: The statement of facts above set forth is not so explicit and orderly as it should be, but it sufficiently appears from it that the plaintiffs agreed in writing with the defendant Chappell, on 8 February, 1887, which writing was duly recorded, to advance to him the sum of one hundred dollars to enable him to produce a crop during the year 1887 on the land mentioned, that he was then about to cultivate, the purpose being to create a lien on the crops to be produced in favor of the plaintiffs as allowed by the statute (The Code, sec. 1799).

At the time that agreement was made the defendant Chappell was the mortgagor and his codefendant Woodlief was the mortgagee of a mortgage of the land mentioned, and the condition thereof was broken; thereafter, on 23 March, 1887, the mortgagor and his wife conveyed his equity of redemption in the land to the mortgagee, and (253) he became the absolute owner of it, and at once leased it to Chappell for the year 1887, the latter agreeing to pay part of the crop as rent, and his landlord advanced to him three hundred dollars to enable him to make the crop.

At the time the agreement mentioned was made, the mortgage referred to was registered and the plaintiffs, therefore, had notice of it. At and before that time the defendant Woodlief was owner of the land as mortgagee. The defendant Chappell, in the absence of agreement to the contrary, was but the mortgagor remaining in possession of the land, not as of right, but by permission of the mortgagee; his possession was that of the mortgagee, and the latter might have turned him out of possession at his will and pleasure without notice. The mortgagee, as such, was the owner and had possession of the land; he had the right to control and let it, and the mortgagor did not have such right. The deed from the latter to the former of March, 1887, did not affect such ownership and right adversely; it simply enlarged and strengthened it. *Jones v. Hill,* 64 N. C., 198; *Johnson v. Prairie,* 94 N. C., 773; *Whitehurst v. Gaskill,* 69 N. C., 449; *Hill v. Nicholson,* 92 N. C., 24; *Coor v. Smith, post,* 261.

The defendant Chappell, therefore, had no subsisting right to make the agreement with the plaintiffs as to the advancement of money; the

land was not his, and he had no lease or authority to cultivate it; he and the plaintiffs certainly made their agreements subject to the superior rights of the defendant Woodlief. He was not bound to lease the land to Chappell or to allow him to remain upon and cultivate it.

On 23 March, 1887, Chappell leased the land from the owner of it, his codefendant. The relation of landlord and tenant then at once sprang up, and in the absence of agreement to the contrary, the crops produced by the tenant "vested in possession of the lessor or his assigns at all times until the rents of said lands shall be paid, and until (254) all the stipulations contained in the lease or agreement shall be performed or damages in lieu thereof shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crops. This lien shall be preferred to all other liens." (The Code, sec. 1754.) Although there are other statutory provisions (The Code, secs. 1782, 1799) that provide for and allow certain other liens, and such as that claimed by the plaintiff, and that these shall be preferred to all others, still that recited above has been interpreted and applied in numerous cases, which decide that the lien of the landlord for rents and advancements is the lien first preferred above all others.

The Legislature did not intend, it seems to us, to vest the possession of the crops in the landlord at all times, and give him such a preferred lien, and then allow him to be divested of such possession, and his lien postponed in favor of others no more meritorious than his. The liens referred to, other than his, are simply declared to be preferred to all others, while his is accompanied and helped by the possession at all times of the crops until it shall be discharged. Why this striking and important difference in favor of the landlord? It imports much in his favor, and we are not at liberty to treat it as meaningless. *Montague v. Mial,* 89 N. C., 137; *Livingston v. Farish, id.,* 140; *Ledbetter v. Quick,* 90 N. C., 276; *Thigpen v. Leigh,* 93 N. C., 47; *Moore v. Faison,* 97 N. C., 322; *Wooten v. Hill,* 98 N. C., 48.

We are, therefore, of opinion that the defendant Woodlief was landlord of his codefendant, and had a lien on the crops produced on the land to secure the rent due him from and the advancements made by him to his tenant, to be preferred above the lien of the plaintiffs thereon and all other liens.

The plaintiffs should have informed themselves as to the relation of the defendant Chappell to the land and the mortgagee, and as to (255) who was landlord. That they did not was their own neglect and misfortune. They were charged with notice of the rights of the mortgagee and of his right as landlord. *Ledbetter v. Quick, supra.*

The judgment must be modified in accordance with the terms of the agreement of the parties, so as not to tax the defendant Woodlief with any cost in favor of the plaintiffs.

Error as to the judgment against Chappell, and affirmed as to judgment against Woodlief.

Cited: Killebrew v. Hines, 104 N. C., 188, 189, 193.

JOHN McIVER AND JAMES DALRYMPLE v. S. E. STEPHENS AND BENTON P. STEPHENS.

Judgment—Record—Jurisdiction—Irregularity.

Where the court has jurisdiction of the subject-matter and the parties to an action, its judgment therein is conclusive until reversed on appeal or vacated by the judgment in some proceeding instituted directly for that purpose; it cannot be attacked collaterally.

CIVIL ACTION to recover land, tried before *Avery, J.,* at August Term, 1888, of the Superior Court of HARNETT County.

It is admitted that both plaintiffs and defendants claim title to the land in question through Jones Stephens, and that defendants were in possession when the action was brought, and are still in possession.

The plaintiffs allege that Jones Stephens died seized and possessed of the land described in the complaint; that on 12 June, 1880, the defendants Sarah E. Stephens and J. L. Stephens, executrix and executor of Jones Stephens, filed a petition in the Superior Court of Harnett County to sell said lands to make assets to pay the debts of their testator; that the devisees of Jones Stephens were made parties to said petition, and by an order of the court, B. F. Shaw was appointed com- (256) missioner to sell the land, and that the said commissioner did, on 7 May, 1883, after due advertisement, pursuant to the order of the court, sell the same at public auction, and the plaintiffs became the purchasers and complied with the terms of sale; that the sale was reported by the commissioner to the court, and by a final decree in the cause the sale was in all respects, on 17 May, 1883, approved and confirmed, and the commissioner ordered to make title to the purchaser upon payment of the purchase money, and that on 30 October, 1883, the commissioner, upon receipt of the purchase-money, executed to the plaintiffs a deed in fee for the land, which has been duly proved and registered; that the

defendants are in possession of said lands, and unlawfully and wrongfully withhold the possession thereof from the plaintiffs.

The defendants, in their answer, say "that while a petition was filed in the name of the executors of Jones Stephens to sell land for assets, it was a proceeding not understood by them, and did not receive their concurrence, and would not have been allowed if properly understood, and that there was no necessity for such proceeding"; that they did not know of the appointment of B. F. Shaw as commissioner to sell the land, and did not consent that the whole proceeding should be taken out of their hands; that as to the allegations in regard to the sale, the report of the commissioner, confirmation of sale, etc., they have no knowledge or information sufficient to form a belief, and demand that full proof be made of the regularity of the whole proceeding to make real estate assets.

For a further defense "these defendants say they are the rightful owners under the will of Jones Stephens of the real estate claimed by the plaintiffs, and that the whole proceedings instituted under the forms of law, in effect by the plaintiffs, or some of them, to deprive them of their land, are illegal and colorable only, wholly defective and
(257) without authority of law, fraudulent and void, as they are advised and believe, and ask that they be set aside, and for such other and further relief as they may be entitled to."

The case on appeal states that plaintiffs offered a deed from B. F. Shaw, commissioner, to plaintiffs, dated 30 October, 1883; a copy of the petition to sell land and record of the proceeding instituted by J. L. and S. E. Stephens, executors of Jones Stephens *v.* Burton P. Stephens.

The petition was filed in June, 1880, and verified by S. E. Stephens, executrix, and among other things asks that James Dalrymple be appointed commissioner to make the sale. In the petition the age of B. P. Stephens is stated to be twenty years.

The summons was issued 13 May, 1882, and is endorsed by the sheriff: "Received 15 May, 1882. Served 1 June, 1882." There is a further endorsement in these words: "Returned into office 2 October, 1884. J. W. A., S. C. A."

An order of sale was made on 2 April, 1883, in which B. F. Shaw was appointed commissioner to make the sale.

There was report of sale made 7 May, 1883, by B. F. Shaw, commissioner, in which it is stated that the land was sold, "one-third cash, balance payable in six months, at $1 per acre, 300 acres, $300. Purchaser, James Dalrymple."

On 17 May, 1883, upon motion of W. E. Murchison, attorney, a decree was made confirming the sale and directing the commissioner to make title to the purchaser upon payment of the purchase-money.

There was also found with the papers in the cause an order of sale without date.

The case was entered on the special proceeding docket, and entries therein: "Summons issued 13 May, 1882; summons executed 1 June, 1882; petition granted; B. F. Shaw appointed commis- (258) sioner; report of commissioner filed 7 May, 1883; sale confirmed; decree of confirmation signed and filed; Dr. John McQueen and James Dalrymple purchasers at $1 per acre."

The sheriff testified that the endorsement of the date of the receipt and service of the summons was correct. He did not recollect, if he ever knew, why the memorandum was endorsed. It was admitted that the memorandum was written by the clerk.

Mr. Dalrymple testified: "I am a member of the firm of McIver & Dalrymple, of Jonesboro, one of the plaintiffs; we were the purchasers of this land. I was at the sale. Benton Stephens was there. He made no objection to the sale of the land. It was bid off for plaintiffs in his presence. He and his mother now live on the land. They came to me to act as commissioner, and then I first heard of the proceeding. I declined to act as commissioner.

Defendants proposed to show by the witness that he did not pay cash for the land, and to ask the witness if plaintiffs did not get, under that deed, more than 300 acres of land.

The evidence was excluded, and defendants excepted.

Defendants proposed to submit the following issue: "Were the sale and deed under which the plaintiffs claim operative and valid?" which was refused.

Defendants proposed to prove by the witness that he is one of the executors of Jones Stephens named in the special proceeding, and that he did not know that the proceedings had been instituted until after the sale. This evidence was also excluded, and defendants again excepted.

The court instructed the jury as follows:

Both parties had admitted title to have been in Jones Stephens, and the plaintiffs have exhibited a deed which it is admitted covers and includes the land in controversy. It is also admitted that the defendants are in possession, and the second issue is answered (259) "Yes" by consent.

The court instructs you that, as it appears from the records of the special proceeding that the defendants were parties, and that the land was sold by a commissioner in pursuance of a decree made in said cause, and said sale was confirmed, and a deed has been made to plaintiffs in pursuance of said decree, the defendants are concluded by the said record, and the jury must respond to the first issue "Yes."

To this charge defendants excepted.

The following issues were submitted to the jury:

1. Are the plaintiffs the owners in fee simple of the land in controversy?

2. Were the defendants in possession of said land when the action was brought?

To these issues the jury responded "Yes," and there was a judgment for the plaintiffs, from which the defendants appealed.

W. A. Guthrie for plaintiffs.

R. P. Buxton for defendants.

Davis, J., after stating the case: The learned counsel for the defendants in his brief insists that the special proceedings under which the land in question was sold were irregular and invalid, and that the deed of the commissioner under which the plaintiffs claim "is fraudulent, inoperative, and void."

It is said that Burton P. Stephens was a minor when the petition was filed in June, 1880, and that no answer was put in by him. Though he was a minor when the petition was filed in June, 1880, it further appears from the record that the summons was served on him in May, 1882, and he was then of age, and it also appears from the petition that the defendant S. E. Stephens, by whom the petition was verified, and said
(260) B. P. Stephens were the devisees, and at most the proceeding on that account could only have been irregular, not void. *England v. Garner,* 90 N. C., 197.

There was no error in excluding the evidence offered to show that the purchasers did not pay cash for the land, nor in excluding that offered to show that the purchasers, by their deed, had more than 300 acres of land. The proceedings under which the land was sold cannot be attacked collaterally by such evidence. For the same reason, the exception to the exclusion of the testimony of J. L. Stephens, one of the executors, offered to show that he did not know of the special proceeding till after the sale, must be sustained; and it is for the same reason that the charge of his Honor, excepted to, must be sustained.

The facts appearing in the record show that the proceedings under which the land was sold were irregular, and the excluded evidence, the exceptions, and the argument of counsel for the defendants would be entitled to consideration in a direct proceeding to annul the sale, but they do not avail in this action, for the judgment was not *void,* and cannot be attacked collaterally.

The court had jurisdiction of the parties and of the subject-matter. *Edwards v. Moore,* 99 N. C., 1, and the cases there cited; *England v. Garner, supra; Doyle v. Brown,* 72 N. C., 393; *Grimes v. Taft,* 98 N. C., 193, and cases there cited.

There was no error in refusing to submit the issues tendered by the defendants. It was embraced in the first issue that was submitted.

Affirmed.

Cited: Barcello v. Hapgood, 118 N. C., 726.

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(261)

H. H. COOR AND WIFE v. AMOS SMITH.

Mortgagee and Mortgagor—Possession—Crops.

The mortgagee of lands, in the absence of any stipulation to the contrary, is entitled to all the crops which may be produced upon it from year to year until the secured debt is paid, although they are the product of the mortgagor's cultivation under a possession permitted by the mortgagee.

THIS is a civil action, which was tried before *Shipp, J.,* at Spring Term, 1888, of WAYNE Superior Court.

The following is so much of the case stated on appeal as need be repeated here:

It was agreed that the crop, the detention of which was the subject of this action, was raised during the year 1887 by the defendant on land bought by him of the plaintiffs on 6 December, 1882, and that the defendant, in payment of said land, on said 6 December, 1882, executed seven promissory notes to the plaintiff, H. A. Coor, by which he promised to pay her thirty-five bales, 500 pounds each, of good middling lint cotton, five bales on 1 November of each year for 1883, 1884, 1885, 1886, 1887, 1888; and to secure the payment of the same executed a mortgage on the lands so conveyed to him by the plaintiff, which mortgage, after conveying land, contained the following: "Also all crops of every kind raised on said land shall be surety for the annual payment of each year, and shall not be removed from said land until the note due that year is paid in full."

It was further admitted that the note for 1887 was due and unpaid when this action was brought, and is still due and unpaid, except three bales of cotton, delivered thereon during the fall of 1882.

The defendant resisted a recovery, on the ground that the mortgage does not vest in the plaintiffs a sufficient interest in the crops to be

raised on said lands to enable them to sustain this action of
(262) claim and delivery; "and for the further reason," that a valid mortgage cannot be given of crops to be raised, except for those to be raised the year next after the execution of the mortgage.

After hearing the argument, the court, being of the opinion that the plaintiffs were entitled to recover, gave judgment for the plaintiffs, declaring H. A. Coor to be the owner and entitled to the possession of the crops seized, and to apply the same in discharge of the note due 1 November, 1887, and for the cost of this action.

From which judgment the defendant appealed.

W. R. Allen for plaintiffs.
No counsel for defendant.

MERRIMON, J. The *feme* plaintiff sold and conveyed the land mentioned to the defendant, taking his promissory notes, coming due at different times, for the purchase money, and at once took from him a mortgage of the land and the crops to be produced thereon from year to year, for the time specified to secure the payment of the notes as they severally came due. The mortgagee, as such, was entitled to the land, and in the absence of agreement to the contrary, to all the crops that might be produced upon it from year to year, until the debts secured by the mortgage should be discharged. The defendant mortgagor remained in possession of the land, not as of right, but by permission of the mortgagee, and the crops produced, including that in question, belonged to the latter for the purposes of the mortgage, although produced by the labor of the former. *Jones v. Hill,* 64 N. C., 198; *Williams v. Bennett,* 4 Ired., 122.

The clause of the deed of mortgage expressly conveying the crops to be produced on the lands from year to year was unnecessary, because, without it they belonged to the mortgagee. It did not in any
(263) degree abridge her rights. As the crops were hers she could agree with the mortgagor to apply them from time to time as provided in the mortgage.

It is unnecessary to advert here to the nature and extent of the right of the defendant to have compensation for cultivating the crops.

So that the objections urged and relied upon in opposition to the plaintiffs' right to recover, are not applicable to this case, and we need not consider them.

Affirmed.

Cited: Brewer v. Chappell, ante, 253; *Killebrew v. Hines,* 104 N. C., 188, 193; *Hinson v. Smith,* 118 N. C., 508; *Stevens v. Turlington,* 186 N. C., 195.

MARY C. D. KRETH v. JAMES A. ROGERS ET AL.

Fraud—Mortgage—Registration—Notice—Evidence—Presumption—Sale.

K. sold to B. a stock of goods on credit, and to secure the purchase money took a mortgage thereon and all property of like character which B. should subsequently add to the stock, which was duly registered, and in which it was stipulated that B. should keep the stock up to its then value, and pay cash for all additions thereto, keep the property insured, and pay all taxes, etc. B. took possession, carried on the business, making payments upon the purchase notes, selling some of the goods embraced in the mortgage and purchasing others, which he so intermingled with the original stock as to render them indistinguishable. He then executed a second mortgage to the defendants to secure debt contracted for goods to replenish the stock, which was also duly registered, under which they immediately took possession: *Held*,

1. That the mortgage to K. was not fraudulent upon its face, and any presumption of fraud arising from the fact of B.'s possession and sales was rebutted by the other stipulations in the deed and the facts recited.

2. That the goods having been intermingled without the fault of K., and the defendants having sold some of them to B. with notice of K.'s mortgage, the burden was on them to prove what portion was subject to the payment of their debt, and failing to do so, the title to the whole stock was in K., and he might recover possession of them from the defendants.

THIS is a civil action, tried upon a case agreed before (264) *Shipp, J.*, at Spring Term, 1888, of WAKE Superior Court.

The parties agreed upon and submitted to the court the following statement of facts:

"On and immediately prior to 1 February, 1887, the plaintiff was the owner of a stock of tailoring goods and tailors' utensils, and the furniture and fixtures of a merchant tailor's establishment, in the city of Raleigh; the goods, etc., being then in a storehouse until recently theretofore occupied by the firm of Kreth & Weikel.

That on 1 February, 1887, the plaintiff sold all of the goods, etc., to the defendant, A. Belsmeyer, and contemporaneously with such sale, Belsmeyer, to secure the purchase money, made and delivered the mortgage set forth below.

That the purchase money was to be paid in installments according to the tenor and effect of the notes of Belsmeyer to plaintiff.

That at the time of the above sale Belsmeyer was a tailor by trade, and had no property other than that purchased as above from plaintiff, and owed other debts to other persons, and was insolvent. These debts

were due to Henkelman, Jackson & Co., and to Focke & Sprenkle, and amounted to two or three hundred dollars and have been since paid. The plaintiff did not know of them when the mortgage was made to her.

That Belsmeyer took possession of the goods, etc., sold to him by plaintiff, and proceeded to manufacture the same into suits, and bought other goods from the defendants, Henkelman, Jackson & Co., and from other parties, and with all the goods thus purchased by him from the plaintiff and from Henkelman, Jackson & Co. and other parties, he carried on the merchant tailoring business in the city of Raleigh
(265) for nearly twelve months, until the sale by him to Henkelman, Jackson & Co., as hereinafter stated. That he carried on this business with the goods thus obtained by him without any control or interference on the part of the plaintiff or any other person. That in this way he sold off, prior to the commencement of this action, a considerable amount of goods, including a large part of that purchased of plaintiff; that he paid plaintiff something over six hundred dollars from the proceeds of such sales, and used the residue of such proceeds in payment of other debts due and owing by him, and in his business and for his family and household expenses.

That between 1 February, 1887, and 16 January, 1888, Belsmeyer became indebted to the defendants Henkelman, Jackson & Co., without the knowledge of plaintiff, for goods purchased of them as aforesaid, to be used in his business as a merchant tailor, in the sum of eight hundred and sixty-three dollars and .... cents, and being so indebted he made and delivered to said Henkelman, Jackson & Co., his other mortgage, to secure the said debt.

That immediately upon the execution of the other mortgage, defendants Henkelman, Jackson & Co. took possession of the goods described in the complaint which were conveyed to them, and held possession of the same, through their agent, the defendant J. A. Rogers, until 17 January, 1888, when they were taken from their possession by the sheriff of Wake County, under and by virtue of process caused to be issued by the plaintiff in this action, and were by the sheriff delivered to plaintiff, by whom they have since been sold and disposed of.

That the goods described in the complaint consisted of some of those originally purchased by Belsmeyer from the plaintiff and some purchased by him from defendants Henkelman, Jackson & Co., and some purchased by him from other persons, and were so intermingled
(266) as not to be separable or distinguishable at the time of the seizure by the sheriff.

That the matters of fact stated in the said mortgages are admitted to be true, except as modified herein.

That plaintiff claims these goods in this action as mortgagee, and the indebtedness still due upon her mortgage is more than thirteen hundred dollars.

The defendants Henkelman, Jackson & Co. claim the goods as mortgagees, and the whole indebtedness secured by their mortgage is still due.

That the value of the goods described in the complaint is $1,250.

That both of the mortgages were duly proved and registered in the office of the register of deeds in and for the said county of Wake—the first on 3 February, 1887, and the second on the .... day of January, 1888.

It was agreed between the parties that if the court should be of the opinion, upon the foregoing case agreed, that the plaintiff is the owner of and entitled to hold the goods and property, then judgment shall be entered that the plaintiff retain possession thereof and recover her costs. If, on the contrary, the court should be of the opinion that the defendants Henkelman, Jackson & Co. were the owners of the goods and entitled to the possession thereof, then judgment should be entered in favor of Henkelman, Jackson & Co. for the sum of $863, less credit of $25, and interest on their counterclaim, and for their costs."

The defendants contended, that on the facts agreed the plaintiff had not rebutted the presumption of fraud, and that the mortgage to the plaintiff was fraudulent and void as to the defendants Henkelman, Jackson & Co., and that therefore the plaintiff could not recover. His Honor declined so to hold, but held that the mortgage was not fraudulent under these facts.

The defendants further contended, that there was no sufficient (267) description of the property conveyed in the mortgage, and as after acquired property was so mixed with that on hand when the mortgage was made as not to be distinguishable, that no property passed to the plaintiff, or at least that only such property passed as was on hand when the mortgage was executed, and as this could not be separated that the plaintiff was not entitled to recover in this action. His Honor refused so to hold, but ruled that all the goods on hand when the plaintiff took possession under the proceedings in this action were covered by the mortgage, and that the plaintiff was entitled to recover them.

The following is a copy of the material portion of the mortgage under which the plaintiff claims:

This deed, made, etc., witnesseth: That for and in consideration of the sum of twenty-five hundred dollars, to said August Belsmeyer in hand paid by said Mary C. D. Kreth, the receipt whereof is hereby acknowledged, the said August Belsmeyer hath bargained and sold and

he doth hereby bargain, sell and convey unto said Mary C. D. Kreth, her executors, administrators and assigns forever the following described property, to wit: All the stock of cloth, clothing, tailors' trimmings, sewing machine, desk, stove and pipe, tables, tailors' utensils, lamp, chairs and boxes in the storehouse on Fayetteville street, lately occupied by Kreth & Weikel, being the property this day sold by said M. C. D. Kreth to said Belsmeyer, and all property of like character which the said Belsmeyer shall acquire for and in his business as a merchant tailor, until the mortgage shall be satisfied.

And he covenants with said M. C. D. Kreth to buy for cash and to keep the stock of goods fully up to present value, and not to remove such stock from said city.

To have and to hold the said property, etc.

(268) The conditions of this deed are such that whereas the said August Belsmeyer and one Bernard Greenwood, of Wilson County, are justly indebted to said M. C. D. Kreth in the sum of twenty-five hundred dollars for the purchase money of said articles of property bought by said Belsmeyer, as evidenced by the thirteen single bonds of said A. Belsmeyer and B. Greenwood, bearing even tenor and date herewith, said bonds bearing interest from date at the rate of eight *per centum* per annum.

Now, therefore, if said bonds and interest thereon shall be promptly paid according to the tenor of the same, then this deed shall be null and void, otherwise to remain in full force and effect.

And if default shall be made in payment of any of said bonds when the same shall fall due, or shall commit a breach in either of his said covenants, then in either such event said Mary C. D. Kreth, her executors, administrators and assigns, are hereby fully authorized and empowered to take possession of and sell the above conveyed property at public outcry, at the courthouse in Raleigh, after advertisement for twenty days in some newspaper published in Raleigh, for cash, and out of the proceeds to deduct, first, the costs of advertisement and sale; second, the amount which shall then be due on said bonds, with interest accrued to day of sale; and if there should then remain any surplus, to pay the same over to said A. Belsmeyer, his personal representatives or assigns. And in the event of a sale under this power, said M. C. D. Kreth, her executors, administrators and assigns, are fully empowered to execute all necessary deeds and instruments of conveyance to the purchaser or purchasers of said property.

It is further expressly understood and agreed between the parties hereto, that if default shall be made in the payment of either of said bonds, when the same shall be due, then all of said bonds shall immedi-

ately become due and payable, whether due by their terms at (269) the time of such default or not, and the said Mary C. D. Kreth, her executors, administrators and assigns, shall be at liberty to exercise the power of sale above given and conferred, notwithstanding the fact that one or more of said bonds shall not at the time of said default be due and demandable by their terms.

And said A. Belsmeyer further covenants that he will pay all taxes that shall be assessed on said property while any of the money secured by this mortgage shall remain unpaid, and that he will keep the same insured in some insurance company in good standing, having a resident agent in the county of Wake, for the benefit of the mortgagee and her assigns, in a sum not less than $2,500, as long as anything shall remain due on the amount hereby secured. And if he fail to pay said taxes and to effect and keep up said insurance, the mortgagee aforesaid shall be at liberty to pay said taxes and to effect and maintain said insurance, and any sum or sums by her or them so paid shall be added to the principal of the sum then due on the first of said bonds thereafter to become due and draw interest accordingly.

In testimony whereof, etc.

"The court, upon the facts set out in the case agreed, found as a conclusion of law and fact that the mortgage made by the defendant, A. Belsmeyer, to the plaintiff, dated 21 February, 1887, was not made with the purpose and intent to delay, hinder and defraud the creditors of said Belsmeyer, or such person as should thereafter purchase from him. And upon the above finding, and other facts in the case agreed, it is considered, ordered and adjudged that the plaintiff is the owner of and entitled to hold the goods and property described in the pleadings and in controversy in this action, and that plaintiff retain possession thereof and recover of the defendants her costs of this action." From this judgment the defendants appealed.

S. F. Mordecai for plaintiff. (270)
John Devereux, Jr., for defendants.

MERRIMON, J., after stating the case: It was conceded on the argument that the deed of mortgage, under which the plaintiff claims title to the goods in controversy, was not upon its face fraudulent and void in law, but it was contended that the facts recited in the deed and other facts in evidence raised the presumption of fact that it was fraudulent, and that such presumption had not been rebutted.

If it be granted that such presumption arose, we think there was evidence to rebut it. The deed itself supplied such evidence. The plaintiff sold a stock of goods to the mortgagor on a credit, taking his promissory

notes, coming due successively at different times, for the purchase-money, and to secure the payment of the same took the mortgage under which she claims. It is not pretended that this was done, nor is there the slightest evidence tending to prove that it was done in bad faith.

Such a transaction was in itself legitimate. The deed was not intended to secure debts antecedent to it in view of and involving an impending failure in business of the mortgagor; on the contrary, it contemplated that the mortgagor should go forward actively in a promising enterprise, and from the first fruits of it, in the course of a reasonable period pay the purchase-money. In this respect, the case is very different from that of *Cheatham v. Hawkins,* 76 N. C., 335, and other like cases relied upon by the defendants, in which the mortgagor owed and purported, by the mortgage, to secure debts antecedent to it, was insolvent and about to fail in his business enterprise, and in view of such fact executed a mortgage of his property, preferring some of his creditors, while he remained in possession of the goods, having control of the same, and devoting part of the proceeds thereof to his own use, and doing other acts suggestive of a bad and fraudulent purpose. The prudential
(271) and cautionary provisions and stipulations in the mortgage under consideration, in respect to the business to be conducted, the requirement that the purchases of replenishing goods should be for cash down, the payment within a few months of more than six hundred dollars of the debt secured by the mortgage—these and like facts and circumstances appearing from the deed and the case agreed, certainly made evidence tending strongly to rebut any presumption of fraud arising from the mere fact that it was intended that the mortgagor should have possession of and sell the goods, and that in violation of his agreement bought other goods on a credit and intermingled them with a part of the goods he so purchased from the plaintiff.

The parties agreed that the court should find the facts and apply the law of the case, and accordingly it found that there was no fraud in fact in the mortgage and transaction in question. As there was evidence to warrant such finding, it must be treated as conclusive. And as the mortgage was unaffected by fraud, it must be allowed to have just legal effect.

Then, unquestionably, the plaintiff was entitled to have possession of and to apply such of the goods in controversy as she so sold to the mortgagor. But it is insisted that these goods have been so intermingled with the like goods the mortgagor purchased from the defendant that they cannot be ascertained. And it is further contended that the title to the goods purchased by the mortgagor from the defendant did not pass to the plaintiff because, first, the mortgage in her favor did not embrace

them; and secondly, if it did, then, as to these goods, the mortgage was not registered as required by the statute.

Granting that there might be force in this last contention, we think that the plaintiff should not suffer prejudice by such intermingling of the goods. She was in no just sense to be blamed on that account. She did not direct or procure it to be done; on the contrary, she required the mortgagor to covenant in the deed that he would purchase replenishing goods for cash down, and thus prevent occasion for (272) such prejudice to any person.

The mortgage was duly registered, and the defendants, therefore, had notice of it and its provisions, and of the nature and circumstances of the mortgagor's business and the rights of the plaintiff in respect thereto. It was their duty to themselves to be cautious in their dealings with him. Nevertheless, they sold him goods on a credit with the knowledge—it is fair to so infer—that he would probably intermingle them with the goods of the plaintiff as mortgagee. It was their laches, their misfortune, thus to deal with such a mortgagor, and thus place their goods beyond recognition and identification.

In such a case one party or the other must suffer prejudice. Which shall it be? Surely not that one to whom no blame attaches. As surely that one so chargeable with laches. The case states that part of the goods in controversy belonged to the plaintiff, but these could not be distinguished from the goods sold to the mortgagor by the defendants and others. But, as we have seen, that was not the plaintiff's fault. She was entitled to have her goods, and when it was admitted on the trial that a part of the goods in question, under the circumstances, were hers, then the burden was on the defendants, chargeable with laches, to distinguish and prove such of the goods as belonged to them, because the mortgagor wrongfully purchased like goods from the defendants on a credit, to be placed with the plaintiff's goods, and this the defendants knew, and they knew also that the mortgagor would probably intermingle their goods with the plaintiff's, and impliedly they gave their consent that he might do so. The goods thus undistinguishable became the property of the plaintiff, as mortgagee. *Queen v. Wernwag,* 97 N. C., 383, and the authorities there cited.

Judgment affirmed.

Cited: Brown v. Dail, 117 N. C., 47; *Messick v. Fries,* 128 N. C., 451; *Cooper v. Rouse,* 130 N. C., 204; *Grocery Co. v. Taylor,* 162 N. C., 312.

(273)

JULIA O. HARRISS AND GEORGE HARRISS v. WILLIAM SNEEDEN AND SILAS SNEEDEN.

Slander of Title—Arrest and Bail.

1. An action for slander of title will lie only where a person has an interest or estate in the property, and another person *falsely* and *maliciously* impugns his title thereto, by reason of which some *special* damage is suffered.
2. It is questionable if an order of arrest may be properly granted in an action for slander of title.
3. In an application for an order of arrest the applicant is required to set forth fully and with legal precision the facts which constitute his alleged cause of action; if they are of his own knowledge they should be positively stated, and if they are upon belief, he should state the sources of his information, so that the court can determine if a proper cause of action exists.
4. Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence.
5. If the order was properly granted it ought not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated.
6. The findings of facts by the judge—in an action at law—upon which an order of arrest is made or vacated, are conclusive.

THIS was a motion to vacate an order of arrest in an action pending in the Superior Court of NEW HANOVER County, and heard by *Shepherd, J.*, at Chambers, in January, 1888.

The plaintiffs alleged that the *feme* plaintiff is the owner of the land described in their complaint, and the following is a copy of so much thereof as is material to the questions considered:

"10. That recently there has been much public discussion as to
(274) the probability of a railroad being built to the island and beach above mentioned, and as to the increased values of the lands in consequence of such improvements, and plaintiffs were offered good prices for their land, and about the middle of August last had almost closed a contract for the sale of a part of the island and beach, when to their great surprise and great pecuniary loss, they ascertained, and now allege, that defendants with strong hand entered upon their premises,

the island aforesaid, and circulated threats, far and near that they would shoot any person who attempted to enter the premises save by their license, and exhibited their shotguns and other evidences of murderous purposes, and proceeded to erect a building on the land, placing it on a prominent point where it can be seen, and is seen by large numbers of people, and the title of plaintiffs has been thereby grossly slandered, and they greatly damaged.

"11. That the acts of trespass and slander and violence herein complained of have been done by both defendants with the malicious intent of injuring the plaintiff, and done solely with the wanton and malicious motive of extorting money from plaintiffs.

"12. That plaintiff Julia O. Harriss has been damaged by the wrongful and malicious acts, slanders, and trespasses of defendants in a sum not less than two thousand dollars; that plaintiffs have been prevented from making a sale of their property, and cannot sell it at all with the cloud on the title, and the acts of trespass which have been committed wantonly and maliciously by the defendants for the purpose of preventing plaintiffs from selling their property and realizing on it.

"13. That defendants have entered and published threats, claims in themselves and slanders against the title of plaintiffs, well knowing them to be false, and actuated by malicious motives, such slanders consisting in the allegation which the defendants have falsely made (275) to the effect that plaintiffs have no title to the premises in question, and that the heirs of Stephen Sneeden own the premises, and that plaintiffs are trying to cheat and defraud them out of it, in consequence of which false and malicious slanders plaintiffs have lost the sale of their lands, and been damaged as hereinbefore stated.

"14. The plaintiffs are informed and believe that no other of the heirs of Stephen Sneeden, except the defendant William, has at any time set up any claim to the premises or disputed plaintiffs' title to the same.

"Wherefore, plaintiffs demand judgment:

"1. For five thousand dollars against said defendants.

"2. For their cost in this action."

The plaintiffs applied at the time the action began for the provisional remedy of arrest and bail. They produced before the court in support of their motion for the order of arrest their sworn complaint used as an affidavit and their other affidavit, the material parts of which are as follows:

"1. That a sufficient cause of action exists in favor of the plaintiffs against the defendants William Sneeden and Silas Sneeden, the grounds of which appear by the sworn complaint in this action hereto annexed, being for the injuring of property, by denying plaintiffs title thereto,

by entering upon and holding possession forcibly of said property, by publishing threats to shoot any one who may enter upon it except by defendants' license, thereby partly causing the plaintiffs to lose the sale of said property. That all the statements of said complaint are true to the knowledge of this deponent, except as to the allegations stated in the complaint to be on information and belief, and as to these allegations, deponent believes them to be true.

"2. That the plaintiffs are about to commence an action in this court against the said defendants, William Sneeden and Silas Sneeden,
(276) upon the cause of action stated above and in the sworn complaint, and has issued a summons against said parties."

The court granted the order of arrest, which was executed.

Afterwards the defendants filed their answer, in which they broadly, positively, and much in detail, denied the material allegations of the complaint and the statements of fact in the affidavit. The following is a copy of two material paragraphs thereof:

"10. The defendants, answering the 10th article of the complaint, admit that there has been considerable public discussion as to the probability of a railroad being built to the island and beach above mentioned, but they deny the other allegations of this article of the complaint, and assert as follows: That in the midst of this discussion they learned for the first time that the plaintiff George Harriss set up some claim, or pretense of claim, to the said Hammocks, and thereupon they consulted counsel, and, acting under his advice, they proceeded to erect a small building upon their property, the said Hammocks, and to occupy the same, without the least violence or offer of violence to any person, and without threats to any person, and continued to occupy the same quietly and peaceably, permitting any one who wished to do so to come upon the island.

"11. That in answer to the 11th article of the complaint, the defendants deny that plaintiffs have any title to said property, or that they have committed any trespass, slander, or violence upon the said plaintiffs or either of them or their title, and they deny that they have been actuated by any malice or any motive of extorting money; on the contrary, the defendants allege that they have simply attempted, in a lawful and peaceable way, to protect their rights to the possession of their own property. And they further allege that frequent offers were made to them of money by persons in privity with the plaintiffs, all of which they rejected, and that the plaintiffs, failing in these efforts to secure
(277) possession, and well knowing that they had no title to the premises, and knowing that defendants were very poor men, and hoping to intimidate them into surrendering their property, resorted to the un-

lawful and oppressive proceeding of arresting and removing from the premises these defendants, in order that they might thereby secure possession for themselves, and that, immediately following the arrest, they did take and still hold possession of said island or Hammocks."

The defendants moved to vacate the order of arrest. The court granted this motion, and made an order, of which the following is a copy:

"This motion coming on to be heard by me upon the complaint and answer used as affidavits, the answer being fully responsive to the allegations of the plaintiffs, and it appearing to the court that the allegations as to slander of title are rebutted, and the court being of the further opinion that the alleged cause of action is not a proper ground for the arrest of the defendants: It is adjudged that the motion be granted, and that the defendants be and are discharged."

From this order the plaintiff appealed to this Court.

Solomon Weil for plaintiff.
Thos. W. Strange for defendants.

MERRIMON, J., after stating the case: In his application in the action for the provisional remedy of *arrest and bail,* the plaintiff should state in the affidavit such facts as clearly disclose a cause of action as to which the defendant may be arrested as allowed by the statute (The Code, sec. 291). These facts should be set forth with such fullness and legal precision as that the court can certainly discern the particular cause of action intended to be alleged. It should find the facts from the evidence produced by the plaintiff, and be able to see and determine that the cause of action exists as alleged.

It is not sufficient that it *may* exist—this must not be left to (278) conjecture or bare probability—the court must be satisfied from the evidence before it that it does so exist, because the statute allows the order of arrest to be granted only "when it shall *appear* to the court or judge thereof by the affidavit of the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those provided for" by the statute. Moreover, a party shall not be arrested upon conjecture, on facts which leave the mind of the court in doubt and uncertainty.

The affidavit should state the facts positively, when this can be done, but if it is founded upon information and belief of the affiant, the grounds of such belief must be set forth so that the court can see and judge of their character and sufficiency. *Peebles v. Foote,* 83 N. C., 102, and cases there cited.

The defendant may, at any time before judgment, move to vacate the order of arrest upon the ground that it was irregularly granted, or

that the evidence and the facts found were insufficient to justify it. In such case the plaintiff cannot be allowed to offer additional evidence to support his motion improperly granted. The Code, sec. 317; *Bear v. Cohen,* 65 N. C., 511; *Devries v. Summit,* 86 N. C., 126. But the defendant may also support his motion by producing counter-affidavits and other appropriate evidence to prove that the plaintiffs' motion for the order of arrest was not well or sufficiently founded. In this case the plaintiff may produce additional affidavits and other pertinent evidence to cure defects and strengthen his case. *Clark v. Clark,* 64 N. C., 150; *Devries v. Summit, supra.*

The court, having the order of arrest and the motion to vacate it before it, will determine whether or not for any cause the order was improvidently granted, and, if need be, finding the facts from the whole evidence and considering and applying the same, it will direct that the order remain undisturbed; that it be modified in some particular
(279) or vacated accordingly, as it may be of opinion, one way or the other.

A motion to vacate the order of arrest should be allowed if, upon all the facts found and the law arising thereon, the court should be satisfied that the order ought to be vacated. But when the order was properly granted, as the facts at first appeared, a mere denial by the defendant of the plaintiff's allegation sufficiently made would not be sufficient to prompt the court to allow a motion to vacate the order. Nor ordinarily would the admission of the material facts upon which the order was granted and facts made to appear in avoidance of the case made by the plaintiff be sufficient, unless such facts in avoidance should have such point and weight as to satisfy the court that the plaintiff's grounds for the order of arrest were not well founded. The order regularly and properly granted; that is, granted upon sufficient proof to warrant it upon the application, should not be vacated, but upon convincing proof that it should be. *Hale v. Richardson,* 89 N. C., 62; 1 Whit. Prac., 421, 422 (4 ed.); 3 Estees' Pleading, secs. 40, 41 *et seq.;* 1 Gray's N. Y. Prac., 91 *et seq.*

Now if it be granted that the cause of action—that of "slander of title"—which the plaintiffs allege very vaguely and unsatisfactorily in their complaint, which was used as an affidavit in support of the motion for the order of arrest, was embraced by the statute (The Code, sec. 291), and as to which the defendants might be arrested (and this questionable), the court had before it the complaint and answer used as affidavits upon the motion to vacate the order of arrest, and informally found the facts from the whole evidence, and that the facts as stated by the defendant were true and "rebutted"—overthrew—the case

made by the plaintiff for the purpose of the motion for the order of arrest. We are not at liberty to review the findings of fact by the court, this being a case at law. *Jones v. Boyd,* 80 N. C., 258; *Hale v. Richardson,* 89 N. C., 62; *Worthy v. Shields,* 90 N. C., 192. (280) And, accepting the facts as found, we cannot hesitate to decide that the court properly vacated the order of arrest. The facts alleged by the plaintiffs are indefinitely, vaguely and loosely stated, and therefore to be taken with more caution. The defendants on the other hand expressly and positively deny all the material allegations of the plaintiffs, and allege affirmatively, facts found to be true, which go strongly to show that they claimed the title to the land referred to in good faith, and did not impertinently and officiously interfere with the plaintiff's claims, but in order to assert their own claim and title. This they had the right to do in good faith in an action of this character, even though upon scrutiny it should turn out that their claim of title was not well founded.

We may add in this connection, that the cause of action commonly denominated "slander of title" as to real property, arises when one person has an estate or interest in such property, and another person *falsely* and *maliciously* denies, impugns, misrepresents or questions the former's title thereto, and he suffers as a consequence special damage. There is always in such case *et damnum et injuria.* An essential element of this cause of action is the false and malicious statement or representation as to the title, and special damage to the complaining party occasioned thereby, however or in whatever manner such statement or misrepresentation may be made. As when a party was about to sell or make an advantageous disposition of his land and another impertinently interfered and falsely and maliciously misrepresented that his title was not good, and thereby prevented the sale, or prevented the owner from getting for it as fair a price as he otherwise would have done. In such a case an action would lie in favor of the injured party, but he would be required to prove that he sustained actual damage. Generally, it is not sufficient to show that the complaining party intended to sell any person who might buy; he should allege and prove that he (281) was in treaty to sell to some particular person, or at least that some one was prevented—deterred—by such false statement or misrepresentation from offering to buy. It is not sufficient to show that the community regarded the land as less valuable; proof must be made that actual damage was sustained.

But if the denial of the complaining parties' title was made *bona fide* in assertion of the title, real or honestly believed to exist in him who made such denial, an action would not lie. A party has the right, as

we have said, to assert in good faith his own title, although he may be mistaken as to its validity. 1 Starkie on Slander, 192; Odgers on Lib. and Slan., 137 *et seq.; McElwee v. Blackwell,* 94 N. C., 261.

There is no error.

Affirmed.

Cited: Sneeden v. Harris, 109 N. C., 354; *Parker v. McPhail,* 112 N. C., 505; *Lumber Co. v. Buhmann,* 160 N. C., 387.

A. D. PUFFER ET AL. *v.* A. F. LUCAS AND WIFE.

Pleading—Counterclaim—Plea Since Last Continuance.

In an action to recover possession of property, the defendant alleged in his answer matters which arose subsequent to the commencement of the suit, and upon which he demanded affirmative relief. On the trial, after the jury was empaneled, the plaintiff demurred, *ore tenus*, to so much of the answer as referred to the said new matters: *Held*,

1. That the objection came too late, and if it had any force it should have been made at the time the answer was filed.

2. That although the matter was not strictly a counterclaim, yet, as it was pertinent to the subject of the action, and the court had jurisdiction, by consent of parties or with the sanction of the court, it was proper to consider the questions thus raised, and determine the action upon the merits, as upon a plea "since last continuance."

(282) THIS was a civil action tried before *Philips, J.*, at Fall Term, 1887, of NEW HANOVER Superior Court.

The plaintiffs alleged that they had contracted to sell and had delivered to one Eifurt an apparatus for the manufacture of soda and mineral waters, under a contract by which the title was retained until the purchase money should be paid; that this agreement had been duly registered; that Eifurt had, without paying the price, sold the property to the defendants; that the purchase money was still due, and its payment had been refused. They demanded judgment for the possession of the apparatus, for damages and costs.

As a second defense, the defendants alleged, in their answer, as follows:

"1. That since the institution of this action the plaintiffs in this action, by and through their agent, Charles Frank, contracted with the defendants to sell them another machine, with apparatus, etc., con-

nected therewith; that as a part of said agreement the plaintiffs stipulated that they would take the machine in controversy in this action in part payment of the new machine, and agreed to allow the defendant the sum of $300 for the same; and that these defendants were to retain possession of the machine in controversy in this cause until the new machine arrived; that the new machine was to be paid for in installments—the sum of $120 upon arrival with the bill of lading attached, and the balance in installments on time.

"2. That these plaintiffs have never yet complied with their contract, and the new machine has never been delivered, although defendants were willing and able to comply with their contract.

"3. These defendants, by the unlawful and willful act of the plaintiff, have sustained damage to the amount of five hundred dollars.

"Wherefore defendants pray judgment:

"1. That the prayer of the plaintiffs' complaint for the possession of said property be denied, and defendants be allowed to (283) retain the same.

"2. That the defendants receive of the plaintiffs the sum of five hundred dollars damages for the willful and unlawful breach of the aforesaid contract.

"3. And for the costs of this action."

The plaintiffs made reply to the answer, among other things, as follows:

"2. That the plaintiffs deny the truth of the facts set forth in article first of the second defense set forth in the said answer, that if any such contract as set forth therein was executed by one Charles Franks, they deny that he was an agent of plaintiffs' with power or authority to make such contract, or that the same was ever ratified by the plaintiffs.

3. That they admit the second article of the second defense of the answer to the extent that they have never complied with the terms of any such contract, but they deny as above, any such contract.

4. They deny the third article of the second defense set forth in the said answer.

5. Replying further, the plaintiffs allege that no notice of such alleged breach of the contract set up in the answer, or that these plaintiffs claimed the existence of any such contract until within the past two days—during the present term of this court—and that no notice was ever served upon them, until that date, to produce said alleged contracts.

Wherefore the plaintiffs demand the judgment prayed for in their complaint filed in this cause."

The action was commenced on 16 August, 1886. The complaint was filed to January Term, 1887, and at the said term of the court was amended. The answer was filed at the following April Term. The defendants relying upon the matters alleged in the second defense set up in their answer upon the trial, offered evidence in support of the allegations made therein.

(284) The plaintiffs demurred *ore tenus* to the second defense in the defendants' answer, and moved to strike it out, because upon its face it did not contain facts sufficient to constitute a good and valid defense in this action, in that—

1. It asked for affirmative relief and could therefore be pleaded only as a counterclaim.

2. As such it was defective in that it was not pleaded as a counterclaim. And even if it were, it alleged that the facts constituting it occurred since the institution of this action. And moreover it appeared upon its face that it was without consideration.

The defendants denied this and contended that the alleged plea or defense was to the further prosecution of this action and in bar thereof.

The court sustained the demurrer and motion of plaintiffs, and defendants excepted.

There was judgment for the plaintiff, from which the defendants appealed.

Thomas W. Strange for plaintiffs.
No counsel for defendants.

MERRIMON, J. The defendants had possession of the "Apparatus" in controversy, and if the contract alleged by them as a second ground of defense, exists as alleged, they are entitled to have such possession until the contract shall be observed and performed, first, on the part of the plaintiffs, or until it shall in some way be discharged. It is not void for want of consideration, as contended; the mutual agreement of the parties to do the several things stipulated to be done on the one side and on the other was a sufficient consideration to support it.

It is regular, proper, and very much better in every way, that all pleadings shall be orderly and formal, but the mere form is not generally essential. If sufficient matter is pleaded, the law deter-

(285) mines the character and effect of the pleading, without regard to the particular name given it. If the defense in question were not in legal effect a *counterclaim* well pleaded, the plaintiffs should have demurred to it in apt time, that is, when it was pleaded and

before the pleadings were settled and completed. If it were not a *counterclaim,* a cause of action was alleged irregularly, it is true, but the parties might have litigated it by consent, certainly with the anction of the court, because the court had jurisdiction of the parties and the cause of action.

But if it is granted that a *cause of action* was not well pleaded as a defense, a sufficient defense arising after the action began was alleged, if the defendants could avail themselves of it in this action. It is contended that they could not, because it arose after the action began. Ordinarily and generally this is true, but in some cases a defense thus arising may be pleaded by answer as in the case of a plea since last continuance by consent of the parties, or by order of the court, with a view to the ends of justice, upon just terms as to costs—as where the plaintiff took possession of the land in controversy after the action began, and like cases. *Bailey v. Cochran,* 1 Hay, 120 (104); *Morgan v. Cone,* 1 D. & B., 234; *Johnson v. Swain,* Busb., 335; *Thompson v. Red,* 2 Jones, 412.

We think that the plaintiffs, by implication, consented to allow the defendants to allege and avail themselves of the defense in question, if it were well founded—at least they waived their right to object on the ground that it arose after the action began. They did not demur to the answer as they might have done—on the contrary they made reply thereto, expressly denying and controverting the defense in question; no objection was raised that it could not be alleged and relied upon in this action until after the pleadings were settled and completed and after the jury were empaneled to try the issue of fact raised by them. It was then too late to raise such objection. There is nothing in the nature of the defense pleaded and relied upon in the plead- (286) ing that puts it without the jurisdiction of the court in this action in the absence of appropriate objection made in apt time. The court might and ought to have disposed of it upon its merits.

The defendants are entitled to a new trial.

Error.

Cited: Lockhart v. Bear, 117 N. C., 302; *Rodman v. Robinson,* 134 N. C., 506; *Williams v. Hutton,* 164 N. C., 223; *Miller v. Dunn,* and *Abdallah v. Dunn,* 188 N. C., 397.

E. J. POWERS v. T. DAVENPORT.

Arrest and Bail—Agent—Jurisdiction—Fraud.

1. A debtor endorsed to his creditor certain notes as collateral security, but retained possession of them under an agreement that he was to collect when due, and pay the proceeds to the creditor: *Held*, that this made him the agent of the creditor, and subjected him to arrest in a civil action for fraudulently failing to account for the sums he collected under the agreement.
2. When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly, otherwise the order of arrest will be continued.
3. It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge.
4. A nonresident of this State may be arrested and held to bail for fraud under The Code, sec. 291 (2).
5. A person may be arrested and held to bail for a fraud committed after the contracting of the debt—*e. g.*—by concealing property, or other devices for defeating the creditor.

THIS is an appeal from the judgment of *Shepherd, J.*, refusing to allow a motion of the defendant to vacate an order of arrest (287) made in an action pending in NEW HANOVER Superior Court, heard at Chambers on 27 January, 1888.

The order of arrest was made upon the following affidavit:

"Henry W. Mallory being duly sworn, deposes and says:

"1. That he is the agent of the plaintiff.

"2. That on or about 5 October, 1885, the plaintiff turned over to the defendant, as his agent, for the purpose of collection, certain notes and accounts against parties in the State of South Carolina, amounting in the aggregate to the sum of two thousand six hundred and thirty-nine and 5/100 dollars, with the understanding and agreement between the said plaintiff and defendant that the defendant would collect said notes and accounts for the plaintiff and turn over the proceeds thereof to the plaintiff as they were collected.

"3. That in pursuance of said agreement the defendant proceeded to collect said notes and accounts, and, as this deponent is informed and believes by conversations with the parties indebted on said notes and accounts, and from receipts in the handwriting of said defendant and in the possession of said parties, and from an examination of the de-

fendant's books, the defendant collected the sum of eleven hundred and eighty-eight and 70/100 dollars from the several debtors and in the several amounts enumerated in the schedule hereto attached and made part of this affidavit. And this affiant believes that he has collected other amounts from the debtors of the plaintiff, but exactly what amounts and from whom he is unable to state.

"4. That the plaintiff has demanded of the defendant that he account to him for the money so collected, and pay the same over to him, but hitherto the defendant has wholly neglected and refused to do so, and as this affiant is informed and believes, has fraudulently and unlawfully converted the same to his own use, with the intent to defraud and cheat the plaintiff.

"5. That the plaintiff has commenced this action, and has (288) issued a summons herein."

The schedule of debts accompanies the affidavit. The order of arrest was made returnable "to the clerk of the Superior Court of New Hanover County, at his office in the city of Wilmington, county and State above written, on Wednesday, 18 January, A. D. 1888."

Defendant moved to vacate the order of arrest, and in support of said motion, filed an affidavit admitting paragraph 1 of plaintiff's affidavit, and so far as is material for our consideration, saying in answer to the affidavit in substance that, in the spring of 1885, he purchased from the plaintiff seventy tons of Gibbs' Guano, for which he executed three notes, and that in October of the same year, at Gaffney City, S. C., he *endorsed* various notes and accounts to the plaintiff as a collateral security for the payment of these notes; that by agreement the said notes and accounts were left in the defendant's hands with the understanding that as defendant collected money thereon he would apply it to the payment of these notes; that when said collaterals were *endorsed* to plaintiff he was informed that they were executed to defendant for various brands of guano—the Gibbs among them; that the defendant was selling other brands, but that he had enough notes and accounts to pay his guano indebtedness, provided he could make collections, and that "agreeable to said understanding," he did collect about "$300, in cash, which said $300 represented the share and percentage which Gibbs' Guano held to the $668 collected on said notes, and that the $300 were paid to the plaintiff, and for freights." That about $600 of said notes were collected by one S. S. Ross and applied to the debts of T. Davenport & Co.; that said Ross was not a partner of defendant in the purchase and sale of Gibbs' Guano, but was a partner in the purchase and sale of other guano; that in November, 1885, plaintiff

(by his agent Malloy) caused defendant to be arrested and
(289) indicted in South Carolina upon a charge of "breach of trust with fraudulent intent" in collecting and fraudulently converting money collected on said notes and accounts; that the defendant was acquitted, and a transcript of the indictment and verdict of "not guilty" accompanies the affidavit.

The third paragraph of plaintiff's affidavit is denied, and so is the fourth paragraph, except so much of it as alleges a demand.

The affidavit further states that in a civil action instituted . . . in South Carolina by the Atlantic Phosphate Company against him an order was made, a copy of which accompanies the affidavit, in which, among other things, it is ordered that defendant turn over to a receiver "all notes, accounts and choses in action in his possession, and all property of every description . . . except the sum of money found by the referee to be in his possession, etc." The court finds, so the order states in substance, that the defendant has made an explanation of the disposition of the funds referred to.

The defendant further says in substance, that a large part of the notes and accounts were not collected by reason of Malloy's (plaintiff's agent) interference with his business in South Carolina, by which he was greatly injured, and that other sums were collected by one Moore, his agent, and Ross, his partner, and went into the general fund of T. Davenport & Co.; that Ross collected a large portion of the money received from the notes and accounts which defendant had endorsed to plaintiff. He denies all intention to defraud, or that he appropriated any of the plaintiff's money to his own use.

Malloy (agent for plaintiff) filed a counter affidavit, denying any such agreement as that contained in defendant's affidavit, or that any-
thing was said about the sales of other guanos, or that defendant
(290) had informed plaintiff that the notes and accounts were for the sales of various brands of guano; on the contrary the defendant "expressly stated that they were from the sale of plaintiff's guanos," and by the agreement between plaintiff and defendant, all notes and accounts for the sale of guano were to be held for the plaintiff till the three notes were paid. The written agreement, a copy of which is filed with the affidavit, is to the effect stated. The affidavit further states that of all the various amounts collected by the defendant only $130 were paid to the plaintiff; that he knew that the defendant continued to make collections, and that it was after full and ample knowledge that the defendant had collected money which he refused to pay over "that he had him arrested on the charge on which he was tried and acquitted

as stated in the defendant's affidavit"; that the money collected "was appropriated by defendant to his own benefit, or by others with his full knowledge and consent."

The defendant moved to vacate the order of arrest on the following grounds:

"1. That the order of arrest is defective, in that it fails to state when it is returnable.

2. That the affidavit upon which said order of arrest was granted is insufficient.

3. That the allegations of the affidavit upon which said order of arrest was granted are wholly denied by the affidavit of the defendant filed in the cause.

4. That the defendant has been indicted and tried by a court of competent jurisdiction of the fraudulent breach of trust alleged in the affidavit upon an indictment instituted by said H. W. Malloy, agent of the plantiff, and was acquitted.

5. That the defendant is a nonresident of the State, and is not liable to arrest for the causes set out in the affidavit of the plaintiff's agent, H. W. Malloy, and under section 291 (2) of The Code.

6. That the collateral security endorsed by defendant to plain- (291) tiff was not the property of plaintiff, but of the defendant, and the defendant did not stand in a fiduciary capacity or relation to plaintiff, and even if he had appropriated all of the money to his own use, he would not be guilty of fraud as contemplated under section 291 of The Code.

7. That the alleged fraudulent conversion or embezzlement was committed, if anywhere, in the State of South Carolina."

The court rendered the following judgment:

"This motion coming on to be heard before me on affidavits and the papers herein as amended, and it appearing to the court that the allegations set forth in the affidavit of plaintiff as grounds of arrest have not, upon the proofs, been sufficiently rebutted, the court finds, for the purpose of this motion only, that the said allegations are true. It is therefore adjudged that the motion to vacate the order of arrest is refused."

From this judgment the defendant appealed.

Solomon Weil (by brief) for plaintiff.
John Devereux, Jr., for defendant.

DAVIS, J., after stating the case: 1. Section 295 of The Code, among other things, provides that the order "shall require the sheriff . . .

to arrest him (the defendant) and hold him to bail in a specified sum, and return the order at a place and time therein mentioned to the clerk of the court in which the action is brought," etc. In exact compliance with this provision the order is made returnable "to the clerk of the Superior Court of New Hanover County, at his office in the city of Wilmington, county and State above written, on Wednesday, 18 January, A. D. 1888."

So the order of arrest is not defective in that respect.

2. Section 291, subsection 2, of The Code, authorizes an arrest
(292) "in an action . . . for money received, for property embezzled or fraudulently misapplied by . . . any factor, agent, broker, or other person in a fiduciary capacity."

The affidavit alleges that the defendant was the agent of the plaintiff, and that as such he collected money which he "fraudulently and unlawfully converted" to his own use with "intent to defraud and cheat the plaintiff," and we think the affidavit was sufficient to warrant the order of arrest.

3. The affidavit of the defendant contains a statement of facts in avoidance of the plaintiff's allegations rather than a denial, and the statement is not very clear or satisfactory. He admits that the notes and accounts were endorsed by him to the plaintiff, and were left with him for collection. Just what he means when he says that he collected "$300 in cash, which said $300 represented the share and percentage which the Gibbs Guano held to the $668 collected on said notes," is not very clear, as the $668 is nowhere else mentioned; but we assume that it had reference to the alleged fact, that the plaintiff was informed at the time the notes and accounts were endorsed to him, that they were executed for various brands of guano.

The defendant also says that some of the notes and accounts were collected by one Moore, his agent, and by one Ross, his partner, and went into the general fund of T. Davenport & Co. He does not say that this was without his knowledge or approval. His affidavit is met by the counter affidavit of Malloy, supported in a material respect by the written agreement signed by the defendant, and it is found, and as the evidence warranted, by the court below, that for the purposes of this motion the allegations of the plaintiff are true, and the third ground upon which the defendant bases his motion to vacate the order of arrest cannot be maintained.

4. This is a civil action instituted in the Superior Court of New Hanover County to recover money which the plaintiff alleges the defendant, as his agent, had collected and neglected to pay over to

him, and which he refused to pay upon demand, and the plain- (293)
tiff's rights in this action cannot be affected by the result of any collateral proceeding or prosecution in South Carolina, and the fourth ground of defendant's motion cannot avail him.

5. Chapter 69, sec. 1, of the Acts of 1869-70, C. C. P., sec. 149, Bat. Rev., 176, authorized arrest and bail "in actions arising on contract where the defendant is a nonresident of the State." This provision has not been brought forward in The Code, doubtless because it was thought to be in contravention of Article I, sec. 16, of the Constitution, which declares that "there shall be no imprisonment for debt in this State except in cases of fraud." But there is no constitutional protection against "arrest for fraud," whether the person be a resident or nonresident, and it would be a singular discrimination in favor of nonresidents if, when within the jurisdiction of our courts, they should be allowed immunities not accorded to our own citizens.

It has been held that under subsection 4, sec. 291, of The Code, a defendant cannot be arrested unless he has been guilty of fraud in contracting the debt. *McNeely v. Haynes,* 76 N. C., 122. The cases cited by counsel for defendant (*Brown v. Ashborough,* 40 How. Prac. Rep., 226, and others), have reference to arrest for fraud in *contracting debt,* and not in the class of cases embraced in subsection 2.

In *Melvin v. Melvin,* 72 N. C., 384, it is said, "The words except in cases of fraud are very broad," and they comprehend "not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but embraces also fraud in making the contract, false representations, for instance, and fraud in increasing the liabilities, as when an administrator, by applying the funds of the estate to his own use, paying his own debts, and the like."

We think the case before us comes within the provision of (294)
subsection 2, sec. 291, of The Code, and that the fact that the defendant is a nonresident of the State gives him no immunity from arrest when within the jurisdiction of the courts of this State.

6. We are unable to see any force in the sixth ground upon which the defendant bases his motion. His own evidence shows that the notes were *endorsed* to the plaintiff, and that he held them to collect for the plaintiff.

7. What is said of the fifth ground for vacating the order, applies to the seventh also. If a person in South Carolina, whether a citizen of that State or of this State, commits a battery in that State upon a citizen of this State, or does any other act for which an action will lie, and afterwards comes within the jurisdiction of this State, he would be

liable to an action here, and the *lex fori* would govern it. The parties are within the jurisdiction of the courts of this State, the relief is sought here, and the action in which the remedy or relief is sought is governed by the laws of this State.

There is no error.

Affirmed.

Cited: Travers v. Deaton, 107 N. C., 504; *Boykin v. Maddrey,* 114 N. C., 90; *Fertilizer Co. v. Grubbs, ibid.,* 472; *Ledford v. Emerson,* 140 N. C., 292; *Guano Co. v. Southerland,* 175 N. C., 231.

A. M. LEE, EXECUTOR OF THOMAS M. LEE ET AL., v. JOHN R. BEAMAN, ADMINISTRATOR OF JONES PETERSON ET AL.

Administration—Statute Limitations—Presumption—Devastavit.

1. The seven years limitation prescribed by Revised Code, ch. 65, sec. 11, was applicable only to demands against the debtor in his lifetime, but when such claims were reduced to judgment, they became merged therein, and there was no statute of limitation against proceedings for its enforcement, either against the personal or real estate of the decedent. After the expiration of ten years a presumption of payment arose.
2. Where there has been a *devastavit* the remedies against the personal representatives must be exhausted before resort can be had to the real estate of which the deceased died seized and possessed; but where the personal estate was lost without negligence or default of the personal representative, recourse may be had to the descended lands.

(295) THIS was a civil action—a creditor's bill—tried before *Shepherd, J.,* at Spring Term, 1888, of SAMPSON Superior Court.

The facts agreed on by the parties at the trial, so far as necessary to be set out in order to a proper understanding of the matters in controversy in the action, are as follows:

Thomas M. Lee, testator of the plaintiff, holding a claim against Jones Peterson, after the death of the latter, recovered judgment for $337.23 and interest, against the defendant, John R. Beaman, administrator, at Fall Term, 1861, of the Superior Court of law of Sampson County, charging him with assets of his intestate. The intestate owned a large number of slaves of the value of $20,000, and a growing crop from which was received about $400.

In January, 1863, the defendant, under a license from the proper court, sold two of the slaves, and in April another, for the aggregate sum of $3,107, with which fund, all received in Confederate currency, after the expiration of the credit given, he discharged all the indebtedness due by the intestate except the said judgment on this debt. Soon after its recovery he offered to pay to the clerk of the court, who refused to receive the money tendered, under directions of said Thomas M. Lee, and thereupon he paid it into the office, where it still remains and has become worthless.

In January, 1863, the other slaves, valued at $17,000, were, under a decree in a proceeding for partition, divided among the distributees, and refunding bonds, with good sureties, taken from each and filed in the office, but they have since been lost, and were rendered insolvent by the results of the war. All the personal estate of the intestate, Peterson, was lost and rendered valueless from the same cause, and this "without negligence or default on the part of the ad- (296) ministrator."

The intestate debtor left a valuable tract of land at his death in addition to the personal estate, which descended to his heirs-at-law, who within two years thereafter sold and conveyed the same to the defendant Beaman, and he, with them, is a party to the present suit, which seeks to pursue and subject the land to the payment of said judgment.

At Fall Term, 1871, an action was begun against the administrator to compel satisfaction out of the personal estate, which resulted in a nonsuit, suffered at June Term, 1876.

On 8 May, 1877, he commenced a special proceeding before the clerk and against the heirs-at-law to subject the intestate's land, which, being carried to the Superior Court for hearing before the judge, upon his intimation of a want of jurisdiction, terminated also on 10 April, 1886, in a nonsuit.

Thomas M. Lee died in April, 1881, and on 1 May thereafter the present plaintiff became his executor, and made advertisement for creditors, as required by law.

The court being of opinion upon these facts that the action so far as it sought to reach the real estate was barred by the statute of limitations, the plaintiff again submitted to a judgment of nonsuit and appealed. The errors assigned in the ruling are as follows:

1. In that it appears that the administrator had, at and before the rendition of judgment, assets of his intestate sufficient, and which he ought to have applied to the payment of the debt.

2. In that having such funds in Confederate currency in sufficient amount to discharge the judgment, and having tendered the same to

the clerk, who, by plaintiff's instruction, refused to accept the currency, the administrator deposited the same in the office of said
(297) clerk, where it now is, and the plaintiff contends that such action on the part of the administrator was at his own peril, and rendered him liable to be charged with the value of said Confederate money at the date of said deposit.

3. That while the suit of the said T. M. Lee was pending against him, so resulting in said judgment, and before said judgment, the said administrator turned over to the children of the said Jones Peterson, as his next of kin, slaves of the value of $17,000, and took from them refunding bonds without sufficiently providing for the satisfaction of the plaintiff's debt, and the plaintiff contends that such action of the administrator was without authority of law.

4. That upon the facts found, the court held that the plaintiff's action was barred, as against the heirs of Jones Peterson, by the statute of 1715 (now Rev. Code, ch. 65, sec. 11).

To this ruling the plaintiff excepted, and assigns for error:

1. That said act applies only to claims against the said Jones Peterson, existing at the time of his death, and not to plaintiff's judgment taken against his administrator.

2. The heirs are concluded by the judgment taken against the administrator in 1863.

3. The heirs do not plead the statute, and as the sale of the land by them to the defendant Beaman was void, being within two years of the death of said Jones Peterson, the title is still in the heirs as against the plaintiff.

4. John R. Beaman, purchaser, under such void sale, cannot plead it, because he is the defendant in the judgment of 1863 and all subsequent proceedings thereon.

5. The heirs cannot plead it, because they received the personalty and gave refunding bonds to pay the debts of the intestate, which bonds are still subsisting against them; and if the heirs could not, neither can the purchaser.

(298) *J. L. Stewart for plaintiffs.*
W. R. Allen for defendants.

SMITH, C. J., after stating the case: The appeal seems to have been intended to present for review the ruling as to the statutory obstruction in the way of reaching the descended lands of the deceased debtor after the lapse of so long an interval, and, strictly speaking, the correctness of the expressed opinion which led to the nonsuit is the sole matter presented for our decision. Confining ourselves to this single inquiry, we

should feel little hesitancy in pronouncing the intimated intended ruling erroneous. The statute which is supposed to have that effect, after the lapse of seven years from the death of the debtor (Rev. Code, ch. 65, sec. 11) most manifestly applies to claims *existing against the debtor in his lifetime,* and a delay for the specified period in enforcing them by action. But when such action has been brought and the debt or demand reduced to judgment against the administrator, a new cause of action arises upon the judgment into which the original claim has merged, and this is governed by the provisions of the other enactments that bar an action, and there are none such under the law in force when the judgment was rendered, but the creditors' inaction for ten years without explanatory and rebutting evidence, raised a presumption that it has been satisfied. *Johnston v. Jones,* 87 N. C., 393; *Mauney v. Holmes, ibid.,* 428.

The judgment being the foundation of the new action, whether the proceeding looks to a satisfaction to be made out of the personal or real estate, both of which came from the debtor and are alike liable to his creditors, the one after the exhaustion of the other, there was no statutory bar to its enforcement. *Speer v. James,* 94 N. C., 417; *Smith v. Brown,* 99 N. C., 377.

The cases of *Syme v. Badger,* 96 N. C., 197, and *Andres v. Powell,* 97 N. C., 155, were determined on a construction of the act of the limitations established under the Code of Civil Procedure, and (299) have no application to that before us, which is controlled by the previous law.

It may facilitate the settlement of the controversy to make a suggestion that seems not to have occurred to the counsel at the trial, and appears in the transcript.

If there has been a devastavit, as the appellant contends, in the disposition of the funds that came into the administrator's hands, without paying the judgment debt in an amount sufficient to its discharge, the present action to subject the real estate cannot be maintained, for the personal estate must first be pursued and recovered, if it can be, and the administration bond be charged and made to pay for what may have been wasted, if it is solvent. This is decided in *Bland v. Hartsoe,* 65 N. C., 204; *Latham v. Bell,* 69 N. C., 135; *Lilly v. Wooley,* 94 N. C., 412. There is no intimation that the administrator is not personally able to make the debt good, and his surety to the administration bond also.

But this is met by the admission that all of the intestate's personalty "were lost by the results of the war, *without negligence* or default on the part of the said Beaman."

If this be so, inasmuch as the creditor declined to accept such moneys as the defendant Beaman had, and the loss of the estate in his hands was

not in consequence of a want of fiduciary care in its preservation, and the slaves have ceased to be property, recourse would be left open for the creditor upon the land, for there would then be no such devastavit as rendered the administrator or his bond responsible for the loss. *Hinton v. Whitehurst,* reported in successive appeals in 71 N. C., 66; 73 N. C., 157; 75 N. C., 178, and in 68 N. C., 316, more especially, where the subject is considered and the ruling made.

There is error, and must be a new trial, and so it is adjudged.

Error.

Cited: Smith v. Brown, 101 N. C., 351.

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(300)

DURANT WILLIAMS v. GEORGE L. HODGES.

Penalty—Marriage—Register of Deeds—Negligence.

Where a register of deeds issued a license for the marriage of a woman under the age of eighteen years, without the written assent of her parents, upon the application of a stranger, who, in response to inquiries put to him, stated the residence of the parties desiring to be married, their parentage and that the woman was eighteen or nineteen years old, but the register made no further inquiry: *Held,* that he had made no such reasonable inquiry that there was no probable legal impediment to the proposed marriage as required by law, and he had incurred the penalty provided for the neglect of his duties in that respect.

CIVIL ACTION tried before *Shepherd, J.,* at Spring Term, 1888, of LENOIR Superior Court.

This action was brought to recover the penalty prescribed by The Code, sec. 1816.

It was agreed by the parties that the court should try the facts as well as the law, and a jury trial being waived, the court found the following facts:

1. That the plaintiff was a resident of Duplin County, and lived twenty-five miles from Kinston, Lenoir County, of which county the defendant was the register of deeds; that plaintiff had a daughter named Ann, who was under the age of eighteen, and who was living with her parents in said county of Duplin; that the daughter married one Chauncy Smith against the consent of the plaintiff; that she left his house and married Smith while the plaintiff was absent at a funeral in the neighborhood; that her parents were opposed to the marriage, which was solemnized on 7 April, 1887.

2. That the license for the marriage was issued by the defendant on 8 March, 1887, and upon the application of one Westbrook, a stranger to defendant, the latter never having seen him before the time of the application; that Westbrook asked defendant for a license (301) for Chauncy Smith; that defendant asked him who was his (Chauncy's) father and mother; that Westbrook gave the defendant the names of the father and mother; that defendant then asked Westbrook where Chauncy Smith lived, to which Westbrook replied that he lived in Duplin County; that defendant then asked the names of the lady and of her father and mother; that Westbrook told him their names. Defendant also asked Westbrook if Chauncy's father was living, to which he replied in the negative; that he also inquired if his mother was living, to which he replied in the affirmative; that defendant asked Westbrook if the father and mother of Ann were living and her age, to which he said yes, that they were living, and that Ann was eighteen or nineteen years of age.

3. That thereupon the license was issued by defendant.

4. That Westbrook was a white man, apparently thirty years of age, of fair address, and of apparent respectability, and that he applied for the license at 10 a. m., during the regular office hours of defendant.

5. That plaintiff was, on the last Sunday in March, 1887, informed by said Westbrook that the defendant had issued, on his (Westbrook's) application, a license for the marriage of said Smith and said Ann; that plaintiff, on 13 March, wrote the defendant from Buena Vista, Duplin County, if he had issued such a license, and that defendant wrote him on 18 March, directed to Buena Vista, Duplin County, "No one has applied for license to marry your daughter Ann."

6. That defendant did not know any of the parties.

Upon the facts found, it is adjudged by the court that the plaintiff do recover of the defendant the sum of two hundred dollars and the costs of this action, to be taxed by the clerk.

The defendant, having excepted, appealed.

H. K. Kornegay filed a brief for plaintiff. (302.)
N. J. Rouse (by brief) and W. R. Allen for defendant.

MERRIMON, J., after stating the case: It appears that the defendant was the register of deeds of the county of Lenoir on 8 March, 1887, and the question presented by the record for our decision is, Did it *appear probable, upon reasonable inquiry* made by him at the time he issued the license mentioned on that day for the marriage of the female, Ann Williams, therein named and Chauncy Smith, that she was of the age of 18 years?

The sections of the statute (The Code, secs. 1814-1816) pertaining to and regulating marriage are in *pari materia,* and must be construed together in the respects material here. *Bowles v. Cochran,* 93 N. C., 398. The first of these sections provides, among other things, that "Every register of deeds shall, upon application, issue a license for the marriage of any two persons: *Provided,* it shall *appear* to him *probable* that there is no legal impediment to such marriage," etc. The second provides that "Every register of deeds who shall knowingly, *or without reasonable inquiry,* issue a license for the marriage of any two persons to which there is any lawful impediment, or when either of the persons is under the age of eighteen years, without the consent required by section eighteen hundred and fourteen, shall forfeit and pay two hundred dollars to any person who shall sue for the same."

The authority thus conferred to issue license is not to be exercised carelessly and as a mere matter of form. It is important, and intended to serve the very wholesome purpose, among other things, of preventing marriage, when there exists some legal impediment, and to prevent the marriage of persons, male or female, under the age of eighteen years, and therefore not presumed to be capable of wisely entering into so important a relation unless with the written consent of the parent
(303) or person having the care and charge of such person to be married. The license shall not be issued as of course to any person who shall apply for it—the register is charged to be cautious and to scrutinize the application; it must *appear probable* to him upon *reasonable inquiry,* when he has not personal knowledge of the parties, that the license may and ought to be issued. The probability upon which the register should act is not such as arises from conjecture, founded upon the application and pointless or evasive replies to inquiries put to the person applying for the license, but from evidence—not necessarily evidence in the strict technical sense—from inquiry of trustworthy persons known to the register who can and do give pertinent information called out by similar inquiry presently or within a reasonable time; from the examination of pertinent records and entries; from inquiry as to like events, and from the like inquiries, and the evidence thus elicited should render it probable—more likely than the contrary—that the license should be issued in pursuance of the application for the same. In this case, to justify the defendant as to the license in question, such or like inquiry should have been made by him, and the evidence elicited should have been such as rendered it affirmatively probable that Ann Williams was of the age of eighteen years—that is, that she was—was more probable than the contrary. And such license should never be issued until it should thus *appear probable* to the register to whom application is

made for the same, that it ought to be issued. To issue a license to marry "without reasonable inquiry," without care and scrutiny, and when it does not *appear probable* to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose and oftentimes brings distress and ruin upon individuals and families. To prevent such evils the statute provides heavy penalties.

Now, applying what we have said, we are of opinion that it did not *appear probable* to the defendant, upon "reasonable inquiry," that Ann Williams, mentioned, was of the age of eighteen years (304) when the license for her marriage was issued by him. He did not know her or her family, nor did he know Smith named in the license or his family. An entire stranger to him made application for the license. He made no inquiry except of this stranger. The questions put to him were very general and vague—not such as to elicit directly material information, except that as to the age of Ann Williams. The answer in this respect was uncertain, careless, and unsatisfactory; indeed, it suggested further inquiry, but none further was made. He was not even asked if the father of the female resided in the county of Lenoir, and it seems the defendant did not know that he did or did not. Surely such inquiry in respect to such a matter was not reasonable, nor did the inquiries and the information so unsatisfactory make it appear probable that the female was of the age of eighteen years. The mere personal appearance of an entire stranger was not evidence to create such probability—it was scarcely ground for conjecture. That an entire stranger, not vouched for, should make such an application was rather ground of suspicion that it was not made in good faith, and this should have prompted further and satisfactory inquiry before issuing the license. *Coley v. Lewis,* 91 N. C., 21; *Bowles v. Cochran, supra.*

There is no error, and the judgment must be

Affirmed.

Cited: Cole v. Laws, 104 N. C., 657; *Hodge v. R. R.,* 108 N. C., 32; *Walker v. Adams,* 109 N. C., 483; *Sutton v. Phillips,* 116 N. C., 505; *Agent v. Willis,* 124 N. C., 32; *Harcum v. Marsh,* 130 N. C., 159; *Trollinger v. Burroughs,* 133 N. C., 316; *Laney v. Mackey,* 144 N. C., 633; *Joyner v. Harris,* 157 N. C., 301; *Gray v. Lentz,* 173 N. C., 351; *Snipes v. Wood,* 179 N. C., 354.

(305)

W. C. FIELDS ET AL. v. W. B. WHITFIELD.

Will—Devise—Covenant—Warranty.

A. devised lands "to my five grandsons—L., A., W., N., and J. . . . —to them or the surviving part of them; and in the event of the death of the (said grandsons) leaving no heirs of their own body, then and in that case the aforesaid lands shall be equally divided between T. and M. (sisters of the first named devisees), or their children." The testator further provided, that each of his said grandsons should "receive his proportional share of said land when he arrives at the age of twenty-five years, and not before." All the grandsons survived the testator, and attained the age of twenty-five years: *Held*, that thereupon the grandsons took an estate absolute in fee simple in common in the lands, and upon the death of any one of them intestate, his share descended to his heirs at law.

THIS is a civil action tried before *Merrimon, J.*, at August Term, 1888, of LENOIR Superior Court.

The action was brought to recover damages for the breach of the covenants of seizin and against incumbrances comprised in a deed executed by the defendant to the plaintiffs, conveying the lands mentioned and described therein, and the following are the facts agreed upon by the parties for the consideration of the court:

1. That on 6 March, 1848, one L. Whitfield, of the counties of Lenoir and Carteret, in the State of North Carolina, executed his last will and testament, and shortly thereafter died in the county of Carteret.

2. The will was shortly thereafter duly admitted to probate and recorded.

3. That in the 8th item of said will he, the testator, bequeathed and devised in the following words, viz.: "I give, bequeath, and devise to my five grandsons, the sons of Allen Whitfield, viz.: Lewis Whitfield,
(306) Jr., Allen Whitfield, Jr., William B. Whitfield, Nathan B. Whitfield, and James B. Whitfield, all of my lands in Sampson County and that part of my lands in Wayne County on the south side of Neuse River; also that part of my lands lying on the north side of Neuse River, in Wayne County, in the bend of said river and within the following bounds (giving certain lines), to them or the surviving part of them; and in the event of the death of the aforesaid Lewis Whitfield, Allen Whitfield, William B. Whitfield, Nathan B. Whitfield, and James B. Whitfield, sons of Allen Whitfield, deceased, leaving no heirs of their own body, then and in that case the aforesaid lands shall be equally divided between Tabitha Wooten and Mary Jane Whitfield, daughters of Allen Whitfield, deceased, or their children. I hereby wish it to be distinctly understood that each son of Allen Whitfield, deceased, as above

named, shall receive his proportional share of said lands when he arrives at the age of twenty-five years, and not before."

4. That that part of said lands comprised in said deed from the defendant to the plaintiffs, and concerning which this action has been brought, is a part of the lands devised in the said 8th item of said will.

5. That Lewis Whitfield, Jr., Allen Whitfield, Jr., the defendant, W. B. Whitfield, Nathan B. Whitfield, and James B. Whitfield, all of the primary devisees named in the said 8th item of said will, survived the testator.

6. That all of the said primary devisees mentioned in the said 8th item of said will survived the age of twenty-five years, and thereupon all of the lands devised in the said 8th item were legally divided between all of said primary devisees, and that part of the said lands concerning which this action has been brought was allotted in said partition, together with other lands, to James B. Whitfield.

7. That on 10 July, 1862, James B. Whitfield died, unmarried, and without having or leaving issue of his body, leaving him surviving the other four primary devisees.

8. That on 12 May, 1864, Nathan B. Whitfield died, unmar- (307) ried, and without having or leaving issue of his body, leaving him surviving the other three primary devisees.

9. That on 15 February, 1866, both of the shares of said James B. and Nathan B. Whitfield, deceased, which were allotted to them in the partition proceeding, mentioned in the 6th section of this agreement of facts, were in one partition proceeding divided between the then surviving primary devisees named in the said 8th item of said will, viz.: Lewis Whitfield, Jr., Allen Whitfield, Jr., and the defendant, William B. Whitfield, and the said lands comprised in said deed from the defendant to the plaintiffs, and concerning which this action has been brought, was, among other lands, allotted in said partition to the said defendant, William B. Whitfield.

10. That Tabitha Wooten, one of the executory devisees mentioned in the 8th item of said will, died on 25 October, 1860, leaving her surviving several children, who are still living.

11. That Mary Jane Whitfield, the other executory devisee mentioned in the said 8th item in said will, is still living—the heirs at law of the said James B. and Nathan B. Whitfield, at the time of said division, being the said three primary devisees, and Mary Jane Whitfield and the children of Tabitha Wooten, the said executory devisees, mentioned in said 8th item.

12. That on 10 April, 1888, Lewis Whitfield, Jr., and Allen Whitfield, Jr., two of the primary devisees named in the 8th item of said will, executed a quit-claim deed to the defendant, William B. Whitfield,

by which they conveyed all of their rights, title, interest and claim in the lands that was allotted to the defendant, William B. Whitfield, in the partition proceedings mentioned in the 9th section above of (308) this agreement of facts, and the lands concerning which this action has been brought are a part of the same.

13. That said Lewis Whitfield, Jr., one of the primary devisees named in the 8th item of said will, died on 10 May, 1888, leaving him surviving several children.

14. That said Allen Whitfield, Jr., one of the primary devisees named in said 8th item in said will, is still living, married, and has children.

15. That the defendant, William B. Whitfield, the other primary devisee named in the 8th item of said will, has no issue of his body, and on 21 April, 1888, executed the deed to the plaintiffs in which is contained the following covenant in respect to the land therein mentioned, concerning which this action was brought: "And the said party of the first part, the said W. B. Whitfield, for himself, his heirs, executors and administrators, covenants to and with the said parties of the second part, their heirs, executors, administrators and assigns, that he is seized of the said lands hereby conveyed, in fee simple, and that he had a right to convey the same in fee, and has done the same by this indenture. That the said lands are free and clear from all encumbrances," etc.

16. That the parties of the second part named in said covenant are the plaintiffs in this action.

17. That if upon the facts above stated the court shall be of opinion that, in law or equity, the plaintiffs are entitled to recover, in whole or in part, judgment shall be given for the plaintiffs for $1,000 damages for the whole, or in that proportion for a portion, and cost; otherwise, judgment for the defendant, etc.

Upon consideration whereof the court declared its opinion to be that, "under the said 8th item of the last will and testament of Lewis Whitfield, Sr., the said devisees in said item named, having survived (309) the said testator, and arrived at the ages of 25 years, took an absolute title in fee simple in the lands described in said item; and that upon the death of the said devisees, Nathan B. and James B. Whitfield, without issue, their shares of the said lands went to their brothers and sisters, to wit: Wm. B. Whitfield, Allen Whitfield, Jr., Lewis Whitfield, Jr., and Mary Jane Whitfield and Tabitha Wooten, and that the deed from the defendant, Wm. B. Whitfield, conveyed only three-fifths interest in the said lands, the other two-fifths being the property of Mary Jane Whitfield and the children of Tabitha Wooten, deceased. It having been agreed by the parties to this action that if the court shall construe the said 8th item as above, then judgment shall be entered in favor of the plaintiffs against the defendant for the

sum of four hundred dollars, it is adjudged that the plaintiffs recover of the defendant the said sum of four hundred dollars with interest thereon, and the costs of this action.

From this judgment the plaintiffs appealed.

No counsel for plaintiffs.

W. R. Allen (Loftin & Rountree also filed a brief) for defendant.

SMITH, C. J., after stating the case: We concur in the construction put upon the clause of the testator's will, recited and set out in the case agreed, as warranted by the ruling in *Price v. Johnson,* 90 N. C., 592, where the phraseology was similar.

It is there decided, following the reasoning in *Hilliard v. Kearney,* Busb. Eq., 221, as applied to a devise of an estate in common to several, which is defeasible, and no time is fixed in which it is to become absolute—whether at the death of the testator or of the devisee—the former will be accepted in the absence of any indication of a different time for the vesting, and when such indication does appear, the (310) time thus indicated will be adopted.

In that case the intention of the testator was made manifest in fixing the period at the arrival of the devisee at the age of twenty-five years.

The coincidence in the cases appears in the fact that the devisee in one case was let free, on attaining the prescribed period of life, to dispose of the property given him *"as he pleased,"* while he could not do so before, and in the other the land was to remain in common until the several tenants attained the same age, and then each devisee was "to receive his proportionate share," that is, to have it separated and assigned to him as his own, and free from further limitations. The quality of survivorship thus being detached, and all being of full age under the requirements of the will, a division was made among the five original devisees, by which each became seized of an estate in fee in the several parts, and the devise to said Tabitha and Mary Jane, as an executory contingent limitation, fails, as it would by reason of the further fact that one of the five having died, leaving children, the contingency never can occur of *death of all without issue.*

After the deaths of James B., in July, 1862, and Nathan B., in May, 1864, neither of whom were ever married, their shares were, in a proceeding for partition, divided among the surviving brothers, who, and Mary Jane and the children of Tabitha who died in October, 1860, were the heirs at law of the deceased intestates.

The defendant, William B., having acquired the several shares allotted in the second division to Lewis and Allen by a quit-claim deed from them to him, not embracing the lands allotted to them in the first division

among the five brothers, and having no issue of his body, by his deed of 21 April, 1888, conveyed to the plaintiffs, for the recited con-
(311) sideration of three thousand dollars, all his, the grantor's estate, in the tracts thus divided among the three brothers, and which descended from the deceased two brothers, being estimated to contain fifty-five acres, with the covenant now sued on. It results that a good title has been conveyed to three-fifths parts of the said descended lands, while the title to two-fifths parts remained in the said Mary Jane and the children of Tabitha. The value of the defective title is $400, and the judgment awarding that sum is correct, and must be

Affirmed.

Cited: Whitfield v. Garris, 134 N. C., 35.

A. M. LEE, EXECUTOR OF T. M. LEE v. A. A. MOSELEY.

Domicile—Constitution—Homestead—Residence—Intent.

1. The words "a resident of this State," employed in the Constitution—Art. X, sec. 2—in respect to homesteads, have a more restricted meaning than that usually given to *domicile;* to entitle a person to the constitutional exemption he must be an actual and not a constructive resident.

2. Where the facts show an actual removal from the State, even for a definite period, the person so removing ceases, so long as he remains absent, to be "a resident of the State," in respect of his right to a homestead, although he may have had the intent to return and resume his residence therein.

MERRIMON, J., dissenting.

THIS was an application to have a homestead allotted, tried upon issue of fact joined, before *Shepherd, J.,* at Spring Term, 1888, of SAMPSON Superior Court.

The plaintiff having recovered judgment against the defendant in the court of a justice of the peace, in the county of Sampson, and caused it to be docketed in the Superior Court, sued out an execu-
(312) tion thereon, under which the tract or lot of the defendant was, in July, 1887, sold and conveyed to the plaintiff without assigning him a homestead. At the time of sale no claim was made thereto, but the defendant, according to the sheriff's return, then residing at Little River, in South Carolina, was notified by mail of the sale. In February, 1888, the defendant applied by petition to the Superior Court upon the

allegations of fact therein contained, for an order setting aside the sale and vacating the deed of the sheriff, and for the appointment of commissioners to lay off and assign to him a homestead in the lot. Accompanying the petition is his affidavit, in which he says that he is a citizen and resident of this State, and that his removal to South Carolina was for a definite period of time, with no intent to make that his permanent home, but to return, and that such is his present purpose, after a short sojourn. Notice was given to the plaintiff of an intended motion to this effect, to be made before the judge on 2 March, 1888.

At April Term, 1888, the application was heard, and a single issue submitted to the jury, to wit: Was the petitioner, A. A. Moseley, a resident of the State of North Carolina on 4 July, 1887?

The testimony of the defendant was to this effect:

"I was born and raised in Sampson County; resided in New Hanover on 4 July, 1887, and reside there now. I own no real estate except this described in the petition. I owned this in July, 1887." Upon cross-examination he stated: "I am fifty-three years old; have a wife and one child; left them in Horry County, S. C., last Sunday. She went there on 17 February, 1887. My child is seventeen years old. My wife has two other children who are of age; one of them is in New Bern, and the other is with her; she owns about three thousand acres of land in South Carolina, and is living on other land in which she has an interest; I am farming on the 3,000 acres; I made a general crop on the same last year, and superintended its cultivation; I am cultivating (313) also the land on which she lives; I went over to South Carolina when she did, and carried horses, mules, furniture and farming implements; I left some of the furniture in New Hanover, and some other things inconvenient for me to carry—some carts and a few hogs; I came back to Wilmington, N. C., two or three times, and got some supplies for my farms in South Carolina; I did my trading in Wilmington, N. C., and went down to see the party I left on the New Hanover place. These farms were rented, and were going down when the division was made; there was only a small house on my wife's part; I couldn't find any one to take it in charge as it was; it was idle the year 1886; I told my wife there was only one way to do with the property, and that was to move to South Carolina; that I could fix the place in two years so as to get rent; I told numerous parties before I left that I was going to move to South Carolina; I left South Carolina last Sunday to come here to this court; I have crops on both places in South Carolina for the present year; I was confident I could fix the place in about two years; I expected to return in the winter of 1888, and I still expect to return and make my residence in North Carolina; I have never intended to change my resi-

dence; I was a justice of the peace in New Hanover, 4 July, 1887; I haven't tried a case since I left for South Carolina, and have not transacted any business as a justice of the peace.

The counsel for petitioner asked the court to instruct the jury as follows:

That if the defendant left New Hanover County to go to South Carolina for the purpose of remaining there for a definite period, to wit: for the period of two years, and at the time of such removal he intended to return at the expiration of such period, and that he did not at any time intend to change his residence, except for the foregoing purpose,

(314) then the defendant was an actual resident of New Hanover.

The court declined to give this instruction, but gave the following:

If in February, 1887, the petitioner Moseley moved with his family to South Carolina for the purpose of cultivating his wife's land there, and to make it his home until he got the property there in order, which he thought would take about two years, and then return to North Carolina, and he has so lived in South Carolina ever since, and is now living there, making that his actual home, returning to Wilmington only two or three times a year to purchase supplies for his operations in South Carolina, and looking after some property he had left in New Hanover County, then you will find that he was not a resident within the meaning of this issue.

The jury answered the issue, "No."

There was judgment dismissing the petition, and defendant appealed.

W. R. Allen and J. L. Stewart for plaintiff.
B. R. Moore for defendant.

SMITH, C. J., after stating the case: The Constitution of the State confers a right of homestead in land, which shall be for a limited time exempt from execution or other final process obtained on any debt, with the dwelling and buildings used thereon, *"owned and occupied by any resident of this State,"* not exceeding one thousand dollars in value—Cons., Art. X, sec. 2—and the only inquiry the appeal requires us to make is, as to the correctness of the construction put upon the words, *"a resident of this State,"* by the judge in his charge to the jury.

We think it clear that the Constitution does not contemplate a double or divided residence in different states, so that if a similar ex-

(315) emption is provided in each, a party can have his exemption allotted to him in both. The preceding qualifying words, limiting the claim to a lot *"occupied"* as well as *"owned"* by a resident, forbids its assertion in a case like the present, when all the facts, outside of the

defendant's declared intent, point to an *absolute and permanent removal.* Can there be any doubt that a person removing, under like circumstances, from South Carolina into this State with his family and domestic implements and furniture into a dwelling on land of his wife, which he cultivates for two successive years, would thereby become a resident entitled to all the rights incident thereto? Or, if the removal was to other lands of his own, such occupation would not secure to him a homestead, therein, of which a creditor could not deprive him? If he would thus acquire a right to an exemption in the State to which he goes, of necessity he loses it in the State from which he removes, for under similar laws he could not have it in both. So, when all the acts of the debtor show an *actual* removal, as they do in this case, an effort to secure a constitutional exemption could not be thwarted by proof of declarations of an intent inconsistent with those acts in which it is expressed. In like manner a secret or avowed intent to return to a forsaken home, when one has been acquired in another State, cannot preserve a privilege accorded to one who has a *present and existing residence,* and only so long as that residence lasts.

Very little aid can be derived from the law of domicile, and little more from the adjudications in other states, where the homestead is deemed a home protected from the creditor only when occupied as such, and ceasing when the place is no longer the debtor's home.

"When a resident removes from the State and becomes a resident elsewhere," remarks *Merrimon, J.,* in *Baker v. Leggett,* 98 N. C., 304, "he thereby abandons—relinquishes—his right of homestead; as to him, it becomes suspended—he ceases to be within the terms, the purpose, or spirit of the constitutional provision, and all the property, (316) both real and personal, that he may leave behind him, becomes at once subject to the satisfaction of his debts."

The same proposition is enunciated by the Court in *Munds v. Cassidey,* 98 N. C., 558, where the party had been absent seven or eight years, employed on board a steamboat in Florida, yet *intended to return in the future* to his former home in Wilmington. In reference to this point, the Court say:

"Our Constitution and statute do not extend to such a case. The person must be *a resident actual and not constructive,* to be entitled to the exemption. This is made clear by the section securing the homestead to insolvent debtors, when "owned and occupied by any resident of this State." The benevolent provision is for our own citizens—those who have a residence among us—and must be construed as not embracing cases of mere domicile, when the rights incident to domicile may be retained until a domicile is obtained elsewhere."

It suggested itself during the argument that perhaps the question of intent should have been left to the jury in determining whether the first residence is retained, so as to secure the home of the debtor for his occupation when he should return. But upon further consideration we approve of the form of the charge, because all the facts, forming the hypothesis upon which the construction is predicated, develop an intent to change, as in fact the debtor does change, his residence, and the effect of his acts cannot be defeated by his declaration that he did not so intend. It is important that legal rights should rest upon facts proved, with their attending consequences, and not upon an undisclosed purpose at variance with them. So we are of opinion that the enumerated facts do in law, if so found by the jury, constitute a change of residence under this clause of the Constitution.

There is no error, and the judgment is affirmed.

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MERRIMON, J., dissenting. Without scrutinizing the instructions which the court gave the jury, I am of the opinion that it should also have given that, or the substance of it, which the plaintiff requested it to give, because, there were two distinctive views of the evidence that might reasonably have been considered, one—that given—favorably to the defendant, the other, as certainly favorable to the plaintiff. When this is so, common justice requires that the court shall submit both views, with proper instructions as to each, especially when the complaining party specially requests the court to give that favorable to him. In such a case it is error not to do so; to submit one view and not the other will, generally, mislead the jury, more or less.

It is not questioned, it seems, that under the Constitution and statutes applicable, the plaintiff was entitled to a homestead, as claimed by him, if he had not abandoned it by removing from this State.

