ANNOTATIONS INCLUDE 179 N. C.

NORTH CAROLINA REPORTS

VOL. 104

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1889

REPORTED BY

THEODORE F. DAVIDSON

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2 ANNO ED.

BY

WALTER CLARK

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RALEIGH, N. C.
1920

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Rule 62 of the Supreme Court is as follows:

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1 and 2 Martin Taylor & Conf	as	1	N. C.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
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1 " Eq.	"	16	"	1 Jones Law	"	46	"
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2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

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

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OF THE

SUPREME COURT OF NORTH CAROLINA

SEPTEMBER TERM, 1889

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*WILLIAM N. H. SMITH
*AUGUSTUS S. MERRIMON

ASSOCIATE JUSTICES:

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ALFONSO C. AVERY
JAMES E. SHEPHERD
JOSEPH J. DAVIS
*WALTER CLARK

ATTORNEY-GENERAL:

THEODORE F. DAVIDSON

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN

MARSHAL AND LIBRARIAN OF THE SUPREME COURT:

ROBERT H. BRADLEY

---

* Chief Justice W. N. H. Smith died 14 November, 1889, and Judge A. S. Merrimon was appointed by Governor Fowle to fill the vacancy, and Walter Clark, Associate Justice, *vice* Merrimon.

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FREDERICK PHILLIPS,	2d	"	JAMES C. MACRAE,	7th	"
HENRY G. CONNOR,	3d	"	R. F. ARMFIELD,	8th	"
*WALTER CLARK,	4th	"	JESSE F. GRAVES,	9th	"
*SPIER WHITAKER,	4th	"	JOHN GRAY BYNUM,	10th	"
*JOHN A. GILMER,	5th	"	WILLIAM M. SHIPP,	11th	"
*T. B. WOMACK,	5th	"	JAMES H. MERRIMON,	12th	"

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FOR NEW HANOVER AND MECKLENBURG COUNTIES

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W. R. FRENCH, New Hanover, Clerk.....Wilmington
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T. R. ROBINSON, Mecklenburg, Clerk.....Charlotte

FOR BUNCOMBE COUNTY

Hon. CHARLES A. MOORE, Judge.....Asheville
E. D. CARTER, Esq., Solicitor.....Asheville
J. R. PATTERSON, Clerk.....Asheville

---

* Mr. Whitaker was appointed by Governor Fowle, *vice* Judge Walter Clark, appointed Associate Justice of the Supreme Court, and Mr. Womack was appointed *vice* Judge Gilmer, resigned.

LICENSED ATTORNEYS

SEPTEMBER TERM, 1889

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Charles B. Atkinson
Richard B. Bailey
Oliver D. Batchelor
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