Parts of the evidence produced on the trial tended to prove that he did not leave with the view and purpose to abandon his residence in this State. On the contrary, he testified in his own behalf expressly, that he did not intend, by going to the State of South Carolina, to change his residence; that he went there for a special temporary purpose, mentioned and explained, to be absent two crop years, and to return in the winter of 1888; that he still expected to return; that he left some of his personal property in this State, and also certain real property—that in which he claims homestead—and to some extent he kept up his business relations in it. The purpose for which he went, was not, of itself, such as necessarily implied permanent residence in South Carolina, at a place not distant from his place of residence in this State. In view of such evidence, it seems to me, that the court should have

told the jury, that if it satisfied them that the plaintiff did not intend to abandon his residence in this State, then they should respond to the issue submitted to them in the negative. (318)

I do not question that if a resident of this State, entitled to a homestead therein, removes from it with the view of changing his residence, and does so, he thereby abandons his homestead and his right to have it, and leaves the real property in which it was, or might have been allotted to him, exposed to the rights of his creditors to subject the same to the discharge of their debts due from him; this is certainly true. *Baker v. Leggett*, 98 N. C., 304. But here the pertinent questions arise, who is such a resident? And when does he cease to be such? I will endeavor to answer them briefly.

The Constitution (Art. X, sec. 2), secures to "any *resident* of this State," the right of homestead. Who is such a resident, in the sense of this provision? The plain purpose of it is to secure to such residents, as such, *a home—a homestead*—the same to be exempt from sale under execution, "or other final process obtained on any debt," and the interpretation of the word *resident* must be such as effectuates this purpose. A resident, then, in such sense, is a person who has his home—not his temporary home—not his home for a temporary purpose, but his permanent home—that which is established—in this State, and has no present purpose to abandon it, temporarily or permanently, while at such home or abroad, and when he leaves it, for any purpose, he has *animus revertandi.* It is not essential to such a home, nor does it in effect imply that the owner thereof—the resident therein—shall be constantly personally present at it; he may be temporarily absent from it, from the state in which it is situate, for the purposes of business or pleasure; his family may all be with him or absent elsewhere, and, nevertheless, his home—his residence—in a large sense, is in the State; he continues to be a resident of it, and he and his family may return at their will and pleasure to their home. A resident of this State means one who has his permanent home in it, whether he be at home or not, if he (319) has *animus revertandi.* Hence, if a resident of the State goes out of it to remain absent, say, for years, in the execution of the duties of a public office, he does not by such absence lose his residence in it, and so, also, if a mechanic goes out of the State to build a house, or a mill, and return, or a builder of railroads goes out of it to be gone two or three or more years, to construct such a road, he does not lose his residence or the benefits arising from it. Nor any more will a farmer lose his residence, or the advantages arising from it, who goes beyond the State temporarily, for a year, or two, or three, to repair and put his farm there, or that of his wife, or that of another person, in condition

to be useful and profitable and fit to be let. Mere absence from the State, in such and like cases, does not work a loss of residence or of its benefits, nor does it necessarily imply abandonment of residence, and, therefore, an abandonment of the right of homestead. Such going from the State—such absence from it—is not an abandonment of residence; it may be *evidence* of it, more or less strong, accordingly as the attendant facts or circumstances tend more or less strongly to show a purpose to abandon it. And, ordinarily, whether there has been such abandonment of residence or not is a question of fact to be determined by the jury, under proper instructions from the court. It is, also, very largely a question of *intent,* and whatever evidence tends to show this intent is competent. The claimant himself may testify as to his intent, and his testimony will have more or less weight accordingly as he is more or less worthy of credit, and as it may be strengthened or impaired by other evidence. What he says or does in this State, and in the state or other country to which he goes, may be competent evidence for or against him. If he claims permanent residence, by words or acts, in the State to which he goes; if he claims and exercises the right of citizenship there; if he votes there, and does the like acts, such facts would be strong (320) evidence against his right; but if his conduct showed a purpose to return to this State, and that he had not abandoned his residence here, the facts would be evidence for him. While the laws of the state to which he goes may extend to him advantages as a temporary resident there, this would not be conclusive against his right of residence here; the residence here depends upon whether he does or does not abandon it. If he does not, he is entitled to the benefits extended to the residents of the State by its Constitution and laws, although temporarily absent. Thompson on Hom. and Ex., sec. 263 *et seq.*

What I have said is not in any degree in conflict with what is decided in *Munds v. Cassidey,* 98 N. C., 558. There, clearly, the appellant had abandoned the State—he was a sort of wanderer, without any fixed purpose to return to it— had been absent seven or eight years—had a vague purpose to return to it. If it had appeared that he went abroad on a vessel making a voyage to Liverpool, or around the world, or to the Arctic seas, to be absent a year, or two, or three years, but with a *fixed,* settled purpose to return to his *home here*—in this State—the case would have been very different. Mere removal from the State, no doubt, generally raises a presumption of abandonment, but this presumption may be rebutted by sufficient evidence.

Cited: Hughes v. Hodges, 102 N. C., 249; *Van Story v. Thornton,* 112 N. C., 214; *Fulton v. Roberts,* 113 N. C., 427; *Jones v. Alsbrook,* 115 N. C., 52; *Chitty v. Chitty,* 118 N. C., 654.

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JAMES L. CURRIE v. N. D. J. CLARK AND JOHN B. CLARK.

Costs—Lien—Sale—Execution and Judicial—Dormant Judgment—Equitable Relief—Jurisdiction.

In an action brought to recover possession of land, to which title was derived under execution sale, the defendant set up an equitable defense, and asked, as affirmative relief, that the sale be set aside upon the ground that the judgment upon which the execution was issued was dormant, and for irregularities in the sale, which relief was granted, but it was made to appear, from the contention of the parties, that the judgment, though dormant, was a lien upon the land: *Held*,

1. That the court, having acquired jurisdiction of the equities arising between the parties, might proceed to enforce the lien of the judgment by judicial sale.

2. That the plaintiff, having failed in his original cause of action; was not entitled to recover costs.

CIVIL ACTION, heard upon exceptions to report by *Gilmer, J.*, at December Term, 1886, of MOORE Superior Court.

This action was brought to recover possession of the land described in the complaint. The plaintiff's title to this land was derived from a sale thereof, under executions issued against the defendants, made on 7 August, 1879, and the deed of the sheriff therefor, executed on the next day.

The answer of the defendants denied the material allegations of the complaint, except that it admitted the possession of the land. It alleged, as a defense, that the sale was brought about by and through the fraudulent practices of the plaintiff; that the executions under which such sale was made were irregular and void, having been issued upon judgments that were dormant, but which constituted valid liens, in their order, upon the land.

In the course of the action the sale mentioned was set aside, (322) and the parties were, by order of the court, "restored to the *status* they occupied previous thereto, and without prejudice to the plaintiff's remedies from the lapse of time." The court further directed that a commissioner, for the purpose, sell the land, unless before a day specified, the defendants shall pay into court the sum of $1,000, to be applied to the payment of the judgments mentioned as the court might thereafter direct.

Afterwards the court directed that the clerk should report in writing the judgments owned by the plaintiff, upon which executions had issued and were in the hands of the sheriff at the date of the sale by him, at

which plaintiff became purchaser, and sale set aside—giving dates of the judgments; dates of the various executions issued; amounts of principal and interest; and returns by sheriff and costs—all itemized.

The clerk accordingly made report, and the defendants filed exception thereto. Thereupon the court found the facts modified the report of the clerk, overruled the exceptions of the defendants and entered judgment. The part of the case on appeal which it is material to report here, is as follows:

"Thereupon the court finds the following facts:

First, as to the Lilly judgment:

On 10 July, 1869, the defendants herein, under sections 325 and 326, C. C. P. (now sections 570 and 571 of The Code), duly confessed judgment in this court in favor of H. and E. J. Lilly for the sum of $200 upon two notes—one for $167.16, dated 22 February, 1861; the other for $114.31, dated 19 April, 1861. The judgment was duly docketed in this court, and executions issued thereon from this court, as found by the clerk.

Said judgment, for value received, was duly assigned to James L. Currie on 7 January, 1879.

(323) An execution was issued thereon on 10 April, 1879, and that on 30 May, 1879, a restraining order was duly granted restraining proceedings under the said execution for twenty days. By agreement of the parties to said action before the expiration of twenty days, the restraining order was continued until 27 June, 1879, and the judge informed thereof. On 27 June, 1879, the judge continued the restraining order until 1 July, 1879. That said execution was in the hands of the sheriff on 7 August, 1879, when he sold the property described in the complaint.

Thereupon the court overruled the first, second and third of defendants' exceptions relating to said judgment.

On 30 September, 1870, judgment was rendered in the Superior Court of Moore County in favor of T. B. Tyson, Alexander Kelly and W. T. Jones, trading as Tyson, Kelly & Co., to the use of Alexander Kelly *v.* N. D. J. Clark, upon a debt contracted prior to the adoption of the Constitution, for the sum of $228.22, with interest on $165 from 30 September, 1870.

No execution issued thereon from 7 November, 1873, to 15 March, 1877.

The court sustains the defendants' first exception relating to this judgment, in so far as it is insisted that the clerk should not have found that an execution issued upon said judgment upon 20 March, 1874, and overrules the exception in other respects.

The court sustains the second exception, to the extent that the court holds that the said judgment was dormant on 7 August, 1879, the day of said sheriff's sale, but overrules the said exception in so far as it claims that the defendant N. D. J. Clark should not be charged with anything on this judgment.

The court holds, as a matter of law, that this judgment on the day of sale, constituted a valid and subsisting lien upon the property which was sold, and that the lien may be enforced in this pro- (324) ceeding.

Third, as to the E. L. Pemberton judgment:

The court finds that, on 10 June, 1872, E. L. Pemberton duly recovered, in a justice's court of Cumberland County, against the defendants, J. B. and N. D. J. Clark, a judgment for $137.20, with interest on $82.58, dated 19 April, 1861. The same was duly docketed in the Superior Court of Cumberland County on 28 October, 1872, and in the Superior Court of Moore County on 6 November, 1872.

Upon notice, motion and proof, leave to issue execution thereon was duly granted, and an execution duly issued thereon on 16 September, 1878, to the sheriff of Moore County. Another execution thereon was duly issued on 29 July, 1879, to the said sheriff, and was in his hands on 7 August, 1879, the date of said sale.

The court overrules the defendants' exceptions as to this judgment.

The court confirms the report of the referee, as modified by the foregoing findings and rulings.

And the court doth declare and adjudge, in accordance with said report and the foregoing findings, that the defendants, J. B. and N. D. J. Clark, are indebted to James L. Currie, upon the judgment of H. and E. J. Lilly against J. B. and N. D. J. Clark, in the sum of $408.51, including costs, with interest on $200 from 20 August, 1885; and upon the judgment of E. L. Pemberton against J. B. and N. D. J. Clark, the sum of $207.85, including costs, with interest on $82.58 from 20 August, 1885; and that N. D. J. Clark is indebted to James L. Currie, upon the judgment of Tyson, Kelly & Co., against N. D. J. Clark, in the sum of $384.90, including costs, with interest on $165 from 20 August, 1885—all of which judgments were liens upon the lands, described in the complaint, on 7 August, 1879, the date of the sheriff's sale, (325) and had been duly assigned to the plaintiff.

By agreement of the parties, no interest is to be charged from 12 April, 1886, to 12 December, 1886, the date of the hearing of the said exceptions.

It is further adjudged that the plaintiff do also recover against the defendants the costs of the action, to be taxed by the clerk.

And it appearing to the court that the defendant N. D. J. Clark has paid into the clerk's office of this court, under a former order herein, the sum of $1,000, it is ordered that the clerk shall pay over to the plaintiff the said sum, which shall thereupon be credited upon said judgments.

And it is further ordered, that the defendants have until 10 July, 1887, to pay to the plaintiff the balance of said judgments, with interest, and the costs of this action, and if they, or either of them, shall fail to pay to the plaintiff the said balance of judgments, and the said costs of this action, on or before the said 10 July, 1887, it is adjudged that the lands described in the complaint herein, or so much thereof as may be sufficient to raise the amount due to the plaintiff for balance, principal, interest and costs of the judgments aforesaid, and the costs of this action, be sold at public auction, at the courthouse door, in Carthage, for cash, by or under the direction of D. A. McDonald, clerk, who is hereby appointed commissioner for that purpose, after 30 days advertisement of the time and place of such sale, posted at the courthouse door, and four other public places in the county of Moore, and also published in some newspaper printed or circulated in said county.

That the plaintiff, or any other party to this action, may become purchaser on such sale; and that the commissioner make a report of such sale to this court."

(326) The defendants, having assigned error as follows, appealed to such sale to this Court."

"1. In respect to the judgment and execution in case of Tyson, Kelly & Co., to use of Alexander Kelly, against N. D. J. Clark.

The defendants except, because, while his Honor finds that the said judgment was dormant when the execution issued and came into the sheriff's hands, and at the time of the sheriff's sale, yet he adjudged that said execution was entitled to be paid out of the fund, whereas the defendants insist that the execution issued on this dormant judgment was irregular, and ought to have been set aside on objection made by the defendant therein, and was not entitled to share in the fund.

2. In respect to the omission of his Honor to respond to the application of the defendants, founded on proof, to free the land from the encumbrance improperly placed upon it by the conduct of the plaintiff in suing out an execution in the case of H. and E. J. Lilly against N. J. D. Clark and J. B. Clark, during the pendency of this action, to wit: on 4 August, 1880, and causing it to be placed in the hands of the sheriff of Moore, J. J. Wicker, and directing a sale of this said land to be made, and bid off by his attorney of record, J. A. Worthy, Esq., at the price of $50, and a deed made therefor to him, without even crediting

the defendants with the $50; whereas, the defendants insist that his Honor, in his decree, should have set aside this sale, and ordered the sheriff's deed to J. A. Worthy to be set aside, and the land cleared from the cloud caused by said sale.

3. Because his Honor adjudged the whole costs of this action against the defendants, including the costs of the trial of the issue of fraud, found by the jury in favor of the defendants and against the plaintiff."

John W. Hinsdale for plaintiff. (327)
R. P. Buxton for defendants.

MERRIMON, J., after stating the case.: The plaintiff alleged in his complaint a cause of action at law, and the defendants in their answer alleged a defense equitable in its nature, and asked for equitable relief, as they might do under the prevailing system of civil procedure, and such relief was granted; but the court went further, and required the defendants to pay the plaintiff's judgments mentioned, which constituted successive liens upon the land, or if they failed to do so within a time specified, it directed that the land be sold and the proceeds of the sale be applied to the discharge of the judgments. This Court so in effect directed when this case was before it by former appeal. *Currie v. Clark,* 90 N. C., 355. In that case it is said: "The defense here is in effect an impeachment in equity of the title acquired by the plaintiff, and the relief cannot go beyond the setting aside the sale and restoring the parties to the *status* they occupied previous thereto, and without prejudice to the plaintiff's remedies from the lapse of time since. This is the full measure of the defendants' equity, and it affects the plaintiff only by depriving him of an estate which he acquired by unlawful means under the form of legal process. The sale must therefore be set aside and the land again exposed to sale, the proceeds arising from which will be paid over, according to the priorities of the several executions as they existed on the day of the sheriff's sale, which is thus put out of the way."

The defendants by their answer brought the judgments mentioned against them that belonged to the plaintiff, the executions issued upon them, and the sale of the land mentioned under them before the court in this action, asking equitable relief as to the executions alleged to have been irregularly issued. The court thus obtained jurisdiction of the judgments and the executions complained of and the land, and could in the exercise of its equitable authority, grant complete relief (328) and do justice, not only to the defendants, but as well to the plaintiff, within the scope of the whole matter thus brought before it. It appeared that the judgments had become dormant, and that hence the executions issued upon them were irregular, and that they and the sale

of the land under them ought to be set aside, but it likewise appeared in that connection, that the judgments having been duly docketed, notwithstanding their dormancy, constituted liens upon the land in favor of the plaintiff, and he was entitled to have the land sold to discharge them, if the defendant would not pay the money due upon them as they ought to do and have done. The court having obtained jurisdiction of the whole matter, as indicated above, had authority to enforce the lien, and the orders and judgments to that end were appropriate and lawful. It is not true, as the defendants seem to suppose, that the liens of the judgments could be enforced only by the ordinary process of executions against the property of the judgment debtor—that is the usual way prescribed by statute; but when such liens come in question in an action, as in this case, where the equitable authority of the court is invoked, it may direct sales of the land or other property as the ends of justice may require.

The second exception seems to have no application. It does not appear in the record that any motion or application was made to the court to set aside the execution and sale complained of, or that the court took any notice of, or made any decision in respect to them. Nothing appears but simply the affidavit and the execution; they do not appear to have any connection or application. The mere exception without application must go for nought. It should appear in the record that the court made, or refused to make, some ruling, order or judgment to which it applies and has reference. Else this Court cannot see error. It would seem that if the affidavit was true that the execution and sale should (329) have been set aside, upon proper application, but we are not at liberty to decide that it ought or ought not to have been, because no ruling or decision of the court in such respect is before us for review.

We think the third exception as to the costs in the court below must be sustained. The plaintiff failed to recover the land, to recover which alone the action was brought. The defendants alleged, and established, an equitable defense, which rendered it expedient and just to administer certain equitable rights of the plaintiff, but the latter failed wholly to maintain the action as to the purpose for which it was brought. The case of *Vestal v. Sloan,* 83 N. C., 555, cited by the counsel for the defendants, is in point.

The judgment must be reversed as to costs, and in all other respects affirmed.

Affirmed, except as to costs.

Cited: Hinton v. Pritchard, 107 N. C., 138; *Patterson v. Ramsey,* 136 N. C., 566.

JAMES L. CURRIE, ADMINISTRATOR D. B. N. OF MALCOLM BLUE, v. N. D. J. CLARK, GUARDIAN OF MALCOLM CLARK.

Statutes of Limitations and Presumptions—Exceptions at Trial.

1. Section 18, ch. 65, Revised Code, was not a statute of limitation, but only raised a presumption of payment, which might be at any time rebutted by proof that the bond had not been paid.
2. In the absence of any exception it will always be presumed that the conduct of the trial and the judgment of the court below were correct.

CIVIL ACTION, originally commenced before a justice of the peace for the county of MOORE, and carried by appeal to the Superior Court of said county, and tried before *Clark, J.*, at April Term, 1887.

The material facts presented in the record are as follows:

On 11 September, 1875, John McKay, administrator of Mal- (330) colm Blue, commenced an action against M. C. Clark and A. R. McDonald, administrator of Arch. Ray, deceased, before a justice of the peace to recover the sum of $200, alleged to have been due on a bond executed 7 June, 1858, by Malcolm Brown, Arch. Ray and M. C. Clark.

On 25 September, 1875, judgment was rendered against the defendants in said action for $200, interest and cost.

On 29 January, 1881, the said M. C. Clark was, in certain proceedings, properly instituted, declared a lunatic, and the defendant, N. D. J. Clark, was duly appointed his guardian, and on 3 February, 1881, the said guardian moved, before a justice of the peace, to set aside said judgment, upon affidavit, because of the "mental inability of the said M. C. Clark," and for the want of service of summons on him.

The motion was denied and the defendants appealed.

Thereafter, John McKay having died, J. L. Currie was appointed administrator *d. b. n.*, etc., and made party plaintiff, and by a judgment rendered at August Term, 1885, of the Superior Court, said judgment was set aside.

On 25 August, 1885, the plaintiff commenced this action before a justice of the peace to recover the said sum of $200 and interest, alleged to be due and unpaid on the bond, which was the subject of the former action. The defendant denied the execution of the bond, and as a further defense relied upon "the statute of limitations and the statute of presumptions." Judgment was rendered by the justice of the peace against the defendant, from which he appealed to the Superior Court.

In the Superior Court the jury, upon issues submitted, having found by their verdict "that M. C. Clark executed the bond sued on; that the

(331) same has not been paid, and that it is not barred by the statute of limitations or presumptions of payment"—it was adjudged that the plaintiff recover the amount of the bond, interest and costs; and from the judgment the defendant appealed.

John Hinsdale for plaintiff.
No counsel for defendant.

DAVIS, J., after stating the case: The bond on which the judgment was rendered having been executed 9 June, 1858, and the summons in the action having been issued on 25 August, 1885, it is insisted by counsel for the defendant, that "it was presumed to be paid and barred by the statute of presumptions," and that the judgment of 25 September, 1875, having been set aside, could have no force and effect, and though the action in which that judgment was rendered was commenced within ten years, and the present action was commenced within less than a year after it was set aside, the judgment so set aside "was equivalent to no judgment, whether remaining upon the docket or not."

The bond sued on having been executed in 1858, there can be no question as to its being governed by the statute of presumptions (R. C., chap. 65, sec. 18). This is not a statute of limitations, and no bar to a recovery, but only raises a presumption of payment, which may be rebutted; and, in view of the verdict of the jury, it is unnecessary for us to determine whether the second action, commenced within less than a year after the judgment in the former was set aside, would of itself repel the statutory presumption of payment, by relation back to the commencement of the first action, in analogy to the provision contained in section 8, chapter 65, of the Revised Code, and in section 166 of The Code.

(332) It appears from the record that the jury found, as a fact, that the "bond had not been paid," and if so, it makes no difference whether the action was commenced within ten years or after ten years.

What evidence was before the jury, or whether there was any exception to any evidence, does not appear; nor does it appear that any instruction was asked for, or that any given by the court was excepted to, and, in the absence of anything indicating the contrary, we must assume that the finding of the jury was correct. There is no error.

Affirmed.

DANIEL M. MORRISON v. JOHN G. WATSON.

Constitution—Execution Sale—Homestead—Evidence—Burden of Proof—Opinion.

1. It is essential to the validity of a sale under execution issuing upon a judgment founded on a debt originating before the adoption of the constitutional provision for a homestead that a homestead be allotted to the execution debtor, unless it clearly appears that, at the time of the sale, the debtor did not own lands subject to execution of the value of one thousand dollars.
2. In such case the homestead should be allotted and the excess, if there be any, should first be sold, and if that is not sufficient to satisfy the execution, or if there be no excess, then the lands embraced in the allotment may be sold.
3. The *onus* is on the purchaser at execution sale to show that at the time thereof the debtor did not own real property of the value of one thousand dollars. (DAVIS, J., dissenting.)
4. Upon an issue of the value of a particular tract of land, it is competent to admit the opinion of a witness founded upon a comparison with his knowledge of other lands in the vicinity.

THIS was a civil action for the recovery of land, tried before (333) *Connor, J.*, at the September Term, 1887, of RICHMOND Superior Court.

The plaintiff claimed title to the land described in the complaint, by virtue of an execution sale and sheriff's deed made pursuant thereto.

The defendant denied that the plaintiff was the owner of the land, or that he wrongfully withheld possession thereof. He admitted being in the possession.

The following issues were, without objection, submitted to the jury:

1. Is the plaintiff the owner, and entitled to the immediate possession of the land described in the complaint?

2. Did the defendant, at the time of bringing this action, unlawfully withhold possession thereof?

3. What damages is the plaintiff entitled to recover?

The plaintiff put in evidence a deed from Z. F. Long, sheriff, to himself, for the land in controversy, dated 26 August, 1882, which purported to convey the land in dispute; also one hundred and sixty acres in addition, made up of one tract of one hundred acres, one of fifty acres, and one of ten acres. The plaintiff also showed in evidence a judgment rendered at Spring Term, 1870, of the Superior Court of Richmond County, in favor of the executors of Stephen Pankey *v.* Thomas Watson, Peter Hanner and John G. Watson, for thirty-five

dollars, with interest on the same from 13 November, 1864, and the costs, docketed 17 May, 1870. Executions were regularly issued thereon until 4 October, 1873. On 20 October, 1873, the judgment was transferred to Z. B. Moore. On 2 April, 1879, leave was given the plaintiff in said judgment to issue execution, and on 5 April, 1879, an execution was duly issued thereon, which was duly levied upon the land in controversy, and the sheriff proceeded, on 9 January, 1879, to sell, when the same was purchased by Z. B. Moore for the sum of forty
(334) dollars. On the same day he transferred his bid and judgment to the plaintiff. The plaintiff showed in evidence the note upon which the same was founded, executed by Thomas Watson, Peter Hanner and the defendant, John G. Watson, dated 13 November, 1863, and due twelve months after date. The plaintiff also showed in evidence a judgment in favor of Frank Sanford *v.* John G. Watson, dated June, 1876, for $15.85, with interest from 6 May, 1860, upon which execution issued 6 January, 1879. No homestead was ever allotted to the defendant.

The plaintiff, for the purpose of showing that the lands of the defendant were, in January, 1879, worth less than $1,000, and the amount of the judgment, after objection by defendant and exception to its admission, introduced W. I. Everett, who testified that he knew the land formerly owned by John G. Watson, Sr., but did not know the dividing lines. He knew where the dwelling was, also the twenty-five acres; that in June, 1879, in his opinion, from three ($3) to four ($4) dollars per acre was a fair valuation. He could not say as to the eighteen acres. The whole tract contained two hundred and twenty-seven (227) acres. In respect to the one hundred acres, he only knew its value by comparison with other similar tracts in the neighborhood; had not been on it; could not say how long before 1879 he last saw the lands.

The plaintiff proposed to ask the witness the value of the one hundred acres. Objected to by the defendant, because the witness states that he cannot give the value of the land except by comparison with other tracts in the neighborhood. Objection sustained; plaintiff excepted.

There was much other testimony as to the value of the lands.

The counsel for the plaintiff requested the court to charge the jury:

1. That there was no evidence that the defendant was worth,
(335) in June, 1879, one thousand dollars and the judgment, interest and costs, amounting to eighty-three dollars.

2. That upon the whole evidence the plaintiff was entitled to recover.

The court declined to so instruct the jury, and the plaintiff excepted. The court then instructed the jury that they could consider the whole

evidence, and, after ascertaining the value of the land, per acre, in June, 1879, they should make a calculation as to its total value.

The court then explained to the jury the issues, and the way in which the testimony should be considered with respect to them, and instructed them that they could consider the return on the execution, in passing upon the question whether the defendant had other property than the land covered by the sheriff; and that to recover in this action the plaintiff must show, by a preponderance of the testimony, that the defendant's land was worth, in June, 1879, less than one thousand dollars and the amount of the judgment, interest and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment.

The jury found the first and second issues in the negative.

Motion for a new trial, for reception of the evidence objected to, and for refusing the instruction asked, and for error in the instructions given.

Motion denied. Judgment in accordance with the verdict. Appeal by plaintiff.

No counsel for plaintiff.
C. W. Tillett for defendant.

SMITH, C. J. No homestead was allotted to the defendant in the course of these proceedings, and to the present action he opposes the defense that, without an allotment of his exemption, notwithstanding the debts antedated the Constitution, in order that the (336) debts might be satisfied from the excess, if sufficient remained to discharge it, out of the land in exoneration of the homestead, the sale was illegal and the deed did not divest the title.

This construction finds support in the ruling of the court, though not unanimous, upon the point in the elaborately argued and carefully considered case of *McCanless v. Flinchum,* 98 N. C., 358.

While it is conceded that under the Constitution of the United States, as construed and applied to the exemption enactment, a debt previously created, and before the State Constitution was adopted, must be paid out of the debtor's estate, and the exemption must give way when it cannot be otherwise satisfied out of the debtor's property (*Edwards v. Kearzey,* 96 U. S., 595), yet the debtor possesses still the right to retain, exempt from sale, even at the instance of such a creditor, whatever excess there may be in his hands after the disposition of so much as may be needed to discharge the debt, and to have the inquiry made in the mode prescribed by law to have the fact ascertained previous to the sale. Should the sale of the part estimated to be sufficient turn out not

to be insufficient, the creditor may then have recourse also to the part assigned as exempt. The Code, sec. 502, *et seq.* The debt must be paid at all events, but the method of proceeding, in appropriating the property liable, is a matter of legislative regulation.

Were it an open question, it might admit of doubt, whether this must not be done in all cases by the assessors, as the statute provides, to render valid the enforcement of the process in the sheriff's hands, and before he undertakes to sell the real estate, instead of instituting such an inquiry before the jury, in an action to establish title and recover possession of premises thus sold. But it has been held that when the real estate is manifestly deficient, and it shall so appear afterwards, such sale will be upheld upon the ground that no harm has come or could come to the debtor by reason of an omission to have a proceeding to ascertain if any homestead could be secured, and therefore it would have been useless and without detriment to the debtor. It is thus held in *Miller v. Miller,* 89 N. C., 402; *Arnold v. Estis,* 92 N. C., 162; *Lowdermilk v. Corpening, ibid.,* 333; and other cases to same import.

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In *Littlejohn v. Egerton,* 76 N. C., 468, the homestead had been set apart, but ineffectually, because not assigned by metes and bounds as prescribed by the statute, and the defendant, claiming under the sheriff's deed a full estate in the land, had come into possession, and refused to admit the exemption. The court, recognizing the right of homestead, but unable to restore possession to the plaintiff, suspended further action in the case until the plaintiffs could, in the regular way, have their exemption ascertained and set apart, giving them leave, on filing a certified copy of the allotment, to move for a writ of possession. The interruption in the progress of the cause grew out of the want of power in the court to have this done under its direction, and the necessity of pursuing the statutory requirements to secure the full benefits of the constitutional provision.

So, if the parties in this case occupied to each other similar instead of reversed relations it would be safe to pursue the same course, and thus enable the debtor to regain his lost possession in furtherance of his legal right to retain possession until the sheriff, after causing his homestead to be ascertained and its boundaries fixed, should make sale under his execution. Such is not the case before the court, but the plaintiff seeks to dispossess the defendant, by virtue of the deed of the sheriff, who sold, as the record shows, a large body of land to satisfy an inconsiderable debt, disallowing any right of homestead or any proceeding to find out whether the value of the land was not sufficient both to satisfy the debt and leave some portion to the debtor.

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It has been repeatedly declared, and after an elaborate and exhaustive examination of the subject in separate opinions settled by a majority of the members of the Court in *McCanless v. Flinchum,* already cited, that, without regard to the time or origin of the debt, the provisions of the statute for laying off the homestead must be observed, because the debtor has a right to the exemption if the debt can, with costs, be satisfied out of other lands, and to this end the assessors should allot, within the prescribed limits, so much as in their judgment is not needed to pay the judgment, subject, however, to the creditor's right to have the exempted part sold also, if the other, on such sale, proves insufficient and the debtor fails, in any way, to provide for the unpaid residue.

In the case referred to, *Merrimon, J.,* uses this language: "The court ought to have instructed the jury to inquire particularly whether or not the land in question was worth more than the debt of the execution creditor and the costs, including the costs of laying off the homestead of the execution debtor, and if they found that it was, then the *plaintiff could not recover, because it appeared that the homestead had not been laid off* as the law required, and in that case *the sheriff had no sufficient authority to sell the land,* and therefore his deed to the plaintiff was void."

Many witnesses were examined in reference to the value of the lands at the time of the execution sale, to the reception of whose evidence, offered by the plaintiff, the defendant objected. To this exception to the course taken by the court, we have only to say that it has the sanction of the case from an opinion of which we have already quoted a part.

The force of the objection to the witness Everett, first examined, being allowed to put in an estimate upon the land, based upon the value of other tracts in the neighborhood, is not apparent, for we do not see how otherwise, unless upon an actual sale of the lands (339) themselves, any reliable estimate could be arrived at. This must, of course, rest on the valuation given other similar lands, irrespective of the effect of improvements.

The references to *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361, do not sustain the exception. In the first, an inquiry as to the price brought upon a sale of an adjoining tract some twleve months before, simply made in this form, and with no intimation of further evidence of the similarity of their condition, or of any particulars that enter into an estimate of value, was ruled out.

Similar proof was offered in the other case of the value of a town lot opposite to that whose value was the subject of inquiry, and was

rejected as incompetent. Neither goes so far as to deny to a witness the expression of an opinion of the value of certain lands founded upon the general value of other lands near thereto, for this is usually a safe, if not the only guide to the formation of a reliable opinion as to the value of that in controversy.

The issues submitted to the jury are the first three of those passed on at a former trial, omitting the fourth, and which will be found in the case as reported in 95 N. C., 479, which was suggested in the opinion then delivered.

The instructions demanded and declined proceeded upon a misapprehension of the point of inquiry, which is not whether a full homestead of $1,000 could be taken from the land and then enough left to satisfy the judgment, interest and costs, amounting to $83, but how much would remain for the use of the debtor after the discharge of the execution, for if he could not get the full measure of the exemption, the debtor would still be entitled to what was not required after providing for such payment. So, the issue was not what is implied in the instruction requested, but would the debtor have any land left after satisfying the debt, and if so, it should have been ascertained and assigned, the neglect to have which done before the sale renders (340) the same void, and hence the plaintiff is not the owner. Such is the response of the jury to the question of the plaintiff's title and right to recover possession.

The refusal to give the second instruction was also proper, for there was evidence to warrant the negative answer returned by the jury.

The charge given is obnoxious to no just complaint of the plaintiff, for it requires him to show that the lands were worth less than $1,000, the maximum allowed for the homestead increased by the debt, interest and costs. It is based upon the erroneous idea that the debtor is only entitled to the exemption when he can get the full measure of the allowable value, while he is entitled to a fractional part of less value, if there be such excess over the demands of the writ, as truly as he would be to the large quantity, if it were sufficient to give him more without interference with the collection of what sum the demand requires. This, however, was favorable to the plaintiff and injurious only to the defendant. It is equally imperative that the debtor have exempt the excess, whatever it might be, and a part as well as the whole.

There being no suggestions of the defendant's owning other lands, we understand that there were none other than those mentioned in the case.

The exceptions to the charge is general, pointing out no specific errors committed, and could not be, for this reason, noticed in the ap-

peal. We refer to this case as reported in 95 N. C., 479, and to *Miller v. Miller,* 89 N. C., 402, in further elucidation.

There is no error, and the judgment is

Affirmed.

DAVIS, J., dissenting: The judgment, upon which the execution under which the land was sold and purchased by the plaintiff, was for the recovery of a debt antedating the Constitution and laws providing for homestead, and I do not concur in the opinion that (341) the sale was invalid because the sheriff had not caused the homestead to be allotted, as I understand the decision of the Supreme Court of the United States in *Edwards v. Kearsey,* 6 Otto, 595, reported in 79 N. C., 664, and the decision of this Court in *Gheen v. Summey,* 80 N. C., 187; *Earle v. Hardie, ibid.,* 177, and *Richardson v. Wicker,* 80 N. C., 172, in conformity with that decision and immediately following it.

Article X, secs. 1 and 2 of the present Constitution, and the legislative enactments for carrying that article into effect, are void as to contracts made prior to the adoption of the Constitution, because they violate that provision of the Constitution of the United States, which declares that, "no state shall pass any . . . law impairing the obligation of contracts."

In *Edwards v. Kearsey* it is said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. . . . The ideas of right and remedy are inseparable." It will not do to say that the law affects the *remedy* and not the rights of the parties to the contract. If the law affecting the remedy impairs the obligation of the contract—lessens the value of the contract—it is void, and "it is immaterial whether it is done by acting on the remedy or directly on the contract itself. *In either case it is prohibited by the Constitution.*" The italics are as reported.

It is also said in the same case: "The remedy subsisting in a state where and when a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

Following that decision, and referring to it as settling the (342) question, this Court in *Gheen v. Summey, supra,* said "The act of 1869 (The Code, sec. 502, *et seq.*), so far then as it provides the machinery for laying off and allotting the homestead against debts contracted prior to 24 April, 1868, the date of the adoption of the Consti-

tution, is void, but perfectly valid as to all contracts entered into subsequent to that date." To the same effect was *Earle v. Hardin, supra.*

Again, referring to *Edwards v. Kearsey,* in *Richardson v. Wicker,* 80 N. C., 172, this Court not only said that the exemption "provided for by the Constitution of 1868 were not allowable against debts previously contracted," but it was further said in effect that it was the duty of the sheriff to have made the money on the plaintiff's execution, and that for his failure to do so the plaintiff could have maintained an action for such damages as he had sustained. In that case the sheriff had returned the execution without selling defendant's land, because the plaintiff had not paid nor tendered the fees for laying off the exemption. While it was held that the Legislature might repeal the penalty amercement for failing to sell under the execution, it is said that "there is no doubt he (the plaintiff) could have maintained such action," that is, for damages.

In these cases it is held that the provisions enacted for carrying into effect Article X of the Constitution in relation to homesteads are void as to contracts made anterior to their enactment; and I think these authorities, based as they are upon an acquiescence in the decision of the Supreme Court of the United States in *Edwards v. Kearsey,* in which the constitutionality of the law under which it is insisted that the deed of the sheriff, in the case now before the Court, is void, was the immediate subject of investigation, should be adhered to.

Wilson v. Patton, 87 N. C., 318; *Albright v. Albright,* 88 N. C., 238, and *Arnold v. Estis,* 92 N. C., 162, so far as the questions de-
(343) cided by them are involved, may, I think, be easily distinguished from the case before us, and from the cases cited, and so far from being in conflict, by the clearest implication they are in harmony.

In *Wilson v. Patton* the land was sold by the sheriff without laying off the homestead, but there were executions in his hands on old and new debts; there was more than enough money from the proceeds of the sale to satisfy the execution on the old debt, and the money being in the hands of the sheriff, he asked instruction of the court as to the application of it, and it was held that after applying enough of the proceeds to satisfy the old debts, the defendant (who made no question as to them) was entitled to an interest in any remainder not exceeding the value of his homestead. As against the executions on the old debts no question was raised as to the right of the sheriff to sell without laying off the homestead, and the validity of the sale was not questioned.

In *Albright v. Albright,* there were executions on old debts and new debts, and besides, there was a mortgage, and at the instance of the debtor (who made no question as to the old debts, and who did not ask for any allotment of the homestead) the court was asked to restrain

the sheriff from selling till conflicting rights and priorities of creditors could be settled, so that the land could be sold to the greatest advantage, and "free from all clouds." It was not even claimed as against the old debts that the sheriff should first lay off the homestead, and certainly not at the expense of any execution creditor on an old debt.

In *Arnold v. Estis,* the execution creditor was the purchaser. The judgment was on old and new debts, blended, and the land was sold by the sheriff without having the homestead allotted. It was held that the sale was void, and it was put upon the ground that it was the fault of the purchaser in blending the old and new debts and selling under both; and the *Chief Justice,* quoting *Mebane v. Layton,* 89 N. C., 396, said: "A sale without laying off the homestead, unless in case of (344) the several exceptions mentioned above, is unlawful and void." One of the "several exceptions" alluded to was on an old debt; and is not the inference irresistible that a sale under an execution on an old debt would *not* be "unlawful and void?" What other possible inference could be drawn?

In *Miller v. Miller,* the sale was made by the sheriff without allotting the homestead, and the sale was held to be void; and though the reasoning in that case was in conflict with the authorities cited, the decision was not.

I think it is conceded that the execution on an old debt must be satisfied, at all events, before the debtor is entitled to a homestead, and that the execution creditor is not bound by the valuation that may be placed upon the debtor's land by the assessors or appraisers, and if the excess, when sold, does not bring his debt, then he may sell the homestead which has been allotted; and if so, why require the creditor to do the vain thing of paying the cost of an allotment in which he has no interest whatever, and by which he is not bound?

It is admitted that if the debtor's property is sufficient to pay the debt, it must be paid at all events, homestead or no homestead. In fact, it would seem that no one would be bound by such an allotment, for, as in the case of *McCanless v. Flinchum,* the execution debtor made no claim to the homestead. He had sold (whether fraudulently or not) what interest he had in the land, and was bound by that sale. The alleged fraudulent vendee, who claimed the land, clearly was not bound by it, for he claimed title, under the debtor's deed, adverse to everybody; and if his purchase was not fraudulent, then his title was good against everybody; if it was fraudulent, then it was not good against the execution creditor; so the creditor in whose favor there is a judgment and an execution on an old debt is driven (not at the instance of the execution debtor or any one else claiming title or interest

(345) in the land) to the expense of having a homestead allotted, which allotment, when made, is binding on no one claiming title to the land. If this is not such a change in and obstruction to his remedy, as it existed prior to the change, as impairs the value of his contract, I am at a loss to conceive what change in the remedy could do so.

But it may be asked, if a debtor has $10,000 worth of land, must it be sold without allotting the homestead, because the creditor has an old debt judgment and execution? My answer is, the debt being an old one, it is a matter with which the creditor has nothing to do. It is the duty of the sheriff, if the defendant in the execution has property not exempt by the law, as it was prior to April, 1868, to sell enough of it to satisfy the execution; and, in doing so, it is his further duty to sell to the best advantage he can, and if the debtor has more than enough to satisfy the execution he may, without expense to anybody, designate what property shall be sold, and the sheriff would not be justified now, any more than he would have been before 1868, in selling unlawfully $10,000 worth of land to satisfy an execution of $100.

As has been said, it is the duty of the sheriff to sell to the best advantage. He sells only the interest of the defendant, and if by his own denial of the sheriff's right to sell, or by any obstructive act of his own, his interest brings at public sale only a small portion of its worth, the purchaser gets it and it is the debtor's own folly. The only valuation by which the execution creditor is bound (the debt being any one of the excepted classes) is that of the highest bidder; and I think *Littlejohn v. Egerton,* and like cases, decided by this Court in regard to old debts were, with *Edwards v. Kearsey,* overruled by the ultimate decision in the last named case. How far the Legislature may control or change the *remedy,* without violating the Constitution, has been the subject of much discussion in the courts of the states and of the United States. There is an able and elaborate discussion of the ques-
(346) tion by *Chief Justice Taylor* in *Jones v. Crittenden,* 1 C. L. Rep., 385, in which the stay-law, passed in 1812, was declared unconstitutional and void as impairing the obligation of contracts, and similar decisions have since been made in *Barnes v. Barnes,* 8 Jones, 366, and in *Jacobs v. Smallwood,* 63 N. C., 112.

I think, as a result of the discussion, it has been settled that the Legislature has the power to alter the law respecting the remedy or to abolish one tribunal and substitute another, provided there is an *efficient* remedy left or substituted, and one that will not impair or lessen the value of contracts.

Stay-laws have been declared unconstitutional as to antecedent contracts, as impairing their obligation, and though it has been said, and

truly said, by *Justice Merrimon,* in *McCanless v. Flinchum,* that "the law favors the homestead," yet the decision of the Supreme Court of the United States in *Edwards v. Kearsey,* and the authorities there cited, seem to me conclusive that, under the Constitution of the United States, it cannot confer that "favor" at the expense of a creditor whose debt antedates the homestead law.

It is with much diffidence that I dissent from the opinion of a majority of the Court in a matter fully discussed and carefully considered, but I am unable to take the same view of the Constitution, and of the force and effect of the ruling of the Supreme Court of the United States in *Edwards v. Kearsey,* as that which has impressed them, and I have felt it my duty to express my nonconcurrence, and, as briefly as I could, my reasons therefor.

Cited: Long v. Walker, 105 N. C., 99, 109; *VanStory v. Thornton,* 112 N. C., 220; *Corey v. Fowle,* 161 N. C., 189.

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JOHN G. SMITH, ADMINISTRATOR OF R. KING, v. W. J. BROWN ET AL.

Administration—Executors and Administrators—Statute Limitations —Real Assets—Judgment, When Conclusive.

1. While the same defenses are available to the heir or devisee of lands, sought to be subjected to sale to constitute assets for the payment of debts, as to the personal representative of the decedent, yet if the claims which are thus sought to be satisfied have been reduced to judgment against the personal representative, that judgment is conclusive upon the heir or devisee, unless it can be shown it was procured by collusion.

2. The heir or devisee may, however, show that, although there has been judgment against the personal representative, the personal estate has not been fully administered, or that there has been a *devastavit,* and the remedies against the administrator or executor have not been exhausted.

3. A personal representative who seeks to subject descended or devised lands to make assets for the payment of debts represents the creditors of the estate; and as he in that capacity would be subject to any defenses the heir or devisee could establish, so he is entitled to any benefit or exception which they might have in prosecuting the action against him.

4. The opinion of the court delivered in this action at former term (99 N. C., 377), is affirmed.

5. *Bevers v. Park,* 88 N. C., 456, is commented upon.

THIS is a petition to rehear this appeal, the cause having been argued and an opinion filed and judgment delivered therein at last term. (See 99 N. C., 377.)

W. F. French for plaintiff.
F. McNeill and T. McNeill for defendants.

SMITH, C. J. This proceeding, as will be seen in the report of the case when before us on the former appeal, at the last term, is prosecuted by the plaintiff, administrator *de bonis non cum testamento annexo* of R. King, against the defendant Brown, the removed executor
(348) and the others, devisees of the testator, to subject divers tracts of land that have come to them to the payment of the testator's debts. In the progress of the cause the plaintiff was required to file a detailed and specific statement of the claims to be provided for, which the personal estate was not adequate to meet, and it was necessary to sell the lands. The list was furnished, and to the debts thus enumerated therein the defendants, to whom said devised lands belong, interpose a defense, alleging that each and all of said claims are barred by the lapse of time, and ought not to be enforced against the real estate left by the testator. The controversy is narrowed to this single point, and the issue as to the statutory obstruction thus set up is in substance and legal effect between the creditors represented by the plaintiff, but not individually, in the action, and the devisees contestants, who claim to hold the real estate free from the testator's debts.

The validity of these unsatisfied demands, reduced to judgment, and the sufficiency of the defense made thereto, were considered and passed on when the first appeal was heard and disposed of. The same point is presented, in the application now before us, for reconsideration of the ruling then made, and the same argument, urged with earnestness and confidence in support of the decision in the court below, which then failed to convince us of its correctness, has not displaced the conclusions to which our minds were led.

The contention was, as it is now, that the statute began to run against claims which became due by the deceased, before the changes introduced in the Code of Civil Procedure, at the date of his death (Rev. Code, ch. 65, sec. 11) and against such as became due since, from the qualification of the executor, and in both cases completed its course seven years thereafter (The Code, sec. 153, subsec. 2), and in neither was its running intercepted or delayed by a suit begun before that time expired, and prosecuted to final judgment against the personal
(349) representative. Upon an examination of these enactments, which are not in terms entirely similar, it will be seen that the first

requires creditors to "make their claims" within the designated time, or, failing to do so, they will "be forever barred," having reference to the creditor's inaction meanwhile, and it is too plain to need argument to show that creditors who do sue and reduce their debts to judgment make their claim in a most efficient manner in doing so. Of whom else could the demand be made, unless of him who represents the debtor, and has in his hands the personal and may have the proceeds of the real estate sold, when necessary to increase the assets to a sum sufficient to pay the indebtedness? Where such presentation of the debt is made and followed by an action, the requirements of the act of 1715 are met, and it can have no further application. After the rendition of judgment, a new cause of action, between living persons, springs up, where any action can be maintained, and is enforced under other and differing statutory provisions, and none can be supported upon the original cause of action against the representative or any one else.

The argument to the contrary derives apparent support from the reasoning, none from the ruling, in *Bevers v. Park,* 88 N. C., 456, the erroneous inferences drawn from which we endeavored to correct in *Speer v. James,* 94 N. C., 417. We now propose to add to the latter by reference to previous positive and direct adjudications upon the question of the effect of a judgment rendered against the personal representative, where it is sought to subject the descended or devised lands to its satisfaction, by converting them into assets in aid of the personal estate. The cases to which we refer were bills filed in the court of equity by the personal representative to have his expenditures, in excess of assets, reimbursed out of the real estate.

In *Williams v. Williams,* 2 Dev. Eq., 69, *Ruffin, J.,* delivering (350) the opinion, thus speaks: "It is only a debt in this Court, upon its principle of substitution, which places the administrator here as the law does—an assignee of the debt. No injury can arise to the heir, but rather a benefit, by the jurisdiction. The personal estate is still the primary fund, and hence the administrator *de bonis non* is a necessary party, and the heir is at full liberty to show assets in the hands of either the first or last administrator. *The debt is fixed conclusively by a judgment at law against the administrator, unless the heir can show collusion.*"

Still more explicitly, and in elucidation of the law established in this State for the settlement of claims against deceased debtors out of their estate, *Henderson, C. J.,* thus speaks in *Sanders v. Sanders, id.,* 262, decided at the ensuing term: "The conclusive effect of that suit," referring to a previous decree, "arises from the *peculiar relation subsisting in our law* (the italics are his) between the personal representative and

the heir. I call it *peculiar,* for I believe it nowhere else exists. *Here they are not strangers,* as they are in England, but there is a *quasi privity* between them, as the former defends as well *for the heir* as for the other creditors, the legatees and next of kin. The judgment against him, in the absence of fraud, is conclusive upon all, except as to the plea of fully administered. The law allows the heir to contest that when brought in to show cause, not why the creditor should (not omitted) recover his debt, but why he shall not have his judgment, obtained against the executor or administrator, levied out of the real estate."

The practice then prevailing, when the devisee or heir was brought in to show cause why the land should not be sold and the proceeds applied to the judgment, differs in no respect, so far as the principle is concerned, from that introduced in the act of 1846, which requires the representative himself to pursue the real estate, and to cause so much of it to be converted into assets, by a sale, as may be needed, and to be
(351) put in his hands and used in a due course of administration in like manner as the personal assets.

The same defenses, and none others, are open to the heir and devisee, whichever course may be pursued, and the judgment equally concludes that arising out of the lapse of time. If the suit were upon the original debt due by specialty, it not being merged in the judgment, no statutory bar would be in the way, as there was no limitation upon such causes of action under the law then existing, but only a presumption, raised from the lapse of time, liable to be rebutted by proper proof, that the debt still subsisted under the former method of proceeding by *scire facias.* So where the personal representative, against whom the indebtedness is established by final judgment, pursues the real estate, the heir and dvisee are, for similar reasons, concluded from setting up a defense under the statute of limitations.

Again, under the act of 1715, if the judgments were out of the way, and the representative was sued, he could not avail himself of its protection, because he had not fully administered and discharged himself of the trust. The present plaintiff, it is found as a fact, has made $1,700 out of funds of the estate delivered over to him by the removed executor, and this would have defeated the plea when interposed, according to the ruling in *Cooper v. Cherry,* 8 Jones, 323-330, recognized since in *McKethan v. McGill,* 83 N. C., 517; *Rogers v. Grant,* 88 N. C., 440; *Morris v. Syme, id.,* 453.

Again, the personal estate must be exhausted or its deficiency ascertained before the land can be charged, and this condition includes the recovery of wasted assets upon the bond or against the representative,

as we have shown in *Lee v. Beaman, ante,* 294. And this necessity arises out of the relations of the two classes and kinds of property towards the creditors, which require the application of the one to the indebtedness first, and charges the other only so far as is required to make up a deficiency; and to enable the heir and devisee to disprove the (352) averment of such sufficiency, they are severally brought into court.

There are, however, two, perhaps more, of the judgments that belong not to the class which we have been considering, and were rendered upon debts incurred under the operation of the present law of limitations. They are in favor of James A. Philips and W. B. Fort. The substituted enactment bars an action "not begun by any creditor of a deceased person against his personal or real representative within seven years next after," etc., contemplating a creditors' suit against a *real* as well as personal representative in some cases, and hence it is said that what would be a defense to the one is equally so to the other. As we have seen, the creditor does not directly sue the devisee to obtain satisfaction out of the devised, nor the heir, to obtain it out of the descended lands.

The creditor has access, by legal process, to the personal representative alone, to compel the appropriation to the debts of the trust fund that goes into hands *virtute officii,* or to coerce him by an adversary action against him and them, in which the same result is reached by the action of the court in having the lands sold and the fruits of the sale thus applied. *Pelletier v. Saunders,* 67 N. C., 261.

It may be that the insertion of this term, *"real representative"* in the new, not found in the old statute, had reference to an action given to a judgment creditor, who acquired the lien in the debtor's lifetime, against the heirs, in the Code of Civil Procedure, sec. 325, and those following, which, though then in force, have been omitted in The Code; and actions to enforce a specific performance of contracts for the conveyance of lands, or for the foreclosure of mortgages and trusts upon land, may have been contemplated.

But a much wider scope has been given to the words in *Syme v. Badger,* 96 N. C., 197, and in *Andres v. Powell,* 97 N. C., 155, and a construction adopted which places both kinds of representatives upon the same footing, and affords a like protection to each estate (353) by the lapse of time. It is difficult to reconcile these conflicting adjudications, and we forbear to express an opinion upon the apparently repugnant ruling, until it shall become necessary to do so. The creditors are not before us, and our opinion is asked only with a view of ascertaining the probable amount to be raised out of the lands; and as other

unmentioned creditors may come in and add to the aggregate by proving their debts, so would these not be concluded by our opinion. It would be otherwise if they were parties to the suit.

Leaving these claims open for adjudication when hereafter presented, if contested, our opinion involves the necessity of selling the land and the overruling the judgment in the court below, and affirming that brought under review.

The other and remaining error assigned is in putting a construction upon the saving clause contained in section 164 of The Code, which, it is argued with earnestness, has no application to the case in whose support it is cited. The fallacy under which the criticism upon the language of the court labors, lies in a misapprehension of the facts to which it applies.

The contest is about the creditor's action and the bar set up thereto, defended, it is true, by the plaintiff, but only in his assuming the creditor's place. Now, the creditor could not sue during the interval between the removal of the executor and the grant of letters to his successor. As the action was not barred at the time of the removal, we deem him to stand substantially in the position of one who has a debt against the deceased, not barred at his death, to whom the statute gives the enlarged time, and in such case we understand the counsel for the defendants to concur. This protection thus being given, he was entitled to the benefit of it when the plaintiff, recognizing the validity of the debt,
(354) sues, as it was his duty to do, for all the creditors, thus dispensing with a further movement on the part of this creditor, and arresting the running of the statute against them. It is essentially of the nature of a creditor's bill, as it is prosecuted on behalf of all, and the statute ceases as to all at its commencement. *Dobson v. Simonton,* 93 N. C., 268.

In truth, except for the purpose of establishing the debt, no action can be brought by a creditor, except on behalf of himself and all others, to have an appropriation of the assets. *Wilkins v. Finch,* Phil. Eq., 355; *Moore v. Miller, id.,* 359; The Code, sec. 1448.

Except as to the claims not passed on, the judgment is affirmed.

Petition refused.

Cited: Long v. Oxford, 108 N. C., 281; *Lee v. McKoy,* 118 N. C., 523, 525; *Publishing Co. v. Barber,* 165 N. C., 490.

N. H. GODWIN ET AL. v. HINTON MONDS ET AL.

Jurisdiction—Assignment of Error—Appeal—Motion to Vacate Judgment.

1. A judge of the Superior Court has no jurisdiction to hear and determine actions or interlocutory motions and orders therein without the county in which such actions may be pending, unless by the consent of the parties thereto.

2. The consent necessary to give jurisdiction to hear in a county other than that in which the action is pending must affirmatively appear in the record; and if it does not, the error may be assigned in the Supreme Court.

THIS is a motion to vacate a judgment rendered in an action pending in CUMBERLAND Superior Court, heard before *Shepherd, J.,* in Chambers at Wadesboro, in the county of Anson, on 4 October, 1888.

In this action the plaintiffs obtained a judgment for the want of an answer; the defendant moved, upon affidavits, before a (355) judge at chambers, to set that judgment aside, etc., because of their "mistake, inadvertence, surprise, or excusable negligence." Thereupon the judge made an order:

"That the clerk of the Superior Court of Cumberland County issue notice to the plaintiffs to show cause at chambers at Wadesboro, on 7 September, 1888, why the execution and writ of possession issued in this cause, and now in the hands of the sheriff of Harnett County, should not be set aside, and why the judgment in this cause shall not also be set aside and the case reopened to be tried upon its merits."

Afterwards at Wadesboro, in the county of Anson, the court heard the motion upon the merits, and made an order setting the judgment complained of aside, whereupon the plaintiffs appealed.

F. P. Jones for plaintiffs.
R. P. Buxton and H. McD. Robinson (by brief) for defendants.

MERRIMON, J. There is no statutory provision that confers upon a judge authority to hear and determine upon its merits a motion to set aside a judgment in an action pending in the Superior Court elsewhere than in the county in whose court the action is pending, and this cannot be done in the ordinary course of procedure. *McNeill v. Hodges,* 99 N. C., 248.

The parties to the action might, by *common consent,* allow it to be done; but such consent should certainly appear in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the

better way; or such consent should appear by fair implication from what appears in the record. This is necessary because, without such
(356) consent appearing, the court would have no authority to hear and determine the motion and grant the judgment. The consent is essential to the valid exercise of the authority, and it must appear to have been given. *Bynum v. Powe,* 97 N. C., 374; *Gatewood v. Leak,* 99 N. C., 363.

It does not appear in this case that the plaintiffs gave such consent in a writing signed by them or by their counsel, nor is the fact of such consent recited in the judgment by the court, nor does it appear that the plaintiffs or their counsel were present at the hearing of the motion, and did not object, thereby implying such consent.

It was contended on the argument that the plaintiffs did not except and assign as error that the judge heard the motion and gave judgment in the county of Anson. That is so; but it does not appear upon the face of the record in some way, as it should do, that the court had authority to give the judgment, and therefore the objection might be taken here, in the absence of any formal exception or assignment of error. Generally, the court could not exercise such authority, it could do so only by consent of the parties, and therefore the consent must appear in the record. *Bynum v. Powe, supra,* and the cases there cited.

So much of the order as sets aside the judgment must be reversed, and the motion heard and disposed of according to law.

Error.

Cited: Taylor v. Pope, post, 368; *Allen v. R. R.,* 106 N. C., 523; *Fertilizer Co. v. Taylor,* 112 N. C., 145; *Ledbetter v. Pinner,* 120 N. C., 457; *Henry v. Hilliard, ibid.,* 484; *Herring v. Pugh,* 126 N. C., 860; *Bank v. Peregoy,* 147 N. C., 296; *Clark v. Machine Co.,* 150 N. C., 375; *Cahoon v. Brinkley,* 176 N. C., 7; *Gaster v. Thomas,* 188 N. C., 349.

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J. C. BARFIELD v. P. H. TURNER ET AL.

Pleading—Process—Malicious Prosecution.

1. The term "color of process," means process sufficient and apparently valid.
2. A complaint which alleges that the plaintiff was arrested and imprisoned under color of process by persons represented to be officers of the law, by means whereof he suffered damages, does not allege a sufficient cause of action, although it may charge that such arrest and imprisonment were illegal, wrongful, and without authority.

3. In an action for malicious prosecution the complaint should allege that the process was void, or was issued without probable cause, or that it was prompted by malice, and that the proceedings thereunder have terminated.

THIS is a civil action, tried before *Boykin, J.*, at Fall Term, 1886, of MONTGOMERY Superior Court.

The following is a copy of the material portion of the complaint:

"1. That on or about 13 February, 1885, the defendant W. F. Hudson assaulted and arrested the plaintiff under color of process sued out by the defendant W. W. Hailey before the defendant D. C. Baldwin, and brought the plaintiff before the defendants Baldwin and Turner, justices of the peace.

"2. That defendants Turner, Hudson, Baldwin, and Hailey, on or about the time aforesaid, illegally, wrongfully, and without legal authority, caused plaintiff to be imprisoned in the dwelling-house of said Hailey, and also in the common jail of Montgomery County, whereby he was deprived of his liberty for a long time.

"3. That while under arrest as aforesaid, and during said imprisonment, the plaintiff suffered great pain in body and mind, and was exposed and injured in his credit and circumstances, and prevented from carrying on his business, and incurred expense in obtaining (358) his liberation from said imprisonment, to his damage two thousand dollars.

"Wherefore, plaintiff demands judgment," etc.

The defendants filed an answer to the complaint, but on call of the case for trial, demurred *ore tenus* to the complaint, for that it appeared upon the face of the complaint that defendants were acting under color of process, and that there were no averments of malice nor of want of probable cause, nor that the said cause in which the process was issued has been terminated.

Whereupon, it was considered by the court that the demurrer be sustained and the action dismissed.

Judgment against plaintiff for costs, from which he appealed.

John Devereux, Jr. (Douglas & Shaw filed a brief) for plaintiff.
No counsel for defendants.

MERRIMON, J. The cases of *Garrett v. Trotter*, 65 N. C., 430; *Johnson v. Finch*, 93 N. C., 205, and *Halstead v. Mullen, id.*, 252, and like cases, relied upon by the plaintiff, have no proper application here. He does not allege a good cause of action, imperfectly or defectively; he fails to allege a cause of action at all; "the complaint does not state facts sufficient to constitute a cause of action."

The court must be able to see a sufficient cause of action alleged in the complaint; it may be imperfectly and, therefore, demurrable—to be demurred to—or admitted in the answer or denied therein and proven on the trial; else the defendant may move to dismiss the action upon the ground that no cause of action is alleged.

The plaintiff alleges that he was arrested by one of the defendants, *under color of process* sued out by another defendant, before a
(359) justice of the peace, also a defendant, and taken before him and another justice of the peace, also a defendant, and that while so arrested he suffered and sustained damages. By *color of process* is meant process sufficient in form and apparently valid. So, accepting the allegation in this respect, the plaintiff alleges no cause of action; he was lawfully under arrest until in some proper way discharged, and the allegations that he was "illegally, wrongfully, and without legal authority" imprisoned, have no force, because he was arrested; and, taking the allegations altogether, he was imprisoned under *color of process.* The complaint does not purport to allege but a single cause of action, and the allegation of imprisonment is intended as matter of aggravation. What the character of the *process* was does not appear, but the inference is that it was apparently sufficient; and, whether civil or criminal, it must be taken that upon its face it warranted the detention of the plaintiff in the jail. It may have been a warrant of arrest in a civil action, or a state warrant in a criminal action; in either case the plaintiff may have been, apparently was, lawfully so detained until discharged according to law.

It was contended on the argument that the court can see that a cause of action for trespass against the person is alleged. This is a misapprehension as to what the court may do in such a case. No such distinct cause of action is formally alleged; but one cause of action purports to be alleged; and the court sees all the allegations of fact, taken together confusedly, and determines whether a cause of action is formally alleged. Thus, taking the allegations all together, a cause of action for such trespass is not alleged, because the arrest and imprisonment complained of were by *color of process.*

The plaintiff does not allege that the process was void, or that
(360) it was groundless, or that it was issued without probable cause, or that it was prompted by malice, or that it was ended. The substance of these things he should have alleged if he intended to allege a cause of action for malicious prosecution, as it seems he intended to do.

Affirmed.

Cited: Ely v. Davis, 111 N. C., 26.

FRED. H. STITH, EXECUTOR OF N. L. STITH, v. ALBERTA B. JONES ET AL.

Jurisdiction—Injunction—Receiver—Devise.

1. Where the judge assigned to hold the courts of a district granted a restraining order, with a rule to show cause, returnable on a day after the close of the circuit, and before the resident judge of the district: *Held*, not to be erroneous, and that the resident judge thereby acquired jurisdiction of the matter.

2. Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appearing there was some danger of waste of the property, and the solvency of the vendee-executor was doubtful: *Held*, to be a proper case for the appointment of a receiver.

3. But the court erred in directing the receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment over to the receiver, of any proceeds therefrom, as the court might subsequently direct.

4. Where lands have been conveyed to one who is also a devisee in a will which makes another disposition thereof, and the vendee takes benefit under the will, he must submit to the provisions of the will in respect to the land.

THIS was a motion for the appointment of a receiver, made (361) in a cause pending in DAVIDSON Superior Court, and heard before *Montgomery, J.*, at Chambers, in Concord, on 22 December, 1887.

N. L. Stith died in February, 1878, having, on 6 June, 1874, made his will, which has been duly proved, and therein appointed as executors his son, the plaintiff, Frederick H. Stith, his daughter, the defendant Alberta B. Jones, and two others, of whom one died in the lifetime of the testator, and the other refused to qualify, thereby devolving upon those named the execution of its trusts. The will, among other things, contains this provision: "The debt due to Turner W. Battle (the refusing executor) for money borrowed, and for which he has my note, with A. B. Stith (the executrix) as security, for two hundred and fifty dollars ($250), with interest on it, I want paid as soon as practicable, and herewith make this debt a special charge on my estate. I herewith direct my executors, hereinafter named, to sell my Ward Gold Mine and land embraced in same tract; also my gold mine and tract of land, known as the Hargrave land, as soon as practicable, and after paying T. W. Battle his debt, to pay a note to the Bank of Mecklenburg," and

other enumerated debts; and then he proceeds to say, after paying said debts, "the money arising from the sale of the Ward and Hargrave tracts of land I give to my son, Frederick H. Stith, and my daughter Alberta Bassett Stith, share and share alike." Subsequent to the making of the will, on 14 January, 1876, the testator executed a deed for the recited consideration of $800, to the said Alberta B., wherein he conveys to her in fee, by defining boundaries, the Ward tract of 350 acres, with full covenants of warranty and seizin, which deed has been proved and registered since the testator's death, but the delivery by him is denied by the plaintiff.

(362) On 15 May, 1886, the contestant parties entered into an agreement to work the Ward mine on joint account, the terms of which are set out in detail in the contract.

On 4 December of the same year the contract was superseded by another, entered into by and between the defendant Alberta and John W. Tonkin for the working of the same mine, by what is called "a hydraulic process," with conditions and provisions not necessary to be specified.

The complaint alleges that the said Alberta, on 10 May, 1886, pretending to be sole owner of the Ward tract, made a a deed therefor and attempted to convey the same to the defendants Wilson Kinley and wife, Mary A., they being aware of the want of title in their grantor.

It further charges that said Alberta has now possession of said land, valuable chiefly for its deposits of gold; is working the mine through irresponsible and insolvent tenants; using the proceeds for her own benefit; rendering no accounts of the operations going on; wasting and despoiling the property, denying all right and interest of the plaintiff therein—while she is insolvent and unable to make good to the plaintiff his share of the toll, and compensate for the deterioration in the value of the mine resulting from the manner of working it. The prayer is for an account, for an order canceling and annulling the alleged deed of the testator, for the appointment of a receiver, and that the trusts of the will be executed.

The answer is full and responsive to these allegations, of which it is only necessary to say, that an interlocutory order for the appointment of a receiver to take charge of the property, and hold the same pending the litigation, was asked of *Clark, J.,* holding the December Term, 1887, of Davidson Superior Court, who allowed the motion of plaintiff's counsel, that the defendants show cause why such appointment should not be made, before *Montgomery, J.,* of the Eighth Judicial District, at Concord, on 20 December.

(363) The parties consenting to the postponement of the hearing until the 22d day of the same month, the court directed "that

Truman Coman be appointed receiver of the Ward tract of land mentioned in the pleadings, except that he is not to disturb the defendant Jones in her possession of the dwelling-house, and houses connected therewith, or in her possession of the farming land, but he will permit her to reside there, cultivate the farming land, and use only such timber as may be necessary for fire-wood, and to repair the fences"; and vesting the said Coman "with all the rights and powers of a receiver according to law and the rules and practices of this court, upon his filing an undertaking pursuant to statute for the faithful performance of his duties.

"It is further ordered that said receiver continue to work said Ward gold mine, until the further order of this court, and that he keep full and accurate accounts of all his acts and doings, as such receiver, and report the same from time to time to this court, and that such receiver have leave to apply to the court from time to time for such further order or directions as may be necessary.

"It is further ordered that defendant Jones deliver to the said receiver possession of the said Ward tract of land, together with the machinery and fixtures used in connection with the gold mine; and the defendant Jones will retain possession of the houses and farming lands as above mentioned in this order, except that her farming operations are not to interfere with or obstruct the working of the gold mine on said tract of land."

The defendant objected to any action upon the motion, for want of jurisdiction in the judge to entertain it in a county not of the judicial district wherein the cause was depending, which objection was overruled, and the motion being heard upon the pleadings, affidavits, exhibits, and after argument of counsel, the order was made as stated, and the defendant appealed.

John Devereux, Jr., for plaintiff. (364)
W. H. Bailey and Theo. F. Davidson for defendant.

SMITH, C. J., after stating the case: 1. The question of jurisdiction. It was conceded that the riding of the Eighth Judicial District terminated with the holding of the Superior Court of Davidson at December Term, and that the judge therein presiding had left the district and returned home before the day appointed for the hearing, and that the ridings of the Twelfth District, the courts in which had been held by Montgomery, J., terminated on 20 December, and he had returned to his residence at Concord in the Eighth District. The jurisdiction under the statute cannot be questioned.

The Code, sec. 336, provides that "all restraining orders and injunctions granted by any of the judges of the Superior Court, except a judge holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special procedure is depending, within twenty days from date of order."

Section 379 declares that "a judge of the Superior Court having authority to grant restraining orders and injunctions, as prescribed in title 9, subchapter 3 of this chapter, shall have the like jurisdiction *in appointing receivers,* and all *motions to show cause shall be returnable as is provided for injunctions.*"

As Davidson County is one of those which constitute the Eighth Judicial District, whereof the judge who passed on the motion was resident, and the matter was provisional and interlocutory, only looking to the preservation of the property in dispute and its fruits—a jurisdiction often necessary to be exercised out of term time—the defendant's exception upon this ground cannot be sustained.

(365) 2. The second point rests upon an examination of the proofs, which, upon nearly all the material issues of fact upon which the exercise of the judicial interference must depend, are in direct conflict. It is, however, inferable from the affidavits that there is danger of the loss of the tolls received from operating the mines, and, indeed, in ascertaining the amount thereof. Whether they should be applied to the payment of the testator's debts charged upon his real estate, and directed to be paid out of the proceeds of sale of the Ward and Hargrave land, it would seem to be a proper case, on the demand of an executor of a coexecutrix, to interpose, so far as to secure the fund to meet the exigencies of the estate; for if the deed made to the daughter was effectually executed, and she became executrix and takes benefit under the will, she must submit to the disposition of the land conveyed to her, made afterwards in the will.

We do not mean to intimate, much less to decide, that such estoppel is in the way of her asserting title under the deed, but such a condition results from the controversy as makes it proper for the court to provide against contingent losses. We think the order goes too far, in taking the gold mine operations from the defendant Alberta B. and placing them exclusively under a receiver, and that every legitimate beneficial object will be secured by leaving the operations to go on as heretofore, and requiring returns to be made to the appointee from time to time as paid over, and the execution of a bond properly secured by her to account for and pay over the proceeds as the court may hereafter order;

and, if she declines thus to secure the fund, to require him to take charge of those operations himself, and hold the funds subject to the control of the court. *Deep River Co. v. Fox*, 4 Ired. Eq., 61; *Falls v. McAfee*, 2 Ired., 236; *Parker v. Parker*, 82 N. C., 165.

The proper limitations upon the powers conferred upon re- (366) ceivers are suggested in the recent cases of *Lumber Co. v. Wallace*, 93 N. C., 22, and *Lewis v. Lumber Co.*, 99 N. C., 11.

With such modifications of the order appealed from, it is affirmed.

Modified and affirmed.

A. J. MOCK v. B. F. COGGIN ET AL.

Impeaching Decree—Fraud—Parties—Jurisdiction.

1. Any error committed or fraud perpetrated in the conduct of an action which has regularly terminated cannot be remedied by a motion in the cause, but relief must be sought by an action to impeach to former proceedings; and this action is only open to the parties to the original suit.
2. Where persons who were not parties to the original suit are the contestants in an issue of fraud alleged to have been perpetrated in the course of the progress of the cause, the remedy must be sought in an independent action.

THIS was a motion to reinstate an action, and for other relief, heard before *Clark, J.*, at Fall Term, 1887, of MONTGOMERY Superior Court.

The facts are stated in the opinion.

J. W. Mauney for plaintiff.
No counsel for defendant.

SMITH, C. J. In this suit certain lands, which had been conveyed to a trustee to secure a loan of money, evidenced by a note which had become, by endorsement, the property of the plaintiff, was sold, under a decree in the cause, by one Thomas E. Brown, a substituted trustee, and the report thereof made and confirmed. The tracts (367) were bid off by and put down to E. D. Hampton, as purchaser, at the aggregate price of $3,749.

The decree, after confirming the report, disposed of the fund, and the cause terminated at ..... Term, 1870. The title was made to Luke Blackmer, by the said Brown, without any direction in reference thereto from the court.

Shortly preceding the term of the court, held on the fourth Monday after the first Monday in September, 1887, for Montgomery County, notice was given of an intended motion, to be made at that term before the presiding judge, for an order requiring the said Brown to convey said lands to the purchasers, March and Hampton, for whom it is alleged the latter bought, and further, that the cause be reinstated upon the docket. The notice bears the signatures of Fanny Williams and Lula Hampton, by their attorneys, and is addressed to the said Brown and Blackmer, no one of whom was a party to the cause, while no notice of the purposed proceeding was given by or to the plaintiffs, or by or to the defendants.

The motion was accordingly made, and several affidavits admitted in its support, and in opposition of which we will only observe that the testimony is in irreconcilable conflict as to the circumstances attending the conveyance of the lands to Blackmer instead of to the purchaser. The court denied the motion to restore the cause to the docket, and dismissed it with costs, from which the said Fanny Williams and Lula Hampton appealed to this Court.

It would be under very unusual circumstances, if under any, the court would restore to the docket a cause ended by a final decree more than seventeen years before the application, and thus neutralize the effects of time, and remove any statutory bar that might arise in case of an original action.

(368) But there is an inseparable obstacle in the way of the proceeding itself, presented in the brief of counsel for the appellee and fortified by references to adjudged cases:

1. The error and wrong, if such there be, cannot be corrected or remedied by *a motion in a terminated cause. Covington v. Ingram,* 64 N. C., 123; *Thaxton v. Williamson,* 72 N. C., 125; *Peterson v. Vann,* 83 N. C., 118; *England v. Garner,* 84 N. C., 212; *Thompson v. Shamwell,* 89 N. C., 283.

2. The remedy must be sought in a new action impeaching a decree for fraud, and this is open to a party in the suit only. *Hinsdale v. Hawley,* 89 N. C., 87; *Moore v. Hinnant,* 90 N. C., 163.

3. The present case most obviously admits of no other remedy except an independent action, since, not being bound by the action of the court, the parties may assert their rights without any disturbance from what has been done for the gravamen of the complaint lies in what was done by the parties unconnected with the proceeding itself, and in which the court did not participate.

There is no error, and the judgment must be

Affirmed.

Cited: Smith v. Fort, 105 N. C., 453; *McLaurin v. McLaurin,* 106 N. C., 334; *Deaver v. Jones,* 114 N. C., 651; *House v. Bonsal,* 149 N. C., 56; *Roberts v. Pratt,* 152 N. C., 736; *Massey v. Hainey,* 165 N. C., 177.

T. W. TAYLOR AND WIFE v. HENRY POPE.

FROM CUMBERLAND.

The point presented in this appeal is the same as that decided in *Godwin v. Monds, ante,* 354, and it was determined in the same way.

Error.

(369)

J. A. AND T. MCAULEY v. W. W. MORRIS.

Exemptions—Allotment and Exceptions Thereto—Jurisdiction—Constable—Oaths.

1. Exceptions to the allotment of a homestead or personal property exemptions, in all cases, must be filed in the office of the clerk of the Superior Court of the county where the allotment is made, together with a transcript of the allotment or appraisement.

2. A constable to whom an execution from the court of a justice of the peace has been delivered may summon appraisers and administer to them the prescribed oaths.

3. The return of the appraisers of personal property exemptions should be made to the clerk of the Superior Court, but an allotment is not vitiated by making it returnable to another place. The court has power to direct the return shall be made to the proper office, and it should exercise that power instead of dismissing the proceedings for defect in the return.

THIS was a motion made by the execution debtor to set aside an allotment of personal property exemptions, heard before *Avery, J.,* at Spring Term, 1888, of MONTGOMERY Superior Court.

An execution issued from the court of a justice of the peace to a *constable,* in favor of the plaintiffs, and against the personal property of the defendant. When the constable levied upon his personal property, the defendant demanded that his personal property exemptions should be appraised and laid off to him according to law, which was done. The defendant filed exceptions to the return of the appraisers,

as allowed by the statute (The Code, sec. 519), and in the Superior Court, upon the trial of issues of fact raised on such exceptions, after the jury were empaneled and evidence heard, "the plaintiffs moved the court to dismiss the proceedings, because the exceptions were not filed by the defendant in the court of the justice of the peace, and
(370) because this court had not jurisdiction. The defendant moved the court, upon the facts admitted, to declare the allotment irregular, and for judgment, and for costs of action, against plaintiffs.

The motion of defendant was allowed. The motion of plaintiffs was refused, and they excepted.

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

"This cause coming on to be heard, and the jury having been empaneled, and it appearing and being admitted by the parties in the argument that the appraisers were selected and sworn by a constable, and that the judgment was never docketed in the Superior Court, and that the execution upon which the allotment was made was issued from the court of a justice of the peace, and that the return of the appraisers was made to the court of said justice, and no return was made to the clerk or register of deeds: It is now, on motion, adjudged and declared, that the said allotment is irregular; and it is further considered and adjudged that the said allotment should be set aside as irregular, and that the defendant recover of the plaintiff the costs of this proceeding, to be taxed by the clerk."

From this judgment the plaintiff appealed to this Court, assigning the following errors:

"1. That his Honor erred in refusing to allow plaintiffs' motion to dismiss the proceeding and to tax defendant with the costs, upon the ground that this court has no jurisdiction to try the appeal from the allotment as made by the assessors, and upon the further ground that the proceeding is not properly in this court, even if it has a general jurisdiction to try appeals from allotments made under exemptions issued from the justice's court.

"2. That his Honor erred in setting aside said allotment and taxing the plaintiffs with the costs.

"3. That his Honor erred in failing or refusing to order a reallotment."

(371) *Douglas, John Devereux, Jr., and Theo. F. Davidson for plaintiffs.*

No counsel for defendant.

MERRIMON, J., after stating the case: It is to be observed that the regulations prescribed in The Code of Civil Procedure as to laying off

the personal property exemption of judgment debtors, apply in all cases, whether the judgment is in the Superior Court or in a court of a justice of the peace, and whether the execution against property issue from the one court or the other. No other such regulations are prescribed, and these are broad and comprehensive in their terms and scope, as will presently appear.

The first exception cannot be sustained. The statute (The Code, sec. 519), prescribes how a judgment debtor may object to the valuation and allotment of his homestead and personal property exemption. It does not require that he shall file his objections in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court; it requires that he shall "file with the clerk of the Superior Court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors (as the case may be), which they or the sheriff shall allow to be made upon demand, together with his objections, in writing, to said return, and thereupon the clerk shall put the same on the civil issue docket of said Superior Court for trial at the next term thereof as other civil actions, and such issue joined shall have precedence over all other issues at such term. And the sheriff shall not sell the excess until after the determination of said action." It thus appears that the objection shall be filed with the clerk of the Superior Court, and also that that court shall have jurisdiction to hear and determine the matter of the objection so allowed to be made, whether the same comes from the judgment creditor or debtor. The procedure in such case is summary, and the court will direct it appropriately, as the circumstances may require.

The second exception must be sustained, because the judgment complained of is founded upon erroneous interpretation of the (372) statutory provision applicable, as we shall see.

The execution levied upon the personal property of the defendant issued upon a judgment in the court of a justice of the peace, and it was properly directed to a constable, although it might have been directed to any lawful officer for such purpose. (The Code, sec. 841.) The constable had authority, by virtue of the execution, to levy upon the personal property of the defendant judgment debtor, and having done so, he had further authority, upon demand of the defendant, to summon appraisers to appraise and lay off to the defendant his personal property exemption from execution. The statute (The Code, sec. 507), expressly prescribes that "the sheriff or *other officer making such levy* shall summon three appraisers," etc., for such purpose, and it further prescribes (The Code, sec. 508), that such appraisers "shall take the *same oath* and be entitled to the same fees as the appraisers

of the homestead," etc.; and it further prescribes (The Code, sec. 502), that "the sheriff *or other officer* charged with such levy (that is, upon the land embracing the homestead), shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath," etc. (See *forms* prescribed, The Code, sec. 524.) So it appears that the constable had authority to summon the appraisers and administer to them the proper oath, as it seems he did do.

It was not necessary that the judgment in the court of the justice of the peace should be docketed in the Superior Court, to entitle the judgment creditor to an execution against the *personal property*. The statute (The Code, sec. 841), expressly provides otherwise.

(373) *The return* of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the Superior Court of the county in which the appraisal was made, and filed there as directed in the statute (The Code, secs. 507, 504); but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. Steps should have been taken in such case to have it placed in the proper office. As there would be no judgment-roll of an undocketed judgment of a justice of the peace in the Superior Court, the clerk should file the return of the appraisers among the judgment-rolls in his office, properly numbered and labeled, and make a "minute of the same, entered on the judgment-docket," and certify a copy of it to the register of deeds, as in and for the like purposes as in other cases.

The judgment of the court seems to have been founded upon the erroneous notion that the constable could not summon the appraisers, and administer to them the oath prescribed, and that the judgment of the justice of the peace must have been docketed in the Superior Court, and that the return to the clerk of the Superior Court was essential to its validity at all, for any purpose. As we have seen, such interpretation of the several provisions of the statute was erroneous. The court should not have set aside the appraisal and allotment as irregular, for the causes mentioned, but should have proceeded to dispose of the matter as directed by the statutory provision, cited above, as amended by the statutes. (Acts 1885, ch. 347; Acts 1887, ch. 272.)

There is error.

(374)

JAMES I. MOORE v. W. H. GARNER, ADMINISTRATOR OF ROBERT GARNER.

Evidence—Burden of Proof—Statute of Limitations—Agency—Demand—Payment.

1. Where the lapse of time is pleaded in bar of an action, the burden is on the plaintiff to show that the action was commenced within the period permitted by the statute of limitations.
2. In this State the general rule is, that an action cannot be maintained against a collecting agent, who has received and has in hand funds belonging to his principal, until after demand made; but where the defendant denies the agency, or it is shown he has misused the funds, no precedent demand is necessary.
3. Where a judgment debtor placed in the hands of the judgment creditor claims and other property to be collected and converted into money, and applied to the satisfaction of the judgment, and the creditor was shown to have collected the moneys but failed to apply it as agreed: *Held*, (1) that upon the collection of the money an appropriation, *ipso facto*, was made to the judgment, and satisfaction thereof should have been entered; (2) and that no demand was necessary to be made before the commencement of an action by the debtor against the creditor for the recovery of any sums due upon such collection.

THIS is a civil action, which was tried before *Merrimon, J.*, at April Term, 1888, of GRANVILLE Superior Court.

The plaintiff sued the defendant in the court of a justice of the peace to recover certain moneys alleged to have been collected, by his intestate, upon a promissory note against J. S. & W. H. Joyner, and from the sale of a rockaway placed in his hands, the proceeds of which were to be applied to the discharge of two judgments against the plaintiff in favor of J. S. Bailey, but assigned to the defendant's intestate, docketed in the Superior Court of Franklin, which the intestate failed to do.

The defendant denied the plaintiff's allegations, and set up the defense of the statute of limitations to the demand. The plaintiff failing to recover judgment upon the trial of his action, re- (375) moved it, by appeal, to the Superior Court of Granville, where it was again tried, upon a single issue, in these words:

"Is the defendant indebted to the plaintiff; if so, in what sum?"

From the judgment rendered pursuant to the verdict, the plaintiff appealed to this court.

It was admitted that the two docketed judgments had been assigned and belonged to the intestate Robert Garner, and had been revived and leave given to issue executions on each, at the February Term, 1887, of

the Superior Court of Franklin, after notice served on and resistance thereto offered by the plaintiff.

The plaintiff alleged that the funds so provided and delivered to the intestate were sufficient to discharge said indebtedness, of the failure to do which he first had information by the service of the notice of the intended application to revive the judgments.

The plaintiff's evidence is as follows:

J. S. Joyner testified: That eight or ten years ago he owed plaintiff a note for about $300, and paid thereon about $150; that some time thereafter defendant's intestate told him that the plaintiff had sold note to defendant's intestate, and he paid the intestate balance, except $9.50, which he paid defendant in the spring of 1884. The payment to intestate was made prior to 1880, and on one occasion he let the plaintiff, on intestate's order, have $10 or $12, in groceries, as he said he was hard up. (During the examination of the witness, the court intimated to plaintiff's counsel that, according to his own showing, his claim was barred by the statute of limitations. Counsel replied, that they alleged and proposed to show that Robert Garner took the claims as plaintiff's agent, for collection, and that the statute did not (376) begin to run till demand.) Robert Garner died in December, 1883, and that defendant took out letters of administration in January, 1884.

R. R. Holmes testified: My father and I owed Mr. Joyner a debt of about $50, which was transferred to Robert Garner; I paid Robert Garner in his lifetime $15, and balance to the administrator; I never knew Moore in the transaction.

The plaintiff, under objection from defendant, testified: That two years after the death of Robert Garner he had a conversation with the defendant, in which he (plaintiff) told him his father had said the Bailey judgment had been paid, and that he (Moore) had let him have a rockaway upon the debt, and that the defendant then said that he knew his father had gotten the rockaway, for he bought it from him at $106. Defendant objected and excepted to this testimony.

H. M. Hicks said: That two or three years before the death of Robert Garner, James I. Moore, then living in Oxford, was thought to be on his death-bed, and he was called in to witness his will, and while there Robert Garner came in and Moore said to him, "Bob, have you settled those matters," and Garner replied, "Yes, Jim, it is all paid except a little cost, which I will pay, and hold the land for Stella, and she shall not be disturbed"; that he did not know what they were talking about, but understood it was a claim against a man in Franklin whose name he had forgotten.

James A. Moore, son of plaintiff, testified: Knew my father sold Garner a rockaway; don't know whether he ever paid for it; heard Garner say that the Bailey debt had been paid, except some cost; this was at the time when my father was thought to be on his death-bed in Oxford.

The defendant introduced no evidence.

His Honor charged the jury that it devolved upon the plaintiff to show that his claim was not barred by the statute of limitations; that he must show that demand was made before bringing this action (and that there was no evidence of any demand), and that this action was brought within three years after such demand, or he could (377) not recover. To this charge the plaintiff excepted.

There was a verdict for the defendant, and from the judgment rendered thereon the plaintiff appealed.

N. Y. Gulley (by brief) for plaintiff.
A. W. Graham for defendant.

SMITH, C. J., after stating the case: There seems to have been no separate issue as to the statutory bar, and as the only exception taken to the charge of the judge is directed to his instructions on that part of the defense, we must understand it to have been allowed under the broad and comprehensive terms of the issue that was submitted and answered by the jury.

There can be no question of the correctness of the proposition which places on a plaintiff, when the lapse of time is relied on as a bar to the suit, the burden of showing that it was begun within the limits of the statute. The former system of pleading required a replication, averring that the action was begun in time. The force of the objection lies to so much of the direction given to the jury as requires the plaintiff to "show that the demand was made before bringing this action," of which no evidence had been offered—an instruction unavoidably leading to an adverse verdict.

The rule in this State, though disowned in many others, undoubtedly is that a demand must be made of a collecting agent, whose duty it is to pay over moneys received to his principal, when he has such, before he becomes amenable to an action; and this has been held, in the case of constables, in *Potter v. Sturges,* 1 Dev., 79; *White v. Miller,* 3 D. and B., 55; *Willis v. Sugg,* 3 Ired., 96, and *Kivett v. Massey,* 63 N. C., 240, and in the case of other agencies for collections, in *Waring v. Richardson,* 11 Ired., 77; *Hyman v. Gray,* 4 Jones, 155; *Patterson v. Lilly,* 90 N. C., 82, and *Bryant v. Peebles,* 92 N. C., 176. (378)

But the rule is not absolute and without qualification, but rests primarily upon the supposition that the agent has the fund, and is not in default until an opportunity is afforded, upon the demand of his principal, to pay it over to him. If he has misused the money, that act itself is a breach of the obligation, and exposes the agent to an immediate suit, and in this case no precedent demand is necessary, but only evidence of the misapplication. *Waring v. Richardson, supra,* and other cases.

In *Bryant v. Peebles,* already cited, as to the necessity of a demand before action, the court says "that such demand must be made of a collecting agent who has the money, until which the action will not lie, nor will the statute of limitations begin to run."

In *Waddell v. Swann,* 91 N. C., 108, *Merrimon, J.,* uses this language in the opinion: "Ordinarily, under the contract of agency, the agent is entitled to be notified by his principal to deliver to him the money or other thing in his hands, as the agent, the object being to give him an opportunity to do so without action. This notice or demand implies, and is given upon the supposition, that the agent recognizes the relation between himself and his principal, and that he will freely do his duty as required. But if he denies the agency, what purpose could a demand serve? It would be useless and nugatory."

The same doctrine is repeated in passing upon the second exception in *Wiley v. Logan,* 95 N. C., 358.

If the contract created an agency to collect and convert the rockaway into money (and such was the view of defendant's counsel), in order to render necessary a demand before suit, it did not, as the plaintiff contends, stop there, but the intestate was to discharge the judgments by thus using the money, and some evidence of this is derived (379) from the conversation had between the parties to the action since the death of Robert Garner. If this application of the moneys received was to be made, and was not made—for the judgments were not satisfied, but are being enforced as still subsisting debts—the action would lie. This aspect of the case seems to have been ignored in the charge, and the case submitted to the jury as one of a mere collecting agency.

If the funds were to be used in paying the judgments, as they belonged to the intestate, the appropriation would be *ipso facto* made as ruled in *Ruffin v. Harrison,* 81 N. C., 208, affirmed on the rehearing in 86 N. C., 190, and satisfaction should have been entered. The intestate did not thus apply them, and his administrator denies any obligation to do so, and is pressing payment.

There is error in the judge's assuming the agency to be one where the demand is necessary, and that it was indispensable to the main-

tenance of the suit, instead of leaving the jury to determine the kind and character of the intestate's undertaking. There is error, and the judgment must be reversed.

Error.

Cited: Nunnery v. Averitt, 111 N. C., 395; *Stubbs v. Motz,* 113 N. C., 459; *Koonce v. Pelletier,* 115 N. C., 235; *Cotton Mills v. Abernathy, ibid.,* 409; *Graham v. O'Bryan,* 120 N. C., 465; *Parker v. Hardin,* 121 N. C., 58; *House v. Arnold,* 122 N. C., 222.

(380)

THOMAS J. GRIFFIN v. ALVIS PETTY AND ATLAS PETTY.

Contract, Express and Implied—Instructions to Jury—Payment.

Where the defendant pleaded payment to an action upon a note, and offered evidence tending to show that such payment was made by another party, for his benefit, by the sale and delivery of certain property, but this was denied by the plaintiff, who alleged that the sale of the said property was an independent transaction, and had no connection with the note: *Held,* that an instruction to the jury that such a sale and delivery could not be considered as a payment on the note, unless the plaintiff so *expressly* agreed, was erroneous; and that the jury should have been instructed that, if they were satisfied by a preponderance of the proof that there was an *implied* agreement that the property was to be so applied, they should find for the defendant.

THIS was a civil action, tried before *Merrimon, J.,* at May Term, 1888, of the Superior Court of CHATHAM County.

The action was begun before a justice of the peace to recover the balance due upon the promissory note of the defendants, made in favor of the plaintiff, for the sum of $150, dated 26 August, 1880, on which was entered certain credits. The defendants pleaded payment, and particularly that Andrew J. Petty had paid on the same $63.75.

On the trial in the Superior Court, in relation to the item of $63.75, claimed by the defendants as a payment, Andrew J. Petty testified that he was a brother of the defendants; that at the time of the execution of said note, he and the defendants were tenants in common upon the land upon which they resided; that they all lived together and had everything in common; that they also had a little store, run in the name of Petty & Brothers; that while he did not sign the said note, it was well known to plaintiff that he was equally interested in it with the defendants; that at several times after the execution of the note, and up to

August, 1884, he delivered to the plaintiff 7,993 feet of lumber,
(381) to the value of $63.75, and that it was understood the lumber was to go as a credit on the note. The plaintiff denied these statements, and said that Andrew Petty was the man he dealt with for the lumber.

In charging the jury, the court said that as to the payment of $63.75, in lumber, claimed by the defendants, if this account belonged to the firm of Petty & Brothers, or to the defendants and Andrew Petty, it could not be allowed as a payment upon the note sued upon by and admitted to be the individual claim of plaintiff, unless the plaintiff expressly agreed that it should go as a payment on the note.

To this part of the charge defendants excepted. There was a verdict for the plaintiff. Defendants moved for a new trial, upon the grounds of misdirection to the jury, which being refused, and judgment rendered on the verdict, they appealed.

No counsel for plaintiff.
John Manning for defendants.

MERRIMON, J. Very certainly, the brother or brothers of the defendants might have paid the notes sued upon, or some part of it, with the lumber mentioned that belonged to them, and not to the defendant, if the plaintiff consented to receive the same as a payment. The court so, in effect, instructed the jury, but it told them that this could not be so "unless the plaintiff *expressly agreed* that it should go as a payment of the note."

We think the strong expression, *"expressly agreed,"* may have misled the jury—it probably did. If from a preponderance of evidence they were satisfied that the plaintiff received the lumber, as such payment, they should have so found, and the court ought to have so instructed them. By "express agreement" is meant, ordinarily, one made in
(382) express terms—such as directly declared it; but an agreement such as that insisted upon by the appellants may appear from strong implication; facts and circumstances in evidence may imply it almost as certainly as direct, explicit words. Although there was not evidence of an express agreement to receive the lumber as a payment, there was evidence from which the jury might or might not have found that the parties so agreed.

There is error, because of which the defendants are entitled to a new trial.

Error.

JOSEPH GILMORE ET AL. v. WILLIAM BRIGHT AND WIFE.

Husband and Wife—Marriage—Contract — Vested Rights — Constitution—Homestead—Deeds.

1. Where the title to land was acquired by the husband and the marriage contracted, prior to the adoption of the Constitution of 1868, no provision therein could divest his right to dispose of that property in any manner he might choose, without the consent of the wife.
2. If, however, the husband had procured a homestead to be allotted therein, or an allotment had been made in which he acquiesced, then the wife's right to a homestead would have arisen—subject to the rights of prior creditors—which could not be divested except by her deed duly executed.
3. While the State may prescribe the manner in which the title to property may be transferred, it cannot, under that power, prescribe a method which in effect will defeat a vested right to convey.

THIS was a civil action to recover land, tried before *Gilmer, J.*, at February Term, 1888, of CHATHAM Superior Court.

It is alleged in the complaint that Samuel Gilmore died in (383) 1874 or 1875, seized and possessed of the land described in the complaint, and the plaintiffs are his heirs at law; that after the death of said Samuel Gilmore, the defendant, William Bright, took possession of the land under an alleged purchase, and fraudulent and void deed, from Samuel Gilmore, and that they have recently discovered that the said Bright obtained possession of said land by fraud, which was not discovered by them till about March, 1886; that the deed or deeds to said Bright were not for the value of the land, but only as a security for an inconsiderable sum, which they are willing to pay; and they ask that the deed or deeds to the defendant be declared only a security, etc., and for an account, etc.

The material allegations of the complaint are denied, and the defendant also relies upon the bar of the statute of limitations. It is stated in the answer that the defendant did not take possession of the land till after the death of Samuel Gilmore, and that he "purchased with the understanding that he was not to dispossess Samuel Gilmore during his life."

The following issues, under the direction of his Honor, were submitted to the jury:

1. Are the deeds from Samuel Gilmore and wife to William Bright fraudulent and void?

2. Were the alleged deeds from Samuel Gilmore and wife intended and understood to be surety for money loaned?

3. Is the demand of the plaintiffs barred by the statute of limitations?
4. What is the annual rental value of said land and premises?

In response to the 1st and 2d issues the jury answered, "No."

Counsel for plaintiffs tendered another issue, to wit:

(384) "Did Samuel Gilmore die seized and possessed of the land described in the pleading?" This was refused and the plaintiffs excepted.

Plaintiffs offered in evidence two paper writings, purporting to be deeds of bargain and sale from Samuel Gilmore to the defendant William Bright, for the lands in controversy—one bearing date 27 September, 1872, and the other bearing date 29 August, 1872—one of which deeds only was signed by the wife of the said Samuel, to wit, the deed executed on 29 August, 1872. The privy examination of the wife of Samuel Gilmore was not taken to the deed which she signed, nor did it appear that she had ever given her free and voluntary assent to either of said deeds.

It further appeared in evidence that Samuel Gilmore had owned and occupied the land continuously for over forty years prior to his death in 1873; that he and his wife, Thany, were in possession at the date of the execution of said deeds, and so continued in possession up to the date of the death of said Samuel—his wife surviving him.

It further appeared from the testimony on both sides that Samuel Gilmore, at the time of the execution of said deeds, owned no other land, and the value of the land so conveyed was less than $1,000.

It was stated in the complaint, and was in evidence, that Samuel Gilmore purchased the land in controversy in the year 1815 and 1835, and that he intermarried with his wife, Thany, long before 1867.

The plaintiffs asked the court to give the following special instructions:

"That if the jury believe that the land in controversy was the only land owned by Samuel Gilmore at the time of the execution of the deeds to Bright, that they were of the value of only $1,000, or less, and that himself and wife were living on the land at the time of the execution of the deed; that the said deeds were invalid and passed no title to

(385) Bright, it appearing from an inspection of said deeds that the wife of Gilmore was not privately examined in regard to her voluntary assent to the execution of the same, as required by the 8th section of the 10th Article of the Constitution of North Carolina."

His Honor declined to give this instruction, but told the jury "that inasmuch as Gilmore owned the lands, and was married prior to 1867, he had the right to convey them without his wife joining in the deed."

Plaintiffs excepted.

His Honor also instructed the jury "that if they shall find the deed from Samuel Gilmore to the defendant Bright void, then that Samuel Gilmore died seized and possessed of the land." There was a verdict and judgment for the defendant, and plaintiffs appealed.

J. H. Headen for plaintiffs.
John Manning for defendants.

DAVIS, J., after stating the case: The first exception presented in the record is to the refusal to submit the issue tendered by the plaintiffs. It is insisted by counsel for plaintiffs that, as it was alleged in the complaint that "Samuel Gilmore died seized and possessed" of the land in dispute, and it was denied in the answer, it presented an issue which the plaintiffs had a right to have passed upon by the jury. It is admitted in the answer that Samuel Gilmore was not dispossessed during his life; it is admitted that he was in possession at the time of his death, but whether he was "seized and possessed" in the sense which carried with it the ownership of the land was properly presented in the issues submitted under the direction of the court, and the issue insisted upon was unnecessary, and if it could serve any purpose it would (386) be only to mislead and confuse the jury.

The material questions, so far as they determined the ownership of the land in controversy, were, whether the deeds from Gilmore to Bright were fraudulently obtained, and whether they were intended only as a security for a debt. These questions were fairly presented by the issues submitted under the instruction of the court, and there was no error in refusing the issue tendered. That there is no error in refusing to submit unnecessary or immaterial issues is too well settled to need citation of authorities.

2. The second exception was to the refusal of the court to give the instructions asked for by the plaintiffs.

This exception is not well founded. The case shows that the lands in dispute were the property of Samuel Gilmore long prior to the adoption of the Constitution of 1868, and that he and his wife, Thany, were married long prior to that time. There never was any allotment of the said lands as a homestead, nor was there ever any petition by the said Gilmore to have such an allotment made, nor was there ever any act of his indicating any purpose, voluntarily, to have said land, or any portion thereof, dedicated to the purposes of a homestead. He had, prior to the adoption of the Constitution of 1868, the absolute right to sell or dispose of these lands as he pleased, without the concurrence of his wife, and, if he chose to do so, without her consent and against her will; and it is too well established by the authorities, Federal and State, that this

right was not divested by Art. X, sec. 8, of the Constitution, to be questioned now. The State could not, by its Constitution or its laws subsequently adopted or enacted, deprive him of his vested right to sell or dispose of the land in question, without contravening that provision of the Constitution of the United States which declares that no State shall pass any "law impairing the obligation of contracts." Const.
(387) U. S., Art. I, sec. 10. Unless a person whose lands were acquired prior to the adoption of the Constitution of 1868, and whose marriage was prior to that date, voluntarily surrenders his right of alienation as it then existed, it cannot be taken away from him. He may surrender this right by having the land allotted and set apart as a homestead, upon his own petition, or by acquiescing in such an allotment; but all his rights (except as they may be affected by his own acts) and the rights of his creditors, as they existed prior to the adoption of the Constitution, remain unimpaired. *Edwards v. Kearsey,* 6 Otto, 595; *Sutton v. Askew,* 66 N. C., 172; *Brice v. Strickland,* 81 N. C., 267; *Murphy v. McNeill,* 82 N. C., 221; *Reeves v. Haynes,* 88 N. C., 310; *Fortune v. Watkins,* 94 N. C., 304; *Castlebury v. Maynard,* 99 N. C., 285; and the numerous cases cited in these authorities.

3. The third exception was to the charge as given.

This exception cannot be sustained, and the reasons for overruling the second exception apply with equal force to this.

It was insisted on the argument of counsel for plaintiffs, that the constitutional provision—that "no deed made by the owner of a homestead shall be *valid* without the voluntary signature, and assent of his wife signified on her private examination according to law"—prescribed a mode by which deeds shall be executed, and that it is within the power of the State to regulate and determine the form and manner in which the deeds of its citizens shall be executed in order to give them validity.

Undoubtedly the State may prescribe the manner or form in which deeds, wills or other instruments shall be executed and proved, as that they shall be signed and witnessed, and acknowledged or proved before some designated officer, and registered in a manner prescribed; but it can prescribe no *mode* or *form* of *conveyance* by which a vested
(388) right is annulled or defeated. It cannot prescribe a *form* of *conveyance* that will defeat the *right* to *convey.* Gilmore had the *right* to convey the lands in question without the consent of his wife, and the State had no power to deprive him of this right by declaring that he should not convey without her consent. There is no error.

Affirmed.

Cited: Hughes v. Hodges, 102 N. C., 249.

CALVIN J. COWLES v. JOHN HARDIN ET AL.

Execution Sale—Purchaser—Irregularity—Officer Buying at his own Sale.

Where, under the former statutes regulating sales under execution, an execution issued upon a judgment rendered by a justice of the peace, was levied by a deputy sheriff upon land, was returned to the proper court from which a *venditioni exponas* issued, under which the deputy purchased, whose title was subsequently acquired by an innocent purchaser, and it did not appear that the execution debtor had notice of the levy and return thereof, but he did have notice of the sale and purchase: *Held*,

1. That the purchase by the deputy was not void.
2. That the failure to give notice of the levy and return was but an irregularity, which did not affect the purchaser's title.

THIS is a civil action, for the recovery of land, which was tried before *Boykin, J.*, at May Term, 1887, of WILKES Superior Court.

The plaintiff showed a grant from the State to one Holsclaw, and a conveyance from the latter to one Cousins.

In order to show title out of Cousins, and in himself, he offered evidence of the following facts: Robert Munday was, in 1857, a deputy sheriff under D. C. McCanless, high sheriff of Watauga (389) County. An execution, issuing upon a judgment rendered by a justice of the peace against Cousins, was, either by the deputy or the sheriff, levied upon the lands of the debtor, returned to the county court, from which a *venditioni exponas* issued, under which the land was sold by the high sheriff, when the deputy became the purchaser and took the sheriff's deed. It did not appear that Cousins ever had notice of the levy and return, or that an order of sale had been made. Munday took possession and retained it for a number of years, with the knowledge of Cousins.

The plaintiff in this action acquired Munday's title through sale under execution, on a judgment rendered in favor of one Blair.

The defendants asked the court to instruct the jury "that if Robert Munday was a deputy sheriff at the time he made the levy hereinbefore spoken of, and at the time of the *sheriff's* sale of the twenty-five acre tract, then the purchase of the land by him would be void, and no title would pass to him by virtue of said sale." The court declined this prayer because it assumes, as a matter of fact, that Munday made the levy, whereas the evidence was to the effect that he or McCanless, the sheriff, made it, as is admitted by the defendant in his statement of this case.

The court likewise declined so to charge, because it was of opinion, that as stated, it was not correct as a principle of law, the *sheriff, McCanless,* having made the sale and the same never having been attacked in any way for collusion, fraud, etc.

The defendants also requested the court to charge the jury "that if Cousins had no notice of said levy, or of its return into court, or of the judgment of the county court ordering said sale, then the sale would be void."

The court declined, being of opinion that the principle did not obtain when the defendant in the execution, Cousins, in this instance,
(390) had knowledge of the sale under execution, the purchase by Munday, the execution of sheriff's deed and claim and possession thereunder by Munday until he left the State two years thereafter, and acquiesced therein; and when the rights of subsequent purchaser had intervened, as in the case at bar, the court was of opinion that *under the circumstances of this case,* when the levy was made and returned, and order of sale was entered by the court, and *venditioni exponas* was issued in pursuance thereof, the law would raise a presumption in favor of this plaintiff—the purchaser at execution sale of Munday's estate—that all necessary intermediate acts, orders and decrees were performed and made by the court.

There was a verdict and judgment for the plaintiff, from which the defendants appealed.

C. H. Armfield for plaintiff.
No counsel for defendants.

MERRIMON, J. It does not appear that the deputy sheriff levied the execution issued by the justice of the peace upon the land in question, but if he did, he had no further connection with it. The *venditioni exponas* issued to the sheriff, and by virtue of it he sold the land, and the mere fact that a person who was the sheriff's deputy, but not charged with selling it, purchased the land at the sale made by the sheriff, could not render the sale void. The buyer—a deputy sheriff—had no official authority in connection with or control over the process, and the sale made under it, and he might bid and buy at it on the same footing as a person without official authority—indeed, as to the sale he had none. If the sheriff and his deputy colluded and perpetrated a fraud in the sale and purchase, the defendant in the execution would
(391) have his remedy, but this would not render the sale void *per se,* nor could it affect adversely innocent purchasers.

The statutory regulations pertinent, prevailing at the time of the levy mentioned was made, required that the defendants in the execution should have notice of it and the return thereof, but the absence of such notice was only an irregularity that did not render the sale void. The purchaser was not bound to see that such notice was given, and if the defendant in the execution suffered injury because he did not have it, he had his remedy against the sheriff or other officer. It seems, however, that he had knowledge of the sale, and did not complain of it on that or any account. The purchaser was not bound to take notice of such irregularities. *Buck v. Elliott,* 4 Ired., 335.

Affirmed.

CLINTON M. EULISS v. JOSEPH McADAMS ET AL.

Processioning.

The requirements of the statute in respect to processioning lands must be strictly observed. The report of the processioners must show with precision the conflicting claims of the contending parties, and the lines established by the processioners as determining the dispute.

THIS was a special proceeding to procession land, heard upon appeal from the clerk, by *Shipp, J.,* at Fall Term, 1888, of the Superior Court of ALAMANCE County.

The petition was filed under sec. 1926 of The Code, and, after setting out the boundaries of the land of the petitioner, alleges: "That some of the dividing lines between Joseph McAdams and your petitioner, to wit: From a stone and pointers, his (McAdams) corner, (392) N. 8 chains to a stake; thence W. 24 chains to pointers; thence S. 9.50 chains to the beginning, are in dispute," and asks for an order directing the processioning of his land.

Thereupon (a summons having been duly issued and served upon the defendants) an order was issued to the county surveyor, *ex officio* processioner, directing him to procession the land mentioned in the petition, who reported:

"That in pursuance of the notice and order returned herewith, he proceeded on Tuesday, 26 April, 1887, to run the lines named in the order. He begun at a rock, formerly a post-oak stump, in the road, and run N. 86⅔° W. 29 chains to a rock, formerly a post oak; thence N. 3⅓° E. 8 chains to a stake. When he got to the end of the eight chains, and

was about to run the next line west, Joseph McAdams disputed the line and forbade the undersigned to proceed further in running or marking the same."

Thereupon freeholders were appointed in accordance with sec. 1928 of The Code to proceed with the processioner to establish the lines in dispute, and the following report was made by them:

"We, J. N. H. Clendennis, W. M. Andrews, Wm. G. Kirkpatrick and Jerry Iseley, commissioners, being freeholders of said county, in obedience to an order of the Superior Court, after being duly sworn to do equal right and justice between the contending parties, proceeded on 31 May, 1887, the said parties, with their attorneys and witnesses, being present, to establish the lines in dispute between the said Clinton M. Euliss and the said Joseph McAdams, as follows: Beginning at a rock, formerly a post-oak stump, in the road leading from Graham to Big Falls, a short distance north of the junction of said road with the road leading from Burlington to Big Falls from said rock; thence N. 86⅔° W. 29 chains to a rock and pointers; thence N. 3½° E. 8 chains (393) to a rock; thence N. 86⅔° W. 23.50 chains to a rock; and we have caused the said lines to be run, marked and processioned as above described, and find that they are the true boundary lines dividing the lands of the said Clinton M. Euliss and the said Joseph McAdams, and that said lines so established and processioned by us are the same claimed by said Euliss and disputed by the said McAdams, and that they are the same forbidden to be run and marked by the said McAdams—so that we find the contention against said McAdams and in favor of said Euliss; that with respect to the boundary lines dividing the lands of the said Clinton M. Euliss from the lands of other contiguous owners, we find there is no dispute.

"The lines in dispute and run, marked and established by us, were run by Lewis H. Holt, county surveyor and *ex officio* processioner; that each of said contending parties had present a practical surveyor, to wit: the said Clinton M. Euliss had present J. G. Tate; the said Joseph McAdams had present Joseph P. Albright."

To this report the defendant filed exceptions and moved to quash. The following are the only exceptions, which need consideration:

2. Because no survey and plot were made of either the tracts of land belonging to the said Euliss, or of that belonging to the said McAdams, being the two tracts adjacent upon the disputed lines, which lines the commissioners were to settle between the said parties, the said McAdams being then and there present with his deeds, and demanding that a survey and plot of each tract be made.

5. Because the report does not state and show any of the facts and circumstances attending said survey, from which the court can see and judge of the correctness of the survey made, or of the conclusions of the jury or commissioners as to the rights of the parties interested in the lands; and further, that the report does not show that any deed was present, or what, if any, deed they run by, or what were the claims or contentions of the parties, or what facts or circum- (394) stances determined the conclusion at which the commissioners arrived.

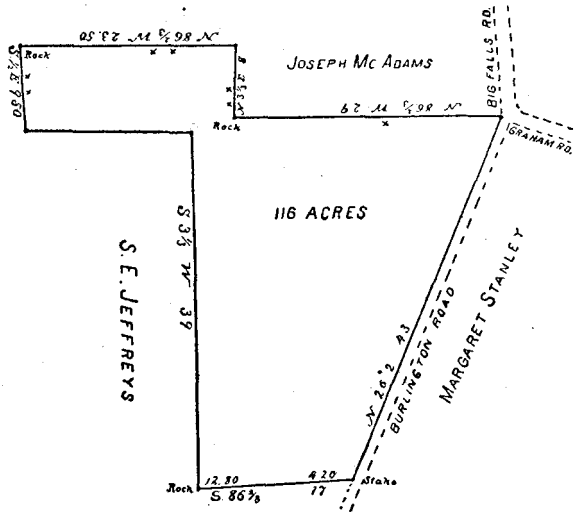
6. That the whole report and proceedings are so meagre and so vague and uncertain that the court cannot see upon what the commissioners or jury founded their verdict, and that none of the facts and circumstances attending the survey are stated, so as to enable the court to pass upon exceptions, without resort to affidavits.

In support of his exceptions the defendants filed an affidavit, setting out minutely and at great length the action of the processioner and the freeholders, and the deed under which he claims, and that he was present with these deeds, and when "on the disputed lines" he presented his deed and those of preceding owners, under which he claimed the land in dispute, "to the processioner and jury (freeholders), and demanded that they survey the line in dispute, and all the lines of his said land, and also that they would survey the tract of the claimant Euliss," and make plats of each of said tracts of land, etc., and that such survey was not made, but it was necessary to settle the dispute between the plaintiff and the defendant.

On behalf of the plaintiff, affidavits of the freeholders were filed also at great length, in which they set out their action and the evidence upon which they acted, and they say, among other things: "We directed the processioner where to run and to make a plat of the Euliss land, and that the plat filed by him is a part of our report, and we supposed was filed at the same time, but have heard that it was not, or, if filed, was lost or misplaced. The plat now on file shows the disputed lines as established by us."

The processioner in his affidavit, among other things, stated: "That he either made and filed a plat of the land of the plaintiff, accompanying the report, and part of the report of the commissioners filed 28 June, 1887, and it has been misplaced—his recollection being that (395) he made such a plat—or his failure so to make and file such a plat was an oversight; at all events, the plat made by me, and filed some time since, is the same as the one made, or should have been made, to accompany the report," etc.

The following is the plat accompanying and referred to in the affidavit:



"This plat represents the land of Clinton M. Euliss in Alamance County, North Carolina, adjoining the lands of S. E. Jeffreys, Margaret Stanley, James McAdams and others, and bounded as shown in the plat surveyed (as stated above) by me on 31 May, 1887, containing 116 acres, more or less, by old deed.

(Signed) LEWIS H. HOLT,

(396) *Co. Sur. Alamance, and Processioner.*"

The introduction of the affidavit on behalf of the plaintiff was objected to by the defendants, and that of the defendants was objected to by the plaintiff, but these objections were overruled by the court (the clerk).

The surveyor, or processioner, filed a plot of the plaintiff's tract of land on 2 April, 1888, which is not claimed to be made from his own survey, but from old deeds which the plaintiff holds under, except as to the two disputed lines. This plot was objected to by defendant McAdams. After considering it, together with the affidavit supporting it, it was admitted and allowed to be filed.

The clerk gave judgment sustaining the exception of the defendant, and allowing the motion to quash, and from this the plaintiff appealed to the Superior Court in term.

In the Superior Court the following judgment was rendered:

"After an inspection of all the papers, and after hearing argument and suggestions of counsel, it is considered by the court that the statute, as contained in chap. 48 of The Code, has been complied with. The ruling of the clerk in admitting the affidavits and plots is sustained. The ruling of the clerk in quashing the proceeding is overruled, and the exceptions of defendant are overruled; and thereupon it is ordered and adjudged: That the report of the freeholders and processioners be confirmed and be recorded with the plot, and that the plaintiff recover his cost of the defendant, to be taxed by the clerk"; from which the defendant appealed.

E. C. Smith for plaintiff.
F. H. Whitaker for defendant.

DAVIS, J., after stating the case: There was a vast deal of unnecessary and irrelevant matter sent up with the record, some of it evidence, and much of which no doubt would have been material in settling the boundary line in dispute in the trial of the cause in the Superior Court in term, if the report of the survey and proceedings of the (397) freeholders and processioner had disclosed what that dispute was. It is impossible, either from the *report or the plat* to see what the conflicting claims of the disputing parties were. It is true the report speaks of the line "established and processioned," as being the same "claimed" by Euliss and "disputed" by McAdams, but there is not the slightest indication in the report or in the plat to show the contention or claim of McAdams, from the which the Court can see, upon a review of the proceedings, whether the one or the other was the correct line.

"When a line is disputed and the processioner is forbidden by any person" to proceed further, he is required to report the matter to the Superior Court, "stating truly all the circumstances of the case, etc.," and thereupon five freeholders are appointed, who, with the processioner, shall establish the disputed line or lines, "and procession the same, and make report of their proceeding," etc.

Except as to the classes of persons embraced in the *proviso,* sec. 1929 of The Code, providing that, "Every person whose lands shall be processioned to him according to the directions of this chapter, shall be deemed and adjudged to be the sole owner thereof, and upon any suit commenced for such land, the party in possession may plead and give the proceeding under this chapter in evidence." Section 1930 gives to either party the right to appeal.

As the processioning of land may fix the rights and title of parties, the importance of a full and strict compliance with the requirements of

the law is apparent, and unless complied with by the processioner and freeholders, their proceedings will be set aside.

As was said in *Hoyle v. Wilson,* 7 Ired., 466, "the report of the processioner is radically defective in not stating with precision the claim of the respective parties, so as to show what lines were disputed, (398) or how far they were disputed." In *Carpenter v. Whitworth,* 3 Ired., 204, it is said by *Gaston, J.:* "It would seem indispensable where, in the course of a processioning, a dispute arises with one of the persons notified, and the claimant wishes the dispute to be thus decided, the certificate (report) should be set forth to show *therein* what the subject of dispute is—that is to say, the respective claims and allegations of the parties—so that the matter may plainly appear upon which they are at issue. Technical terms are not indeed required, but in the language of the act, "all the circumstances of the case," which must mean all the things controverted, "shall be truly set forth."

"It is not sufficient that it should be reported that two persons, owning coterminous land, claimed lines. It ought to state the lines claimed by each." *Mathews v. Mathews,* 4 Ired., 155; *Porter v. Durham,* 90 N. C., 55; *Forney v. Williamson,* 98 N. C., 329, and cases cited.

Concluding that the plat made by the processioner shall be considered as if made and filed with the report, it is not such a plat as is contemplated by the statute, and is, for the reasons already stated, fatally defective.

The 2d, 5th, and 6th exceptions of the defendant must be sustained, and this renders it unnecessary for us to consider the others. There is error, and the report and proceeding of the processioner and freeholders must be quashed.

Error.

Cited: Roberts v. Dickey, 110 N. C., 69.

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(399)

W. C. ORRENDER v. DAVID CALL.

Will—Devise—Powers—Color of Title—Administration—When Lands Regarded as Personalty.

C. devised his lands to his wife for ten years, for the support of some of his children, and directed that at the expiration of that time his widow should have dower allotted her, and the balance of the lands rented by his executor until the death of his wife, "then all my lands to be sold by my executor, and the money divided . . . equally among my chil-

dren as they come of age." The executor died before fully executing the will, and three or four years after the death of the widow the land was sold by an administrator *d. b. n. cum testamento annexo: Held,*

1. That the administrator had power to sell and convey the land after the death of the widow.
2. That the proceeds of the sale, as between the devisees, should be regarded as personalty.
3. That no alienation, by the devisees of their estate under the devise, could operate to defeat the powers conferred upon the personal representative.
4. That no conveyances made by the devisees, although accompanied by long possession by the vendees, made before the death of the widow or the sale by the administrator, could operate as color of title.

THIS is a civil action to recover land, which was tried before *Clark, J.*, at Spring Term, 1888, of the Superior Court of DAVIE County.

The plaintiff claimed title under a deed executed to him by M. R. Chaffin, administrator *de bonis non,* with the will annexed, of David Call, Sr., on the ..... day of ....., 1886, and in support of his title offered in evidence:

1. The will of David Call, Sr., deceased, dated 14 July, 1838, which, so far as is material for our consideration, devises to his wife Sarah, his "lands and plantation ten years," for the support of five of his children (naming them), and at the expiration of the ten years, his said wife is to have "her dower land laid off to her, and the (400) balance of the plantation to be rented out" by his executor during his wife's lifetime or widowhood; and it then provides, "at the death of my beloved wife, then all my lands to be sold by my executor, and the money divided, as will hereafter be stated." The division referred to included the proceeds of sale of personal property, to be "equally divided among my children as they come of the age of twenty-one years, to wit: Polly, James, Ellender, Henry, Sally, Louisa, John, Greenbury, Betsy Ann, David, and Mary Ann."

2. The appointment of M. R. Chaffin as administrator, etc.

3. The deed of said M. R. Chaffin, administrator, etc., showing that, after due advertisement according to law, and according to the provisions of said will, he had publicly sold and by said deed conveyed the land to plaintiff.

4. The plaintiff then offered a record of said county court, showing an allotment of dower to Sarah Call, widow of said David Call, Sr., deceased, made according to the provisions of said will in 1847. Defendant objected; the dower did not embrace the *locus in quo* and allotment; and was only offered to show execution of provisions of will. Objection overruled by court, and exceptions by defendant.

There was evidence showing that John Sheek, the executor named in the will, had died many years ago, without having executed trusts and selling the lands as provided for, and that Sarah Call, widow of David Call, Sr., died three or four years before the trial of this cause; and that Berry Call, one of the children and devisees mention in the will, went into possession of the *locus in quo* a year or two before the war, and that he afterwards built a dwelling-house thereon; that during, or about the close of the war, Sarah Call, the widow of David Call, Sr., moved into said dwelling, and remained there until her death; and that the annual rental value of said land was $15 or $20.

(401) The plaintiff then closed, and defendant offered the following testimony, to wit:

1. A deed from James Call, one of the children of David Call, Sr., to Sarah Call, dated 2 January, 1843, purporting to convey to her his interest to the *locus in quo*.

2. A similar deed from Mary Call, dated 11 February, 1846.

3. A deed from Henry Call, dated 1 April, 1848.

4. A deed from Louisa Call, dated 22 December, 1849.

5. A deed from Robert Orrell and wife, Nellie, dated 29 March, 1848.

6. A deed from John Call, dated 6 October, 1850. All of these deeds were made to Sarah Call.

7. A deed from Jacob Handine and wife, Sarah, who also was one of the children of David Call, Sr., to Berry Call, another of said children, and mentioned in will as Greenberry.

8. A deed from Berry Call to Milton Hobbs, dated 28 October, 1860, purporting to convey his interest in and to the *locus in quo*.

9. A deed from Milton Hobbs to Thos. Furches, dated 26 August, 1861, for same land—all the foregoing deeds having been registered since 1 January, 1887.

Defendant also introduced a deed from Thos. Furches, dated 1 April, 1863, to Sarah Call, for the tract of land in controversy, and also deed from Sarah Call to Coleman Foster, one of defendants, dated 6 May, 1872, purporting to convey the land in controversy.

The following issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to possession of the premises, and do the defendants wrongfully withhold possession of the same?

2. What damage has plaintiff sustained?

(402) The jury responded, under the instructions of the court, "Yes" to the first issue, and to the second issue they responded "Fifteen dollars per year." Judgment was rendered for the plaintiff, and the defendants appealed.

John Devereux, Jr., for plaintiff.
J. C. Buxton for defendant.

DAVIS, J., after stating the case: The first exception is to the record showing the allotment of dower to the widow in 1847. The widow was entitled, under the will, to the possession of all the land for ten years, and after that her dower was to be allotted, and the evidence was offered to show that the provision of the will in regard to the land had, in this respect, been complied with. It could not prejudice the defendant in any event that we can see, for, whether allotted or not, it could not affect the power of the executor, or, in the event of his death, the power of the administrator *de bonis non,* with the will annexed, to sell the land after the death of the widow; and the only material questions presented and discussed relates to the power of the administrator *de bonis non,* with the will annexed, to sell, and the effect of the deeds made by some of the children of the testator, under which the defendant claims title.

We think the administrator, with the will annexed, had the power under the statute to sell, and that the deed from him to the purchaser was valid and conveyed a good title. Rev. Stat., ch. 46, sec. 36; Rev. Code, ch. 46, sec. 40; The Code, sec. 1493; *Rogers v. Wallace,* 5 Jones, 181; *Council v. Averett,* 95 N. C., 131; *Vaughn v. Farmer,* 90 N. C., 607, and cases cited. Whatever may have been the effect of the deeds under which the defendants claim, they could not operate to defeat the power of the executor or the administrator with the will annexed to sell, in accordance with the directions of the will, after the death of the widow. The proceeds of the land, directed to be sold after the life estate and divided among children, will be regarded as personalty. This is settled by *Smith v. McRay,* 3 Ired. Eq., 204; *McLeran* (403) *v. McKethan,* 7 Ired. Eq., 70; *McBee et al., ex parte,* 63 N. C., 332, and many other cases; and whatever might be the effect of the deeds of some of the persons interested in the proceeds of the sale under the will, it could not be to deprive the executor or administrator with the will annexed, of the power conferred by the will to sell.

Donoho v. Witherspoon, 70 N. C., 649, and *Brandon v. Phelps,* 77 N. C., 44, cited by counsel for defendants, relate to land sold by heirs after two years, and have no application to the case before us, in which the land, by the terms of the will, was not to be sold till after the death of the widow, when it was to be sold by the executor and the proceeds divided, etc. Whether the deeds of the children, under which the plaintiffs claim, operated to convey their interests in the proceeds of the sale, it is not necessary for us to consider. They did not convey the land, nor did they constitute such color of title—as against the executor or

administrator with the will annexed, or against the other children, whose rights and interests might require the sale of the land in accordance with the directions of the will—as would be perfected by seven years possession. Certainly, such possession would not be adverse to the rights of the children who did not sell, and who had the right to require the provision of the will to be executed; and, even supposing it to be adverse, it would only begin from the death of the widow, which occurred, the case states, "three or four years before the trial of this cause." *Rogers v. Wallace,* 5 Jones, 181; *Hicks v. Bullock,* 96 N. C., 164; *Page v. Branch,* 97 N. C., 97, and cases cited.

We have not considered the motion of counsel of appellee to dismiss for want of proper assignment of error, because the exceptions plainly appear in the case stated by his Honor below, by whom the case on appeal was settled.

Affirmed.

Cited: Saunders v. Saunders, 108 N. C., 331; *Farabow v. Green, ibid.,* 343; *Orrender v. Chaffin,* 109 N. C., 429.

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(404)

THE PIEDMONT RAILROAD COMPANY AND THE RICHMOND & DANVILLE RAILROAD COMPANY, LESSEES, v. THE TOWN OF REIDSVILLE.

Constitution—Case Agreed—Interstate Commerce—Taxation—Municipal Ordinance.

1. The summary method provided by The Code for the submission of an action upon a case agreed, contemplates that all the facts necessary to a determination of the questions submitted shall be fully stated in the case agreed; and where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected.

2. The ordinance of the town of Reidsville imposing an annual tax upon a railroad company, organized under a charter granted by the State of North Carolina, whose track runs through the corporate boundary, is not a tax upon interstate commerce, nor upon the instruments employed in the transportation of such commerce.

3. Such a tax is not obnoxious to the Constitution of the State, or of the United States, notwithstanding the fact that the property of the railroad may have been taxed, *ad valorem,* under the general revenue laws of the State.

CONTROVERSY without action, submitted upon a case agreed, heard before *Connor, J.*, at July Term, 1888, of ROCKINGHAM Superior Court.

This proceeding is under section 567 of The Code, and its object is to obtain the decision of the court upon the question of the validity of a tax imposed on the plaintiff by a municipal ordinance passed by the defendant. The facts agreed are as follows:

1. The town of Reidsville is a municipal corporation, organized under the laws of North Carolina.

2. It has passed an ordinance levying fifty dollars ($50) tax on every railroad company running its road through its corporation.

3. The Piedmont Railroad Company is a corporation organized under the laws of North Carolina, and its track runs through (405) the town of Reidsville.

4. The Piedmont Railroad Company has depots, tracks, road-bed and other corporate tangible property in Reidsville, which is taxed by the State, county, and town as other corporate property, *ad valorem,* under the Constitution.

For taxation, the road is valued at $10,000 per mile by the properly constituted assessors.

5. The Richmond and Danville Railroad Company is the lessee of the Piedmont Railroad, and is in possession thereof.

The plaintiffs resist this tax as unconstitutional, and the matter in difference is submitted, without action, under section 567 of The Code.

The court adjudged that the town of Reidsville is authorized to levy the tax of fifty dollars imposed under the ordinance of said town against plaintiff company, and that the same is not unconstitutional; that the action be dismissed, and that the plaintiff pay the cost thereof; from which the defendants appealed.

F. H. Busbee for plaintiffs.
No counsel for the defendant.

SMITH, C. J. This method of procedure, introduced in The Code as a summary and inexpensive way of securing a judicial determination of matters in law, contemplates somewhat a proceeding in the nature of a special verdict under our former system, a complete and concise statement of all the facts necessary to a solution of the controversy. The statement before us refers to exhibits A and B, said to be, but are not, annexed nor in the file. Again, in the case on appeal (wholly unnecessarily) it is left to either party to add to the facts in the case agreed the public laws taxing railroads, and any action taken by the board of appraisers and assessors in the valuation of the plaintiff company, thus introducing new matter in the case agreed, (406)

which is wholly inadmissible, because the controversy is to be determined solely upon the facts therein contained.

For these reasons the cause must be dismissed or remanded, and we prefer the latter course because, when amended so as to present all the facts—not by references, to be hunted up, but in direct and positive form—it may be decided in the court below, and reviewed, on appeal, in this.

We are unable to see any well-grounded objection, founded upon the Constitution of the United States or of this State, to the tax put upon the defendant. It is in no sense a tax upon interstate commerce; that is, upon freight or passengers conveyed out of this State into another State, or brought from the latter into this State, nor upon the coaches and cars, instruments of such commerce employed in such transportation. The tax is upon the corporate body created by the State and doing business within the corporate limits of the town, and this liability cannot be evaded by the fact that the road transports beyond as well as within the boundaries of the State. It is such commerce as is carried on between the states, as a distinct species of taxable property, that is protected by the Constitution of the United States from State assessment, when separately taxed, or when intermingled with that which is purely and solely State.

In *State Tax on Railway Gross Receipts,* 15 Wall., 284, a tax upon the gross receipts of a railroad, though entering into the aggregate sum derived from a transportation beyond the State lines, is held not to be an invasion of the exclusive right to regulate commerce between the states, and the distinction is taken between a tax upon freights carried between states, *because of their carriage,* and a tax upon the freights of such transportation after they have become intermingled with the other property of the carrier.

Again, a tax of one-fourth of one per cent, in addition to other
(407) taxes, upon the value of every share of its stock, with a proviso that when the road so taxed lay partly within and partly without the State, the company should only be responsible to the State levying the tax upon such number of shares as would be in the same ratio to the whole as the number of miles of its track in the State bore to the entire line of the road. This was upheld as not interfering with interstate commerce. *The Delaware Railroad Tax,* 18 U. S., 206.

So has it been decided that a railroad, 455 miles in length, of which 42 only were within the State that incorporated the company, was "doing business within the latter State, and subject to a tax imposed upon all railroad companies doing business within the State, and upon whose road freight may be transported." *Erie Railway Co. v. Pennsylvania,* 21 Wall., 492.

It is then manifest that the municipal tax imposed by the defendant invades no prohibitory provision contained in the Constitution of the United States.

We are equally clear that it is not repugnant to our own organic law, nor does it depart from the principle of uniformity therein recognized. The tax is imposed upon every railroad "running its road through its corporate limits," and whether it be called a privilege tax, or by some other name, it is imposed upon its business in the town; or, if the road simply passes over the corporate territory, in view of the perils to the place, it is a tax which the State can authorize, and, when imposed under such authority, is valid.

Nor is it wanting in uniformity, as the term is defined by *Mr. Justice Miller,* speaking for the Court, *Railroad Tax Cases,* 92 U. S., 575, and followed by this Court in *Worth v. R. R.,* 89 N. C., 291.

While we give our opinion upon the point intended to be presented, for reasons stated it must be remanded, and is so ordered.

Remanded.

Cited: Thornton v. Lambeth, 103 N. C., 89; *Dalton v. Brown,* 159 N. C., 179.

(408)

AVERY PATTON ET AL. v. WESTERN CAROLINA EDUCATIONAL COMPANY ET AL.

Easement—Reservation in Deed—Description.

P. conveyed to B. a tract of land by deed, in which was contained the following clause: "With the following reservation, that is to say: the said P. reserves 33 feet for a street, running from the cross street down to C.'s fence to J.'s fence; then up J.'s fence to the street that leads down to P.'s house": *Held,*

1. That this reservation created an easement in P. and his heirs to use the street thus designated, and have it kept open and unobstructed for their enjoyment.

2. That the reservation was not so vague and indefinite in its terms as to make it inoperative.

CIVIL ACTION tried before *Merrimon, J.,* at Spring Term, 1888, of HENDERSON Superior Court.

The complaint alleges that the plaintiffs are the owners and entitled to the possession of the land mentioned in the complaint by virtue of

a reservation contained in a deed from M. M. Patton to M. Bowen, under which defendants claim, and that the possession is wrongfully withheld; and, further, that they have been and are entitled to a free and unobstructed right of way over and upon said land and every part thereof, and that the defendants have obstructed the said right of way with gates, etc., and they ask judgment for possession of the land, for the removal of the obstructions, and for damages and for costs.

The material allegations of the complaint are denied.

The plaintiffs offered a deed from Mitchell King to M. M. Patton, dated 7 September, 1855, which (the defendants admitted) embraced in its boundaries the real estate in controversy, and that the plaintiffs were the heirs-at-law of M. M. Patton.

The defendants further admitted that M. M. Patton entered into possession of the land about the date of his deed, and continued
(409) in possession from that time to the day of his death, which occurred on ...., 18...., and that his heirs, the plaintiffs, have been in possession at the same place ever since the last mentioned date to the bringing of this action.

The plaintiffs then introduced testimony tending to show that the defendants had obstructed the streets indicated in the deed. The defendants admitted that they had placed a gate and fence across the street, and also a gate and fence at another point, and that they had built a fence so as to take into the college lot the street there indicated, and to completely obstruct said street.

The defendants then introduced a deed from M. M. Patton to N. Bowen, chairman of the board of trustees of the college, dated 6 May, 1859, for the lot described on the map as college lot, and a deed from M. M. Patton to Joseph Jordan, described as the J. P. Jordan lot, dated 30 July, 1861, and a deed from N. Bowen to the defendant company, dated 7 February, 1876, for the college lot. The plaintiffs admitted that M. M. Patton never had possession of the college and Jordan lots after the date of his deeds to Bowen and Jordan. His deed to Bowen contained the following clause: "With the following reservation, that is to say, the said M. M. Patton reserves 33 feet for a street running from the cross street down L. Clayton's fence to J. P. Jordan's fence, thence up Jordan's fence to the street that leads down to M. M. Patton's house."

Patton's deed to Jordan contained the following clause: "And further, that the street now opened up through to the college land, thirty-three feet wide, shall be kept open." The defendants admitted that this street runs from the gate in the south line of the J. P. Jordan lot, as shown on the map, north.

The plaintiffs withdrew their claim to have the title declared to be in them of the said streets, and only insisted upon their right to have the gates and other obstructions removed from said street, (410) and for judgment for damages assessed by the jury.

The court, being of the opinion that the defendants had no right to erect gates and fences across said streets, gave judgment accordingly. Defendants excepted.

1. Because the reservations were for Patton's life only, and did not inure to the benefit of his heirs.

2. That, by the deeds, title to the soil passed to the defendants, and the reservations in the deeds gave to plaintiffs and those claiming under them only an easement, and that the defendants had the right to fence across the streets, so long as they kept a gate ten feet wide, through which plaintiffs might pass at pleasure. It was admitted that the plaintiffs could pass through gates from their house to K on the map, but the street from K to C was obstructed so they could not pass.

3. That Patton had not shown a possession sufficiently long to give him title to the land, taking the facts as admitted to be true, and that defendants were not estopped to deny his title by reason of their claim of title through him.

There was a judgment for the plaintiffs, from which the defendants appealed.

S. V. Pickens (filed a brief) for plaintiffs.

E. C. Smith and T. F. Davidson, W. A. Smith (filed a brief) for defendants.

DAVIS, J., after stating the case: It is conceded that the deed from King to M. M. Patton included the streets obstructed by the defendants, and the effect of the admission of the defendants in regard to the judgment is to present the single question, Did the defendants have the right to obstruct the streets in the manner set out?

The title being originally in M. M. Patton, through whom the plaintiffs claim, what was the effect of the reservation in the (411) deed from him to M. Bowen? Conceding, as insisted by the defendants, that the deed conveyed the title to the soil, and that the reservation was only of an easement, the title to it is in the plaintiffs, who have been in possession since the death of Patton. *Merrimon v. Russell,* 2 Jones Eq., 470; *Hays v. Askew,* 5 Jones, 63.

The reservation is not vague and uncertain, as was the case in *Waugh v. Richardson,* 8 Ired., 471, and *McCormick v. Monroe,* 1 Jones, 13, relied on by defendants. In those cases the exceptions in the deeds were

held to be inoperative and void, because so vague and uncertain that no effect could be given to them.

The case of *Fisher v. Mining Co.*, 97 N. C., 95, cited by counsel, has no application. In that case the plaintiffs failed to show title in themselves or in those through whom they claimed title to the excepted minerals.

In the case before us, it does appear that the title and rights to the easements reserved was in M. M. Patton, and in the plaintiffs who claim under him.

The plaintiffs abandoned all claim to title in the land, and only insist upon their right to the unobstructed use of the street reserved.

It is shown that there has been no abandonment or *nonuser* of the street, and there is no claim of title to the soil by length of possession or otherwise.

The plaintiffs have shown title to the easement reserved, and we think the obstructions admitted to have been made were invasions of their right. A street with gates or fences across it is not what was reserved, but a full and unobstructed "33 feet for a street."

Affirmed.

Cited: Ruffin v. R. R., 151 N. C., 335.

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(412)

J. G. BYNUM ET AL. v. THE BOARD OF COMMISSIONERS OF BURKE COUNTY.

Elections—Injunction—Officers—Cause of Action—Undertaking—Appeal—Interlocutory Orders, etc.

1. Where power is conferred to open, conduct and declare the result of an election, the action of those charged therewith in that respect is final and conclusive until it is reversed by some proper action brought to impeach it; and the courts will not interfere by injunction to prevent them from ascertaining and promulgating the result.

2. It is a general rule that the cause of action must have existed at the time the suit began.

3. The amount of the undertaking to be given upon the granting of an injunction or restraining order must be fixed by the judge, and while it may be executed and the sureties allowed to justify before the clerk, the latter, in that respect, is the mere servant of the judge, who may revise his action.

4. The adjudication by the judge that the undertaking has been duly executed and filed, is conclusive, and no appeal lies therefrom.

BYNUM *v.* COMMISSIONERS.

THIS was a motion for an injunction, made in an action pending in BURKE Superior Court, heard before *Montgomery, J.,* at Chambers, on 22 November, 1887.

An election was ordered to be held, and was held, in the county of Burke, under the direction of the defendants—county commissioners—on 15 May, 1886, to take the sense of the electors of the county upon a proposition submitted to them at that election to subscribe to the capital stock of the "Southern and Western Air Line Railroad Company," as allowed by the statute (Acts 1885, ch. 274, sec. 10) incorporating that company. This statute provides that such subscription might be made "if a majority of the qualified voters of such county shall vote for such subscription," etc.

This action was begun on 4 June, 1886. It is alleged in the (413) complaint that there were in the county, on the day of the election mentioned, 2,401 qualified voters; that 970 votes were thereat cast in favor of "Subscription"; that 439 votes were cast for "No Subscription"; that nevertheless the defendants, as county commissioners, thereafter, *on 6 July,* 1886, falsely pretended to ascertain and declare that a majority of such qualified voters cast their votes at the said election for "Subscription," when, in fact and truth, greatly less than a majority so voted. It is further alleged that the defendants have directed that a subscription for the capital stock of said company be made for the county named, and that county bonds be issued, etc.

The defendants answer the complaint, and among other things allege:

"That it appears upon the face of the complaint that if any cause of action exists against these defendants, which is denied, then the same arose after the summons was issued, on 4 June, 1886, and that one of the material averments of the complaint is the action of the defendants on 6 July, 1886, subsequent to the institution of this action, and defendants are advised and believe that the cause of action must have existed when the summons issued, otherwise this action must be dismissed and the restraining order herein vacated."

The purpose of the action is to contest the result of the election—to have the true result ascertained and declared, to the effect that a majority of such qualified voters did not vote for such subscription.

Relief by injunction and general relief are demanded. At chambers a judge granted an injunction, pending the action, until the hearing upon the merits, from which the defendants appealed.

John Gray Bynum (J. T. Perkins filed a brief) for plaintiffs. (414)
I. T. Avery and S. J. Ervin for defendants.

MERRIMON, J., after stating the case: It was the province and duty of the defendants, county commissioners, to ascertain and declare truly, as prescribed by law, the result of the election in question, and their action in that respect was final and conclusive as to such result, for all proper purposes, until it should be impeached successfully in an action brought for that purpose. Their ascertainment of the result cannot be questioned in any collateral action or proceeding. This is settled by many decisions. (The Code, secs. 1996-1998; Acts 1885, ch. 274, sec. 10); *Smallwood v. New Berne,* 90 N. C., 36; *Duke v. Brown,* 96 N. C., 127; *McDowell v. The Construction Co., id.,* 514; *Wood v. Oxford,* 97 N. C., 227; *Rigsbee v. Durham,* 98 N. C., 81; *S. v. Emery, id.,* 768; *Rigsbee v. Durham,* 99 N. C., 341; *S. v. Cooper, post,* 684.

The law contemplates and intends that such elections shall have distinctive character, integrity, and certain effect for the purposes intended by them, just as in case of other elections, and the results of them, when ascertained and declared by the proper officers, shall not be questioned collaterally in any action or proceeding in which what they are intended to settle shall become material. If this could be done, the result of the election would never be settled, but it would be continually open to be questioned, and it would depend upon the fortunes of each action in which it might become material. The law does not tolerate such practical absurdity.

The officers respectively charged by the law with ordering such elections, holding and ascertaining and declaring the results of them, as to their duties have authority, in the exercise of which they shall not be interfered with or restrained, while they proceed in the course (415) of their action according to the forms and requirements of the law applicable. They must be allowed to discharge their duties respectively in the exercise of the authority conferred upon and confided to them, although they may so do erroneously. The legal correctness of their action is not to be questioned or contested at every step they may take, but only by proper action, when the election shall have been completed; otherwise, an election might in many cases be thwarted and defeated by the factious and unwarranted interference of persons unfriendly to it. Moreover, it would be impracticable to restrain officers in the exercise of authority that involved their judgment and discretion, which cannot be certainly known until the same shall be expressed and made operative.

It would be otherwise, however, when persons (officers) claiming the right to exercise authority really had none, colorable or otherwise. The authority exercised must be allowed by law. And, no doubt, there may

be cases in which a threatened or contemplated unlawful exercise of authority might be restrained, but such cases are exceptional.

In the present case, the county commissioners had authority, and it was their duty, to ascertain and declare the result of the election, and the plaintiffs had no right to have them restrained in that respect by injunction. They alone could first determine the result, and if they should do so falsely or erroneously, as alleged, then the plaintiffs, or other persons interested, could bring their action to contest the result complained of, and have relief by injunction accordingly as the circumstances might require. No cause of action as to the result arose until it was ascertained and determined by the defendants; they were charged with power for such purpose, and they could not be prevented from executing it in the orderly course prescribed by the statute.

Obviously the purpose of this action is—though it is not formally and precisely alleged—to contest the result of the election mentioned. At the time it was brought, the election had been held, and the (416) apparent and unofficial result was known to the plaintiffs, as claimed by them; but at that time, and for more than a month afterwards, the result was not ascertained and declared by the defendants, county commissioners. The cause of action did not exist at the time the action was begun, and the defendants do not waive their right of objection in this respect, but expressly insist upon it in their answer and the same as amended.

Generally, the cause of action must exist at the time the action is brought, and there is nothing in this case that puts it without this general rule. It is of the nature of an action, and its very purpose is to enforce an existing right or cause of action denied in some way, or to settle a right that requires to be settled, by a judicial determination, in order to give it complete operative effect. It would be alike unreasonable and unjust to allow a plaintiff to bring his action and maintain it against the defendants before he had any cause of action in some way arising. In the nature of the pleadings, they relate to the time the action began, and ordinarily the plaintiff and the defendant must respectively allege the cause of action and the counterclaim as they existed at that time. *Clendennin v. Turner,* 96 N. C., 416; *Kramer v. The Electric Light Co.,* 95 N. C., 277.

The judgment must be reversed and the action dismissed.

Error.

In the course of the action, a judge at chambers allowed a motion for an injunction pending the action, until the hearing upon the merits: "*Provided,* that the plaintiffs execute an undertaking, payable to the

defendants, in the sum of five thousand dollars, justified and conditioned pursuant to the statutes, said undertakings to be filed with the (417) clerk of the Superior Court," etc. The undertaking was given and filed as required by the order of the court.

Afterwards, the defendants made application to the clerk to be allowed to examine the sureties to the undertaking, and they assigned divers grounds of objection to it. The clerk allowed the application, and the plaintiffs made objections thereto. Thereupon the clerk heard the matter, and made sundry rulings, from some of which the plaintiffs appealed to the judge, and others from which the defendants likewise appealed.

The judge considered the appeals, and decided that the undertaking was "in substance a compliance with an order made by me (the judge) in this cause on 22 November, 1887, and I hereby direct the same to be filed by the clerk," etc. From this order the defendants appealed to this Court, assigning as grounds of exception that the judge had not overruled certain rulings of the clerk, and that he had made the order appealed from.

The statute (The Code, sec. 341) prescribes that, "Upon granting a restraining order for an injunction, the judge shall require, as a condition precedent to the issuing thereof, that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before and approved by the said clerk, or by the judge," etc. It is confided to the judge to fix the amount of the undertaking, and it may be justified before and approved by the clerk or the judge, and the latter has authority to supervise the action of the clerk, whose action stands as that of the court, unless objection shall be made by a party to the action who is interested. The clerk is the mere servant or agent of the court. No appeal lies in such case from the action of the court in term, or from that of the judge at chambers. The justification and approval of such undertakings is of a class of merely incidental (418) matters in the action, in which the decision of the court must almost necessarily be final. It would be alike inexpedient and impracticable to allow appeals from such decisions; it would give rise to an indefinite number of appeals in the same action, create complications, confusion and endless delays, while it would not settle and determine any substantial matter litigated by the action. The court makes many incidental rulings and orders in the course of actions, from which no appeals lie, and as to them its action is final, as certainly so as the action of this Court in respect to matters that properly come before it by appeal.

It is a mistake to suppose that the statute (The Code, sec. 548) allows appeals to be taken "from every judicial order or determination of a

judge of a Superior Court, upon or involving a matter of law or legal inference, whether made in or out of term"; appeals are allowed only where such an order of determination "affects a substantial *right claimed in any action or proceeding;* or which, in effect, determines the action, prevents a judgment, from which an appeal might be taken, or discontinues the action, or grants or refuses a new trial." The appeal lies from an order or determination in the action which affects the right litigated—the cause of action in controversy therein—in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and not affecting directly the cause of action litigated.

Now, the order of the court appealed from did not affect the "substantial right claimed"—the merits of the cause of action litigated by the action; it was as to a matter and in a respect purely incidental, and the statute just cited does not embrace it. No appeal lies in such a case. The proceedings as to the undertaking was summary; the court—the judge—had complete authority, without regard to what the clerk had decided, to approve or disapprove it, and to make the order (419) which the defendants undertake and suppose they had a right to appeal from. *Marsh v. Cohen,* 68 N. C., 283; *Sternberger v. Hawley,* 85 N. C., 141.

The appeal of defendants in this respect must, therefore, be dismissed.

Cited: Powell v. Allen, 103 N. C., 50; *Crawford v. Barnes,* 118 N. C., 916; *Bolick v. R. R.,* 138 N. C., 371; *Wallace v. Salisbury,* 147 N. C., 60; *Jones v. Flynt,* 159 N. C., 97; *S. v. Jackson,* 183 N. C., 701; *McAden v. Watkins,* 191 N. C., 108.

JOHN M. BROWER v. J. C. BUXTON, TRUSTEE, AND WINSTON FULTON.

Injunction—Trustee—Surety—Res Judicata.

An injunction will not be granted restraining a trustee from selling lands conveyed to him by a debtor to indemnify a surety, where it appears that in a former action, having the same object, a consent decree was made dismissing it, and wherein there was an agreement that the trustee should sell if the debt was not paid by a day fixed, although the terms of the deed might not have originally conferred a power of sale without the intervention of the court.

BROWER *v.* BUXTON.

THIS was a motion for an injunction made in a cause pending in the Superior Court of SURRY County, heard before *Connor, J.*, at Chambers, on 9 August, 1888.

The complaint alleges that plaintiff borrowed of Wachovia Bank $8,300, for which he gave his note, with defendant Fulton as surety, and at the same time executed to defendant Buxton a deed conveying certain real estate in trust, with power to sell the same upon default of payment; that the deed was to indemnify Fulton, the surety, against loss, but that he had suffered no loss thereby, and the debt, with accrued interest, has from time to time been paid, amounting to $5,488.07,

(420) together with other payments of interest which should have been credited on the note by said Brower. The plaintiff further alleges that defendant trustee has advertised the land for sale, without being authorized to do so under said deed, and is thereby "clouding" the title of the plaintiff.

Wherefore, plaintiff asks that defendant be restrained, etc.

An order to show cause, etc., was made returnable at Wentworth on 28 July, 1888, before Judge Connor.

The defendant trustee, answering the complaint, alleges that he acted in accordance with the terms of the deed; that plaintiff owed, on 17 July, 1888, the sum fo $4,048.75, and plaintiff promised to settle the same prior to the institution of this suit, and that in consequence of Brower's default the said Fulton, his surety, executed to said bank his note for $8,300.

For a second defense: That the present plaintiff brought suit in Surry County against the present defendants and the said bank, wherein the same relief is sought as in this action, and that the court dismissed the same on 16 February, 1888, and the defendants here specially plead former adjudication as a bar to this action.

The other facts necessary to an understanding of the questions presented in the appeal are stated in the opinion of the Court.

The motion for an injunction was heard upon sworn complaint, answer, and exhibits, and was denied. From the order of denial, the plaintiff appealed.

F. H. Busbee for plaintiff.
J. C. Buxton for defendants.

MERRIMON, J. The spirit and purpose of the trust are to indemnify the surety named in the deed of trust against loss by reason of the suretyship therein mentioned and particularly specified. The trust property (land) should, in good faith, be devoted, if need be, to

(421) that purpose, and the execution of the power of sale, to that end,

should not be restrained, unless for substantial and just cause. If it be granted that, strictly under the letter of the trust and the power of the sale in connection therewith, the trustee could not sell the land without the direction of the court, in a proper action for the purpose, until the surety had in fact paid the debt of his principal, any question in that respect was settled and concluded by the record and judgment in the former action, pleaded by the defendants in this action, which embraced and settled the cause of action alleged in this case.

In the former action mentioned, the present cause of action was in substance, almost precisely, alleged. In the settlement of the matters then in controversy it was agreed by and between the parties to the action that no sale of the property should then be made as then intended by the trustee, but it was adjudged by such consent "that J. C. Buxton, trustee (the present defendant), if so required, may advertise to sell the land conveyed in the mortgage of Brower and wife to J. C. Buxton, trustee, and Winston Fulton (the other defendant and surety) in time to make sale by 1 June, 1888." In pursuance of the deed of trust and this agreement of record, the defendant was proceeding to sell the land when the appellant brought this action, asking relief by injunction, upon the ground that the surety has not yet in fact paid the principal debt, though long past due, and thus suffered. If, as we have seen, such objection to the sale of the property might at first have had force, it was obviated by the subsequent agreement of record, and the letters in evidence of the appellant to the defendant trustee, asking for a delay of the sale as matter of favor, show that he so well understood.

There is no error. The motion for an injunction was properly denied.

Affirmed.

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(422)

LOUISA TUCKER ET AL. v. PAULINA MARKLAND ET AL.

Contract—Consideration—Frauds, Statute of—Betterments—Improvements—Partition—Evidence, Burden of Proof.

M contracted, in parol, to convey to G his estate in common, in expectancy, upon the death of his ancestor, in certain lands, and received the price therefor. Upon the death of the ancestor, G and the other tenants in common had the lands partitioned, G entering into possession of the portion assigned to him as purchaser from M, and placed valuable improvements thereon. M then began a proceeding for another partition, denying G's title to his share, and pleading the Statute of Frauds in bar of the alleged contract: *Held*,

1. That the purchaser was required to prove, by a preponderance of evidence, the contract as he alleged it, but he was not required to prove that the consideration was full and fair.

2. That while the contract was void, and at the time it was made the vendor had no estate in the premises, yet, as he had received the price, and permitted the vendee to take possession and add to the value of the property, in a partition his share should not only be charged with the purchase money he had received, but also with its proportion of the enhanced value by reason of the betterments placed thereon.

THIS was an issue joined in a special proceeding for partition before the clerk, tried before *Clark, J.*, at Spring Term, 1888, of DAVIE Superior Court.

Upon the trial it was admitted by the parties that Mary Markland died, intestate, in the year 1876, seized in fee simple of the lands in controversy.

Mary Markland left surviving her Matthew Markland and Louisa Tucker, the plaintiffs, and Paulina Markland, the heirs-at-law of John Markland, a deceased son, who are defendants in this proceeding, and George Markland, another son, who, since the death of his mother, Mary, has also died intestate, without issue.

George and the defendant Paulina and the heirs-at-law of
(423) John had the lands partitioned among themselves, the said Paulina being assigned one-fifth thereof, the heirs of John one-fifth thereof, and the said George three-fifths thereof, he alleging in said proceeding that he was purchaser and owner of the one-fifth that descended to Louisa and the one-fifth that descended to Matthew upon the death of their mother.

Louisa and Matthew were not made parties to said proceeding for partition.

The defendants allege, in their answer, that George had purchased and plaintiffs, Tucker and wife and Matthew, had sold and conveyed their one-fifth interest each in the land descended from their mother, Mary, to him, which was denied by plaintiffs, and the Statute of Frauds was set up by them in their replication. The defendants admitted there had been no conveyance from plaintiffs to George, nor had there been any written contract executed between plaintiffs and George for their interest in said lands; but they alleged that during the life of the said George and of his mother, Mary, the former, by parol, bought and paid the said Tucker and wife and Matthew for their expectancy in said lands. As to the purchase from Mrs. Tucker, the defendants' evidence entirely failed, and the court directed the jury to find the issues submitted as to her "No."

The following issue was submitted to the jury as to Matthew Markland, to wit:

"Did George Markland purchase, under parol contract, the one-fifth expectancy of Matthew Markland in the land; and if so, what was the consideration paid?"

Answer: "Yes; $800."

The personal representative of George Markland was not a party to the proceeding.

The plaintiffs asked the court to instruct the jury:

1. This being a transaction with regard to an expectancy, before the jury can answer the issue in favor of the defendants (424) that there was a parol contract and payment of money thereunder, they must be satisfied by a preponderance of the testimony that the alleged sale was fair, and that the consideration paid for their land was full and fair.

2. That this being a parol transaction with regard to an expectancy in the lands of his mother, Mary Markland, George acquired no estate therein, either legal or equitable.

Both of which instructions were refused by the court, and the court instructed that it was not necessary that defendants should allege and prove that the transaction of George with Matthew Markland for his interest in the lands was fair and for a full consideration, but was like any other transaction; they only had to show that the trade was made and that there was a consideration therefor. Plaintiffs excepted.

The court gave judgment, directing that the land be partitioned, and as to the appellant Matthew Markland, it adjudged that his share thereof be charged with the payment of such sums as may be found due the estate of George Markland as the purchase-money paid and the improvements placed thereon by the said George Markland, deceased, and to that end it is ordered that the cause be referred to take and state an account.

The appellant assigned grounds of exception to the judgment as follows:

1. That no estate in the land, either legal or equitable, passed from the plaintiff, Matthew Markland, to the said George Markland in the parol contract as to his expectancy in his mother's estate, and there could be no claim thereon for betterments or for purchase-money.

2. If any such claim did exist it would be personalty, and belong to the personal representative of the said George Markland, and not to the defendants as the heirs-at-law of the said George (425) Markland, and the same cannot be enforced and collected in this way and in this proceeding.

3. That as the said George was one of the tenants in common with the plaintiffs and the other defendants, if he placed valuable improvements on the land so held in common, all he could have claimed in the partition would have been to have the part he had so improved, without estimating the value of such improvements. And upon his death that is all his heirs-at-law can claim, and his share descends to them thus enhanced in value; therefore, there should be no account as to betterments.

4. That as the said George occupied the one-fifth he inherited from his mother, Mary, as well as the two shares he claimed to have purchased from the plaintiffs, Mrs. Tucker and Matthew Markland, all three of these shares having been assigned to him in one lot or body, it cannot be determined, as a fact or as a proposition of law, that the improvements were placed on the one-fifth of the plaintiff Matthew, but the presumption of law is that he placed them upon his own interest.

5. The reason the law charges for betterments is that bargainor gets the benefit of them, and it would be inequitable for him to do so without paying for the same. But in this case Matthew Markland is no more benefited than each of the other heirs of the said George.

From the judgment rendered, the plaintiff Matthew appealed.

D. M. Furches and R. B. Glenn for plaintiffs.
J. C. Buxton for defendants.

MERRIMON, J. The first exception is groundless. The parol contract in question, as to proof of its existence, for the purposes of this (426) action, stood on the like footing as other ordinary contracts. It was sufficient to prove, by a preponderance of evidence, that it was in fact made; and if so, the purchaser could insist upon such relief as in equity he might be entitled to have. There was nothing in the relation of the parties, nor were there considerations of policy or conscience that rendered it necessary that the consideration paid for the land should be "full and fair"; else the purchaser must lose what he in good faith paid, if the vendor saw fit to avail himself of the statute rendering such contracts void.

The latter part of the special instructions asked for was immaterial. Whether the purchaser got an estate legal or equitable or not, he was entitled, under the circumstances, to be reimbursed the money he paid to the appellant for the land. It seems that, having paid the money, he took possession of the land in pursuance of his supposed right under the voidable contract of purchase and with sanction of the vendor. It would be inequitable and against conscience to allow the latter to turn him out of possession thereof without restoring his outlay in cash and

for valuable improvements he put on the land while so in possession. The contract was void under the statute if the vendor saw fit to avail himself of it, but he could not be allowed to take fraudulent advantage of a contract he might and did treat as void. He took the purchase-money and induced the vendee to take possession of the land and make valuable improvements on it, believing he would get the title therefor. Shall the court allow the vendor to keep the money of the vendee, which he thus obtained, while it helps him to get possession of the land? Surely not. The Court of Equity will not enforce the contract because the statute pleaded renders it void, but it will not help the vendor to consummate a fraud. *Albea v. Griffin,* 2 D. and B. Eq., 9; *Baker v. Carson,* 1 D. and B. Eq., 381; *Chambers v. Massey,* 7 Ired. Eq., 286; *Thomas v. Kyles,* 1 Jones Eq., 302; *Love v. Neilson, ibid.,* (427) 339; *Syme v. Smith,* 92 N. C., 338; *Cade v. Davis,* 96 N. C., 139; *Pitt v. Moore,* 99 N. C., 85.

The parol contract referred to is peculiar. The vendor contracted to sell his expectancy in the lands of his mother specified in the complaint. The contract could not have been executed in the lifetime of the mother, because while she lived he had no estate—nothing—to convey. It was, in effect, an agreement to convey the undivided interest the vendor might have in the land of his mother, as one of her heirs-at-law, immediately upon her death. *McDonald v. McDonald,* 5 Jones Eq., 211.

As to the second exception. The court might direct the money to be paid into court, to be disposed of according to law. But if for any cause it turns out that the administrator ought to be a party, the court may, and ought yet, with a view to the ends of justice and a complete determination of the action, to direct him to be made a party defendant. The Code, sec. 275; *Isler v. Koonce,* 83 N. C., 55.

The third, fourth, and fifth grounds of exception are not well founded. If the vendee in his lifetime, after the death of his mother, in pursuance of their parol contract of purchase mentioned, placed valuable improvements on the land, the latter should account for such improvements to the extent of the interest he undertook to sell by parol. The vendee placed all such improvements on the land for his own benefit, no doubt believing that he would have the just benefit of them, but it has turned out that the vendor was not willing that he should do so in his lifetime, nor is he willing that his heirs shall do so since his death. The vendor is not required to account for the whole value of such improvements; he accounts only to the extent of his interest, because to that extent he gets benefit. No question is made, so far as appears, as to the liability, in this respect, of any other party to the action. Be this as it may, the appellant is called upon to account to the

(428) extent of his liability, and this is in question. This may be ascertained by ascertaining the whole value of such improvements, and dividing this by the whole number of his brothers and sisters, including himself, who shared as heir-at-law of his mother. *Albea v. Griffin, supra; Pitt v. Moore, supra,* and the cases there cited.

There is no error. Affirmed.

Cited: Vann v. Newsom, 110 N. C., 126; *Faison v. Hardy,* 118 N. C., 144; *Pass v. Brooks,* 125 N. C., 131; *Luton v. Badham,* 127 N. C., 100, 105; *Boles v. Caudle,* 133 N. C., 534; *Kelly v. Johnson,* 135 N. C., 648; *Reid v. King,* 158 N. C., 91; *Faircloth v. Kenlaw,* 165 N. C., 231; *Deal v. Wilson,* 178 N. C., 604; *Carter v. Carter,* 182 N. C., 190; *Eaton v. Doub,* 190 N. C., 22.

WILLIAM M. WALTON v. WILLIAM F. MCKESSON AND N. W. WOODFIN, ADMINISTRATOR OF CHARLES MCDOWELL, AND WILLIAM F. MCKESSON, ADMINISTRATOR OF JAMES MCKESSON.

Appeal — Amendment — Jurisdiction — Dockets—Records—Parties—Vacating Judgments—Void and Irregular Judgments.

1. As a general rule the Supreme Court, in the exercise of its appellate functions, cannot acquire jurisdiction of a cause and the parties thereto until a proper transcript has been brought up and duly docketed therein.
2. While it may be the Supreme Court has power to direct or allow amendments to the record below of a cause while an appeal is pending, it is clear that it has no such power after a final judgment therein has been rendered.
3. The purpose of the civil issue docket is to have there stated the issues joined between the parties to an action, and only such notes and memoranda as are pertinent to such issues and their preparation for trial should be entered thereon.
4. The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made.
5. While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail.
6. Under the practice prevailing before the adoption of the present procedure in relation to appeals, the trial judge, without the intervention of the parties to the action, made up and stated the case on appeal, and when filed and transmitted to the Supreme Court it was treated as a part of the record; and where the record proper and the case on appeal—though

the latter was not certified as a part of the record—were in conflict in respect to a statement of the fact, the case on appeal was allowed to prevail, the records of the Supreme Court containing some evidence that that Court had proceeded in its decision upon the statements therein made.

7. A case on appeal stated by the parties and intended as a substitute for that prepared by the Court, found among the files of a case disposed of at former term of this Court, will not be recognized in the absence of affirmative proof that it was adopted by the Court.

8. The Court will not allow amendments to be made in its records—particularly after the long lapse of time—unless the proofs offered in support thereof are strong and convincing.

9. While any person having an interest in the subject may attack collaterally a judgment which is void, or may move to strike it from the records as a nullity, yet the general rule is that, *only parties to the action* will be heard to assail a judgment or record for *irregularity.*

The CHIEF JUSTICE having been of counsel in the cause, did not sit upon the hearing of this motion.

THIS is a motion made in this Court by Richmond Pearson, the (429) executor of Richmond M. Pearson, to vacate a judgment therein rendered in this case at January Term, 1870.

The action in which this motion is made was begun by William M. Walton in the Superior Court of the county of Burke, on 15 March, 1866, against W. F. McKesson, N. W. Woodfin, administrator *cum testamento annexo* of Charles McDowell, and W. F. McKesson, administrator of James McKesson, to recover the money due upon the single bond of W. F. McKesson, principal therein, and Charles McDowell and James McKesson, sureties thereto, in favor of the plaintiff, for the sum of $2,200, dated 25 November, 1855, and due one day from date.

At the return term of the writ, the case was duly docketed in that court, and continued from term to term until the Spring (430) Term thereof of 1869, when the following entries therein appear, *made with pencil:*

"Fully administered for W. F. McKesson, administrator of James McKesson; same plea for the administrator of Charles McDowell." "Payment and set-off"—"open; continued on affidavit of defendant."

At the October Term of 1869, an entry in the case appears on the *civil issue docket* in the following words:

"Debt" "Jury—verdict. See minutes. Judgment against defendant, and N. W. W., adm'r, and W. F. McK., adm'r, $4,039.92, interest on $2,200, from 2 November, 1869."

This entry was made with *a pencil.*

"From this judgment the defendant McKesson appeals to the Supreme Court of N. C."

This entry was made with *ink*.

"*Quando*, as to administrator; absolute, as to W. F. McK."

This entry was made with a pencil.

At the same term of the court an entry in the case was made in writing on the *minute docket*, whereof the following is a copy:

"W. M. WALTON
v.
W. F. MCKESSON *et als.* } General issue—Payment and set-off.

The following good and lawful men, chosen, sworn and empaneled, to wit: Reuben Houck" (and eleven others, naming them), "who find the bond declared on to be the act and deed of the defendant W. F. McKesson, and Charles McDowell, intestate of defendants N. W. Woodfin, and James McKesson, the intestate of W. F. McKesson. They further find that said bond, or no part thereof, has been paid or satisfied, and that there is no set-off to the same. And they further find that

(431) the defendants, N. W. Woodfin and W. F. McKesson, have not fully administered upon the estates of their intestates, but have assets belonging to the same sufficient to satisfy the plaintiffs' demands. And they also find the value of the bond declared on to be ($4,039.92) four thousand and thirty-nine and 92-100 dollars, of which sum ($2,200) twenty-two hundred dollars is principal, to bear interest from 2 November, 1869, until paid.

"Judgment of the court, that the plaintiffs do recover of the defendants, W. F. McKesson, and from N. W. Woodfin, administrator of Charles McDowell, deceased, and from W. F. McKesson, administrator of James McKesson, deceased, the aforesaid sum of $4,039.92) four thousand and thirty-nine and 92-100 dollars, with interest on ($2,200) twenty-two hundred dollars from 2 November, 1869, until paid, and costs, to be taxed by the clerk.

"Defendants appeal to the Supreme Court of North Carolina."

The presiding judge thereupon stated the case for the Supreme Court. He entitled the case thus:

"Burke Superior Court, Fall Term, 1869—W. M. Walton *v.* W. F. McKesson *et als.*"

He then thereunder stated the case, the last paragraph thereof being as follows: "This evidence was also objected to and ruled out. For rejection of evidence in these instances, the *defendants* excepted. *They* move for a new trial, which was refused. *They* appeal to the Supreme Court."

The case stated by the judge was filed—certainly appeared—with the transcript of the record of the appeal. In the Supreme Court the appeal

was docketed by its title, thus: "W. M. Walton *v.* W. F. McKesson and others." "Folk" was marked on the docket as "counsel for the appellant"; "Furches, *contra.*"

The case stated by the judge was not set forth in the transcript of the record of the appeal. In the Supreme Court the counsel for the parties agreed upon a case for that court apparently intended as a *substitute* for that of the judge. And the substitute is entitled (432) thus: "W. M. Walton *v.* W. F. McKesson and N. W. Woodfin, administrator, W. F. McKesson, administrator." At the end of this case stated, it is said: "Judgment for plaintiff, and defendants appealed." The counsel named signed the same.

In the *transcript of the record of the appeal,* at the end of the judgment as therein set forth, it is said: "From which said judgment the defendant W. F. McKesson prays an appeal to the Supreme Court of North Carolina."

The appeal was argued by counsel for both parties, and determined at the January Term of 1870 of this Court. The judgment of the Superior Court was affirmed, and judgment entered here against all the defendants, and at the foot thereof this order was entered: "Let the plaintiff have execution for the costs of this Court, as well as for his said judgment, from this Court to be issued, and let the judgment here be certified to the said Superior Court to the intent that the execution for the costs in that court may issue."

Justice Rodman delivered the brief opinion of this Court in the appeal, and entitled the same thus: "W. M. Walton *v.* W. F. McKesson and others." In the course thereof, citing several authorities, he says they "are decisive against the defendant." Then citing another authority, he says: "In that case there was but one defendant, here there are several. What relief the defendant may find in The Code, it is not for us to say. Judgment below affirmed."

N. W. Woodfin died on the ..... day of ....., 1876, and thereafter John Gray Bynum became the administrator *de bonis non cum testamento annexo* of Charles McDowell.

The late Richmond M. Pearson became, and was, at the time of his death, surety to the bond of N. W. Woodfin as administrator of Charles McDowell. He died the ..... day of ....., 1878, leaving a last will and testament, which was duly proven, and Richmond (433) Pearson qualified as executor thereof.

The judgment in this action has not been paid, and the plaintiff sold and assigned the same on 18 March, 1879, to Samuel McD. Tate and James W. Wilson, who afterwards brought their action in the Superior

Court of the county named against the said Richmond Pearson, executor, etc., alleging, substantially, as their cause of action, that the said Woodfin, administrator, failed and neglected to pay the said judgment and the single bond on which the same is founded, and thereby committed, and was chargeable with, a breach of his bond as such administrator, etc., for an account of which the said Richmond Pearson, executor, is liable, etc., etc.

In aid of his defense in that action, Richmond Pearson, executor, moves in this action "to set aside the judgment rendered in the Supreme Court, as above set forth, so far as Woodfin is concerned, on the ground:

1. That the same was irregularly rendered and contrary to the course of the court.

2. That the said judgment is void as to Woodfin and all the parties named therein as defendants, except W. F. McKesson, it appearing from the transcript sent from the court below in said case that no appeal had been prayed from the judgment of said court by Woodfin, as administrator of McDowell, or any other defendant, except W. F. McKesson, and that said Woodfin, as administrator, was not before the court."

Thos. Ruffin, D. G. Fowle and F. A. Sondley in support of the motion. D. Schenck, J. B. Batchelor and Jno. Devereux, Jr., contra.

(434) MERRIMON, J., after stating the case: It is very true, as contended by the learned counsel who argued in support of the motion under consideration, that in this and like cases this Court gets jurisdiction of the subject matter and of the parties to the action through and by means of an appeal, or some appropriate proceeding or writ substituted therefor, and a party cannot be treated or affected as an *appellant* unless he appeals as allowed by law. The appeal is essential to the jurisdiction, and this is not complete for all purposes, though it is for some, until the transcript of the record of the appeal shall be brought into this Court, and the appeal docketed, according to the course and practice of the court; and that a party to the action appealed must be made matter of record, and appear sufficiently from and by it. The court ordinarily sees, and has knowledge of its jurisdiction in a particular case, only by and from what appears in the record. It is this, and what thus appears in it, that establishes the jurisdiction of this Court and puts it in efficient relation and connection with the court below, as to the appeal and whatever may be embraced by it. *Murray v.*

Smith, 1 Hawks, 41; *Bledsoe v. Nixon,* 69 N. C., 81; *Bryan v. Hubbs,* 69 N. C., 423; *Moore v. Vanderbury,* 90 N. C., 10; *Spence & Ross v. Tapscott,* 92 N. C., 576; *Mfg. Co. v. Simmons,* 97 N. C., 89.

Now it is contended in effect, *first,* that the defendant Woodfin, administrator, did not appeal, nor does it so appear in the record, and, therefore, the judgment complained of is void; and *secondly,* that if apparently from the record he appealed, he did not do so in fact, and, therefore, the judgment as to him is irregular and ought to be set aside. We, on the contrary, are of opinion that all the defendants, including Woodfin, administrator, appealed, and that they did, sufficiently appears of record in the court below, and as well in this Court.

It is questionable whether it is within the scope of our present inquiry to ascertain and determine what the defendant did or did not do in respect to the appeal in this case, not made a matter of record, (435) and what amendments of the record in the Superior Court might, or ought, in apt time, to have been made in respect thereto, because we have no authority now to alter or amend the record of that court as made. It may be that this Court had authority to allow proper amendments in the case to meet the ends of justice, before the final judgment was entered, but the statutes conferring such power do not authorize such amendment to be made *after* final judgment. (Rev. Code, ch. 33, sec. 17; The Code, sec. 965.) But we need not decide that we have, or have not, such authority, as in any view, our opinion is adverse to the motion.

It is true that at the trial term in the Superior Court, *memoranda* were made on the *civil issue docket* as to the verdict and judgment, and it is there written: "From this judgment the defendant McKesson appeals to the Supreme Court of North Carolina." But these *memoranda* ought not to have been made on that docket. Its purpose is to set down the issues of fact joined upon the pleading, and all other matters for hearing before the judge at a regular term of the court. Only notes and *memoranda,* as to the condition and preparation of these things, can find an appropriate place on that docket. Entries like those mentioned above should properly and regularly be made on the *minute docket,* the purpose of which is to record "all proceedings had in the court during the term in the order in which they occurred, and such other entries as the judge may direct to be made therein." (The Code, sec. 83; par. 3. 6.) But the *memoranda* made above mentioned were not intended to be, or regarded as, the record or a minute from which it might be drawn out, because therein, after the words "Jury—verdict," are found the other words, "See minutes"—that is, see the *minute docket,* the proper docket as to the entry of the judgment, etc. In the absence of entries in

(436) the proper docket, such *memoranda* might be important—sometimes controlling, but not otherwise.

Moreover, it does not appear who made the entries in pencil, or that they were made by authority. It does appear that the entry in writing was made by counsel.

It is also true that in the transcript of the record of the appeal, at the foot of the judgment therein set forth, this entry appears: "From which said judgment the defendant W. F. McKesson prays an appeal to the Supreme Court of North Carolina." Nothing appearing to the contrary, this entry might fairly imply that the other defendants did not appeal, and the court no doubt would have so accepted its meaning.

But the case stated by the presiding judge distinctly states that the *defendants* excepted; that *they* moved for a new trial, and that *they* appealed to this Court. This is important here. This action was pending at the time the Code of Civil Procedure was enacted and became operative; it was therefore to be conducted and tried—it appears that it was—under the procedure, laws and practice of the court prevailing next before that time. (C. C. P., sec. 402; Bat. Rev., ch. 17, p. 241); *Walton v. McKesson,* 64 N. C., 154. Under that procedure and practice the presiding judge *allowed* the appeal—it was not *taken* by a party as under the present procedure—and it was the duty of the judge, in allowing an appeal, to know who appealed, and to state the case on appeal for this Court, which was treated as a bill of exceptions. The case thus stated, became a part of the record, and imported verity.

This Court took notice of, and was governed by it, in hearing appeals, certainly in so far as it was pertinent and not in conflict with other parts of the record proper. (Rev. Code, ch. 31, sec. 98); *S. v. Reid,* 1 D. & B., 377; *S. v. Ray,* 10 Ired., 29; *King v. King,* 4 Dev. & Bat., 164; *State Bank v. Hunter,* 1 Dev., 100. So, in this case, the court learned from the case stated by the judge that all the defendants appealed;

(437) and thus, at least apparently, the court had jurisdiction, and the judgment was not void—at most, it was only voidable.

It is insisted, however, that the case stated by the judge was not certified as part of the transcript of the record, and therefore it was not part of it. But it was filed with and treated as part of it by the parties, and so recognized and acted upon by the court. We say so because it appeared with the record, and it was orderly and proper that it should be part of it, and the court so recognizing it, decided the questions of law raised by it. As it was so accepted and acted upon, no person can now be heard to say that it was not part of the record of the appeal before the court.

A paper writing, purporting to be a case agreed upon for this Court in the appeal, and signed by the counsel for the appellants and appellees, and which may have been intended as a substitute for the case stated by the judge, though it does not purport, on its face, to be so, is found among the papers of the appeal, but it does not appear from the record of this Court or otherwise that it was made such substitute, nor does it appear that the court recognized it at all, nor does it appear that the case stated by the judge was withdrawn or displaced. The very intelligent counsel who argued the appeal, whose affidavits have been taken and filed, testify that they cannot say that such paper was intended as such substitute, nor can they say that the court recognized and acted upon it. In the absence of affirmative satisfactory proof that it was so received, it cannot be allowed to displace and render ineffectual the case stated by the judge, found, when in the nature and course of the matter it ought to be, although coming there in a disorderly way by consent of parties. It must be so taken.

Passing now to the second branch of our inquiry, did the defendant, Woodfin, administrator, in fact appeal? We cannot hesitate to say that we are fully satisfied by a strong preponderance of the evidence before us that he did. It appears that the transcript of the record (438) upon which the appeal was heard and determined, was not a complete and correct one in several respects. A second transcript of it laid before us sets forth the verdict of the jury and the judgment thereupon, drawn out formally and in detail, and with much care, on the *Minute Docket* of the court, where it ought to appear, and at the foot of the judgment, this entry distinctly appears in its orderly and proper place, under the procedure and practice applicable: *"Defendants* appeal to the Supreme Court of North Carolina." Seeing the discrepancy between the transcripts we have troubled ourselves to examine the *minute docket* itself, and find the true entry to be as last above recited. This harmonizes with the case stated by the presiding judge for this Court, and with all the entries in respect to the appeal, except that on the *civil issue docket,* which was irregular and out of place. The strong presumption is that the entry thus made is correct, and this is strengthened in that the record immediately in connection with it is drawn out with unusual care and precision, and recognized and acted upon by the judge in stating the case for this Court. The entry was not made hurriedly, but advisedly; the counsel and the court, it seems to us, must, at the time, have been advertent to what was thus done. The entry in the *civil issue docket,* made by one of the counsel of the appellants, was probably made hurriedly, while he thought for the moment of McKesson, the principal defendant and the active defender of the action. Two of

the able and experienced counsel say that they cannot now state whether all the defendants appealed or not; a third one says: "I think, though I cannot be at all positive, that all the defendants appealed." The same counsel—certainly two of them—appeared in the case in this Court. The appeal, by its title on the docket, purported to be that of all the defendants; it so appeared to be in the case stated on appeal; and
(439) also in the judgment of this Court, the names of the defendants are severally set out and judgment entered specifically as in the Superior Court.

The appearance of the counsel was general; they were able lawyers of much experience in this Court, and the appellant Woodfin himself was an able lawyer, of long experience in the practice in the Superior and Supreme Courts.

It is not at all probable, but very improbable, that such counsel would so appear and allow such entries in the Superior Court, and such a judgment in this Court, if the defendants, or any of them, had not appealed. Moreover, the testator of the defendant Woodfin, administrator, was only surety to the bond sued upon. It is not at all probable that he would allow the judgment in the Superior Court to stand and be effectual against him, while the principal in the bond sued upon appealed, for the purpose of making good a defense that might have relieved all the defendants from liability to the plaintiff. He had a strong motive, as administrator, to appeal, and it had been strange indeed if he had not done so. It is said that the judgment against Woodfin, administrator, in the Superior Court was, in fact, but a judgment *quando*. If this be so, nevertheless, he had a like motive to appeal. Besides, he survived five or six years after the judgment was entered in this Court against him. So far as appears, he never suggested, nor has his administrator, since his death, nor has the administrator *de bonis non of McDowell,* that he did not appeal in this action. How very strange this is if he did not; and it would be quite as strange if he and his counsel had not knowledge of the appeal on his part, and the judgment here at the time, and for some while after it was entered, although after the lapse of eighteen years, the counsel have no recollection about the matter. The fact that this motion was not made until after the lapse of eighteen years is important, and weighs much against it, though this alone would not be conclusive.

(440) This Court will interfere, in a proper case, to disturb a record or a pertinent entry made thereon in the orderly course of procedure, like that now in question, only when the proof produced in support of important proposed amendments thereto is clear, strong and convincing; it would be dangerous, indeed, to act upon any other

rule. The record is a serious, authoritative memorial, imputing absolute verity as to what the court does in actions, proceedings and matters that properly come before it. It is presumed to be made upon solemn scrutiny, with care and deliberation. Its purpose is to preserve and perpetuate the highest and best evidence of the rights of parties settled and determined by the court. It is of great moment and importance, and must not be disturbed for slight causes, or upon evidence that gives rise only to doubts and uncertainty.

The principal evidence produced in support of the motion before us is the entry on the *civil issue docket* as to the appeal to which we have already sufficiently adverted, and also the fact that at once, after the judgment was entered in the Superior Court, the plaintiff docketed his judgment in the county of Buncombe, where Woodfin, administrator, resided, with a view to create a lien on his property, etc. It is said, why did the plaintiff do this, if Woodfin, administrator, appealed?

This evidence is indirect, argumentative, and inconclusive, and not entitled to much weight. The Code of Civil Procedure had, at the time the judgment was entered, been in effect but a brief while, and there was considerable uncertainty and confusion in the practice of the law. It may be that the plaintiff was advised by counsel to so docket his judgment, as a cautionary measure, especially as the appellant did not give an undertaking to stay execution pending the appeal. This may or may not have been so, but that it might not unreasonably have been so, impairs the force of the argument founded upon such evidence. It is also in evidence that, very soon after the entry of the judgment in the Superior Court, the plaintiff and another joined in a pro- (441) ceeding against the defendant Woodfin, administrator, and the devisee and heirs-at-law of his testator, to sell lands of his testator to make assets to pay debts, etc.; and in the petition it was alleged that the judgment in this action was *quando,* etc.

Perhaps this might be evidence as to the character of the judgment, but it does not go to prove that the administrator did not appeal—he might well have appealed, if the judgment was only *quando,* in order to avail himself of the defenses other than those in respect to assets. What motive impelled the plaintiff to join in the proceedings mentioned, does not appear. It may be that he was ill-advised, but any question in such respect is not material here.

The question much discussed on the argument, as to whether the judgment against the defendant Woodfin, administrator, in the Superior Court, was an absolute one or a judgment *quando,* is not before us. It is not presented by the motion, and as to it we express no opinion.

Indeed, as we have said above, if it were before us, we could not decide it or grant any amendment in this Court of the final judgment.

The plaintiff insisted on the argument that the executor of the will of Pearson, who was surety of the administration bond of the defendant Woodfin, administrator, cannot be heard to make the motion before us, and we are of this opinion. Woodfin, administrator, did not, in his lifetime, complain of the alleged irregularity of the judgment of this Court, against him, and he is presumed to have been satisfied with it; nor has his administrator—not the administrator *de bonis non* of McDowell—complained of it since his death. Pearson, the testator, was not a party to this action—he had no direct interest in it, and no such interest as entitled him to be or become a party to it, nor could he have directed the defense to it, nor could he have prevented Woodfin, administrator, from waiving irregularities in the course of the action, if he saw (442) fit to waive them. He had no present right in the action as to the plaintiff, nor had he any subsisting right in it as to the defendant Woodfin, administrator. Any right or liability on his part was prospective and contingent.

In support of the motion, the learned counsel cited and relied upon *Hervey v. Edwards*, 68 N. C., 243, and *Dobson v. Simonton*, 86 N. C., 492. In the former case the Court said that when it appeared from the record that the court had no jurisdiction any person might ask the court to strike the judgment—a mere nullity—from the record. And in the latter case it appeared that the judgments in question were *void*, and the Court held that creditors having a direct interest in the matter in the particular litigation might attack the judgment on that account. We think they have no just application here.

It is settled by many decisions that generally only a party in the action interested may complain of irregularity therein, if he be living at the time the judgment was given against him. No doubt when there was collusion found to the prejudice of third parties they might find appropriate remedies. *Hinton v. Roach*, 95 N. C., 106; *Knott v. Taylor*, 99 N. C., 511, and numerous cases there cited.

We are therefore of opinion that the motion can in no aspect of it be allowed.

Motion denied.

Cited: Wilson v. Pearson, 102 N. C., 300, 307, 312; *Brown v. Rhinehart*, 112 N. C., 776; *McLeod v. Graham*, 132 N. C., 475; *Reynolds v. Cotton Mills*, 177 N. C., 425.

(443)

THE STATE EX REL. M. M. MOCK, ADMINISTRATOR OF L. L. HOWELL, v. J. V. HOWELL, ADMINISTRATOR OF G. F. HOWELL.

Bankruptcy—Trustee—"Fiduciary Character"—Tenant by the Curtesy—Sureties.

1. In determining what are "debts created while acting in any fiduciary character"—which are excepted from the effect of a discharge under the Federal Bankrupt Act—the liability is held to be one incurred *while acting in a fiduciary capacity theretofore created,* and not one where the relation arises from the act itself.

2. Where, upon a sale and partition of real estate, the share of a married woman was paid to her husband—he being a tenant by the curtesy—under a decree of the court, upon his executing bond to pay the principal at his death, or whenever so required, into court, or to such person as might be entitled thereto, and the fund was lost and the husband was adjudged a bankrupt: *Held* (1), that the sureties on the bond were discharged, (2) but the husband had contracted the debt as a trustee, and it was not released by his discharge.

THIS is a civil action which was tried before *Clark, J.,* at Spring Term, 1888, of DAVIE Superior Court.

Upon a petition filed in the late Court of Equity of the county of Davie by the heirs-at-law of John Hendricks, of whom Lydia L., wife of Gideon F. Howell, and a daughter of the intestate was one, for the partition and sale of certain real estate descended from him, the sale was decreed and made, and the share accruing to her therefrom ascertained to be $1,773.65, to the interest on which the said Gideon F. was entitled as tenant by the curtesy for life. This sum was directed to be paid over to him, to the end that he apply the said interest to his own use, and enter into bond to secure the principal money, to be paid at his death or whenever so required by the court, "into court or to the assignee of said Howell and wife, under a proper conveyance by them upon the privy examination of said Lydia."

Such bond was accordingly executed by the said Gideon F., with approved sureties, in the same penal sum of $1,773.65, with (444) condition of avoidance if, upon his death, "his executors, administrators or representatives shall pay over to the children of said Gideon F. the aforesaid sum of seventeen hundred seventy-three dollars and sixty-five cents, or whenever the Court of Equity shall require it to be paid into the clerk and master's office."

Lydia L. died during her husband's lifetime, and the relator of the plaintiff was, on 12 February, 1887, duly appointed her administrator, and her husband died on 23 November, 1886, and the defendant, John

B. Howell, took out letters of administration on his estate. The present action is to recover the principal money so paid over to the defendant's intestate, to which the defense is set up that the deceased, under proceeding in the bankrupt court, was adjudged a bankrupt, and on 26 September, 1870, obtained a discharge from his debts.

Upon the trial before the court, and upon the development of these facts in evidence, the court intimated its opinion that the discharge pleaded was a bar to the action, and the relator, in deference thereto, submitted to a judgment of nonsuit, and appealed.

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

SMITH, C. J., after stating the case: The plaintiff assigns as error in the intimated ruling that the discharge has no effect upon the demand, in that the debt was fiduciary, and further, was contingent and not provable against the bankrupt's estate. These are the only questions raised by the appeal and argued upon the hearing in this Court.

The exception to the general operation and effect upon debts (445) and claims provable against the bankrupt's estate of the discharge when granted, is contained in this section:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or *while acting in any fiduciary character,* shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Rev. Stat. of U. S., sec. 5117.

Was a fiduciary obligation incurred in placing this fund, the proceeds of the sale of realty and impressed with the quality of realty, in the hands of the deceased for preservation, and to be accounted for when called on to return the same at his death, or upon the order of the court, he not being responsible for interest meanwhile? The interpretation of the words, "while acting in his fiduciary character," has given rise to many conflicting decisions, and especially when it was extended to the misuse of funds in the hands of brokers, factors, commercial and other agents, and the predominant rulings seem to be that such are not within the term. Such was the construction put upon very similar words used in the bankrupt act of 1841 by the Supreme Court in *Chapman v. Forsythe,* 2 Howard U. S., 202; *Coonan v. Cathey,* 104 Mass., 245; *Hayman v. Pond,* 7 Met., 328; *Armstill v. Crawford,* 7 Ala., 335.

The underlying and governing rule in determining the character of the debt is that the liability must be incurred by one *"while acting in a fiduciary"* capacity which has been before created, and not when the

relation arises out of the act itself. The cases on the subject are collected and judiciously distributed by the author in his discussion of the clause in Blumensteil's Law and Practice in Bankruptcy, at page 540.

It is manifest, we think, that the decree which placed the money in possession of the intestate constituted him a trustee and invested him with the duties and liabilities which attach to a (446) fiduciary, for the safe keeping and ultimate return of the fund, for the benefit of such as would be entitled at his death, or into office if he should be sooner so required, his *status* is essentially the same in this respect as that of a guardian, receiver, representative, or other fiduciary entrusted with the property of another. The bond, with its sureties, is a recognition of the trust and a security for its discharge. The fund has itself disappeared, not kept specifically for the ultimate owners and the deceased trustee and his administrator failed to make it good. No recourse is made to the sureties on the bond who are discharged. *Simpson v. Simpson,* 80 N. C., 332; *Councill v. Horton,* 88 N. C., 222. But the action is against the principal upon the liability assumed in accepting the trust and receiving the money under it for which the bond is but an additional security or guaranty. This, then, being a debt or liability incurred by the intestate while acting in a fiduciary character, by a misuse of the trust fund, he remains responsible, and the discharge is not operative against the recovery.

This renders it unnecessary to consider the other point, and we forbear to undertake to solve the problem which is presented.

There is error, and the judgment must be reversed to the end that the cause proceed in the court below.

Error.

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(447)

D. S. JENNINGS v. JAMES W. REEVES ET AL.

Actions, Joinder of—Deeds—Reëxecution—Evidence—Registration—Cancellation.

1. A plaintiff, in the same action, may unite a demand for the reëxecution of an unregistered lost deed and for the possession of the land embraced therein.

2. Parol evidence from the necessity of the thing, is competent to prove the contents and execution of a lost unregistered deed.

3. A vendor and vendee may rescind a conveyance of land, before a probate and registration thereof, by a return of the consideration and surrender of the deed, provided third parties have not acquired an interest in the estate of the vendee.

4. The statute—chapter 147, Laws 1885—in relation to the registration of deeds has no application to lost or destroyed deeds.

THIS is a civil action which was tried before *Clark, J.*, at Spring Term, 1888, of the Superior Court of WILKES County.

The complaint alleges, in substance, that in 1860 the defendant, Daniel Jennings, made and executed a deed, conveying the lands mentioned in the complaint to his son, D. S. Jennings, in fee simple; that D. S. Jennings, the grantee, died in the year 1863, intestate, and the plaintiff is his only child and heir-at-law; that after the death of D. S. Jennings, the defendant, Daniel Jennings, procured said deed without the knowledge or consent of the plaintiff, who was then an infant of tender age, and caused the same to be destroyed, and that said deed had never been proved and registered; and demands judgment that the plaintiff be declared the owner of the land, for possession and general relief.

The material allegations of the complaint were denied.

Upon the trial the plaintiff offered to prove the execution and destruction of said deed by oral testimony, and defendant objected to this evidence upon the ground that plaintiff could not set up a lost and unregistered deed in an action of ejectment; that if plaintiff (448) had the deed, it would not be competent evidence, the same never having been proved and registered. The court overruled the objection, and the defendant excepted, and the testimony was admitted.

After the plaintiff had closed his evidence, the defendant J. M. Reeves offered in evidence a deed from the defendant Daniel Jennings to James G. Absher for twenty-five acres of the land mentioned in plaintiff's complaint, dated 26 February, 1873, and thence by a succession of *mesne* conveyances in fee, derived title to himself, dated 4 August, 1883; a deed from Daniel Jennings to W. B. Segrist, dated 27 August, 1875, and deeds thence to defendants Brown and Long, dated, respectively, in 1875 and 1881, which cover and convey the other twenty-five acres of the lands in dispute in fee simple, were also introduced.

The defendants asked the court to charge the jury that if plaintiff was allowed to set up the deed to D. S. Jennings, the grantee of the defendant Daniel, by parol, that plaintiff could not recover under the act of 1885, which provided that deeds should only take effect and pass title from and after registration. The court remarked that he would submit the facts to the jury, reserving the question of law, and thereupon submitted, with assent of both parties, to the jury the following issue, to wit:

Did the defendant Daniel Jennings, about 1860, execute to his son, D. S. Jennings, a deed in fee simple to the lands described in the complaint?

Answer: "Yes."

The court charged the jury, among other things, that if they were satisfied by a preponderance of the evidence that about 1860 the alleged deed was executed by defendant Daniel Jennings to his said son, and after the death of son, defendant Daniel Jennings got possession of the deed and destroyed it, to respond "Yes" to the issue, otherwise to answer "No."

To the issue submitted the jury responded "Yes," and the court, after considering the question of law reserved, gave judg- (449) ment for the plaintiff, and the defendant appealed.

R. B. Glenn for plaintiff.

D. M. Furches for defendants.

DAVIS, J., after stating the case: The record presents two exceptions, the first to the parol evidence offered to prove the execution and destruction of the deed from Daniel Jennings to D. S. Jennings, and the second to the refusal of the court to charge as requested.

As to the first exception: From the very nature of the allegation, if proved at all, it must be by parol evidence; but it is said this cannot be done in an action of ejectment, and the deed, before it can be offered in evidence, must first be established in a direct proceeding for that purpose and registered. It has been frequently held otherwise, and decrees for possession and for title have been made upon parol proof, both in Courts of Equity under the old practice and in actions for the possession of land under the present law. *Love v. Belk,* 1 Ired. Eq., 163; *Plummer v. Baskerville, ibid.,* 252; *McCain v. Hill,* 2 Ired. Eq., 176; *McMillan v. Edwards,* 75 N. C., 81; *Davis v. Enscoe,* 84 N. C., 396; *Cowles v. Hardin,* 91 N. C., 231; *Phifer v. Barnhart,* 88 N. C., 333, and cases cited therein. It has been held that before probate and registration a vendor and vendee may rescind a contract by a return of the consideration to the vendee by the vendor and a surrender of the deed to the vendor by the vendee (*Love v. Belk, supra*); but this must be by agreement, and even by agreement, if third parties have acquired any interest or equity in the estate of the vendee, that interest cannot be defeated by such a redelivery and surrender of the deed, and certainly the right of the vendee cannot be defeated by any act of the vendor in destroying the deed against or without the ven- (450) dee's consent.

In *Triplett v. Witherspoon,* 74 N. C., 475, cited by counsel for the defendants, the well-settled principle that a deed cannot be used to support a title or be read in evidence till proved and registered is settled, but it is there also said, "One of two things is necessary to be done before the legal title can vest in the plaintiffs: set up the lost deed and register a copy, or declare the defendants trustees for them and compel a conveyance of the legal title." It will be seen upon an examination of the judgment of his Honor that it decreed a conveyance of the legal title as indicated in the second alternative. In *McMillan v. Edwards,* 75 N. C., 81, also cited by counsel for defendants, the plaintiff sought to recover possession of the land purchased under execution, the deed for which had been lost or mislaid, and the Court said: "If the action had been ejectment, under the old system, the plaintiff, to recover, must have shown a legal title existing at the commencement of the action. But now both legal and equitable rights are administered in the same action, and no sufficient reason can be assigned why the plaintiff may not, at the same time and in the same action, ask for the execution of another deed, to be made effectual by registration, and also for the possession of the land."

It is quite clear that under section 267 of The Code the plaintiff can unite, in the same action, a demand for the execution of a deed and for possession of the land, while under the old system the lost or destroyed deed could only be established in a Court of Equity, where a decree for title and such other relief as might be proper could be made and enforced according to the practice of that court.

In regard to the exception to the charge of the court, the same reasons for admitting parol testimony to establish a lost or destroyed deed apply. If the plaintiff *had* a deed which could be registered, and
(451) failed to have it registered, undoubtedly the registration act of 1885 would apply, and the objection would avail the defendants, but the allegation is that the deed was destroyed, and the relief sought being equitable, the statute does not apply.

In *Phifer v. Barnhart, supra,* quoting *Walker v. Coltraine,* 6 Ired. Eq., 79, *Ruffin, J.,* says: "It was declared to be an error to say that an unregistered deed conveys only an equity, that it is a legal conveyance which, although it cannot be given in evidence until registered, and is therefore not a perfect legal title, yet has an operation as a deed from its delivery, and it was emphatically said the ignorance of such a title in one who might afterwards buy the land could not impair it," and it was held that such a deed could be set up in equity.

It has been held in *Cowles v. Hardin,* 91 N. C., 231; *Mobley v. Watts,* 98 N. C., 284, and other cases, that the statutory provisions for re-

storing burnt and lost records (The Code, ch. 8) do not repeal the "common-law rules for establishing lost deeds, such as have been destroyed by time or accident," and it is equally clear that chapter 147, Acts of 1885, has no application to lost or destroyed deeds, which of course cannot be registered, and which can only be established by a judgment of the court.

There is no error. Affirmed.

Cited: Arrington v. Arrington, 114 N. C., 171; *Hinton v. Moore,* 139 N. C., 47; *Brown v. Hutchinson,* 155 N. C., 208; *Powers v. Murray,* 185 N. C., 339.

(452)

THOMAS MARTIN, TRUSTEE, v. JAMES S. FLIPPIN AND SAMUEL FLIPPIN.

Processioning—Appeal.

1. Appeals to the Supreme Court will only be entertained from final judgments, or from such interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant.

2. In a processioning proceeding the defendant filed exceptions to the report of the freeholders, which were overruled, but the court directed an issue to be submitted to the jury in respect to the location of the disputed land: *Held,* that an appeal from the judgment overruling the exceptions before the trial of this issue and the final judgment of the court thereon was premature.

THIS is a processioning proceeding. In the course of it the defendants, the appellants, made numerous objections and filed exceptions, all of which were overruled, and the court entered its findings and determination of record, as follows:

"The court finds that the plaintiff is the party in interest; that there was no misconduct on the part of the jury, and no irregularity in the proceedings, and the motion to quash is denied. The court being of opinion, however, that under the constitutional provision guaranteeing the right of trial by jury, and also under sections 256 and 1930 of The Code, the defendants are entitled to have the issue of fact as to the location of the line passed upon by a jury, an issue to that effect will be submitted to a jury in this court."

From this order the defendants appealed to this Court.

R. B. Glenn for plaintiff.

J. C. Buxton for defendant.

MERRIMON, J., after stating the case: The court was of opinion that the appellants were entitled to a trial by jury as to the location (453) of the boundary line in question, and directed that a proper issue for that purpose be submitted.

The appellants did not object and *waive* any such right they might possibly have, and insist upon their objections to this proceeding and their exceptions to the report of the freeholders and a final judgment, in their favor, or against them, as they might have done. No final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the appellants, if the appeal should be delayed until the final judgment. It is only in such cases that an appeal lies. Fragmentary appeals are not allowed. *Leak v. Covington,* 95 N. C., 193, and the cases there cited.

It is not at all probable that the court would have forced the appellants to accept a trial by jury against their will; but if it had done so, they might have objected and assigned error, and having gone to trial, the result might have been satisfactory to them; otherwise, they might have appealed from the final judgment adverse to them, and all their assignments of error appearing in the record, might have been determined by a single appeal. No judgment was entered against the appellants, and, obviously, the proceeding is still open in the court below for further proceedings there. They should have taken some appropriate steps to have a final judgment entered from which they could have appealed. The attempted appeal must be dismissed.

Appeal dismissed.

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(454)

W. J. WALLACE v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Evidence—Trial—Judge's Charge—Negligence.

1. When the court in its instructions to the jury read to them the opinion of the Supreme Court delivered upon an appeal from a former trial, wherein certain material facts were recited, of which no proof was offered on the second trial, without calling the attention of the jury to that point, and exception thereto was made in apt time: *Held,* to be sufficient cause for a new trial.

2. That the testimony offered on the trial furnished evidence to go to the jury that there was negligence on the part of the defendant; that the injuries were not the result of a mere accident, and that they were not produced by the contributing negligence of the plaintiff.

WALLACE *v.* RAILROAD.

THIS was a civil action by plaintiff to recover damages for personal injuries, suffered by defendant's alleged negligence, tried before his Honor *Clark, J.,* at October Term of McDOWELL Superior Court for the year 1888.

By consent, the following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. Did the plaintiff contribute to his injury by his negligence?

3. What damage, if any has the plaintiff sustained?

The jury responded to the first issue, "Yes"; to the second "No"; and to the third issue, "Three thousand dollars ($3,000)."

1. The plaintiff, testifying in his own behalf, said he got on the train at Old Fort to go to Marion on defendant's railroad in November, 1885, and that soon after leaving Old Fort the conductor came in the car and took up the tickets; that within about two miles of Marion the train stalled, and tried two or three times to move, and eased back and stopped, and the train being stopped he got up from his seat to pick up an overcoat and bottle of liniment for a friend, when (455) car was suddenly struck, as if by a cannon ball, when he was thrown forward and fell and had his thigh broken.

On cross-examination he testified that the train was a freight train, and that the car he was sitting in was one attached to end of train, and had a partition in it with seats along each side; there were seven persons in the car, passengers, and there were plenty of seats in the car for all; that there was some jerking and moving backward and forward; train had stopped a little while, and some one in car said train was about to stall; that at time of shock, had overcoat in one hand and bottle in the other, and was standing up handing them to a Mr. Clinard, when the train smashed back, and he was thrown forward and Clinard was thrown on his feet; that he had ridden on freight trains before often; that in going up hill, there was no slack; that the train did not move after he was hurt; train had finally stopped when he got up; that nobody in car was hurt but him, nor was any thrown down but him and Clinard, and that Clinard was a crippled man, having his arm in a sling; it was raining that morning and was a damp, wet day.

The deposition of Frank Clinard, a witness for the plaintiff, was then offered and read, the material parts of which are as follows:

Q. Were you present when the plaintiff received the injury complained of in this case? A. I was.

. . . . . .

About two miles from Marion the train stalled, and when it stalled it gave a sudden jerk, and my overcoat was hanging on a hook attached

to the side of the car, and when the sudden jerk came it threw my overcoat off the hook, and in my overcoat pocket was a bottle of liniment, a liquid; when the overcoat fell the bottle of liniment fell out of my pocket on the floor of the car; the car was then perfectly still; I had my right arm in a sling; Mr. Wallace, the plaintiff, and I
(456) got up off the bench at the same time to pick up my overcoat; at the same time Dr. Cheek and two other passengers got up and walked to the rear end of the car.

After Mr. Wallace and myself had got up to get the overcoat the engine came back against the cars and threw Mr. Wallace down, and threw me down also; I fell on my crippled arm across Mr. Wallace's left leg, between the knee and ankle; some gentlemen in the car picked me up; when I got up I found that Mr. Wallace was badly hurt, and I was hurt also.

The engine came back with very great force, sufficient to throw one down in a car. The force was backward, and Wallace and myself were thrown forward.

Q. Was there any signal given before this shock occurred? A. I did not hear any.

Q. Up to the time the jerk occurred, which threw the coat down, where had the plaintiff been and what was he doing? A. He was sitting on the seat beside me.

Q. Did he leave his seat at any time from the time he left Old Fort till the car became stationary on the track? A. Not that I remember.

Q. How long did the car remain stationary before the shock came which threw you and the plaintiff down? A. From the best of my knowledge and belief, from one-half of a minute to a minute.

Q. At the time the train was forced back by the engine, was there, or was there not, any circumstance to indicate immediate danger to a person if they got up? A. There was not.

The defendant introduced no evidence, but requested the court to give the following instructions to the jury:

1. That upon the facts, as they appeared from the evidence
(457) of plaintiff, and which are admitted, the plaintiff was negligent and contributed to his injury by the same, and the jury be so directed to find, and that the court so declare.

2. That a passenger on a freight train accepts it, and takes it, and travels on it, acquiescing in the usual incidents and conduct of a freight train, if managed by prudent, competent men.

3. That in the movement of a freight train the jerking is inevitable, and is not ascribable to negligence or want of skill, or improper management on the part of agents of the company.

4. That it is not to be expected a company will provide the freight trains with all the conveniences and safeguards against danger that are required in the operation of passenger trains.

5. It is the duty of a passenger in the train to take ordinary care of himself. If danger is apparent or expected he is to see and know it.

6. It is usual and proper for a passenger to remain in his seat, and especially so on freight trains, when he has reason to believe there is danger in any other position than being seated.

7. That there was no evidence that the engine or locomotive was overloaded.

8. That there is no evidence of careless management of the locomotive or cars on the part of the agents or servants of the defendant on this occasion.

9. That in the light of the evidence in this action, the injury suffered by the plaintiff was an accident, and not the result of negligence.

After filing of the instructions and prayer for instructions with the court, the defendant moved the court to hold, that the plaintiff could not recover in this action, as a matter of law, inasmuch as his own evidence, admitted to be true, showed him to be guilty of (458) contributory negligence.

This motion was denied by the court, and defendant excepted to the ruling of his Honor.

One ground of negligence assigned was that the locomotive was overloaded, and as a consequence it stopped on a steep grade on the road, and in pushing the train back to a point from which it could the more readily start anew it produced heavy jolts and jars, and while the plaintiff was standing on the floor of the car in which he was riding there came such jolt so violent as to cause him to fall on the floor and break his thigh, etc.

The case was before this Court by a former appeal—*Wallace v. R. R.*, 98 N. C., 494. On the former trial, as tending to show that the locomotive was overloaded, the plaintiff produced evidence that "the train was a long one." On the last trial there was no evidence as to the length of the train, but on this trial the court, in its instructions to the jury as to the law applicable, read to them a considerable part of the opinion of this Court delivered in the former appeal and particularly for the present purpose, that part wherein the Court said: "It is in evidence that the jolts and jars incident to the freight train were known to him; *that on this occasion the train was a long one,* and the locomotive was moving it with difficulty," etc. The court did not qualify the reading and caution the jury by telling them there was no evidence on the last trial as to the length of the train. The defendants

assign error that the court so read the extracts recited at all, and particularly that it did so without explaining to the jury that there was no evidence on the trial then in progress as to the length of the train.

From the judgment rendered for the plaintiff the defendant appealed.

John Devereux, Jr., for plaintiff.
Charles Price for defendant.

(459) MERRIMON, J. It is alleged in the complaint, among other things, that the defendant was negligent, in that "the locomotive of the said defendant upon its said railroad was overloaded, causing it to stall," etc.

Such negligence made one of the leading elements and constitutes part of the plaintiff's alleged cause of action, and it was material to prove on the trial that the locomotive driving the train on which the plaintiff was riding when he sustained the injury complained of was overloaded. The evidence to prove this fact was not very clear, strong and satisfactory, and evidence that the train *was a long one* would tend directly and materially to prove it, and in case of doubt might—would, no doubt—lead the jury to conclude that it was as alleged. There was no evidence produced on the last trial as to the length of the train; on the first one, it appeared that it was a long one, and when the court read from the opinion of this Court, in the former appeal, that there was such evidence, without a word of caution or explanation the jury might reasonably have understood the court to instruct them that there was such evidence for them to consider. Certainly the tendency of what was read to them as to the evidence in this very case was to mislead them, and we can see that that evidence, in connection with the other evidence as to whether or not the train was overloaded may have been treated by the jury as controlling. If the train was not overloaded, and they so found the fact to be, they might have rendered a verdict in favor of the defendant. We do not mean to suggest that they ought or ought not to have done so in that case.

The court should, in connection with its reading from the opinion of this Court, have cautioned the jury that they could not consider the evidence of the former trial, and that particularly there was no evidence on the last trial as to the length of the train. It was error to fail to do so, because the direct tendency was to mislead the jury—perhaps, materially. If it be said that the defendant's counsel (460) ought to have called the court's attention to the misleading tendency of the extract from the opinion mentioned read to the jury, it must be said in reply, that such suggestion might have force if

objection was not made in apt time before the jury rendered their verdict. It does not, however, appear that objection was not made in apt time; on the contrary, the case stated on appeal shows that the exception was taken before the verdict was rendered, so that the court had opportunity to make any corrections it deemed proper.

Inasmuch as there must be a new trial, we deem it proper to add, in respect to other assignments of error, that we are of opinion that there was evidence to go to the jury tending to prove that the locomotive was overloaded, and of careless management of it; that the court could not properly instruct the jury, in the light of all the evidence, that the injury sustained by the plaintiff was the result of a mere accident; nor should it be said to them that, in view of all the evidence, the plaintiff could not recover; nor that, accepting the plaintiff's own evidence as true, he was chargeable with contributory negligence. What we said in the former appeal in respect to contributory negligence was appropriate to be said in the last trial in view of the evidence.

The defendant is entitled to a new trial.

Error.

Cited: S. c., 104 N. C., 449; *Graves v. R. R.,* 136 N. C., 4; *Marable v. R. R.,* 142 N. C., 564.

(461)

A. J. SMITH ET AL. v. G. W. SMITH ET AL., ADMINISTRATORS OF DRURY SMITH.

Administration—Executors and Administrators—Evidence—Exceptions—Distribution — Interest — Costs—Excusable Neglect—Reference.

1. Exceptions to the findings of fact by a referee, under a reference by consent, except those which relate to the admission of incompetent or the rejection of competent testimony, or to those findings where there is no evidence to support them, are not reviewable.

2. Executors and administrators will not be charged with interest upon money received at the time of their qualification, or afterwards, in the administration of their trusts, where it appears that they have not used it for their own advantage, or that no profit has arisen from it. The same rule is applicable to choses in action—particularly where a settlement has been obstructed by unavoidable litigation.

3. Where it was agreed by some of the distributees and the administrator that, at a sale of the personal effects, the distributees might purchase "as for cash," and the amount of purchases should be charged against

their respective distributive shares, some of the distributees being absent and others objecting: *Held*, that those purchasing should be charged with interest upon the amounts of their purchases from the date thereof until the final settlement.

4. Where the facts agreed upon as a basis of exceptions conflict with the finding of the referee, the exceptions should be overruled, especially where they are indefinite.

5. In an action for the settlement of accounts of executors and administrators, where there are separate answers and defenses, and the interests of the defendants are conflicting, the adjustment of the costs is in the discretion of the court below, and its judgment will not be disturbed in the Supreme Court. The Code, sec. 527.

6. Where, pending a reference, the counsel for the parties to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc., in the cause, neglected to retain other counsel: *Held*, that it was not such excusable neglect as required the court to set aside the report and recommit the matter passed upon therein.

7. Where a party to an action against the representatives of a deceased person is examined as a witness by such representatives in respect to any transaction or communication with the deceased, his testimony in reply or explanation must be confined to the particular matters called out by the adversary party.

(462) THIS is a civil action, commenced in 1877, and tried before *Clark, J.*, at January Term, 1888, of the Superior Court of ROCKINGHAM County, upon exceptions to referee's report.

Drury Smith died intestate in the county of Rockingham in January, 1873, and the defendants, G. W. Smith, L. F. Smith and Darien Smith, were duly appointed administrators of his estate, and executed bonds in the usual form in the penal sum of $36,000, for the faithful discharge of their duties, with the other defendants as sureties, and this action is brought by the plaintiffs, who, together with the defendants (except G. M. Grogan, W. A. Robertson and P. H. Martin), are the heirs-at-law and distributees of the said Drury Smith, against the administrators and the sureties on their bond, alleging divers breaches of said bond, and demanding judgment for the amount of the penalty named therein, to be discharged upon the payment of such sums as may be found to be due to them upon an account and settlement of the estate.

G. W. Smith and Darien Smith, two of the administrators, filed a joint answer, and their coadministrator, L. F. Smith, a separate answer, presenting collateral matters of controversy, which were compromised and settled, and a judgment in accordance with the compromise was entered with consent of all parties.

At Spring Term, 1878, by an order in the cause, it was referred to the clerk to take and state an account.

At January Term, 1887, "by consent," the clerk was allowed to withdraw as referee, and W. S. Ball, Esq., was substituted and appointed referee, "to make a report upon the evidence heretofore taken under the former order of reference, and that he file his re- (463) port, . . . subject to the same rights of exception as would have obtained if the original referee had completed his duties by a report."

The referee filed his report, together with all the evidence taken in the cause. The contesting parties filed numerous exceptions to the findings of fact by the referee, and also exceptions to his conclusions of law; all of which, except two not material to this appeal, were overruled, and judgment rendered confirming the report, from which the plaintiffs, and some of the defendants, appealed.

H. R. Scott and R. B. Glenn for plaintiffs.
W. F. Carter, by brief, for defendants.

DAVIS, J., after stating the case: The record is very voluminous, comprising 357 pages of printed matter, the greater part of which consists of the evidence in the cause, sent up under the misapprehension that this Court will review the evidence and findings of fact. The original reference to David Settle was without objection by the plaintiffs, and by consent he was allowed to withdraw and W. S. Ball was substituted as referee, and his findings of fact are not subject to our review. The only reviewable exceptions in regard to the finding of fact by the referee must relate "either to evidence received after objection or offered and refused or the want of evidence of a fact found," and such exception must be specific. *Morrison v. Baker,* 81 N. C., 76; *Grant v. Reese,* 82 N. C., 72, and cases cited.

The plaintiffs' exceptions to the referee's conclusions of law are:

1. "As to conclusion one: (1) For that he finds that the administrators are not chargeable with interest on moneys that came to their hands, there being no evidence on their part to show that they had not used the same for their own purposes. (2) For that he fails to find that they are chargeable with interest on the purchases (464) made by distributees."

The ruling upon the first branch of the exception is as follows: "No charge for interest is made against the administrators for the money on hand at the death of the intestate, nor for the actual money collected at the different sales. These amounts, compared with the aggregate sum charged against administrators for such sales and the sales to the distributees, are inconsiderable, and it does not appear that the administrators had used any portion of the fund for their own ad-

vantage, and it also seems that no actual profit has been made from it to the administrators. They should consequently not be charged with interest in this regard."

This we think is correct. The general rule is that an executor or administrator who retains funds and keeps no interest account to show what was in fact received will be charged with interest. "Interest," says *Gaston, J.*, in *Graham v. Davidson,* 2 D. & B. Eq., 155 (172), "according to the usage of our courts, follows debt as the ordinary attendant; therein we depart from the English rule, and probably this distinction has resulted from the circumstances that in this country money never lies idle, and he who holds from another what is his is presumed, till the contrary appears, to have had it out in schemes of profit."

In the case cited, the contrary not appearing, the executor was charged with interest, but in the case before us, it appears from the report of the referee that the administrators made no profit from the use of the money, and in this respect the exceptions of the plaintiffs were properly overruled. *Spruill v. Cannon,* 2 D. & B. Eq., 400.

With regard to the second branch of the exception, the facts found by the referee are: "That it was agreed by and between the administrators and a majority of the distributees that the said distributees might bid at the sale as cash bidders, so far as their interest in the personal property might go, and if they should bid more than
(465) such interest, the excess should be deducted from the interest of said distributees in the real estate of the intestate, and that all the administrators assented to this agreement, but that A. J. Smith, one of the distributees, dissented, and that all the distributees were not present at the time of the agreement." The referee further finds that, pursuant to this agreement, certain of the distributees bid at the various sales and made purchases to the amount set out in a list accompanying the report. This list shows that of the amount of sales made by the administrators in 1873 and in 1874 (exceeding $12,000), much the larger portion was "to distributees, regarded as cash." Upon the facts the referee finds, as a conclusion of law, that interest should not be charged upon the sales to the distributees, "because the sales to them, agreed to between them and the administrator, amount in law to a distribution of the personalty on the spot, and all questions of interest are at once ended, both as to them and the administrators, so far as these sales are concerned, for such distribution amounts to the same as surrendering to the distributees a portion of their money."

This ruling would perhaps be just and unexceptionable, if the benefits of what is thus called a "distribution" were shared equally, or any-

thing like equally, by all the distributees. In the distribution of the intestate's estate "equality is justice," and under the ruling excepted to, the distributees, who were purchasers and debtors, derived a benefit equivalent to the interest on what they owed down to the present time, while those who were not present made no purchases and did not assent to the agreement, and those who were minors and could not purchase, and who, therefore, could derive no benefit in the way of interest on their distributive shares, or any portion of such shares, are required now, after the lapse of many years (the sales were principally in 1872), to share equally with the purchasing distributees, some of whom purchased nearly to the amount of their distributive shares. (466) Such a distribution would be manifestly unequal and unjust, especially to those who were minors.

Unquestionably, if the administrators had used the money they would have been chargeable with interest for the benefit of all the distributees; but as they did not use it, and the profit or use inured to the benefit of the debtor distributees alone, the inequality can be remedied and the injustice prevented by charging them, in the distribution of the estate, with interest on the amounts of their respective purchases or debts, and thus securing to all equality in the estate.

The second branch of the first exception of the plaintiffs to the conclusion of law must be sustained, and interest will be charged as indicated.

2. The second exception is to the refusal of the referee to charge the administrators with *interest* on the notes and other debts that came to their hands, and with which they were charged by the referee, "when, according to the evidence, they failed to make settlement, or to attempt to do so, within the time prescribed by law," etc., and they insist that the administrators shall be charged with interest down to the settlement. We can see no reason why a different rule in regard to interest should apply to "notes and other debts" with which the administrators are charged and the money on hand, or proceeds of sales made by them. In either case, as a general rule, if no interest account is kept, the administrator will be charged with interest on money, if improperly retained, but it does not appear that the money has been improperly retained by them, and it does appear, in the findings of the referee, that no profit accrued to them. Besides, "the peculiarity of this case," as is said by the referee, "is, that the settlement of it is retarded by litigation, which was commenced ten years ago." It would be manifestly unjust to charge the administrators with interest down to the date of settlement, when, as is said, "there is so much time (467) necessarily consumed in adjusting the various and conflicting claims."

The ruling of the court below in regard to the second exception is sustained.

3. The third exception is to the credits allowed in class "H" by the referee, which "were admitted by the plaintiffs' attorneys for their clients, whereas the plaintiffs' attorneys only admitted that such a list was filed, with the reservation of their objection."

Class "H," referred to in the exception, embraces divers credits, in regard to which the referee says they "have been mostly made up from a list furnished by plaintiffs' attorneys, admitted by them for their clients, inspected by the attorneys for the defendant administrators, and agreed to."

The fact stated as the basis of the exception is in conflict with the fact as stated by the referee, and the exception is vague and indefinite, in that it does not appear what the "objections," said to have been reserved, were.

In regard to this exception the ruling of the court below is sustained.

4. The fourth exception is: "For that divers breaches of the bond have been clearly established in the evidence, as also serious laches on the part of the administrators; and the seventh conclusion of law is clearly erroneous, as causing the innocent sufferers from the breaches of the bond to pay for the expense of forcing the administrators to a settlement."

The seventh conclusion referred to is as follows: "The referee is of opinion, and so holds, that the costs, disbursements, allowances, attorneys' fees, and commissions ordered by the court, of necessity, where the same have not already been ascertained and embodied in this report, should be charged *pro rata* against the shares of the distributees and heirs-at-law before the same are paid by the administrators."

(468) The question of costs in the case before us is, under section 527 of The Code, "in the discretion of the court," and an inspection of the record, the character of the litigation, the several orders, the conflicts of interests presented, not only between the plaintiffs on one side and the defendants on the other, but also collateral questions between the plaintiffs themselves, and between the defendants themselves, all tend to show that the ruling in regard to costs was not unjust, and it will not be disturbed.

The judgment below will be made to conform to this opinion.

Modified and affirmed.

APPEAL OF G. W. SMITH (ONE OF THE DEFENDANTS).

A motion was made by G. W. Smith to "reopen the report of the referee and to recommit the case, that further evidence may be offered

in his behalf, and also to set aside the reference to W. S. Ball, made at January Term, 1887. Both motions were refused and defendant excepted."

Upon affidavits filed the facts as found by the court are, in substance, that G. W. Smith had an individual interest in the suit distinct from his interest as administrator, and employed counsel to represent him in his individual capacity who was not the counsel who represented him as administrator; that he was told by counsel that any additional evidence he might offer could be presented to the referee before the evidence closed; that subsequently said counsel became clerk of the Superior Court and ceased to act as counsel for said Smith, but that said counsel tendered to the referee all the evidence furnished by said Smith. Said Smith knew his counsel had become clerk of the Superior Court and had ceased to act as his counsel, but employed no other counsel and offered no additional evidence, though several terms (469) of the court passed. On these facts the court refused to recommit the case.

G. W. Smith was represented as administrator by counsel. His counsel in his individual capacity had become clerk and ceased to act, and Smith knew it, but employed no other counsel. No exception was taken to the order appointing W. S. Ball as referee by any one, and Ball notified Smith of his appointment and cited him to appear before him, but he did not do so, and at this term he first makes objection to said order of reference to W. S. Ball. On these facts the court declined to set aside the order of reference to W. S. Ball, and G. W. Smith excepted.

This action had been pending for a number of years, the defendant G. W. Smith had been duly made a party and was charged with notice of whatever action the court may have taken therein while it was pending. *University v. Lassiter,* 83 N. C., 38, and cases cited.

But counsel for the appellant says that the application to set aside the order of reference to W. S. Ball was made within one year after the making of said order, and is therefore within section 274 of The Code. Assuming that to be so, the power conferred by section 274 is discretionary, and upon the facts found by the court there was no error in refusing to recommit the cause or in declining to set aside the order of reference.

The defendant, G. W. Smith, also files numerous exceptions to the report of the referee, all of which, except the first and last, are abandoned in this Court.

The first is as follows:

"That the referee erred in excluding the evidence of G. W. Smith, the claimant, offered to establish his said claim, upon the ground that

the same and every part thereof was objected to by plaintiffs, and was incompetent under section 590 of The Code.

(470) The appellant alleged that the estate of his deceased father, Drury Smith, was indebted to him individually in the sum of $1,890.90. Upon examination by plaintiffs, he was asked the following question:

"Did you not, about the year 1869, buy from your father, on a credit, two tobacco screws, a tobacco shape and a two-horse load of tobacco? If so, what were you to give for them?"

"A. I did buy two screws from my father, also a shape, in 1872, I think, as the books will show. . . . We agreed on the price of the screws and shape, but I do not recollect what it was; the books, I think, between Drury Smith and myself will show, and I think the books will show a credit of $50 or $100."

Plaintiffs objected to defendant further answering in such a way as will tend to establish a claim in his favor against the deceased, Drury Smith. Objection overruled. When the witness resumed his answer as follows: "There was special contract in the agreement for the screws that I was to pay him so much money, and then the balance was to go between me and him on the account I kept against him."

This question having been asked by the plaintiffs, it was insisted, on behalf of G. W. Smith, that it rendered him competent, as a witness, to prove his claim against the estate of Drury Smith, deceased. The witness was permitted to testify in regard to the transaction relating to the screws and shape. He was asked divers questions in regard to his account, the items in the account and the understanding and agreement with the deceased in relation thereto, involving transactions other than that relating to the screws and shape. These questions were all objected to, and excluded under section 590 of The Code.

It is insisted by defendant's counsel that the questions in regard to the account were competent in explanation of a "transaction inquired of by plaintiffs," and that it was "one entire transaction." The

(471) evidence is only competent so far as it is "concerning the same transaction or communication," testified to in a legitimate response to questions propounded by the adverse party. The exception in section 590 cannot have the broad scope and effect contended for by the counsel for the appellant, and while some of the questions, as for instance, "is $15 per month for a two-horse wagon, two mules and a driver, a reasonable charge?" would be competent as not involving a "personal transaction or communication" between the witness and the intestate, yet these questions were predicated upon transactions had with the intestate, referred to in the excluded testimony of the witness,

and must, with that testimony, be excluded. If the facts upon which the questions were predicated had been established by competent evidence, then the question would have been competent, but the witness was not competent to testify to any "transaction or communication other than what pertained to the question asked by the plaintiff, and tended to discharge that claim." *Kesler v. Mauney,* 89 N. C., 369, and cases cited.

The appellant's first exception cannot be sustained.

The other exception insisted on is: "That W. S. Ball, referee, had no right to pass upon G. W. Smith's claim against the estate of Drury Smith, nor of his liability to the said estate, he, the said Ball, having been substituted as referee without the knowledge or consent of G. W. Smith, and that his findings in this regard are nullities."

For the reasons for not sustaining appellant's exception to the refusal to recommit the cause and to set aside the order substituting W. S. Ball as referee, this exception cannot be sustained.

Affirmed.

Cited: Bond v. Cotton Mills, 166 N. C., 23; *Yates v. Yates,* 170 N. C., 535.

(472)

SEPARATE APPEAL OF A. J. SMITH (ONE OF THE PLAINTIFFS).

A. J. Smith excepted individually to the report of the referee:

"For that the referee has applied the Confederate scale to the $1,000 bond of John P. Smith."

The note or bond of John P. Smith, referred to in the exception, was executed on 1 June, 1863, and, in absence of evidence to the contrary, it is presumed to be scalable in Confederate currency, and the legislative scale furnishes the measure of the value of the contract in the absence of evidence to the contrary. *Palmer v. Love,* 82 N. C., 178.

The scale was properly applied as of the time when the note was made. *S. v. Cowles,* 70 N. C., 124.

Affirmed.

APPEAL OF THE DEFENDANT ADMINISTRATORS.

The defendant administrators having failed to perfect their appeal, the exceptions by them to the findings of fact and conclusions of law, sent up with the record, have not been considered by the Court.

(473)

MARY ANN SUMMERLIN v. CALVIN J. COWLES ET AL.

Fraud—Trust—Statute of Limitations—Presumption—Married Women—Evidence.

1. More proof than a mere preponderance of evidence is necessary to warrant the courts in attaching a parol trust to a legal estate, or to convert a deed, absolute upon its face, into a security.

2. To such cause of action, arising prior to the adoption of the existing statutes of limitations, there was no time prescribed as a bar, but the ten years statute of presumption—Revised Code, ch. 65, sec. 19—is applicable.

3. While there is no saving provision in favor of women under disability of coverture contained in the statute—Revised Code, ch. 65, sec. 19—raising a presumption of an abandonment of equitable interests after the lapse of ten years, yet when the period there prescribed is adopted by the courts in the exercise of their equitable jurisdiction, as the one in which the action must be brought by analogy to the general statutes of limitations, the time during which such disability existed will not be computed.

THIS is a civil action, which was tried before *Clark, J.,* at Spring Term, 1888, of WILKES Superior Court.

John C. Hamby, in the year 1852, conveyed the tract of land described in the complaint, and containing about one hundred acres, to Jesse C. Summerlin, then the plaintiff's husband, from whom, under an execution sale and the sheriff's deed, the defendant claims to derive his title. The complaint alleges that the grantor, an old and illiterate man, intending to convey the land to the plaintiff, his daughter, directed Griffin Summerlin, her husband's father, so to draw the deed; but by a fraudulent contrivance, the conveyance was made to the said Jesse C., and executed by the said John C., who could neither read nor write, under representations that it was made as he had directed.

The purpose of the present suit, begun on 26 August, 1885, is to have the deed declared fraudulent and the defendant to hold as
(474) trustee for the plaintiff, so as to effectuate the intention of the maker thereof.

The answer, in reference to the various allegations of the complaint, says the defendant who bought the land has not knowledge or information upon which to form a belief as to the truth of those statements, and therefore puts the plaintiff upon proof.

The single issue submitted to the jury was as follows:

"Was the deed from J. C. Hamby to Jesse Summerlin intended by the grantor Hamby to be a deed to the plaintiff, but made to the said Jesse Summerlin by the fraud of the said Jesse and his father, Griffin Summerlin?"

Upon the trial it appeared in evidence that the defendant, after receiving the deed from the sheriff, in 1854, entered into possession and held the land for one or two years, since which it remained vacant until the plaintiff's entry thereon some three years before the trial, and she has continued in the occupation.

The plaintiff proved by her own testimony that she was the daughter of J. C. Hamby and the widow of Jesse Summerlin, and that Jesse was the son of Griffin Summerlin; that her father was illiterate, could neither read nor write, and that she could neither read nor write; that Jesse died in July, 1879, and that she took possession of the land in controversy about three years ago; that she was at the house of her father in 1852, when the deed from him to Jesse Summerlin was written; that her father was there, and also one James Byers, and that her husband and his father came to her father together. [Here, upon objection of defendant, and the ruling of the court, she was not allowed to speak of any transaction that took place or any communication made to her or direction given by her father, witness having participated therein.]

The plaintiff then called James Byers, who testified that he was at the house of J. C. Hamby on the occasion spoken of; that the plaintiff and her father were there; that Jesse Summerlin and (475) his father came in; that soon after they came Griffin Summerlin said to Hamby, "I have come to do that writing." Hamby replied that he wanted a deed written to the plaintiff for the land in controversy; that he did not want Jesse's name in it, and did not want it made so it would be liable for Jesse's debts, if it was it would soon be gone. To this Griffin Summerlin replied that he knew how to write it; that paper and ink were gotten and they were about writing the deed when he left.

Austin Yates testified that he was at Hamby's some time before the making of the deed in 1852 to Jesse Summerlin, and wanted to buy the land in controversy, when Hamby told him he would not sell it to him or any one else; that he intended his land for his two children.

N. P. Caldwell testified that he lived a near neighbor to old man Hamby, and on several occasions before the date of the deed to Jesse Summerlin Hamby told him that he intended to give his home place to his son James Hamby and the lands in controversy to his daughter, Mary, the plaintiff in this action; that he intended to make a deed for it to his daughter so it would not be liable for Jesse Summerlin's debts, as it would soon be gone if he was to make it to him; that Hamby was a very

old man in 1852, and could neither read nor write; that he afterwards did give the home place to his son James.

The defendant then introduced the deed of 1852 from J. C. Hamby to Jesse Summerlin, witnessed by Griffin Summerlin and Amos Church, and registered in 1853 upon the jurat of Amos Church. The defendant then showed four judgments on the execution dockets of the old county court of Wilkes, for the year 1853, and then offered in evidence the sheriff's deed, dated March, 1854, reciting that he sold under *ven. ex.* in his hands issuing on the four judgments above mentioned.

(476) There was other testimony introduced, but it is not material to the questions considered in the opinion.

The defense was two-fold:

1. That there was no sufficient evidence offered, as the law requires, to warrant the findings of the jury; and

2. The action is barred by the lapse of time.

The jury found the issue in favor of the plaintiff, but the court being of opinion that, upon the facts proved the plaintiff was not entitled to recover, rendered judgment for the defendants, and the plaintiff appealed.

D. M. Furches for plaintiff.

C. H. Armfield for defendants.

SMITH, C. J. While to attach a trust to a legal estate by parol, or to convert a deed absolute in form into a security merely, and perhaps in other cases invoking the exercise of equitable judicial functions for relief, more proof is required than that which preponderates and governs in the trial of ordinary questions of fact, as held in *Ely v. Early,* 94 N. C., 1; *Smiley v. Pearce,* 98 N. C., 185, and in numerous other cases, we think the evidence of the fraud in procuring the deed to be falsely drawn, fully meets the requirements of the rule.

While the plaintiff was not permitted to relate what passed between her father and her husband's father, at the time of the drawing and executing the deed, a witness, one James Byers, who was present, testified that he heard the said John C., when the said Griffin announced his readiness to write the deed, say "he wanted a deed written to the plaintiff for the land in controversy; that he did not want Jesse's name in it, and did not want it made so it would be liable for Jesse's debts; if it was, it would soon be gone, and that to this Griffin Summerlin

(477) replied that he knew how to write it, and that paper and ink were gotten, and they were about writing the deed when he left."

This found corroborative support in proved antecedent declarations of the donor's intention thus to provide for his daughter, and in subsequent declarations of what he understood he had done in carrying out his purpose.

If this evidence be accepted as true by the jury, it afforded full warrant for their conclusion that a false instrument was palmed upon the old man, and his credulity imposed on in executing the deed that was in fact made.

The second objection, resting upon the delay in bringing the suit after the plaintiff's liberation from the disability of coverture, is more serious and difficult.

The defendant, in his first answer, alleges, as a bar to the action, the lapse of *ten years,* and in his amended answer the lapse of *seven years* since it occurred, referring, we suppose, to the limitations prescribed in The Code, secs. 153 and 158. These enactments do not apply, since the present cause of action originated in the false and fraudulent substitution of the *deed in fact made* in place of that *intended by the donor, and which he supposed he was making,* and hence comes under the limitations, if there be such, applicable of the previous law, as declared in section 136.

If it were otherwise, and the present enactment applied, the defense would be unavailable, since the statute did not begin to run against the plaintiff while under disability (sec. 163, par. 4), and as this was removed by her husband's death in July, 1879, the shorter period of *seven years* had not passed when the action was begun in August, 1885.

The former limitations were put alone upon the different forms of actions at law, yet, in analogy, the same limitations, according to the subject-matter, were recognized and enforced when the remedy was sought in a Court of Equity, with the like reservations in favor of persons under disability. *Thompson v. Blair,* 3 Murph., 583; (478) *Falls v. Torrence,* 4 Hawks, 412; *Leggett v. Coffield,* 5 Jones, Eq., 382.

As the present suit belongs to the equitable jurisdiction of the court, and any analogy to be found in the statute determining the periods within which legal remedies must be pursued or rights lost upon a presumption of abandonment, must be, we think, traced to the provision which raises a presumption of abandonment (Rev. Code, ch. 65, sec. 19) after an inaction, unexplained and not rebutted, for the space of ten years. While the operation of this statute is not suspended because of the coverture of one against whom it runs, notwithstanding the disability as decided in *Johnson v. England,* 4 D. and B., 70; *Headen v. Womack,* 88 N. C., 468; *Houck v. Adams,* 98 N. C., 519, yet, when adopted as a measure of time in which an action must be brought, it

must, by reason of the same analogy, be accompanied with the qualification attaching to *all limitations,* and mentioned in section 9 preceding.

This section contains a general saving as to all the statutory limitations, except when penalties are sought to be recovered in favor of any person who, at the time of the accruing of the cause of action, is "within the age of twenty-one years, *feme covert, non compos mentis,*" etc., reserves to such the right to bring the same action within the times as before limited, "after his coming to or being of full age, discovert, of sound memory," etc., as "other persons having no such impediment might have done."

If a statutory limitation can be deduced from the effect as evidence to which is given the force of a presumption of abandonment, and placed as an obstruction in the way of the plaintiff's action, it should be in subordination to the conditions which are annexed and incident to limitations, whenever any as such are prescribed.

But aside from these suggestions, the defendant relies on his averment—first, that ten, and then that seven years have elapsed (479) since the plaintiff's cause of action accrued and before she began—allegations literally true, but which are met by the fact that, during all this period, except a month more than six years, she was laboring under a disability recognizing the former, as well as the present limitation, which arrested the running of the statute at the start, and which, when set in operation, did not run even for the shorter time before she commenced her suit.

The defense therefore fails, and the court erred in ruling to the contrary. The judgment is reversed, and a new trial must be had in the court below; and so it is adjudged.

Error.

Cited: Ellington v. Ellington, 103 N. C., 57; *Alston v. Hawkins,* 105 N. C., 8, 9; *Summerlin v. Cowles,* 107 N. C., 459; *Faggart v. Bost,* 122 N. C., 522; *Wilson v. Brown,* 134 N. C., 405; *In re Dupree's Will,* 163 N. C., 261.

GEORGE W. REEVES ET AL. v. F. J. MCMILLAN, ADMINISTRATOR, ET AL.

Administration—Disbursements—Assets.

1. An administrator has no authority to use the funds belonging to the estate committed to him, to secure or protect the real estate of which his intestate died seized and possessed, without the sanction of those who are entitled to the funds.

2. The "real estate" which the administrator is authorized to lease by section 1413 The Code, extends only to *leasehold* estates which belonged to the intestate.

THIS is a civil action heard by *Clark, J.*, upon exceptions to report, at Spring Term, 1888, of ALLEGHANY Superior Court.

This action is prosecuted by the numerous plaintiffs mentioned in the complaint on behalf of themselves and others next of kin, and as such entitled to share in the distribution of the personal estate of A. B. McMillan, deceased, against the defendant F. J. McMillan, his (480) sole surviving administrator for an account and settlement thereof.

In the course of the action before the clerk of Alleghany County he proceeded to hear the evidence and state an account of the administration, from which it appears the administrator is charged with the aggregate sum of $21,470.76, to be reduced by uncontested vouchers for sums disbursed in the amount of $9,538.72 (by written agreement of counsel filed), instead of $8,591.94 set out in the transcript.

Exceptions taken by both parties were heard and passed upon by the judge, and upon a recommittal for reformation of the report in accordance with the rulings, it was returned amended accordingly and confirmed. The only matter brought up for review relates to the vouchers for expenses incurred in prosecuting a suit to establish title to a tract of land bid off by the administrator, as shown in the report, and are, with the added interest, as follows:

No. 1.

By receipt of G. W. Folk, attorney in sundry cases, 26 May, 1877	$ 60.00
By interest to 17 January, 1888	38.31

No. 2.

By receipt of J. R. Wyatt, sheriff, for cost in Edwards' case, 8 October, 1878	549.00
By interest, 17 January, 1888	305.51

No. 3.

By receipt of R. F. Armfield, attorney, 20 May, 1877	55.00
By interest, 17 January, 1888	35.20

No. 4.

By receipt of J. R. Wyatt, cost Whitted case, 2 September, 1873	92.96
By interest, 17 January, 1888	79.93

(481) No. 5.

By receipt of J. R. Wyatt, for cost, 8 October, 1877....$	93.34
By interest, 17 January, 1888.....	57.40

No. 6.

By receipt of R. F. Armfield, attorney, 19 May, 1877.....	30.00
By interest, 17 January, 1888.....	19.20

The report of the clerk in reference to these expenditures finds the facts following, to wit:

1. That the defendant McMillan bid off the "Archibald or Morgan Edwards and McGrady lands," in his own name, but under a judgment in which his estate was not interested, and prosecuted the suit in his own name, but for the benefit of the estate of A. B. McMillan, for which the costs were incurred as shown by contested vouchers Nos. 1, 2, 3, 4, 5, and 6.

2. That the defendant McMillan purchased said lands, when sold under the Whitted judgment, for the benefit of A. B. McMillan's estate, and that voucher No. 4 is the receipt for the same, taken by him on his said purchase.

Upon the foregoing facts I hold, as a matter of law, that the defendant F. J. McMillan is entitled to credit for said vouchers, to wit, Nos. 1, 2, 3, 4, 5, and 6.

The plaintiffs excepted to this ruling of the court, and the same was reversed by the judge and the charges disallowed, and the defendants appealed.

E. R. Stamps for plaintiffs.
C. H. Armfield for defendants.

SMITH, C. J., after stating the case: The facts found are so meagre and indefinite that we are at a loss to know what considerations induced the defendant's departure from the scope and limit of his official
(482) duties in administering the personal estate, and employ the fund in his hands in the effort to secure the real estate. Certainly he had no legal right thus to use the money that had come into his hands without the sanction of those to whom it belonged, and who were legally competent to give such consent; nor does it appear that any interest of the distributees has been subserved thereby, or they in anywise benefited by the expenditures.

Certainly good faith and generous intention will not excuse the misappropriation of the trust funds to unauthorized objects. The lands descended to the heirs-at-law who may be the distributees, but they, and not the administrator, must look after their interest in them.

The Code, which directs the personal representative to make his "rentings of real property by auction," sec. 1413, has been construed, in using the term "real estate," to refer to leasehold estates in land which an intestate may own, and to confer no power upon him to enter upon and make lease of lands which have descended. *Lee v. Lee,* 74 N. C., 70.

So it has been repeatedly held that the taxes assessed on land after death fall upon the owner, and do not constitute a legitimate item in an administration account, unless with the assent of the party whose distributive share would be lessened thereby, and to such extent only.

There are no facts here which, so far as the record discloses, and we can only know what it contains, tending to explain or to excuse the *devastavit* to the prejudice of the numerous distributees.

There is no error in the ruling, and the judgment must be

Affirmed.

Since the opinion in this case was filed, our attention has been called to an erroneous recital of the amount of the vouchers to which the administrator is entitled as a credit, and counsel of the op- (483) posing parties submit a statement in which the true total sum is admitted to be $18,770.60, made up of $9,231.88, overlooked, and $9,538.74. The mistake originated in the manner of stating the case on appeal, in which the clerk, in stating the account, charges the administrator with $21,970.76, and adds: "I allow him the following sum, as per vouchers filed, $8,591,94," which was understood to be intended to be raised to the sum mentioned in the written agreement of counsel filed.

The correction of thee error is now made by this memorandum, to which we will only add that no detrimental consequences could follow, if allowed to remain, as we only passed upon certain charges excepted to, and, in disallowing them, affirmed the judgment rendered in the court below.

THE TRUSTEES OF NEWTON ACADEMY v. THE BANK OF ASHEVILLE.

Will—Charitable Bequest—Trust—Statute Limitations.

P., in 1845, bequeathed to the trustees of Newton Academy and their successors $1,000, "which sum is to remain in the hands of my son James and his heirs forever, and the lawful interest to be paid annually by my said son James, his heirs and assigns, to the said trustees, to be by them applied to the payment of tuition money for such poor children" as the trustees might designate, and to secure the payment of said interest the testator directed that it should constitute a charge on the real estate

devised to his son James. The interest was paid until 1861, when James died solvent, but his testator became insolvent by the results of the war. He sold the lands charged to divers persons, who have been in open adverse possession since, but no demand had ever been made upon them, or other steps taken by the trustees to secure the fund, until 1884: *Held*,

1. That the bequest was a valid one, and during the life of his son it might have been enforced against the lands charged; after that it was a charge against his personal estate.

2. That the trustees might, within a reasonable time and upon proper application, have had the fund secured for the purposes of the trust, but having neglected for so long a time to enforce any remedies they may have had in that respect, they were barred by the statute of limitations.

(484) THIS is a civil action which was heard before *Boykin, J.*, at August Term, 1888, of BUNCOMBE Superior Court, upon a case agreed.

"The plaintiff is a corporation, created by an act of the General Assembly in 1845, and duly organized in that year, and has existed and acted as such corporation, under the control and management of a board of trustees, from that time until the present.

"The defendant, the Bank of Asheville, is also a corporation, duly chartered and organized under an act of the General Assembly, and authorized to acquire and hold real estate.

"In the year 1845, one James Patton, being seized in fee of the land hereinafter described, died, leaving a last will and testament, which was duly admitted to probate in Buncombe County, and which contained a clause in the following words, to wit:

" 'I give and bequeath to the trustees of Newton Academy, and their successors in office, the sum of one thousand dollars, which sum is to remain in the hands of my son James and his heirs forever, and the lawful interest thereon to be paid annually by my said son James, his heirs and assigns, to the said trustees, to be by them applied to the payment of tuition money for such children of poor parentage as they may deem proper objects in this county, and to the end that payment of the said interest may be properly secured, I desire and direct that it shall constitute a charge upon that portion of my real estate herein
(485) devised to my son James, lying on the southwest side of Main Street in Asheville.'

"James W. Patton, mentioned in the foregoing clause as 'my son James,' paid to the trustees of Newton Academy the lawful interest on said sum of one thousand dollars annually, down to the time of his death, in 1861, but no interest has since been paid. At the time of his death James W. Patton was solvent, but by reason of the loss of his slave property, occasioned by the result of the war, his estate at the end of the

war had become insolvent. The executors of his will, who were duly qualified immediately after his death, were never called on either for said one thousand dollars or the interest thereon, nor have any proceedings been instituted against them or the heirs of said James W. Patton to recover or secure any portion of said principal sum or the interest thereon. The heirs of said James W. Patton have not inherited any property from their said ancestor.

"Long prior to his death, and when he was amply solvent, James W. Patton sold and conveyed, for valuable consideration, said land in lots of different sizes to divers persons, under whom the defendants claim, who had no notice in fact that the same had been charged with or were in any way liable for the payment of the said one thousand dollars or the interest thereon, and the defendants, and those under whom they claim, purchased the lands now occupied and possessed by them, respectively, for full value and without notice in fact of any lien, charge or claim of the plaintiffs or other person, by reason of the matters aforesaid, or otherwise. And the said defendants and those under whom they claim have been in the open, notorious and uninterrupted adverse possession, under colorable titles and up to known lines and visible boundaries, of said lands for more than seven years, over and above the time during which the statute of limitations did not run; and no claim or demand was made by the plaintiffs, or by any one for them, upon the defendants or those under whom they claim for any interest (486) upon said one thousand dollars or for any part of said principal sum until just before the bringing of this action.

"It is admitted that although more than one thousand dollars of the money of James Patton went into the hands of his son James W. Patton, as the executor, of his will, upon the death of the former in 1845, and the said James W. Patton paid interest on the sum of one thousand dollars, as hereinbefore stated, yet the said one thousand dollars was never in fact set apart for the benefit of the plaintiffs, or other persons, and has not been otherwise in existence since the death of James Patton in 1845.

"The defendants own in unequal portions the lands described in the complaint and on which the plaintiffs claim a lien, and said lands are situate on the southwest side of Main Street in Asheville, and are the lands embraced in the clause of James Patton's will, hereinbefore recited. It is agreed that if said lands are subject to a lien or charge in the hands of the defendants for the payment of either the principal or interest thereon, to the plaintiffs, of said alleged legacy of one thousand dollars, and that shall be the final judgment of the court, the cause shall be retained for an equitable adjustment under the direction of the

court, upon reference or otherwise, of the respective equities between the defendants, growing out of questions referring to the relative values of the land owned by them respectively, by reason of improvements thereon, and other equitable considerations. If the court shall be of opinion with the plaintiffs upon the foregoing facts, it is agreed that the court shall declare the lien a charge and also fix and determine the amount of interest, if any, now due, which shall be apportioned among the defendants in accordance with their respective equities, to be hereafter ascertained as hereinbefore provided.

"It is further agreed that the pleadings in this cause shall be
(487) deemed to have put in issue all the material facts aforesaid.

"It is further agreed that nothing hereinbefore stated shall be held to exclude the fact of such notice of plaintiffs' alleged equity as the law shall imply from the record of the will of James Patton, but it is admitted that defendants have never had actual notice thereof in fact."

The court being of opinion with defendants, rendered judgment accordingly, from which plaintiffs appealed.

Charles A. Moore for plaintiffs.
No counsel for defendants.

DAVIS, J. The endless variety of forms in which the last wills of testators find expression, especially when efforts are made to provide for future and often remote contingencies, will render the construction of wills an ever recurring source of difficulty to courts.

In the case before us we do not understand that any question was made as to the validity of the gift of $1,000 to the "trustees of Newton Academy," nor is there any question as to the relation that the testator's "son James" sustained to the gift, but the difficulty grows out of that part of the clause which seeks to make the gift perpetual to "his heirs forever," and to *secure the payment of the interest* by a charge upon that portion of the real estate mentioned in the clause.

The trust was a valid one, as is settled by many authorities, and during the lifetime of James Patton, the son, the provision in relation thereto could have been enforced against him, and after his death, undoubtedly, the "trustees of Newton Academy" might have had the $1,000 secured in such way and under such orders and decrees of the court, in respect thereto, as would have given effect to the testator's intention, and secured the *corpus* of the gift and the accruing
(488) interest thereon, for the purpose named in the will. Not only so, but an action might have been commenced "at the suggestion

of two respectable citizens," and the court might have made such orders and decrees as were best calculated to give effect to the trust.

Section 2342 of The Code (Rev. Code, ch. 18; Rev. Stat., ch. 18; 43 Eliz., ch. 4) enacts that "when real or personal property may have been granted by deed, will or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust to deliver in writing a full and particular account thereof to the clerk of the Superior Court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts," and the section following provides the manner in which a compliance with this duty may be enforced, and while the trust itself is not void, because the objects of it are sufficiently certain (*Griffin v. Graham,* 1 Hawks, 96; *S. v. McGowan,* 2 Ired. Eq., 9; *Miller v. Atkinson,* 63 N. C., 537, and cases there cited), and while the courts would, upon proper application and within a reasonable time, make necessary orders and decrees to give it effect and secure the fund, and this from time to time, and as often as necessity might require; yet, being a gift of money, in the very nature of things, the *method* of giving perpetual effect to it, namely, that it should remain in the hands of his "son James and his heirs forever," attempted to be provided by the testator, must be inoperative, certainly after the death of James. The gift was personal property, held in trust; it did not *descend* to the heirs of James. He was solvent at the time of his death, and his estate did not become insolvent till the end of the war. He died in 1861. No effort was made to secure the principal sum of $1,000; that was lost, and lost, as appears, by the laches of those whose duty it was at least to receive the interest, and to see that the principal (489) was properly secured upon the death of James. In the view we take of it, it is immaterial to consider whether the *principal* sum of $1,000 or only the *interest* constituted a charge upon the land. After the death of James the $1,000 and accrued interest were primarily charges upon his personal estate. Upon the loss of the principal, the interest of course ceased. The defendants, and those under whom they claim, were purchasers—not in any sense trustees—and though, after the death of James Patton, it may be that upon a failure of personal assets, they could have been held liable as purchasers, affected by notice of the charge contained in the will of James Patton, through which they had to trace their title; yet their possession being "open," notorious and uninterrupted," the plaintiffs were required "to act as upon an asserted adverse title," and having failed to bring the action in time, the bar of statute applies. Wood on Limitations, secs. 213 and 200 and note.

Lapse of time may be a bar even against *cestui que trusts,* when by adverse acts the relation of trustee is denied. Perry on Trusts, sec. 745.

"It is the province of a court of equity," says *Henderson, J.,* in *Thompson v. Blair,* 3 Murph., 583, speaking of the statute of limitations, "to infuse its spirit into their decisions as much as can be done without violating its fundamental maxims."

The case before us is unlike that of *Foscue v. Foscue,* 2 Ired. Eq., 321, and many similar cases in which persons deriving title from trustees with *fraudulent* knowledge of *dereliction* of duty on the part of the trustees, are not allowed to set up the *legal* title and possession thereunder as a bar to defeat the person really entitled. See *Taylor v. Dawson,* 3 Jones Eq., 86; *Blake v. Lane,* 5 Jones Eq., 412; *Herndon v. Pratt,* 6 Jones Eq., 327.

Here there was no pretense of fraudulent purpose, either on the part of vendor or of the vendees.

Affirmed.

Cited: Keith v. Scales, 124 N. C., 511; *Bradford v. Bank,* 182 N. C., 233.

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(490)

A. B. ALLISON ET AL. v. W. W. WHITTIER, EXECUTOR OF CLARK WHITTIER ET AL.

Appeal—Undertaking—Notice—Res Judicata—Judicial Discretion—Vacating Judgments.

1. The omission of the proper penal sum in an undertaking on appeal will not be considered such a fatal defect as to authorize the court to dismiss the appeal in the absence of the notice required by the Act of 1887, ch. 121; nor will the omission of the clerk to insert in the transcript of the record the fact that the appeal was taken, if it appears in the case on appeal.

2. The proceedings of a court are *in fieri* until the close of the term, and the judge may, in the exercise of his discretion, without notice and without finding and stating the facts upon which he bases his action, at any time during the term, vacate, modify or reverse anything done therein; and the exercise of such power is not reviewable, unless, perhaps, it should be made to appear it had been grossly abused and resulted in oppression.

3. Where an application is made to a judge at chambers, or at a term subsequent to that in which a judgment was rendered, to set it aside on the ground of mistake, inadvertence, surprise, or excusable negligence, notice

must be given to the adverse party, and the judge must find the facts upon which he bases his ruling, to the end that it may be reviewed on appeal.

4. The principle of *res judicata* does not extend to ordinary incidental motions and orders in a cause, though it does operate when the ruling affects a substantial right subject to review in the appellate courts.

THIS is an appeal from an order made by *Boykin, J.*, setting aside a judgment at Fall Term, 1888, of SWAIN Superior Court.

The action was instituted on 27 April, 1886, by J. B. Allison against Clark Whittier, to pursue and enforce a trust upon land bought by one R. V. Welch, under an agreement with the former that they were to be equally interested in all such land as they, or either one of them, might buy in certain named counties, and by said Welch, who had taken title to himself, conveyed to the said Whittier. The original (491) parties having died pending the action, the heirs of the plaintiff and the executrix, executor and devisees of the defendant, who are very numerous, were successively made parties in place of those deceased—the latter, who were nonresidents, by publication.

Thereafter, at Spring Term, 1888, of the Superior Court of Swain, the substituted plaintiffs filed an amended complaint, referring to the original complaint as containing the cause of action, and setting out the relations of the defendant thereto, when the following order was entered:

"Defendants allowed sixty days in which to file their answer."

No answer was put in during the limited time, but was filed with the clerk on 3 October, 1888, in which the allegations of the complaint are denied, as well as every equity arising out of the facts stated.

At the succeeding two weeks term, held on the ninth Monday after the first Monday in September, judgment by default final was rendered, the court refusing to extend the time and allow the answer to be filed upon the affidavits offered in explanation of the delay, and attributing it to the oversight of counsel, and the facts were therein declared as they are set out in the complaint, and adjudging to the plaintiffs the relief demanded as cotenants entitled to one undivided sixth interest in the tract of land of 50,000 acres designated. Thereupon a motion to set aside the judgment was made, and refused by the judge.

Again, later in the term, "after the close of the docket," in the words of the case sent up on appeal of the plaintiffs, "and after the plaintiffs' counsel had left the court, and while the judge was still present at the court, the judge, on motion of the defendants' counsel, granted an order upon the grounds of discretion, striking out the judgment and allowing the defendants sixty days in which to file an answer." From this ruling plaintiffs' counsel, as soon as advised of it, appealed (492) to this Court.

F. C. Fisher for plaintiffs.
A. M. Fry, Chas. A. Moore and G. A. Shuford for defendants.

SMITH, C. J., after stating the case: Upon the calling of the cause the defendant submitted a motion to dismiss the appeal, assigning as grounds therefor:

1. For that the record fails to show that any appeal was entered in the court below; and

2. For that the penal sum mentioned in the undertaking without any authority for the reduction, is fifty dollars instead of $250, specified in The Code, sec. 552.

Neither of these reasons require us to refuse to entertain the appeal and pass upon the assigned errors. It is the duty of the clerk to perfect his record in reference to the taking the appeal, and his omission to make the memorandum of an appeal taken and prosecuted to this Court cannot be allowed to defeat it, as we have already said in passing upon a similar objection in another case disposed of at the present term (*Fore v. W. N. C. R. R. Co., post,* 526). The other objection cannot prevail, because the notice required by the act of 1887, ch. 121, of the motion has not been given. We have in a recent case (*Bowen v. Fox,* 98 N. C., 396) put a construction on the words of the statute that covers this defect. It is there said that the General Assembly "had confined this remedial legislation to cases of irregularity in the instrument, such as an *insufficient penal sum,* and a deviation in other particulars of its provisions from the statute, and for want of verification. The motion must therefore be denied."

(493) In the argument of appellants' counsel at the hearing before us, the result of a careful study and examination of authorities as shown in the brief, several reasons are assigned for a revisal of the judgment complained of, to wit:

1. For that no notice of the proposed motion was given to the plaintiffs or their counsel.

2. For that no facts are found upon which the action in vacating the first judgment is based, so that it can be seen whether a *legal* instead of an arbitrary discretion has been exercised; and

3. For that the matter was *res adjudicata* by the first ruling against the defendants' motion.

These propositions will now be considered.

1. It is a settled rule that the court retains control of cases pending at any term for its action, and may recall, reverse, or modify anything done previously before its close. Until its termination everything is *in*

fieri, and this liability to correction or revocation underlies any action it may have taken in the cause. It involves an exercise of discretion unrestrained by what may have been previously done, and its efficacy depends alone upon the legal capacity of the judge to do the act, and this alone is open to an inquiry in the reviewing court. Of this litigants and counsel are required to take notice, and nothing is done beyond recall until the *session* ends with the completion of the business.

In the language of this Court, in *Branch v. Walker,* 92 N. C., 87, spoken in reference to the power of a presiding judge, "the action was not *ended* when the judgment was entered. The record stood open for motions like the one before us, and other motions that might be made, and it was the duty of counsel to give them attention, when made, as occasion might require, until it should be ended." And again it is added, "neither the defendants nor their counsel were required to take notice of judgments and entries made after the *judge had left the courthouse for the term;* on the contrary, they might reason- (494) ably infer that no business would be done after the judge left."

As, then, the appellants' counsel knew that the power resided in the court during the term to reconsider and reverse its action for reasons satisfactory to itself and subservient to the interest of a party, injuriously and wrongfully affected, it was not necessary to give notice of the second motion favorably responded to in setting aside the judgment by default.

The cases cited in the brief of appellants are none of them cases where the motion was made during the same term, but either at a subsequent term or before the judge at chambers, and of course notice was then an indispensable prerequisite. The circumstances under which the judge was induced to reverse his first ruling and reopen the case do not appear, unless upon a reconsideration he deemed himself to have acted erroneously, and desired promptly to correct his error to prevent a wrong; but when practicable and in fairness notice should be given, not, however, as a legal duty to the adverse party, so that he could be heard upon the question of the proposed reversal. In this case it would seem to have been almost impracticable to give such notice without a needless prolongation of the term, and while the plaintiffs simply lose the advantage of a summary judgment and are free to prosecute their action as before, the defendants would be deprived of all defense to the claim if the judgment were allowed to stand, however meritorious and sufficient it might be shown to be at the trial. *Erwin v. Lowery,* 64 N. C., 321.

2. As the act complained of was, and is so declared to be in the case, the exercise of a discretion reposed in the presiding judge, not resting

upon any assumed legal principle, it was not necessary to find the facts, and in this particular is like the setting aside a disapproved jury verdict.

(495) The facts must be found to enable this Court to revise the ruling, when application is made to have a judgment set aside at a term subsequent to that in which it was entered, under section 274 of The Code, because of "mistake, inadvertence, surprise, or excusable neglect," whereof the adverse party is not bound to take notice, and consequently it must be given him of the intended application. In *Dick v. Dickson,* 63 N. C., 488, a motion was made and allowed at a subsequent term to set aside and strike out a judgment previously rendered, the judge "being of opinion that he had control of the case, and could shape it by such direction as he thought justice required." Upon the appeal the ruling was approved, and this Court said: "As to the power of the court to set aside judgments by default, we entertain no doubt, and *we have nothing to do with the exercise of its discretion.*"

The appellants contend that this discretion must be a *legal* and not an *arbitrary discretion,* and that its abuse may be the subject of review and correction by appeal. There are cases where this proposition is asserted—cases determined in other states—and there are expressions of like import found in opinions delivered in this Court, when the action of the judge is found to be oppressive and unjust, and repugnant to the legal rights of others. *Rodman, J.,* in *Moore v. Dickson,* 74 N. C., 423; *Bynum, J.,* in *S. v. Lindsey,* 78 N. C., 499.

Referring to the same subject, in deciding the appeal in *Long v. Gooch,* 86 N. C., 709, this language is used, "nor does it become us to say *under what circumstances, if any such case be anticipated,* this court would be constrained to interfere in the management of a cause committed to the judge who conducts it, but certainly no abuse of his discretion is disclosed in the record before us."

If the case was one requiring the facts to be found, it is a sufficient answer to say the appeal was taken from the order setting aside the judgment, and giving further time for an answer, that is upon

(496) the assumption of an unauthorized power—one under the circumstances denied to the judge.

3. The maxim expressed in the term *res judicata* is not involved in the present case; it is not one judgment rendered contrary to another, but the substitution of one for another, while the whole matter is before the court and under its control. To deny the right to do this, is to place the hasty and inconsiderate action of the court beyond the means of correction and remedy, however urgent might be the demand for it upon further reflection, or upon fuller information, and this, too, while the entire subject matter is under control, or, as it is said to be, *in fieri.*

"The principle of *res adjudicata* does not," says this Court, "extend to ordinary motions incidental to the progress of a cause, for what may one day be refused may the next day be granted, but it does not apply to decisions affecting a substantial right, subject to review in an appellate court." *Mabry v. Henry,* 83 N. C., 298. Numerous references in the elaborate brief of appellants' counsel, to cases decided elsewhere, will, we think, upon examination, be found not to be in conflict with the views expressed in this opinion, and whatever apparent differences are seen to exist in those adjudications, to result from differences in the systems of judicial procedure.

There is no error, and the judgment must be

Affirmed.

Cited: Coor v. Smith, 107 N. C., 431; *Harper v. Sugg,* 111 N. C., 327; *Edwards v. Phifer,* 120 N. C., 407; *S. v. Chestnutt,* 126 N. C., 1122; *Hardy v. Hardy,* 128 N. C., 180; *Bird v. Bradburn,* 131 N. C., 489; *Abernethy v. Yount,* 138 N. C., 348; *Bank v. Peregoy,* 147 N. C., 295; *Hatch v. R. R.,* 183 N. C., 625.

T. L. FRANCIS AND JOSIAH FRANCIS v. J. P. HERREN ET AL.

Deeds—Registration—Creditor—Injunction—Receiver—Lien—Purchaser—Execution—Exoneration.

1. The statute—Laws 1885, ch. 148—in relation to the registration of deeds, etc., will be construed in accordance with the principles adopted in the construction of the other statutes—The Code, secs. 1254 and 1275—in respect to deeds in trust, conditional sales, etc.

2. The failure to register the instrument does not make it void, or authorize creditors to treat it as such in a collateral proceeding, but only when it is interposed against any proceeding they may institute to subject the property to the satisfaction of their debts will it be declared a nullity.

3. The principle in equity which will require a creditor having a lien on lands, some of which have been sold by the debtor since the lien attached, to resort to the unsold part before the other can be subjected to the satisfaction of his debt, will never be extended so far as to interfere with his rights under his lien, or impose unreasonable delay or litigation and expense in the enforcement of his remedies.

THIS is a civil action, which was tried before *Boykin, J.,* at Fall Term, 1888, of HAYWOOD Superior Court, upon exceptions to referee's report.

The case presented in the complaint is this:

In pursuance of an agreement entered into between the plaintiff T. L. Francis and the defendant J. P. Herren, and reduced to writing, the latter and his wife M. J. Herren, on 20 November, 1886, executed a bond—the said M. J. Herren being privily examined and giving her assent thereto—covenanting therein, upon payment of the purchase money, to make title to a certain described tract of land in the county of Haywood.

The plaintiff, immediately after the execution of the bond for title and after ascertaining the location and boundaries of the land
(498) by actual survey, entered thereon and has since held absolute, notorious and open possession, claiming under his purchase.

The bond for title, upon proof of execution and after the private examination of the *feme* obligor, as required in conveyances of real estate, was, on 7 March, 1888, duly admitted to registration in the county aforesaid, and the payment of the whole purchase money made on or about 19 March, 1887, when a demand for a deed for the premises was made and refused.

Divers judgments were recovered by creditors against the vendor, J. P. Herren, and docketed in the Superior Court of Haywood, intermediately between the execution and registration of the bond, which are specified in detail, and the plaintiffs in which are made defendants in this action, under executions issuing, on many or all of which the sheriff is proceeding to make sale in order to their satisfaction. The plaintiff, after specifying certain real and personal estate belonging to the debtor and liable to his debts, and among such, notes, bonds, money and accounts, demands the cancellation of certain instruments, made, it is asserted, to defraud creditors; the appointment of a receiver to take charge of said property and apply the same to the judgment liens in exoneration of the land so bought by the plaintiff; the issue of an order to the sheriff restraining him meanwhile from selling said land, until the debtor's other property can be thus applied, and for general relief. Such is the general scope and purpose of the action, the answers to which, put in by the vendors and the creditors, denying imputations of fraud, it is unnecessary to give in detail.

The cause was referred, at Spring Term, 1888, to J. C. L. Gudger and W. L. Norwood, to state and report "an account of all the moneys, rights and credits, choses in action, lands and tenements, bonds for land or other interest, either in law or equity, the said J. P. Herren and M. J. Herren had or claimed at the commencement of this action, or
(499) now have or claim, and also what property they have disposed of

since the execution to the plaintiffs of the bond for title," and the interlocutory order or injunction before issued continued to the hearing.

The referees made their report at Fall Term, 1888, with the voluminous evidence taken during their sittings, with their findings of fact and conclusions of law as follows:

1. That on 14 July, 1876, the defendant J. P. Herren purchased from J. C. Smathers a tract of land on Raccoon Creek in Haywood County, containing two hundred and thirteen acres more or less.

2. That at the time of the sale by Smathers to J. P. Herren, they estimated the land at the sum of two thousand dollars, and that the conveyance was made to Herren upon his paying to Smathers $1,000, the remaining $1,000 not being required to be paid in consequence of the fact that Herren had married the daughter of Smathers, he, Smathers, intending in this way to benefit his daughter by making this conveyance to her husband.

3. That on 12 October, 1886, the plaintiff Leroy Francis and the defendant J. P. Herren entered into the contract for the sale of a portion of said land to said plaintiff, which contract is set forth in the complaint.

4. That in pursuance of said contract a survey and computation of the area was made, and the lands embraced in the contract were ascertained to contain one hundred and thirty-six and seven-tenths acres, and on 20 November, 1886, the defendants J. P. and M. J. Herren executed their bond for title to the plaintiffs Leroy and Josiah Francis, for said tract of land, for the sum of $25 per acre.

5. That the purchase money for said land was fully paid by plaintiffs to the defendant J. P. Herren, by February, 1887.

6. That at the time of the execution of the said bond for title (500) there existed as liens against said property a judgment in favor of Carhart & Co., against one A. L. Herren and the defendant J. P. Herren as stay, for the sum of one hundred and twelve dollars and sixty-one cents, and $1.85 costs, and one judgment in favor of officers of court against J. P. Herren for $4.98.

7. That the mortgage executed to H. N. Wells, chairman of the board of county commissioners, for the sum of $2,500.00 (Exhibit "D" of the complaint), has been fully satisfied.

8. That all the other judgments mentioned in the complaint were docketed subsequently to the execution of the said bond for title, and before the registration of the same.

9. That on 4 August, 1884, the defendant J. P. Herren bought from the county of Haywood the old courthouse and lot, and took the bond for title to same, signed by the board of county commissioners for said

county; and on 10 September, 1887, said Herren assigned the said bond to his wife, the defendant M. J. Herren.

10. That of the purchase money for said courthouse lot ($701) the sum of $377.68, with interest on $314.15 from 12 September, 1887, and $19.24 costs, is still due and unpaid.

11. That on 20 January, 1886, the defendant purchased a lot back of and adjoining the said courthouse lot, from J. K. Boone, for $85.

13. That on 21 September, 1887, the said defendants J. P. and M. J. Herren executed to Israel Whitehill a mortgage deed upon the courthouse lot to secure the sum of six hundred and seventy-eight dollars and forty cents, with interest from that date, which mortgage was registered on 22 September, 1887.

15. That on 1 January, 1887, the defendant J. P. Herren was the owner of a tract of land, part of his purchase from J. C. Smath-
(501) ers, made in 1876, which on the said day, the said J. P. Herren and wife, M. J. Herren, sold to W. P. Underwood, and gave their bond for title upon the payment of $1,116.75; said bond was filed for registration 13 June, 1887, and was registered in the register's office of Haywood County on 10 March, 1888, and said tract contains forty-nine and five-eighths acres.

22. That the assignment by the defendant J. P. Herren to his wife, M. J. Herren, on 10 September, 1887, of the bond for title for the courthouse property was so made in order to reimburse her for her supposed interest in the lands conveyed to said J. P. Herren by J. C. Smathers in the year 1876, and which said Herren had sold.

25. That on 16 January, 1888, the defendant J. P. Herren sold a stock of goods to one T. W. Davis for the sum of $1,140, and at the same time took his notes for $1,000 of the price of said stock, payable to the defendant, M. J. Herren, in order to indemnify her against loss by reason of her having joined in the mortgage to Whitehill on 21 September, 1887, of the courthouse property.

29. That the real estate included in the testimony and claimed or owned by defendants J. P. and M. J. Herren is worth as follows:

One-seventh of E. B. Herren's farm	$1,428.57
One-seventh of National Hotel lots	500.00
Courthouse proper and back lot	3,000.00
Land bonded to W. P. Underwood	1,116.75
Land bonded to plaintiffs	3,417.50
No evidence as to one-half of tan-yard lot	
Aggregating	$9,462.82

From the foregoing facts, we conclude as matter of law:

1. That the defendant M. J. Herren did not take any interest, either legal or equitable, in the Turner lands sold by J. C. Smathers to the defendant J. P. Herren, as against purchasers for value (502) and creditors.

2. That the assignment of the bond for title to the courthouse property, made by J. P. Herren to the said M. J. Herren, was voluntary, and was without value or legal consideration, and is void as to creditors.

3. That the notes given by T. W. Davis for the stock of goods are the property of J. P. Herren, so far as the rights of creditors are involved, there having been no consideration moving from her, M. J. Herren, but, on the contrary, the notes having been given for the goods of J. P. Herren.

4. That the paper writing signed by J. P. Herren, and copied in the 21st finding of fact, does not operate either as a release or a conveyance of the said J. P. Herren's interest in the lands descended from the late E. B. Herren, and that said J. P. Herren is the owner in fee of one-seventh of all the lands so descended from said E. B. Herren, his father.

The defendants J. P. Herren and M. J. Herren excepted to the report of the referees filed in this cause:

1. That the defendant J. P. Herren excepts to the 5th finding of fact by said referees, as the same is contrary to evidence.

2. That the defendants J. P. Herren and M. J. Herren except to item 15 of said report, as the evidence shows that M. J. Herren was the equitable owner of one-half the tract of land sold to W. P. Underwood.

3. That said defendants except to the first finding of law by referees, as the same is erroneous in law.

4. That said defendants except to the second conclusion of law, as the same is erroneous.

5. That the third and fourth conclusions of law by said referee are erroneous.

The court rendered the following judgment:

"This cause coming on to be heard upon the report of the (503) referee, and the exceptions of the plaintiffs and the defendants filed thereto, and being heard, it is now considered and adjudged, that the exception of the plaintiffs be and the same is hereby overruled; and it is further considered and adjudged, that the first exception of the defendants J. P. Herren and M. J. Herren be sustained, and the second, third, fourth and fifth exceptions filed by said defendants be and the same are hereby overruled; and it is further considered and adjudged, that the defendant J. P. Herren is the legal owner of the tracts of land

on Raccoon Creek, in Haywood County, North Carolina, known as the 'Turner Farm,' and which the plaintiffs and W. P. Underwood hold contracts for sale and bond for title; and all judgments docketed prior to the registration of the contracts for sale and bonds for title are liens on said lands; also, that the said J. P. Herren is the owner in fee simple of one-seventh undivided interest in the tract of land in Haywood County known as the 'E. B. Herren Farm'; and also one-seventh undivided interest in the town lots, in the town of Waynesville, known as the 'National Hotel lots,' and also one-seventh of one undivided half interest in twelve acres of land near the town of Waynesville, known as the 'Tan-yard Lot'; and that the judgments mentioned in the complaint constitute a lien on the same; also, one lot in the town of Waynesville, back of the old courthouse lot, being the same purchased by J. P. Herren from J. K. Boone, and that the said judgments constitute liens upon the same according to the priority of their docketing, subject to the balance due on the mortgage of J. M. Moody.

"It is further considered and adjudged, that the defendant J. P. Herren is the equitable owner of the lot in the town of Waynesville, and the improvements thereon, known as the old courthouse lot, and that said judgments constitute a lien upon the same, according to the priority of their docketing, subject to the payment of balance due to the
(504) board of commissioners of Haywood County of the purchase money for the same; and also balance of the debt to W. E. Weaver and George A. Shuford, after admitting the credits set forth in the said referees' report; and also that the said J. P. Herren is the equitable owner of one undivided seventh interest in the two hundred acres of land on Raccoon Creek, being a part of the 'E. B. Herren Farm,' on which his homestead has been set apart; and it is further considered that the said J. P. Herren is the owner of the personal property, notes, judgments, accounts and choses in action mentioned in referees' report, including the notes of T. W. Davis and one hundred dollars deposited with G. H. Smathers, which were not included in his personal property exemptions, set apart to him by the sheriff of Haywood County.

"It is further considered and adjudged, that the mortgage executed to H. N. Wells, chairman of the board of county commissioners, for the sum of two thousand five hundred dollars, and filed with the plaintiffs' complaint as Exhibit 'D,' has been fully satisfied, and the board of commissioners of said county are ordered and directed to cancel the same of record.

"It is further considered, ordered and adjudged, that the judgment creditors of J. P. Herren, who are parties to this action, may, and they are hereby directed, first, to sell all the legal estate of the said J. P.

Herren outside of the 'Turner Farm,' bonded to the plaintiffs and James Underwood and W. P. Underwood, except that portion which has heretofore been laid off and set apart to J. P. Herren as his homestead.

"It is further ordered, adjudged and decreed that the real estate in which the said J. P. Herren has an equitable estate as in this judgment declared, to be sold subject to his homestead, and the proceeds of the sale of the lot known as the courthouse lot shall be applied, 1st, to the payment of the debt due the board of commissioners of Haywood County, being the balance of the purchase money. 2d. Then to the discharge of the balance of the said debt due to W. E. Weaver (505) and G. A. Shuford, secured by said deed of trust to J. M. Moody, and then to the discharge of said judgments according to priority of their docketing, and that the proceeds of the sale of the said J. P. Herren's equitable interest in the other lands as herein declared shall be applied to the payment of said judgments according to the priority of their docketing, and Geo. A. Shuford is hereby constituted and appointed a commissioner of this court to make said sale."

[He was also appointed receiver, with the usual powers, of the personal property, etc.]

"It is further ordered and adjudged, that the restraining order heretofore granted against J. P. Herren and M. J. Herren be continued until the further orders of this court, except such property as has heretofore been set apart as the personal property exemptions and homestead of the said J. P. Herren.

"It is further ordered, adjudged and decreed that W. B. Carhart and W. E. Carhart, trading as Carhart & Co., be restrained from selling under execution until the property of A. L. Herren is exhausted, and until the further orders of this court.

"It is further ordered, adjudged and decreed that the said" (other judgment creditors, naming them) "be restrained and enjoined from selling under execution the land known as the 'Turner Farm,' contracted to be sold to the plaintiffs, and for which they hold bond for title, until the other property of the said J. P. Herren is exhausted, and until the further orders of this court; and that J. M. Moody, trustee, be enjoined from selling under the deed of trust to him executed until the further orders of this court.

"It is further ordered and adjudged, that the board of county commissioners of Haywood County be restrained from selling the courthouse lot until the further orders of this court, and that they also be enjoined from selling under execution any of the lands for (506) which the plaintiffs hold J. P. Herren's bond for title until after the other property of said J. P. Herren is exhausted, and until the further orders of this court.

"It is further ordered, that the referees, J. C. L. Gudger and W. L. Norwood, be allowed one hundred dollars each, and the commissioner and receiver is hereby directed to pay said allowance out of the first moneys which shall come to his hands, the said allowance to be taxed as costs, and abide the result of the final decree in this cause."

From this judgment both parties appealed.

G. S. Ferguson for plaintiffs.
George H. Smathers and George A. Shuford for defendants.

SMITH, J., after stating the case: By an act of the General Assembly, passed at the session of 1885, ch. 148, it is provided that "no conveyance of land *nor contract* to convey or lease land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county wherein the land lieth," with certain qualifications not pertinent to the present case.

Two of the judgments held by defendants were docketed before the making of the contract with the plaintiffs, according to the referees' finding—one in favor of Carhart & Co. for $112.61, and costs, against A. L. Herren and the defendant J. P. Herren, as a stay thereto, and the other in favor of the officers of the court for $4.98, against the latter alone, for costs incurred by him.

The other numerous judgments reported were docketed after
(507) the making the contract, but before the registration of the bond on 7 March, 1888.

Under the statute, therefore, all the docketed judgments have a preferable lien to that acquired by the plaintiffs by the registration of their bond. Some criticism was made in the argument upon the words of the statute, which its construction, in our opinion, does not warrant, and we must give it an import and scope commensurate with similar language employed in reference to mortgages and deeds in trust—The Code, sec. 1254—and to conditional sales of personal property—section 1275.

The want of registration does not invalidate the instrument so that creditors, *merely as such,* may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. *Boyd v. Turpin,* 94 N. C., 137; *Brem v. Lockhart,* 93 N. C., 191.

The present action, which proposes to require that the creditors, having acquired a prior lien upon the land embraced in the contract of

sale to the plaintiffs, shall exhaust all the other property of the debtor liable to his creditors before proceeding to sell under the executions in the sheriff's hands, is based upon the equitable principle thus enunciated by *Bynum, J., in Jackson v. Sloan,* 76 N. C., 306:

"It is an analogous principle of equity that when a debtor, whose lands are encumbered by a judgment lien, sells one portion of it, the creditor who has a lien upon that which is sold and upon that which is unsold, shall be compelled to take his satisfaction out of the undisposed of land, so that thus the creditor and the purchaser both may be saved"—citing several authorities, to which may be added 2 Story Eq. Juris., sec. 1233 a.

But upon this is put the restriction mentioned in the opinion (508) and following the words quoted: "But this is never done when it *trenches on the right or operates to the prejudice of the party entitled to go upon both funds,*" fortified also by cited cases.

Thus far, and no farther, does the doctrine go which puts one fund in front of the other, so that without disturbing priorities levied to secure the application of both to the secured debts.

But the creditor may not be delayed or needlessly obstructed in the adjustment of the equity between the other creditor and himself. Now the present suit, utterly ignoring the limits of the equity, seeks to suspend the action of the judgment creditors, until all the estate of the debtor J. P. Herren has been ascertained and applied to the preferred creditors, and this is accordingly done by the exercise of the restraining power of the court, the results of which will be manifest from the inquiries prosecuted before the referees and their findings shown in their report. The controversy is thus made to involve the settlement of the estate of a living party among his judgment creditors, and in which numerous disputes have arisen as to the validity of the debtor's title to some of the property claimed by others, and the amount of debts due and owing to him, which may be difficult of adjustment and cause long delay, those having a direct and expeditious remedy under execution are to be kept back and not allowed to assert their legal rights. The controversies that have sprung up are mostly among the defendants themselves, and inuring to the plaintiffs' benefit only as it prevents the immediate sale of the land purchased by them, but whose title is in subordination to the creditors' judgment liens.

The only relief open to the plaintiffs is not in an interruption of the executions, but in a mandate requiring the sale of such property as the debtor has and is subject to execution to be made, before proceeding to the sale of the land sold to the plaintiffs, and this (509) without hindrance in the prompt making of the money due the execution creditors.

All the directions in the judgment that go beyond this limit are unauthorized, and must be reversed. There should be no restraint imposed upon any of the defendants, except as they may be applied by the requirement that the sheriff postpone the sale of the plaintiffs' land until he has first disposed of property of the defendants which he may rightfully seize and sell, and which are not under lien to others, and this without a determination of the conflicting claims of the debtor and others to any portion of it. This dispenses with an examination of the various exceptions of different parties, and disposes of the action. The affidavit is insufficient to warrant the issue of the writ of *certiorari*. The judgment, except in the allowance to the commissioners, must be reversed, and the case proceed in accordance with the law declared in this opinion.

Error.

Cited: Stancill v. Spain, 133 N. C., 80; *Trust Co. v. Sterchie,* 169 N. C., 24; *Realty Co. v. Carter,* 170 N. C., 7, 266.

J. B. PENLAND v. W. H. LEATHERWOOD.

Execution—Levy—Application of Proceeds of Sale—Pleading—Damages.

1. Where the cause of action alleged was that the plaintiff became entitled to the possession of personal property sued for by virtue of the levy of executions issued to him as an officer: *Held*, not to be necessary to set forth in the complaint the process under which the seizure was made.

2. When a levy is made upon personal property the officer making the levy thereby acquires a special property therein, which he holds for the purpose of satisfying the execution in his hands, and after that has been done he should apply the remainder of the proceeds of the sale to the satisfaction of other executions in his hands at the time of the sale.

3. If personal property has been seized by one officer under execution, another officer, having executions also, may make a second or constructive levy, by going to the property and endorsing his levy, on his process, but he has no right to take possession until the first levy is satisfied; but it is the duty of the first officer, having notice of the subsequent levy, to apply any surplus proceeds of his sale to the executions so afterwards levied.

4. Where there has been more than one constructive levy they should be paid off in the order of the time they were made.

5. The measure of damages, in an action for the conversion of property seized under execution, cannot exceed the amount of the executions, principal, interest and costs, which were entitled to be satisfied therefrom.

THIS is a civil action, which was tried before *MacRae, J.*, at (510) Spring Term, 1888, of HAYWOOD Superior Court.

The plaintiff alleged that as constable he levied certain warrants of attachment and an execution against the personal property in his hands, upon the stock of goods mentioned and specified in the complaint, and that while the same was so levied upon him and in his possession, the defendant wrongfully seized and forcibly took the same from him, and devoted the same to his own purpose, etc., etc.

The defendant denied all the material allegations of the complaint, and alleged that he, as sheriff, levied certain executions in his hands upon the goods mentioned, and by virtue of his office and lawful process in his hands, he sold the same, etc., etc.

Plaintiff offered in evidence two warrants of attachment in favor of L. Oppienheimer & Sons against said McIntosh & Sprague, which purported to have been levied on the stock of goods in question on 10 December, A. D. 1885.

Defendant objected, on the ground that said warrants had not been referred to in the complaint, and that there was no allegation in the complaint that plaintiff had obtained any property in, or possession to, said goods under or by virtue of said warrants of attachment.

The court overruled the objection, and the defendant ex- (511) cepted.

Plaintiff then testified that he received these warrants of attachment 10 December, A. D. 1885, at four or five o'clock p.m., and went to the store of McIntosh & Sprague, and notified the clerk, Mr. Rhineheardt, that he had papers to close up the store and to take charge of the goods, and asked Mr. Rhineheardt for the key, which he refused to deliver to the witness, but after considerable contention he surrendered the key, and witness took charge of the stock of goods, and levied said warrants of attachment thereon; that about twelve o'clock m., on 11 December, 1885, while in possession of the said goods, he levied an execution in favor of the Hickory Manufacturing Company, and against McIntosh & Sprague, for thirty-seven dollars, and interest and cost; and that on the same day the warrants of attachment were vacated and dismissed, and two judgments were rendered for the plaintiff Oppienheimer & Sons against McIntosh & Co., but that in the meantime, after three o'clock p.m., of the same day, and before he levied his two executions issued on the two last named judgments, the defendant sheriff forcibly dispossessed him and took into his own possession the said

stock of goods and prevented him from making the money on the first execution, which he had already levied upon said goods, and also prevented him from levying, selling and making the money to satisfy the other two executions which had come into his hands on the said judgments rendered in favor of Oppienheimer & Sons; that he never consented to any such levy by defendant.

The defendant testified that at eight o'clock a.m., 11 December, 1885, as sheriff of Haywood County, he levied two executions on the stock of goods in controversy, in favor of Hornthorn & Deiches, against McIntosh & Co., in favor of V. O. Thompson & Co., and against McIntosh & Co.; and that he also levied, at nine o'clock a.m. of
(512) the same day three other executions on said stock of goods in favor of Wingo, Elliott & Crump, of L. C. Younger & Co., and M. T. Rhineheardt, against McIntosh & Co. The defendant also testified that at 9:20 o'clock a.m. of 11 December, 1885, he levied three other executions against McIntosh & Sprague, on said stock of goods.

So much of the other facts and the evidence and the instructions of the court to the jury as are necessary to a proper understanding of the opinion of the court are therein adverted to. There was a verdict and judgment for the plaintiff, and the defendant, having assigned error, appealed to this Court.

George H. Smathers for plaintiff.
G. S. Ferguson for defendant.

MERRIMON, J., after stating the case: The first exception is without force. It was neither necessary nor proper to mention or to make any allegation in the complaint in respect to the warrant of attachment mentioned. They were produced on the trial as evidence explanatory how the plaintiff came to have possession at first of the property in controversy. It may be that they were unnecessary for that purpose, but no objection was made on that ground. It is not proper, ordinarily, to allege in the pleadings merely evidential facts, whether documentary or otherwise, or the evidence of the plaintiff's cause of action alleged, or of the defense relied upon in the action. The pleadings should state in an orderly way only the facts which constitute the cause of action and the defense.

If the evidence of the plaintiff himself, received on the trial without objection, be accepted as true, then unquestionably he was entitled to recover in this action. He testified that on 11 December, 1885, he had possession and control of the goods in question, and levied an
(513) execution—it must be taken to have been in all respects a valid and proper one—on the same; that in the course of the same day

other like executions came into his hands which he had not levied on the goods at the time the defendant came upon him, as sheriff, seized the property and forcibly deprived him of the possession thereof.

As the plaintiff so levied upon and had possession of the goods, he had a special property therein for the purpose of selling the same and applying the proceeds of the sale to the payment of the judgment specified in the execution levied and to the satisfaction of any other executions properly in his hands, though they were not actually levied. The property, by virtue of the levy and seizure thereof, was in *custodia legis,* and might, indeed ought, properly to have been applied to the execution then in the hands of the plaintiff as constable, although, except as to the first one mentioned, they had not been actually, but only constructively, levied. As the property levied upon was, or the proceeds of the sale thereof under the levy were, in the custody of the law, the officer was required to apply the same properly to the satisfaction of other executions in their order then current and requiring by the exigency of the same such application. The law is true to its purposes, and will not allow its final process, going against the property of individuals, to be disappointed or defeated while it has in its custody and control property or money of the persons against whose property such process goes that ought to serve its purpose.

There can be but one actual levy of one or more executions upon personal property at one and the same time, because the officer in making the same seizes or gets possession and control of it and has a special property therein and ownership thereof that excludes and prevents other like levies, which levy, however, as we have already seen, places the property in *custodia legis,* to be applied in proper cases if need be to other executions. Other officers having like execu- (514) tions may make other levies upon the same property, but these will be constructive in their nature and entitle the officers making them, in their order, to have the property or the proceeds of the sale thereof after the executions under and in pursuance of which the first actual levy proper was made shall be satisfied. It is the duty of the officer making the first levy, and having notice of the second and other constructive levies, to so apply the property and the proceeds of the sale thereof, and the courts will, if need be, compel him to do so. The late *Chief Justice Pearson* meant no more than this when he said, in *Bland v. Whitfield,* 1 Jones, 125, that "when an officer has already levied and taken the property into possession a second officer may make a second levy by going where the property is and making the endorsement on his execution. In this case he has no right to touch the property, and the levy gives him the right to it after the first execution is satisfied." Such

a levy is necessarily only constructive. The officer making it cannot get possession of the property until the first levy shall be over. It is the levy of the execution on personal property that creates the lien on the same in favor of the judgment creditor, and hence the proceeds of the sale of the property must be applied to the satisfaction of each execution in the order as to time of the levy of the same. It is difficult to see how otherwise numerous judgment creditors of their common judgment debtors could have just benefit of executions issued upon their respective judgments going against the debtor's personal property. It is otherwise as to the debtor's real property; as to it, the docketed judgments creates a lien thereon in favor of the creditor, and a levy serves no other purpose than to designate the particular property sold or to be sold. *S. v. Poor,* 4 D. & B., 384; *Jones v. Judkins, id.,* 454; *Alexander v. Springs,* 5 Ired., 475; *Barham v. Massey, id.,* 192; *Rives v.* (515) *Porter,* 7 Ired., 74; Freeman on Executions, secs. 135, 262, 268; Hermon on Executions, secs. 172, 174.

If, therefore, the plaintiff testified truly on the trial, he had such special property in and ownership of the goods in dispute as entitled him to recover in this action, his measure of damage being the whole sum of money due upon the execution actually levied upon the goods, as well as that due upon the executions in his hands not actually levied, including costs, at the time the defendant seized the goods and took the same from him.

If, however, the defendant, as his testimony tended to prove, levied executions in his hands while the warrants of attachement were in the hands of the plaintiff and levied by him, and before the latter received the executions that first came into his hands, then the property should have been devoted to the executions in the hands of the defendant at that time, and constructively levied, subject to the levy of the warrants of attachment. Or, if the defendant levied constructively the executions in his hands after the plaintiff levied the execution first in his hands, actually or constructively, and before the plaintiff received the executions which he said he did not levy, then the property should have been first devoted to the first execution so levied by the plaintiff; secondly, to the execution first so levied by the defendant; thirdly, to the execution that came into the hands of the plaintiff next after the levy so made by the defendant; and fourthly, to the executions that came last into the hands of the defendant, if he made a proper constructive levy of the same.

There was some evidence tending to show such order of levies, made constructively and successively, after the first actual levy made by the plaintiff.

But the court instructed the jury that the defendant, as sheriff, could not make such constructive levy of executions in his hands; and, in effect, further, that the plaintiff had the right to devote the property levied upon by him to the satisfaction of the execution (516) that first came into his hands and was levied; and also, secondly, to the execution that subsequently came into his hands, although in the meantime the defendant, as sheriff, may have made a constructive levy of executions in his hands upon the same property. Such instruction was erroneous.

For reasons already stated, the court should have instructed the jury, in applying the law, substantially as it is above stated. The appellant is entitled to a new trial, and we so adjudge.

Error.

Cited: Harper v. Rivenbark, 165 N. C., 182.

STERN & CO. v. J. P. HERREN.

Costs—Witnesses—Nonresidents.

1. The manner of summoning witnesses and their compensation is entirely regulated by statute.
2. There is no provision in our law authorizing the taxation, as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State.

THIS is an appeal, from a judgment of *Boykin, J.,* at Fall Term, 1888, of HAYWOOD Superior Court, adverse to the plaintiff, upon a motion made by defendant to retax costs, based upon an affidavit of the defendant, that W. D. Norvell, a witness for plaintiff, had charged mileage from Richmond, Va., to Waynesville, N. C.

The motion was made at Spring Term, 1888, at which term, by an order, it was referred "to J. K. Boone, clerk of the court, to hear evidence and report to the next term of the court." At (517) Fall Term the clerk made the following report:

"1. That the witness, W. D. Norvell, Jr., claimed and proved for 544 miles, traveling to and from Richmond, Va., the said distance claimed being counted from the North Carolina State line, near Danville, Va., to Waynesville, N. C., and return.

2. That said witness attended the court for five days at Fall Term, 1887, as a witness for plaintiff.

3. That said W. D. Norvell resides three-fourths of his time in Virginia and the remainder of his time he spends in Waynesville, N. C., visiting his family.

4. That said witness paid poll tax in Waynesville, N. C., for the year 1887, and did road duty in Waynesville.

5. The said witness registered and voted in Waynesville, N. C., in the fall of 1885, but that he has not voted since that time.

6. That he has not kept house, but boarded his family at Waynesville, since January, 1885.

7. That said witness was a resident of the State of Virginia at Fall Term, 1887, and was entitled to prove his attendance as a witness for the plaintiff from the State line to Waynesville and return.

8. W. D. Norvell is a commercial tourist, and stays part of his time with the house in Richmond, Va., and travels for the house the remainder of the time."

To this report the defendant filed the following exception:

The defendant excepts to the seventh finding of fact and law, "That the said witness, W. D. Norvell, was a resident of the State of Virginia at Fall Term, 1887, and was entitled to prove his attendance as witness for the plaintiff from the State line to Waynesville and return"; and says, from the other finding of facts, it will appear to the court that

(518) said W. D. Norvell, if he has any fixed residence, is a resident of Waynesville, N. C., and is not entitled to prove mileage, as the seventh finding of fact and law contradicts all the other findings of fact by the referee.

His Honor sustained the defendant's exception, and ordered that the bill of costs be reformed by striking out the mileage of W. D. Norvell, and from this the plaintiff appealed.

George A. Shuford for plaintiff.

G. S. Ferguson and George H. Smathers for defendant.

DAVIS, J., after stating the case: Section 3756 of The Code prescribes the fees to be paid witnesses, and section 1355 prescribes "rules for summoning witnesses." It is apparent from an inspection of the sections of The Code referred to that they do not have reference to witnesses who reside out of the State. Section 1357 provides for the taking of depositions, and section 1358 specifies what depositions may be read in evidence, among them those of witnesses who reside in a foreign country or in another State. Section 1369 prescribes the man-

ner in which witnesses shall prove their attendance, "every person *summoned,* who shall attend as a witness in any suit, shall," etc.

In *Lewis v. Comrs.,* 74 N. C., 194, it was said: "At common law no costs were recoverable by the plaintiff or defendant in civil actions or criminal prosecutions. . . . Costs are now given by statute both in England and in this country, but they are recoverable by law only in those cases, State and civil, where they are allowed, and only in the manner and to the extent allowed by law." A witness who attends court "without having been summoned" is not entitled to prove his attendance so as to charge the losing party with the amount of his tickets. *Thompson v. Hodges,* 3 Hawks, 318.

The attendance of a nonresident witness cannot be enforced, (519) even though summoned; and, as was said by *Daniel, J.,* in *Kinzey v. King,* 6 Ired., 76, the party desiring his evidence may have his deposition taken. To the same effect is *Meredith v. Kent's Exrs.,* Martin, 17 (Battle's edition).

It is true that in the case of *S. v. Stewart,* 1 Car. Law R., 524, it was held that a witness who, after being summoned on the part of the State, removed to another State, was entitled to mileage from the place of his residence, but the reasons given were, that the "binding a man in recognizance to attend" and give testimony did not put him under obligations not to change his place of residence; and another reason might have been given, and that is, in criminal cases the witnesses must be confronted with the accused, and they may be put under bonds to attend, if necessary.

In the case before us, it does not appear that the witness was summoned, and, so far as his right to charge the plaintiff with mileage is concerned, it is immaterial whether he was a resident of Richmond, Va., or of Waynesville, N. C. If the former, his deposition could have been taken and read, or if he chose to attend voluntarily as a witness on behalf of the defendant in the action, he could not tax the plaintiff with mileage; if the latter, there was no mileage to be taxed.

There is no error in the ruling of the court below.

Affirmed.

Cited: S. v. Means, 175 N. C., 822.

(520)

THE COMMISSIONERS OF THE COUNTY OF BURKE v. THE COMMISSIONERS OF THE COUNTY OF BUNCOMBE.

Paupers—Settlement—Pleading—Sufficient Cause of Action—Demurrer—When Not Necessary to Plead Statute.

1. The liability of a county for the support of a pauper does not depend upon the law of *domicile* or *citizenship*, but upon that of *residence* or *settlement*, as prescribed in section 3544 The Code.

2. Where the complaint alleged that one M. was a resident and citizen of the county of B., and was an inmate of the almshouse, having been duly committed; that while suffering from a fit of insanity she escaped, wandered into an adjoining county, where she was taken charge of by the authorities, and being unable to give any account of herself, was cared for by the last named county as a pauper for several years and until her restoration, when she was returned to the county of B., and demanded payment for her support for that period: *Held*, (1) That M. had acquired a settlement in the county of B.; (2) that the complaint stated a sufficient cause of action against the county of B., and (3) that it is never necessary that the pleadings shall set out a public statute.

THIS is a civil action, which was tried before *MacRae, J.*, upon complaint and demurrer at February Term, 1888, of BUNCOMBE Superior Court.

The following complaint was filed:

1. That in and during the year 1880, one Rosanna Meadows was a resident and citizen of the county of Buncombe, in the State of North Carolina, and during a part of the year 1880 was an inmate of the almshouse of said county of Buncombe, having been sent there and being there under lawful authority as an inmate.

2. That on or about the ..... day of ....., 1880, the said Rosanna Meadows, while suffering from a fit of insanity, escaped from said almshouse of Buncombe County, where she had a right to be, and wandered to the county of Burke, in which said county she was arrested and committed to jail of said county under a charge of insanity. That

(521) at the time of her arrest, the said Rosanna Meadows was insane—could give no account of herself, or where she came from, and had no means of support. No one knew her, and the plaintiffs, the board of commissioners of Burke County, had her sent to the almshouse of Burke County, and had her cared for, fed, clothed therein from time she was arrested, on 3 August, 1880, up to and until about 5 July, 1886, when the said Rosanna Meadows came to her senses and told where she came from, and who she was; and she was at once returned by the plaintiffs, or under their order, to the defendants, the county commissioners of Buncombe County, who received her.

3. That during all the time that Rosanna Meadows was an inmate of the almshouse of Burke County, from about 3 August, 1880, to 5 July, 1886, she was unable to give any account of herself—where she was from, or where her home was—and plaintiffs, all this time, were trying to find out something about her, and where her home was, but in vain, until she came to her mind as above stated, about 5 July, 1886, when she was immediately returned to her home in Buncombe County.

4. That the plaintiffs made application to have her taken into the Western Carolina Insane Asylum as an inmate, and did what they could to get her admitted, but the application was refused and said Rosanna Meadows refused admittance.

5. That the plaintiff commissioners of Burke County expended in taking care of, feeding and clothing the said Rosanna Meadows while she was an inmate of the almshouse of said county of Burke, the sum of five hundred and nine dollars and twenty-five cents, of which sum four hundred and seventy-nine dollars and twenty-five cents is for board of the said Rosanna Meadows for the period of five years and eleven months, at six dollars and seventy-five cents per month, and twenty-five dollars is for clothing, and five dollars is for costs (522) of attempting to get her into the asylum for the insane. All of which said sum is due to the plaintiff from the defendant, as appears from the paper marked "Exhibit A," which is herewith filed, and asked to be taken as a part of this complaint, showing the account and warrant upon which the said Rosanna Meadows was arrested.

6. That said account for the sum of five hundred and nine dollars and twenty-five cents has been presented to the defendant board of commissioners of Buncombe County by the plaintiff board of commissioners of Burke County, and payment thereof demanded, which has been refused, and defendant refusing to pay the same or any part thereof.

Wherefore, plaintiffs pray judgment for the sum of five hundred and nine dollars and twenty-five cents, and interest on the same, for costs of action, and for such other and further relief as may be appropriate.

To this complaint the defendant demurred, for that:

1. That it does not state that Rosanna Meadows, prior to the time of her arrest in Burke County, was last legally settled in Buncombe County, or that she was a poor person, likely to become a charge to Burke County, or that she was arrested and committed to the almshouse of the county last named to prevent her from becoming a charge thereto, or that any steps were taken, as required by law, to have her removed to the county where she was last legally settled, or that she was sick or disabled, and could not be removed to such county without danger of life.

2. It not only does not state that Buncombe County was the county where the said Rosanna Meadows was last legally settled, but it shows that the said Rosanna Meadows resided continuously in Burke County from 3 August, 1880, till about 5 July, 1886, whereby she became
(523) legally settled in said county of Burke, and a proper charge to that county.

3. It does not state or show that Buncombe County is liable, under any law of the State, to reimburse or pay Burke County or the plaintiffs for the maintenance and support of the said Rosanna Meadows in the almshouse or elsewhere in said last named county.

Wherefore, the defendant demands judgment for costs.

There was judgment sustaining the demurrer, and the plaintiff appealed.

John Gray Bynum for plaintiff.
Charles A. Moore for defendant.

DAVIS, J., after stating the case: Section 707, subsection 21, of The Code, confers upon the county commissioners authority to provide for the maintenance of the poor. Section 3540 does not differ materially from section 707, subsection 21, and the commissioners have authority "to institute proceedings against any person coming into the county who is likely to become chargeable thereto, and to cause the removal of such person to the county where he was last legally settled, and to recover, by action, from the said county all charges and expenses whatever incurred for the maintenance or removal of such poor person."

Section 3545 provides more in detail the manner in which paupers shall be "removed to their settlements," and "if such poor person be sick or disabled, and cannot be removed without danger of life, the board of commissioners shall provide for his maintenance and cure at the charge of the county, and after his recovery shall cause him to be removed and pay the charges of his removal, and the county wherein he was last legally settled shall repay all charges occasioned by his sickness, maintenance, cure and removal," etc.
(524) It thus provides that the board of commissioners of the county to which such poor person belongs shall receive and provide for him, under a penalty for refusal to do so, and makes them liable, if they "shall refuse to pay the charges and expenses" mentioned in the section.

Section 3544 provides, among other things, that "every person who shall have resided continuously in any county for one year shall be deemed legally settled in that county." We have been favored with an interesting argument upon questions of domicile, citizenship and resi-

dence, and many authorities have been cited by counsel, but the law applicable to pauper "settlements" is regulated by statute, and is in no way governed by the law of domicile or citizenship.

There is no change of domicile by removal of residence without an accompanying *intent,* and one does not lose his domicile by change of residence simply—there must be an intent to abandon the old and acquire the new—and no length of time is necessary to constitute the change nor will any length of residence affect the change if the intent be wanting.

It is manifestly the purpose of the law in regard to pauper settlements to charge each county with the support of its own poor, and the liability of the county in relation thereto is controlled, not by domicile, but by settlement. *S. v. Elam,* Phil., 460.

In *Neal v. Comrs. of Burke,* 85 N. C., 420, Hoke C. Secrest, a citizen of Union County, in passing through Burke County, was charged with the murder of his wife. He afterwards became insane, and was sent, by an order of the judge, to the asylum. His *settlement* was not in Burke, and it was held that the cost of sending him to the asylum, being no part of the costs of the prosecution, the county of Burke was not chargeable therewith. The county of his *settlement* was liable for that charge. The case does not state how long it was from the time of arrest to the time when he was sent to the asylum, but the (525) facts apparent show that it was much more than one year, and while one year's *residence* will create a new settlement, it is manifest that a confinement for one year under legal process does not constitute such a *residence* as is contemplated by the statute. A legal settlement is a right which a pauper may "acquire," so as to entitle him to be supported as a pauper, by a residence of twelve months. It is clear that Rosanna Meadows was not in a condition to lose or acquire any rights. Being insane, she could do no act by which she could lose or gain a settlement. As an unfortunate person, she was entitled to support, and how and at whose expense this should be, is regulated by the statute, and this must be by the county where she was "last legally settled." In what county was she "last legally settled?" Do the facts alleged in the complaint, if admitted, sufficiently show that it was in the county of Buncombe?

The facts stated are not as concise or as definite as they might have been, but they are stated with sufficient clearness to leave no doubt as to what "the cause of action" is or as to the relief demanded. Undoubtedly they are sufficiently stated to enable the defendant to answer intelligently and make any defense that it may have to the plaintiff's demand. *Nance v. R. R.,* 94 N. C., 619.

Every fact necessary to constitute a claim against the county of Buncombe for the money expended in the maintenance of Rosanna Meadows is substantially stated; and the first ground of demurrer cannot be sustained.

Though it appears from the complaint that Rosanna Meadows was continuously in Burke County from 3 August, 1880, to July, 1886, it also appears that during that time she was cared for in the almshouse of that county, and the facts in relation thereto are clearly stated, and as we have seen, do not constitute such a residence as is contem-
(526) plated by the statute in section 3544; and the second ground of demurrer cannot be sustained.

It is sufficient, if the complaint states *facts* constituting a cause of action, and it is not necessary to set out in the complaint any public statute or law; and the third ground of demurrer cannot be sustained.

The court below erred in sustaining the defendant's demurrer.

Error.

Cited: Fulton v. Roberts, 113 N. C., 426; *Comrs. v. Comrs.,* 121 N. C., 296; *Currie v. R. R.,* 135 N. C., 534.

LEWIS P. FORE v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Appeal—Damages—Eminent Domain—Condemnation of Land—Trespass—Evidence.

1. An appeal will not be dismissed because no entry thereof appears in the record proper, when the case on appeal shows that it was duly taken and perfected.

2. The charter of the Western North Carolina Railroad Company does not give it the right to enter upon (without the consent of the owner) and appropriate a yard, garden or dwelling-house for the purposes of its road; and when such entry or appropriation is made, the owner may maintain a civil action for the trespass, and is not compelled to resort to the statutory remedy provided for condemnation of lands.

3. Nor will a recovery in such action vest in the corporation any easement or property in the premises.

4. In such action the plaintiff is confined to such damages as may have been done to the *land while in his possession;* and evidence of extra hazard to the dwelling of plaintiff from fire because of its proximity to the road is not competent. The same rule is applicable to the measure of damages in an assessment under the statutory remedy.

FORE *v.* RAILROAD.

THIS is a civil action, which was tried before *MacRae, J.*, (527) at June Term, 1888, of BUNCOMBE Superior Court.

The Western North Carolina Railroad Company, formed and organized under an act of the General Assembly, ratified on 15 February, 1855 (Acts 1854-'55, chap. 228), was invested with "the same powers to condemn all such lands" (needed in the construction of the road) "belonging to individuals or corporations as may be needed for the aforenamed purposes as were granted to and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions and conditions as are prescribed in the charter aforesaid for the government of the said company," etc.; and, further, that "in the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with 100 feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road, and no longer, unless the owner or owners shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road has been located."

This section (29) has a saving clause in favor of "infants, *femes covert,* persons *non compos* or beyond seas," and that referred to in the charter granted to the North Carolina Railroad Company (Acts 1848-49, chap. 182, sec. 27), superadds a concluding proviso in these words: "That the right of condemnation herein granted shall not authorize the said company to invade the dwelling-house, yard, garden or burial ground of any individual without his consent."

The defendant company, in the asserted exercise of the power conferred, entered upon plaintiff's land and laid out, by stakes placed in the central line, in 1878, designing the course of the (528) track, and late in the year 1880 proceeded, by excavation and banking, to level the ground for the laying the cross-ties and iron rails. In doing this the servants of the company, under an overseer in charge, entered upon and passed through a garden of the plaintiff, near to his dwelling, within thirty feet thereof, and committed the trespasses for the redress of which this action was instituted on 15 August, 1882.

No other proceeding has been brought to obtain compensation from the company for the land thus taken and appropriated to its uses as a railway, and the demand now preferred is for compensation for the damages committed in the alleged trespasses.

There was a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed.

The other facts necessary to an understanding of the questions presented are stated in the opinion.

F. A. Sondley for plaintiff.

D. Schenck, Charles Price and C. M. Busbee for defendant.

SMITH, C. J., after stating the case: Upon the call of this case, and before entering upon the trial, the plaintiff moved to dismiss the appeal, because no entry of the appeal was found on the record. But it does appear from the case made up by the judge, at the close of which are these words: "Rule for new trial. Rule discharged. Judgment for plaintiff. Defendant appeals to the Supreme Court. Notice waived. Bond in $50 adjudged sufficient. Case settled on disagreement of counsel. James C. MacRae, Judge S. C."

This is sufficient. The mere neglect of the clerk to note an appeal actually taken and prosecuted leaves no ground for the motion, (529) and it is denied. We proceed to examine the case on its merits.

There are three several causes of action enumerated in the complaint, of which the first two are abandoned by the entry of a *nolle prosequi,* miscalled in the record a nonsuit, and such issues alone as are raised in the third were submitted to the jury, in response to which they find:

That the plaintiff is the owner of the land; that the defendant did trespass thereon as alleged in the complaint; that the defendant has acquired no easement on the land; that his action is not barred by the statute of limitations, and that his damages, by reason of the trespasses charged, are $400.

This is not the special proceeding provided for in the act which must be pursued by the owner to obtain satisfaction for the right of way over his land acquired by the company, which must be resorted to within two years from the *location* of the road, according to the provision in the defendant's charter, or from the completion or finishing of the road on said land, according to the charter of the North Carolina Railroad Company, or be lost by delay. If the plaintiff had voluntarily surrendered his land to the defendant for railroad purposes he would be concluded and deprived of all remedy. But this he did not do. On the contrary, availing himself of his right to resist this attempted appropriation of his garden and yard, which the statute gave no right to the company to enter upon and take, the plaintiff placed a fence across the projected line of road, and when the work began in October, 1880,

or later, the defendant's agent overseeing and in charge of the convict laborers was informed by the plaintiff's son that the plaintiff forbade his going there.

This prohibition being disregarded and the work being pushed, the plaintiff, at the term stated, began his suit for damages.

The action, then, was properly instituted, for the company (530) had no authority "to invade the dwelling-house, yard or garden," and could lawfully take it only with his consent, and this consent was not given.

The result of the suit is not to transfer any easement or property in the land to the defendant, but to remunerate the plaintiff, for the injury sustained by the land in consequence of the defendant's illegal entry thereon and wrongful acts done upon the premises in the construction of the road. A witness introduced by the plaintiff (for no testimony came from the defendant) testified, after objection made and overruled, that the damages were, in his judgment, about $400, and he proceeded thus to give the grounds of his estimate:

The plaintiff "had a first-class garden, which was destroyed. The lower part of the yard was dug up, leaving a ditch in it. The plaintiff moved his stables beyond his house for fear of fire. They removed fruit trees, garden herbs, etc., and cut off his outlet, the only road he had to get out from his house. They took his fences out of the way. Witness does not know what became of them. The house was very near, and might take fire from the train."

The defendant objected to the statements of the witness as to the nearness of the house and danger of fire, on the ground that this is not a proper element of damage in this action. The objection was overruled, and defendant excepted.

We think there was error in permitting this hazard to be proved and considered by the jury in assessing the damages. It evidently entered into the witness' estimate as given to the jury, and may have influenced the jury in arriving at the same estimate as the witness. The action is for *trespasses upon the land* and the injury done to it as property, and cannot include dangers arising from the running of trains, though in close proximity to the plaintiff's dwelling—dangers which, if they existed, never led in fact to any loss or detriment to the plaintiff.

If the land had been lawfully appropriated under the statute, the damages compensatory therefor could not be increased by (531) perils incident to the running of trains, because if such happen from the want of care and attention on the part of employees, they may be recovered in a separate suit; and if not, compensation is allowed, not for perils, but for injuries to property. *R. & A. A.-L. R. R. Co. v. Wicker*, 74 N. C., 220-229.

It is equally true that the same rule applies to a claim for damages by reason of an unlawful invasion of the plaintiff's land. *Lance v. R. R.*, 5 En. & Am., 620; *R. R. v. Lazaine*, 28 Penn. St., 203; *Rodmacher v. R. R.*, 41 Iowa, 297, cases cited in brief of defendant's counsel.

For injuries sustained after the defendant acquired possession no recovery could be had until the plaintiff had regained possession, for the gravamen of the complaint is for an injury to the possession. *London v. Bear*, 84 N. C., 266. The other assigned errors seem to grow out of the confounding the action for trespass with the special proceeding for damages sustained by the taking and appropriating property for the use of a railway; in other words, the value of the acquired easement. We do not pass upon them, as it is unnecessary to do so. For the error assigned, the verdict must be set aside and a *venire de novo* awarded.

Error.

Cited: Allison v. Whittier, ante, 492; *S. v. Wilson,* 107 N. C., 872; *Atkinson v. R. R.,* 113 N. C., 588; *Simmons v. Allison,* 119 N. C., 563; *Barden v. Stickney,* 130 N. C., 63; *R. R. v. Mfg. Co.,* 166 N. C., 187.

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(532)

W. M. BLANTON v. THE BOARD OF COMMISSIONERS OF McDOWELL COUNTY.

Constitution—Contract—Novation—Pleading—Mandamus—Taxation.

1. A complaint in an action for *mandamus* to compel the levying of a tax to pay a debt, which fails to set forth the debt specifically for which the relief is demanded, is defective.

2. Where a county, prior to the adoption of the present Constitution, contracted a debt for which it issued bonds, and since that Constitution went into effect the board of commissioners issued other bonds in exchange for the first, under an act of the General Assembly which provided that such "bonds shall be deemed and held to be a continuation of the liability created by the county" for the original bonds: *Held,* That all the securities and remedies which attached to the bonds first issued entered into and became a part of the new obligation, and that the limitations upon the rate of taxation contained in the Constitution of 1868 did not apply to them.

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

BLANTON *v.* COMMISSIONERS.

THIS is a civil action which was tried before *Clark, J.*, at Fall Term, 1888, of McDOWELL Superior Court.

Under and by virtue of section 47 of chapter 228 of the act incorporating "The Western North Carolina Railroad Company," passed at the session of the General Assembly held in 1854-'55, the county of McDowell, with the approval of a majority of the voters, subscribed for $50,000 of its capital stock, and in payment therefor issued its coupon bonds in that amount, running twenty years and bearing six per cent per annum interest payable semiannually.

The bonds were issued in 1867, and at the session held in 1883 an act was passed "to empower the board of county commissioners of McDowell County to compromise, commute and settle the debt of McDowell County"—chapter 204—by which the commissioners were authorized to issue other coupon bonds, not exceeding in amount the said sum of $50,000; and, in section 3, it is declared that "the bonds so (533) issued therefor may have expressed upon their face that they are issued in the place and instead of such contract or liability created and existing as aforesaid (prior to the year 1868), and are not liable to the limitation of taxation provided for in section six of Article V, of the Constitution."

At the session held in 1887 an amendatory act was passed entitled "An act to empower the board of county commissioners of McDowell County to settle the bonded debt of McDowell County," by the first section of which authority was given them "to issue coupon bonds of the denominations of not less than one hundred nor more than one thousand dollars, to be made payable at any period not more than thirty years from the date of said bonds, and bearing such interest as may be agreed upon by said board of county commessioners of McDowell County and the holders or owners of the bonds issued by said county of McDowell in aid of the Western North Carolina Railroad Company, and not exceeding six per cent per annum, to be paid semiannually; and said bonds shall be signed by the chairman of said board of county commissioners of McDowell County and countersigned by the clerk of said board."

The second section repeals the section of the same number in the previous enactment, and substitutes therefor the following:

"The bonds so issued under this act may be exchanged with the holders and owners of said bonds heretofore issued in aid of said Western North Carolina Railroad Company under an act of the General Assembly of North Carolina, passed at its session of 1856 and 1857, chapter 68, and when so issued shall be deemed and held to be a continuation of the liability created by said county under the provision of said act."

Under the power thus conferred the plaintiff has surrendered bonds of the original issue held by him, and accepted others issued in (534) exchange, the coupons due on which the commissioners refuse to provide for by levying a tax in excess of the constitutional limitation of 66⅔ cents on the $100 valuation of taxable property, all of which is required to meet the expenses and liabilities of the county. So no funds are raised to meet the accrued interest on the bonds, the commissioners, in answer to the plaintiff's demand for such additional levy, alleging a want of power to do so.

This is the question raised by the demurrer, which, upon the hearing, was overruled, and the commissioners declining to answer, whereupon judgment was rendered awarding the writ of *mandamus* and requiring the commissioners to make the necessary further assessments to meet the plaintiff's debt, and from this judgment they appealed.

No counsel for plaintiff.
R. H. Battle for defendants.

SMITH, C. J., after stating the case: It is perfectly manifest that in the issue of the new bonds in place of those that had matured, it was not intended to surrender any security which the creditor had for the debt by a novation of the one for the other, but to maintain the indebtedness as essentially one and the same in the different forms assumed. The security possessed in the capacity of the taxing power, when necessary to provide means to pay the obligations, to go beyond the limits fixed in the Constitution, and repeatedly asserted as incident to obligations entered into before the adoption of the Constitution (*Clifton v. Wynne,* 80 N. C., 145, and numerous cases therein referred to), was clearly intended to be preserved and to attach to those given in renewal.

It is held in *Hyman v. Devereux,* 63 N. C., 624, that the taking up a bond secured by a mortgage upon real and personal estate, and giving a new one for the residue due on the first, was not an extinguish- (535) ment of the debt unless so intended, and that it still retained the mortgage security. The principle was again asserted in *Kidder v. McIlhenny,* 81 N. C., 123. The ruling in *Clifton v. Wynne* and the several previous adjudications therein referred to, proceeds upon an interpretation of the Federal Constitution, which forbids a state, by any act impairing the obligations of contracts, to withdraw from the Legislature, by restraints upon the taxing powers, the ability and means possessed when the contract was entered into and essential to a fulfillment of its requirements. The mere renewed recognition of a subsisting liability in the issue of a new bond, declared in the very act which

authorizes the issue "to be a continuation of the liability" resting upon the county, cannot, upon any second reasoning, be deemed the creation of a new debt in the sense of its falling under the restrictions applicable to new contracts of indebtedness, with the deprivation of the preëxistent means of enforcing performance by the levy of the necessary taxes.

The only case called to our attention in the argument for defendants, *Wilson v. Patton*, 87 N. C., 318, supposed to militate against the view taken, simply decides that a creditor taking a new in place of an old note and reducing the former to a judgment, upon which he sues out execution, loses his right to proceed against the debtor's exemption under the latter, since he must enforce the contract sued on, with the incidents attaching to it when it was made under the then existing laws. It is not, therefore, pertinent to the present inquiry.

Another specification in the demurrer, is the omission to allege in the complaint that the question of issuing of the new bonds was submitted to the voters of the county in pursuance of section 7, Article VII, of the Constitution, and was sanctioned by them.

But, as we have already said, this and other sections limiting (536) the exercise of the taxing power have reference to the contracting of debts, the pledging of municipal faith, the loan of municipal credit and the levying and collecting of taxes after they become operative, and not to antecedent obligations, or the use of the means necessary for their discharge. *Street v. Comrs. of Craven*, 70 N. C., 644; *Brothers v. Comrs. of Currituck, ibid.*, 726, and other cases to the same effect.

Our attention has been called to *Katzenberger v. Aberdeen*, 121 U. S., 172, where the validity of an act of Mississippi, whose Constitution contains a clause in terms very similar to that (Art. VII, sec. 7) in our own, was considered.

In this case the city of Aberdeen had issued bonds in payment for shares subscribed to the New Orleans, Jackson and Great Northern Railroad Company, under an act of the Legislature which authorized the subscription but not the issue of bonds in payment therefor. Since the adoption of the new Constitution containing the restraining clause which required any county, city or town, before becoming a stockholder in, or lending its credit to, any company, association or corporation, to obtain the assent to the proposal of two-thirds of the qualified voters therein. (Art. XII, sec. 14.) The Legislature passed what was intended to be a validating or curative act, which attempted to legalize, ratify and confirm all bonds not made in violation of the State Constitution and issued to the said railroad, to which a different name had been given, without requiring the sanction of a popular vote of two-thirds. The objection to the bonds lay in the want of power in said city to issue them.

The language of the *Chief Justice* delivering the opinion is as follows: "The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were (537) issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the Legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds."

The facts in this case are wholly unlike those in the case before us; the differences being too marked to need being pointed out.

In our opinion none of the grounds of the demurrer are tenable, and it was properly overruled. But the demurrer fails to point out other serious defects in the complaint, among which is the failure to insert any definite debt to be provided for by a specific mandate, and for this and other defects which may perhaps be remedied by amendment in the court below, the case must be remanded, in doing which, however, we have deemed it proper to give our opinion upon the the matters involved.

Remanded.

Cited: Goldsboro v. Broadhurst, 109 N. C., 232; *Gooch v. Faucett,* 122 N. C., 276.

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(538)

J. M. BAILEY v. W. H. HESTER.

Courts of Justices of the Peace—Jurisdiction—Judgment—Payment—Officer.

1. While the courts of justices of the peace are not, strictly speaking, courts of record, they possess and may exercise many of the powers of such tribunals, *e. g.*, they may recall executions improperly issued, and cause satisfaction of judgments rendered by them to be entered.

2. Payment made by an execution debtor to a sheriff, or other officer, is effectual as against the creditor only where the officer at the time has a judicial mandate to make the collection, unless, irrespective of his office, the creditor has constituted him an agent for that purpose.

THIS was a motion to recall an execution and have satisfaction of a judgment entered, heard before *Merrimon, J.,* heard upon appeal from the court of a justice of the peace, at Spring Term, 1888, of BURKE Superior Court.

The plaintiff, in an action begun by the issue of a summons, recovered judgment on 27 March, 1886, before two justices of the peace of Burke, acting in concert, upon which subsequently execution issued to the sheriff of said county.

In September following the defendant submitted the following affidavit:

1. That on 27 March, 1886, a judgment was rendered in the above cause against affiant in the sum of $43.10 in an action pending before T. N. Neill and W. N. Thompson, wherein J. M. Bailey was plaintiff and W. H. Hester was defendant.

2. That on 9 April, 1886, W. H. Morrison, a deputy sheriff, came to the said W. H. Hester with a judgment and demanded payment of said debt, and affiant paid the said judgment of $43.10, and procured a receipt from the said deputy sheriff, and affiant is informed and believes that the same is discharged and fully satisfied, and that (539) affiant is entitled to have satisfaction entered of record.

3. That since said debt has been paid and discharged the said J. M. Bailey has applied to the said W. N. Thompson, a justice of the peace, and obtained from him an execution on said judgment, and under said execution J. A. Lackey, sheriff of Burke, is now about to levy upon and sell the property of affiant.

Wherefore, affiant prays the court that notice issue to the said J. M. Bailey, notifying him to appear and show cause why said judgment shall not be marked paid and discharged, and satisfaction entered of record; and that, in the meantime, the said J. A. Lackey, sheriff, be ordered not to proceed with said sale.

Thereupon notice was issued to the justice, who reports the proceedings upon the appeal to the Superior Court, and served by the sheriff and returned before such justice, who heard and dismissed the motion at the defendant's cost. From this judgment he appealed to the Superior Court, wherein, at Spring Term, 1888, the case was disposed of in the manner following:

The court ruled that such a motion could not be heard by a justice of the peace, and that from his decision no appeal would lie to the Superior Court, and, further, that upon the affidavit offered as the foundation of the motion the defendant was entitled to no relief. Thereupon judgment was rendered dismissing the appeal with costs. To this defendant excepted and appealed to this Court.

Jno. Gray Bynum for plaintiff.

S. J. Ervin, by brief, for defendant.

SMITH, C. J., after stating the case: While the proceedings before a justice in a civil action are not strictly a record, as declared (540) in *S. v. Green,* 100 N. C., 419, they yet possess very many of the attributes of a record under existing legislation. They (the justices) are furnished with criminal and civil dockets in which must be entered a minute of every proceeding had before him (The Code, sec. 831); when filled such dockets must be filed with the clerk, and if incomplete when he goes out of office delivered over to his successor (secs. 827 and 828); and indeed he acts in the trial of causes and issues in enforcing process throughout as do other regularly constituted judicial tribunals. As he may issue execution after judgment unless the cause has been removed to and docketed in the Superior Court, we can see no reason why he may not recall an execution which improvidently issues after the plaintiff has received payment, or for other sufficient cause, and in a proper case have satisfaction entered on his docket, so that the fact is patent to him or to his successor and the debtor freed from the annoyance of other executions.

This results from several adjudications in which it is held that the judgment rendered by a justice, though transferred to the docket of the Superior Court and there becomes a judgment also for the purpose of enforcement, remains as before when to be impeached, modified or reversed. *Bidsey v. Harris,* 68 N. C., 92; *Broyles v. Young,* 81 N. C., 315; *Morton v. Rippy,* 84 N. C., 611, authorities furnished in the brief of counsel.

But the judge further holds that the deputy, though having in his hands the judgment and assuming the right to receive payment, had in law no such authority, and unless as agent of the plaintiff, irrespective of office, he made the collection—of which the affidavit contained no proof—it would be an officious and inoperative act, and defendant's liability would remain.

It is only by a judicial mandate issued from the proper judicial source that the sheriff or other officer could proceed to collect and acquit the debtor. *Mills v. Allen,* 7 Jones, 564.

(541) The court, therefore, properly gave judgment against the defendant, not in dismissing the appeal, but in denying the motion upon its merits.

As the same judgment refusing the defendant's application was made in each of the courts, the same consequences follow, whether the motion was denied or the appeal dismissed.

Affirmed.

Cited: Hamer v. McCall, 121 N. C., 198.

STATE EX REL. PHILLIP ANTHONY ET AL. V. J. C. ESTES, GUARDIAN, ETC., ET AL.

Bonds of Guardians, etc.—Penalty—Judgment—Default and Inquiry—Damages—Evidence.

1. Judgments upon bonds of guardians, administrators, etc., should be for the penalty of the bond, to be discharged upon payment of the amount of damages assessed, with interest—when it is allowed—from the first day of the term at which the judgment was rendered.
2. When the action is upon the *bond*, the recovery against either the principal or the surety cannot exceed the penalty thereof.
3. Where, upon the trial of an action, a part of the original record of another cause in the same court is offered upon proof that the papers so offered were found among the files, the other party is entitled to introduce other original papers in the same cause, without further proof of their authority than their obvious connection with the cause, and that they were produced from the place where such papers should be kept.
4. In an action upon a guardian's bond the breach alleged was that the guardian had negligently or collusively permitted the administrator of his ward's ancestor to procure a license to sell the lands, which had descended to them, for assets. There was judgment by default and inquiry, and upon the execution of the inquiry it was held to be error to instruct the jury that the measure of damages was the value of the land so sold; it was open to the defendants to show that the lands descended to plaintiffs subject to the debts of their ancestor, and that the proceeds of the sale had been applied to their discharge.
5. A judgment by default and inquiry is conclusive as to the plaintiffs' right to recover something upon his assigned cause of action, but it leaves open the question of the amount to which he may be entitled; and upon that issue the *onus* is upon him.

THIS was an inquiry, as to damages, upon a judgment by de- (542) fault, tried before *Merrimon, J.,* at Spring Term, 1888, of BURKE Superior Court.

The plaintiffs' action is upon the guardian bond executed by the defendant J. C. Estes as principal and the other defendants sureties, to recover damages for the alleged negligence and misconduct of the guardian in consenting to a sale of certain lands belonging to George W. Anthony, their grandfather, which descended to their father as tenant in common with two others, and whose undivided one-third interest therein upon his death descended to them, instead of resisting and defeating the sale.

The complaint alleges that one N. P. Beck, to whom letters of administration on the estate of the intestate George W. Anthony issued, instituted a special proceeding in the proper court on 14 October, 1871,

to obtain license to sell the lands of his intestate upon an averment of the insufficiency of the personal estate to pay debts and expenses incurred in the course of administration, to which their said guardian was made a party in their behalf, and that he, well knowing the contrary, and that such sale was not necessary, made no opposition to the grant of license, but admitted the facts to be as alleged in the petition, and by such sale the lands were lost to the plaintiffs.

The summons was executed and returned in the present action to Fall Term, 1886, of Burke Superior Court, when further time to file
(543) pleadings was allowed. The complaint was put in at Spring Term following, not verified, and the defendants failing to appear, judgment final was entered against the defendants for $600, with interest from 14 October, 1871, being one-third of the estimated value of the lands. This judgment was afterwards changed and made a judgment by default and inquiry, such inquiry, by consent, to be executed at the ensuing term.

The cause coming on accordingly to be heard at Spring Term, 1888, the defendants, J. C. Estes and Spainhour, moved to dismiss the action, for that the complaint does not contain a statement of facts sufficient to constitute a cause of action, assigning as defects therein:

1. The suit should have been in the name of the State on relation of the plaintiffs.

2. No breach of the bond sued on is set out in the complaint.

3. The demand of judgment is for the value of certain lands, not for the penal sum in the bond, the complaint showing the action to be for the recovery of the land.

The defendant Spainhour especially objected to proceeding with an inquiry of damages, for that there was no judgment for the penalty of the bond, but for the value of the lands.

The objections were overruled and exception entered, and thereupon the question of damages was submitted to the jury upon this issue:

"What damages, if any, are the plaintiffs entitled to recover?"

Upon the trial plaintiffs introduced in evidence certain papers in the clerk's office in the case of *Beck v. Estes,* which the clerk testified were all that were on file, and these were read to the jury, the court remarking that the substance of what they contained appeared to be set forth in the complaint, to which no answer had been filed. To this defendants excepted.

(544) Testimony was then, after objection overruled, received as to the value of the lands.

Defendants produced and offered what they alleged to be other parts of the record in the administrator's suit, without further proof of their being such except what appeared upon their face; nor was it suggested

how the evidence would tend to show that the plaintiffs had not sustained damage, or would be otherwise relevant.

The evidence was rejected, and exception to the ruling entered.

The instructions to the jury, among others not necessary to be stated, were to the effect that, as it was not denied that the facts set out in the complaint were true, and by it the plaintiffs were entitled to a one-third interest in the lands of the intestate, lost by the collusion of their guardian with the administrator, they were entitled to recover as damages one-third part of the value of the lands in 1871, to which the jury, if they thought proper, might add interest to the present time. The defendants excepted to the charge. There was a verdict for the plaintiffs.

After the jury were empaneled the plaintiffs were permitted to amend the summons and complaint by making the State, on the relation of the parties suing, a plaintiff. To this exception was taken also. The judgment was, "that the relators recover $1,045, with interest from 5 March, 1888, of which sum $800, the penalty of the guardian bond sued on, is adjudged against both defendants, and the residue, $245, is adjudged against the defendant J. C. Estes alone.

And it is further adjudged by the court that this judgment is given upon a certain guardian bond given by J. C. Estes, guardian, and other defendants as surety, of date 4 January, 1868; and it is ordered that execution issue, in which the date of liability shall be stated."

To the form of the judgment the defendants also excepted, (545) and appealed.

C. M. Busbee (and W. S. Pearson filed a brief) for plaintiffs.
Jno. Gray Bynum (and J. T. Perkins filed a brief) for defendants.

SMITH, C. J., after stating the case: While not material in disposing of the appeal, lest our silence should be misconstrued, we pause to say that the judgment should be as defendants insist: for the penal sum mentioned in the bond to be discharged, upon the payment of the damages aforesaid, with interest on the principal from the first day of the term, and costs. A form will be found in Mr. Eaton's excellent collection of Forms, at pages 282 and 283. Moreover, in an action *on the bond* the damages recoverable cannot exceed the penalty, which alike measures the damages to be adjudged against the principal as against the sureties. This necessarily results, from the fact that as an *obligation* it is the same as to all the obligors. The judgment can be in this respect reformed, and the excess in the damages assessed by the jury disregarded.

We pretermit an examination of the numerous exceptions taken during the progress of the trial to notice the rulings upon the question of damages and the evidence offered and passed on pertinent thereto.

It is apparent that the presiding judge considered all the averments of fact made in the unanswered complaint as incontestable upon the inquiry of damages, and therefore the jury were left only to ascertain the value of the plaintiffs' shares in the lost lands, assuming the defendants' failure to answer as an admission of the truth of all the allegations, and among them the culpable negligence of the defendant guardian in not resisting and defeating the sale. This view, in
(546) our opinion, gives a larger scope and efficacy than what belongs to a judgment by default and inquiry.

It does, indeed, conclusively determine the defendants' liability, expressed in the technical words, *"quod recuperet";* but it leaves open the inquiry as to the damages to which a party is entitled, and, in the absence of any showing as to the amount, must be for a sum merely nominal. This will be seen by a reference to some of our own adjudications on the point.

In *Parker & Gatling v. Smith*, 64 N. C., 291, upon a judgment by default and inquiry in an action to recover for goods sold and delivered, it was held in the Superior Court that, although the defendant could contest the amount of damages, he was estopped by the judgment from disputing the delivery of the articles. This was declared to be error, this Court saying: "In actions where the measure of damages is to be given by the jury, the assessment must be made upon the proofs introduced by each party, and the *onus* of proof as to the *amount* of damages is upon the plaintiff, as a judgment by default *admits something to be due, but not the amount.*"

In *Parker v. House,* 66 N. C., 374, the action was upon a constable's bond, and the plaintiff alleged a breach in that the officer had not used due diligence in endeavoring to collect certain claims placed in his hands, setting them out specifically and in detail. The plaintiff read his complaint and the officer's receipt of the claims which he undertook to collect, and then stopped. After verdict and judgment for the plaintiff, and upon the defendant's appeal, this Court said: "The breach of the official bond assigned in the complaint is that the defendant did not use due diligence in collecting claims put into his hands as an officer. The defendant, by failing to answer admits this allegation, but does not admit the amount of damages, for this is the question to be
(547) determined upon proofs." Of like import are *Wynne v. Prairia,* 86 N. C., 73, and *Rogers v. Moore,* 86 N. C., 85.

Applying this statement of the law and practice to the facts before us, the defendants' default admits the sale of the land, the guardian's failure to put in any defense when he ought to have done so, but how much damage has resulted therefrom is not determined by the facts,

and it would be competent to prove that debts were extinguished to a large amount, for which the land was liable.

The rejected record of further proceedings in the administrator's suit was of papers in the clerk's office on file in the said suit, and purports to be part thereof. Their production from the source where they were found, and their obvious connection with the papers introduced by the plaintiffs, as well as their contents, tend to show their genuineness as parts of the record, and their admissibility did not depend upon other external proof of their relations to the cause, nor upon a failure to suggest other grounds for their reception than their bearing upon the *quantum* of damages.

One of those papers professes to be a final settlement of the administrator with the probate judge, under a prefix of the name of the cause, copied from the record of settlement, from which it appears that the administrator is charged with $812.06, proceeds of the sale of the chattel property, and $1,369.15 realized from a sale of land, aggregating $2,181.21, from which has been disbursed $2,029.83, leaving in his hands $151.58. We see no sufficient reason for withdrawing this record evidence of the disposition of the personal and real estate from the hearing of the jury, as it does bear materially upon the measure of damages, and tends to show the extent of the real interest of the plaintiffs in the lands; for it is only where the intestate's debts have been paid and subject thereto that the legal estate descended to the heirs-at-law. (548)

We think there was error in disallowing this evidence to go to the jury for the alleged want of authenticity and supposed irrelevancy to the issue, for which the judgment must be reversed and a new trial awarded.

Error.

Cited: Darden v. Blount, 126 N. C., 250; *Machine Co. v. Seago,* 128 N. C., 160; *Osborn v. Leach,* 133 N. C., 432.

J. G. WARLICK v. SARAH LOWMAN.

Appeal—Roads and Cartways—Road Supervisors—County Commissioners.

1. The action of township supervisors in ordering the establishment of a cartway is such a final determination of the matter as will support an appeal to the board of commissioners, and thence through the Superior to the Supreme Court, although the order may not have been executed.

2. Upon such appeal to the board of commissioners, they should have considered the whole matter *de novo* upon the merits, and so likewise the Superior Court, upon appeal to it.

THIS was a proceeding to establish a cartway, heard upon a motion to dismiss an appeal from the board of commissioners, before *Clark, J.*, at August Term, 1888, of BURKE Superior Court.

The plaintiff filed his petition before the board of supervisors of the proper township, alleging that it was necessary, reasonable and just that he should have a private way to a public road specified, and to that end "praying for a *cartway* to be kept open across" the lands of the defendant, etc., as allowed in a proper case by the statute (The Code, sec. 2056). The defendant appeared and opposed the petition. The supervisors, nevertheless, made an order allowing the prayer of
(549) the petitioner. From that order the defendant appealed to the county commissioners, and they affirmed the order appealed from, and from their order the defendant appealed to the Superior Court in term. Upon motion of the plaintiff, that court dismissed the appeal, "upon the ground that said appeal was prematurely taken," and thereupon the defendant, having excepted, appealed to this Court.

Jno. Gray Bynum for plaintiff.
I. T. Avery for defendant.

MERRIMON, J., after stating the case: The statute (The Code, sec. 2056) allowing cartways to be laid off in certain cases, among other things provides that "the petitioner or the adverse party may appeal from the order of the supervisors to the board of commissioners of the county, and from the order of the board of commissioners to the Superior Court at term, where the issues of fact shall be tried by a jury and from the judgment of the Superior Court to the Supreme Court as in other cases of appeal." So that by express provision of the statute an appeal lay from the order of the supervisors allowing the cartway and directing that it be laid off as prescribed by law. That order was final in its nature, and as the defendant had the right to appeal from it, it would be idle to execute it before the appeal should be taken. It might be reversed by the county commissioners or by the Superior Court, on appeal from their order. The county commissioners, on appeal to them, should have heard the whole matter of the application upon its merits, and not simply upon a statement of the facts and the points of contention before the supervisors, and so also the Superior Court should have heard it upon its merits as to the facts and the law applicable. That the statute so intends is apparent, from the provision that in the Superior

Court "the issues of fact shall be tried by a jury," and the further provision that the court may direct either party to pay (550) the costs that may accumulate after the order of the supervisors. We cannot conceive of a substantial reason why the order allowing the cartway should be executed to any extent until it is settled and determined.

The case of *McDowell v. The W. N. C. Insane Asylum, post,* 656, is much in point here, and we need not add to what is said in that case.

The court should not have dismissed the appeal, but should have heard the whole matter brought before it by appeal upon the merits.

The judgment must therefore be reversed, and the matter disposed of according to law.

Error.

Cited: Cook v. Vickers, 141 N. C., 106.

A. J. McALPINE, EXECUTOR OF GEORGE W. BRITTAIN, ET AL., v. JAMES DANIEL.

Will—Executors and Administrators—Parties—Deed—Possession—Assets—Damages—Action to Recover Land.

1. Pending an action to recover land, B., the plaintiff, died, leaving a will, wherein he provided that his wife should have the use of specific personal property and the rents and profits of his real estate, to be paid to her by the executor for her life, or widowhood, the executor to "have charge of the renting and letting of the same," and after the death or marriage of the wife, the executor was directed to "sell off all my property, real and personal, and reduce my property of every kind to cash": *Held*, that the executor was properly made party to the action because the terms of the will vested in him the right to possession; and further, if that was not so, he was entitled to the damages which might be recovered up to the death of the testator for withholding the land.

2. Where B. entered upon a tract of land under a deed which conveyed but a life estate in consequence of the omissions of the necessary words to pass the fee—there being no proof that any estate was reserved to the grantor—but he and his vendor had been in the open, notorious and continuous possession thereof, claiming to fixed boundaries for more than twenty years, the title being out of the State: *Held*, that he thereby acquired the title in fee, irrespective and independent of the life estate passing by virtue of the deed.

3. The introduction of unnecessary parties into an action will not defeat the right of those entitled to recover.

MCALPINE *v.* DANIEL.

(551) THIS is a civil action, which was tried before *MacRae, J.*, at March Term, 1888, of BUNCOMBE Superior Court.

The material facts of the case, so far as deemed needful to be reproduced in order to a correct understanding of the rulings and exceptions brought up for review by the present appeal, will be found in the opinion of our late *Associate, Mr. Justice Ashe* delivered when it was formerly before us—*Brittain v. Daniel,* 94 N. C., 781.

The original planitiff, George W. Brittain, died thereafter, leaving a will, which has been admitted to probate and the executor and executrix therein appointed, to wit: J. J. Fox and Rebecca A. Brittain, having renounced the trust, the remaining executor, A. J. McAlpine, alone took out letters testamentary, and became a party to the action in place of his testator, and filed an additional complaint, to which an answer was filed; and from the pleadings were eliminated and submitted to the jury issues which, with the responses to each, are as follows:

1. Is the plaintiff the owner and entitled to the possession of the first tract described in the complaint, or any part thereof; and if a part, what part? Answer: Yes; to the whole.

2. Does the defendant wrongfully withhold possession thereof from the plaintiff? Answer: Yes.

(552) 3. What damage, if any, has the plaintiff sustained by reason of such wrongful withholding? Answer: Forty dollars.

4. What damage, if any, has the plaintiff sustained by reason of the wrongful withholding of the other tract described in the complaint? Answer: Forty dollars.

It was conceded that the State had parted with the title to the land in dispute, and among the muniments of that alleged to be vested in the testator, the plaintiff exhibited a deed from one Joseph Eller to his testator, dated on 10 March, 1838, which, upon the former appeal, was declared, for want of words of inheritance, to pass an estate for life only.

He also offered the will of George W. Brittain, the provisions of which, with the codicils, so far as they bear upon the present controversy, are these:

"4. I will and bequeath to my dearly beloved wife, Rebecca A., in the event she survives me, my house and lot in the county of Henderson, in said State, lying and being in the town of Hendersonville, known as the Garren lot, and containing about one acre, to her and her heirs forever in fee simple. I also give to my said wife all my household and kitchen furniture, and so much of my other personal property as, in the judgment of my executors, may be necessary for her support and maintenance, to be used by her only as long as she shall remain un-

married and shall reside on my house place on Flat Creek, in the said county and State, which household and kitchen furniture and personal property for her maintenance shall, at the death of my said wife, return to my estate and be disposed of by my executors with my other property.

My said wife shall also have and receive from my said house place the rents and profits thereof, to be paid over to her by my executors, who shall have charge of the renting and letting of the same; but she shall only receive such rents and profits so long as she shall remain on such house place and continue unmarried. In the event (553) she remain unmarried and live upon said house place, then the said rents and profits shall be paid to her during the term of her natural life.

5. It is my will and desire that, after the death of my said wife, or after her marriage again after my death, or after she shall remove her residence from my said house place, my executors sell off all my property, real, personal, . . . and reduce all my property of every kind to money, etc., etc., and collect all debts due and owing to me."

The heirs-at-law of the testator were made parties plaintiff over an objection as to the time when it was done, and the absence of evidence of their relations to the deceased. The facts connected with this action of the court are these:

At December Term, 1887, the plaintiff obtained leave "to make new parties, if desired," and also "amend their complaint at the next term."

This was not done until the trial of the cause had been entered upon and the jury empaneled, when application was made to the court to introduce the heirs of the testator among the plaintiffs, and denied. After two days' progress in the trial, the court reconsidered its action and gave leave to amend as proposed. Thereupon defendant's counsel demanded the production of authority from the heirs to make them parties, and plaintiffs' counsel, not having such, were allowed to obtain and file such form at any time during the term.

At the close of the argument, such written authority was produced from persons claiming to be the heirs-at-law, and they, coming in as co-plaintiffs, filed their amended complaint.

Defendant's counsel objected generally—on what ground is not stated—and were permitted to draw up their specific objections at their convenience, and did so when the case was prepared for the (554) Supreme Court.

They are thus stated:

1. There is no evidence that the parties are heirs-at-law.

2. The said George W. Brittain having been dead more than a year, his heirs can only come into the cause upon a supplemental complaint.

3. The interest of the heirs, if any they have, in the estate is paramount and adverse to that of the executor, and adverse also to that of the defendant, and their admission would be to change the action..

4. Neither the heirs nor executor are entitled to possession under the will, but the widow only.

The plaintiff introduced a grant issued on 31 December, 1796, to John Gray Blount, and many other deeds by which to locate the deed aforesaid from Eller. He also read in evidence to the jury, and introduced witnesses whose testimony tended to show that the land in dispute was covered by those deeds; that Eller had been in possession for fifteen years before his conveyance to the testator Brittain in 1838, and that the latter at once entered into possession by Eller's surrender, and had continued thence to hold adversely until a short time before commencing the present action, when the defendant took possession.

The defendant offered in support of his claim of title:

1. A grant to John Dillard, issued on 28 March, 1808, for sixty acres.

2. A deed from John Dillard to William Pickens, dated 19 October, 1821, for the same tract.

3. A deed from William Pickens to Adam Eller, of 14 August, 1826, conveying the same land.

He further offered much testimony to prove that the land in dispute was covered by these deeds and the exercise of acts of ownership under claim of title on the premises by said Adam Eller, and in dis-
(555) proof of adverse possession in Brittain for twenty years.

The action was begun on 21 October, 1880, so that possession of the land has been in Joseph Eller and the testator, according to the plaintiff's witnesses, for the space of about forty-two years—a period sufficient to raise the unrebuttable presumption, in the absence of proof of an express grant, of the divesting of the legal title out of the State.

The defendant asked the following special instructions:

1. That under the last will and testament of George W. Brittain, deceased, the plaintiff is not entitled to the possession of the land in controversy in this action, and he cannot recover.

2. That the plaintiffs in this action rely for their recovery upon the deed from Joseph Eller, made in 1838, to George W. Brittain, which only conveys a life estate to Brittain; that before he can recover in this suit, he must show by a preponderance of proof to the jury that since the death of Brittain he, and those under whom he claims, have been in the actual occupancy of the said sixty-acre tract of land for twenty years.

3. That the plaintiffs have offered no color of title to the land in controversy for a longer period than the life of George W. Brittain, and,

not having had a twenty-years possession since said Brittain's death, the plaintiffs cannot recover.

4. That the plaintiff claiming under George W. Brittain, who had only a life estate, cannot repudiate his title, or claim that the same, by possession, ripened into a fee, or that he entered not under the deed for life, but as a trespasser, but he must stand by the title under which his testator entered, and unless after the expiration of such life estate he can show that he occupied the land for twenty years, unbroken, he cannot recover in this action.

His Honor declined to give any of the foregoing instructions to the jury, and the defendant excepted.

His Honor, among other instructions to the jury, charged (556) them as follows:

"Plaintiff contends that he has proven that the tract of land in controversy was conveyed by Joseph Eller, on 10 March, 1838, to George W. Brittain, who was the plaintiff in this action, and that said George W. Brittain immediately entered into the possession and held the same until the entry of defendant, a short time before the beginning of this action.

It seems to have been determined by the Supreme Court that this deed only conveyed to Brittain a life estate in the land, and that he cannot, under this deed, recover an estate in the land in fee as demanded in the complaint, and, in subordination to this determination I so instruct you.

Plaintiff says, however, that even if this is true that he has shown uninterrupted possession in Brittain and in Joe Eller for a period of twenty years, and that even though he may not be entitled to the fee of this land by virtue of this deed, yet, because of his long adverse possession, he is presumed in law to be in under a deed conveying to him a good title in fee simple.

If the plaintiff has satisfied you of the location of the land claimed by him, has he further satisfied you that Brittain has had the open, notorious, continuous, adverse possession of the land, using it as his own, either for the cutting of timber, the taking of firewood, the cultivation of the soil, or for any or all of these purposes, in G. W. Brittain and under those whom he claims, for twenty years, not counting the time between 20 May, 1861, and 1 January, 1870, such acts to be so repeated as to show they are done in character of owner and not of an occasional trespasser? If he has been in such possession the law will presume that he has a good title in fee simple for the lands so occupied by him, having no deed in fee simple by which, with possession, he would have a colorable title only for such land as he may have had in actual possession—that is, such as he exercised ordinary acts of ownership over from time

(557) to time, as he had occasion to do, occupying part and claiming the whole under visible lines and boundaries, and using the same as his own."

To so much of this charge as stated that the plaintiff might show title by possession after having entered under a deed conveying to him a life estate, and while being in possession of the land under said deed, the defendant excepted.

Judgment being rendered on the verdict for the plaintiff, the defendant appealed.

F. A. Sondley and Charles A. Moore for plaintiff.
Geo. A. Shuford for defendant.

SMITH, C. J., after stating the case: The provisions of the will are recited to show that the testator contemplated his executors taking possession of his land as essential to the execution of the trusts with which he clothed them, and the reason why the plaintiff should be a party to the action in order to recovering possession.

If the executor were not a proper party for such purpose, and there were no testamentary dispositions of the real estate requiring him to be present in the action, he should be, for the recovery of the damages sustained up to his testator's death, since they, as part of the personal estate, devolved on him in his representative capacity.

The heirs-at-law are also made parties, and any objection on this ground is thus removed.

1. We have already said that the executor would be entitled to carry on the suit, if only to recover the damages, but we think he has also a right to recover possession, assuming the title to have been vested in the testator at his decease, since only thus could he control the property, and by "the renting and letting of the same" have and receive rents "to be paid over to him" for the widow, as required under the will.

2. The introduction into the cause of the said heirs is un-
(558) necessary, but the result of abundant caution, impairs no defense open to the defendant, and works no injury to the plaintiff executor.

3. The appropriate time to make objection to the admission of a new party to the record, because of there not being any suggested relation to the cause or subject matter of the suit, is when the motion is made to admit. It is somewhat uncertain, on the record, when the objection in this case was made, but it is not material, since for the reasons stated, the executor, under clear indications of the will, must have possession in order to carry out the testator's direction, and no harm can come to the defendant from the action of the court.

4. The next inquiry is as to the title to the tract of 175 acres mentioned and defined in the deed, made on 10 March, 1838, by Joseph Eller to the plaintiff's testator.

We find no error in the refusal to give to the jury the instructions asked, nor in the directions given instead, in which, in our opinion, the law is correctly laid down for their guidance. The charge is strictly warranted by the ruling upon a very similar state of facts in *Osborne v. Anderson,* 89 N. C., 261, so ruled upon former hearing of this case, 94 N. C., 781. It is there said that "the title has thus been divested out of the State and put in the possessor, unless Joshua Cox (the bargainor), or some one succeeding to his estate, can show a larger estate than that conveyed to Moses Dixon (the grantee) reserved, against which the possession of the latter would be inoperative to defeat a recovery by one in whom the reversion is vested. But there is no such claim asserted or suggested, and hence the long occupancy of the land with limits defined in the deed, irrespective of the latter as color of title, becomes itself an independent source of title in Dixon, which descended to his son." See, also, *Fisher v. Mining Co.,* 94 N. C., 397, affirmed on rehearing, 97 N. C., 95. In that as in this case the defect in the deed was the absence of words of inheritance, and it is held (559) that an occupancy of upwards of thirty years put title in the occupant, in the want of proof that any estate was reserved in the grantor, or that he did not convey all that he had to the grantee. There is no error, and the judgment must be

Affirmed.

Cited: Smathers v. Moody, 112 N. C., 795.

C. T. ROGERS v. JOSEPH KIMSEY, EXECUTOR OF L. R. WELCH.

Estoppel—Judgment—Res Judicata—Statute Limitations—Lien—Homestead—Administration.

1. Every defense which was available at the time of the rendition of a judgment, in the absence of fraud, is conclusively presumed to be determined thereby, and the parties are estopped thereby so long as the judgment remains in existence.

2. A judgment was recovered and docketed against W., in 1877; thereafter, in the same year, he conveyed his lands, of less value than $1,000, to purchasers for value; in 1880 W. died, leaving no widow or minor children surviving him, and administration was granted upon his estate in

same year: *Held*, (1) that the judgment was a lien upon the lands owned by W. at the time of the docketing thereof, subject to his right to a homestead, and that, upon his death, the creditor might enforce that lien against the purchasers; and (2) that an action commenced in 1884 to enforce this remedy was not barred by the statute of limitations.

THE plaintiff, endorsee of a note under seal, executed on 18 April, 1874, by Loyd R. Welch, the defendant's testator, to W. A. Parker, in the sum of $125, payable three years after date, sued the obligor and recovered judgment thereon before a justice of the peace of the county of Cherokee, on 17 July, 1877, with interest thereon, and for
(560) costs. A transcript thereof was docketed in the Superior Court on 24 September next following, and on the next day execution issued and was returned by the officer, with his endorsement: "Nothing collected."

The judgment debtor died some time in the year 1880, without leaving a widow or minor child, having executed a will, wherein he appoints the defendant Joseph Kimsey executor, who has caused the same to be proved, and qualified as executor thereof. The judgment becoming dormant, notice of a motion to revive the same was accepted by the defendant, and he submitted to an entry of a revival of said judgment.

The original debtor, Loyd R. Welch, at and before the docketing of the judgment, owned certain lands in said county, particularly described in the complaint filed in the present action, which, on 2 November, 1877, he conveyed or attempted to convey, by deed, duly executed, proved and registered, to G. W. Cooper and R. A. Aiken, who, with the said executor and the heirs at law of the deceased, are defendants in this proceeding, prosecuted to subject the said real estate, there being no other property left by the deceased subject to the statutory lien of said judgment, and to cause it to be sold and converted into assets for the satisfaction of said debt. The action was begun by the issue of a summons on 11 April, 1884, and its purpose is to coerce the sale of the lands aforesaid in the hands of said Cooper and Aiken, who claim title thereto, and an estate in fee free from such lien.

The last named defendants answer and deny the existence of any lien or any liability resting upon the lands so conveyed to them, and, with the executors, set up the further defense that the note, the primary cause of action, is null and void under the statute (The Code, sec. 1553), the deceased obligor, Loyd R. Welch, being, at the time of signing
(561) the same, of Cherokee Indian blood within the second degree.

This enactment declares that "all contracts and agreements of every description, made after 18 May, 1838, with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note

or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same."

This statute, constituting a section in the statute of frauds of this State, and intended for the protection of this class of our population against imposition and deceit, has been in force since it was first enacted in 1836, and is retained in all subsequent revisals. Rev. Stat., ch. 50, sec. 11; Rev. Code, ch. 50, sec. 16; The Code, sec. 1553.

The following issues were submitted to the jury without objection:

1. Did the plaintiff recover judgment against L. R. Welch, as alleged in the complaint, and was the same docketed on the judgment docket of this court, and when?

2. Has said judgment, or any part thereof, been satisfied?

3. Was the land described in the complaint the property of L. R. Welch at the time of the rendition of the judgment, and was the same subsequently sold to Cooper and Aiken?

4. Is this action barred by the statute of limitations?

The following additional issues were tendered by defendants. The court declined to submit either of them to the jury, and the defendants excepted:

1. Was L. R. Welch, at the time he made the note to W. A. Parker, of Indian blood within the prohibited degree, under section 1553 of The Code?

Was the note sued upon obtained by W. A. Parker without (562) adequate consideration, and in violation of section 1553 of The Code?

3. Was L. R. Welch entitled to a homestead exemption in fee simple at the time he sold the land to Cooper and Aiken?

The jury found all the issues submitted in favor of the plaintiff.

During the trial the defendants offered as a witness one Meroney, and proposed to prove by him that the said Welch was within the prohibited degree, under section 1553 of The Code, for the purpose of showing that the note and judgment on it were void, and that the judgment could have no relation back to defeat the debtor's homestead under the act of 1876-'77, and no lien resulted from the docketing. To this testimony objection was made by the plaintiff, for that all defenses then existing, and which could have been made, are concluded by the adjudication, and the objection was sustained by the court and the testimony ruled out. The defendants excepted.

It was in proof by defendants that the sale of the lands to Cooper and Aiken was for the sum of $900, its full value, which was paid; that the testator had some other land which was sold at auction by the

executor for $50, and that there was an interest in some land in Graham County which still remains.

The defendants, who had set up in their answer a defense under the bar of the statute of limitations, asked an instruction that the action is barred; to the refusal of the court to give which, the defendants also excepted.

Judgment was rendered for plaintiff and defendants appealed.

G. S. Ferguson for plaintiff.
E. R. Stamps (J. W. Cooper filed a brief) for defendants.

(563) SMITH, C. J., after stating the case: With this recital of the facts in the case in the aspect in which the allegations and the evidence presented it, we proceed to examine the rulings to which exceptions are taken.

1. The rule is too well established, and its subversion would lead to too many grave and disastrous consequences to require argument or authority to support the proposition that every defense available at the time, and which a defendant could set up at the trial, in the absence of fraud is conclusively determined by the judgment, and cannot be again asserted while the judgment remains in a controversy between the same parties. The testimony which proposed to inquire into the validity of the note thus reduced to a final judgment was clearly inadmissible and was properly rejected. *Jordan v. James,* 3 Hawks, 110, and other cases.

2. The statute of limitations interposes no impediment to the prosecution of the action. It falls under those enacted in 1868, since which the note was made and the judgment on it rendered. The letters testamentary issued in 1880, since which the judgment has been renewed, and the suit was brought in 1884. This appears in the record and admissions in the pleadings.

3. The time of the transfer of the note, whether before or after its maturity, was wholly immaterial, and no proof thereof was admissible.

4. The remaining inquiry is as to the existence and effect of the alleged lien of the judgment upon the debtor's lands upon the conveyance of the legal estate by the debtor's deed to the defendants Cooper and Aiken. No homestead was laid off during the testator's lifetime, nor was any attempt made to enforce the execution against the land. The right to such homestead terminates at his death without wife or infant children surviving, and hence if a lien has been acquired it may now be enforced.

(564) The judgment lien attaches when "docketed on the judgment docket of the Superior Court" to the real property of the debtor in the county where the same is docketed, "which he may have at the

time of the docketing thereof in the county in which such real property is situated, or which he shall acquire thereafter for ten years from the date of the rendition of such judgment." The Code, sec. 435.

"Real property," as used in the Code of Civil Procedure, in which the judgment lien is given, is therein defined to be "coextensive with lands, tenements and hereditaments," title 16, sec. 388, that is of the same wide import and meaning.

The lien of the plaintiff's judgment did, then, at its rendition, spring up and adhere to the debtor's estate in the lands, subject to his recognized right to the homestead exemption, and this lien followed the transfer of the estate to the contesting defendants, Cooper and Aiken, which they took in subordination thereto.

The lien is not affected by the act of 1876-77, ch. 253, even conceding its validity (and as an attempt to enlarge the homestead it has been declared unconstitutional and inoperative in *Wharton v. Taylor,* 88 N. C., 230), since that enactment, declaring that there shall be no judgment lien upon the homestead, is confined to "debts contracted or causes of action accruing since 1 May, 1877"; while here the debt was contracted on 18 April, 1874, and became due three years thereafter, and before the time specified in the statute.

And even this act, displacing the statutory lien, as soon as the attention of the General Assembly was called to it by the decision in *Markham v. Hicks,* 90 N. C., 204, was amended at the next session by restoring the lien to that class of judgments. Acts 1885, ch. 359.

This legislation recognizes the existence of the lien upon the land subject to exemption for the limited period, and the right to enforce which, in an appropriate manner, arises at its expira- (565) tion.

It is, then, the duty of the executor to proceed to convert the land into assets in order to the satisfaction of this and the judgments of any other creditors, if there be such, whose liens prevail over the title acquired under the deed, for the action is that of creditors, among whom the proceeds must be divided according to their respective claims.

Even if the original judgment had become dormant it would sustain the present proceeding and retain its precedence as such. *S. v. Johnson,* 7 Ired., 231.

There is no error.

Affirmed.

Cited: Stern v. Lee, 115 N. C., 431; *Bevan v. Ellis,* 121 N. C., 234; *Joyner v. Sugg,* 132 N. C., 588; *Watters v. Hedgpeth,* 172 N. C., 312.

GEORGE K. WELCH v. THOMAS K. WELCH.

Homestead—Evidence.

An allotment of the homestead or personal property exemption cannot be attacked collaterally by the judgment debtor, or any one claiming under him. If he is dissatisfied therewith, he must present his objections in the manner prescribed by the statute. The Code, sec. 519.

SPECIAL PROCEEDING for sale of land for partition, tried before *MacRae, J.*, upon issues sent up by the clerk, at Spring Term, 1888, of the Superior Court of CHEROKEE County.

The petition alleges, in substance, that the plaintiff and defendant are tenants in common of the land mentioned in the petition, each being entitled to an undivided half thereof, "except three-fourths of the mines and minerals thereon"; that actual partition of the land cannot be had for reasons set out, and asks that the land be sold, etc.

(566) The defendant answers, alleging title in himself to the whole of the land mentioned, and further, that if the plaintiff had any interest in said lands, as alleged by him, it is not true that actual partition cannot be had without injury, etc.

The following were the issues:

"1. Is the defendant sole seized of the lands described in the petition?

2. Can the lands described in the petition be divided without prejudice to the interests of the tenants in common?"

The plaintiff offered in evidence, after showing title in John R. Welch and the defendant as tenants in common:

The judgment docket of Cherokee County, showing judgment in favor of A. T. & T. F. Davidson *v.* S. D. Abernathey, W. F. Abernathey, J. R. Welch and Sally Welch and B. Mayfield, and an assignment of same by plaintiff to J. W. Cooper, 27 April, 1877.

A motion, upon notice, for leave to issue execution and order to issue execution, 17 March, 1884.

The entry: "Homestead laid off and set apart to J. R. Welch, 2 April, 1884."

The return of appraisers, Book V, page 219, register's office, 10 May, 1886. This return, signed by the appraisers, sets forth that "having been duly summoned and sworn, according to law, to act as appraisers of the homestead and personal property exemptions of J. R. Welch and Sally Welch, of Valley Township, in Cherokee County, by W. G. Payne, sheriff of said county, do hereby make the following return." Then

follows the appraisement and allotment to J. R. Welch and Sally Welch of a homestead and personal property exemptions, signed by the appraisers and attested by the sheriff. Attached is the following certificate.

"The foregoing homestead came to hand and was registered (567) in Book V of deeds, pages 219-220, 10 May, 1886.

(Signed) W. M. WEST,
Register of Deeds."

This was objected to by the defendant, for that:

"1. It was not the proper place to register an appraisement of homestead.

2. That there is no authority for registration, on account of the absence of any certificate of the clerk of the Superior Court.

There does not appear to be a certified copy."

Objection overruled and defendant excepted.

W. G. Payne testified that he was sheriff; recollected making sale of "John R. Welch's land at the homestead; proceedings were had; had execution; levied on the lands, tracts thirty-nine and part of forty, in district six, as the excess, after the homestead was laid off. The execution was in favor of A. T. & T. F. Davidson against John R. Welch and Sally Welch; not sure that there were any others. It was against John R. Welch and his wife Sally."

He was asked if John R. Welch, at the time of the appraisement, did not notify him, as sheriff, and the appraisers, that the land they were about to assign as homestead to him was the dower of his wife, and that he had no interest in it? Question objected to; objection sustained, and defendant excepted.

A deed from W. G. Payne, sheriff of Cherokee, to plaintiff, dated 8 September, 1884, conveying part of tract forty, reciting judgment, execution, levy and sale, and sale to plaintiff at public outcry at courthouse door, etc., and a similar deed of same date to plaintiffs, for tract thirty-nine—these tracts embracing the lands in controversy.

The defendant offered in evidence a deed from J. R. Welch to himself, dated 11 September, 1878, conveying to him the land in controversy, for the price of $770.

A. J. Leatherwood testified:

"I knew Sallie Welch. She was an Abernathey, being first a (568) Morgan; married Abernathey, who died, and she is now the wife of John R. Welch. She had a dower and has it yet.

I was one of the appraisers who laid off the homestead before referred to."

Question: Whose land was it that was laid off as the homestead?

Objected to by the plaintiff. Sustained, and defendant excepted.

Defendant proposes to show that John R. Welch had no interest in the land laid off as homestead.

Objection by plaintiff. Sustained, and defendant excepted.

Defendant proposes to show that John R. Welch, at the time of laying off of the homestead, had no land subject to the lien of the judgment under which execution issued and the sheriff sold, except the two tracts in controversy, and they did not exceed in value $1,000.

Objection by the plaintiff. Sustained. Defendant excepted.

It was agreed that the second issue may be answered No.

Defendant asked the following instructions:

"That a sale by a sheriff, without laying off the homestead of the judgment debtor, is absolutely void, and the purchaser at such sale acquires no title.

It appearing from the records of the appraisers that there were two defendants in the execution, and that only one thousand dollars in land was allowed by them to both defendants jointly, the court instructs the jury that there was no allotment of a homestead to either, and that the sale by the sheriff was void, and plaintiff acquired no title."

The court declined to so instruct the jury, and the defendant excepted.

The jury responded "No" to each issue; there was a judg-
(569) ment ordering sale, etc., and defendant appealed.

George H. Smathers (and J. C. L. Gudger filed a brief) for plaintiff.
G. S. Ferguson, T. R. Purnell and Theo. F. Davidson for defendant.

DAVIS, J., after stating the case: Thomas K. Welch and J. R. Welch were formerly tenants in common of the land mentioned in the petition under deed from W. H. Thomas and Bartlett Morgan. The plaintiff claims to have title to the interest of John R. Welch in said land, derived by purchase and deed under an execution sale, and the defendant claims title to the whole alleging title to the share or interest of John R. Welch by purchase and deed from him.

The defendant insists that the deeds from the sheriff to the plaintiff, George K. Welch, are void because the sale was made by the sheriff under execution without having allotted the homestead of the debtor in the execution, and the first exception is to the admission of the return of the appraisers as evidence to show the allotment of the homestead.

Section 504 of The Code requires the return of the appraisers to be registered in the office of register of deeds, and this was done, but the defendant says it was without authority, and proposed to show by the sheriff that at the time of the appraisement John R. Welch notified him and the appraisers that the land they were about to assign as a homestead was the dower of his wife, and that he had no interest in it.

The Code, ch. 10, provides for the allotment of homesteads, and the duties of the sheriff in relation thereto are defined, and section 516 subjects him to indictment and to liability on his official bond for selling land in which execution debtors may be entitled to homesteads without a compliance with the requirements of the statute. (570)

Section 519 provides the remedy for a judgment creditor or debtor who may be for any cause dissatisfied: "If the . . . judgment debtor or other person entitled to homestead . . . shall be dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter . . . and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the Superior Court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors, which they or the sheriff shall allow to be made on demand, together with his objections in writing to said return, and thereupon the clerk shall put the same on the civil issue docket of said Superior Court for trial at the next term thereof . . . and the sheriff shall not sell the excess until after the determination of said action."

When the homestead is allotted and no exception taken thereto in the mode prescribed by the statute, the sheriff may sell the excess and the purchaser has the right to assume a "determination" of all dissatisfaction with the "allotment," and neither the judgment debtor nor any one claiming under him can be heard to attack it collaterally. This is so clearly and fully discussed in *Burton v. Spiers,* 87 N. C., 87, that we deem it only necessary to refer to that case. See, also, *Spoon v. Reid,* 78 N. C., 244.

The several exceptions to the exclusion, upon objection, of the evidence offered and questions asked by the defendant, are sustained for the same reason. The purpose was to attack collaterally the homestead allotment, and, as we have seen, this cannot be done. The refusal to grant the first instruction asked was proper, because it was not warranted by the evidence. It appears that the sheriff did not sell "without laying off the homestead of the judgment debtor."

Neither was there error in refusing the second instruction (571) asked. The homestead was allotted before sale under execution;

there was no exception or appeal. The homestead was allotted to John R. Welch and Sally Welch, who were husband and wife.

The return of the sheriff shows that the homestead of J. R. Welch was "laid off and set apart," and the *excess* was sold.

Affirmed.

Cited: Gudger v. Penland, 118 N. C., 834; *Oates v. Munday,* 127 N. C., 446; *Kelly v. McLeod,* 165 N. C., 384.

WILEY J. ZACHARY v. T. C. PHILLIPS AND JAMES WILSON.

Evidence—Partnership—Payment—Burden of Proof.

1. A letter written by one who was sued with another as partner, and which had the alleged firm name subscribed, and which referred to the subject of the controversy, although addressed to a third party, is competent upon an issue as to the existence of the partnership.

2. Where the existence of the partnership was denied by both persons who were alleged to constitute it, but one admitted the contract sued on, but pleaded payment: *Held,* that the issue in respect to the existence of the partnership being found against defendants, the rule imposing the burden of proving payment upon him who pleaded it was applicable to both.

THIS is a civil action, which was tried before *MacRae, J.,* at March Term, 1888, of BUNCOMBE Superior Court.

The following is the case settled on appeal:

"Plaintiff sought to recover of the defendants the price of certain beef cattle alleged to have been sold by him and delivered to defendants as partners in trade, and a sum of money advanced by plaintiff to defendants to pay the freight on said cattle, all of which plaintiff alleged that defendants promised to pay.

(572) The defendants denied that they, as partners, had purchased the cattle from plaintiff, but admitted that the defendant Phillips had made the purchase at the price set forth in the complaint, and alleged that he, Phillips, had paid all of it. They denied that any money was advanced to them to pay freight.

The following issues were agreed upon and submitted to the jury:

1. Were the defendants partners in the purchase of the cattle as alleged?

2. Has defendant Phillips paid plaintiff for the cattle, or any part thereof; if so, how much?

3. Are the defendants, or either of them, indebted to plaintiff for money advanced to pay for freight; if so, how much?

Plaintiff testified that the defendants had given him a letter to one Dan. Phillips, object being to prove partnership in the purchase of the cattle, the letter being signed 'T. C. Phillips and Wilson.'

Defendants' objection to its reception was overruled, and they excepted. It was not contended that defendant Wilson had ever paid any of the sum demanded—the contention being that he was not a partner and not liable in any event.

The judge charged the jury that, as to the first and third issues, the burden was upon the plaintiff, and as to the plea of payment, the second issue, that the burden was upon the defendants.

There was no objection made to the charge until after the verdict, when defendants excepted to the instruction given on the second issue, insisting that as to defendant Wilson the burden on all the issues was upon the plaintiff.

The jury rendered a verdict in response to the—

First issue, 'Yes.'

Second issue, 'Yes, $100.'

Third issue, 'Yes, $15.'

Rule for a new trial for errors alleged. Rule discharged. Judgment for plaintiff. Defendants appealed." (573)

George A. Shuford for plaintiff.

E. C. Smith and Theo. F. Davidson for defendants.

MERRIMON, J. The plaintiff testified that he received the letter objected to on the trial from the defendants—from one as much as from the other, and from both—and no objection was made that he did not receive it from the defendant Wilson. It purported to be the letter of both, had reference to the beef cattle mentioned, and their joint business and liability in that respect. It was therefore some evidence of such partnership of the defendants as that alleged, subject to explanation and contradiction by controverting evidence.

The objection to the instruction of the court to the jury was unfounded. It was not contended, in the answer or on the trial that the defendant Wilson paid anything on account of the indebtedness alleged in the complaint—it was denied that he was a partner and at all liable. The second issue fully embraced the question raised by the pleading as

to payment. The burden of proof as to that was plainly on the defendant Phillips, and as well on the other defendant if he insisted on the defense of payment.

There is no error.

Affirmed.

Cited: McBrayer v. Haynes, 132 N. C., 610; *Bank v. Thompson,* 174 N. C., 350.

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(574)

IN THE MATTER OF THE PROBATE OF THE WILL OF REBECCA ANNIE HAYGOOD.

Probate—Nuncupative Wills.

1. A nuncupative will which has been reduced to writing within ten days after it was made, may be proved for probate either before or after the lapse of six months after the making thereof; but if not put in writing within the ten days, then it cannot be proved after the expiration of the six months.

2. After the contents of the will are established within the time and in the manner prescribed by the statute—The Code, sec. 2184—it cannot be admitted to probate until the citation or publication has been made according to the statute, but it is not essential that this citation or publication and the probate based thereon shall be completed within six months from the making of the alleged will.

THIS is an appeal from an order of *Gilmer, J.,* made at August Term, 1888, of the Superior Court of MECKLENBURG County, in the matter of the will of Rebecca Annie Haygood.

The following is the case settled on appeal for this Court:

"This was a petition for probate of a nuncupative will before the clerk of the Superior Court of Mecklenburg County.

Rebecca Annie Haygood died at her residence in Mecklenburg County, N. C., on 25 September, 1887, having, on the day before her death, as alleged by petitioners, made a nuncupative will, in which the petitioners were named as legatees.

There was no executor named in the will.

On the day of the filing of the petition for the probate of the will, to wit: on 23 March, 1888, the clerk, in conformity with the prayer of petitioners, caused the witnesses to said will to be brought before him, and said witnesses then and there reduced the will to writing, and made before him the affidavits which appear in the record."

All the other material facts appear in the following order, made by his Honor, Judge Gilmer, at the August Term, 1888, of the Superior Court of Mecklenburg County:

"This cause coming on to be heard upon the appeal by the (575) propounders from the order of the clerk of the Superior Court refusing to allow the propounders to introduce testimony tending to establish and prove the said will, the court finds the facts to be as follows:

That the said will was made on 24 September, 1887; that said will was reduced to writing on 23 March, 1888; that on 23 March, 1888, a petition was filed in due form of law for the probate of said will before the clerk of the Superior Court by the propounders; that on said day and at the time of the filing of the application for the probate of the will, an order was made by the clerk citing the next of kin of the testatrix to appear to contest said will, should they think proper, as required by law, which citation was duly published for six successive weeks in the *Charlotte Democrat,* a newspaper published in the city of Charlotte; that at the expiration of the said publication of the citation, the propounders appeared in court and offered testimony tending to establish and prove the said will; whereupon, certain of the next of kin appeared before the clerk and objected to the introduction of testimony to establish the said will, upon the ground that the said alleged will was not put in writing within ten days from the making thereof; and, further, that the order of publication made in the cause within six months from the making of said will, calling in the next of kin of the testatrix to contest said will, if they saw proper, did not expire within six months from the making of said will, which objection was sustained by the clerk, who, thereupon, refused to allow the propounders to introduce testimony offered for the purpose aforesaid; and the matter having been debated in open court by counsel for the respective parties, it is thereupon ordered, adjudged and decreed by the court that the said will was offered for probate within the time required by law, and the case is hereby remanded to the clerk of the Superior Court to the end that the said will may be admitted to probate and that further (576) proceedings may be had thereon according to law."

From this order the parties interested in opposition to the will proposed for probate, having excepted, appealed.

C. W. Tillett (Clarkson & Wilson filed a brief) for propounders.
Clement Dowd, contra.

MERRIMON, J., after stating the case: The statute (The Code, sec. 2148) prescribes how wills shall be admitted to probate, and as to *nun-*

cupative wills it provides, among other things, as follows: "No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making, nor shall it be proved till citation has been first issued or publication been made for six weeks in some newspaper published in the State to call in the widow and next of kin to contest such will, if they think proper." It seems to us that a just interpretation of this provision is, that if such will shall be put in writing within ten days next after it was made, it may be proved by the witnesses thereof either before or after the lapse of six months next after the making thereof, because the will being in writing with the sanction of the witnesses, their recollection as to what it was is helped and strengthened thereby, and they could the better be trusted to testify as to the making of the same, and what it was in its detail, at any time within a reasonable period. The putting of the will in writing is intended to serve such purpose. But if it is not so put in writing, it shall not be proved by *the witnesses* after the lapse of that time; that is, the proof of the witnesses must be taken within that period—their recollection, unaided by such writing, shall not be trusted for a longer period than six (577) months—they shall cease to be witnesses, certainly to make the first proof, if not examined within that time.

The will, as proved *by the witness,* shall not be deemed *proved and admitted to probate* "till a citation has first been issued or publication made for six weeks in some newspaper published in the State to call in the widow and next of kin to contest such will, if they think proper." It will be observed that it is not required that the will shall not be *proved by the witnesses* until the citation and notice provided for shall be made, but it shall not be *proved*—that is, proved in the sense of admitting it to probate at once—until citation shall be made, the purpose being to give the widow and next of kin opportunity to contest the will—the proof thereof by the witnesses thereof—if they shall see fit to do so. If this view is not correct, and if the witnesses of the will cannot be examined until after the citation shall be made, then it might turn out that the will could not be proven, although the propounder had taken steps long before the lapse of six months to prove it, because the citation could not be properly made, and thus the purpose of the statute would, in a measure, be defeated.

Indeed, in case of a *caveat* of the will the proof thereof by the witnesses might—would almost necessarily—in the course of the litigation, be delayed greatly longer than six months. It is not contemplated by the statute that the proof of the will by the witnesses

thereof shall be contested at the time of taking the proof—in the first instance; this is to be done by a *caveat* and proper contest of it. This is the ordinary course pursued in contesting wills. Hence the statute (The Code, sec. 2149) requires that "every clerk of the Superior Court (the probate officer) shall take in writing the proofs and examination of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and examination, in case the will be admitted to probate, in his certificate of (578) the probate thereof, which certificate must be recorded with the will. The proofs and examinations, as taken, must be filed in the office." *Etheridge v. Corprew,* 3 Jones, 14.

The proceedings in the matter of the probate of a will is summary and *in rem,* and at first it is ordinarily *ex parte,* and the contest of it is begun by a *caveat.* (The Code, sec. 2158.) The purpose of the statute is not to prevent the examination of the witnesses of the will, after such lapse of six months, on the trial of the issue *devisavit vel non* in the course of a contest of it, but, as we have said, it is to require that *they* shall not be allowed to *prove it* in the first instance—when it is first presented for probate—after that time, unless it shall have been put in writing within ten days next after the making thereof.

In this case the alleged will was put in writing, presented to the clerk of the Superior Court for probate, and it was *proved by the witness thereof* before him—that is, he took "in writing the proofs and examination of the witnesses" in respect to the making of it, and made the order of citation—publication of notice—but he did not allow the will, as proved, admitted to probate, and ought not to have done so until the proper notice had been given. It was given, and thereupon the appellees objected that the witnesses had not proved the will within six months, as required by the statute, and moved that the proceeding be dismissed.

The clerk, improperly, so ordered. On appeal the court below properly overruled the order of the clerk, and directed that he proceed according to law in the matter of the probate. In this there is no error. The order appealed from must be affirmed, and the same carried into effect.

Affirmed.

(579)

N. J. BICKETT AND WIFE, ELIZABETH, v. JOSEPH NASH ET AL.

Estoppel—Res Judicata—Former Judgment.

1. Where, in a former action, in which plaintiff claimed title to the disputed land, under a devise, the only issue was whether the devise embraced the tract in controversy, and there was judgment for the plaintiff: *Held*, that this was as conclusive upon the defendant and those claiming under him as if the title under which plaintiff claimed had been put directly in issue; and that in a subsequent action between same parties involving the title, the defendant was estopped to show anything in opposition thereto except that since the former judgment the title had become divested from plaintiff.

THIS is a civil action, which was tried before *Boykin, J.*, at February Term, 1888, of UNION Superior Court.

This action, commenced in January, 1886, is prosecuted to recover compensation for trespasses alleged to have been committed by the defendant upon land particularly defined and described in the complaint, belonging to the *feme* plaintiff, and to prevent their threatened repetition by a perpetual injunction. The plaintiffs state that at a special term of the Superior Court of Union, held in August, 1884, in an action there pending, in which they were plaintiffs and the present defendant and others were defendants, and there tried, it was adjudged that the plaintiffs were the owners and entitled to recover possession of the same land as that on which the trespasses were committed and the title to which the defendant now claims under a grant from the State issued to him on 10 December, 1885, for a larger tract of which that now controverted forms a part.

Upon the trial the plaintiffs introduced the record of the former suit, and after proving the trespasses, it being admitted that they were upon the same land that was recovered in the former action, rested.

The defendant undertook to show title in himself, and for this (580) purpose offered the grant in evidence.

The plaintiff objected, on the ground that the adjudication in the previous suit operated as an estoppel, and was conclusive between the parties as to the title. The court sustained the objection, and the defendant excepted.

The complaint in the former suit sets out in full the will of Richard Nash, the first and fifth clauses of which, embracing the land in dispute, are as follows:

"1. I give my wife Julian the house and land whereon she now lives; also the crop that is on hand, two cows and calves, two sows and pigs,

and ten head of first choice head of hogs, twelve head of sheep, one beef cow, and all of the geese, all household furniture, the thresher and fan to remain where it is.

"5. I give unto my son James Nash the land whereon I now live at my wife's death; also for James to live on said land, one horse and fifty dollars in money, one cow and calf and ten dollars in money."

The complaint further alleges, in article 3, that at the time of the death of the said Richard Nash he was seized and possessed in fee simple absolute of the tract of land more particularly described in the eighth article, and in article 4, that the tract is embraced in the devises made in the articles recited.

It alleges that the two divisees survived the testator, and afterwards the said James Nash died intestate, leaving him surviving, his widow, the plaintiff Elizabeth E., since intermarried with Nimrod J. Bickett, and an infant child of her first marriage; and thereafter said infant Sarah died, leaving no brother or sister, and thence her estate descended to her mother under the law of descent—The Code, sec. 1281, Rule 6—and that the widow of the testator died in the year 1881. Thus the plaintiffs derive their title—or rather that of Elizabeth E.—to the land.

In the answer it was admitted, in article 1, that the allega- (581) tions made in articles 1, 2, 3 and 5, are true, and then it denies that the tract in dispute "is included in the land mentioned in items 1 and 5 of the will." It, for want of information, denies that James Nash is dead; or if he is, that his death preceded that of his infant daughter, and that the intestate ever owned the land, or had any interest therein other than as a tenant in common with the heirs-at-law of the testator, and proceeds to controvert other averments in the complaint.

There is a separate and additional answer put in by the defendants, to which we advert only to say that the defense, or counterclaim set up as a defense, seems not to have been considered in the further conduct of the cause.

The record, without setting out the issues raised by the pleadings—if, indeed, any were drawn in form and submitted to the jury—states in general terms that all the issues, that is, matters in controversy, were found by the jury in favor of the plaintiffs, and upon the verdict judgment was entered up in the following terms:

"This cause coming on to be heard before his Honor, Jas. C. MacRae, judge, and a jury, and being heard, and issues having been found in favor of the plaintiff, and that the *feme* plaintiff is entitled to the possession of the land in controversy, it is adjudged that the plaintiffs

are entitled to the immediate possession of the following described land (giving the same boundaries as in the plaintiffs' complaint in the present action), and that the plaintiffs do recover of the defendants the costs incurred for the attendance of their witnesses. It is further adjudged that a writ of possession issue," etc.

From the judgment rendered in the present action, adjudging that plaintiffs are entitled to possession and perpetually restraining (582) the defendant, the latter appealed.

H. B. Adams for plaintiffs.

J. B. Batchelor and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the case: The only matter averred in complaint and controverted in the answer in the former action was the truth of the averments of fact by which the title of the devisee of the remainder, derived under item 5 aforesaid, is traced to the *feme* plaintiff, and whether that devise, in using the words "the land whereon I now live," construed in connection with those contained in item 1, "the house and land whereon she now lives," comprehends that claimed in the suit. Both of these questions were conclusively settled by the verdict, and taken in connection with the admissions in the answer, followed by the judgment upon them, as conclusively and finally determines the title to be in the *feme* plaintiff. Not alone does the result show that the defendants have not, but it shows that the *feme* plaintiff has, an estate in fee and absolute in the premises, and the record cannot be contradicted by them. There could be no direct issue as to the title derived under the will, since this is admitted, and the only controverted fact is, not as to the testator's ownership of the land, but whether the devises comprehend it, and thus the same consequences follow as would from a direct finding upon an issue as to title.

The record shows a direct adjudication, and its results cannot be avoided by taking out a subsequent grant. If the adjudication establishes the incontrovertible fact between the parties that the *feme* plaintiff owned the land, the defendant can only defend himself by showing that the estate was in some legal method divested out of her afterwards, and this he has not done. The State could not grant the land unless the title was in the State, and as the defendant is estopped to deny that it was in her when the adjudication was made, (583) he must show that it has been since divested to resist the recovery, and this he has not attempted to do.

The cases cited for the defense are not in point, and the rulings in them proceed upon the ground of a subsequent divesting, as in *Johnson v. Farlow,* 13 Ired., 84, or upon the recognized rule of practice that

where both parties claim the same land from the same common source neither can dispute the title of the other and show it to be in another, unless he can connect himself with it. *Fisher v. Mining Co.*, 94 N. C., 397, and numerous recent cases therein cited.

The present case involves none of these conditions. There is no claim of an after acquired title superior to the plaintiffs', for that of the State had been divested previously and not again acquired, and if it had been, it was not subject to an entry and regranting under the law. *S. v. Bevers,* 86 N. C., 588. Nor do the parties claim from a common source. On the contrary, as an examination of the record shows, the controversy was not about the testator's title, but about his disposition of the property under his will.

Clearly the record constitutes an estoppel, as understood and defined in many adjudications in this Court. *Armfield v. Moore,* Busb., 157; *Fanshaw v. Fanshaw, ibid.,* 166; *Rogers v. Ratcliff,* 3 Jones, 225; *Isler v. Harrison,* 71 N. C., 64; *Falls v. Gamble,* 66 N. C., 455; *Yates v. Yates,* 81, N. C., 397; *Tuttle v. Harrill,* 85 N. C., 456.

The effect of a judgment where the title to land comes into controversy and is decided is equally an estoppel as if personal property was the subject matter involved in the suit. *Davis v. Higgins,* 87 N. C., 298; *Johnson v. Pate,* 90 N. C., 334.

There is no error, and the judgment is

Affirmed.

Cited: Carter v. White, 131 N. C., 17; *Woodlief v. Woodlief,* 136 N. C., 138; *Turnage v. Joyner,* 145 N. C., 83.

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(584)

MARGARET L. PATTERSON v. J. M. WILSON AND J. N. PATTERSON, EXECUTORS OF WILLIAM PATTERSON.

Will—Legacy—Property—Money.

1. While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not so intended, that interpretation will be given it by the courts with which the testator had evidently employed it.

2. P. devised to his wife the "plantation on which I now live . . . also two mules (and various other articles of personal property—naming them), also one thousand dollars to be paid to her out of my estate" for her life, and in the succeeding clause he devised to his daughter, M., "at

my wife's death . . . all the property of whatever description that I have heretofore willed to my wife; . . . I also will and bequeath to my daughter M. one thousand dollars": *Held*, that the legacy of $1,000 to the wife did not pass under the bequest to M.

THIS is a controversy, submitted to the court without action, as allowed by the statute (The Code, secs. 567-569), and heard before *Boykin, J.*, at February Term, 1888, of MECKLENBURG Superior Court.

It appears that the testator of the defendants, William Patterson, died in the county of Mecklenburg, leaving a last will and testament which was duly proven. The following is a copy of such parts thereof as are material here:

"Item 3d. I will and bequeath to my beloved wife, Elizabeth C. Mc. Patterson, the plantation on which I now live, containing four hundred acres, be there more or less, during her natural lifetime; also two of my mules or horses of her choice, and my blind horse (named Joe); also five head of cattle and fifteen hogs of her choice; one of my four-horse wagons and harness; my one-horse wagon; one set of blacksmith tools; my cotton gin and running works; my car-
(585) riage and harness, buggy and harness, and sufficient farming utensils to carry on a four-horse farm; also a quantity of provisions for her family and stock for one year; also all of my household and kitchen furniture, except such as I may hereafter will and bequeath; also one thousand dollars, to be paid to her out of my estate by my executors.

"Item 4th. I will and bequeath to my daughter, Margaret L. H. Patterson, at my wife's death, my plantation on which I now live, containing four hundred acres, more or less; also all the property of all descriptions that I have heretofore willed to my wife; I also will and bequeath to my daughter, Margaret L. H. Patterson, one thousand dollars; also two of my horses or mules of her choice, after her mother has had first choice; also my gold watch and chain which she now has in her possession; also my piano and two beds and furniture; one bureau, one set of chairs, one folding leaf table, and a bridle and saddle; I also will and bequeath to my daughter Margaret one-half of all the crop that is made on the plantation on which I now live during my wife's lifetime; all to be hers forever.

"Item 12th. I will and direct that all of my property not herein willed be sold at public auction for cash and that all my notes and accounts on hand be collected by my executors, and after all my debts are paid and all the money I have herein willed is paid over, then the balance of the money to be equally divided between my wife, my daughters Margaret L. H. Patterson, Leonora L. Wilson, Banna

A. J. Alexander, my son John A. W. Patterson, and one child's share of it to be equally divided between my grandsons William J. Houston and G. S. Houston.

"The plaintiff is the person named in the fourth item of the will. Elizabeth Patterson, the wife of the defendants' testator, died before her husband some two years. The plaintiff claims that by virtue of the general limitation over to her, contained in the fourth item of said will of all the property which had been devised (586) and bequeathed to her mother in the third item of the will, the sum of one thousand dollars bequeathed to her mother in said third item passed to her. The personal property of the estate is sufficient to pay all the debts and a part at least of the legacies, including part of plaintiff's, if the court shall be of opinion that the plaintiff is entitled to recover the same."

The court adjudged that the plaintiff was not entitled to the legacy of $1,000, and she appealed.

W. P. Bynum and C. W. Tillett for plaintiff.
Burwell & Walker (filed a brief), for defendants.

MERRIMON, J., after stating the case: The appellant's counsel contended on the argument that the words "also *all the property of all descriptions* that I have heretofore willed to my wife," as used in the fourth clause above recited of the will mentioned, properly interpreted, embraced the sum of one thousand dollars given to the wife of the testator by the third clause thereof recited above. No doubt such words might in some connections embrace money as well as other property certainly embraced by the term property, but do they as employed in the will before us?

The testator's intention must prevail, and in ascertaining what it is, words and phrases must be allowed to have the meaning and effect he intends to give them, if this can be done consistently with settled rules of law. Hence, to a large extent, the interpretation of every will must depend upon what is in and intended by it, without strict regard to the ordinary legal or common meaning of the words or the general rules of interpretation. Every will must, in large measure, be interpreted by itself.

The third, and so much of the fourth clause of the will before us as has reference to the property embraced by the third, must be construed together—they have a direct bearing each upon the (587) other, and dispose of the property first to the testator's wife for life, and after her death to his daughter Margaret. It will be observed that, in the third clause, he classifies the property he intends

his wife to have. First, he devises to her certain lands for her natural life; secondly, he gives her divers kinds and quantities of personal property, particularly designated and adapted to particular purposes; and thirdly, he gives her "one thousand dollars, to be paid to her out of my (his) estate."

It is apparent from the nature and the manner of the gift of the personal property, other than the money, that the testator intended his wife to use and apply it for the purposes to which it was adapted and intended, in the ordinary use of it, and not to sell or otherwise dispose of it, so that when the wife should die the daughter might have so much of it as should not be worn out by the ordinary use of it or consumed in the use. It was otherwise, however, as to the money given. In its nature, it could not be used, worn and partly consumed and partly left like the other property.

Money is intended for and adapted to the purposes of exchange—it is to be parted with from time to time, as occasion may require, for property or advantage of some kind. The testator intended, nothing to the contrary appearing, that his wife should have and enjoy the money as money is ordinarily enjoyed. He does not say that she shall have the interest that may accrue upon it; he gives it to her—directs it "to be paid to her," thus implying the absolute gift of such peculiar property. He gives point to his meaning, in that he directs this legacy to be paid "out of my (his) estate"; and in the twelfth clause of his will directs that "property shall be sold for cash" and his "notes and acccounts" be collected, and this and like legacies be paid out of the fund so arising.

(588) While the term "property," in its broad legal sense, embraces money in its ordinary acceptation, among people not familiar with legal terms and phraseology it does not—they use that term as applicable to things, such as horses, oxen, cattle, wagons, plows, hoes, corn, hay, things to be eaten, and the like. Money, among such people, and generally, indeed, is regarded and treated as different from "property," accepting the broadest legal meaning of that word.

We think the testator, in the will before us, did not use the term "property," in the fourth clause of his will, in such sense as to embrace money—he intended it to apply to mules, horses, wagons, carriages, farming implements, and the like. *Pippin v. Elllison,* 12 Ired., 61; *Webb v. Bowler,* 5 Jones, 362; *Cole v. Covington,* 86 N. C., 295.

There is no error and the judgment must be affirmed.

Affirmed.

Cited: In re Shelton's Will, 143 N. C., 222; *McIver v. McKinney,* 184 N. C., 396; *Kidder v. Bailey,* 187 N. C., 507.

(589)

R. W. TIDDY AND WILLIAM TIDDY v. H. W. HARRIS AND R. H. HARRIS.

Nonsuit—Issues—Appeal—Principal and Surety—Payment.

1. Where, at the close of the testimony, the judge stated that he should charge the jury that, if they believed the evidence, the defendant had established his defense: *Held*, that the plaintiff might submit to a nonsuit and have the questions of law raised by the testimony reviewed on appeal.
2. It is again intimated that this Court will not entertain an appeal where the transcript of the record fails to show that issues were proposed and submitted as required by The Code.
3. When a debtor pays money to his creditor, in the absence of anything to the contrary appearing, the presumption is that it was a payment on the existing debt; and so if the payment is made by the delivery of a check, which is afterwards converted into cash.
4. If a surety desires to preserve for his benefit an existing security for the debt which he is called upon to discharge, the debt and security must be assigned to a trustee, otherwise the payment will be in satisfaction.

CIVIL ACTION, tried before *Boykin, J.*, at Spring Term, 1888, of MECKLENBURG Superior Court.

This action commenced on 10 July, 1885, by the service of a summons on H. W. Harris and R. H. Harris—as to the last named of whom a *nolle prosequi* was entered before the trial—is prosecuted to recover a balance alleged to be due for goods, wares and merchandise sold and delivered, the items whereof are set out in an exhibit annexed to the complaint. The complaint was met by demurrer, and this being overruled, the defendants put in separate answers in each of which respondents deny their liability to the plaintiffs, and aver that the debt demanded has been paid.

The only witness who testified in behalf of the plaintiffs was R. N. Tiddy, one of the plaintiffs, whose testimony tended to show that the plaintiffs, Tiddy & Bro., had sold merchandise to A. M. Waddell and the defendant H. W. Harris, as set out in the com- (590) plaint, and the defendant and A. M. Waddell were indebted to plaintiffs, as set forth therein.

The defendant, seeking to establish his plea of payment, introduced as a witness one H. A. Deal, who testified, on his direct examination, that he asked R. N. Tiddy, in the fall of 1883, if the debt sued on had been paid, and he said it had; he didn't say how it was paid, nor by whom. On his cross-examination, the witness said: "This was in September, 1883, in Tiddy's office. H. W. Harris said he had not

paid it. Waddell and I had had a conversation, and he said this debt was paid." And on his redirect examination the witness said: "I saw Col. Waddell at Warm Springs; he said to me he had retired from the newspaper; that he was a public man and could not afford to leave an unpaid debt."

The defendant testified: "I went to Mr. Tiddy's office in June, 1884, and said: 'I understand, Mr. Tiddy, that all that debt has been paid.' He replied: 'You know how that is,' and went on to talk about his not being a free agent. I told him I didn't know; that I had been informed it had been paid. He did not deny it." And on his cross-examination this witness stated that H. A. Deal had told him that this debt was paid.

This was all the testimony introduced by the defendant to establish his plea of payment.

The plaintiffs replied thereto by recalling R. N. Tiddy, who said: "I said to Deal that the debt had been paid, because I wanted Col. Waddell's interest in the contract. I told one W. C. Morgan to give Waddell his check for $1,000, and I would cover it. I gave him my check. Morgan gave Waddell his check and Waddell gave it to me and I got his interest. I have not received any money from any party on this account." And on his cross-examination, he said: "I (591) put the Waddell check in bank to our credit. I credited part to the book-store account and part to the paper-mill account in settlement of these claims. I will not say I did not tell Deal the debt was paid. We got credit in bank on Waddell's check. I charged the debt up again when I signed my check. I marked the claim satisfied in order that I might get Waddell's interest."

There was no other evidence relating to the payment of the debt, except what is above stated.

After close of the testimony and during the argument of counsel, his Honor stated to the counsel that he should charge the jury that if they believed the testimony, the defendant had established his plea of payment, and the jury should find that issue in his favor, and thereupon the plaintiffs asked to be allowed to enter a nonsuit, which request was granted, and judgment of nonsuit, accordingly entered, and the plaintiffs appealed.

C. W. Tillett for plaintiffs.
Burwell & Walker (filed a brief) for defendants.

SMITH, C. J., after stating the case: There are no issues shown in the record to have been submitted to the jury as required by The Code, the neglect to draw up which, so as to give meaning to the verdict,

would induce us, after such repeated warning given and disregarded, to refuse to entertain the appeal and remand the case, but that the verdict was dispensed with and the case never reached the jury.

The defendants' counsel insists that the appeal should be dismissed, because the nonsuit was needlessly suffered when the cause ought to have proceeded to its termination. But the practice has long prevailed that when the proofs are all in and the judge intimates an opinion that, under the old practice the plaintiff *cannot recover,* or under the new fails to establish the issues necessary to his having judgment, he may suffer a nonsuit, and, by appeal, have the cor- (592) rectness of the ruling reviewed. We see no reason why this course may not be taken when the judge announces, as in this case he substantially does, that if the jury believe the facts to be as deposed to by the witnesses, he will instruct them to find the issue as to the payment in favor of the defendant.

In a late case—*Davis v. Ely,* 100 N. C., 283—the court did not wait until the evidence was concluded, but in denying the motion to dismiss the action, added, that the plaintiff, if he proved his averments, could not have the specific relief asked—the contract reformed, and, as reformed, specifically enforced—but he would be entitled, upon the facts set out in the complaint, if proved, to a judgment rescinding the contract. Thereupon, the nonsuit was suffered.

This course of procedure did not meet our approval, for the reason that the opinion was purely hypothetical and contingent, open to a retraction when the opportune time arrived for an authoritative ruling; and, moreover, the verdict might dispose of the case if rendered against the plaintiff upon the evidence. We took occasion then to say what we now repeat, that a convenient practice is, to reserve a ruling upon the motion to nonsuit, with consent of parties, "and let the case proceed to 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 to the defendant, when erroneous, could be corrected, and, in either case, the cause terminated." *Kirby v. Mills,* 78 N. C., 124.

The rule will operate quite as favorably in cases like the present.

Upon the point, however, brought up by the plaintiff's appeal, we concur in the ruling indicated by the judge. He does not say that admissions of payment are not open to disproof as when merely such they are, but evidence of payment to be considered and passed on by the jury, but he means to say that when Waddell, the debtor, gave the check, drawn in his favor by Morgan to the plaintiff R. N. Tiddy, who deposited it to his credit as stated, the transaction, (593) nothing to the contrary appearing, must be understood to have

been intended to be, and to be, a payment. The fact that Morgan gave the check under Tiddy's promise to cover does not change the nature and effect of the act as between him and Waddell, whose interest was thereby acquired by the former. That the act of delivering the check and its conversion into a money credit by the deposit are in legal effect a payment, is sustained in principle by *Brisendine v. Martin,* 1 Ired., 286, and *Hall v. Whitaker,* 7 Ired., 353, and other cases. The appellees' contention, which aims to give to the transaction the effect of an assignment instead of payment, so as to preserve the remedy against the other debtor, finds no support in the facts.

To prevent a satisfaction when a surety pays the money to the creditor to preserve the security for the benefit of the surety so paying, it must be assigned to a trustee, and in no other way can it be kept alive. *Hodges v. Armstrong,* 3 Dev., 253; *Briley v. Sugg,* 1 D. & B. Eq., 366. Nor when intended as a payment can it fail to have such effect because less than the sum demanded, when accepted as such, under the act of 1874 and 1875. The Code, sec. 574.

There is no error, and the judgment is

Affirmed.

Cited: Asbury v. Fair, 111 N. C., 258; *Liles v. Rogers,* 113 N. C., 200; *Peebles v. Gay,* 115 N. C., 41; *Burnett v. Sledge,* 129 N. C., 120; *Midgett v. Mfg. Co.,* 140 N. C., 363; *Merrick v. Bedford,* 141 N. C., 505; *Chandler v. Mills,* 172 N. C., 368, 560; *McKinney v. Patterson,* 174 N. C., 489; *Nowell v. Basnight,* 185 N. C., 148.

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(594)

MARGARET L. PATTERSON v. J. M. WILSON AND WIFE.

New Trial—Evidence—Witness—Will.

1. Where one party was permitted to introduce evidence impeaching and contradictory of that given by witnesses for the other, and the latter was allowed to recall the assailed witnesses and examine them again upon the controverted matter: *Held,* that any error in admitting the contradicting evidence was removed by the opportunity for reëxamination thus given.
2. The admission of immaterial evidence is not ground for a new trial, though incompetent, unless it appears that it did or had a tendency to prejudice the party complaining.
3. While under some circumstances the declarations of a testator are competent upon the question of the *factum* of the will, they are not competent upon the question of the interpretation of the contents of the will.

PATTERSON *v.* WILSON.

THIS is a civil action, which was tried before *Boykin, J.*, at February Term, 1888, of MECKLENBURG Superior Court.

The action was brought to recover a tract of land, the plaintiff claiming the same under a clause of the will of Wm. Patterson, in which he devises to her "the plantation on which I now live," and the *feme* defendant claiming the same under another clause of said will in which he devises to her his "Reid plantation."

There was evidence introduced by the plaintiff tending to show that the testator considered the *locus in quo* a part of the plantation on which he lived, and intended the same for the plaintiff, while there was evidence introduced by the defendants tending to show the contrary, and that it was considered by him as part of his Reid plantation and intended for the defendant Leonora.

The contest was mainly over the question as to what lands were embraced in the "Home" and "Reid" tracts, and where was the dividing line between them.

The jury rendered a verdict for the defendants, and from (595) the judgment thereon the plaintiff appealed.

The other facts necessary to an understanding of the points decided in the appeal are stated in the opinion.

W. P. Bynum and C. W. Tillet for plaintiff.
Burwell & Walker (filed a brief), for defendants.

MERRIMON, J. The first and third exceptions rest upon the same ground, and are clearly not well founded. The appellant assigns as error that two witnesses produced by the appellees were allowed, the appellant objecting, to give evidence of facts tending to contradict and impeach, two witnesses examined by her in respects and as to matters purely collateral to the issues submitted to the jury—the witnesses so contradicted not having been cautioned on their respective examinations that they would be contradicted in the respects mentioned. This might be error, but for that the witnesses so impeached were recalled for the purpose, and allowed to testify and make explanations as to the alleged collateral matters wherein it was sought to impeach them. This certainly obviated the appellant's objection and rendered the grounds of it harmless. The appellees contended that the evidence of the witnesses so controverted was directly material to the issues submitted, but we need not decide whether it was so or not, as what we have said disposes of the exceptions.

Nor has the second exception any substantial force.

"A witness was asked if Patterson (a witness for the appellant) abandoned the survey—the one made by Jetton at the request of both

parties? He said, 'Yes.' He was then asked if he assigned a reason? He said, 'Yes; he handed in the papers, and said he was going to give up the survey; that his sister Margaret and Sidney (Houston) (596) were dissatisfied with the will, and he never had been satisfied.'

The plaintiff objected to the evidence. The objection was overruled, and the plaintiff excepted."

This evidence was unimportant, and, as far as we can see, immaterial. It does not appear that any stress was placed upon it on the trial; and if it had any bearing at all upon the issues it was as much in favor of one party as the other. It was so little important that its admission, though perhaps not strictly proper, was not ground for a new trial. The admission of immaterial evidence is not ground for a new trial, unless it appears that it did, or the tendency of it was, to prejudice the party complaining. There is scarcely the slightest probability that the evidence objected to had any weight with the jury.

Nor can the fourth exception be sustained.

"H. H. Cathey, a witness for the defendant, had testified that shortly before the testator's death, he and testator were at the point 'B' on a day when a fence was burned, and that testator then told the witness that B was a corner of his Reid place, calling attention to the stone and letters and figures on it.

The plaintiff, for the purpose of showing that the testator was not present that day, proposed to prove by the witness Houston, who had been recalled, that the testator, on the night of that day, inquired how much of the fence was burnt.

This evidence was objected to by the defendant. The objection was sustained, and the plaintiff excepted."

This proposed evidence was hearsay, and was properly rejected upon that ground, as well as because it was immaterial. The inference intended to be drawn from it was very remote, in any possible view of it, and besides, it was not inconsistent with what the witness intended to be impeached by it said.

Nor can the fifth and last exception be sustained.

"The plaintiff offered herself as a witness, and proposed to testify that she had heard a conversation between her father, the tes- (597) tator, and her mother, before the will was made, wherein he stated that he expected to give her the woodland.

It is stated by counsel for the plaintiff, that if witness proves the conversation, they will argue that the testator intended by the will to devise the land to the plaintiff.

The defendant objected to the evidence, the objection was sustained, and the plaintiff excepted."

The evidence thus proposed was incompetent. The very purpose of putting the will in writing was to declare and express the testator's settled intentions in respect to his property, to establish the certain evidence of such intentions, and such evidence must prevail, no matter what he may have said before or after its execution. Otherwise, the will would serve no practical purpose—it would be but a solemn mockery subject to the whims of every day—to the incautious and variant expressions made by the testator in the hearing of different people in respect to his purposes as to the final disposition of his property. The will is made the evidence—the sole and the best evidence—of the testator's intentions and disposition of his property affected by it.

The case of *Reel v. Reel,* 1 Hawks, 248, cited by the learned counsel for the appellant, has no application here. That was a contest of the will then in question—the purpose was not to interpret it and ascertain its meaning. The evidence as to what was said by the supposed testator was for the purpose of showing that he did not execute a valid will. In such case, no doubt, the pertinent declarations of the testator for proper purposes might be evidence. In the case under consideration, however, the evidence was offered to prove the meaning of the will as to the disposition of certain land disposed of by it.

The court properly held that the evidence was inadmissible.

Affirmed.

Cited: Strother v. R. R., 123 N. C., 199; *Jeffries v. R. R.,* 129 N. C., 237; *In re Shelton's Will,* 143 N. C., 222; *Grantham v. Jinnette,* 177 N. C., 232.

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(598)

D. H. McCALL ET AL. v. WILLIAM S. WILSON ET AL.

Evidence—Witness—Statute—Registration of Deeds.

1. A witness who is excluded, under section 590, The Code, from testifying to any personal communication or transaction with a deceased person, may, nevertheless, be competent to testify what he saw the deceased do, or to any fact which does not include a personal transaction or communication.

2. The section of The Code (1279) extending the time within which grants, etc., might be registered, went into operation on 2 March, 1883—the date of the passage of The Code—and consequently there was no period intervening between the expiration of two years from the enactment of the Extending Act of 1881 and November, 1883, in which grants and other instruments requiring registration might not be registered.

THIS is a civil action for the recovery of land, which was tried before *Gilmer, J.*, at Fall Term, 1888, of MECKLENBURG Superior Court.

It was in evidence that the plaintiffs were the children and heirs at law of Josiah McCall, who died in 1864. They introduced (1) a deed from John E. Moore to Josiah McCall, their father, dated 22 October, 1858, and registered 2 September, 1884. This was in form a fee-simple deed and the lands described therein are the lands in dispute; and (2) a deed from A. M. Moore, the widow of John E. Moore, to the defendant, William S. Wilson, and M. C. Wilson, the ancestor of the other defendants. This deed was dated 16 February, 1882, and registered two days thereafter. It was in fee simple and described the lands in dispute, and added that the same was made subject to the dower of C. C. McCall, who is the widow of Josiah McCall.

The defendant then introduced testimony tending to show that John E. Moore purchased the land at a sale under execution as the property of Matthew McCall, and that he executed a deed conveying the (599) land to said Matthew McCall, and that the defendant W. S. Wilson purchased the land from A. M. Moore, the widow of John E. Moore, in 1882. It was also in evidence that Josiah McCall was a very poor man and never owned any land. The defendant introduced a deed from W. C. Maxwell, administrator of John E. Moore, deceased, to A. M. Moore and her heirs, dated 16 February, 1882, reciting a sale made 1 November, 1880, under proceedings to make assets, and the proceedings under which the land was sold. This deed embraces the land in dispute. Also a deed from S. C. McCall, the widow of Josiah McCall, dated 3 February, 1882, conveying to the defendant, W. S. Wilson, all her right of dower and interest in the land in dispute.

Plaintiffs then introduced S. C. McCall, who testified "that she saw the deed from John E. Moore in the possession of her late husband Josiah McCall. He had land in Union County, sold it, brought back the money. She saw him start off with the money and bring back the deed. This was objected to by the defendant, under section 590 of The Code, but admitted, and defendants excepted."

"D. H. McCall, one of the plaintiffs, testified that he had not resided on the land since the war. That he saw Penninger pay his father $175 for the Union land. Objected to by defendants. Objection overruled, defendants excepted."

"The defendants insisted that they were entitled to judgment because the deed from Moore to Josiah McCall . . . was not registered within the time prescribed by law," and was void as against the deed

from the administrator of Moore, under which they claim as innocent purchasers for value. His Honor reserved his opinion on this question till after verdict.

There was a verdict finding the issues in favor of the plaintiffs and judgment for the plaintiffs, and appeal by the defendants.

W. P. Bynum for plaintiffs. (600)
Osborne & Maxwell filed a brief for defendant.

DAVIS, J., after stating the case: 1. The first exception is to the admission of the testimony of S. C. McCall. She testified to no "personal transaction or communication" between her and the deceased. What she *saw*, and the fact that the deceased had land in Union County, involved no such "transaction or communication." *Loftin v. Loftin,* 96 N. C., 94.

There was no error in admitting her testimony.

2. The second exception was to the admission of the testimony of D. H. McCall. He testified to what he "saw," and the exception cannot be sustained.

3. The third exception, and the only one relied on in the brief of counsel for defendants, was to the refusal of his Honor to give judgment for defendants, upon the ground, as insisted, that the deed from Moore to Josiah McCall was void as against the deed from the administrator of Moore, because the former was not registered within the time prescribed by law.

It is insisted that the Acts of 1883 did not extend the time for registration of deeds, and that section 1279 of The Code, giving further time, did not go into effect until the first day of November, 1883, more than two years after the extending act of 1881, and that there was no law in force that authorized the registration of the deed from Moore to Josiah McCall on the second day of September, 1884, which could have relation back to defeat the title acquired under the deed from the administrator of Moore, registered in February, 1882, under which the defendants claim title.

It is a misapprehension to suppose that section 1279 of The Code, extending the time for registering grants and other instruments, did not take effect till 1 November, 1883, and that there was an intervening period between the expiration of two years, or after the extending act of 1881, and 1 November, 1883, during which there was no law in force extending the time for registering grants, etc.

Section 1279 of The Code, as appears upon its face, is a re- (601) enactment of chapter 180, sec. 1, of the Acts of 1870-71, and provides that "all grants of land in the State, or all deeds of conveyance

. . . required by law to be registered within or by a given time," and which "have not been proved and registered within or by such time, may be proved and registered within two years after the *passage* of this Code, under the same rules," etc.

The Code was passed and ratified on 2 March, 1883. The Code, Vol. II, page 601, sec. 3866, is as follows: "All the provisions, chapters and sections contained in this Code shall be in force from and after 1 November, in the year of our Lord one thousand eight hundred and eighty-three, except only such parts thereof as to which a different provision is expressly made therein."

By the express provision in section 1279, the time is extended two years "after the passage" of The Code—that is, after 2 March, 1883, and not after 1 November, 1883.

The Acts of 1881, ch. 313, extended the time two years from its ratification, 11 March, 1881, and, as we have seen, the provision in The Code, sec. 1279, was passed 2 March, 1883; so there was no intervening period of time when no law was in force allowing further time for the registration of grants, etc., as there was in the case of *Scales v. Fewell,* 3 Hawks, 19, and *Haughton & Slade v. Roscoe & Gray,* 3 Hawks, 21, relied on by counsel for defendants.

The third exception cannot be sustained.

There is no error.

Affirmed.

Cited: Lane v. Rogers, 113 N. C., 173; *Wetherington v. Williams,* 134 N. C., 280; *McGowan v. Davenport, ib.,* 536; *Johnson v. Cameron,* 136 N. C., 244; *Bonner v. Stotesbury,* 139 N. C., 3; *In re Bowling,* 150 N. C., 510; *Zollicoffer v. Zollicoffer,* 168 N. C., 329; *Brown v. Adams,* 174 N. C., 493, 502, 503; *In re Will of Saunders,* 177 N. C., 157; *Reece v. Woods,* 180 N. C., 633; *In re Harrison,* 183 N. C., 460; *Ins. Co. v. Jones,* 191 N. C., 181.

(602)

F. E. PATRICK v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Reference—When Order for May be Vacated.

1. The court will not vacate an order of reference, made by consent without the mutual assent of the parties thereto, unless a sufficient cause therefor is made to appear.

PATRICK *v.* RAILROAD.

2. A reference was made to two arbitrators, with a provision in the order for the substitution of alternates in the event the original referees, or either of them, could not serve. One of them declined, and the alternate for him, vainly trying to secure a meeting with the other, also refused to serve: *Held*, to be good cause for the court to vacate the order.

THIS is an appeal from a judgment of *Boykin, J.*, rendered at Spring Term, 1888, of the Superior Court of MECKLENBURG County, setting aside an order of reference to arbitrators, made at Spring Term, 1887.

The order of reference was as follows:

"In this case it is agreed between the parties that the whole matter in dispute, law and fact, be submitted to J. H. Dillard and M. E. Carter, as arbitrators, and if they disagree they may select an umpire, or they may select an umpire in the first instance to sit with them and hear the evidence and argument, but only to act finally in case of disagreement of the arbitration—the award of the arbitrators, or a majority of them, to be final and a rule of court. Arbitrators to sit and hear the case at Greensboro, N. C. If Judge Dillard declines the plaintiff selects R. H. Battle, and if Mr. Carter declines the defendant selects F. C. Robbins, as arbitrators."

Upon the hearing plaintiff showed that Judge Dillard and Mr. Carter had both consented to act as arbitrators, but that Judge Dillard afterwards declined to act, and so notified the parties. That thereupon, Mr. Battle was notified of his appointment as alternate arbitrator and requested to act in the place and stead of Judge Dillard, (603) which he consented to do. That Mr. Battle then for some months endeavored to arrange with Mr. Carter for a hearing, but failing to hear from Mr. Carter, he also declined to act further, and on 6 February, 1888, so notified counsel for plaintiff, and requested them to make known to the court his determination to decline to act as arbitrator.

There was no notice to the plaintiff, either from Mr. Carter or the defendant, that Mr. Carter had at any time declined to act, nor did he ever so decline.

Neither the plaintiff nor Mr. Battle ever communicated with Mr. Robbins, the alternate arbitrator selected by the defendant, with regard to the hearing of the case before him as such alternate, nor was Mr. Robbins ever requested by defendant to act as arbitrator.

On 14 March, 1888, during the term at which the motion was made, Mr. Carter notified defendant's counsel that he had "sometimes since" written to Mr. Battle, agreeing to serve as one of the arbitrators, but had been informed by Mr. Battle that he, Battle, had declined to act further. He further stated that he, Carter, was still willing to serve.

Upon the foregoing facts his Honor Judge Boykin struck out the order of reference, and the defendant appealed.

The defendant stated as grounds of exceptions:

1. That the court had no power to strike out the order of reference, it being a reference by consent, or to arbitrators.

2. That the facts did not warrant the exercise of such a power, if it existed.

A. M. Lewis and C. W. Tillett for plaintiff.
D. Schenck and C. M. Busbee for defendant.

DAVIS, J., after stating the case: Except in cases of compulsory reference, under section 421 of The Code, issues in an action, whether of fact or of law, or both, can only be referred upon the written
(604) consent of the parties. The Code, sec. 420. The order of reference entered of record by consent of parties is a sufficient compliance with the statutory requirement in regard to the written consent. *White v. Utley,* 86 N. C., 415.

The settlement of controversies by reference has always been regarded with favor, and while under the old practice the consent of the parties was essential to the making of the order, except in matters of account in actions against executors, administrators, guardians and sheriffs, or other officers, or in courts of equity, yet when once made it could not be annulled by the act of the parties. It might be revoked by operation of law; as for instance, the death of one of the parties; and the court might rescind it as a matter of course by the wish and consent of the parties; but the courts would not set aside orders of reference when once made by consent at the instance of one party against the wish of the other, unless for good and sufficient reason shown. *Tyson v. Robinson,* 3 Ired., 333.

In *Perry v. Tupper,* 77 N. C., 413, it was held that the court could not, after a reference by consent, "withdraw the trial of the controversy from the tribunal voluntarily selected by the parties without their mutual consent, except for good and sufficient cause assigned and made to appear to the court." It was said in that case: "The death of the referee would terminate the reference, and for a sufficient cause the judge may do it, but not otherwise."

The court had the power to strike out the order of reference for good and sufficient cause. Did the facts in the case before us warrant the exercise of such power?

While the case on appeal does not state sufficiently the findings of fact upon which the order of reference was stricken out, it sufficiently

appears that John H. Dillard and R. H. Battle successively declined to act, and we must consider the facts as thus found. The court has no power to compel the referee to act, and "as the consent extends (605) not only to the terms of the reference, but to the person of the referee," (*White v. Utley, supra*) it has no power, without consent, to substitute other referees.

This being so, if the court had no power to set aside the order of reference, a trial might be defeated entirely, and we think the facts warranted his Honor in setting aside the order of reference.

Affirmed.

Cited: Smith v. Hicks, 108 N. C., 251; *Lance v. Russell,* 157 N. C., 453.

C. W. LESTER v. G. S. HOUSTON AND JOHN D. BROWN.

Constitution—Mechanics' and Laborers' Liens—Contractor and Subcontractor—Application of Payments.

1. In the application of payments the creditor may, and if he does not, the law will, appropriate them to the most precarious debt, in the absence of any direction to the contrary from the debtor.
2. Where payments are made upon a running account they will be applied to the preceding debit items in the order of their date.
3. The constitutional provision for giving to mechanics and laborers liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others.
4. The lien given to subcontractors by the statute of 1880—The Code, secs. 1801-1803—does not supersede that in favor of the contractor, but only gives it a preference to the extent of the amounts which may be due the subcontractor, provided it does not exceed the sum which may be due the original contractor.

THIS is a civil action, which was tried before *Boykin, J.,* a jury being waived, at February Term, 1888, of MECKLENBURG County.

The action was instituted to recover an alleged balance due upon a contract for the construction of a house at Davidson Col- (606) lege, and to enforce a lien upon the premises against the defendant Houston and his codefendant Brown, to whom the property had been conveyed in trust to secure creditors.

A jury trial was waived and the judge found the following facts:

1. That a contract was entered into between plaintiff and defendant Houston as set out in the complaint, and in pursuance and fulfillment thereof the plaintiff did, during the months of February, March, April, May, June, July, August, September, October, November and December, 1886, furnish the necessary materials to build the said buildings, and from said materials to cause to be built upon the premises described in the complaint the houses therein described.

2. That the materials so furnished and the work and labor done in building the house were reasonably worth the sum of two thousand six hundred dollars.

3. That of the work and labor performed, the plaintiff, from time to time, worked and labored as a mechanic in framing the house, putting it up, making window frames and the like, for the space of three months in all, and his services for the manual labor performed by him was worth the sum of seventy-five dollars per month.

4. That the balance of the work and labor was performed by mechanics employed by plaintiff, he planning and supervising the construction of the buildings, and he visited the place at intervals of two to three weeks on an average for the purpose of working on said buildings and of supervising and directing the work; that during the time the houses were being built he resided in Catawba County, some twenty miles from Davidson College.

5. That during the time he was having the Houston house built at Davidson College he also had a contract to build a house at Statesville, in Iredell County, and one in Catawba County, and the work on
(607) these two houses was being done at the same time as the work on the Houston house.

6. That from time to time the defendant Houston made payments on account to the plaintiff; that the parties came to an accounting on 15 December, 1886, when it was found that the balance set forth in said account was due to the plaintiff, and a due bill given therefor; that on the accounting it was found that all the materials were paid for.

7. That on 13 January, 1887, the defendant Houston executed and delivered to his codefendant Brown a deed conveying the premises described in the complaint, together with other property, in trust to secure the payment of preferred debts other than the plaintiff's, to about the sum of five thousand dollars, and then, if any residue, to be distributed *pro rata* amongst the other creditors of said Houston, which said deed of trust was duly registered in said county on 14 January, 1887.

8. That the "incidental" $349.97 in the statement made on settlement was for board of self and work performed in getting materials for said buildings.

9. That the plaintiff, on 24 January, 1887, filed a lien in the office of the clerk of the Superior Court of Mecklenburg County.

10. That there was no evidence that plaintiff waived his lien.

Thereupon the court adjudged:

"1. That the plaintiff is entitled to recover of the defendant Houston the sum of seven hundred and seventeen 83/100 dollars with interest on the same from 15 December, 1886.

2. That the plaintiff has still subsisting a valid lien upon the premises described in the complaint to the amount of the said sum still due, and is entitled to have said lien enforced against both the defendants, as prayed for in the complaint"; and directed a formal judgment to be entered in pursuance thereof, which was done, (608) from which defendants appealed.

The defendants excepted to his Honor's conclusions of law as follows:

1. That his Honor has decided that plaintiff is entitled to a lien on the property described in the complaint for the amount claimed by plaintiff, as set forth in the second conclusion of law.

2. That his Honor has concluded as a matter of law that plaintiff is entitled to a lien on said property for more than the value of plaintiff's manual labor and work—that is, seventy-five dollars a month for three months.

3. That his Honor should have concluded as a matter of law that the plaintiff is not entitled to a lien on said property for any amount claimed by him, and certainly for not more than his individual manual work and labor—that is, $225.

C. W. Tillett for plaintiff.
Burwell & Walker (filed a brief), for defendants.

SMITH, C. J. *Exception* 1. The entire indebtedness incurred by the defendant is found to amount to $2,587.71, and the partial payment to $1,864.88, showing a balance due the plaintiff on 15 December, 1886, of $722.83, for which sum (again reduced by five dollars) the defendant Houston gave a certificate in these terms:

"This is to certify that I am indebted to C. H. Lester in the sum of seven hundred and seventeen dollars and eighty-three cents, balance due for building house at Davidson College. This 15th day of December, 1886. G. S. HOUSTON."

On this accounting all the materials were found to have been paid for in the credits.

(609) In this adjustment all the charges preferred were admitted to be correct, and the defendant not designating before, or then, how the payments should be applied to the residue of the debt outside of that incurred for materials, left the creditor to apply them, even if not by law so appropriated, to the items, if any, not secured by a lien, and this confines the sum demanded in the action to the unpaid charges for labor performed upon the premises, and thus eliminates from the controversy such as are resisted as not entitled to the lien. The creditor may, and if he does not the law will, apply the money paid without direction to the most precarious debt. *Ramsour v. Thomas,* 10 Ired., 165; *Moss v. Adams,* 4 Ired. Eq., 42; *Jenkins v. Beal,* 70 N. C., 440; *Sprinkle v. Martin,* 72 N. C., 92.

If the payments were upon a running account the credits would be appropriated as made to the preceding charges, to wit: the first item of the debit side discharged by the first item on the credit side. *Jenkins v. Smith,* 72 N. C., 296. The same general ruling is made in *Boyden v. Bank,* 65 N. C., 13; modified, however, in the case of a transition from one to another currency which are of different values.

This brings us to the consideration of the proposition contended for by defendants, which interprets the statute (The Code, sec. 1781) as giving the lien to mechanics and laborers as such, who themselves so work, and refuses it to contractors by whom they are employed and for whom they render service.

The Constitution requires the General Assembly to "provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Art. XIV, sec. 4. And the statute gives the lien "for the payment of all debts contracted for work done on the same or material furnished." The Code, sec. 1781. In the construction of this section it is declared, in *Wilkie v. Bray,* 71 N. C., 205, that "in order to create the lien, the circumstances (610) must be such as first to create the relation of debtor and creditor; and then it is for the debt that he has the lien."

The effect of this ruling, which makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract, made at June Term, 1874, was followed by the enactment of 29 March, 1880, entitled "An act to give subcontractors, laborers and material men a lien for their just dues," the provisions of which constitute sections 1801, 1802 and 1803 of The Code in chapter 41.

It was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers and material men a preference over "the mechanics' lien now provided by

law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor.

The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enable them to secure, in order to the payment of what is due them, the indebtedness due from the debtor to the contractor.

Whatever may be the ruling in other states in the construction of such a statute as may be there in force, it is quite manifest that ours gives to the contractor, under whom his employees and agents work, the lien provided in section 1781, and though subordinated to the lien of the latter, and only displaced when its enforcement would be prejudicial to them, when these are paid the contractor's lien becomes absolute and unconditional. Such is the result of our legislation upon the subject, and similar views are taken by the authors, Phillips and Kneeland, who have written on the subject of Mechanics' Liens.

Says the first named author, quoting from the opinion of (611) the Court delivered in the case of *Woodbury v. Grimes,* 1 Cal., 100, in reference to a law whose terms are very like our own: "Now, a debt cannot be due except upon a contract, express or implied, and therefore the act assumes the existence of a contract, but does not create it." Phill. Mech. Liens, sec. 28.

He defines the contractor as "one who agrees to do anything for another," and adds that "this general term, however, as will be seen, has been held to include either those who have made contracts directly with the owner of the premises or those who have contracted with the contractors." Sec. 40. He thus describes a subcontractor: "One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." Sec. 44. The other author uses language of similar import, and says: "Although the original contractor may sublet his entire contract, and neither himself performs labor or furnishes materials in a literal sense, yet he will be entitled to a lien, for each subcontractor is an agent for the performance of a portion of the entire contract, and the act of the agent is in law the act of his principal." Kneeland, Mech. Liens, sec. 3.

Again, he defines subcontractors, laborers and material men, and says they are all "specially provided for in all the existing statutes of this state (New York), and it makes no difference in what degree they stand to the original contractor, provided the work or material

was rendered specially for the building on which the lien is sought." . . . "Neither the owner, the contractor, nor any subcontractor can be compelled by such proceeding to pay any third party a greater sum than that due to the person with whom he has contracted." Sec. 4.

The case—*Winder v. Caldwell,* 14 Howard U. S., 438—cited for appellant, decided upon the words of a statute altogether dif-
(612) ferent, is not applicable, and if it were, we are not disposed to follow it.

The filing of the claim and its specifications, in order to perfect the lien, seem to pursue the statutory requirements, and are not questioned by the appellant. As this lien has precedence of all other liens, incumbrances which attach to the property subsequent to the time at which the work was commenced, it is superior to the title acquired under the deed to the defendant Brown, and must prevail over it, according to the statute. Section 1782, as construed in *Burr v. Maultsby,* 99 N. C., 263.

There is no error, and the judgment must be

Affirmed.

Cited: Wallace v. Grizzard, 114 N. C., 495; *Burnett v. Sledge,* 129 N. C., 120; *Cox v. Lighting Co.,* 152 N. C., 167; *Stone v. Rich,* 160 N. C., 164; *Mfg. Co. v. Andrews,* 165 N. C., 292; *Scheflow v. Pierce,* 176 N. C., 94.

MARY E. BOWDEN v. A. B. BAILES.

Contempt—New Trial—Slander—Damages—Pleading.

1. Where the party to an action upon the trial was guilty of such gross misbehavior as induced the court then to issue a rule against him to show why he should not be attached for contempt: *Held,* that whatever prejudice he may have suffered thereby in the minds of the jury was attributable to his own fault, and it was not error to refuse him a new trial.

2. In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the abscence of proof of actual special damages, recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and wilful wrong, or was oppressive, vindictive damages may be awarded.

3. In such action it is not necessary that the complaint should allege that the words were "wantonly and maliciously" uttered.

BOWDEN *v.* BAILES.

THIS is a civil action, which was tried before *Boykin, J.*, at (613) Spring Term, 1888, of MECKLENBURG Superior Court.

The complaint charges that the defendant, on divers occasions, falsely and maliciously spoke of and concerning the plaintiff the defamatory words set out in the different causes of action therein contained, imputing incontinency; and so, upon issues, the jury find and assess her damages, by reason thereof, at one thousand five hundred dollars.

Upon the trial one Edwards, after objection, was allowed to testify to the pecuniary condition of the defendant, and to this his counsel entered an exception which, in this court, was abandoned as untenable. *Adcock v. Marsh,* 8 Ired., 360; *Reeves v. Winn,* 97 N. C., 246.

The defendant became a witness on his own behalf, and during his examination grossly misbehaved, repeatedly testifying to irrelevant matters in spite of protest of plaintiff's counsel and of his own, and in disregard of the judge's order to desist. During the opening speech of plaintiff's counsel, and while he was adverting to defendant's conduct, the latter raised his hand and shook his finger at the speaker. During the closing argument for the plaintiff, when counsel was contrasting the testimony of defendant with that of his own witnesses, defendant rose and, "in an insolent and threatening manner," demanded: "Do you dispute my word?" and was answered, "Yes, I do, most emphatically." So, after argument, while the judge was about to begin his charge, defendant asked: "Your Honor, may I speak a word?" and received the reply, "No, sit down", which he did.

Thereupon, the judge, addressing his counsel, said: "Gentlemen, I give you notice of a rule on your client to show cause why he should not be attached for contempt, to be heard on next Monday morning."

This remark was excepted to as calculated to prejudice defendant's case before the jury.

The remaining exceptions are to the following charge:

"If the words were spoken by defendant, as charged, the plaintiff is entitled to some damages. If the jury should find that the words were spoken by defendant of the plaintiff, as charged, (614) but that the defendant, in so speaking them, was not actuated by any actual malice, then the plaintiff is entitled to recover compensatory damages only, by which is meant such damages as will compensate plaintiff for any injury to her character which you may find from the evidence she has sustained by reason of the words so spoken.

On the other hand, if the jury should find that the words charged were spoken by the defendant of the plaintiff, and that the defendant, in so speaking them, was actuated by actual malice, they may award exemplary or vindictive damages; and so they may award exemplary

or vindictive damages if they should find from the evidence that the words were spoken by defendant, as charged, and that the conduct of defendant was marked by gross and wilful wrong, or was oppressive; and, in estimating the amount of damages, if the jury should find that the words were spoken, as charged, and that they were spoken with malice, they would consider the evidence as to the pecuniary condition of defendant for the purpose of determining the amount of damages to be awarded. In estimating the amount of damages, the jury may consider in mitigation thereof the evidence tending to prove the bad character of the plaintiff. By exemplary or vindictive damages is meant such damages as are given, not merely as pecuniary compensation for the loss actually sustained by plaintiff, but likewise as a kind of punishment to the defendant, with the view of preventing similar wrongs in future."

In conclusion, his Honor instructed the jury that they might consider, in mitigation of damages, the reports in the neighborhood derogatory to the character of the plaintiff.

The defendant entered a rule for a new trial upon the exceptions above stated and to the charge to the jury as follows:

(615) 1. That his Honor charged the jury that if the words were spoken of the plaintiff, as set forth in the complaint, she would be entitled to recover at least nominal damages.

2. That his Honor charged the jury that in assessing damages they might consider the plaintiff's character.

4. That his Honor charged the jury that in assessing the amount of damages they consider both the alleged bad character of the plaintiff and the pecuniary condition of the defendant.

5. That his Honor charged the jury that if no actual malice was shown, the plaintiff was entitled to recover compensatory damages.

6. That his Honor charged the jury that if the conduct of the defendant was marked by gross and wilful wrong, or was oppressive, the jury might award exemplary or vindictive damages.

7. That his Honor charged the jury that if actual malice was shown, the plaintiff might recover exemplary or pecuniary damages.

8. That his Honor charged the jury that if they should find that plaintiff's reputation or character for chastity was not good, they could consider that fact in mitigation of damages.

There was a judgment in accordance with the verdict, and the defendant appealed.

C. W. Tillett for plaintiff.

J. B. Batchelor and John Devereux, Jr., for defendant.

SMITH, C. J., after stating the case: We recapitulate the evidence of what transpired, which shows great forbearance on the part of the judge in tolerating such conduct, and will only say that if the defendant suffered, it was in consequence of his own defiant manner and conduct, of which he cannot complain.

The various exceptions to the charge may be grouped into (616) a few propositions of law, the disposition of which will be an answer to all.

1. There is error in the instruction that in the absence of *actual,* by which we understood *special* damages, the plaintiff may recover such as are compensatory only.

2. Also in the instruction that if malice was proved in the utterance of the words, or the conduct of the defendant was marked by gross and wilful wrong or was oppressive, the jury may award exemplary damages. These we will now consider:

1. As under the statute the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is *per se* actionable, their utterance must be followed by the same consequence as to damage as the publishing of other defamatory imputations, and this we take to be the meaning of the instruction as to actual damages.

2. We discover no just grounds of complaint in what is said in regard to vindictive or punitory damages, when the circumstances stated accompany the defamatory imputations or they are prompted by malice.

In respect to a slander prompted by express malice for which punitory damages may be awarded, the law is well settled, and we are content to refer to a single case recently decided—*Sowers v. Sowers,* 87 N. C., 303.

Nor do we see any reason why this may not be so when the slander is accompanied with acts of oppression or a wilful wrong and indifference to its consequences to the injured party, for these but emphasize the malicious spirit which prompts them.

It is suggested in the argument that the slander should be *wantonly as well as maliciously* spoken, and the complaint should so aver.

We do not concur in this view. The statute in the operative part is explicit and positive that "any words written or spoken of a woman which may amount to a charge of incontinency shall (617) be actionable." (The Code, sec. 3763.) The language is unlike that used in section 1113, which makes *"an attempt in a wanton and malicious* manner to destroy the reputation of an innocent woman by words written or spoken which amounts to a charge of incontinency" a misdemeanor.

So that to constitute the criminal attempt other averments must be made to give it the character of an indictable offense, not required in a civil suit. *S. v. Claywell,* 98 N. C., 731.

We find no error in the record, and the judgment must be

Affirmed.

Cited: Brooks v. R. R., 115 N. C., 625; *Tucker v. Winders,* 130 N. C., 147; *Stanford v. Grocery Co.,* 143 N. C., 428; *Gray v. Cartwright,* 174 N. C., 51; *Cotton v. Fisheries Co.,* 181 N. C., 152; *Baker v. Winslow,* 184 N. C., 6.

CHAPEL HENDRICK v. THE CAROLINA CENTRAL RAILROAD COMPANY.

Eminent Domain—Damages—Assessment—Carolina Central Railroad Company—Statute Limitations—Condemnation of Lands.

1. The Carolina Central Railroad Company, by virtue of the statutes under which it was organized, and the titles acquired under the judicial sales of the Wilmington and Charlotte Railroad Company, the Wilmington, Charlotte and Rutherfordton Railroad Company, and the Carolina Central Railway Company, became the owner of all the rights, powers, privileges, etc., of those corporations, and likewise became liable for all damages and assessments on account of the appropriation of lands of individuals for the right of way.

2. Although the right of way was located by one of the preceding companies in 1856 on a tract of land, and work was done on adjacent lands, but the road was not *finished* more than two years before action began by the landowner for damages, such owner was not barred of his remedy for compensation, notwithstanding he may have acquired his title since the location.

3. The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed.

(618) THIS is a summary proceeding for the assessment of damages, heard by *MacRae, J.,* upon case agreed, at August Term, 1887, of CLEVELAND Superior Court.

This is a summary application of the plaintiff, claiming damages from the defendant railroad company, occasioned by the location and construction of the railroad of the latter over and across the lands of the former as allowed by the statutes (Acts 1854-55, ch. 225, secs. 26,

27, 28; Acts 1872-73, ch. 75, secs. 9, 10, 11, 15; Acts 1881, ch. 5, sec. 1; The Code, secs. 697, 698, 1943, 1946), in which plaintiff prays that the court appoint commissioners to assess damages to him, etc. The defendant filed its answer to the petition, denying the plaintiff's alleged rights, etc.

In term time the parties agreed upon and submitted the facts of the matter of the proceeding to the court for its judgment thereupon, and the following is a statement of the facts agreed upon:

"1. That plaintiff is the owner of the land described in the complaint, and traces of his title through intermediate conveyances from John and William Forbis' heirs, who owned it in 1856, and back to the State of North Carolina. Plaintiff acquired his title in the year 1878.

2. That in the year 1856 the Wilmington, Charlotte and Rutherford Railroad Company, a corporation created and organized under the laws of North Carolina, as hereinafter stated, in locating its line of railroad from Wilmington to Rutherfordton, crossed the land described in the complaint, and staked out the line of its railroad at the places for which plaintiff now claims his damages in this action; that said railroad company about the year 1859 or 1860 caused work to be done at various points upon its said route between Shelby and Rutherfordton, excavations and embankments for building and operating its railroad along said route, and some upon the William Forbis land in 1856 (the heirs of William Forbis were nonresidents and minors), but upon the lands in complaint no work was done, except the staking by the surveyors, and some excavations were also made upon said route (619) about one thousand feet east of where said line of route struck the eastern line of plaintiff's tract; that upon said route of line there was also work done west of plaintiff's land upon a stone quarry, located upon the said right of way; that other work was done at various other points upon said right of way, between Shelby and Rutherfordton; that except upon the William Forbis land, as above stated, no work was done upon the right of way over the land of the plaintiff described in the complaint, except that where the same was originally taken, located and surveyed in 1856, the said roadbed was staked out by the surveyors; and ever since then and up to the fall of 1885, a part of said right of way so staked out over plaintiff's land remained in its original timber growth, and the remaining portion has been continuously cultivated by plaintiff and those under whom he claims.

3. That except as hereinbefore stated no work was done by said W., C. & R. R. R. Co., or any of its successors, upon said right of way on plaintiff's land described in the complaint, until the fall of 1885, when the defendant finished its railroad thereon.

4. That before the commencement of this action the plaintiff made regular demand of the defendant for damages claimed by him, and they were unable to agree upon the same.

5. That neither the plaintiff nor any one under whom he claims title has ever granted or contracted in any way the said right of way to defendant, nor to any corporation under which it claims.

6. That the Wilmington and Charlotte Railroad Company was a corporation, created by an act of the General Assembly of North Carolina, ratified 13 February, 1855, entitled 'An act to incorporate the Wilmington and Charlotte Railroad Company'; that this corporation (620) was succeeded by the Wilmington, Charlotte and Rutherford Railroad Company, being the same corporation which took and located the said right of way as hereinbefore stated, which was created and organized by an act of the General Assembly of North Carolina, ratified 14 February, 1885, and entitled 'An act supplemental to an act passed at the present session of the General Assembly, entitled an act to incorporate the Wilmington and Charlotte Railroad Company'; that under a judgment and decree for foreclosure of a mortgage obtained at January Term, 1873, of the Superior Court of New Hanover County, N. C., the corporate franchises, roadbed and all other property of said W., C. & R. R. R. Co. was sold at public sale, when one Timothy H. Porter became the purchaser, and on 25 April, 1873, the commissioners, duly appointed by said court, Edwin E. Burnes and others, executed a deed to said Porter, conveying the franchises, roadbed and all the property of said W., C. & R. R. R. Co., which deed was duly proven and registered in said county of New Hanover on 3 May, 1873; that by virtue of the act of the General Assembly of North Carolina, ratified 20 February, 1873, entitled 'An act to incorporate the Carolina Central Railway Company,' the Carolina Central Railway Company was created and duly organized and became vested with the powers and rights therein stated, as to the purchase of the said W., C. & R. R. R. Co., its franchises, roadbed and other property; that on 17 May, 1873, said Timothy H. Porter and wife sold and conveyed by deed the franchises, roadbed and all other property of said W., C. & R. R. R. Co. purchased by him at said foreclosure sale as aforesaid, to the Carolina Central Railway Company, which deed was duly proven and registered in said county of New Hanover. Under a judgment and decree for foreclosure of a mortgage rendered by the Superior Court of New Hanover County, N. C., on 15 March, 1880, the property, rights and franchises of (621) the said Carolina Central Railway Company (being covered by said mortgage) were sold at public sale on 31 May, 1880, by Nathan A. Steadman, Jr., and Junius Davis, commissioners duly ap-

pointed, and when F. O. French and others, as a committee for certain bondholders, were the last and highest bidders and purchasers, who, exercising the right granted to them by the act of the General Assembly of North Carolina, ratified 1 March, 1873, entitled 'An act to regulate mortgages by corporations, and sales under the same,' designated in the deed which was made then by the commissioners, in pursuance of said decrees in said cause and their said purchase, the manner and style under which they wished to be known as a corporation, which was 'The Carolina Central Railroad Company,' the defendant in this cause, and which corporation was duly organized in accordance with said act last mentioned; the said deed was duly executed 25 June, 1880, and duly registered in said county of New Hanover.

To prevent disputes as to the organization of defendant under said purchase and deed, the General Assembly of North Carolina passed an act entitled 'An act to perfect the organization of the Carolina Central Railroad Company,' which was ratified 18 January, 1881; that the proceedings in which the said judgments and decrees of foreclosure of mortgages were made, and the sales thereunder, and the said deeds executed in pursuance thereof, are regular and according to the course and practice of the courts.

. . . . . .

8. That the right of way from Wilmington to Rutherfordton, passing on the land in complaint, described hereinbefore in this agreement of facts mentioned, and taken and located by said W., C. & R. R. R. Co., was done according to the provisions and in pursuance of the powers to said corporation by its said charter, and work other than that hereinbefore stated was done upon said right of way at various points, excavations and embankments, etc., between Shelby and Ruther- (622) fordton, in the year 1870, but no work was done upon that portion of said right of way across plaintiff's land described in the complaint, except as hereinbefore stated."

Thereupon, the court made an order appointing commissioners to assess the damages of the plaintiff, etc., and the defendant excepted.

The commissioners so appointed made report, to which there was no exception, assessing the plaintiff's damages at $340. The court gave judgment in his favor for that sum, and the defendant appealed.

W. P. Bynum for plaintiff.

T. H. Cobb and John Devereux, Jr., for defendant.

MERRIMON, J., after stating the case: The assignment of error is so indefinite that we can scarcely discern what it is.

As well as we can learn, the appellant insists that its right of way across the appellee's land mentioned was acquired by force of the charters and the long possession of the former corporations under which it claims, and through which it derives its title to the same; that if any right to damages ever arose on account of such right of way across the appellee's land, it arose long before he became the owner thereof, and in favor of the former owner thereof under whom he claims, and therefore the appellee cannot maintain this proceeding. It further insists that if such corporation, or any one of them, was liable in the past for such damages, it is not; that it did not succeed to such liabilities, and that the defendant's right, if he ever had any, is barred by the statute of limitations.

In our opinion the grounds of error assigned are unfounded, and the appellant is clearly liable for the value of the land—the damages—assessed against it. This appears from the nature of the rights, property and advantages it acquired, and the duties and obligations it (623) assumed, by its creation and by its purchase of the right of way, and the other property of the corporations mentioned, from which it derives title mediately and immediately, and statutory provisions bearing upon and applicable to it.

As appears, it is the successor, mediately, of "The Wilmington and Charlotte Railroad Company," afterwards styled "The Wilmington, Charlotte and Rutherford Railroad Company." The charter of that company (Acts 1854-55, sec. 28) provided, as to damages occasioned to individuals by the location and construction of its right of way, as follows: "That in the absence of any contract or contracts in relation to the land through which said road or any of its branches may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to said company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as the same shall be used for the purposes of said road, and no longer, *unless the person or persons owning the land at the time that part of the said road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road which may be on the said land was finished," etc.*

The immediate successor of the last company was "The Carolina Central Railway Company," and its charter (Acts 1872-73, ch. 75, secs.

11, 15) contains the same provision last above recited, and it is authorized to purchase the property of "The Wilmington, Charlotte and Rutherford Railroad Company," and to succeed to and "thenceforth have, hold, possess and be entitled to the said railroad, extending from Wilmington to Rutherfordton, about two hundred and fifty (624) miles, and *its contracts, franchises, rights, privileges and immunities,* and all the estate and property of every description, real and personal, belonging to the said Wilmington, Charlotte and Rutherford Railroad Company, and by such purchase the said company hereby incorporated shall acquire all the rights, privileges and immunities conferred on the Wilmington, Charlotte and Rutherford Railroad Company by its charter and amendments made thereto."

The appellant is the immediate successor of the last above named "The Carolina Central Railway Company," taking and having the name "The Carolina Central Railroad Company." The latter was organized and purchased the right of way, other property and franchises of the former under authority conferred by a power of sale contained in a mortgage foreclosed as allowed by the statute (The Code, secs. 697, 698), and its organization was ratified and made effectual by the subsequent statute (Acts 1881, ch. 5, sec. 1), and it is therein expressly "declared to be a lawful corporation, *succeeding* to and legally possessed of all the rights, powers, privileges and franchises which were owned and possessed by the former corporation, the Carolina Central Railway Company, on and prior to the day of sale, to wit, 31 May, 1880," and its right to the right of way is again ratified by the statute (Acts 1885, ch. 239, sec. 4).

The statute (The Code, sec. 698) above cited applies to the appellant as to its organization, rights and duties as the successor of "The Carolina Central Railway Company," and it provides among other things that "the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and *perform all such duties* as would have been or should have been performed by the first corporation but for such sale and conveyance, save only that the corporation so created shall not be entitled to the debts due to the first corporation, and shall not be liable for (625) any debts of or claims against the first corporation," etc., etc.

This résumé of the facts and the statutory provisions applicable show that the appellant is the successor of the two former corporations mentioned; that it has purchased and owns the property that formerly belonged to them respectively, in the order of their existence, including the right of way, and has succeeded to and become the owner of the franchises, rights, privileges and immunities that belonged to them, and it took such parts of the right of way located but not perfected in the condition and subject to the burdens incident to such perfection as they

came to it—that is, it had the right to perfect and complete its incomplete right of way, and it became liable to pay damages to the lands of individuals occasioned thereby. It would be unreasonable and unjust to hold that it took the incomplete right of way free from liability for damages or the value of the land appropriated to individuals occasioned by perfecting it. There is nothing in the statutes applicable nor in the nature of the matter that renders it necessary to so hold. Such liability grows out of the exercise of the rights, franchises, privileges and immunities the appellant purchased, and arises out of the exercise of them subsequent to the purchase. It purchased an incomplete railroad; in the exercise of its rights and powers to complete it, it was bound to pay for its incomplete right of way so far as incomplete, as well as for the incomplete grading, cross-ties, iron, and other necessary things.

The contention that any right to such damages or value of land appropriated accrued many years ago in favor of a former owner of the lands mentioned, is not tenable. No doubt such owners had a right to have damages or the value of the land assessed when the line of
(626) the road was at first located, and he might have insisted upon it, but he waived it, probably on the ground that the real damage had not then been done. But the statute gave the plaintiff the right to claim such damages. It (Acts 1854-55, ch. 225, sec. 28; Acts 1872-73, ch. 75, sec. 11) provides, among other things, that "the person or persons owning the land at the time that part of the railroad which may be on said land, or those claiming under him, he or them, shall (may) apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after the part of said road which may be on said land was finished," etc. Such assessment embraces the damages; its effect is to give and perfect the right of way in the railroad company, and to assess the value of the land taken under existing circumstances, as they affect the immediately adjoining lands. Thus, if the right of way taken would, in the use of it, very injuriously affect the adjoining lands, such fact would enhance the assessment. This is to be made in the light of the circumstances of the land, the value of which is assessed. The value assessed is really the damages contemplated by the statute.

Neither the appellant nor either of its predecessors was bound to wait and allow the appellee or the former owner of the land to apply for such assessment; either of them might have made application when the line of the road was first located, or afterwards, to have the land for the right of way condemned. The statute makes ample provision in such respects.

It thus appears that the appellant is liable for the value of the land—the damages—assessed, and that the statute gave the appellee, as the

owner of it at the time the railroad was finished, the right to apply for and have such assessment.

This proceeding was begun within two years next after the (627) road was finished, and is, therefore, not barred by the statute.

There is no error.

Affirmed.

Cited: Beattie v. R. R., 108 N. C., 429; *Dargan v. R. R.*, 113 N. C., 599.

WALTER BREM v. J. M. HOUCK AND WIFE, AND W. L. SAUNDERS, SECRETARY OF STATE.

Grant—Entry—Injunction.

An injunction will not be granted to restrain the issuance of a grant, upon the ground of irregularity in the entries upon which it is to be based, upon the application of one who has not title himself to the premises, especially where it appears that whatever interests the parties may have, may be, without prejudice, presented and determined in an ordinary action to try the title.

THIS is a civil action, pending in the Superior Court of MECKLENBURG County, heard upon a motion for an injunction before *Boykin, J.*, in Chambers, on 2 March, 1888.

The complaint alleges, in substance, that on 7 September, 1887, the defendant J. M. Houck irregularly entered two tracts of vacant land of the State situate in the county of Caldwell; that such entries were void because of irregularities specified; that thereafter, in pursuance of such entries, warrants of survey were issued to the surveyor of the county named; that surveys of the land were made and certified to the Secretary of State for the purpose of obtaining a grant from the State for the lands; that the Secretary of State is about to issue a grant, etc.; that the plaintiff, in the month of October, 1887, entered the same lands; that the same were surveyed for him according to law; that he intends to apply for a grant therefor if the Secretary of State shall not issue the grant to the defendant H. C. (628) Houck, as he ought not to do, etc.

The Secretary of State is made a party defendant; he answers and submits to the court to determine his duty in the matter. The other defendants answer, denying many of the material allegations of the complaint, etc.

The plaintiff demands judgment that the Secretary of State be perpetually enjoined by order of the court from issuing a grant for the lands, and that the defendant H. C. Houck be likewise enjoined from receiving such grant when issued, and that the alleged pretended entries be declared void, and for general relief.

The court refused to grant an injunction pending the action until the hearing upon the merits, and the plaintiff appealed.

C. W. Tillett for plaintiff.

Attorney-General (and G. N. Folk, by brief), for defendants.

MERRIMON, J., after stating the case: We are of opinion that this action cannot be maintained. The relief by injunction sought is not in support of and ancillary to some primary equity of the plaintiff to be settled and established by the action. The plaintiff does not allege a cause of action of himself against the defendants, but a state of facts upon which he demands that the defendant, the Secretary of State, be restrained from issuing, and the defendant, H. C. Houck, from receiving a grant from the State for certain lands, to the end he may obtain a like grant for the same lands and not be embarrassed by a senior grant and a possible future litigation to have a right of himself, that may hereafter arise, settled in his favor. He alleges no right of himself as against the defendants and invaded by the latter; at most, he seeks in advance of the issuing of (629) the grant to have the entry of H. C. Houck settled adversely to him, so that his way to a grant for the lands may be clear.

The court will not thus anticipate, settle and establish incipient rights of the plaintiff, especially when he can suffer no substantial wrong by a grant that may be issued by the State. The effect of the grant is simply to put any title to the land in the State out of it, and this not to the prejudice of any existing rights of the plaintiff. If the grant that may be issued to the defendant Houck shall be founded upon insufficient entries, or such as are affected with fraud, the plaintiff, if he obtain a grant to the same land, will, at the proper time, have his remedy. *Patterson v. Miller,* 4 Jones Eq., 451; *Harris v. Norman,* 96 N. C., 59; *Pearson v. Powell,* 100 N. C., 86.

There is no error.

Affirmed.

Cited: Wool v. Saunders, 108 N. C., 736; *Newton v. Brown,* 134 N. C., 445.

THE STATE EX. REL. D. V. RHODES v. J. W. HAMPTON.

County Treasurer—Sheriff—Election—Office—Vacancy—Vested Right—County Commissioners.

1. The power conferred upon the board of justices of the peace by sec. 768 The Code, in respect to the abolition and restoration of the office of county treasurer, may be exercised at any time and whenever, in the discretion of the board, it may be thought desirable.
2. If there is no person to fill the office at the time of its restoration, there is a vacancy which may be filled, until next regular election, by the board of county commissioners.
3. When the office is abolished the duties thereof devolve upon the sheriff of the county, who, however, has no such vested interest therein that may not be taken away by a restoration of the office and an appointment of another person to fill it.
4. The election of a person to an office which does not exist, or in which there is no vacancy, is a nullity.

THIS is a civil action, which was tried before *Boykin, J.*, at (630) Spring Term, 1888, of POLK Superior Court.

The object of this action, began on 21 March, 1887, is to compel the defendant, sheriff of Polk County, to surrender to the plaintiff the books, papers, moneys and other effects in his hands belonging to the treasurer's office, and was tried upon the following agreed facts:

That J. W. Hampton is sheriff of Polk County, North Carolina, and that since 1876 up to November, 1886, the said county had no office of treasurer, having abolished the same in 1876, and that the sheriff of the county had regularly performed the duties of treasurer; that in 1886 the board of commissioners of said county and the justices thereof, in regular meeting, had made the records (copies of which are set out below), as of the date appearing thereon.

That at the regular election, on the first Tuesday in November, said J. W. Hampton was elected sheriff, and one A. B. Thompson was elected by the people to fill the office of treasurer of said county.

That the defendant J. W. Hampton, sheriff of said county, is now performing the duties of treasurer, and receiving the emoluments of the office, and refuses to surrender the same.

By order of the board the clerk of said board was instructed to notify the justices of the peace to meet on the first Monday in December, 1886, for the purpose of voting for or against restoring the treasurer's office, as the vote that was taken today, allowing each and every justice of the peace to sign his name to an instrument of

writing, instead of voting by ballot for or against restoring the office of county treasurer, was thought to be illegal.

15 November, 1886.

By order of the board, and after consultation with a few citizens present, and the newly elected county officers, it was, on motion, agreed to adjourn from day to day on account of bad weather, it being so bad that it was seemingly impossible for the bondsmen of the va-
(631) rious county officers and other officers notified to attend, and the board agreed on Monday for receiving bonds. And also a few justices of the peace met, and, without organizing adjourned, and clerk instructed to notify the justices of the peace to meet on Monday, the 13th inst., for the purpose of voting for or against restoring the county treasurer's office.

6 December, 1886.

The board of county justices of the peace met, and in convention assembled did, by their votes, restore the county treasurer's office, and the newly elected treasurer was notified to file a justified bond by the first Monday in January, 1887.

The vote for restoring.....15
The vote against restoring..... 0

13 December, 1886.

By the failure of A. B. Thompson, the duly elected treasurer, to give bond, the office was declared vacant, and D. V. Rhodes appointed to fill unexpired term. D. V. Rhodes present. His bond as treasurer, approved by board of commissioners, found to be correct, and approved and ordered to be recorded.

3 January, 1887.

That on 13 December, 1886, defendant having been elected sheriff of said county, filed his bond, and was qualified as such.

Now, if the court shall be of the opinion, on the foregoing facts, that the plaintiff is entitled to recover, judgment shall be entered for the plaintiff; otherwise judgment shall be entered for the defendant.

The court being of opinion that the plaintiff was entitled to recover, so adjudged, and the defendant appealed.

J. B. Batchelor for plaintiff.
W. P. Bynum for defendant.

(632) SMITH, C. J., after stating the case: By virtue of the authority conferred in an amendment to the Constitution in 1875—Art. VII, sec. 14—the General Assembly, by the Act of 27 February, 1877, modified the first section of that article by omitting therefrom the

words "and five commissioners," and annexing thereto as follows: "*Provided, however,* that a majority of the justices may abolish the office of treasurer, and thereupon the duties and liabilities now attached to the office shall devolve upon the sheriff." Acts 1876-77, ch. 141, sec. 2.

Some doubts being entertained as to the power of the justices to establish the office after it had been abolished, a further amendment was made in these words: "That in all cases where the board of justices of the peace of any county has abolished the office of county treasurer, the said board shall have like power to reëstablish the same, if, in the judgment of the board the public interests so require." Acts 1881, ch. 362, sec. 1.

Substantially, these provisions are embodied in section 768 of The Code.

As there is no restriction put upon the justices as to the time when they may exercise the conferred power of abolishing the office and devolving its duties upon the sheriff, so none is imposed upon them in restoring it, so that it may be again filled according to law. As the legislation is transferred to The Code, even the restraint that the restoration may be made when, in the judgment of the justices, the public interest may require, is removed, and the discretion reposed in the board in taking such action is absolute and unqualified.

It is therefore plain that the action of the justices, for whatever cause taken, was opportune and effectual—opportune, in that it took place at the end of the sheriff's term of office and the entering upon a new term, when the transfer of the duties from the one office to the other would least disturb the public business; effectual, in that the incumbent of the reëstablished office would begin a term (633) commensurate with that of the other biennially chosen county officers, and terminating at the same time.

As then, the office of treasurer was, by the vote of the justices, restored, and without an incumbent a vacancy existed—*Cloud v. Wilson,* 72 N. C., 155—and the duties disannexed from the office of sheriff, it became necessary to have the place filled, and this could only then be done by an appointment from the board of county commissioners, or there would be no one to perform the functions and execute the duties of the office. The Code, sec. 720.

This appointment, like that of other county officers, would be for the term during which it was made, and until, at an election held pursuant to law, the incumbent could be supplied by a popular vote.

It is plain that the election of Thompson in November preceding was a nullity, for the obvious and sufficient reason that there was then

no such office to be filled, and equally so that the appointment of the plaintiff was regular and valid.

But the defendant contends that, having given his official bonds and been inducted into office before the action of the justices in restoring that of treasurer, the privileges and advantages attaching to him as sheriff cannot be withdrawn without impairing a right vesting in him to the emoluments thereof.

The contention has no support in law. The transferred duties occasioned by the abolition of the office of treasurer in 1876, attached to the office of sheriff only so long as there was no treasurer to perform them, and subject to the underlying condition that they should revest at once upon the restoration of the office of treasurer whenever the justices should see fit to restore it.

(634) There could not be a regular and duly appointed treasurer without the rights and functions belonging to the office, and these could not be then possessed and exercised by the sheriff. The incongruity is manifest, and has no support in the legislation on the subject, as no vested right of the defendant is disturbed for it is only *during this interregnum* in the treasurer's office that the sheriff is charged with its duties and entitled to compensation for their discharge, and these terminated upon the expiration of the interval when the office is resuscitated and resumed by an appointee.

We decide the case upon the facts and agreement of counsel, and affirm the judgment.

Affirmed.

Cited: Cook v. Meares, 116 N. C., 587, 588, 589, 590, 592.

JOHN R. MARTIN v. J. C. MCNEELY AND WIFE.

Mortgagor and Mortgagee—Fraud—Statute of Frauds—Joinder of Causes of Action.

1. A plaintiff may unite in the same action a demand for the foreclosure of a mortgage, a judgment for the amount of his debt and for possession of the property conveyed by the deed.

2. B., being indebted to the plaintiff, sold land to the defendant, who executed bond for the purchase money and mortgage, embracing the land so sold, as well as other lands belonging to defendant, to the plaintiff, who accepted these securities in satisfaction of B.'s debt. The defendant alleged that he had been unfairly induced to include the other lands in

the mortgage by the fraudulent representations of B. that he would see that his—defendant's—homestead should not be sold under the mortgage, and that the plaintiff had notice: *Held*, (1) that this agreement in respect to the homestead could not affect plaintiff's right to judgment; (2) that as against B. it was void under the Statute of Frauds.

THIS is a civil action, which was tried before *Clark, J.*, at (635) Fall Term, 1888, of BURKE Superior Court.

The defendants, J. C. McNeely and wife Naomi, on 5 February, 1885, executed a mortgage deed to the plaintiff, John R. Martin, whereby they conveyed to him three several tracts of land in trust to secure the single bond on the same day made by the said J. C. McNeely, in the sum of $1,250, due and to be paid with interest at the rate of eight per cent per annum from date on or before 5 February, 1887. The mortgage contains the usual clause vesting in the plaintiff the power to make sale of the lands in case of default in payment of either principal or interest after the maturity of the obligation. Such default having occurred, the plaintiff proceeded to advertise and sell the land, at which Thomas B. Pugh and Elisha Holler became the last and highest bidders at the price of $780, no part of which was paid, and they, on 21 November, 1887, assigned their bid to the plaintiff. Upon these allegations in the complaint the plaintiff demands judgment for his debt, possession of the lands, which the defendant J. C. McNeely detains, and for the sale of the lands under a decree of foreclosure for the satisfaction of his said debt.

The defendant, J. C. McNeely, in answer, denies that the bond was in truth, as professing upon its face, given for money borrowed, or for any indebtedness then due the plaintiff, and that the mortgage deed was made as stated in the complaint, or for the purpose therein mentioned, and as a further defense says: That one B. A. Berry, who owned the tract of land described in the mortgage as lying on Linville River, "after much persuasion and representations, induced the defendant, J. C. McNeely, to agree to purchase a one-half interest in said land at the agreed price of $1,250; that after said agreement said Berry persuaded and procured the defendant to agree to execute a mortgage to the plaintiff instead of to the said Berry; that when defendant objected to giving a mortgage upon his home tract of land, worth about $800 (all the land the defendant owned (636) in addition to that he agreed to purchase from Berry on Linville River), as a security for the purchase money of the said Linville tract, the said Berry promised and agreed with the defendant that if he could not pay for said tract he (Berry) would not let the defendant lose anything by the transaction, and especially that he would see

that the defendant did not lose his homestead in any event; and that by reason of said promise and agreement the defendant was induced and persuaded to include his said homestead, described as tracts Nos. 2 and 3, in the mortgage; that defendant was afterwards informed by the plaintiff that he did not pay or loan any money to said Berry, and that no money passed between them."

These transactions the defendant alleges constituted a fraud practiced upon him from which he is entitled to be relieved, and he avers that the plaintiff was cognizant of them all, and he demands that the mortgage, so far as it embraces the homestead lands, be declared null, and that the defendant be allowed to pay the interest on said bond in lieu of rents, and the bond itself, upon such payment, be canceled and the mortgage also, and to this end an account be taken, etc.

The said Berry having been made a party at the instance of the defendant McNeely, filed his answer, in which summarily stated, he makes this explanation of the transactions wherein he participated and which are charged to be fraudulent. He says that he was indebted to the plaintiff for borrowed money in a sum larger than that mentioned in the bond, and that in his negotiation with McNeely for the sale of the half interest in the land he then owned on Linville River, at the price of $1,250 agreed on between them, McNeely wanted time for the payment, to which respondent answered that as he desired to pay off his debt to the plaintiff, he would see and ascertain from him if he would accept the proposed bond for the purchase
(637) money in exchange for respondent's indebtedness to the plaintiff, to which the plaintiff assented; that when the plaintiff and McNeely came together to arrange and settle the matter, the former was unwilling to take the land for which the bond was given as security, and required other and further security, and in consequence the two other tracts were agreed to be put in the mortgage deed, and it was accordingly so drawn as to convey all these tracts.

The respondent disavows and denies the practice of any unfair means to bring about the adjustment, and alleges the defendant's mismanagement of the property as the cause of its deterioration in value, and the consequent embarrassments in which he has become involved.

Upon the trial the defendant McNeely moved to dismiss the action upon the grounds:

1. That the complaint shows upon its face that the court has no equitable jurisdiction of the action; that the power of sale in the mortgage set up has been exercised, the mortgage foreclosed by sale, and the legal title is, or ought to be, in plaintiff.

2. That complaint does not state a cause of action.

The court allowed plaintiff to amend complaint by alleging that defendant wrongfully withholds possession of the premises, and by adding a prayer to recover possession, and denied the motion to dismiss.

The court being of opinion that the allegation in the answer of defendant, McNeely, of the cotemporaneous parol agreement by Berry not to sell under the mortgage, was not a sufficient answer to the proceeding for a foreclosure under the mortgage, adjudged that upon complaint and answer, the plaintiff was entitled to recover. The defendant, McNeely, excepted. The plaintiff thereupon stated that he was willing that the defendant, McNeely, might elect to treat the sale made under the power in the mortgage as valid or invalid. The defendant, McNeely, without prejudice to his legal rights (638) to insist upon the above exceptions, elected to consider the sale heretofore made under the power in the mortgage as a nullity, and the court signed judgment for a foreclosure, requiring the Linville tract to be first sold, and if that should prove insufficient to pay the debt, then for a sale of the other two tracts embraced in the mortgage.

From this judgment defendant, McNeely, appealed.

S. I. Ervin for plaintiff.

I. T. Avery (filed a brief) for defendant.

SMITH, C. J., after stating the case: The complaint in its statement of facts attending the sale, evidently intended to place at the option of the mortgagor the confirmation or rejection of the sale, which was the real equitable relation in which he stood towards it. He had the right to hold the plaintiff to his purchase, or to repudiate what had been done and hold the plaintiff still to his position as mortgagee unchanged by what had transpired. The election is with the mortgagor. The matter is fully considered in *Gibson v. Barbour,* decided at the last term and reported in 100 N. C., 192.

The objection, however, if possessed of any force, is removed by the mortgagor's assent to the plaintiff's proposition to treat the attempted sale as a nullity. Thus the apparent purpose of the allegations in this respect has been attained.

The second objection, that the complaint fails to state facts constituting a cause of action, is equally untenable.

Under the amendment the action is for the recovery of possession of the lands and a judgment for foreclosure and sale of the lands, under the direction of the court, for the satisfaction of the secured bond. This action of the court is warranted by the ruling in *Robinson v. Willoughby,* 67 N. C., 84.

(639) The alleged equity arising out of the promise of the defendant Berry to protect the mortgagor from loss or detriment in making the deed, cannot avail to obstruct the plaintiff in the pursuit of his remedies under the mortgage deed, even if it were made known to the plaintiff. He was no party to the *personal undertaking* of Berry upon which the said McNeely appears to have relied, which is aside from and does not enter into the conveyance or abridge the plaintiff's legal rights. If he has any redress, it must be upon the personal engagement of Berry himself. Moreover, if the verbal indemnity against damage was given, most obviously it could not have the effect of becoming an element in the transaction with the plaintiff, and to allow it would be to violate the uniform and consistent rulings of the Court, and to disregard the Statute of Frauds. *Walters v. Walters,* 11 Ired., 145; *Kessler v. Hall,* 64 N. C., 60; *Bonham v. Craig,* 80 N. C., 224; *Boone v. Hardie,* 87 N. C., 72, cited by counsel.

Upon the facts presented in the pleading and in the answer of the defendant, McNeely, the plaintiff's right to the relief demanded is manifest, and no defense is shown thereto.

There is no error, and the judgment must be

Affirmed.

Cited: Taylor v. Hunt, 118 N. C., 172.

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(640)

SARAH HOUSTON v. LAURA SLEDGE ET AL.

Specific Performance—Contract—Statute Frauds—Pleading—Joinder of Causes of Action—Tender.

1. The plaintiff brought an action for the specific performance of a contract to convey land: the defendant answered, setting up an abandonment and rescission of the contract; the plaintiff replied, admitting the rescission, but alleged that the defendant agreed to reimburse him for improvements made while he was in possession, and demanded judgment therefor: *Held,* that this was not such a departure from the original cause of action as to warrant the dismissal of the action, and as the two demand the same transaction they might be determined in the same action.

2. That the contract to reimburse the expenditures for improvements, etc., was not within the operation of the Statute of Frauds.

3. In an action for specific performance, where the defendant denies the equity of the plaintiff, after a trial upon the issues joined, a tender of deed and demand for payment of purchase money comes too late.

THIS is a civil action, tried before *Clark, J.*, at Fall Term, 1888, of MCDOWELL Superior Court.

The plaintiff instituted her suit against the defendants M. L. Sledge and Joshua McCurry, executor and executrix of R. Don. Wilson; the first named being also his devisee of the lot which the testator is alleged to have contracted to convey to John W. Houston, the deceased husband of the plaintiff, who claims to be the owner of all his estate—to enforce the specific execution of the contract and the conveyance of the lot on payment of the purchase money, the said vendee having died before any of the notes given to the testator became due.

The defendants do not deny that such a contract in writing was made, but, in defense, set up the total insolvency and inability of both the vendee and the plaintiff to make the required payment, in consequence of which the plaintiff abandoned all claim to the lot, and united in a petition for its sale to make assets to meet (641) the liabilities of the deceased intestate vendee, and the said Wilson entered into possession and expended a large sum in the construction of a house and putting other improvements upon the lot, making it inequitable now to assert any claim under the contract. To this the plaintiff replies, admitting rescission of the contract between the plaintiff and the testator, and as the consideration of such rescinding, alleges that the testator agreed, with her, to take back the lot at the contract price and pay her the value of the improvements made by the vendee, and to take, use and account for all the material then on hand or contracted for by him, and that having demanded payment therefor and been refused, she now demands payment for $650, due under said agreement, from the defendants, the personal representatives of the vendor, the said R. Don. Wilson.

No counsel for plaintiff.
John Devereux, Jr., for defendants.

SMITH, C. J., after stating the case: The action thus assumes a new form, being changed from one demanding a specific performance to one for the recovery of the money agreed to be paid upon its rescission and the restoration of the lot, which is a substitute for the surrendered claim first made and asserted.

When this cause was before us upon a former appeal—98 N. C., 414—from the ruling sustaining the defendants' demurrer to the replication taken to the answer, this language was used in reference to the alleged departure of the replication from the case made in the complaint: "But the plaintiff may waive the delay and take the money

to be paid in reimbursement of the expenditure put upon the
(642) premises, and the offer to do this is the substance of the replication." And again: "Nor does the demand for the money, which may be considered but a proposition to abide by that agreement, essentially change the nature and legal effect of the pleading." The import of this is that, while an unexecuted contract forms no bar to an action for specific performance, for which it was intended to be a substitute and adjustment, the plaintiff may, at her election, proceed upon it, just as, when the Statute of Frauds is interposed, the plaintiff may have an account of moneys paid and improvements put on the land when the promise relied on was not in writing, and the defendant acquiesced in the outlays, and thereby induced the belief that he would, in good faith, abide by his contract. And so has this suit been conducted in the court below since the decision.

Now such a change is not such a departure from The Code system of pleading as necessarily to defeat the action and send the plaintiff out of court to pursue her remedy upon the rescinding agreement, for the vital and essential subject matter remains, and such an amendment accords with the new practice, which, ignoring the new forms, aims to adjust and settle controversies about the same matter in a single action when the other party is not misled to his injury and damage.

The plaintiff being thus called to answer the new cause of action, though set out in the replication, treated as virtually an amendment of the complaint (and such association of the pleadings in order to get at the true cause of action is recognized in *Hughes v. Whitaker,* 84 N. C., 640), the defendants were entitled to answer the demand, and were offered by the court an opportunity to plead the Statute of Limitations, which they refused to avail themselves of, their counsel
remarking that he knew no rule of pleading that admitted
(643) such a plea to a replication, ignoring its relation to the complaint, as in substance an enlargement of its scope and operation.

Thus considered, the complaint, aided by the subsequent pleadings, presents the claim of the plaintiff in a two-fold aspect: (1) A demand for title to be made by the devisee of the lot, and alternatively for (2) a judgment of the court for expenses incurred agreed in lieu thereof to be paid by the testator against his representatives.

The first claim is abandoned and the suit proceeds upon the second. Now, both grow out of one transaction, and there is not seen any reason why the controversy may not, when presented in proper form, be adjusted and settled in a single action.

Nearly if not quite all the errors assigned on the appeal grow out of the assumption of the incongruity in the pleadings, while under the

present practice the action must be ascertained by an inspection of them all. *Boyett v. Vaughan,* 79 N. C., 528 (overruled, but not on this point, on the rehearing, 85 N. C., 363); *Perry v. Adams,* 98 N. C., 167.

1. What has been said is an answer to the exception to the ruling in respect to the issues proposed by the defendants to be submitted to the jury and refused, and is alike applicable to all the exceptions founded upon the supposed incompatibility of the plaintiff's pleadings.

2. The defendants introduced in evidence the petition of the administrators of J. W. Houston and the proceedings under it for the sale and conversion of his interests in the lot arising out of his contract, and, we understand, rely on them as an estoppel to a claim of that interest.

The answer describes the suit as one instituted by the testator Wilson against the plaintiff and others for the sale of the equitable interests acquired by the deceased vendee in the lot and its sale thereunder for the inconsiderable sum of five dollars. But in whatsoever form the action was brought it was intended to divest the said equitable estate, and while not relied on, so far as we can see, as a defense, does not interfere with the assertion of the plaintiff's claim to (644) compensation for improvements by virtue of the testator's alleged undertaking to pay for them.

3. The defendants also insist that the agreement whereby the vendor recognized his equitable obligation to reimburse the expenditures falls under the Statute of Frauds, and not being in writing, cannot be enforced.

We are unable to appreciate the force of this objection. When in a verbal contract for the sale of lands the vendor repudiates it and refuses to comply with its terms, for this reason he is required to return the purchase money received and account for improvements which he permits to be put upon the land, with full knowledge that the vendee does this in expectation that its terms are to be complied with by the vendor, and in full faith in his integrity; and this because the repudiation of the contract, optional with him, and the acquisition of the fruits of the vendee's labor and expenditures, would, if tolerated, be a fraud, and thus the statute, instead of preventing, would become a cover for fraud. The recognition of the equitable obligation growing out of the transaction cannot impair its force and effect.

The contract involves no interest in land, but simply assumes to pay a sum of money, because no title or right to land passes from the one to the other parties. The statute has no application. *McCracken v. McCracken,* 88 N. C., 272, and cases cited in the opinion and dissenting opinion in the case.

4. The defendant, M. L. Sledge, devisee, after verdict, through her counsel, now tendered a deed for the lot upon payment of $1,200, admitted to have been expended upon the lot by the vendor, and the purchase money, with interest thereon until the surrender of possession to the vendor in January, 1878, consenting to a deduction therefrom of the interest on the sum, $610, claimed to have been spent on the premises by the vendee. No deed was exhibited, and the
(645) plaintiff introduced the register's book showing the title not now to be in said defendant, but to have passed to one Maloney.

The court ruled that the offer came too late after verdict, and the plaintiff not consenting to accept the deed the tender was ineffectual. We concur in the ruling of the court and overrule the exception.

From a careful review of the record we find no error, and must affirm the judgment.

Affirmed.

Cited: Mfg. Co. v. Blythe, 127 N. C., 326; *Newby v. Realty Co.,* 182 N. C., 40.

ALEXANDER DOBSON ET AL. v. ALBURTO WHISENHANT.

Evidence—Maps and Surveys—Boundary—Judge's Charge.

1. While maps of a survey not made in pursuance of an order of the court are inadmissible as evidence *per se,* they may be used by a witness under examination to explain and elucidate his testimony.

2. Where the plaintiff deduced his title from a grant issued in 1815, and the defendant from one issued in 1817, and one of the deeds forming the chain of plaintiff's title, dated in 1870, called for the lines of the land claimed by the defendant: *Held,* that in the absence of any evidence of adverse possession on part of the defendant, and there being conflicting evidence as to the location of the lines, it was not error in the court to refuse to instruct the jury that the plaintiff's claim was confined to the lines of defendant's lands; but an instruction that, as he claimed under the grant of 1815, the lines thereof were the ones to determine the controversy, was proper.

CIVIL ACTION, to recover possession of land, tried before *Merrimon, J.,* at Spring Term, 1888, of BURKE Superior Court.

The case on appeal is as follows:

"To show the location of the land in dispute the plaintiffs introduced as a witness D. F. Denton, who testified that he was county

surveyor of Burke; that he surveyed the calls of the grant (646) under which plaintiffs claim in the fall of 1881. Witness was then handed a map of the survey made by him in 1881. Defendant's counsel objected to the use of the map by witness giving his testimony to the jury, upon the ground that the survey was made in 1881, not in pursuance of any order made in this action, and that there had been orders of survey made. There was no map of any survey . . . shown, nor was it suggested that there was any map in existence, or that any such survey had ever been made.

The court overruled defendant's objection to the use by the witness of the map, . . . stating at the time that the map itself was not evidence, but that the witness might use it to explain his testimony to the jury. Defendant excepted.

The plaintiff introduced in evidence a deed from E. J. Erwin, clerk and master, etc., to the plaintiffs in this action, dated 7 November, 1870, and this deed was relied on by the plaintiffs to show title in themselves, through a regular chain, from the State.

S. E. Conley, a witness on behalf of the plaintiffs, testified, without objection, that he knew the lines of this deed, and that they embraced the land in dispute.

After the evidence on both sides was all in, and the argument of one of the defendant's counsel had been made, the court was asked to instruct the jury on behalf of defendant as follows:

"That as the deed to the plaintiffs of date, 1870, and under which they claim, calls for Isaac T. Avery's line, and adopting said line, running with said line, the plaintiffs' boundary must be settled by first ascertaining the boundary of said Avery's tract, and that would locate the plaintiffs' boundary, and that if the jury find that said Avery's line covers all the land of which defendant was in possession at the commencement of this action, plaintiffs can- (647) not recover."

The grant from the State under which the plaintiffs claim, was to one Abraham Corpening, and was issued 5 December, 1815, upon an entry dated 1 January, 1814. The plaintiffs' witness, S. E. Conley, testified that he knew the land—knew its corners; that he was present at the survey made in 1881, and pointed out every corner; and the witness, Denton, testified that the defendant was in possession inside of the boundary of this grant. Conley, on cross-examination, said he knew the lines of the I. T. Avery lands.

The grant relied upon by the defendant was issued by the State to Waightstill Avery in November, 1817, upon an entry made on 4 January, 1814.

The court declined to give the special instructions asked for, and defendant excepted. No other exceptions were taken by the defendant. As there were no exceptions to the charge to the jury, it is not set out in the case."

Verdict for plaintiffs. Judgment, and appeal by defendant.

Jno. Gray Bynum for plaintiffs.
J. T. Avery (filed a brief) for defendant.

DAVIS, J., after stating the case: All the evidence is sent up with the record. This is useless, for the findings of fact upon the issues submitted to the jury are final, and we cannot review or revise these findings; nor can we review the evidence or pass upon the correctness of the verdict of the jury. Only so much of the evidence as is necessary to a clear understanding of the exceptions taken, and of the questions of law involved, should be sent up with the record.

Only two exceptions are presented:

First: To the use of the map or survey by the witness Denton. As we understand the ruling of his Honor, the map or survey was not admitted as evidence, and it was inadmissible as such. *Jones* (648) *v. Huggins,* 1 Dev., 223; *Dancy v. Sugg,* 2 D. & B. 515. But it was clearly competent for the purpose of enabling the witness to explain his testimony and enabling the jury to understand it. Diagrams, plats and the like are of frequent use for this purpose in the trial of causes, and for such purpose the use of the map in question was admissible. *S. v. Whiteacre,* 98 N. C., 753.

The second exception was to the refusal of his Honor to charge as requested, and it is insisted by counsel for defendant that, as the deed under which the plaintiffs claim calls for the Isaac T. Avery line as one of the boundaries, and one of the witnesses testified, as appears in evidence, that "this boundary (meaning Avery's) covers the land where defendant lives," the case of *Cansler v. Fite,* 5 Jones, 424, is conclusive.

This might be so if there were no conflicting evidence, but as there was conflicting evidence it was the sole province of the jury, under the instructions of his Honor as to the law applicable, to ascertain where the boundary lines of the land in controversy were.

When there is a call for the lines of a prior deed or grant, which are known and established, these lines will ordinarily control, but if not known and established they must be ascertained and governed by the calls in the grant or deed, under and through which the person

holding the prior deed derives his title. *Carson v. Burnett,* 1 D. & B., 546; *Blount v. Benbury,* 2 Hay, 542; *Fruit v. Brower,* 2 Hawks, 337.

The boundaries called for in the oldest grant, where the title has not been affected by adverse possession or by adverse possession under color of title, must control.

In the case before us the plaintiffs claim title under the grant of 5 December, 1815, upon an entry made 1 January, 1814, and the deed of 1870 was a link in their chain of title. The defendants claim through the grant of November, 1817, upon an entry made 4 January, 1814. In the absence of such adverse possession or possession under color of title, the true lines would be those of the grant (649) of 1815, and as the evidence was conflicting it was properly left to the jury to say where the true boundary lines were, and there was no error in refusing the instructions asked. "It is not the duty of the judge to charge upon any single selected fact, but to charge the law on the case with reference to all the facts as the jury may find them." *Wilson v. White,* 80 N. C., 280. There was no exception to the charge of his Honor, as given, and it is to be assumed that he did this.

There is no error.

Affirmed.

Cited: Burwell v. Sneed, 104 N. C., 120; *Boomer v. Gibbs,* 114 N. C., 81, 86; *Riddle v. Germanton,* 117 N. C., 389; *Brown v. House,* 118 N. C., 880; *Hampton v. R. R.,* 120 N. C., 537; *Andrews v. Jones,* 122 N. C., 666; *S. v. Wilcox,* 132 N. C., 1135; *Cowles v. Lovin,* 135 N. C., 490; *S. v. Harrison,* 145 N. C., 411; *Hagaman v. Bernhardt,* 162 N. C., 383; *S. v. Rogers,* 168 N. C., 114; *S. v. Kee,* 186 N. C., 475; *Elliott v. Power Co.,* 190 N. C., 66.

J. C. LOUDERMILK ET AL. v. A. J. CORPENING.

Execution Sale—When Void—Sales.

A sale of real estate under execution made on a day other than one prescribed by the statute is absolutely void.

THIS is a civil action, which was tried before *Merrimon, J.,* at Spring Term, 1888, of BURKE Superior Court.

This is an action to recover the land specified in the complaint. On the trial the plaintiffs put in evidence and relied upon a paper writing purporting to be a sheriff's deed founded upon a sale of the land in question under executions in his hands made on 16 April, 1870. The court intimated the opinion that upon the evidence the plaintiffs could not recover, whereupon they suffered a judgment of nonsuit, and having excepted, appealed to this Court.

(650) *J. T. Perkins (filed a brief) for plaintiffs.*
S. J. Ervin for defendant.

MERRIMON, J., after stating the case: Treating the sheriff's deed relied upon by the plaintiffs as evidence of title in them to the land in controversy as sufficient in form, we are of opinion that it was inoperative and void upon the ground, that the sale of the sheriff upon which it was founded was not a lawful one, it having been made on a day other than a day prescribed by the statute prevailing at the time it was made on which the sale of real estate under execution might be made. The statute applicable then in force (Acts 1868-69, ch. 237, sec. 8) prescribes that "the sale (of all real property sold under execution) shall be during the first three days of the term of the Superior Court of the county, or on the first Monday in a month (or on the first Saturday in a month) or on the Monday and Tuesday next succeeding such Saturday." But the sale in question was made, not on any of the days so designated, but on *Saturday, the 16th day of April,* 1870. This could not have been on any of "the first three days of the term of the Superior Court of the county" of Burke (the county in which the sale was made), because that court then came "on the tenth Monday after the third Monday in March and August." (Acts 1868-69, ch. 47, sec. 4.) Obviously, from the course of time, it was not made on the first Saturday in the month, nor on the Monday and Tuesday next thereafter, nor on the first Monday of the month. So that the sale was not made on a sale day prescribed by law on which real estate might be sold under execution.

It is settled that a sale of real estate made on any day other than as prescribed by the statute in a case like this is absolutely void. *S. v. Rives,* 5 Ired., 297; *Mayers v. Carter,* 87 N. C., 146; *Wortham v. Basket,* 99 N. C., 70.

Judgment affirmed.

(651)

JOHN A. LACKEY, COMMISSIONER, v. JOHN A. PEARSON.

Appeal—Undertaking—Judicial Sale—Remedy Against Purchaser.

1. An error in the recital in an undertaking on appeal, of the rendition of the judgment from which the appeal is taken, will not authorize a dismissal of the appeal; and such error may be remedied under the provisions of the act of 1887, ch. 121.
2. An independent action upon an obligation to secure the payment of money given upon a purchase under a judicial sale will not be entertained if the objection be made in apt time, the proper course being to enforce the contract by a motion in the cause in which the sale was decreed; but if the objection is not made at the proper time, the court may proceed with the action.
3. Such objection will not be entertained when made for the first time in the Supreme Court. (The ruling in *Council v. Reeves*, 65 N. C., 54, on this point, disapproved.)
4. Where a commissioner appointed to conduct a judicial sale was directed to sell for cash, and did so, except that one of the purchasers did not immediately pay his bid: *Held*, that the commissioner might maintain an independent action in his own name to recover the amount of the bid.

THIS action was begun on 26 February, 1887, and prosecuted to judgment before a justice of the peace of BURKE County, and removed by defendant's appeal to the Superior Court of the county, and was tried before *Merrimon, J.*, and a jury, at March Term, 1888.

The complaint states that the plaintiff, as commissioner, had been ordered at Fall Term, 1886, of said court, to make sale of a house and lot and certain drugs for cash, and that he did make such sale on 3 January, 1887, at which the defendant bought of the personalty to the amount of seventy-four dollars, and received possession without paying his bid at the time, but of which he has since paid all but the sum of twenty dollars, to recover which the suit has been brought. The defendant's answer (for formal pleadings were (652) made up in the justice's court before trial) admits the allegations of the plaintiff, but sets up a counterclaim for rent of the store in which were kept the drugs, the same as that demanded in the complaint, and to this a replication was put in denying any liability of the plaintiff for the claim.

In the Superior Court an issue in these words, "What, if anything, is due the defendant from the plaintiff?" was submitted to the jury, who responded, "Nothing."

Thereupon, judgment was rendered for the plaintiff, prefaced by the following recital:

"This action having been submitted to a jury, who find the issue against the defendant as to the counterclaim, and the cause of action as to the plaintiff and the amount being admitted by the defendant."

From this judgment defendant appeals.

The case on appeal is thus set out:

"In this action defendant admitted that the claim of the plaintiff was correct, but insisted that the plaintiff owed him a like sum for rent, and pleaded this alleged indebtedness as a counterclaim.

The issue submitted to the jury was not objected to by either party.

After verdict defendant moved for a new trial, stating that the jury had misunderstood the issue. The court said that a juror could not be heard to impeach the verdict, but stated that if it could be made to appear by the affidavit of jurors that they misunderstood the issues or the charge of the court thereon the verdict would be set aside. No affidavit of the kind was offered. There was no objection to the testimony and no exception to the charge of the court to the jury. There was judgment for the plaintiff."

S. J. Ervin for plaintiff.
I. T. Avery for defendant.

(653) SMITH, C. J., after stating the case: Upon taking up the cause in the court the plaintiff moved to dismiss the appeal, upon the ground that the undertaking given to sustain it recites the judgment as having been rendered on 23 March, 1888, while the record shows it to have been rendered on the 5th day of that month.

The exception is without force. The term of the court began on 5 March, the first Monday thereof, and under the statute (Acts 1885, ch. 180, sec. 1) was continued two weeks, and while the two weeks had expired, the judgment in every other respect is correctly described in the undertaking, so that an erroneous recital of its date cannot have the effect of impairing the obligation as a security for the costs and damages not exceeding $25, that may be awarded against appellant in the appellate court. If it were not so the defect would seem to be one intended to be remedied by the Act of 1887, ch. 121, which disallows a motion to dismiss unless notice has been given the appellant twenty days before the entering upon the hearing of appeals from courts of the district to which it belongs, as construed in *Bowen v. Fox,* 98 N. C., 396. Disposing of this motion by a denial, we proceed to consider the case upon its merits.

It will be observed that no opposition was made to the plaintiff's right of action to recover the balance due on the sale, either on the trial before the justice or in the Superior Court. On the contrary, it was admitted, and the sole controversy was as to the counterclaim set up against it. Nor, indeed, was any opposition made thereto, even after verdict.

The point is first taken in the argument in this Court that the action is not maintainable by suit in the commissioner's name, and that the sole remedy was by motion in the cause, according to the cases of *Ex parte Cotten,* Phil. Eq., 79; *Lord v. Meroney,* 79 N. C., 14; *Lord v. Beard, ibid.,* 5, and numerous cases following.

The objection, taken in apt time to the prosecution of an (654) independent suit upon a bond or other security given by a purchaser at a judicial sale conducted under the directions of the court, in accordance with repeated rulings in this Court, might have been fatal to its maintenance, as a more direct and expeditious remedy is furnished by the statute first in force in Rev. Code, ch. 31, sec. 129, and now embodied in sec. 941 of The Code. So far has this as a sole and exclusive remedy to be pursued in such cases been carried, that it is held in *Council v. Reeves,* 65 N. C., 54, that the objection to the bringing of a separate action for such unpaid deferred purchase money may be taken in this Court upon an appeal, though never before, *ore tenus,* or it will be noticed by the Court, *mero motu,* and the action dismissed. The reasoning by which this result is reached rests upon the supposed incompatibility of the two methods of procedure, and, in the language of the *Chief Justice,* "to prevent the Court from being encumbered, and the useless accumulation of costs by having two actions when the latter is unnecessary, and its purpose can be effected better by a motion in the first."

The reasoning is not satisfactory to us, because it does not follow, when a choice of two modes of redress is given, that both may be used at the same time, but rather that an election of the one precludes a resort to the other. A familiar illustration is furnished in the statute which gives the summary remedy by a motion, after notice, against a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, who receives money by virtue of color of office, and on demand fails to pay the same to the person entitled, and not only against him, but the sureties to his official bond—The Code, sec. 1889—and it has never been understood that this cumulative and optional remedy obstructed the bringing a regular action on the bond, when the injured party preferred to have recourse to it.

(655) Now, it is plain that while the security given for a deferred payment in a bond executed to secure it, and which is under the control of the court that orders the sale, may be thus summarily enforced, there is seen no intrinsic reason why a new suit upon the bond, in the name of the State, may not be prosecuted instead.

It is expressly provided in section 51 of The Code, transferred from the Revised Code, that "bonds and other obligations taken in the course of any proceeding at law under the *direction* of the court and payable to any clerk, commissioner, or official of the court for the benefit of the sureties in the cause, or others having an interest in such obligation, *may be put in suit* in the name of the State."

The difficulty lies not so much in the action as in the party who brings it, and this objection can hardly follow, unobserved, an action in its course from its inception to the appellate court, and there be allowed to work out its defeat. The case of *Council v. Reeves* has not since been followed to the extent of allowing an action to be defeated after reaching the Supreme Court on such ground.

In *Winfield v. Burton,* 79 N. C., 388, *Rodman, J.,* thus declares the law: "It may be observed here that, under the decision in *Lord v. Baird, ante,* 5, the present claim should regularly have been made by motion in the suit for partition among the Daniel children. *This irregularity,* however, *is one that may be waived, and it has been.* We pass it, therefore, without further notice."

This is reaffirmed by *Ruffin, J.,* in *Hawkins v. Hughes,* 87 N. C., 115. The present case is marked by essential and distinctive differences peculiar to itself.

The sale of drugs was directed to be for cash and no indulgence given, to the purchaser, nor was any security authorized to be taken for any part of the purchase money. There was no security taken and delivered into the possession of the court. For aught that appears the money was accounted for and paid into court, and if not it could have been (656) compelled. The delivering of the goods was outside the order under which the commissioner was acting, and no confirmation made of this departure from the direction given. It seems to have been an unwarranted act of the commissioner, and hence a personal matter between him and the defendant, in which the former must seek direct redress against the latter, and in which the court, while it might have enforced payment against the purchaser, if the money had not been paid into the office by the plaintiff, for colluding in the act of disobedience to the mandate of the court, and by motion and judgment if the sale had been sanctioned and confirmed, did not choose thus to proceed.

Differing thus essentially, we do not feel at liberty to extend the ruling in the case cited to the fact before us.

The judgment must therefore be affirmed, and it is so ordered.

Affirmed.

Cited: Lyman v. Coal Co., 183 N. C., 586.

S. M. McDOWELL ET AL. v. THE WESTERN NORTH CAROLINA INSANE ASYLUM.

Appeal—Roads—Trial—Jurisdiction.

1. An appeal lies from the order of the board of county commissioners directing the establishment of a road, before the order has been executed.
2. Upon such appeal the Superior Court hears the matter *de novo*, and the parties are entitled to have the issues of fact joined in the proceeding passed upon by the jury.

THIS is a summary proceeding, to establish a road, heard upon a motion to dismiss defendant's appeal from the order of the board of commissioners, before *Clark, J.,* at August Term, 1888, of BURKE Superior Court.

The plaintiffs filed their petition before the county commis- (657) sioners of the county of Burke, suggesting and alleging the necessity for a public road in that county as therein specified, and praying that the commissioners order the laying out of such road, as allowed by the statute (The Code, sec. 2088).

The defendant corporation appeared and filed objections to the petition in writing.

Afterwards the county commissioners heard the matter of the petition and the objections thereto, and upon consideration thereof, made an order directing that the road prayed for be established, and that the sheriff summon a jury to lay out the same, etc.

From that order the defendant appealed to the Superior Court of the county named. In that court the plaintiffs moved to dismiss the appeal, which motion was allowed "upon the ground that said appeal was prematurely taken before a final order was made." The defendant having assigned error, appealed to this Court.

I. T. Avery for plaintiffs.

S. J. Ervin for defendant.

MERRIMON, J., after stating the case: This is not a civil action nor a special proceeding, but is a summary proceeding prescribed by the statute (The Code, sec. 2038) to be observed in the establishment and discontinuance of public roads and ferries. It was begun before the county commissioners, who are invested with power and authority to hear applications for such purposes, "and if sufficient reason be shown the board (of county commissioners) shall appoint and settle or discontinue the said ferry or order the laying out or discontinuance or alter the said road as the case may be."

The statute (The Code, sec. 2039) expressly allows an appeal to the Superior Court from the decision and order of the county com-
(658) missioners in such matters. It provides that "in all applications provided for in the preceding section (that first above cited) the board of county commissioners may direct how and by whom the costs shall be paid, and any person may appeal to the Superior Court at term time; and if any person shall appeal from the board on such petition he shall give bond to the opposing party as provided in other cases of appeal, and the Superior Court at term shall *hear the whole matter anew;* and where any proceeding is instituted to lay out, establish, alter or discontinue public roads, or to appoint and settle ferries, and the said proceeding is carried to the Superior Court in term time by an appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the Superior Court in term time by jury, and from the judgment of the Superior Court either party may appeal to the Supreme Court, as is provided in other cases of appeals in this Code." Thus plainly a litigation is contemplated and appeals are allowed in such matters, but the plaintiffs contend that an appeal did not lie in this case until the jury had laid out the road as directed and made their report, and the court had taken final action upon the same and the whole matter, and the court below was of that opinion.

We do not concur in that opinion. The order appealed from was not interlocutory in its nature, but final. It settled and determined the principal matter in controversy—the question whether or not the proposed road should be established. So much of the order as directed that a jury be summoned to lay it out as prescribed by the statute was in execution of the principal final order, and like further orders that may yet be made in the course of the proceeding will be only for the like purpose. Why complete the matters and things to be done merely incident to and in execution of the principal order before the appeal should lie? It may be that that order will be reversed on appeal and go for
nothing, and hence it would become wholly unnecessary to incur
(659) the trouble and expense of carrying it into effect, and indeed

it might be important to the party opposing it that it should not be executed to any extent. Obviously, the laying out of the road might give him annoyance and trouble in a variety of ways.

Moreover, the statutory provision allowing the appeal from the order of the county commissioners establishing or refusing to establish or discontinuing or refusing to discontinue a road or ferry already established, contemplates that an appeal shall lie at once from such order. The province of the Superior Court upon such appeal is not simply to correct errors of law of the county commissioners. In such case the whole matter of the application is heard *de novo,* and the parties will be entitled to have all the issues of fact raised by the petition, and the objections thereto, tried by a jury. Then, wherefore execute the principal order before an appeal would lie from it? What end could be subserved by delaying the appeal until it could be executed? It is not probable that the dissatisfied party would be content after its execution, because his objection was to establishing the road at all, and his appeal would prevent questions in that respect that he would be entitled to have settled and decided by the Superior Court, not exercising jurisdiction and authority simply to correct errors of law, but to hear and determine the whole matter anew upon the merits as to the facts and the law applicable. It would be idle and nugatory to execute such order before the appeal.

The right to appeal at the same stage of the proceeding, as was done in this case, is incidentally recognized in *Burden v. Harman,* 7 Jones, 354; *Pridgen v. Anders, ibid.,* 257; and *Andrews v. Beam,* 97 N. C., 315. In each of these cases the appeal was taken without delaying to execute the principal order appealed from, and no question was made on that account.

Such appeals do not come within the rule of practice settled (660) by numerous decisions of this Court as to appeals in proceedings for the assessment of damages in the condemnation of land for the right of way, and other purposes, for railroad companies. As to such a company, its right to have and construct its railroad is established, ordinarily, by its charter, and the assessment of the damages is incident to that right; when the proper authority directs such condemnation and assessment, the order must be executed before an appeal lies. This rule rests upon the ground that the right to construct the road is settled, and it is important to the public convenience to expedite its construction, and to that end avoid all unnecessary delays in litigation as to questions arising in the course of the proceeding to ascertain the damages.

Nor does the rule of practice which prevents fragmentary appeals, in the course of an action, to this Court, apply to cases like the present one. This is almost wholly a Court of errors of last resort; it does not hear and determine actions *de novo* upon the whole merits—it only decides questions of law presented by assignments of error, and such as appear upon the face of the record proper, and it is important in point of expediency and reasonable and just procedure that, as far as practicable and consistently with the rights of parties, all questions of law, arising in the course of the action, shall be presented to this Court by one appeal taken from the final judgment.

There is, therefore, error. The court should not have dismissed the appeal, but should have proceeded to "hear the whole matter anew" according to law.

Error.

Cited: Warlick v. Lowman, ante, 550; *Lambe v. Love,* 109 N. C., 306; *Cook v. Vickers,* 141 N. C., 106; *Sutphin v. Sparger,* 150 N. C., 518; *S. v. Davis,* 159 N. C., 458.

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(661)

J. W. WIGGINS v. W. A. GUTHRIE.

Agency—Evidence—Bill of Particulars—Witness—Trial Practice.

1. The object of the statute—The Code, sec. 250—requiring the furnishing a bill of particulars and declaring that on failure to do so the party upon whom the demand is made shall be precluded from giving evidence thereof, is to supply a defect in that respect in the complaint or answer, and when furnished it becomes a part of the pleadings.

2. The party who insists upon the rejection of testimony, because the bill of particulars has not been furnished, should have that question presented and settled before the trial begins.

3. If a witness on cross-examination is asked to give a reason for any act or declaration done or made by him, he is entitled, by way of corroboration and in explanation, to speak of other contemporaneous acts, writings, etc., in support of his testimony.

4. Objections to incompetent testimony must be made in apt time, otherwise a verdict thereon will not be disturbed.

5. Where one by his conduct ratifies, or accepts benefit from the act of another, who held himself out as the agent of the former, he thereby makes himself responsible for the conduct of such agent.

WIGGINS *v.* GUTHRIE.

CIVIL ACTION, tried before *Merrimon, J.*, at June Term, 1888, of DURHAM Superior Court.

The action is to recover the balance due on an alleged contract for the sale and delivery of a lot of lumber by the plaintiff to the defendant.

The latter denies that any such contract was entered into, and further sets up a counterclaim, based upon allegations of fact contained in his answer, not material to be stated.

Two issues were submitted to the jury:

1. Did the plaintiff furnish material to the defendant under a contract with him?

Answer: Yes.

2. If so, what sum, if any, is due from the defendant to the (662) plaintiff for such material?

A. Six hundred and thirty-nine dollars and sixty-five cents, with interest from 1 November, 1886.

As the controversy is essentially upon the point of the defendant's responsibility upon any contract, express or implied, to the plaintiff for the lumber furnished and used in the construction of the defendant's dwelling, it is necessary to set out the evidence pertinent to that issue, abbreviated only, or omitted, when it passes beyond the scope of that inquiry.

The plaintiff, after stating that he had furnished lumber to build the house in Durham in which the defendant lives, and testifying to various entries of lumber in his books, which were exhibited, between 18 August and 24 December, 1886, proceeded thus:

"First time I spoke to Mr. Guthrie was on 13 November. I presented him bill on 13th, including all lumber, except Bush Hill bill, and asked him for the money; his reply was, I must look to the man I sold the lumber to. I told him that was just what I was doing. I sold him the lumber; gave him the credit through his agent Pugin. He said, well, he didn't know anything about it, and couldn't pay it. I insisted on the payment, and he suggested we walk down to Mr. Pugin's office; we did so; had a talk with him (Pugin) about it. I stated to Pugin what I had stated to Mr. Guthrie; this was in Mr. Guthrie's presence; and told him what Mr. Guthrie's reply was. I asked Mr. Pugin if he didn't instruct me to send this lumber to Mr. Guthrie's house, and he would see I got the money for it? Pugin said he did. I further asked if he didn't tell me that he paid Mr. Guthrie's money out, and would see that Mr. Ransley paid all the bills? He said he did tell me so, and I needn't to be uneasy, I would get my money; that there was a sufficient amount still due on the contract to pay all the bills; and further stated about the amount that had been paid on the contract—about

(663) $1,900, the contract being for about $3,500—would leave a balance of about $1,600 still due. I asked Mr. Pugin, in Mr. Guthrie's presence, if he didn't tell me he was Mr. Guthrie's agent; that all the money passed through his hands, and that he would see that I got my money? Mr. Guthrie said that he couldn't go round town assuming everybody's bill; that he didn't buy the lumber, and wouldn't pay for it, unless there was a surplus after the house was completed. Pugin then went on to say how much money it would take to complete the house; said it would take $600 or $700, and wouldn't certainly exceed $1,000. I then told Mr. Guthrie that I had just sent an order off from Mr. Pugin for his inside work, which I should countermand by that train unless he paid these bills. He turned off and said, 'All right!' and walked out of Mr. Pugin's office; turned and came back, and said, about that Bush Hill order, 'Don't countermand that order, let it come along, and when the bill comes send it to me, and I'll send you my check for it'; and instructed me, at the same time, to charge it up to his private account. He turned and went off, and said no more right then; last I saw of him for several days. After that time—some time after first talk—had a talk with him on the street; I asked him to settle the bills for lumber I presented. He said he never intended to settle them till he did it at the end of the law. I then told him that I should sue him; that I had sent the lumber there by the request of his agent (Pugin), and should sue him unless he paid them. He said, 'All right!' and walked off."

Notwithstanding the defendant's objections, the court admitted the above conversations in evidence, and defendant excepted.

Plaintiff further testified as follows:

"The first of the Bush Hill bill arrived 9 December, last about 24th; didn't know at time what bill would amount to. Mr. Guthrie, in Pugin's office, did not deny that Pugin was his agent. All my bills, ex-
(664) clusive of Bush Hill, amout to $636.97, before any payment. He paid $100 13 November, after conversation in Pugin's office and before Bush Hill bill arrived; got the money on that check. I credited this amount on bill of lumber I furnished Mr. Guthrie. At that time he owed me no other debt; had had no dealings with him up to that time."

Cross-examined: "Bush Hill bill was rendered to me 15 March; paid the bill few days after I got it; think the first bill sent to me was turned over to Mr. Guthrie. This was after I brought this suit. Ransley was building Mr. Guthrie's house. I didn't sell any lumber to Ransley. I very often got checks like the one shown; have never made any charge to Ransley. The items of 18 August, 1886, to 4 September, are charged

to W. A. Guthrie; this from the ledger. On the journal, 18 August, 1886, Joseph Ransley for W. A. Guthrie's house.' This is just as it stood there the day the entry was made. I made the entries to suit my own convenience in keeping books. The reason I charged to Ransley was because he gave orders on Guthrie for the lumber. (Order shown. Its introduction objected to by defendant. Objection overruled and defendant excepted.) Dated 4 September, includes bill from 18 August to 4 September; this order was presented to Mr. Pugin; can't say I ever showed this order to Guthrie; may have done it. 19 November (this order was read to the jury)—this order was for lumber I furnished Mr. Guthrie at the instance of Mr. Pugin; Pugin said when I presented the order it was all right, and he would write to Mr. Guthrie and get the money and pay it off."

The defendant objected to the order of 4 September, but the plaintiff's counsel insisted that, as the defendant asked on the cross-examination the reason the plaintiff charged bills to Ransley, and the plaintiff gave as his reason that Ransley gave orders on Guthrie for the money, he should have the privilege of sustaining his statement by (665) showing the order in evidence as part of his explanation. The defendant's objection was overruled, and he excepted.

Plaintiff testified further, on cross-examination, as follows: "Lumber was delivered between 18 August and 4 September to Mr. Hill, Ransley's foreman; entry on the journal 6 September is 'Joseph Ransley for W. A. Guthrie.' This entry has been changed; was changed in November to correspond with first entry. When the account was opened with Mr. Guthrie, it was opened 'W. A. Guthrie, by T. E. Hill'; this was on 16 November. When that change was made, don't know whether Ransley had left here or not; didn't know whether he was insolvent or not; didn't see him for some time before he left. It originally stood, '6 September, W. A. Guthrie, by Joseph Ransley'; changed all to 'Joseph Ransley for W. A. Guthrie,' that were not made that way originally, to make them correspond with 18 August and 4 September. About 16 November changed the bills of 4 September and 18 August, and have not since changed them. 4 September is charged 'Jos. Ransley for W. A. Guthrie.' When these entries (18 August and 4 September) were made, had no orders from Ransley; gave credit to Guthrie because Pugin instructed me to send him anything he wanted, and he would pay the bill. When Mr. Guthrie commenced to buy lumber he instructed me to charge it to him by Mr. Hill, or to let Hill have what he wanted upon a written order signed by Hill. Never had any contract with Guthrie, but with Pugin, who represented himself as Guthrie's agent; never had any agreement with Guthrie personally before 13 No-

vember; never had any agreement with Guthrie personally on 13 November, or after, for lumber Ransley got. My clerks made change under my directions to correspond with first entry. The changes on books might have been made before 13 November, or after that (666) time. On the ledger the charge is to W. A. Guthrie direct. All of the lumber charged on books was delivered before 13 November, except 4,000 laths delivered on that day before I saw Guthrie."

On redirect examination plaintiff testified as follows: "Ransley applied to me for bill of lumber for Guthrie's house. I refused him. He was a perfect stranger to me; knew nothing about him. (Order sent for Bush Hill lumber introduced, dated 12 November, 1886. Copy will be sent, marked 'D.') Bought Bush Hill bill in my own name and sold it to Guthrie. In Southgate's office, showed Guthrie bills of lumber furnished. No other sum but $100 has ever been paid; nothing on Bush Hill bill has been paid except freight."

The plaintiff here rested his case, and the defendant testified in his own behalf as follows:

"I made no contract with Wiggins prior to 13 November, 1886, and never made any with him in regard to lumber, furnished by him, and for which he has sued in this action, except the Bush Hill bill. Up to 13 November, 1886, never had any business dealings with Mr. Wiggins whatever about this or any other matter. I was living in Fayetteville up to and after 13 November, and until my house was completed, about 1 March, 1887. Came to Durham 13 November for the purpose of looking after work on my house, and to see Ransley, with whom I had contracted to build it. On arriving in Durham, came down street and met Mr. Wiggins, who, at the time was a stranger to me, near where Johnson's drug store now is, on sidewalk. He came up and spoke to me, and inquired of me if I knew where Mr. Ransley was, and called him in the conversation my contractor. I replied to him I did not; had been informed he was sick. Wiggins then remarked he wanted to see him; that he had a bill against him for lumber he had furnished to build my house. I replied to him I knew nothing about it; that I had contracted with Ransley to (667) furnish everything and give me a complete job for so much money; think I stated the amount; told him I had nothing to do with buying materials or furnishing. Wiggins then said, 'I have furnished him lumber, and I want my pay out of somebody. I replied to him that he would have to look to the man he sold the lumber to; that I had bought no lumber from him, and I didn't intend to pay him for it; told him my house was then, as he well knew, hardly half finished; that when it was finished I was ready to pay for it; if there

was any surplus left over, or balance going to contractor, it was a matter of no concern to me whether the contractor got it or he got it; that what I wanted was the completion of the contract by Ransley. He didn't at that time show me any bill, or state to me the amount of it. That's about all that occurred in that conversation; all that I remember. Some time after that, but during same day, I met Wiggins again, and he again asked me if I would become responsible—this I think, at Southgate's office—for Ransley's bills. I told him I would not, and I think he pulled a paper out of his pocket which he claimed to be a bill. I declined to read it or accept it; told him I had nothing to do with it; that it was a matter entirely between him and Mr. Ransley. I called his attention to the fact I had already told him I would have nothing to do with it. He then remarked, 'Ransley gave me an order for some stuff for your house that couldn't be had here, and that was ordered from some manufacturers of building supplies at Bush Hill, N. C., and, says he, 'if I can't get pay for what I have already furnished Ransley, I will stop the shipment of the Bush Hill stuff.' I told him he could do just as he pleased about that; that I didn't intend to assume, as my own, any obligation whatever that he had against Ransley. With that we separated. I think both these conversations occurred about the middle of the day. In the evening of that day I was in Pugin's office. Pugin had been employed by me as an architect, and not as a builder, to (668) supervise the construction of my house, and see that Ransley did the work according to his contract. Wiggins came in again, spoke about wanting pay for the bill he had against Ransley, and again threatened to countermand the order for the Bush Hill stuff. I distinctly refused again to become responsible for the first indebtedness of Ransley to Wiggins, but I told Wiggins that, to avoid delay in the finishing up of the house—that I was anxious to get into it—if he would not countermand that order I would assume and pay the bill, if Ransley didn't do it; I would see, as to that, he suffered no damage. Wiggins then went off, and I had no further conversation with him that day. In conversation at Pugin's office, and in no other conversation I had with Wiggins that day did he pretend to me that any part of his claim arose out of any contract between him and Pugin as my agent. It is only since this litigation commenced that I ever heard of such claim. Pugin was not my agent for the purpose of buying material to build my house prior to 13 November, 1886; I don't deny I employed him after that date to buy material; had Pugin employed August, September, October, up to 13 November, simply as an architect; that was the extent of his authority. No such

statement was made that he sold me the lumber and gave me the credit. Wiggins didn't pretend to have dealt with Pugin at all; didn't pretend that Ransley gave him orders. Wiggins did not state, in presence of Pugin, that Pugin had acted as my agent in purchase of this lumber; nothing said by Wiggins about Pugin being my agent. I paid Vanoppen's expenses to go to Bush Hill and back, $10; when stuff came it was not according to the order; went to Wiggins and said, I consider myself as standing between you and Petty & Co., and told him if he paid it I intended to contest it; was willing to pay something for it, but not full price; sash and doors not delivered till about
(669) Christmas; on this account plastering froze in three rooms of the house; had to be replastered; damage $15; $50 damage in completing the house; no transoms furnished; had to have them made to order; delayed every time; cost me $26.28. In this was included sash for windows on north side of the house; no sash came for that window; window-sash had a very wide bottom rail; glass had to be cut; incurred expense to cut glass, $12; sash not made to fit frame; square sash for arched frames; closet doors had to be cut down; doors of green lumber; shrank; damaged $115. Offered to pay Wiggins $105, in full settlement of the whole thing; he declined; I offered it in writing; I delivered the check to Hill, Mr. Ransley's foreman, and told him to take it and give it to Mr. Wiggins. At that time I supposed it covered all Wiggins' claims; knew nothing to the contrary. I paid the $100 for Ransley. Don't remember the conversation at Blacknall's corner. I notified Wiggins to produce his books; examined them, and made memorandum."

Cross-examined.—"Discharged Joseph Ransley 17 November. Bill for Bush Hill lumber in Pugin's handwriting; Pugin ordered balusters and I paid; and wall paper. All this after Ransley was discharged. At time Pugin made order for glass I knew nothing about it; it was ordered before Ransley left.

On 13 November, I had overpaid Ransley for all the work he had done and material furnished."

Pugin, introduced for defendant, testified as follows: "I was employed by Guthrie as architect and superintendent. This embraced making designs for house and superintending construction. I was not authorized to buy material; didn't tell Wiggins so, as I recollect; was not authorized by Mr. Guthrie to accept orders drawn by Ransley on him; never notified Guthrie of order drawn by Ransley on him in favor of Wiggins; never told Guthrie verbally of the order. Don't remember any such conversation that Wiggins said in my office
(670) that I represented to him I was Guthrie's agent to buy lumber. First time I ever saw Wiggins he was asking me for pay for

lumber he furnished for defendant's house. I told Mr. Wiggins that Mr. Guthrie sent me money, and if Ransley would give an order I would pay. I did tell him I had no doubt Guthrie would pay for all the lumber he put into the house; that the contract price was enough to finish it; this was an opinion. Guthrie did not authorize me to make such statement. Guthrie made his payments to Ransley in checks; to Joseph Ransley or order."

Cross-examined.—"Bush Hill bill pretty generally filled the order. There was paid up to 13 November, $1,125."

Defendant here closed, and the plaintiff introduced T. E. Hill, who testified as follows: "What Wiggins sent was used there; he delivered lumber there. The 13 November met in Pugin's office; notice of Ransley's discharge given to me forenoon of Saturday 13th; gave it to Ransley in the evening. Check of $100 for Wiggins was given to me in the morning of the 13th. Tuesday, 16th, I ordered first bill from Wiggins; I had then taken charge for Mr. Guthrie. The check 13 November, gave it to Wiggins before notice to Ransley; gave Ransley notice after supper. . . . Guthrie gave me checks to pay Ransley's hands; Ransley knew nothing about it till I told him."

Cross-examined.—"I was foreman for Ransley both on Guthrie's house and church; Ransley furnished to both places. Pugin suggested the amounts to be paid."

Plaintiff then introduced Mr. Lloyd, who testified: "Mr. Pugin came into my store; I sent for him, and asked him if he was Mr. Guthrie's agent; he said he was, and all the money was passing through his hands, and he accepted the order."

At the commencement of the trial, the defendant demanded payment on his counterclaim because no reply was filed thereto. The court ruled that the counterclaim, considered as a cross-action, (671) seeking affirmative relief, was not within the jurisdiction of the court, as the demand was under two hundred dollars and founded on contract, but that defendant might have the benefit of it as a recoupment. To this ruling defendant excepted. The defendant afterwards took advantage of his counterclaim as a recoupment, and the court, without objection on the part of the defendant, charged the jury fully as to rights of defendant under his counterclaim, and particularly and in detail called the attention of the jury to the evidence of defendant tending to show that he had sustained damages, as alleged in his counterclaim, and told the jury that if they should find the first issue for the plaintiff, they should reduce the amount of any claim they might find plaintiff entitled to recover by the amount of the damages which defendant had shown, by a preponderance of evidence, he had sustained. At the close of the evidence defendant requested the court

to put its instructions to the jury in writing, and the judge at once wrote the following (and handed them to counsel for defendant), to wit:

"1. If the jury are satisfied, by a preponderance of the evidence, that the plaintiff sold and delivered to defendant the lumber, the value of which he sues for in this action, they will answer the first issue in the affirmative.

2. If the lumber was sold and delivered to Pugin as agent for defendant, and Pugin was defendant's agent to purchase such lumber, this would be, in law, precisely the same thing as a sale and delivery to the defendant personally, and the jury should answer the first issue in the affirmative.

3. If Pugin, professing to be the agent of defendant, purchased and received such lumber for defendant, and defendant subsequently ratified such purchase, the jury should answer the first issue (672) in the affirmative.

In addition to the written instructions, the court, without objection on the part of the defendant, explained to the jury that they should answer the first issue "yes," if they were satisfied, by a preponderance of the evidence, that the plaintiff furnished the defendant the Bush Hill bill of material under a contract with defendant, and called the attention of the jury to the evidence on both sides in regard to that bill of lumber, and further to the jury, without objection, that if they found the first issue in the affirmative, it would be for them to ascertain, in passing upon the second issue, whether defendant's contract with the plaintiff embraced only the Bush Hill bill of lumber, or whether it included the bills claimed by plaintiff to have been furnished by him to defendant between the 18th of August and 13th of November. The court then directed the attention of the jury to the evidence on both sides bearing upon these questions, and impressed upon them that the *onus* was upon the plaintiff.

The defendant requested the following special instructions:

"1. To constitute a sale of personal property, delivery of the article to the purchaser (either actual delivery or symbolical, as by written bill of sale) is necessary, and when the delivery is had the sale is then complete. There is no such thing as a vendor's lien recognized in North Carolina, and when the vendor parts with the possession, by delivery to the purchaser, his right to the property thereupon ceases, and the title passes to the vendee unencumbered, unless the vendee should enter into mortgage on the property, or sign a conditional bill of sale. If Ransley contracted with Guthrie to build and complete his house, and furnish lumber and other material himself for that purpose, and the plaintiff contracted with Ransley to sell to him the lumber, etc., embraced in the account sued on, and, pursuant to

contract with Ransley, in the months of August, September, October and up to 13 November, 1886, delivered to Ransley the articles embraced in his account for that time, then he cannot recover for these items against Guthrie. And it makes no difference, (673) in this view of the case, that the articles were delivered on Guthrie's premises, nor that they were used in building the house Guthrie now occupies." The court said there was no evidence in the case calling for this instruction as a whole, and such parts of it as are necessary to be given are embraced in the general charge to the jury. The instruction was therefore refused.

"2. If the jury find the lumber was sold and delivered to Ransley under an express contract with him, then the using of the materials on Guthrie's premises, and to build a house for Guthrie, will not, in law, raise any implication against Guthrie, nor bind him under an *implied* contract, to pay for the same. If there was an express contract with Ransley, then that would exclude all idea of an implied contract with Guthrie." (Given.) "If the plaintiff sold and delivered the lumber in August, September, October, and up to 13 November, 1886, to Pugin, as the agent of Guthrie, then such sale and delivery to Pugin, as Guthrie's agent, will not bind Guthrie, unless there was the relation of principal and agent subsisting at the time between Guthrie and Pugin, and to bind Guthrie the plaintiff must prove such agency by a preponderance of evidence."

No. 3 was given with this addition:

"Unless the jury shall be satisfied, by a preponderance of the evidence, that Guthrie ratified Pugin's acts."

"4. That if the bills of lumber of August, September, October, and up to 13 November, 1886, were sold and delivered to Ransley under contract between the plaintiff and Ransley, then the same became the debt of Ransley, and the plaintiff could not, under the Statute of Frauds, hold Guthrie responsible, unless Guthrie bound himself in writing to pay it. That the giving of the check for $100, 13 November, 1886, by Guthrie, was not, in law, sufficient to bind him to pay the full amount of Ransley's then indebtedness to the plaintiff, (674) as there is no evidence in the case and no contention on the part of the plaintiff that defendant is or has made himself any way responsible for Ransley's debt." (Refused.)

"5. That if the plaintiff paid the bill of W. C. Petty & Co., of Bush Hill, after notice from Guthrie of the grounds of his counterclaim, then that bill is subject to the amount if any, which you shall find due to Guthrie for his counterclaim." (Given.)

"6. That if Wiggins paid to Petty & Co. the Bush Hill bill of $127.68 *after* 19 February, 1887, when his suit was commenced, then

he cannot recover anything in this action on account of such payment." (Refused, because plaintiff does not seek to recover on such grounds.)

"7. That the burden of proof is upon the plaintiff, and it is his duty, by a preponderance of evidence, to satisfy the jury that the defendant contracted with him to furnish the material, and if he has failed to satisfy the jury he is not entitled to recover." (Given.)

Defendant moved for a rule for a new trial upon the following grounds:

1. Because his Honor refused the defendant's special instructions Nos. 1, 4 and 6.

2. Because, in giving defendant's special instruction No. 3, his Honor gave the same with the modification and qualification written below it on same paper.

3. Because his Honor charged the jury as set forth in his written instructions numbered 1, 2 and 3.

4. Because his Honor overruled the defendant's exceptions to evidence and admitted the same in behalf of plaintiff, as follows, viz.: "The evidence, exceptions to which are noted in his Honor's notes of the evidence, and such other exceptions to evidence as de-
(675) fendant may desire to have put into the case," such being the understanding in taking down the evidence."

New trial refused, and defendant appealed.

No counsel for plaintiff.
John W. Graham for defendant.

SMITH, C. J., after stating the case as above: Upon the introduction of the plaintiff as a witness on his own behalf, objection was made to his testifying in support of the claim, because, when demanded, he had failed to furnish a bill of particulars thereof under sec. 259 of The Code. This section declares that while "it shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within ten days after a demand in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or to be precluded from giving evidence thereof," etc.

This enactment, which, in case of a disregard of the demand, shuts out all proof of the items of the claim coming from any witness (and does not close the mouth of the party making it alone), is intended to meet the case of a complaint that does not set out the particulars, and confine the evidence at the trial to such as are set forth. Its aim

is to supply an omission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect a part of the complaint itself. *The People v. Monroe,* 4 Wend., 200.

"The better practice," says the court in *Kellogg v. Paine,* 8 How. Pr. Rep., 329, "is for a party who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand, or an order for the particulars of such account, to apply for an order to that effect *before the trial,* so as to have the question settled before the trial." The propriety of this course (676) is strikingly manifest in this case.

But a complete answer to the objection is furnished in the fact that such bill is attached to the complaint, and made, by reference, a part of it, so that no such demand is authorized, unless the statement is defective; and the appropriate remedy for this is an application to the court for a more definite bill, in which the defects should be pointed out. *Kellogg v. Paine, supra.*

There was no error in receiving the testimony offered.

We do not set out the building contract made between Ransley and the defendant, which is full and minute in its specifications, and contemplates a complete and finished job undertaken by the former for a fixed price to be paid by the latter.

The next exception was taken during the cross-examination of the plaintiff, to the production of an order under date of 4 September, 1886, drawn by Ransley on the defendant in favor of the plaintiff for $258.65, which was referred to in explanation of and giving reasons for an entry on plaintiff's journal. The exhibition of the order was a verification of what he was saying about its contents, and is part of the cross-examination itself. The reason given for the ruling to receive the order as evidence for the limited purpose mentioned is entirely satisfactory in sustaining it.

The further objection to what was said by the witness that led to the production of the order is quite as untenable, as it was elicited by the defendant's counsel without interference until the evidence was out. As is said in the opinion in *McRae v. Malloy,* 93 N. C., 154, the defendant, "if opposed to the giving in of the testimony, should have interposed and arrested the examination, or if this could not be done in time, should have asked the judge to require its withdrawal or direct the jury to disregard it, so that it would become harmless. But it is not admissible for counsel to be quiet and (677) allow the evidence to come out and take advantage of it if favorable, and if not to ask that it be stricken out and not considered." If we misinterpret the record as to the time when the objection was

made, we see no intrinsic objection to the matter of the testimony itself, and for the reasons given by the presiding judge it was competent.

The next exception is to the ruling made at the commencement of the trial, that what the answer sets up as a counterclaim being less than $200, and cognizable in a justice's court only, could not be enforced as a demand for affirmative relief, but the defendant could avail himself of it as a recoupment in reducing the plaintiff's demand. This accorded to the defendant all the benefit to which he was entitled, and he should be content in being allowed to use it for this purpose. But the objection disappears in presence of the fact that precisely the same purpose was subserved whatever name be given to the defense. Inasmuch as the plaintiff recovered a much larger sum, whether a counterclaim, recoupment or set-off, the opposing demand, if allowed by the jury, would necessarily be in effect a diminishing of the plaintiff's claim, and this, to some extent, would seem from the verdict to have been done, as the sum assessed by the jury is less by $25 than that demanded in the complaint, or it has been disallowed altogether.

We have carefully considered the instructions asked and denied or modified, and those given to the jury, in the light of the full evidence as reported, and are unable to find any reviewable error in either.

There is no dispute that the defendant's agreement with Ransley required the latter to furnish all the materials and do all the work in putting up the house, doing what is called "a turnkey job," for all which the former was to pay for the work as it progressed definite sums until it was completed. It is also not denied that the
(678) material for the value of which the suit is brought was supplied by the plaintiff and entered into the construction of the house. So the only question is, were these supplies furnished to the one or the other of these contracting parties, and do the facts proved authorize the inference that they were on the credit of the defendant with his assent, from which a contract to pay for them may be implied? This the jury found, and there was no direction asked to be given to the jury that there was no evidence warranting the verdict, and no complaint can now be entertained here for the failure to give such an instruction.

The fourth instruction refused is outside the controversy, for it is not whether the defendant became collaterally liable for the debt of Ransley, under the Statute of Frauds, but whether he contracted himself for the goods, and therefore the evidence did not admit of such charge.

The sixth instruction was properly refused upon the ground stated by the judge, for it was not material whether the plaintiff had or had not paid for so much of the lumber as he got of Petty & Co.—the Bush Hill bill—if as his material thus acquired they were furnished to the defendant under a contract with him.

We find no error in the record of which the defendant can complain, and the judgment must be and is

Affirmed.

Cited: Blake v. Broughton, 107 N. C., 227, 229; *Townsend v. Williams,* 117 N. C., 337; *Beaman v. Ward,* 132 N. C., 69; *Hodges v. Wilson,* 165 N. C., 327; *Cropsey v. Markham,* 171 N. C., 46; *Sewing Machine Co. v. Burger,* 181 N. C., 245; *Burris v. Litaker, ibid.,* 377.

(679)

SILVER VALLEY MINING COMPANY v. THE BALTIMORE MINING COMPANY.

FROM DAVIDSON SUPERIOR COURT.

SMITH, C. J. This repeal has been retained for several terms under an *adversari,* while the subject matter has been fully considered in the opinion heretofore delivered in the decision of the defendant's appeal. *Silver Valley Co. v. Baltimore Co.,* 99 N. C., 445. After due consideration, and in view of what is there said, our conclusion is that no error is disclosed in the ruling from which the present appeal is taken, and therefore we affirm the judgment.

Affirmed.

Cited: Lanier v. Pullman Co., 180 N. C., 410.

BROWN v. BROWN.

FROM JACKSON.

The judgment of the court below—in favor of the defendant—was affirmed.

A petition to rehear having been filed, the opinion delivered at this term will appear with that which will be made on the final disposition of the cause.

(680)

THE STATE v. J. M. DALTON.

Liquor Selling—Druggists—Indictment—Negative Averments.

1. The principle enunciated in *S. v. Wray*, 72 N. C., 253, which exempts from criminal prosecution a druggist who, in good faith, and upon the prescription of a physician, sells liquor without a license, *as medicine*, will not be extended to a "liquor dealer," although the latter may make such sale upon representations and honestly believing that the liquors are to be used for medicinal purposes.

2. Indictments under the Revenue Acts of 1885 and 1887 for selling liquors in quantities greater than one quart, should negative the facts that the liquors were of the defendant's own manufacture, and were sold at the place of manufacture, or were the product of his own farm.

INDICTMENT for selling liquors without license, tried before *MacRae, J.*, at Spring Term, 1888, of the Superior Court of MACON County.

The indictment contained three counts:

1. The first charged the defendant with unlawfully selling and retailing spirituous liquors to Joseph Beasley, by measure less than a quart, to wit, by the *pint,* not having a license, etc.

2. The second charged the unlawful selling, etc., to Joseph Beasley, by a measure less than a gallon, to wit, by the *quart,* not having a license, etc.

3. And the third charged the unlawful selling, etc., to Joseph Beasley, by a measure less than five gallons, to wit, by the *gallon,* not having a license, etc.

The indictment was found by the grand jury at Fall Term, 1887.

"Before the jury was empaneled the defendant moved to quash the indictment for want of jurisdiction, upon the ground that under the Revenue Act of 1887, secs. 31 and 35, the jurisdiction was in
(681) the court of a justice of the peace." Motion denied, the court holding that the defendant might have the benefit of this point under the plea of not guilty. Defendant excepted.

J. Beasley, witness for the State, testified that "he bought whiskey from the defendant in January or February, 1887, a quart each time. Defendant keeps a regular place of sale—a grocery. About the last of January or first of February, 1887, was the first time witness bought whiskey of defendant. After that he bought again, both times a quart. Witness bought whiskey from defendant on a physician's certificate for his sick wife. Defendant is not a druggist."

Counsel for defendant asked the court to charge the jury that, if the defendant sold the whiskey in good faith for medicinal purposes,

on a prescription of a physician, he was not guilty. This was declined, and defendant excepted.

The court charged the jury that if defendant sold whiskey to the witness as alleged, at a time more than six months before the finding of the bill, the court would have jurisdiction, but if the sale took place within six months before the finding of the bill, this court would not have jurisdiction. Defendant excepted.

The court further instructed the jury, that the defendant not being a druggist, could not sell by the quart without a license, even upon a physician's prescription. Defendant excepted.

There was a verdict of guilty, judgment, and appeal.

Attorney-General for the State.
Kope Elias for defendant.

DAVIS, J., after stating the case: The only evidence as to the time when the alleged offense was committed, shows that it was in January or February, 1887, before the enactment of chapter 135 of the Laws of 1887, which was 7 March, 1887, but so far as it relates to the offense charged in the indictment, it is immaterial whether it (682) occurred under ch. 175, sec. 34, of the Acts of 1885, or ch. 135, sec. 35, of the Acts of 1887, as they do not differ in respect to the matters charged in the indictment. The slight changes made in the former by the latter in no way affect the penalties imposed, and as to them the latter does not repeal the former. *S. v. Sutton,* 100 N. C., 474.

Whether under the Act of 1885 or 1887, the punishment does not exceed a "fine of $50 or imprisonment for thirty days, and a justice of the peace had exclusive original jurisdiction" within six months after the commission of the offense." After six months the Superior Court might assume jurisdiction, if official cognizance had not been taken by a justice of the peace, and the ruling of his Honor upon the question of jurisdiction was correct. The Code, sec. 892.

This disposes of the defendant's exception to the refusal of his Honor to quash the indictment, and also of the exception to the charge in regard to the jurisdiction.

As to the questions involved in the exceptions to the refusal of the court to charge as requested in regard to the sale for medicinal purposes upon the prescription of a physician, and to the charge in relation thereto as given, there has been some conflict in judicial decisions; but in the late case of *S. v. McBrayer,* 98 N. C., 619, *Merrimon, J.,* delivering the opinion of the Court, in commenting on the case of *S. v. Wray,* 72 N. C., 253, relied on by counsel for de-

fendant, said that case "went to the extreme limit of the power of interpretation"; and much stress, in *S. v. Wray,* was laid upon the fact that the sale was not only upon the prescription of a physician, but was made by a druggist, whose business it was to sell medicine upon prescriptions, and though in conflict with a *dictum* in *S. v. Wool,* 86 N. C., 708, this Court will not go, by construction or interpretation, beyond the ruling in *S. v. Wray.* To do so would tend (683) to impair the force of the statute, weaken its restraining power, and often to defeat the legislative will, by rendering evasions and violations of the law easy. It is not pretended that defendant kept whiskey for sale as a medicine, as druggists do, and for which they are required to pay a license. Tax Acts of 1887, ch. 135, sec. 21. This disposes of the other exceptions.

We think it proper to call attention to the omission in the second and third counts of the indictment to negative the facts that the spirits sold were of the defendant's own manufacture, and sold at the place of manufacture, or the product of his own farm, as was properly done in *S. v. Whissenhunt,* 98 N. C., 682, and which should be done. *S. v. Stamey,* 71 N. C., 202; *S. v. Miller,* 7 Ired., 275; *S. v. Loftin,* 2 D. & B., 31; *S. v. Hazell,* 100 N. C., 471; *S. v. Sutton, ibid.,* 474.

This objection does not apply to the first count, which is good, and the verdict being a general one, it is sufficient if any one of the counts is good.

There is no error.

Affirmed.

Cited: Randall v. R. R., 107 N. C., 754; *S. v. Edwards,* 113 N C., 654; *S. v. Downs,* 116 N. C., 1067; *S. v. Tisdale,* 145 N. C., 424.

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(684)

STATE v. J. C. COOPER.

Local Option—Elections—Public Acts—Townships—Jurisdiction—Indictment—Duplicity—When Defect Cured by Verdict.

1. The result of an election cannot be collaterally impeached—this must be done by an action brought for that specific object.

2. Public acts are always noticed judicially by the court, and the omission to refer to them in indictments is not ground for arrest of judgment.

3. Where an election is held under the Local Option Act in a township, and afterwards the name of the township is changed by law, this does not have the effect of repealing the Local Option Law therein.

4. The Superior, Criminal and Inferior Courts have jurisdiction of offenses against the Local Option Act.

5. An indictment which charges more than one offense in the same count is bad for duplicity, and may be quashed for that reason, but if a *nol. pros.* is entered as to all but one charge, or the defendant elects to go to trial and is convicted, the defect will be cured.

INDICTMENT for violation of the Local Option Law, tried before *Montgomery, J.*, at September Term, 1887, of TRANSYLVANIA Superior Court.

It is charged in the indictment that the sale of spirituous liquors was prohibited in Davidson River Township, in the county of Transylvania, by a vote of a majority of the electors of that township, as allowed by the statute (The Code, secs. 3110, 3116), and that the defendant sold such liquors within that township while such sale was so prohibited to sundry persons named, there being but one count in the indictment, so that several distinct offenses were charged in the same indictment and in the same count.

Before the defendant pleaded, "by direction of the court, and without objection from the defendant, the solicitor was required to elect as to which charge of the bill he would try upon, and a *nol. pros.* was entered as to all but the charge of selling to Samuel Merrill. Defendant pleads not guilty, and specially that no such election (685) as that charged or reported was ever held."

On the trial the State offered in evidence the minutes of the county commissioners of said county containing an order for an election on local option in said township.

Record of petitions before said board and the original petitions of citizens of said township.

Record of returns of election of June, 1880, made to board of commissioners, declaring the result of said election: for prohibition, 84; for license, 74.

The register of deeds, as a witness, identified the records and original petitions, and testified that there were no other records of said board concerning said election.

Samuel Merrill, a witness for the State, testified that in February, 1887, he bought two packages of whiskey containing five gallons each, and four or four and a half gallons also, from the defendant at rectifying house in said township.

The defendant offered as a witness one Forsythe, who stated that he remembered the local option election in 1880; that he took an interest in it outside, and assisted in counting the votes.

The defendant asked the following question:

"Do you recollect of any votes in favor of license being thrown out after the counting of the votes?"

Objection by the State. Sustained, and the defendant excepted.

The defendant's counsel offered the following further exception in writing:

The counsel for the defendant offered to prove that at the election held, as alleged in the bill of indictment, there were seventy-four votes cast for license and eighty-four for prohibition, and this was the return of the judges of said election. He then offered to prove that after the election was open and had progressed for a while the (686) judges took out the votes and began *de novo,* without any notice or proclamation to that effect. He also proposed to prove that after the election was over and the polls closed the judges threw out eight or ten votes, all of which were for license, and had these votes been counted it would have changed the result, or at least made it doubtful. But his Honor ruled out the question intended to elicit this information, and held that the election could not be thus collaterally attacked, and thereupon the defendant excepted. The counsel further insisted that the irregularities before and after the election was closed were sufficient to annul the election, and the same was done by the officers appointed to hold the election, and employees acting under their immediate direction, and it was done for the purpose of defeating the will of the majority of the voters. But his Honor was of the opinion that the election could not be thus attacked, and thereupon ruled out the evidence as was intended to be elicited by the question propounded to the witness Forsythe, and the defendant excepted.

Defendant moved in arrest of judgment on the ground:

1. That the bill of indictment is defective, in that no allusion is made to the act of assembly authorizing local option, nor to the act of assembly changing the name of the township.

2. That the act of assembly, chapter 136, 1881, changing the name of the township, repells the local option act.

3. That this court has no jurisdiction of the offense charged in the bill of indictment.

Motion in arrest. Defendant excepts.

There was a verdict of guilty and judgment against the defendant, from which he appealed to this Court.

Attorney-General for the State.
G. N. Folk for defendant.

MERRIMON, J., after stating the case: The defendant made no (687) objection on the trial to the evidence produced on the part of the State. It went to prove that an election was ordered and held according to the forms of the law, and that the result was ascertained and declared in writing to be in favor of "Prohibition." The statute (The Code, sec. 3114) required that it should be held as nearly as practicable in accordance with the statute regulating elections of members of the General Assembly. It seems to us that this was substantially done. It appears that there was but one voting place in the township. The judges and registrar conducted the election at the time and place prescribed, ascertained the result thereof, and certified the same over their proper signatures, and deposited their certificates with the register of deeds. They, under the circumstances, necessarily constituted the canvassing board for the purpose of ascertaining the result, and what they did was about as near an observance of the election law applicable as was practicable. There was no formal proclamation of the result, but this was not essential. The important and essential things to be done were, that the proper officers should hold the election, ascertain the result and certify the same, and deposit their certificate in the proper public office of deposit, so that the people of the township—indeed, all people—could there learn the result. They had notice of the election, and the law charged them with knowledge of the result. It provided the means by which and the place where such information might be had by everybody.

Such ascertainment and declaration of the result of the election was *prima facie* correct, and it was conclusive until by a proper action, brought for the purpose, the true result otherwise should be ascertained and declared by a judicial determination. The law contemplates and intends, generally, that the result of an election, as determined by the proper election officers, shall stand and be effective until it shall be regularly contested and reversed, or adjudged to be void by a tribunal having jurisdiction for that purpose. It would lead to confusion and ridiculous absurdity to allow the validity (688) and result of an election to be contested every time the result of it, as determined by the election officers, became material collaterally in a litigation. In the present case the defendant might be able to prove facts showing that the election mentioned was void for one cause or another; another defendant, charged with a like offense, might be less fortunate, and the State might show that it was regular and valid, and so on indefinitely. The law does not provide for such

continual and repeated contests in every case that may arise. It intends that one contest, properly instituted for the purpose, shall establish the validity or invalidity of the election questioned. If the present defendant or others were dissatisfied with the conduct of the election, or the result of it as declared, they should have promptly brought their action, as they might have done, to contest its validity and the correctness of the ascertained result. They had the right to do so, and, as they did not, it cannot be attacked in a collateral action. This is well settled. *Smallwood v. New Bern,* 90 N. C., 36; *S. v. Emery,* 98 N. C., 768, and cases there cited; *Gatling v. Boone, ibid.,* 573; *McDowell v. Construction Company,* 96 N. C., 514; *Rigsbee v. Durham,* 99 N. C., 341.

Nor can the motion in arrest of judgment be sustained. The first ground assigned in support of it is without force. The statute in respect to "Local Option" referred to is a public one, of which the court takes notice, and applies in all proper connections, and in this case in connection with the charge in the indictment. And so also the statute (Acts 1881, ch. 136) which changes the name of the township mentioned in the indictment is a public-local one, of which the court takes notice, and applies, in connection with the averment in the indictment, that the name had been changed by that statute. *S. v. Chambers,* 93 N. C., 600.

(689) Nor does the statute last cited repeal the "Local Option Act" in the township mentioned or elsewhere, or in any way or manner affect it; it simply changes the name and does not purport to change or affect the territory or anything or any state or condition of things within its compass.

Very clearly, the court had jurisdiction of the offense charged. The statute (The Code, sec. 3116) makes it a misdemeanor to sell any spirituous liquors within a "county, town or township" where such sale is prohibited as provided in that statute, and no particular measure of punishment for the offense is prescribed. A justice of the peace, therefore, had not jurisdiction of the offense charged, and the Superior Court had, and the criminal and inferior courts would have in like cases.

What we have said disposes of the objections raised by the defendant. It is made our duty to look through the whole record and see if it is sufficient to warrant the judgment. We have done so, and deem it proper to say that we find that the indictment contained but a single count, and in effect charged several distinct offenses. It was, therefore, bad, because of duplicity, and the defendant might have objected to it successfully by demurrer, or a motion to quash it might

have been sustained. Ach. Cr. Pl., 50. But the court required the solicitor to elect that he would prosecute for a single offense charged, and he entered a *nolle prosequi* as to all the offenses charged but one. This, in effect, left but a single charge in the indictment, and we cannot see that the defendant suffered or could suffer any harm by pleading to it, and going to trial upon his plea. But if there was a defect it was cured by the verdict, and the judgment could not be arrested on that account. *S. v. Locklear,* Busb., 205; *S. v. Simons,* 70 N. C., 336.

There is no error.

Affirmed.

Cited: Bynum v. Comrs., ante, 414; *S. v. Farmer,* 104 N. C., 888, 889; *S. v. Harris,* 106 N. C., 686; *S. v. Davis,* 111 N. C., 733; *S. v. Wilson,* 121 N. C., 655; *S. v. Burnett,* 142 N. C., 579; *Barnette v. Midgett,* 151 N. C., 3; *S. v. Knotts,* 168 N. C., 191; *S. v. Munday,* 182 N. C., 910; *Barnes v. Comrs.,* 184 N. C., 327; *S. v. Jarrett,* 189 N. C., 519.

(690)

STATE v. J. FRANK SHOEMAKER.

Slander of Innocent Woman—Evidence.

1. A new trial will not be awarded upon the ground of the admission of irrelevant evidence, unless it is made to appear that the appellant was in some way prejudiced thereby.
2. In an indictment under The Code, sec. 1113, for slandering an innocent woman, it is sufficient if it is made to appear that the words used amounted to a charge of incontinency, and that they were uttered in the hearing of a third person.
3. Calling an innocent woman "a d—d whore," in a loud and angry manner, in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute.

INDICTMENT for slander of an innocent woman, tried before *Meares, J.,* at October Term, 1888, of the Criminal Court of MECKLENBURG County.

The following is so much of the case on appeal as is necessary to present the grounds of the defendant's exceptions:

The prosecutrix, one Mrs. Annie McClure, testified in substance, that the defendant was abusing and cursing his wife; that they (the

defendant and his wife) were running towards her, and when within a short distance of where she was, about forty steps from the public road, the defendant halted and turned towards her and said: "Yes, there is another d—d negro whore who will go to town tomorrow and get out another warrant against me." That the defendant cursed here and called her a whore. The language was in a loud tone of voice and could have been heard a long ways off. Defendant's wife was a short distance off. The presecutrix also testified that she was an innocent woman and never had illicit intercourse with any man.

On the cross-examination the defendant's counsel asked the witness "if she did not tell one H. L. Hunter (when on a visit to her (691) house at a certain time), while talking to him about this occurrence, that the defendant had called her a negro, and upon being told by said Hunter that it was not an indictable offense to call a woman a negro because it was not slander according to law, and she then told Hunter that the defendant had called her a whore; and furthermore, in the same conversation with said Hunter, did she not speak of some former prosecutions against the defendant, J. F. Shoemaker, saying that her object was to drive him from the neighborhood, and saying, *'I think that we will down him this time?'* "

To this interrogatory the prosecutrix answered that she "had never had any such conversation with Hunter; that it was true, however, that Hunter did make a visit to her house at that time, and that he tried to 'pick' her and other members of the family about a suit which he had against the Plummers, and he talked a good deal about the suit and the Plummers, and advised us to break with the Plummers; but he said nothing in my hearing about this occurrence with the defendant, Shoemaker, although he might have talked about it to other members of the family without my hearing him. *I deny that he had any such conversation with me.*"

H. L. Hunter was introduced by the defendant, and testified that a few days prior to the August Term of the court he visited the house where the prosecutrix, Annie McClure, lives, and that in a conversation between them, which was relative to this difficulty between her and the defendant, Shoemaker, she said to him that Shoemaker called her a negro, and the witness then told her that did not amount to slander and was not indictable, and she then said to the witness that the defendant had called her a whore. She went on to speak of some former prosecutions against the defendant which she said had failed, and then said *"she thought they would down him* this time, and she wanted to drive him out of the neighborhood."

On the cross-examination the witness testified that he did have (692) something to say about the Plummers in that same conversation with the prosecutrix, but he denied that he advised her to break with the Plummers, and that he had said they were a bad people.

The defendant himself and one John Lytle testified, and their evidence tended to contradict the prosecutrix.

After the close of the defendant's testimony the State resumed the examination of witnesses, and recalled Mrs. Annie McClure, who testified that she did not have any conversation with the defendant's witness Hunter, at the time spoken of by him, or at any other time, relative to the difficulty between her and the defendant Shoemaker; that nothing was said between them about the language which Shoemaker had applied to her. The solicitor for the State then asked the witness what was the conversation between her and the witness Hunter at the same time and place about the Plummers. This question was objected to by the defendant's counsel, and admitted by the court, and the defendant's counsel excepted. The witness answered, that in the conversation referred to, the witness Hunter tried to "pick" her with regard to a suit he had with the Plummers, and also that he advised her to break with the Plummers and cut their acquaintance, as they were not proper persons to associate with.

Two witnesses testified that the character of the prosecutrix, Mrs. Annie McClure, is good, and two witnesses testified that the character of the defendant Shoemaker is bad, and two witnesses testified that the character of the witness H. D. Hunter is good.

The following prayer for instruction was offered and asked for by the defendant's counsel, viz.: *"That even taking the testimony of all the State's witnesses to be true, no case has been proved within the meaning of the statute, and that the defendant is entitled to an acquittal; that, in order to make a case, it must be shown that* (693) *the language must have been heard by some third person."*

This prayer for instruction, taken as a whole, was refused by the court, although the defendant was given the benefit of the concluding proposition of the prayer; that is to say, that the language used by the defendant must have been heard by some third person in order to constitute a case of guilt.

The counsel for the defendant excepted to this ruling of the court.

The court instructed the jury on the law (in substance), that the statute controlling this case was intended for the protection of innocent females only; that an innocent woman, within the purview of the statute, is a woman who has never had illicit sexual intercourse with a man; that it devolved upon the State to establish the fact of the innocency of

the woman whose character is alleged to have been slandered by the defendant to the satisfaction of the jury and beyond any reasonable doubt. (The court here recapitulated the testimony in the case bearing upon the character of Mrs. Annie McClure, the prosecutrix.) The court furthermore instructed the jury that the language charged, or alleged to have been used by the defendant in this and all similar cases, must be such as to amount to a charge of *incontinency*.

The court, after recapitulating all the testimony in the case, instructed the jury that if "they were convinced beyond a reasonable doubt that the prosecutrix is an innocent woman, and furthermore that the prosecutrix had sworn to the truth; that at the time and place described by her the defendant had called her a 'damned negro whore' in the presence of a third person (his wife), that this language amounted to a charge of incontinency, and they ought to convict the defendant; but that the jury must be satisfied beyond a reasonable doubt on both of these issues before they could convict. Is the prosecutrix an
(694) innocent woman? If so, did the defendant call her a damned negro whore, as she has testified? That the defendant had testified that he did not say anything of an insulting nature on the occasion in question to the prosecutrix, but that he did answer back to a negro woman (as he supposed) that she was a 'damned black bitch.'

He denies this charge.

The defendant is an interested witness. The law does not say, however, that an interested witness must not be believed, but it does say that the jury must scrutinize his testimony with greater severity, for the reason that he is an interested witness, than they would otherwise do; that being an interested witness his testimony does not stand on the same high and unsuspicious level or plane where otherwise it might stand."

On motion of defendant's counsel, a motion for a *venire de novo* was entered.

The counsel for the defendant submitted a motion for a new trial, based upon the following reasons, viz.:

1. Because the court erred in admitting the testimony of the State's witness, Annie McClure, in that she was allowed to state the conversation which was held between her and the defendant's witness, H. L. Hunter (as she alleges) relative to cutting the acquaintance of and breaking off with the Plummer family, which was objected to by the defendant's counsel.

2. Because the court erred in refusing the prayer for instruction as hereinbefore set forth and offered by the defendant's counsel; and because of the erroneous charge as given by the court.

There was a verdict of guilty, judgment, and appeal by the defendant.

Attorney-General for the State. (695)
W. H. Bailey (by brief) for defendant.

DAVIS, J., after stating the case: 1. The admission of the testimony of the prosecutrix in regard to the conversation with Hunter, and what was said about the suit with the Plummers, is the ground of the first exception. This evidence first came out, without objection, upon the cross-examination of the witness by the defendant, and thereafter, Hunter, a witness for the defendant, was examined in relation thereto without objection. We do not see how what was said in relation to the suit with the Plummers was in any way material to or could affect the issue before the jury, and, if material upon the reëxamination of the witness, Annie McClure, it was rendered so by what was said by her without objection, on cross-examination, and by the contradiction thereof by the witness Hunter. In this aspect of the case she had a right to explain, and thereby corroborate her own testimony. *S. v. Whitfield,* 92 N. C., 831. But if not competent for the purpose of explanation and corroboration, it was immaterial, and could in no way prejudice the defendant in the minds of the jury. The admission of immaterial evidence is not a ground for a new trial, unless it appears that its admission probably worked injury to the appellant. *Waggoner v. Ball,* 95 N. C., 323.

2. There was no error in refusing to give the first part of the prayer for instructions asked by the defendant. The words spoken, as will be seen by reference to any dictionary, unquestionably "amount to a charge of incontinency," and if the witness Annie McClure is to be believed, she was a chaste woman, and the evidence as to her general reputation was competent to support her testimony. It is insisted by counsel for defendant that the charge of his Honor is "obnoxious to the objection that it violated the act of 1896 in *arraying the testimony* against the defendant." It is stated that the court recapitulated "all the testimony in the case," and if any favorable to the defendant (696) was omitted, attention should have been called to it by counsel.

It is further insisted for the defendant that the "legal entity" of the wife being merged, "husband and wife are one person," and, therefore, words spoken by the husband in the presence of the wife are protected, and "assuming that the supposed defamatory words were spoken in the hearing of a third person," the wife is not such a person within the meaning of the law, and if she was such a third person the fact that she was "a short distance off" is not sufficient to prove that she heard the defamatory words. We are unable to see the force of this objection. The words spoken were not of a gentle and confidential character, between husband and wife, but spoken in a loud tone which could have

been heard a long way off, and besides, it appears from the testimony on behalf of the defendant that a negro woman was near, and that the witness John Lytle was in hearing, though he testified that the language used by the defendant was different from that charged by the prosecutrix. There is no error in refusing to charge the jury as requested or in the charge as given.

Affirmed.

Cited: Strother v. R. R., 123 N. C., 199; *S. v. Pitts,* 177 N. C., 545.

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(697)

THE STATE v. ELIZA MURPHY.

Perjury—Indictment—Materiality of Oath—Evidence.

1. In an indictment for perjury, where the necessary averments of the constitution of the court, the joinder of issue, the administration of the oath, and the falsity and materiality of the evidence given are properly made, the judgment will not be arrested because the truth of alleged false testimony is not formally negatived, if that allegation sufficiently appears from other parts of the indictment by necessary implication.
2. On the trial of an indictment for an assault with a deadly weapon, it is a material fact whether such weapon was in fact used—among other things to show the jurisdiction of the court—but *how* it was used is not material, and hence is not necessary to allege the particular way in which it was employed.

THIS is a criminal action, which was tried before *Clark, J.,* at Fall Term, 1888, of MCDOWELL Superior Court.

The defendant is indicted for the crime of perjury.

The following is so much of the indictment as is necessary to report here:

"The jurors for the State, upon their oath, present that, heretofore, to wit, on 22 September, A. D. 1884, at and in the county of McDowell, a certain criminal action, wherein the State of North Carolina was plaintiff and George Turner, John Turner and Mary Turner were defendants (the same being an indictment against said defendants for an assault and battery upon one George Murphy with deadly weapons, to wit, a gun, a rock, and a pistol), was pending and at issue in the Superior Court of McDowell County, and at said Fall Term of said Superior Court of said McDowell County the aforesaid criminal action was tried by and before his Honor, J. A. Gilmer, judge presiding, at said Superior Court, and a jury, said Superior Court having competent juris-

diction to try said criminal action. And that upon the said trial, so then and there had as aforesaid, one Eliza Murphy, late of the county aforesaid, appeared and was produced as a witness for (698) and in behalf of the said State of North Carolina, the plaintiff aforesaid, and was then and there duly sworn and took her corporal oath on the Holy Gospel of God, before the said J. A. Gilmer, so being judge as aforesaid, to speak the truth, the whole truth and nothing but the truth, touching and concerning the premises aforesaid, to wit, the matter then in question on the trial and action aforesaid, the aforesaid J. A. Gilmer, as judge of said Superior Court as aforesaid, then and there being sufficient and competent power and authority to administer the said oath to the said Eliza Murphy. And that then and there, upon the trial and action aforesaid, it became, and was a material question in the same, whether the said John Turner, one of the defendants aforesaid, had and used, or attempted to use, a certain pistol in committing the assault and battery charged against the said defendant in the indictment and criminal action there being tried as aforesaid. And the jurors aforesaid, upon their oath aforesaid, present that the said Eliza Murphy, being so sworn as aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and wickedly devising and intending to prevent the due course of law and justice, and unjustly to injure and aggrieve the said defendant John Turner, then and there, on trial and action aforesaid, upon her oath aforesaid, unlawfully, falsely, corruptly, knowingly, wilfully, feloniously and maliciously, by her own act and consent, before the said judge and jury aforesaid, did depose and swear and give in evidence (amongst other things) in substance and to the effect the following, that is to say, that the said John Turner in committing the assault and battery aforesaid, had and used or attempted to use a certain deadly weapon, to wit, a pistol, whereas in truth and in fact the said John Turner did not have or use, or attempt to use, any pistol in committing the assault and battery as charged in the indictment (699) and criminal action as aforesaid," etc., etc.

The defendant pleaded not guilty to this indictment. On the trial there was a verdict of guilty. Thereupon her counsel moved in arrest of judgment and assigned as grounds of his motion:

1. She avers that the proceeding in which the false oath is alleged to have been taken is not substantially set forth in the indictment as required by the act in such case made and provided.

2. That the alleged false oath is not sufficiently negatived.

3. That the alleged false oath is not stated with sufficient precision in simply averring that the defendant swore that said John Turner had

and used in the assault a pistol, without showing how she swore that he used it and for what purpose he used it.

The motion was denied, as was also a motion for a new trial, and there was judgment against the defendant, from which she appealed to this Court.

The following is so much of the case stated on appeal as it is necessary to report:

Upon the trial the State introduced several witnesses who swore that on the trial of the case of the State against John Turner and others, stated in the indictment in this case, the defendant appeared as a witness, and some of them swore that defendant stated that John Turner presented a pistol at her, and others stated that she swore that he presented the pistol at her and also at George Murphy, George at the same time being in the hands of the defendant, and was attempting to get to John Turner, but was detained by the defendant.

Defendant's counsel insisted that if she swore that said Turner presented the pistol at her she would not be convicted on this trial, as the oath would not be material, and if she swore that it was presented at both it would not help the matter, for the reason it would not (700) support the charge in the indictment, and asked his Honor thus to submit the question. But his Honor declined to do so, and the defendant excepted.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J., after stating the case: The motion in arrest of judgment was properly disallowed. No one of the grounds assigned in support of it is tenable.

The indictment charges, in an intelligent and orderly manner, that a certain criminal action, specified by its title and other descriptive facts, was pending at a specified time in and before a court of competent jurisdiction to try and dispose of it—its specific nature and purpose and how and by what means the offense charged therein was committed; that it was at issue—that on the trial the defendant was produced as a witness for the State and duly sworn—the court having competent authority to administer the oath; that a material question, the substance of which is charged, arose on the trial; that the defendant, as such witness sworn, testified on the trial and gave material evidence, the substance of which is charged in such terms and with such fullness as to show its materiality. The truth of this evidence, it is true, is not negatived in express terms, as it should have been, but it is certainly denied in effect by charging praticularly, specifically and in detail that

what the defendant so testified to as true was not done as she said. The falseness of the particular material evidence of the defendant charged thus appears, and is charged by necessary implication, and with such clearness and precision as that the court and the defendant could certainly see that such testimony of the defendant is charged to be false. This was sufficient to serve every just purpose.

It was material on the trial of the criminal action mentioned (701) in the indictment to prove that the assault and battery therein charged was committed with a pistol, as charged, in order to show the grade of the offense and the jurisdiction of the Superior Court in which the action was pending (The Code, sec. 892); and if he used it at all in committing the offense, it was material to show that fact, whether the defendant in that action in using it fired it at the person assaulted or struck him with it, or attempted to do so. It was material to show that he used the pistol in some—in any—way in committing the assault, because the use of that weapon—a deadly one—gave the Superior Court jurisdiction of the offense. Wherefore charge with more particularity the defendant's testimony as to the particular manner in which and the purpose for which it was used? If she testified that it was used by the party on trial in any way and for any purpose in committing the offense, the testimony was material; and if she swore falsely, and did so wilfully and corruptly, that it was, when, in fact, it was not, she committed perjury. The charge in this respect was sufficiently definite to give her to understand in what particular she swore falsely, and to enable her to prepare her defense.

The indictment sets forth the substance of the offense charged "in a plain, intelligible and explicit manner," with such fullness as that the court could see that it was charged, and it gave the defendant such information as was necessary to enable her to make defense on the trial and in case of a subsequent prosecution. Although it is not so precise and satisfactory in some particulars as it might have been made, we concur with the court below in holding that it is sufficient, under the statute (The Code, secs. 1183, 1184, 1185), the purpose of which is to render unnecessary merely useless refinements and technicalities in pleading that once prevailed in cases like the present one. *S. v. Hoyle,* 6 Ired., 1; *S. v. Davis,* 69 N. C., 495; *S. v. Roberson,* 98 N. C., 751.

Nor is the error assigned as to the special instruction asked on the trial well founded. The evidence that the defendant testified (702) that the pistol was presented at her was wholly immaterial, but the evidence that she testified that it was presented at her and the prosecutor in the criminal action on the trial of which she was examined as a witness, was material, because it tended to prove the guilt of the de-

fendant in that action, and to show that the court had jurisdiction of the offense therein charged. It is not suggested that the immaterial evidence misled the jury to the prejudice of the defendant, and she was not entitled to the particular instruction she asked for. What instruction the court gave the jury does not appear, but the presumption is that it was correct and satisfactory, as there was no exception to it.

There is no error.

Affirmed.

STATE v. S. F. WATKINS.

Cruelty to Animals—The Code, sec. 2482—Indictment—Practice.

1. In charging an offense created by statute, it is sufficient, ordinarily, if the indictment follows the language of the statute; but where the words of the statute designate by words of general meaning, rather than define, the offense, the indictment must set forth the acts constituting such offense.

2. The court should refuse to give judgment when it appears that the offense is not sufficiently charged, even though no motion in arrest be made; and when it appears from the record that this should have been done, the Supreme Court will, *ex mero motu*, so direct.

3. An indictment which charged that the defendant did "knowingly, wilfully and unlawfully torture, torment and act in a cruel manner towards a certain animal," without setting out the facts which constitute such torturing, tormenting or cruel conduct, is defective, and should be quashed.

(703) INDICTMENT for cruelty to animals, under section 2482 of The Code, tried before *Boykin, J.*, and a jury, at August Term, 1887, of WATAUGA Superior Court.

The facts are sufficiently stated in the opinion.

The defendant is indicted for an alleged violation of the statute (The Code, sec. 2482) which provides as follows: "If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, tortured, or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated, or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor."

The indictment charges that the defendant "did then and there knowingly and wilfully and unlawfully torture, torment, and act in a cruel manner towards a certain animal, to wit, a hog, the property of," etc.

The defendant pleaded not guilty. Upon the trial there was a verdict of guilty and judgment against the defendant, and he, having assigned error, appealed to this Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. It seems that no motion in arrest of judgment was made in the court below, but that court should, in the absence of such motion, have refused to give judgment upon the ground that the offense was not sufficiently charged in the indictment. The court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged. It is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested it will, *ex mero motu,* direct it to be done. *S. v. Wilson,* Phil., 237; *S. v. Wise,* 67 N. C., 281; *S. v. Bob-* (704) *bitt,* 70 N. C., 81; *Thornton v. Brady,* 100 N. C., 38; *Morrison v. Watson,* 95 N. C., 479.

It is sufficient and proper, ordinarily, to charge statutory offenses in the words, or substantially in the words, of the statute creating them, and especially is this so when the statute defines the offense in words that have a technical or precise meaning, such as in themselves imply the offense, or the character and quality of the act or acts, or things that constitute it or an essential part or essential parts of it.

This is so, because the court can in such case see and determine that an offense is charged in the indictment, and the accused will have such information in respect to it as will enable him to understand it, and make preparation for his defense, and as will enable him to plead former acquittal or conviction in case of subsequent prosecution. Thus in the statute recited above the words "beat," "cruelly beat," "wound" and "kill," of themselves respectively, taken in the proper connection, imply sufficiently the act forbidden and the offense charged.

It is otherwise, however, when the words of the statute are not precise, but are uncertain and indefinite in their meaning, implying a multiplicity and variety of acts or things that may or may not constitute the offense in whole or in part. In such cases it is necessary to charge the facts that give special character and significance to the acts charged to have been done, and as designated, with reasonable certainty in the statute cited, the animal abused, in order that the court may see that the offense is charged and the accused may prepare for his defense. Thus the words of the statute mentioned—"overloaded," "injured," "tortured" "and tormented"—do not imply or describe the acts charged to have been done with certainty: they each imply a variety of acts that may

or may not constitute the offense or parts of it. The acts should be so specified and charged as to show that they mean what the statute (705) intends by overdriving, injury, torture and torment. The court must see that the offense is charged, and it and not the pleader must determine that the acts done constitute the offense denounced by the statute. *S. v. Harney,* 2 D. & B., 390; *S. v. Stanton,* 1 Ired., 424; *S. v. Harper,* 64 N. C., 129; *S. v. Sloan,* 67 N. C., 357; *S. v. Liles,* 78 N. C., 496; *S. v. Hill,* 79 N. C., 656; *S. v. George,* 93 N. C., 567; *S. v. Wilson,* 94 N. C., 1015; *S. v. Whiteacre,* 98 N. C., 753; *S. v. Howe,* 100 N. C., 449.

In the case before us the indictment charges that the defendant "did," etc., "torture, torment and act in a cruel manner," etc. These are the words of the statute, but they are not precise in their meaning; they designate rather than define the offense or suggest the acts that constitute it; they do not, of themselves, import what is meant by the statute; in pleading, they need to be aided by charging acts that certainly imply what is meant by the terms torture and torment, and they should be so charged as that the court can see that they do. If the charge contained in the proper connection one or more of the words beat, wound, shoot, kill, and the like, the court could then have seen that the offense was charged; such precise and pertinent words would have implied the offense forbidden. Such words were used in the indictments in *S. v. Allison,* 90 N. C., 733; *S. v. Butts,* 92 N. C., 784. See, also, Bishop on Stat. Crim., secs. 1098, 1102, 1113.

As what we have said puts an end to the present action, we need not advert to the assignment of error. The judgment must be set aside, and judgment arrested.

Error.

* *Cited: S. v. Farmer,* 104 N. C., 889, 890; *S. v. Bagwell,* 107 N. C., 860; *Rogers v. Bank,* 108 N. C., 578; *S. v. Marsh,* 132 N. C., 1001; *S. v. Ballangee,* 191 N. C., 702.

(706)

THE STATE v. GEORGE GOINGS.

Larceny—Evidence.

Upon the trial of an indictment for the larceny of a horse, there was testimony tending to show that the horse was stolen at night; that the defendant lived near; that he and one S. were seen in the vicinity the day previous; that tracks leading from the stable from which the horse was

stolen, accompanied by those of one person, joined the tracks of another and a mule in a road near by; that next day the horse and a mule were seen in the possession of S. some twenty miles distant, where the defendant met him, and without inquiring as to where the horse and mule were obtained, or for what purpose they were being taken away, agreed to assist in conveying them to a distant point, and did aid in removing them: *Held*, to be sufficient evidence to be submitted to the jury to be considered upon the question whether the defendant had stolen or aided in stealing the property.

THIS is an indictment for larceny, tried before *Connor, J.*, at Spring Term, 1888, of ROCKINGHAM Superior Court.

The defendant was convicted and appealed.

The facts are fully stated in the opinion.

Attorney-General for the State.
T. R. Purnell for defendant.

MERRIMON, J. The single question presented by the assignment of error for our decision is, was there evidence produced on the trial tending to prove the defendant's guilt, to be submitted to the jury? We are of opinion that this question must be answered in the affirmative.

Very clearly there was strong evidence that the larceny charged in the indictment was perpetrated by some person or persons, and there was certainly evidence tending to prove that two persons participated in its perpetration. A witness testified that the black mare, the property of the prosecutor, was stolen; that he saw and traced the tracks made by her, and also the tracks of a man, as she and he passed (707) from the stable from which she was stolen through the orchard to the road; that at the road, in addition to the tracks of the mare, he found the tracks of a mule, and also the tracks of two men; there was also evidence that a mule was stolen on the same night in the same neighborhood, and that the stolen mare and mule were found the next morning after the larceny in Danville, distant about twenty miles from the place of the larceny, in the possession—apparently in the sole possession—of one Saunders, mentioned by some of the witnesses, and the defendant, who was there without employment or business, or anything to do; met him apparently by accident in possession of the animals mentioned on an unfinished and unused bridge across the Dan River. He knew Saunders, had seen and been with him the day next before that day; the evidence went to prove that the latter had stolen the mare and mule the night before; nevertheless, the defendant, without inquiry as to the ownership of the mare and mule, or as to how he came to have possession of them, or as to why he had them at the unused bridge, or

as to why and for what purpose he was taking them to Big Lick, consented, with reluctance at first, to go with him under the circumstances, without any apparent necessity for his going. The day next before that—the mare and mule having been stolen at some time during the intervening night—the defendant and Saunders were seen by a witness at the house of the defendant's father, and also they were seen together in the neighborhood of the place where the mare was stolen, going in that direction and in the direction of Danville, in which place they were found the next morning with the mare and mule, as above stated.

These facts—if they were such—pointed to the defendant as a participant in the larceny charged, and they pointed to no person or persons other than himself and Saunders, nor did any of the evi-
(708) dence point to any other person or persons as the guilty parties.

They were together in the neighborhood of where the mare and mule were stolen on the day of the night of the larceny; they had opportunity to steal them on the night mentioned; two persons participated in the larceny; they were seen in possession of the stolen property in Danville; the jury might so believe. The defendant apparently was employed by Saunders to go with him to Big Lick; both the facts and circumstances of such employment tended to show that this was a feint, a subterfuge; they were evidence that might lead the jury to so believe; and if they believed from such evidence that really the defendant and Saunders were jointly in possession of the stolen property, then such possession, recently after the larceny was committed, was evidence to go to the jury to prove the defendant's guilt. He and his confederate could not shift or avoid the responsibility by a pretense that the defendant was not a participant in the larceny, nor could they contrive evidence to exculpate him, nor could they destroy the effect of recent possession of the stolen property as evidence by pretending that Saunders alone was in possession of the property, when in fact they were both in possession and taking the property to Big Lick or elsewhere. There were marks of insincerity about the employment of the defendant by Saunders at the bridge. There was no apparent necessity for it; the latter could ordinarily have easily ridden the mare and led the mule to Big Lick, and thus have saved himself the unnecessary outlay of four dollars that he agreed to give the defendant to go with him. Why did he want the defendant to go with him? And it was strange that he crossed the river at the unfinished and unused bridge, out of the usual way of passage, and stranger still that under the circumstances the defendant made no inquiry as to where Saunders got the mare and mule, whose they were and why he was taking them to the place mentioned.

The facts and circumstances in evidence, taken altogether and (709) in their just and reasonable bearing upon each other, and with reasonable inferences that might properly be drawn from them, we think clearly constituted evidence of the defendant's guilt to be submitted to the jury. From it they might not unreasonably find him guilty, while on the other hand they might have rendered a verdict of not guilty. There was evidence to go to them, and it was their province to give it such weight as they deemed just. *S. v. White,* 89 N. C., 462; *S. v. Atkinson,* 93 N. C., 519; *S. v. Powell,* 94 N. C., 965; *S. v. McBryde,* 97 N. C., 393.

There is no error. Let this opinion be certified to the Superior Court according to law.

Affirmed.

Cited: S. v. Clark, 173 N. C., 745.

STATE v. GEORGE W. SMILEY.

Spirituous Liquors—Local Option—Verdict.

1. The Local Option Law does not repeal or affect the statute which requires a license to retail liquors, but merely takes from the county commissioners the power to grant such licenses within the territory where the Local Option Law has been put into operation.

2. Where there are two counts in an indictment and a general verdict of guilty is rendered, if either count be good, judgment will not be arrested.

INDICTMENT, for unlawfully selling spirituous liquors, tried before *Connor, J.,* at July Term, 1888, of the Superior Court of ROCKINGHAM County.

The indictment contained two counts: One for selling in violation of the Local Option Law in the town of Reidsville, on 5 April, 1888, and the other for selling spirituous liquors by the measure (710) and quantity, less than a quart, without having license to retail, etc.

There was proof of sale, and it was admitted that local option prevailed in said town at the time of sale, and at the time the defendant was bound over to the Superior Court under a justice's warrant, and it was further admitted that at the time of the trial and prayer for judgment local option did *not* prevail in said locality, by reason of an elec-

tion held as provided by law on the first Monday in June, 1888. It was also proved that six months had not elapsed, as charged in the indictment. There was a general verdict of guilty, and the defendant moved in arrest of judgment:

"1. For that at the time of the trial and prayer for judgment local option did not prevail in said locality.

2. That the effect of the adoption of the local option law being to suspend the license law, the charge in the second count does not amount to an offense."

Motion denied, judgment, and appeal.

Attorney-General for the State.
H. R. Scott for defendant.

DAVIS, J., after stating the case: That the repeal of a statute pending a prosecution for an offense created by it puts an end to the prosecution, is too well settled to need the citation of authority; but whether there be a difference between a repeal by legislative enactment and an election under the local option law reversing a former election by which the sale of spirituous, vinous or malt liquors was made unlawful, as insisted upon by the Attorney-General on the one side and controverted by counsel for the defendant on the other, it is unnecessary for us to decide, as it is clear that the law which forbids the retailing of spirituous liquors without license was not repealed, suspended, or in any way affected by the local option law, except to prohibit the commis-
(711) sioners of the county from granting license to retail spirituous liquors at all to any person within a locality in which there has been a majority vote for *"no license."* Whether local option prevails or not, it is alike unlawful to retail without license, and the provisions of chapter 32 of The Code, as amended by chapter 215 of the Acts of 1887, so far from being in conflict with section 1076 of The Code, which prohibits the sale of "spirituous liquors by small measure" without license, are in harmony with that section, and the verdict being general, if either count be good, the judgment will not be arrested. *S. v. Miller,* 7 Ired., 275; *S. v. Williams,* 9 Ired., 140; *S. v. McCauless,* 9 Ired., 375; *S. v. Beatty,* Phil., 52.

There is no error.

Affirmed.

Cited: S. v. Cross, 106 N. C., 651; *S. v. Toole, ibid.,* 741, 742; *S. v. Smith,* 126 N. C., 1058.

STATE v. JOHN JOHNSON.

Cost—Clerks—Nolle Prosequi—Salaries and Fees.

The clerk of the court is not entitled to any fee for entering a judgment of *nolle prosequi* in a *criminal action.*

THIS is an appeal, by the clerk of the Superior Court of the county of SURRY, at Spring Term, 1888, from the refusal of his Honor, *Clark, J.*, to allow a motion to retax costs.

The appellant is the clerk of the Superior Court of the county of Surry. In the criminal action of State *v.* Johnson, pending in that court at the November Term thereof of 1887, a *nolle prosequi* was entered. Thereafter, in taxing the costs of the action, the clerk taxed, "as part of the cost, half the cost of a judgment or determination fee of fifty (50) cents, payable to himself as clerk," which the (712) solicitor for the State, in the exercise of authority conferred upon him by the statute (The Code, sec. 733), refused to approve. The clerk thereafter moved, upon affidavit in the action, for an order directing that the costs be retaxed, and his fee mentioned be allowed. The court disallowed the motion, and the clerk having excepted, appealed to this Court.

Attorney-General for the State.
No counsel for appellant.

MERRIMON, J., after stating the case: The statute (The Code, sec. 739) prescribes that "if there be no prosecutor in a criminal court action, and the defendant shall be acquitted or convicted, and unable to pay the costs, or a *nolle prosequi* be entered or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees only, except in capital felonies and in prosecutions for forgery, perjury and conspiracy, when they shall receive full fees." It thus appears that the clerks of the Superior Courts and other officers mentioned are entitled to half fees in criminal actions in the cases specified, and the present case is one of them.

The statute (The Code, sec. 3739) further prescribes "that the fees of the clerk of the Superior Court shall be the following and no other," and it specifies them in detail. No fee for entering a *nolle prosequi,* or a "judgment," in that respect, is prescribed, and therefore he is entitled to none. In the case of "judgment final against each defendant in a criminal action," he is allowed a fee of one dollar (half that when the

county pays the costs in cases like this), but no such fee is allowed in case of a *nolle prosequi.*

It is questionable whether the remedy sought by the clerk in this case is the proper one, where the solicitor refuses to approve the (713) itemized bill of costs in a criminal action, but we are not called upon to decide here that it is or is not, and this suggestion is intended to preclude the conclusion that we approve this proceeding as the appropriate remedy.

Judgment affirmed.

THE STATE v. A. R. PORTER.

Assault and Battery—Deadly Weapon—Serious Injury—Jurisdiction.

Where the indictment charged an assault and battery "with a deadly weapon, to wit, a certain stick, to the great damage of the said," etc., but did not set forth the dimensions of the stick, nor the extent and character of the damage, and it appeared upon the trial that the offense was committed less than six months before the finding of the bill: *Held*, that the Superior Court did not have jurisdiction.

THIS is a criminal action, tried before *Clark, J.*, at Spring Term, 1888, of WILKES Superior Court.

The defendant is charged, by the finding of the grand jury at Spring Term, 1888, of the Superior Court of Wilkes, in an indictment of the following form:

"The jurors for the State, upon their oath, present: That A. R. Porter, in Wilkes County, on the first day of December, 1887, did unlawfully and wilfully assault, beat and wound one Candace Porter with a deadly weapon, to wit, a certain stick, to the great damage of the said Candace Porter, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

(714) Upon his arraignment and entering his plea of not guilty, he was put on trial before the jury and convicted. Thereupon, his counsel submitted motions for a new trial and in arrest of judgment, both of which were denied, and judgment being rendered on the verdict, he appealed.

The time when the assault was made was proved to be in December preceding, and less than six months before the finding of the indictment.

Attorney-General for the State.
No counsel for defendant.

SMITH, C. J., after stating the case: The indictment, as will be seen, is in the ordinary form, and in no way indicates the existence of the marital relation which existed between the parties to the assault. Its form must, therefore, be considered as if they were indifferent persons.

It has been repeatedly decided that to give the Superior Court jurisdiction, under the statute distributing the judicial power over smaller offenses between the Superior and the justices' courts (The Code, sec. 893), it is not necessary to the former's taking cognizance of such as the justices fail to assume jurisdiction over for the period of six months, to aver the fact of this omission in the indictment itself, and that this is a matter of defense upon the trial. *S. v. Moore,* 82 N. C., 659; *S. v. Taylor,* 83 N. C., 601.

Nor is it material that the offense is alleged to have been committed on a day more than six months before the finding of the indictment, in the indictment itself, as the date is not traversable and is not fixed by the verdict.

If, however, as was said by the Court in a recent case, "as the evidence produced at the trial tended to prove" (in the present case did prove) "that the offense charged was committed within six months next before this action began, the court ought to have instructed the jury if they found the fact so to be they ought to render a verdict of not guilty. In that it failed to do so there is error." *S. v. Earnest,* (715) 98 N. C., 740; *S. v. Berry,* 83 N. C., 603. This defect of jurisdiction becoming apparent, the court could not, of course, proceed, and the prosecution must terminate.

This brings us to the inquiry whether the offense is so charged as to vest immediate and original jurisdiction in the Superior Court. It has been repeatedly decided that while the Superior Court may take cognizance of an assault when charged in the indictment with those accompanying averments of its aggravated nature, as made with intent to kill, or to commit rape, or with a deadly weapon, or when followed with serious damage, and may proceed to punish when a simple assault is proved only *(S. v. Ray,* 89 N. C., 587); nevertheless, such averments must be made to the end that the court may see the criminal act to be such as is committed to its jurisdiction. *S. v. Moore, supra; S. v. Russell,* 91 N. C., 624; *S. v. Cunningham,* 94 N. C., 824; *S. v. Earnest, supra.*

In *S. v. Cunningham, supra,* the late *Justice Ashe* thus plainly lays down the principle, applying it to the case then before Court: "It" (indictment) "charges that an assault was committed with a deadly weapon, and that serious damage was done, but it fails to state the *character of the weapon* used or the *nature and extent* of the injury alleged to have been inflicted, and by reason of the omission of these

averments in the indictment, which were necessary to give the Superior Court jurisdiction, we are of the opinion that it was error in that court to render a judgment in the case without," etc., having reference to the expiration of the six months.

Such is the uniform ruling of the Court on the sufficiency of the form of the charge to confer original jurisdiction upon the Superior Court. *S. v. Shelly,* 98 N. C., 673; *S. v. Earnest, ibid.,* 740; *S. v. Russell, supra.*

(716) That the court must be able, from an inspection of the charge, in the terms in which it is made in the indictment, to see that its jurisdiction attaches, that the weapon with which the assault was made was a deadly instrument, not merely by calling it *"deadly,"* unless by so describing it by name, or with such attending circumstances as show its character as such, and when so described the jurisdiction becomes apparent and will be exercised.

The present indictment manifestly falls short of this requirement, for while called a deadly weapon it is designated simply as a stick, with no description of its size, weight or other qualities or properties from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed.

As the indictment does not, in form, confer jurisdiction upon the Superior Court of cases withdrawn from that of a justice, but charges an offense of which the former could assume jurisdiction only after six months, there is error, that want of jurisdiction appearing at the trial, in the failure of the court to direct an acquittal, and in proceeding in the cause, for which the judgment must be reversed and a new trial awarded, and it is so adjudged.

Error.

Cited: S. v. Phillips, 104 N. C., 789; *S. v. Fesperman,* 108 N. C., 771; *S. v. Kerby,* 110 N. C., 559; *S. v. Battle,* 130 N. C., 657; *S. v. Beal,* 170 N. C., 766.

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(717)

STATE v. M. A. LAWSON.

Landlord and Tenant—Wilful Trespass.

1. A tenant in possession may exercise any lawful control over the land embraced within his lease, in the absence of an agreement restricting him, and the landlord has no power to interfere with such right.

2. Where the defendant had been forbidden by the landlord to enter upon land belonging to the latter, subsequently did enter upon a part in the possession of a tenant upon the invitation of the tenant: *Held*, that he was not guilty of a wilful trespass.

INDICTMENT, for trespassing on land after being forbidden to do so and without license therefor, under sec. 1120 of The Code, tried before *Clark, J.*, at Spring Term, 1888, of the Superior Court of STOKES County.

J. W. Thomas, the prosecutor, testified "that some time in February, 1887, he forbid the defendant from going on his land, and the defendant agreed in writing to stay off said land." Pylandus Nelson testified for the State "that he was a tenant of J. W. Thomas, and that some time in May, 1877, he was working in his field when the defendant called to him to come to him, that he wanted to see him; that he then invited the defendant to come into the field, and the defendant then came to the fence, seven or eight feet over on the Thomas land, talked to him about what he wanted to see him on, and went away. This was six months before the finding of the bill in the Superior Court."

The defendant introduced no evidence, and asked the court to charge the jury "that Nelson being a tenant on Thomas' land, if he invited and permitted the defendant to enter on the lands cultivated by him, though belonging to Thomas, the defendant would not be guilty." The court declined to give this instruction, but charged the jury "that if the defendant knew where the line was, and intentionally, (718) not accidentally, entered on prosecutor's land, after being forbidden, he would be guilty, unless he had license to enter, and that the invitation or permission of the tenant would not protect him, the tenant's authority being subservient to the higher authority of the landlord."

There was a verdict of guilty, judgment, and appeal.

Attorney-General for the State.
R. B. Glenn for defendant.

DAVIS, J., after stating the case: It was manifestly the purpose of the act under which the defendant was indicted to keep off intruders and to prevent wilful and unlawful trespasses upon land and to subject persons, who might so wilfully trespass after being forbidden to indictment for so doing, but, as was said in *S. v. Hause*, 71 N. C., 518, "when the statute affixed to such trespass the consequences of a criminal offense, we will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the

trespasser, unless the terms of the statute forbid any other construction." Even conceding that the possession of the tenant was not such as gave to him authority to invite the defendant to come upon the land, the facts show conclusively that he went only upon that invitation, and this excludes the idea of such wilful trespass as is contemplated by the statute. But we think that the tenant being in possession had the right, in the abence of any evidence to show that there were restrictions upon his tenancy to the contrary, to invite such persons as his business interest or pleasure might suggest, to come upon the premises so in his possession for any lawful purpose. The possession was rightfully his, and in the absence of any restrictions upon his tenancy he had the right
(719) to control the possession for any lawful purpose. If he or his family were sick might he not send for a physician, and if forbidden by the landlord would such physician be liable to an indictment for going on the premises to attend a patient?

No such invitation would protect a person from liability for a wilful and malicious trespass to the injury of the landlord if committed under the fraudulent pretense of such invitation. The evidence in this case shows no purpose to commit such a trespass, and there is error. *S. v. Hanks,* 66 N. C., 612; *S. v. Crossett,* 81 N. C., 579; *S. v. Ellis,* 97 N. C., 447; *S. v. Smith,* 100 N. C., 466.

Error.

THE STATE v. HARRISON JONES.

Accessory—Arson—Former Acquittal and Conviction—Jurisdiction—Merger—Constitution.

1. The statute—The Code, sec. 977—dispenses with the necessity of the conviction of the principal felon before an accessory before the fact can be tried and punished, but the common-law rule, that an *acquittal* of the principal is an acquittal of the accessory, still is in force.

2. Where, upon arraignment of one charged as a principal with the crime of arson, the record showed that by the consent of court and the defendant the "indictment was changed to charge an attempt to burn a dwelling-house," but no other charge was made by the grand jury, and the defendant thereupon "pleaded guilty to an attempt to burn a store," and was sentenced to imprisonment in State's prison: *Held*, that the attempted change of the bill, the plea of guilty and the judgment of the court were nullities, and that an accessory after the fact could not sustain a plea of acquittal of the principal felon by proof of such proceedings. (SMITH, C. J., dissenting.)

3. It is a general rule that where two or more offenses arise out of the same transaction, a conviction or acquittal upon an indictment for one will not be good in bar of that for the other, unless the latter is a necessary ingredient of the former, and the defendant might have been convicted of it under the first indictment.

INDICTMENT, charging the defendant with being accessory be- (720) fore the fact to the crime of arson, tried before *Philips, J.*, at August Term, 1888, of the Superior Court of ROWAN County.

One William Thrasher was charged with the felonious, wilful and malicious burning of the dwelling-house of one Theo. Burbon, and indicted therefor in the Superior Court of Rowan County, at Spring Term, 1888, of said court, and at the same term of the court and in the same indictment the defendant was charged with being accessory before the fact in feloniously, wilfully and maliciously inciting, moving, procuring, causing and commanding the said Thrasher to do and commit said crime.

Upon this indictment the defendant Harrison Jones was put upon his trial, the defendant Wm. Thrasher not being on trial.

Before the introduction of any testimony, either upon the part of the State or the defendant, the defendant Harrison Jones moved the court that this action should abate as to him, and in support of his said plea in abatement offered an affidavit setting forth, in substance, that, at May Term, 1888, an indictment was preferred against William Thrasher for arson, and containing a count charging the defendant with being accessory before the fact thereto; that at May Term, 1888 (the same term), an indictment theretofore found, to wit, at May Term, 1886, against the principal defendant, Wm. Thrasher, for arson, was changed so as to charge the said principal defendant with an attempt at burning, and that said defendant Thrasher was allowed to plead guilty to said substituted charge, and was thereupon adjudged guilty of an attempt to burn, and that judgment, sentence and (721) execution followed, and that said defendant Thrasher is now serving out said sentence in the State's prison.

Accompanying the affidavit is a transcript of the record, showing that at May Term, 1886, the defendant William Thrasher was indicted for arson in burning the dwelling-house of Theo. Burbon, on the first day of May, 1886, and, among other things, the following entries appear:

"State *v.* William Thrasher. No. 1. Arson. Indictment changed to charge an attempt to burn a dwelling-house.

The defendant pleads guilty to an attempt to burn store."

Upon this plea of guilty, the record shows a judgment that the defendant be imprisoned for a term of seven years in the State's prison. The transcript of the case on appeal shows also the following: "The reason why the defendant Thrasher was allowed on this original bill to plead guilty for an attempt to burn, and the record was so amended, was, that it was made to appear to the court that Thrasher was a man of weak and infirm mind."

The solicitor for the State opposed the defendant's plea in abatement, on the ground that the indictment against the defendant Jones was, under the statute, a substantive felony, and that the two indictments were for one and the same felony.

The plea in abatement was overruled, and the defendant excepted. There was a verdict of guilty, judgment and appeal.

Attorney-General for the State.
Theo. F. Kluttz, for defendant.

DAVIS, J., after stating the case: It is well settled that an acquittal of the principal is an acquittal of the accessory, and at common (722) law an accessory before the fact could only be convicted when tried at the same time with the principal and after conviction of the principal, or unless the principal had been before tried, convicted and sentenced. *S. v. Duncan,* 6 Ired., 98.

To remedy this and prevent accessories from escaping punishment, it was enacted, or, as the statute expressed it, "for the more effectual prosecution of accessories before the fact to felony, it is enacted that if any person shall counsel, procure or command any other person to commit any felony, . . . the person so counseling, procuring or commanding shall be deeemed guilty of felony, and may be indicted and convicted either as an accesory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, *or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice,* and may be punished," etc. Rev. Code, ch. 34, sec. 53; The Code, sec. 977.

This changes the common law and removes the necessity of a prior conviction and sentence of the principal felon, but has no application to cases in which the principal felon has been tried and acquitted. *S. v. Ludwick,* Phil. Law, 401. And we are met in the case before us by the question, has Thrasher charged as the principal felon, been *tried* and *acquitted?* If he has been tried for and acquitted of the crime for which the defendant Jones is indicted as accessory before the fact, then the latter cannot be convicted. Thrasher, the alleged principal, has

been indicted for that crime. Has he been tried and acquitted? We think not. The court did not have the power to change the indictment so as to charge an offense entirely different and calling for a punishment entirely different from and not included in that passed upon by the grand jury, and no submission or consent on the part of the principal felon charged could give jurisdiction to the court in the absence of an indictment by a grand jury to punish at all, nor did the (723) court have the power to change the indictment. A new and different bill might have been found by the grand jury, if the evidence warranted it, but there was no power in the court to change the indictment returned into court by the grand jury; and the submission and sentence were not warranted by law and were null.

Upon an indictment for *arson,* charging the wilful and felonious burning of the dwelling-house of A., could the defendant be convicted of the misdemeanor of "attempting to burn a store"? Or upon a charge for the latter could he be convicted of the former? That would be the legal criterion by which a plea of former acquittal or former conviction would be decided for or against the principal if he were on trial. *S. v. Jesse,* 2 D. & B., 297; *S. v. Revels,* Busb. Law, 200.

No consent of the prisoner can confer a jurisdiction which is denied to the court by the law, and any punishment imposed other than that prescribed for the offense is illegal. *In re Schenck,* 74 N. C., 607.

In Bishop on Criminal Procedure, sec. 293, it is said to be "a proposition to which there is perhaps no exception, that whatever is necessary as a guide to the court in pronouncing the sentence must be alleged in the indictment." And it might be added, ordinarily this must be done by the grand jury.

"It may be generally said," says Wharton on Crim. Law, sec. 565, "that the fact that the two offenses form part of the same transaction is no defense when the defendant could not have been convicted at the first trial on the indictment then pending of the offense charged in the second indictment." This rule, he says, has some qualification, "as where one of the offenses is a necessary ingredient or accompaniment of the other . . . And it has been ruled in North Carolina that a conviction for larceny barred an indictment for robbery, the goods being the same. But these cases cannot be sustained (724) except on the assumption that on the first trial the defendant could have been legally convicted of the major offense, and that his non-conviction was equivalent to an acquittal. It is clear that after a conviction of larceny on an indictment for larceny there may be a conviction of burglary, so far as concerns the breaking, and in respect to burglarious entries this is the general rule."

A submission to a plea of "guilty of an attempt to burn a store," without any indictment therefor, cannot be "equivalent to an acquittal" of a charge of arson in burning a dwelling for which there is an indictment.

Can the voluntary action of the principal, in pleading guilty to a charge for which he was never indicted, and of a character that could not be included under an indictment pending against him, have any legal validity? Could any lawful judgment, without an indictment, follow such a plea of guilty?

In *S. v. Lawrence,* 81 N. C., 522, it is said: "The practice settled in this State when a prisoner has been convicted and an illegal sentence pronounced against him, and the case is brought to this Court by appeal or otherwise (in that case by *certiorari* applied for after the defendant had been for some time in the penitentiary serving out the sentence), is to send the case back for such judgment as the law allows." *S. v. Goings,* 98 N. C., 766; *S. v. Walters,* 97 N. C., 489.

But how, if he has not been legally tried and convicted at all of the crime for which he is sentenced? *S. v. Queen,* 91 N. C., furnishes an answer to this question. In that case the defendant was indicted in the proper form for "the crime of burglary, with intent to kill and murder," and pleaded "not guilty." "The case was submitted to a jury, and while the case was in charge of the jury, the prisoner being at the bar of the court by his consent and that of the solicitor for the State, it was ordered that a juror be withdrawn
(725) and a mistrial had, which was done, and the jury discharged from its further consideration."

The defendant then pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary for ten years.

The defendant having failed to appeal, after being confined in the penitentiary for some time, applied for a writ of *certiorari,* which was granted, and the court held that he should be discharged from the penitentiary, but should be remanded to the custody of the sheriff of Watauga to answer the charge of burglary, for which he had been indicted.

It was said by the Court: "The record presents an anomalous case, . . . the matter was *coram non judice.* The judge had no more power to sentence the defendant to imprisonment than any private person in the county."

The Bill of Rights declares that "no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment." And there is no other mode provided in the Constitution for the prosecution of felonies.

The judgment pronounced by his Honor was in contravention of this provision of the Constitution, and was therefore without authority and void.

We think the ruling in that case applies to this, and that Thrasher, charged as principal felon, has never been tried and acquitted, and the fact that though of "weak and infirm mind," he may be wiser than Queen was, and consent to serve out a term in prison for a minor offense, for which he was never indicted and lawfully convicted or sentenced, rather than undergo and take the chances of a trial for the capital felony for which he was indicted, cannot have any legal force and effect; and, never having been tried and acquitted upon the indictment for arson, the accessory Harrison Jones could be tried, as authorized by sec. 977 of The Code, for the substantive felony with which he was charged.

Affirmed.

SMITH, C. J., dissenting: I am unable to concur in the disposi- (726) tion of this case made by the other members of the Court.

The principal offender, William Thrasher, was put on trial upon an indictment in which he is charged with the crime of arson, and was allowed to enter the plea of "guilty of an attempt to burn a store," the record stating that the indictment was changed "to charge an attempt to burn a dwelling-house," which the plea seems to have been construed as an admission of the charge in that form. In fact no change was made in the form of the indictment, as found by the grand jury, nor could there be.

So understood, judgment was rendered against the accused, imprisoning him in the State prison for the term of seven years, which sentence he is now undergoing.

The defendant is charged with being accessory to the crime of arson, alleged to have been committed by Thrasher, the principal, and upon his trial averred in defense, under the plea of not guilty, this precedent action against Thrasher was in legal effect an acquittal of the charge of arson, and that there could be no accessory to a crime that, under said judicial proceeding, is conceded not to have been committed.

The opinion conceding such to be the consequences of an acquittal denies that what was done was an acquittal in fact, or could legally operate as an acquittal, and that the sentence being unauthorized, was void, and the imprisonment by an arbitrary act of the court; so that, as I understand, the principal, while he might obtain his enlargement from the illegal imprisonment, may fulfil the term of his sentence, and would then be subject to be tried and convicted of the original felony, and to be punished therefor.

Now the court evidently deemed the charge of the felony to comprehend the minor and subordinate offense of an attempt to do that which, if done, would have been a consummation of the higher crime charged, and punishable as such, under the indictment in its
(727) present form. Thus the record is made to speak, since there was no alteration in the indictment, and the judgment was pronounced according to the plea and under it.

While in England, for reasons not pertinent to the administration of the criminal law in the United States, a conviction for a misdemeanor under a charge of felony, in which it is included, is inadmissible in the practice there, and is accepted and acted on as a rule in some of the United States still, yet it does not prevail in many others, to wit: New York, Vermont, New Jersey, Ohio, Arkansas, North Carolina and South Carolina, where, according to Mr. Wharton, "it has been held that the English reason ceasing, the rule itself ceases," and that "in most states the latter position is now established by statute." 1 Whar. Cr. Law, sec. 400.

Now, while it is by no means clear that the attempt, which in fact must precede the commission of the crime charged, is a severable part of the charge, so as to admit of a conviction therefor, the court appears to have so considered, and acted according to the record.

If there was error, and no such submission was allowable, still the court so adjudged, and proceeded to pass judgment. The judicial mind shrinks from the proposition that all this is so absolutely null as to subject the parties executing the sentence to an action, perhaps, and if not, subjecting the accused to be twice punished for one and the same criminal act.

The case of *S. v. Queen,* 91 N. C., 659, is not a precedent, and it was correctly decided. There was no indictment for larceny in this case, or for an offense in which it could be included, the burglary charged, alleging the breaking with intent to *commit murder,* and larceny formed no element in it.

The judgment was, therefore, founded upon no indictment, but was merely a naked and unwarranted exercise of judicial power. It
(728) seems to me that the ruling in the present case strikes a blow at that great principle of personal security which finds its way into all just systems of jurisprudence, that forbids the infliction of punishment a second time for one and the same criminal act.

Cited: S. v. Whitt, 113 N. C., 719; *S. v. Satterwhite,* 182 N. C., 893.

THE STATE v. JOHN C. DEATON.

Liquor Selling—Statute—Jurisdiction—Taxation.

1. The provisions in the "Revenue Laws" of 1885 and 1887, regulating the rate of taxation and the method by which licenses may issue for the sale of liquors, did not repeal or suspend the operation of the general statute (The Code, sec. 1076) making it a misdemeanor to retail such liquors without a license. Nor did the Revenue Act of 1887 repeal that of 1885 in respect to the penalties and punishments therein imposed.

2. The Superior Court has jurisdiction of the offense of retailing spirituous liquors without license.

THIS is a criminal action, tried before *Avery, J.*, at Spring Term, 1888, of MONTGOMERY Superior Court.

The defendant is indicted for retailing spirituous liquors by a measure less than a quart in the month of March, 1886, without having obtained a license so to do, as required by the statute (Acts 1885, ch. 175, sec. 34). He insisted that the statute under which he was indicted was repealed by the subsequent statute (Acts 1887, ch. 132, sec. 45), and therefore he could not be convicted. He further contended that the Superior Court had not jurisdiction.

There was a verdict of guilty, and judgment accordingly against the defendant, from which he appealed.

Attorney-General for the State. (729)
No counsel for defendant.

MERRIMON, J., after stating the case: The general statute (The Code, sec. 1076) provides that "if any person shall retail spirituous liquors by the small measure in any *other manner than is prescribed by law,* he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court." The statutes, commonly called "revenue laws" (Acts 1885, ch. 175; Acts 1887, ch. 135), do not change or modify the general statutory provisions above recited; they regulate the sale of spirituous and other liquors, and prescribe that such liquors shall not be sold in certain specified quantities, until and unless the person who desires to sell shall first have obtained a license in the way prescribed, authorizing him to sell the same; but they do not prescribe the criminal offense of selling such liquors without a license—that is done by the statutory provision first above recited. And, plainly, the Superior Court has jurisdiction of such offense, because the punishment is fine or imprisonment—one or

both—in the discretion of the court. A justice of the peace has jurisdiction of criminal offenses only "where the punishment prescribed by law shall not exceed a fine of fifty dollars or imprisonment for thirty days." The Code, sec. 892.

Now the statute (Acts 1885, ch. 175, sec. 34), among other things, provides that "every person, company or firm for selling spirituous, vinous or malt liquors, or medicated bitters, shall pay a license tax quarterly, in advance, on the first day of January, April, July, and October, as follows: First, for selling in quantities less than a quart, twenty dollars," etc.; and further, that "every person, company or firm wishing to retail liquors in quantities less than five gallons, shall apply to the board of county commissioners for an order to the sheriff to issue a license, stating the place at which it is proposed to conduct the business," (730) etc. The defendant is indicted under the statute (The Code, sec. 1076) above cited, for selling spirituous liquors without obtaining such license. His contention that the subsequent statute (Acts 1887, ch. 135, sec. 45) repealed that just mentioned, is wholly unfounded; and more particularly, it does not in any way affect the general statute under which he is indicted. *S. v. Sutton,* 100 N. C., 474. He is indicted under the latter statute for a violation of the revenue law.

There is no error.

Affirmed.

THE STATE v. BETTIE WILSON.

Embezzlement—Larceny—Master and Servant—Indictment.

1. In an indictment for embezzlement, under section 1014 of The Code, it is not necessary to aver, nor on the trial to prove, that the property charged to have been embezzled had been committed to the custody of the defendant, nor any breach of trust or confidence save that which grows out of the relation of the owner and the servant or agent.
2. But in an indictment under section 1065, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and being so held it was feloniously converted or made way with by the servant or agent.
3. The averment that the defendant was not within the age of 18 years is a sufficient negative that he was under 16 years of age.

INDICTMENT for embezzlement, tried at May Term, 1888, of ROWAN Superior Court, before *Montgomery, J.*

The defendant is charged with the offense of embezzlement in the form following:

"North Carolina—Rowan County. (731)
Superior Court—November Term, 1887.

The jurors for the State, upon their oath, present: That Bettie Wilson, late of the county of Rowan, on 1 September, in the year of our Lord one thousand eight hundred and eighty-seven, with force and arms, at and in the county aforesaid, being then and there the agent and servant of one Ross Turner, and whilst acting in the service of the said Ross Turner as his servant and agent, and against the will of the said Ross Turner, did then and there, unlawfully, wilfully and feloniously embezzle and convert to her own use, with intent to steal the same, and defraud her said master of the same, contrary to the trust and confidence reposed in her by her said master, a large sum of money of her said master, Ross Turner, to wit, the sum of twenty dollars in money, she, the said Bettie Wilson, not being then and there an apprentice or servant within the age of eighteen years, against the form of the statute in such cases made and provided and against the peace and dignity of the State."

Upon her arraignment and plea of not guilty she was tried and convicted before the jury. Thereupon her counsel moved in arrest of judgment, for what supposed defect in the record does not appear, and the motion being allowed, the solicitor for the State appealed.

Attorney-General for the State.
No counsel for defendant.

SMITH, C. J., after stating the case: We have not had any argument in support of the ruling, but the Attorney-General calls our attention to two sections, numbered 1014 and 1065, in The Code, as bearing upon the imputed offense.

The first mentioned section is in these words: "If any officer, (732) agent, clerk, employee or servant of any corporation, person or copartnership (except apprentices and other persons under the age of sixteen years), shall embezzle or fraudulently convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently convert to his own use, any money, goods or other chattels, bank notes, check, order for the payment of money, issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any valuable security whatsoever, belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and punished as in cases of larceny."

The purpose and effect of this enactment are to protect property from the depredations of those whose occupations and relations to the employers furnish facilities and temptations to the taking of property thus exposed, and to place the criminal act upon the footing of larceny, to which it is closely allied, by reason that the intent is common to both. No goods are intrusted to the special custody of the person except through the misplaced confidence which grows out of the relation itself. Hence the crime cannot be committed by one not arrived at sixteen years of age.

The other enactment, less severe in terms, is as follows: "If any servant or employee to whom any money, goods or other chattels, or any of the articles mentioned in the preceding section (1064)) by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master, and go away with the said money, goods or other chattels, or any of the articles, securities or choses in action, mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, *contrary to the trust* and confidence in him reposed by said master; or if any servant, being in the service (733) of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or defraud his master thereof, the servant so offending shall be fined or imprisoned in the penitentiary or county jail, not less than four months nor more than ten years, at the discretion of the court: *Provided,* that nothing in this section contained shall extend to apprentices or servants within the age of eighteen years."

This enactment has for its object the punishment of breaches of trust committed by those into whose custody the property has passed, when accompanied with an intent to steal and thereby defraud the owner, when the servant or employee makes way with the goods and himself, or when such goods are in his custody and charge he shall embezzle them or in some other way appropriate them to his own use with the like purpose to steal and defraud. This has reference, primarily, to cases where the taking is lawful and the *animus furandi* enters into the disposition made of them. The indictment is evidently framed upon this latter section, whose phraseology is so largely followed in defining the criminal act, and this is the more manifest in the adoption in very words of its proviso.

The indictment does not, however, set out any facts constituting a trust in the delivery of the money, but, for aught appearing to the contrary, alleges a larceny of money which had gone into the defendant's possession, except that it omits to charge a felonious taking by a servant.

The general scope and aim of the statute will bear a somewhat strained interpretation, if construed to embrace the facts charged in the indictment, and we are not prepared to give it so large a meaning. However this may be, the case is within the terms of the first recited section, which requires, to consummate the crime, no breach of trust or abused confidence in placing the money in the defendant's hands other than such as results from the relation of master and servant, and (734) which affords unusual opportunities for the perpetration of the crime.

The averment that the defendant, when committing the act, was not *within*—that is, was of the age of eighteen years or more, and thus negatives that she was under sixteen years of age—does not invalidate the indictment, although the negative goes beyond the statutory requirement, for the greater includes the less.

There is error, and the judgment is reversed, and the court will proceed to judgment upon the verdict.

Error.

Cited: S. v. Summers, 141 N. C., 843; *S. v. Smith,* 157 N. C., 589; *S. v. Gulledge,* 173 N. C., 747.

THE STATE v. HENRY McDOWELL.

Bastardy—Evidence—Husband and Wife—Witness.

1. When a child is born in wedlock the law presumes that it is legitimate (when it is shown the husband might have begotten it, the presumption is conclusive); but this presumption may be rebutted by proof of facts and circumstances showing that the husband could not have been the father.

2. The wife is a competent witness against one charged as the father of her bastard child to prove, not only the fact of the unlawful sexual connection, but the fact that it was impossible for her husband to have had access to her within the period of gestation.

THE defendant is charged with being the father of a bastard child, in a proceeding originally commenced before a justice of the peace in the county of CUMBERLAND, and carried by appeal to the Superior Court and tried before *Philips, J.,* at Fall Term, 1888, of said court.

The oath and examination of Ann Patterson, the prosecutrix, (735) and mother of the child, were read in evidence, and then, after having said, in answer to a preliminary question, that "she had been

married, but her husband left her two years ago, and she had not heard from him since he left, she was permitted to testify, after objection by the defendant, that she had a child after her husband left, begotten by the defendant on 24 December; that he had intercourse with her on that day; and on cross-examination she said that the defendant had intercourse with her but once; that no one but defendant had, and that she was true to her husband till he left her.

To corroborate this witness Chany Nichols was permitted to testify that she knew Ann Patterson and her husband Albert Patterson; that she had been living on the same place with Ann Patterson for three years; that Albert went away two years ago last January, and has not been back; that she would have seen him if he had been back; that she was with Ann pretty much every day since her husband left.

On cross-examination she said that her house was not more than fifty or seventy-five yards from Ann's; that she worked off a day or two year before last; that she worked nearly all the time with Ann, and that "it was possible for Ann's husband to have gone to his house in the night time," without being seen by her.

The child was exhibited by the State. It is a bright mulatto; the mother is black. The defendant testified that he had never had connection with Ann, and was not the father of the child.

The defendant asked his Honor to charge that there was no evidence that it was impossible for the husband of the prosecutrix to have connection with her. This was refused, and his Honor charged as follows:

"Unless the jury were satisfied from the evidence that it was
(736) impossible for the husband to have access to his wife at the time this child was begotten they should return a verdict for the defendant, because, if the husband could have had access to his wife, the law conclusively presumes that he was the father and the child is legitimate. But if the jury is satisfied from the evidence that it was impossible for the husband to have access to the wife, and that Henry McDowell is the father of the child, then they should return a verdict against the defendant."

The jury returned a verdict against the defendant, and from the judgment rendered thereon he appealed.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the case: The case presents two questions for our consideration:

1. Can a married woman be the mother of a bastard child?

2. If so, is the mother a competent witness to prove the facts and circumstances which tend to show that it could not have been begotten by the husband?

Both questions must be answered adversely to the defendant.

When a child is born in wedlock the law presumes it to be legitimate, and unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access. *S. v. Pettaway,* 3 Hawks, 623; *S. v. Wilson,* 10 Ired., 131; *S. v. Allison,* Phil. Law, 346.

It was held in *S. v. Pettaway* and *S. v. Wilson* that, while the (737) married woman was not a competent witness to prove impotency or nonaccess, she was a competent witness to prove the criminal intercourse of which the child was the offspring; and now, as she is not testifying "for or against" her husband, she is a competent witness under section 588 of The Code to testify in any "suit, action or proceeding," except as stated in the said section, and there is nothing in section 1353 of The Code to exclude the testimony of the wife in a case like the present.

There is no error either in admitting evidence or in the charge of the court.

Affirmed.

Cited: S. v. Wiseman, 130 N. C., 728; *Ewell v. Ewell,* 163 N. C., 236; *Powell v. Strickland, ibid.,* 397; *West v. Redmond,* 171 N. C., 744.

THE STATE v. DEEMS PUGH.

Assault and Battery—Police Officer—Arrest.

1. A police officer may, for the purpose of stopping a fight, strike a blow, and he is the judge of the degree of force necessary to be used under the circumstances; but if he wantonly, or maliciously, or unnecessarily exercises this power, he will be guilty of an assault and battery, and of this the jury is the judge under proper instructions from the court.

2. The presumption is the officer acted in good faith, and the jury should be directed not to weigh his conduct in "gold scales" against him.

THIS was an indictment against the defendant, who was one of the policemen of the city of Wilmington, for an assault and battery, tried

in the criminal court of NEW HANOVER County, before *Meares, J.*, at September Term, 1888.

(738) Smith, a witness for the State, on whom the assault and battery was alleged to have been committed, testified that at the time of the alleged assault he was engaged in a fight with one Bailey in a back yard in Wilmington, and while so engaged the defendant came up and struck him on his head with his club; that at the time he was struck he, witness, was making at Bailey; that the officer did not catch hold of him, and he did not hear the officer say to him, before striking him, "consider yourself under arrest"; that after the officer struck him and broke up the fight and was leading him away, he, witness, struck Bailey again in his face with his fist; that he, witness, had been drinking, and though not drunk, he was pretty full at the time.

Pugh, the defendant, testified that his attention had been called to the fact that a fight was going on in Mr. Bailey's back yard; that on looking through the store from the sidewalk, at the front, he saw Mr. Bailey and Mr. Smith fighting; that he hurried through to the parties, and found Mr. Bailey backing and Mr. Smith advancing on him and striking at him; that he immediately grasped Smith on his shoulder, at the same time saying to him, "consider yourself under arrest"; that Smith then cast his eye at him, and did not heed the arrest, but went right on striking at Bailey, and was in the act of striking Bailey when he, witness, struck him with his club; that Smith would have struck Bailey again after his arrest if he, witness, had not struck him, and that he struck him to prevent his striking Bailey again; that after he caught hold of Smith and told him to consider himself under arrest, he could feel him pressing forward to strike at Bailey; that the blow he gave Smith stopped the fight; and that afterwards, whilst he was taking Smith off, having hold of him, he struck Bailey a severe blow in his face with his fist, on Mr. Bailey's requesting him, the defendant, to carry him through the back way, and let him wash. He then drew back to strike him again,

(739) but on request of a bystander, who promised that he should go without further trouble, desisted.

There was other testimony tending to support the different versions of these two witnesses.

His Honor charged the jury that if they believed the evidence of the witnesses, even upon the testimony of the defendant himself, the defendant was guilty, because the prosecutor offered no resistance to the officer, and there was no necessity for the blow.

The defendant's counsel excepted to his Honor's charge.

The jury returned a verdict of guilty, and from the judgment rendered thereon the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, J. The evidence, certainly parts of it, tended to prove that the defendant was a policeman in the line of his duty; that he found the prosecutor engaged in a fight, advancing upon his retreating adversary, one Bailey; that he grasped the prosecutor on the shoulder while he was so engaged, and bade him "consider himself under arrest"; that the latter cast his eye at him but did not heed the arrest or desist from the fight, but went right on striking at Bailey, and was in the act of striking him when he struck the prosecutor with his club—one usually carried by policemen—and that the blow was given to prevent him from striking Bailey.

It was the duty of the defendant to interfere and suppress the fight, and if need be, he might, in good faith, strike a reasonable blow for the purpose. While he had no authority to strike an unnecessary blow, or one greatly in excess of what was necessary for the purpose, and wanton, he was the judge of the force to be applied under the circumstances, and he would not be guilty of an assault and battery unless he (740) arbitrarily and grossly abused the power confided to him, and whether he did or not was an inquiry to be submitted to the jury, under proper instructions from the court. A grossly unnecessary, excessive and wanton exercise of force would be evidence—strong evidence—of a wilful and malicious purpose, but the jury ought not to weigh the conduct of the officer as against him in "gold scales"; the presumption is he acted in good faith. This is the rule applicable in such cases as the present one, as settled in *S. v. Stalcup,* 2 Ired., 50; *S. v. McNinch,* 90 N. C., 696, and the cases there cited. So also, *S. v. Bland,* 97 N. C., 438.

The court instructed the jury "that if they believed the evidence of the witnesses, even upon the testimony of the defendant himself, the defendant was guilty, because the prosecutor offered no resistance to the officer, and there was no necessity for the blow." But there was evidence that the prosecutor persisted in the fight after and while the defendant had hold of him, and he persisted in it until he was forced to desist by the blow. This was *evidence* of resistance to the officer, and of the necessity to exercise force to suppress further violence. In view of the evidence the case should have been submitted to the jury substantially as indicated above.

Error.

Cited: S. v. Sigman, 106 N. C., 731; *S. v. Hunter, ibid.,* 802; *S. v. Rollins,* 113 N. C., 733; *S. v. Isley,* 119 N. C., 864; *S. v. Dunning,* 177 N. C., 562.

(741)

THE STATE v. JOHN S. DIXON.

Indictment—False Pretense.

An indictment charged that the defendant, "designing and intending to cheat and defraud C., did unlawfully, knowingly and designedly falsely pretend that U. did send him (the defendant) to C. after the sum of five dollars in money, whereas in truth and in fact the said U. did not send him . . . after the said sum of five dollars in money; by means of which false pretense he (the defendant) knowingly and designedly did unlawfully and with intent to defraud obtain from C." five dollars, etc.: *Held*, that the offense of obtaining property by false pretense was sufficiently averred.

The statute (The Code, sec. 1025) commented on by MERRIMON, J.

INDICTMENT for false pretense, tried before *Shepherd, J.*, at Spring Term, 1888, of ONSLOW Superior Court.

The indictment charges that the defendant, "designing and intending to cheat and defraud George Canaday, on 15 August, A. D. 1887, at and in the county aforesaid, unlawfully, knowingly and designedly did, unto George Canaday, falsely pretend that one U. G. Canaday, did send him, the said John S. Dixon, to him, the said George Canaday, after the sum of five dollars in money, whereas in truth and in fact the said U. G. Canaday did not send him, the said John S. Dixon, to him, the said George Canaday, after the sum of five dollars in money; by means of which said false pretense he, the said John S. Dixon, knowingly and designedly, did then and there unlawfully and with intent to defraud, obtain from said George Canaday the following goods and things of value, the property of U. G. Canaday, to wit, five dollars in money, against," etc.

There was a verdict of guilty. Thereupon the defendant moved in arrest of judgment, and assigned as ground of his motion that the indictment charges no criminal offense. The court disallowed the motion and gave judgment against defendant, and he, having excepted, appealed to this Court.

(742) *Attorney-General for the State.*
No counsel for defendant.

MERRIMON, J., after stating the case: The motion was properly disallowed. The indictment substantially and sufficiently, though not with as much fullness as is desirable, charges the defendant with having committed the statutory offense of knowingly and designedly obtaining money by false pretense with intent to cheat or defraud, etc.

The statute (The Code, sec. 1025), prescribing and defining that offense is very broad and comprehensive in its terms and purpose. It provides that "if any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, *or other false pretense, whatsoever,* obtain from any person or corporation within the State any money, goods, property, or other thing of value, or any bank note, check or order for the payment of money, etc., . . . with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a misdemeanor for fraud and deceit," etc. And it is sufficient to charge in the indictment "that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security," etc.

It will be observed that the statute designates certain kinds or classes of means whereby the offense may be perpetrated, and adds, "or other false pretense whatsoever." By "false pretense" is meant false statements or representations, however made, with intent to defraud, for the purpose of obtaining money or property. If one falsely and with fraudulent design represents to another that something material—something already said or done—is true, when the same is not true, and it is calculated to mislead, and does mislead, and induce such party to part with his chattels, money or the like, surely such false and fraudulent representations, though wholly verbal, come within (743) the scope of the comprehensive words, "or other false pretense whatsoever," and as well within the purpose and spirit of the statute. Fraud and injury may as certainly be accomplished by false statements as to what has been said and done by others, prompting the party defrauded to part with his property, as "by means of any forged or counterfeited paper, in writing or in print, or by any false token." Falsehoods simply expressed in words as to persons and what they have said or done, or desire, or as to existing conditions of persons or things, when material, and uttered with fraudulent design, constitute a fruitful means of false pretense. The words of the statute recited, "*or other false pretense whatsoever,*" taken in connection with the words and phraseology which next precede them, cannot be said to imply only *like means* of cheating, because the word *like* or some like word is not used, and the preceding words specially designate particular kinds of means employed to cheat and defraud, while the comprehensive words "or other *false pretense* whatsoever," are intended to enlarge the kinds of means that might be so employed, and make it criminal to cheat by *any means* that might be denominated a false pretense.

The language of the statute is broad enough to comprehend cheating by means of *false words* expressed as indicated above, and there is nothing in the nature of their application that gives them a restricted meaning.

The mischief to be remedied suggests the broad meaning we give them. Why should cheating by mere falsehoods, as indicated, be omitted from the statute?

The language embraces cheating by such means, and the evil to be remedied goes to show that the statute intended to embrace the same. Hence the Court said in *S. v. Phifer,* 65 N. C., 321: "We state the rule to be that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, (744) whether the representation be in writing or in words, or in acts, by which one man obtains value from another, without compensation, is a false pretense, indictable under our statute." *S. v. King,* 74 N. C., 177; *S. v. Hefner,* 84 N. C., 751; *S. v. Matthews,* 91 N. C., 635; *S. v. Sherrill,* 95 N. C., 663.

In this case the indictment charges, with sufficient aptness, that the defendant designedly and fraudulently obtained the money by falsely stating to the prosecutor that another person had sent him "after"—that is—to get five dollars in money. In the nature of the matter such false representation was calculated to deceive the prosecutor; it might, not unreasonably, in the course of business do so; it is charged that it did so. The statute makes it indictable to cheat by such false pretense.

There is no error.

Affirmed.

Cited: S. v. Hargrove, 103 N. C., 334, 336; *S. v. Skidmore,* 109 N. C., 796.

THE STATE v. JAMES ROBERTS.

An erection, consisting of posts, nine or ten feet apart, on which near the top were nailed slats, placed along the side of a road and separating it from a cultivated field, but which did not connect with any other fence or protection from such field, is not such a fence or enclosure as is protected from injury by sec. 1062 The Code.

THIS is a criminal action, which was tried before *Merrimon, J.,* at June Term, 1888, of DURHAM Superior Court.

The indictment charges that the defendant "did, on the 5th day of April, 1888, unlawfully and wilfully pull down, injure and remove a part of a fence surrrounding and about a cultivated field of Zachary Dickey," etc.

The jurors find the following special verdict: "That in said county, on the first day of April, 1888, Zachary Dickey, the prosecuting witness, being in the actual possession of the land, erected along (745) the side of a private or neighborhood road, which ran between his land and that of the defendant's father, posts three feet high, placed nine or ten feet apart, on the sides of which, near the top, were nailed slats. This line of posts or slats was about one hundred and thirty-five yards long, and came within two feet of prosecutor's pasture fence on the east end and adjoining no other fence or wall on the west end by sixty yards. In the field along the side of which this line of fence was built prosecutor Dickey had cultivated tobacco in the year 1887 and had wheat growing at the time of building the fence. In the road was a stump and hole, and travelers had been, before this fence was built, for several years in the habit of turning out on prosecutor's land for a sufficient distance to avoid said stump. The fence extended to a point three panels length beyond that point of the road where the stump stood and crossed the parcel of land on which travelers had sometimes turned out, as already stated. This fence was erected to prevent persons from riding and driving on prosecutor's land and trampling on his crops in said fields. Previous to erecting said fence people had walked on prosecutor's crops planted in said field alongside said road. In this territory the stock or no-fence law prevailed in April, 1888, and before the passage of said law the prosecutor had had a fence all around said field, but shortly after its passage had removed said fence. The fence described above was, at the time of the acts complained of, the only enclosure around or about the field (except the pasture fence on the east side). On 5 April the defendant injured and removed part of said fence by knocking off one slat and one end of another with an ax. There was sufficient room on the side of the road opposite to prosecutor's field for vehicles to pass and avoid the stump without going on cultivated or cleared ground. Defendant was walking and could (746) have gotten over or under the fence without removing or injuring it.

If upon these facts the court be of opinion that the defendant is guilty, then the jury so find for their verdict; but if the court be of a contrary opinion, then the jury for their verdict find the defendant not guilty."

Upon the rendition of this verdict the court adjudged the defendant not guilty and ordered that he be discharged. The solicitor for the State appealed.

Attorney-General and E. C. Smith, Esq., for the State.
No counsel for defendant.

DAVIS, J., after stating the case: Section 1062 of The Code, under which the defendant is indicted, declares that "if any person shall . . . unlawfully and wilfully burn, destroy, pull down, injure or remove any fence, wall, or other enclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture . . . every person so offending shall be guilty of a misdemeanor."

The defendant is charged in the indictment with injuring and removing "a part of a fence surrounding and about a cultivated field," etc. Was the fence described in the special verdict "surrounding *or* about any . . . cultivated field" within the meaning of the statute? Was it an "enclosure" or any part of an "enclosure"? Was it intended to "inclose or shut up" the field? It was certainly not *surrounding* any cultivated field. It is within the observation of all persons who have traveled over our country roads that obstructions such as posts, felled trees, etc., are frequently made use of to prevent travelers from turning out of the road to avoid bad places, and we think such obstructions would not constitute "fences or walls or enclosures" within the meaning of the statute, and yet it is apparent that it was for just such purpose—not to *enclose* the field—that the posts and slats in
(747) question were intended. They were intended, not to enclose or surround the field, but to prevent travelers from trespassing on the land by turning out of the road to avoid the stump and hole in the road. It was not a "fence, wall or other enclosure" "surrounding or about" a cultivated field within the meaning of the statute, nor a "fence *surrounding*" any field at all, as charged in the indictment.

There is no error.

Affirmed.

Cited: S. v. Biggers, 108 N. C., 763.

THE STATE v. W. H. HICKS.

Liquor Selling—Punishment—Presumption.

1. A defendant, convicted of unlawful liquor selling, may be, by virtue of chapter 355, Laws 1887, punished by imprisonment at hard labor on the public roads.
2. Where judgment has been rendered imposing such punishment, *it will* be presumed the county authorities have made the proper provisions for its enforcement.

STATE *v.* HICKS.

INDICTMENT, for unlawfully selling spirituous liquors, tried before *Merrimon, J.*, at Spring Term, 1888, of the Superior Court of DURHAM County.

The defendant was indicted for selling spirituous liquors on Sunday. The indictment was in proper form, and there was a verdict of guilty.

Thereupon, "the solicitor for the State, praying the judgment of the court on the verdict rendered, it is ordered by the court that the defendant, W. H. Hicks, be imprisoned at hard labor on the public roads for a term of sixty days, and that he pay a fine of $25 and the costs."

From this judgment the defendant appealed.

Attorney-General for the State. (748)
No counsel for defendant.

DAVIS, J., after stating the case: We have not been favored with an argument for the defendant, and no error is assigned in the record, but it is suggested that the exception may be to so much of the judgment as imposes imprisonment "at hard labor on the public roads for a term of sixty days."

By section 1117 of The Code, under which the defendant was indicted and convicted, it is declared that, "if any person shall sell spirituous or malt or other intoxicating liquors on Sunday . . . the person so offending shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court."

By chapter 355 of the Acts of 1887, it is among other things, enacted: "That when any county has made provision for the working of convicts upon the public road, or when any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful and the duty of the judge holding court in said counties to sentence to imprisonment at hard labor on the public road, for such terms as are now prescribed by law for their imprisonment in the county jail or in the State prison, the following class of convicts: First, all persons convicted of offenses the punishment whereof would otherwise be wholly or in part imprisonment in the common jail," etc.

The act further gives to the county authorities power to make all needful rules and regulations for the successful working of convicts upon the public roads.

Under section 1117 of The Code, the punishment of the prisoner would be in part imprisonment in the common jail *(S. v. Norwood,* 93 N. C., 578), and therefore, if the county of Durham has made

provision for "working convicts upon the public roads," the (749) court had the right to impose the sentence set out in the record.

If it be said the record must show that the county of Durham had taken advantage of the Act of 1887, ch. 355, and that this does not appear in the record, the answer is, the statute makes it the "duty" of the judge holding court in any county where provision is made for working convicts upon the public road, to sentence the class of convicts named "to imprisonment at hard labor on the public road." He holds court in the county and must get information from the county record or the county authorities, upon which he acts, in imposing the sentence, and while, perhaps, it would be well that the judgment should state that the county had made provision for working convicts on the public road, we must assume, in the absence of any suggestion or intimation to the contrary, that it was imposed in accordance with his duty and the authority conferred by chapter 355, Acts of 1887.

Affirmed.

Cited: S. v. Haynie, 118 N. C., 1270; *S. v. Smith,* 126 N. C., 1059; *S. v. Hamby, ibid.,* 1069; *S. v. Young,* 138 N. C., 573; *S. v. Farrington,* 141 N. C., 845; *S. v. Bush,* 177 N. C., 555.

THE STATE v. C. C. CHRISTMAS.

Indictment—Entering House with Felonious Intent—Evidence—Larceny.

1. An indictment for entering a house with an intent to commit a felony or other infamous crime—The Code, sec. 996—is not defective because it charges an intent to commit more than one offense.

2. Where the testimony tended to show that money was missing from a drawer of a bureau in a bed chamber; that the drawer was usually locked, but frequently was not thus secured; that the domestic servants of the family had access to the chamber; that the defendant was a journeyman carpenter, and had often been employed upon jobs about the house and was familiar with its construction, and knew where money was kept; that on one occasion, when not employed at work, he was discovered in an unoccupied chamber, behind the door and a box in such a position that he could observe the door of the room in which the money was deposited; that upon being discovered, he said he had come to get

a balance due for work; that there was nothing so due him, and that there was found on his person a key which would unlock the drawer in which the money was deposited: *Held*, that while none of these circumstances, standing alone, were sufficient evidence of the defendant's guilt, yet, when taken together and as a whole, they did constitute evidence which was properly submitted to the jury upon the question of the intent with which defendant entered the house.

INDICTMENT, tried before *Avery, J.*, at September Term, 1888, (750) of the Superior Court of WAKE County.

The indictment charged the defendant with feloniously entering the dwelling-house of T. B. Lyman, in the day time, with intent to steal "the goods, chattels and money of him, the said T. B. Lyman, and also the goods, chattels and money of Anna M. Lyman, in the said dwelling-house then and there being," etc.

The following is a summary statement of so much of the case on appeal as is necessary to a proper consideration of the exceptions to the ruling of the court below:

Miss Lancashire, a witness for the State, testified, among other things, that she lived at the house of Bishop T. B. Lyman; was there on the 28th of July last, and on that day "found the defendant standing behind the door in an unoccupied bed room; . . . his head was turned towards the crack of the door; he was behind a box."

The defendant is a carpenter, and has worked in almost every room in the house, and had worked there some part of every month since August, 1887. The room in which he was, was on the second floor. Mrs. Lyman's room was ten or fifteen feet from where he was, and its position was well known to the defendant. The witness went to Col. Andrews' and called for a policeman. On her return she told defendant that he could not go; that some money was missing. (751) He said that there was twenty-five cents due him, and he had come to collect it, and see if there was any more work for him. The testimony of the witness tended further to show that the defendant had been up stairs before; that Mrs. Lyman kept her money in a bureau drawer in her bedroom. About a fortnight before, she had found the defendant up stairs at the head of the steps near the door.

Upon cross-examination the witness said that it was some hours after daylight; that the door of the unoccupied room was wide open; that the defendant used to go up stairs constantly; that Mrs. Lyman generally paid him for his work; sometimes witness paid him; he was paid by Mrs. Lyman once on the landing near her bed room door. Witness had seen him inside Mrs. Lyman's room door for the purpose of getting pay for his work. The witness testified that servants had access to

the rooms, and upon redirect-examination she said the defendant had been paid off and discharged.

Mrs. Lyman was introduced as a witness, and the solicitor proposed to prove by her "that about the time the defendant had been employed as a carpenter and had had access to the upper rooms of her house, money was missing from the drawer in her bed room up stairs, with a view of having this testimony connected with further facts hereafter to be shown by the witness, that the key to the upper drawer of the bureau standing in the passage up stairs was missing about the same time, and the fact to be proved by another witness that a key was found on the person of the defendant when arrested that unlocked the drawer in her room in which she kept her money." This evidence was objected to by the defendant, objection overruled, and defendant excepted.

The witness then testified to having missed money; had missed it twice before; to having paid the defendant money, and that
(752) there was a key to the bureau in the passage, which was missed, and that she found that the key to her bureau drawer unlocked the drawers of the bureau in the passage, and that the policeman "pulled out a key when he arrested the defendant" that unlocked her drawer and looked like the lost key of the passage bureau. That she did not owe the defendant twenty-five cents, and that the money lost was her separate property. The witness was cross-examined in regard to missing money, and testified that servants were in her room every day to clean up, dust, etc., and that she frequently went out and left them in the room, and that she kept money in her bureau drawer and frequently left it unlocked.

J. D. Thompson, a witness for the State, testified that he arrested the defendant, and on searching found a bunch of keys, one of which unlocked the upper drawer of the bureau in Mrs. Lyman's room. The key also unlocked the drawers of bureau in defendant's house, as he had ascertained upon trial, at defendant's request.

"After the testimony for the State was closed, the defendant moved to exclude the testimony referred to in the exception as stated, on the ground that the solicitor had failed to offer the testimony then proposed to be offered, in connection with the loss of money by Mrs. Lyman. The solicitor had in the meantime offered the testimony of Mrs. Lyman, that when she left she did not recollect whether she took the key outside the drawer in the passage bureau and put it in the bunch given Miss Lancashire, or left it in the drawer.

Miss Lancashire testified that soon after Mrs. Lyman left she hunted for said key and did not find it in the bunch of keys given her by Mrs.

Lyman, or in the drawer where it belonged. Policeman Thompson testified that he found a key on the person of the defendant when arrested, and it fitted the drawer where Mrs. Lyman kept her money, as testified to by her.

The court refused to exclude the testimony which had been (753) submitted.

The defendant then testified in his own behalf. His testimony sent up with the record purports to explain his reasons for being at the house of Bishop Lyman, his conduct while there, the facts connected with the keys, and, if believed, fully rebutted all the evidence tending to show his guilt.

The defendant asked the court to give a number of instructions to the jury, of which the following were refused:

"3. That there is no evidence to connect the defendant with the larceny of the money deposed to by Mrs. Lyman.

4. That if the jury believe that Mrs. Lyman left her money in her bureau drawer generally unlocked, and that various other persons had access to her room, the evidence is too vague and uncertain to warrant a verdict against the prisoner.

6. That the evidence in this case is too vague and uncertain to be submitted to the jury, and that they will return a verdict of not guilty.

7. That the fact that the prisoner was concealed in a room in a house is not evidence that he entered it with the intent to commit any particular felony.

8. The evidence in this case being circumstantial only, in order to convict on such evidence it must exclude in the opinion of the jury every other reasonable hypothesis inconsistent with the guilt of the party accused. (Other instruction was given as a substitute for this, but defendant excepts and alleges that it is not given as asked in words or in substance.)

10. If evidence insufficient to support verdict must not go to the jury, although some."

His Honor charged the jury: "That where the act proven against the defendant admits equally of two constructions, one of which would point to the guilt and the other to the innocence of the accused, it is the duty of the jury to give the benefit of the doubt to the accused and render a verdict of not guilty.

That unless the jury believe that the defendant committed (754) the former larcenies deposed to by Mrs. Lyman, the fact that they were committted is no evidence against him.

That if the jury shall be satisfied beyond a reasonable doubt from the testimony that the defendant entered the house mentioned in the

indictment with intent feloniously to steal the money, goods or chattels of T. B. Lyman or Mrs. Lyman, then the jury will find the defendant guilty.

It is admitted that the defendant entered the house, and the only question for the jury is with what intent he entered. If the jury have any reasonable doubt as to his entering the house with intent to steal the money, goods or chattels of T. B. Lyman or Mrs. Lyman, then the defendant should be acquitted.

The State relies upon circumstantial evidence to show the intent. It is a rule of law that if, in such cases, there is a reasonable hypothesis or supposition arising out of the testimony and consistent with the innocence of the defendant, the jury must treat such hypothesis as true, and acquit the defendant. It is also a rule that in such cases every material circumstance in the chain of evidence relied on for conviction must be as fully proved as if the conviction depended upon proving it. Another mode of expressing the same idea is found in the rule that no chain of circumstantial evidence is stronger than the material links in the chain.

It is the duty of the jury to ascertain and determine what circumstances, if any, tending to show the intent of the defendant in entering the house, have been proven beyond a reasonable doubt. If the jury find that circumstances are so proven which exclude every reasonable hypothesis connected with the idea that the defendant had any intent not criminal in entering the house, or entered with any intent other than to steal the goods, chattels or money of T. B. Lyman or Mrs. Lyman, then they should return a verdict of guilty.

(755) The jury should not be influenced by any reference to the race or color of the defendant, or by the fact that he belongs to a particular race. On the other hand, the jury are not to be influenced by the fact that the law has prescribed any particular punishment for the offense charged in the bill."

The defendant excepted to the refusal of the court to give the instructions asked, as above set forth, and also to the instructions given.

There was a verdict of guilty. Motion in arrest of judgment. Motion refused, and judgment and appeal.

Attorney-General for the State.

J. B. Batchelor and John Devereux, Jr., for defendant.

DAVIS, J., after stating the case: The motion in arrest of judgment was upon the ground that the bill charged two distinct offenses, to wit:

"The intent to steal the goods, chattels and money of T. B. Lyman, and also with intent to steal the goods, chattels and money of Mrs. Anna W. Lyman."

The indictment is under section 996 of The Code, and the entering the house "with *intent* to commit a felony or other infamous crime therein," constitutes the gravamen of the charge. He was not charged with larceny. The offense charged is the felonious entering the dwelling-house with *intent* to steal, and if that entry was with the intent to steal anything of value, whether one thing or many things, or from one person or many persons, it constituted but one offense, but one crime, and whether convicted or acquitted he could not be again put upon trial for the *entry* and *intent*. But at all events the objection comes too late after verdict. *S. v. Brown,* 2 Winston, 54; *S. v. Fore,* 1 Ired., 378; *S. v. Tytus,* 98 N. C., 705.

The exception to the the refusal of the court to exclude the testimony of Mrs. Lyman was properly overruled by the court below.

The facts testified to by her were sufficiently connected with (756) other facts to render them competent as tending to show defendant's guilt.

The first exception in regard to the charge of his Honor was to the refusal to give the third instruction asked. Assuming that the fact that the defendant was found concealed in the house could only raise a suspicion of some guilty intent, and was not sufficient by itself to warrant a verdict of guilty upon a charge of entering with any specific felonious intent, the facts that money had been stolen, that the defendant had been frequently in the house, that he had been paid money and knew where it was kept, that he had on his person a key that unlocked the drawer in which it was kept, and other facts testified to, constitute some evidence—much more than a mere scintilla or suspicion —of guilt, and tend to give direction to the intent of the defendant. The able counsel for the defendant, in his earnest argument, pointed to the fact that the evidence showed that the drawer in which the money was kept was often left unlocked, and that servants had access to it, and it might have been stolen by them. That is true; and the single isolated fact that money was missing, if standing alone, would constitute no evidence to go to the jury, but when taken in connection with other facts and circumstances, no one of which alone would warrant a verdict of guilty, yet, when taken all together, may amount to full and conclusive proof. It is the *union* of many facts and circumstances, each one insufficient in itself, that often makes the strongest proof. Money is stolen—this fact by itself would convict no one. B. knew where the money was—this is a circumstance, but would not by

itself be sufficient to go to the jury upon a charge against him; he is afterwards seen about the place where the missing money was kept—this may create a suspicion; he conceals himself—another suspicious circumstance; a key is found upon his person that opens a drawer near by where he was concealed—another very suspicious circum-
(757) stance, but by itself too weak to justify a conviction. Circumstances accumulate, each one by itself of no great strength, but when united, like the bundle of twigs in the fable, they become very strong. *S. v. White,* 89 N. C., 462, and cases there cited.

Counsel relies upon *S. v. Wilkerson,* 72 N. C., 376. In that case there is no evidence of asportation, which was a necessary ingredient in the crime with which the defendant was charged. There was no evidence that connected the defendant with the killing of the hog, and only the circumstances of looking upon the dead hog and flight that pointed to defendant's guilt. In the case before us there were many circumstances, and it may be easily distinguished from the case of *S. v. Wilkerson;* and we are not called upon to express an opinion upon the sufficiency of the evidence to convict in that case, in regard to the correctness of which I myself entertain doubt.

There was no error in refusing, for the reasons stated, the third prayer for instructions, and for the same reasons there was no error in refusing the fourth and sixth instructions asked for.

The seventh prayer was properly refused because it asked the judge to charge upon an isolated fact. If the concealment had been the only evidence it might become material for us to consider the exception, but there was other evidence.

The eighth prayer was given in the charge of his Honor in language unmistakable and fully as strong as could be properly asked by the defendant.

The tenth prayer for instruction was also properly rejected. There was evidence to go to the jury, and its sufficiency was for them. *S. v. Powell,* 94 N. C., 965, and the cases there cited.

We have examined with care the charge of his Honor as given, and can see no error of which the defendant can complain.

Affirmed.

Cited: S. v. Bruce, 106 N. C., 795; *S. v. Austin,* 108 N. C., 781; *S. v. Brabham, ibid.,* 795; *S. v. Telfair,* 109 N. C., 882; *S. v. Green,* 117 N. C., 696; *S. v. Gragg,* 122 N. C., 1087, 1091; *S. v. Shines,* 125 N. C., 732; *S. v. Ellsworth,* 130 N. C., 691; *S. v. Peck, ibid.,* 713; *S. v. Walker,* 149 N. C., 531; *S. v. Hawkins,* 155 N. C., 472; *S. v. Spear,* 164 N. C., 453; *S. v. Bridgers,* 172 N. C., 882; *S. v. Allen,* 186 N. C., 630.

(758)

THE STATE v. HOWARD ANDERSON.

Evidence—New Trial—Argument, Right to Open and Conclude.

1. The rejection of competent testimony will not be ground for a new trial where the record shows that at a subsequent stage the rejected evidence was admitted and the party offering it had the full benefit of it.
2. The right to open and conclude the argument, except in cases where no evidence has been introduced by the defendant, is now, under Rule 6, Supreme Court, left to the discretion of the court, and the exercise of this discretion will not be reviewed upon appeal.

INDICTMENT for murder, tried before *Avery, J.*, at September Term, 1888, of the Superior Court of WAYNE County.

There was a verdict of guilty, and the defendant appealed.

Only two questions are presented in the record:

1. One T. J. Vinson, a witness for the defendant, who had been examined and cross-examined, was recalled for further cross-examination, and in reply to the question, "When the prisoner was talking to you in front of the carriage shop, did he not tell you that he had stricken Porter (the deceased) with a rock"? testified: "When I was talking to Anderson in front of the buggy shop, he did not tell me that he struck Porter with a rock."

The (counsel for) prisoner then insisted that he had a right to ask the witness what the prisoner *did* say in front of the carriage shop as to whether he was the person who struck Porter. On objection, the court held "that as no part of the conversation had been called out by the question from the solicitor, the prisoner did not have a right to have his declaration on that occasion put in evidence." *Prisoner excepted.*

The witness then said: "Anderson did not say that he struck Porter with a rock; he did not say anything like that."

Afterwards, as the record shows, the prisoner, in his own behalf, testified, among other things: "I met Jeff Vinson and had a conversation with him; I did not strike Porter that night; I (759) had no hard feeling against Porter, and he had none against me."

T. J. Vinson was again recalled, and testified: "I first saw Anderson, after Porter was stricken, near the boarding house. I said, 'Mr. Porter is stricken, and they say you did it.' He said he did not. We went, leaving there, down the street from the boarding house. We walked down to the carriage factory, and (he) kept saying, 'I did not do it.' He then said he was going back up there, and if they arrested him they would arrest him wrongfully."

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the case: 1. Whether there was or was not error in refusing to permit the witness Vinson to testify as to what the prisoner *did* say when the evidence was first offered, we are relieved of the necessity of considering or passing upon the question, in view of the fact that the witness Vinson was again recalled and testified as to what the accused *did* say, and if there was any error, it was thus cured. In fact, the evidence, when brought out as it was, in corroboration of the prisoner, was more beneficial to him than it would have been if it had been permitted when objected to and excluded; and, having been admitted, we can see no possible prejudice that could have resulted to the prisoner. If there was any error or just ground of complaint it was removed. *Gilbert v. James,* 86 N. C., 244, and the cases there cited; *S. v. Freeman,* 100 N. C., 429.

2. "Counsel for the prisoner insisted that the solicitor, who appeared alone for the State, should be required by the court to make an opening speech as well as to conclude the argument. The court decided that it was proper for the solicitor to state fully the propositions of
(760) law upon which he relied, and if the solicitor should fail to do so, the court would, in its discretion, hear the prisoner's counsel in answer to any proposition of law submitted for the first time by the solicitor in his closing argument. The solicitor, after some objection, simply stated his position as to the law applicable to the case, but made no full opening argument upon the facts. The prisoner's counsel excepted to the refusal of the court to order and require the solicitor to discuss the theory or theories relied upon by the State as to the facts."

In *S. v. David,* 4 Jones, 353, it is said: "The proper rule is that the party having the right to conclude opens the argument; the opposite party then has an opportunity to reply, and he in his turn may reply by way of conclusion." It is also there said that "common fairness suggests" that the counsel having the right to open should be required to state the ground upon which he relies, otherwise views might be presented and inferences drawn from the evidence which would go to the jury unanswered. But the question as to who shall open and who shall conclude the argument, except in cases where no evidence is introduced, is now, by Rule 6, 92 N. C., 852, left to the court, and its "decision shall be final and not reviewable." Full power is given to the court, in its discretion, to see that in the conduct of the argument no prejudice shall result to either party by any improper statement

of counsel, but it would often be difficult for the court to determine how far counsel, in opening, should be required to go, and we think the question must necessarily be left largely to its decretion. *Brooks v. Brooks,* 90 N. C., 142; *Cheek v. Watson, ibid.,* 302; *Austin v. Secrest,* 91 N. C., 214; *S. v. Keene,* 100 N. C., 509.

We were not favored with an argument for the prisoner, but it is stated in the case that "the motion for a new trial was solely on the ground of excluding testimony," and we suppose it was not intended that the second exception should be relied on in this (761) Court; but we think neither exception will avail the prisoner.

There is no error.

Affirmed.

Cited: S. v. Burton, 172 N. C., 941; *May v. Menzies,* 186 N. C., 146.

THE STATE v. FURNIS HARPER.

Jury—Verdict—New Trial.

1. Where it appeared that after several ballots in the jury room, a proposition was made and assented to, that the verdict of a majority of the jurors should be the verdict to be returned, and another ballot being taken some of the jurors adhered to their previous opinions, and thereupon the deliberations were continued and resulted in a conviction, and the trial judge found the fact that the verdict was the voluntary action of the jurors: *Held,* that the defendant was not entitled to a new trial.
2. A verdict will not be set aside upon vague and indefinite proof that some of the jurors were improperly approached and spoken to about the case, especially where it is not alleged that the action of the jurors so approached was influenced thereby.
3. The presence of the officer in charge of the jury at their deliberations, and the fact that the jury were allowed to separate, but still under the charge of officers of the court, will not vitiate a verdict, in the absence of any proof or suggestion of improper conduct on the part of the jurors, or the exercise of undue influences over them.

THIS is an indictment for larceny, tried before *Connor, J.,* at Spring Term, 1888, of GREENE Superior Court.

The defendant was charged with stealing a hog belonging to one Eli Dorgan, and upon the trial of his plea of not guilty was convicted of the offense, and sentenced to confinement in the State prison for the term of five years, beginning with the 2d day of April, 1888. After the

return of the verdict his counsel moved to set it aside for alleged misconduct of the jury, to prove which he examined orally one
(762) Thomas Harney, whose testimony, under the findings of the court, established the following facts:

The witness was a regular deputy of the sheriff, and after being sworn was put in charge of the jury. On several occasions he was in the room where the jurors were, and heard part of their deliberations and witnessed the taking of several ballots, in all of which a majority were for a conviction of the defendant, but no unanimity was reached. One of the jurors then proposed that the majority should rule, and this was assented to. Upon a ballot then following, one of the jurors who had favored an acquittal changed his vote and gave it against the defendant, two of them adhering still to a vote for an acquittal. They then "reasoned together," during which the witness left, and another deputy, one Edwards, took his place and stood at the door of the room. After an absence of about five minutes the witness Harney returned and resumed his charge, and soon thereafter he was informed by the jury that they had agreed upon a verdict. The jurors then came into court, and the foreman, on their behalf, gave in a verdict of guilty. They were thereupon polled at the instance of the defendant's counsel, and each for himself gave the same response.

At one time eleven of the jurors, under the officer in charge, left for dinner, and one of their number remained in the room in charge of another sworn deputy. There was no evidence tending to show, nor was there any suggestion that either deputy conversed with any juror in respect to the testimony, the defendant or the verdict.

The counsel then offered one of the jurors to testify in reference to the verdict, which the judge refused to permit.

The counsel further proposed to prove by a witness, not of the panel, that during the retirement of the jury some of them were improperly *approached and spoken to* about the case by an outside party. In the exercise of his discretion, the judge declined to hear further
(763) testimony, and refused to set aside the verdict, for the reason that it did not appear that the jury had rendered a majority verdict, nor that the jury had been tampered with, the court being of opinion, however, that the conduct of the officer was not proper, and so stating.

The grounds upon which the court was asked to set aside the verdict, in order to a new trial, are:

1. For that the verdict was the result of the surrender of the convictions of the dissenting jurors to the opinion of the larger number of them, and was not in reality unanimous.

2. For that the judge refused to hear the affidavit offered to show a tampering with the jury.

3. For that he did not rule that the separation of the one juror from the body does not vitiate the verdict; and

4. That the testimony of a juror was refused to show misconduct.

Attorney-General and John Devereux, Jr., for the State.
No counsel for defendant.

SMITH, C. J., after stating the case: In reference to the first exception, it confronts the fact that the polling shows the assent of each juror to the verdict given in making it unanimous, and the judge who ascertains the fact upon which a reviewing court must proceed, finds that the unanimity was not brought about by an involuntary yielding of the convictions of the few to the many, notwithstanding the apparent assent in the jury room, for immediately thereupon, two of the three jurors, upon the vote taken, adhered to their first opinion.

We have had some hesitancy in sustaining the refusal of the judge to hear the witness, by whom it was proposed to prove that a part of the jury were "improperly approached and spoken to about the case," but upon a more careful consideration we cannot find any reason- (764) able error in his action. The proof offered is in a vague and indefinite form, pointing out no specific act done or words spoken to show a tampering, or that any juror was influenced or heeded what was done or said, and the setting aside of a *suspicious* verdict rests in the discretion of the judge where nothing more appears, and there is not a legal right denied.

In the words of *Pearson, J.*, in *S. v. Tilghman,* 11 Ired., 513, "perhaps it would have been well had his Honor, in his discretion, set aside the verdict and given a new trial as a rebuke to the jury, and an assertion of the principle that trials must not only be *fair but above suspicion.* This, however, was a matter of discretion, which we have no right to revise."

He proceeds to say in this connection, the inquiry to be, "was the misconduct and irregularities such as to vitiate the verdict, to make it in law null and void and *no verdict?*"

The subject is elaborately discussed by *Ruffin, C. J.,* and *Gaston, J.,* dissenting in *S. v. Miller,* 1 D. & B., 500.

The same doctrine is held in *S. v. Morris,* 84 N. C., 756, and in *S. v. Brittain,* 89 N. C., 481.

The refusal to entertain a proposition and to admit testimony in its support, expressed in such loose terms and without indicating any fact to prove a tampering, were surely within the province of the judge.

If a juror was "improperly approached" and something said to him about the verdict, this is entirely consistent with the regular and proper action of the juror, and may have been unheeded by him in arriving at his conclusion as to the defendant's guilt. It is true the record states that the judge, in his discretion, "refused to hear any further testimony," that is, of the kind that had just been rejected, couched in such general terms and not to prove the fact wherein the (765) *tampering* consisted, so as to enable him to judge of their tendency and effect in guiding the exercise of his discretion in the premises.

The third and fourth grounds are untenable, and have been so adjudged in several cases (*S. v. Morris, supra; S. v. Brittain, supra,* and others), inasmuch as though present, the officer had no conversation on the subject of the deliberations of the jury; nor, as the case states, was there any suggestion to the contrary.

The cases cited are on indictments for capital felonies, in regard to which more rigid restraints are put upon jurors, while more control is exercised by the court and greater freedom tolerated than in trials for subordinate felonies and misdemeanors.

There is no error.

Affirmed.

Cited: Baker v. Brown, 151 N. C., 17; *S. v. Trull,* 169 N. C., 369.

THE STATE v. AMMA ELLIS.

Homicide—Provocation—Evidence—Judge's Charge.

Where, upon a trial for murder, it was shown that the prisoner and his brother went to the house of deceased (their father) in his absence, when prisoner complained to deceased's wife of the conduct of a younger brother and threatened to whip him if his father did not, and also expressed bad feeling toward his father; that prisoner and his brother then sharpened their knives, when the latter said, "Some one will be surprised tonight," to which prisoner assented; that they remained until the father arrived, when an altercation began between him and the prisoner, resulting in a combat in which the father was killed by a stab; that there was conflicting evidence as to the circumstances of the fight, and whether the prisoner acted in self-defense, or whether he struck from malice or from heat of passion; and it further appeared that he uttered heartless expressions toward his father after the fatal blow: *Held,*

STATE *v.* ELLIS.

1. That the declaration of the brother to the prisoner while sharpening the knives was competent.

2. That it was not error in the court to instruct the jury, after having charged them in respect to the law of self-defense and manslaughter, that if the provocation was slight and the prisoner used excessive force, out of all proportion to the provocation, the prisoner was guilty of murder.

INDICTMENT for murder, tried before *Merrimon, J.*, at Fall (766) Term, 1888, of the Superior Court of SAMPSON County.

There was a verdict of guilty, judgment, and appeal.

The prisoner, Amma Ellis, was charged in the indictment with the murder of James Allen Ellis. It was in evidence that he went to the house of the deceased, who was his father, on the evening of 4 September, when the sun was about one and three-quarters or two hours high. The deceased was not at home when the prisoner went to his house, but came later in the evening and before dark.

Susan Ellis, the wife of the deceased and step-mother of the prisoner, testified, among other things, in substance, that she "was at home when the prisoner came; that he complained that Holmes, a younger brother, had been 'scandalizing' him; that he said he was going to stay till the deceased came home and tell him about it, and if he did not whip Holmes he (the prisoner) would."

There was evidence tending to show the bad temper of the prisoner, and the witness testified that she told him "it was not worth while to wait and have a fuss with his father." It was in evidence that William Ellis (a brother of the prisoner, who had been included in the bill of indictment with the prisoner, but as to whom the grand jury returned "not a true bill") was in company with the prisoner; that each had a knife, which was sharpened at the grindstone; that the prisoner turned the grindstone for William to sharpen his knife, and William turned the grindstone for the prisoner while he sharpened his knife. The witness testified that "while he was grinding his knife they (prisoner and William) both laughed; Will. said, 'somebody will be surprised (767) tonight,' and Amma (the prisoner) said, 'somebody will be surprised tonight.' They finished grinding their knives, went into the house, got a whetstone and whetted their knives. Then they stood around there till the sun got low."

The prisoner excepted to the admission of the declaration of William Ellis made while he and the prisoner were grinding their knives. This is the first exception presented in the record.

There was much evidence introduced, without objection, as to what was done and said by the prisoner after he went to the house of the de-

ceased and before the deceased came home, tending to show ill will against his younger brother Holmes (who came home with his father), and also dissatisfaction with the deceased.

The other facts necessary to an understanding of the questions presented are stated in the opinion.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the case: The declaration of Will. Ellis, by itself, would not have been admissible as evidence, but he and the prisoner were engaged in a conversation; it was shortly preceding the homicide; the declaration was a part of the conversation, and the response of the prisoner made it his own declaration. The conduct of the prisoner just prior to the mortal blow, his acts and declarations, the fact that he had a knife (there was evidence tending to show that "he kept muttering about whipping the boy, Holmes, walking about with his knife open"), were competent circumstances to go to the jury, to be considered by them in determining the character of the homicide. *S. v. Gooch,* 94 N. C., 987.

(768) "It was admitted that the prisoner killed the deceased with a deadly weapon."

The evidence was conflicting. There was evidence on the part of the State tending to show malice. There was evidence on behalf of the prisoner tending to show that he was going away from the house of the deceased when the deceased rushed upon him and gave him a heavy blow on the back of the head with a thick plank or post, and was in the act of repeating the blow when the prisoner "struck back-handed" the fatal blow.

There was evidence on the part of the State tending to contradict this, and to show that the deceased "had nothing in his hand" when the fatal blow was given; that the deceased "had run across the yard to him (the prisoner) and told him to leave there or he would knock him down"; that he had nothing to strike with but his hand, and the prisoner had the knife open in his hand and struck the fatal blow.

In charging the jury his Honor instructed them, among other things, that it was for them to say "from the evidence, whether the killing was done because of a deliberate intent to kill previously formed, or because of the present provocation, or in self-defense. That if the killing was done with malice aforethought, then it was murder; but if it was done, not because of malice aforethought, but because of present provocation,

then it was manslaughter. That if the defendant had started away from the house of the deceased, and the deceased rushed after him and struck him a blow upon the back of the head with a plank or post and was in the act of striking him again, and the prisoner stabbed and killed the deceased because it was necessary for him to do so to protect his own life or to avoid great bodily harm, then there would be no offense, but the killing would be excusable homicide"; and upon these several points the testimony of the several witnesses was recited to the jury.

Upon the question of murder his Honor further said to the (769) jury that if the provocation was slight and the prisoner used excessive force, out of all proportion to the provocation, the killing would be murder, although the prisoner may not previously have formed a design to kill the deceased, and upon this point the testimony of the witnesses as to the immediate circumstances attending the stabbing was called to the attention of the jury, and it was left to them to say whether the provocation was slight and whether the prisoner used excessive force, out of all proportion to the provocation. The prisoner excepted upon the ground that the principle embraced in that part of the charge in regard to provocation and excessive force had no application to this case and was not supported by any evidence. This is the second exception.

We have not deemed it necessary to set out in detail the evidence as presented in the record, but we think there is no error in the charge of his Honor of which the prisoner could complain, for upon a review of all the evidence we feel constrained to say the most exculpatory parts of it are rendered nugatory by the conduct of the prisoner after the killing, about which there is little conflict.

The prisoner's own evidence shows an absolute want of all concern for the deceased after the blow was inflicted, while other evidence tended to show heartless exultation. It was in evidence that he said: "You may holler, G—d d—d you; I have cut you to your liver," and that upon the refusal of Will. to go for the doctor, he said, "That's right."

The charge of his Honor was as favorable to the prisoner as the evidence would warrant, and is fully sustained in all its aspects by rulings in *S. v. Gooch,* 94 N. C., 982; *S. v. Chavis,* 80 N. C., 353; *S. v. Curry,* 1 Jones, 280, and *S. v. Jarrott,* 1 Ired., 76.

Affirmed.

(770)

THE STATE v. CHARLES E. CROSS AND SAMUEL C. WHITE.

Forgery — False Entries — Jurisdiction—National Banks—Evidence—Intent—Former Conviction and Acquittal—Polling Jury—Verdict—Merger of Offenses—Nol. Pros.

1. When an offense is a necessary element and constitutes an essential part of another offense, and both are in fact one transaction, a conviction or acquittal of one is a bar to the prosecution of the other.

2. While it may be the courts of the United States have exclusive jurisdiction to try and punish the offense of making false entries in the books, etc., of national banking associations, as provided in Revised Statutes (U. S.), sec. 5209, it does not follow that, because such entries may have been based upon acts which constitute an independent and distinct offense against the laws of a State, the jurisdiction of the courts of the latter is thereby ousted.

3. Therefore, where it appeared that the defendant, an officer of a national bank, forged certain bonds, etc., with the purpose only to deceive the bank examiners of the United States, and entered them upon the books of the bank as genuine: *Held*, that the State courts had jurisdiction of the *forgery*.

4. Section 5418, Rev. Stat. U. S., providing for the punishment of those who shall forge or counterfeit "any bond . . . or other writing for the purpose of defrauding the United States," is confined to frauds attempted to be perpetrated against the government, and does not embrace securities held by banks or individuals against other business corporations or individuals; nor does it extend to forgeries made with the intent to deceive a Federal Bank Examiner, where it does not appear that the Federal Government has any pecuniary interest in the matter.

5. Upon the trial of an indictment for forgery against the president and cashier of a bank, wherein it was charged the defendants forged and uttered certain bonds and deposited them as assets of the bank: *Held*, that evidence of the ownership of the stock of the bank and its financial condition at and prior to the time of the alleged forgeries was incompetent, the only inquiry being as to the perpetration of the forgery and the intent to defraud; and that it was unnecessary to allege or prove that any particular person was defrauded.

6. If a forgery is committed with a present *intent* to defraud, the offense is complete, whether it is successfully consummated or not; and it is not essential that any advantage was anticipated to accrue to the person charged.

7. Where the paper-writing alleged to be forged is such in appearance that it may, from its nature, or in the course of business, deceive another person, the offense of forgery is complete.

8. Where the alleged forged instrument has the names or two or more persons affixed, it is sufficient if one of them is proved to have been forged.

9. Where, upon the trial of an indictment containing four counts, the jury, after considerable time devoted to deliberation, announced they could not agree, and upon being polled so stated, whereupon the court further polled them by asking each juror what was his verdict, and it thereby appeared that the jury were agreed upon two counts, but could not agree upon the others, and the jury having again retired the Solicitor entered a *nol. pros.* as to the two counts upon which the jury were disagreed, and thereupon a verdict of guilty was rendered as to the others: *Held*, that while this method of polling the jury was not to be approved, inasmuch as no injury could result to the defendant the verdict should be allowed to stand—the *nol. pros.* being, in effect, an acquittal of those counts.

THIS was an indictment for forgery, tried before *Avery, J.*, at (771) July Term, 1888, of WAKE Superior Court.

The defendants, Charles E. Cross and Samuel C. White, in an indictment found by the grand jury of the Superior Court of the county of Wake, are charged as follows:

"The jurors for the State, upon their oath, present: That Charles E. Cross and Samuel C. White, both late of the county of Wake and State aforesaid, on 8 March, in the year of our Lord one thousand eight hundred and eighty-eight, and within the jurisdiction of this court, at and in the county aforesaid, unlawfully and feloniously of their own head and imagination, did wittingly and falsely make, forge and counterfeit, and then and there wittingly assent to the falsely making, forging and counterfeiting, a certain promissory note for the payment of money, which said forged promissory note is of the tenor following, that is to say:

$6,250.00. 8 MARCH, 1888. (772)

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest at the rate of eight per cent per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

And upon the back of which said false, forged and counterfeit promissory note is stamped and written—D. D.

D. H. GRAVES.
$6,250—July 8.

With intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The second count charges the defendants with feloniously and wittingly uttering and publishing as true a certain false, forged and counterfeit promissory note for the payment of money, setting it out in the same descriptive words as in the first count, "with intent to defraud," adding,

"they, the said Charles E. Cross and Samuel C. White, at the time
(773) they so uttered and published the said false, forged and counterfeit note, then and there well knowing the same to be false, forged and counterfeited, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The third is in all respects similar to the first count charging the forgery, except that it concludes thus: "With intent to defraud then and there the State National Bank, a corporation then and there duly created and existing under the laws of the United States, contrary," etc., as before.

The fourth count charges a conspiracy with others to defraud the same bank by making, forging and counterfeiting and uttering such promissory note, "with intent to defraud," contrary, etc., as in the other count.

At their arraignment for trial at the July Term of said Superior Court the defendants put in a plea in abatement to the jurisdiction of the court, which is in these words:

"And the said Charles E. Cross and Samuel C. White, in their own proper persons, come into court here, and, having heard the indictment in the above-entitled case read, do say:

That the said court here ought not to take cognizance of the conspiracy and conspiracies, forgery and forgeries, uttering and utterings in the said indictment specified, because:

Protesting each for himself that he is not guilty of the same, as so averred, nevertheless the said Charles E. Cross and Samuel C. White, each severally says:

That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in said indictment specified, there was a national banking association duly organized and acting under the laws of the United States in Raleigh, Wake County, North Carolina, known as the State National Bank of Raleigh, North Carolina, having

its place of business and doing its said business in the said city
(774) of Raleigh, in the county of Wake and State of North Carolina,

and within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina.

That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel C. White was then and there an officer of said bank, to wit, its cashier.

That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, were made, entered into, committed and done by the said Charles E. Cross, and afterwards assented to by the said Samuel C. White, for the purpose of supporting, sustaining and making a certain false entry and entries in the books of said bank, and that the said false entry and entries were by the said Samuel C. White, cashier, as aforesaid, acting as cashier, actually made in and upon the books of said bank, the said Charles E. Cross being then and there aiding and abetting, for the purpose of deceiving and with the intent to deceive the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examine into the affairs of the said association, to wit, the State National Bank of Raleigh, North Carolina.

That the said note in said indictment specified was never uttered or published in any way nor to any other person or corporation, nor was there any intent or attempt to do so. That the said note in the said indictment specified was entered upon and in the books of the State National Bank aforesaid as the property of the said the State National Bank of Raleigh, North Carolina, and placed among the assets by the said Charles E. Cross and Samuel C. White as aforesaid, for the purpose and with the intent aforesaid.

The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

Whereupon, they pray judgment of the said court now here, will or ought to take cognizance of this indictment here preferred against them, and that by the court here they may be dismissed and discharged,

etc. (Signed) C. E. CROSS, (775)
SAMUEL C. WHITE."

The plea is verified by their several oaths, and thereupon the solicitor, T. M. Argo, prosecuting for the State, entered a demurrer to said plea, which demurrer, upon argument, was sustained, and the defendants' motion to dismiss the action was denied, and an appeal from the ruling at this stage of the proceeding refused, to all which ruling defendants excepted.

The defendants then each and severally pleaded not guilty of the charges contained in the indictment.

Upon the issue thus joined upon the evidence, after argument and the charge of the court, the jury returned a verdict of guilty as to both de-

fendants upon the two first counts of the indictment, and judgment being pronounced thereon, the defendants appealed to this Court, assigning various errors to the rulings of the court during the progress of the trial.

The other facts necessary to an understanding of the questions decided are stated in the opinion.

Attorney-General and John Devereux, Jr., for State.

Walter R. Henry, T. C. Fuller, E. C. Smith and George H. Snow for defendants.

SMITH, C. J., after stating the case: The first exception is to the action of the court in sustaining the demurrer and disallowing the plea to the jurisdiction of the court.

It is insisted in the carefully prepared brief for the accused laid before us, with an oral argument in its support and a large array of adjudications and other authorities, that (and we copy the words of the (776) contention) "the State court has no jurisdiction over the case at bar. The false entries on the books of the State National Bank of Raleigh, N. C., *are so false* because based upon the forged notes. If the notes are not forged, the entries are not false. To determine the falsity of said entries, the Federal Court has exclusive jurisdiction. If the State court be conceded jurisdiction to try the defendants for said forgeries, the Federal Court cannot afterwards try the defendants for the false entries, the forgeries being integral and essential elements in the false entries. The Federal Court having exclusive jurisdiction to determine the falsity of the entries and to punish the makers thereof, it follows that jurisdiction to try the defendants for said forgeries cannot be conceded to the State court."

The argument proceeds upon the assumption that the forgery, a misdemeanor of high grade under the laws of the State, being the means by which the false entries are made, and by reference to which the falsity is determined, is so associated with the entries and so merges in them as a constituent element in the offense constituted and punished under the act of Congress as to oust the jurisdiction of the State court to try and punish the forgery as a distinct and separate crime. We shall not question the correctness of the proposition which places the offense of making the false entry on the books of the bank under the sole cognizance of the courts of the United States, and denies jurisdiction to the courts of the State, but we are unable to agree with counsel that this takes from the latter courts the right to try and punish for the distinct and independent crime made such by the laws of the State, notwithstanding the forged note was the instrument employed to give a false coloring to the entry and deceive one examining into the financial condition of the bank. If

the note was genuine, but deposited in the bank with the understanding that it was to be surrendered to the makers, or canceled, as soon as the illegal purpose was accomplished, or if the entry showed a larger sum than was really due, ignoring the credits to which it was (777) subject, and this was knowingly done with the same illegal intent, or if it had been made without the apparent support of any such paper of value, the entry would be false and deceptive, and become a criminal offense under the act of Congress.

The forgery is not, then, a constituent part of the criminal act of making a false entry, though in the present case preceding the latter in time, and comprehended in the general purpose formed to defraud, and furnishing strong evidence of the unlawful intent in making the entries, and thus misrepresenting the resources and condition of the association when undergoing official examination.

Let us suppose the crime of forgery were a capital felony, or an offense punished with great severity and the making the false entry one of much milder grade, would the fact that the latter is cognizable in the Federal Courts, even when, as in this case, no jurisdiction has attached, deprive the State of its right to pursue and punish the offender for the infraction of its own laws in the committing of the higher crime? The question supplies its own answer; and as forgery and making a false entry are distinct and separate crimes, the jurisdiction assumed over the one offense against the State law is entirely consistent with the exercise of a like jurisdiction over the other offense, made such by the act of Congress.

The numerous references made in the brief of defendants' counsel do not conflict with the foregoing view of the law applicable to the facts of the case that we have taken, as upon an examination will appear. The authorities are cited in the brief at page 14, and those most favorable to the view taken for the defendants we propose to examine. It will be seen that none of them refer to distinct and conflicting jurisdictions, but to cases under a single jurisdiction.

In *S. v. Shepard,* 7 Conn., 54, it was decided that a conviction (778) of an attempt to commit a rape under an indictment so charging, was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape. And so it is held in *S. v. Smith,* 43 Verm., 324, and the general principle is laid down that when an offense is a *necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction,* a conviction or acquittal of one is a bar to a prosecution to the other.

In *Drake v. State,* 60 Ala., 43, which was an indictment for an assault with intent to murder, and under it a conviction of an assault and bat-

tery, without a weapon, a *nolle prosequi* having been entered as to the felony charged, is not a bar to the charge of an assault and battery with a weapon, when, with leave of the court, the defendant withdraws that plea and pleads guilty, and he cannot complain thereof. The Court say, in general terms, that a single criminal act cannot be split up into two or more distinct indictable offenses and prosecuted as such.

In *S. v. Cooper,* 1 Green. (N. J.), the prisoner was indicted as principal, with two others as accessories, for the wilful and malicious burning of a dwelling-house, and at the same time charged another indictment, then found, with arson, in burning the same dwelling-house, and by means thereof mortally burning and killing one Joseph Hopper, who was in said dwelling. On the trial of the charge of arson the defendant was found guilty. The indictment for murder was then moved; thereupon the prisoner interposed the defense of a conviction of the offense of arson.

The court sustained the plea, declaring that the killing being unintentional and a simple consequence of the burning, the conviction for the burning was a bar to the second indictment, charging a homicide as an accidental but not intended assault, and that the offenses
(779) were so essentially one that the prisoner could not be punished for the second imputed crime.

In the case of *S. v. Chappen,* 2 Swann, 493, it is held that after a fine imposed for an assault, a person could not be indicted for an assault and battery, there being but a single act.

In *S. v. Shelly,* 11 Lea., 594, it was held that a person swearing falsely in a case pending before a United States commissioner, exercising his functions, as such judicially, could not be tried for the perjury then committed before the tribunal of a state, the jurisdiction vested in the federal courts being exclusive.

The same conclusion is reached and announced in *S. v. Pike,* 15 N. H., 83.

The principle is extended and applied to actions for a penalty given by an act of Congress in reference to license for retailing spirituous liquors, in *United States v. Lathrop,* 17 Johnson, 4.

We now proceed to consider the cases referred to in our own reports.

In *S. v. Ingles,* 2 Hay., 4 (148), the indictment for a riot and for beating and imprisoning one Barry, was resisted upon the plea of a former conviction for an assault and battery grounded on the same fact. The Court say that "the State cannot divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offense compounded of them all," and so the plea was held good.

In *S. v. Lewis* (a slave), 2 Hawks, 98, two bills of indictment were found against the prisoner at the same time—one for burglary and larceny, the other for robbery—and both charged the felonious taking of the same goods. On the first the prisoner was convicted of the larceny only. It was ruled that he could not be tried on the second indictment, because it would be twice putting him in (780) jeopardy for the same crime.

In *S. v. Commissioners of Fayetteville,* 2 Murph., 371, the defendants were tried and convicted for not keeping one of the streets in the town of Fayetteville in repair, and there were three other streets in the same condition, for the neglect to repair which three other separate indictments had been found, the conviction was relied on as a bar to the other indictments, and the plea was sustained. "It would be monstrous," says the court, "to charge them with separate indictments for every street in the town, when the whole were out of repair at the same time, especially when upon one indictment a fine can be imposed adequate to the real estimate of the offense." The imputation is of negligence as the distinctive offense, though shown as applicable to different streets, just as an overseer is guilty of but one offense in neglecting to keep his road in repair as a whole, and not as many offenses as there *are parts* of it out of repair and needing amendment.

So, if a person has been tried for an affray, he cannot again be prosecuted for an assault and battery committed in making the affray. *S. v. Stanly,* 4 Jo., 290. And similar ruling was made when the assault was made in a riot and given in evidence to prove the riot in an indictment for the latter offense.

None of these cases to which our attention has been given go beyond these adjudications, and they clearly recognize the distinction which we have drawn in examining the case before us, where the offenses are not only cognizable in different tribunals, but distinct and independent themselves, of either one of which a party may be guilty, and not guilty of the other. The principle is not affected by the fact that the spurious character of the note may supply forcible if not invincible evidence of the *mala fides* and fraudulent purpose of (781) the act of the making the false entry.

It is furthermore insisted that the forgery of the note, as a substantive crime, made, as alleged, to defraud the United States, can be prosecuted only in the courts of the United States under sec. 5418 of the Revised Statutes of the United States. The enactment is in these words: "Every person who falsely makes, alters, forges, or counterfeits any bid proposal, guarantee, official bond, public record, affidavit *or other writing,* for the purpose of defrauding the United States, or utters or publishes

as true any such false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, *or other writing,* for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered or counterfeited for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment."

Very similar in terms is sec. 5479, in the same chapter 5 of title 70, entitled "Crimes against the operations of the Government."

From the entire context and the carefully constructed sentence or section itself, it is manifestly directed against frauds attempted to be perpetrated on the Government in its fiscal operations, as the entire chapter shows. The section nowhere mentions promissory notes or money securities held by banks or individuals against other business corporations or individuals, and the careful enumeration of the things to be forged, and leaving out bills and notes, in which are formed relations between the debtor and payee or holder, are significant of the scope and limitations of the enactment.

(782) The expression, "or other writing," following the enumeration must find a restriction in the class to which it belongs, and the obvious scope of the operation of the section as an entirety. It does not include in our interpretation of the clause, "for the purpose of defrauding the United States," a commissioner sent to look into and report the condition of the bank, when it does not appear that the government has any pecuniary interest in the matter and is only exercising, through this agency, a supervisory power over these institutions to secure their fidelity to duty and the safety of the public.

But if it be conceded that such a promissory note is embraced, it is only such as are forged or counterfeited to defraud the United States, and an averment to that effect is necessary to withdraw such forgeries from the general jurisdiction of state courts. Such notes alone are transferred to the jurisdiction of the federal courts, leaving all others, where such intent does not enter into the criminal act, to the judicial tribunals of the state. The absence of this indispensable prerequisite in any averment contained in the plea in abatement precludes the defendants from insisting that the forgery does not belong to the jurisdiction of the state, for it is not all forged notes that can only belong to and be tried in the federal court, but such as are made for the unlawful purpose specified in the statute, and therefore, the plea

does not show an excluding jurisdiction and take away that of the court. See *Coleman v. Tennessee,* 97 U. S. Rep., 509.

The exceptions numbered from 8 to 24 inclusive are taken to the refusal of the court to permit evidence proposed to be given, that the stock of the bank belonged to the family of the late John G. Williams, its founder, and to one of whose daughters the defendant Cross was married, while the defendant White was the brother of the widow of the deceased, and offered to repel the charge of an intent to defraud the bank; and further, as to the previous condition of (783) the bank under the management of former presidents.

We think the testimony was properly rejected. The simple inquiry was as to the alleged forgery of the note set out in the indictment and the fraudulent purpose for which it was intended to be used and was in fact used in covering up the real condition of the institution and supplying spurious in place of its wasted resources. To this end the forgery was committed as a method of effectuating the purpose, and placed as if genuine among the assets. This use of the paper involves the intent to defraud some one, and under our statute (The Code, sec. 1191), a general charge of an intent to defraud without designating the person or corporation intended to be defrauded is sufficient.

The intent to defraud is involved in the making and using the forged instrument as if genuine, and this purpose is not repelled by the existence of family relations among the parties, nor does the evidence tend to disprove the presence of the fraudulent intent in the act to which it is an inseparable incident. Whatever misconduct of others, previously entrusted with its management, may have led to the disastrous condition in which, in assuming the presidency, the defendant Cross found it, no defense nor extenuation in law is afforded by its necessities for the criminal act committed, and inquiries in that direction were wholly out of place in this prosecution.

Again, other notes, alleged to be spurious and found among the assets of the bank, the State proposed to prove in support of the charge of conspiracy and to show the *scienter,* and, after objection, was allowed to do so.

For this purpose only it was competent, and for this purpose alone the proof was admitted. But it became immaterial, inasmuch as no conviction was had upon the charges it was offered to support. . . .

We dispose of the other exceptions relating to the evidence (784) with the single remark that they are equally untenable as the others, and we next proceed to examine the instructions which were tendered and refused, as also such as were addressed to the jury, so far as they are not embraced in what has been already said.

The first three refused instructions are of the class referred to in the preceding remark as having in their import been before examined.

The fourth relates to the charge of conspiracy, which is put out of the way by the verdict.

The fifth asserts, as a proposition of law, that if the note was forged not for the benefit of the defendants, nor was any money obtained thereon, but merely to create a false idea of the condition and solvency of the bank, and the jury so believe, the defendants are not guilty.

5. The proposition is an erroneous statement of the law, for if the forgery was committed with a *present intent* to defraud, the offense was complete, whether the expected advantage was to accrue from it to the defendants personally or to another, and whether the purpose was successfully attained or they failed in it.

6. The sixth instruction is substantially the same as must be our ruling upon it.

7. The court properly declined to tell the jury that the finding the note among the assets of the bank, after the departure of the defendants, was not a finding that the defendants had had possession, and warranted no inference that the defendants knew of, were guilty of, or were in any way connected with the making of the note.

The tenor of the evidence did not authorize the giving any such direction, and the jury were to draw their conclusions, not from one isolated fact, but from all that was shown.

9. If there was not such resemblance between the genuine and spurious handwriting of Graves and Sanders appearing in the
(785) note as would deceive a man of ordinary intelligence and caution, and for want of similarity in the signatures the forged note "did not have any legal adaptation to accomplish a legal wrong, the person could not be convicted."

This proposition would excuse an act of forgery in every case, even when the fraud had been consummated when the person upon whom it was practiced was unacquainted with the handwriting of one whose signature it purported to be and who reposed confidence in the genuineness of the paper. The variation in the writing may be evidence of the absence of an intent to defraud, but not when the intent has been developed in the act of defrauding. It was in this case made payable to the bank and put in possession of the bank, and there left when its doors were closed as part of its resources. Besides, the variance was not so marked as to call for such a direction, nor does it find support in the case of *S. v. Covington,* 94 N. C., 913. Precisely such an instruction was declined in that case in words almost identical and the ruling affirmed on appeal; *Merrimon, J.,* speaking for the Court,

in the conclusion of his remarks upon this point thus: "If, therefore, the false and fraudulent paper-writing be such that it might, from its nature and the course of business deceive or mislead to the prejudice of another person, the offense of forgery would be complete."

The remaining instruction refused was that if only one of the names signed to the notes is shown to be forged and the evidence not satisfactory of the forgery of the other, there is a fatal variance, and the verdict must be for the defendants.

The contrary has been expressly decided in the cases of *S. v. Gardiner,* 1 Ired., 27, and *S. v. Davis,* 69 N. C., 313, and we are content with the mere reference to them.

It will conduce to a more correct understanding of these exceptions and the rulings upon them to reproduce so much of the charge delivered in place of that asked and refused as relates to the (786) same subject matter, and which is also excepted to in detail.

After explaining the separate charges made in the several counts of the indictment and defining the offense of forgery, the court says:

"If the jury should be satisfied, beyond a reasonable doubt, from the testimony that either of the defendants forged or altered the note set forth in the bill of indictment with intent to defraud any individual or corporation whatever, then such defendant would be guilty as charged in the first count of the bill of indictment.

If the jury should be satisfied in the same way, beyond a reasonable doubt, that either of the defendants aided or abetted another in falsely forging or altering said note, or assented to the false forging or altering said note after it had been *forged* by another with intent to defraud any person or corporation whatever, such defendant would be guilty, in manner and form, as charged in the first count.

If the jury are satisfied beyond a reasonable doubt that either of the defendants did utter and publish said note, knowing it to have been forged or altered with intent to defraud any person or corporation whatever, then such defendant would be guilty as charged in the second count.

If the signature of the name of D. H. Graves to the note did not resemble his own proper signature, that is a circumstance that the jury may consider in determining whether there was an intent on the part of either of the defendants to defraud said Graves. But if his name was written by either of the defendants to said note for the purpose of defrauding any person, or if either of the defendants assented to the writing of such name by another than Graves with said intent, then such defendant would be guilty, whether the signature bore such resemblance to that of said Graves as would probably deceive any person

acquainted with his handwriting as to the genuineness or not.
(787) The rule in reference to the adaptation to deceive in such cases applies only to counterfeit money, or currency, or coin."

We find nothing in this series of directions of which the defendants can justly complain, and what has been already said disposes of these exceptions also. But if there was an erroneous statement of the law in one particular, while it was correctly laid down in other parts of the single instruction, it would be unavailing according to our own and the rulings in the U. S. Supreme Court. *Bost v. Bost,* 87 N. C., 477; *Williams v. Johnston,* 94 N. C., 633; *Johnson v. Jones,* 1 Black., 209; *Lincoln v. Claflin,* 7 Wall., 132.

We have omitted to advert to the charge in so far as it refers to the second and third counts, for the reason that no verdict was demanded or rendered on them, as will hereafter appear, and no harm has come to the defendants in consequence.

The last and remaining objection disclosed in the record has reference to what transpired at the rendition of the verdict. The facts are these:

The jurors having retired to consult upon their verdict, sent a message through the officer put in charge of them, signed by one of their number, to the effect that it was impossible for them to agree, and this juror stating that he had been suffering for a day or more with sick headache caused by indigestion, and did not feel able to continue longer. The jurors were thereupon brought before the court by order of the judge, and the court, in the exercise of its discretion, in the presence of the defendants, proceeded to poll the jury, to the doing of which the defendants excepted. In polling the jury, the judge first inquired of the whole body whether they could agree, and the foreman answered that they could not. Then each juror, as his name was called, was asked, "What say you—are the defendants, or either of them, guilty in the manner and form as charged in the bill of indictment,
(788) or not guilty?" To this exception was also taken. When the process of making the separate inquiry of each was concluded, it appeared from the answers that all the jurors were agreed upon a verdict of guilty against both defendants upon the first and second counts, while two of the number were for finding them not guilty upon the third and fourth counts. The solicitor thereupon proposed, in presence of the jury, to enter a *nolle prosequi* to those counts. The jury withdrew, and, after argument from the solicitor, he was authorized to make the entry. Upon the return of the jury to the courtroom, they were informed by the judge of the allowance of the entry, and that they need only pass upon the charges contained in the first and second counts. After again retiring, they returned in charge of the

officer into court, and for their verdict say the defendants are guilty. The jury was again polled, at the instance of the defendants' counsel, and asked, each juror, as to the verdict, and each responded, "Guilty." Exceptions were made to each step taken in the action of the court; and further, that the verdict, though so ordered by the court, was a general and not a special verdict. The court finds, as a fact, that the jury were not ordered to find a special verdict. While we do not approve of the mode adopted to ascertain the individual opinion of each juror before an agreement has been reached by the entire body, even to ascertain whether there are insurmountable difficulties in the way of arriving at unanimity and they should be discharged, a discretionary power rested in the judge, because of its possible injurious effect upon the minds of the dissenting jurors, there is no error in law committed, and it is apparent no injury has come to the defendants by eliminating so much of the charge as was abandoned by the solicitor. He had no right to enter a *nolle prosequi* in its strict legal sense, which, like a nonsuit in a civil action, would leave the defendants exposed to another prosecution for the same offense. The action of the solicitor is miscalled, but in legal effect it was a consent to an (789) acquittal of the accusations in the specified counts, and such is the result of a failure to render a verdict upon some of several counts in an indictment. *S. v. Taylor,* 84 N. C., 773; *S. v. McNeill,* 93 N. C., 552; *S. v. Bowers,* 94 N. C., 910; *S. v. Thompson,* 95 N. C., 596.

The last case shows also that a general verdict may be construed in the light of instructions given by the judge, and though general in terms will, in legal effect, be restricted to such alone of the counts as the jury were directed to pass on, a ruling sanctioned in the case of *S. v. Long,* 7 Jones, 24, and *S. v. Leak,* 80 N. C., 403.

The questioning of the jury revealed the fact of an entire unanimity upon the first two charges, the result of their deliberation before coming into court, and a readiness to render a verdict accordingly. The abandonment of the others for the purpose of ending the cause was so far favorable to the defendants as to operate as a partial acquittal, and did not, nor could of itself work any injury to them. *S. v. John,* 8 Ired., 330.

There was no reviewable error in what transpired, but the granting of a new trial after setting aside the verdict rested in the sound discretion of the presiding judge, which he has seen fit to exercise in refusing the application for it. The motions in arrest of judgment for supposed defects in the form of the indictment were properly overruled, for it substantially follows approved and recognized precedent, except so far as modified by statute in reference to the averment

of an intent to defraud, which it sanctions without further designation. We have thus carefully perused the record and examined the numerous exceptions taken during the progress of the trial, pressed with great earnestness in the argument on the appeal, in which a very thorough research among the reports and elementary writers has been
(790) apparent, and yet our convictions as given in this opinion are clear and strong that the accused have had an impartial trial and the result must stand. There is no error, and the judgment must be and is

Affirmed.

Cited: S. v. Harmon, 104 N. C., 794; *S. v. Cross,* 106 N. C., 650; *Bagg v. R. R.,* 109 N. C., 290; *S. v. Staton,* 133 N. C., 644.

INDEX.

COMMON CARRIER.

1. A common carrier who enters into a *special contract* to transport passengers or freight to a point beyond its own line, which can only be reached by another line, thereby constitutes the latter its agent in the performance of the contract, and will be held liable for any damages resulting from the negligence of such agent. *Washington v. R. R.*, 239.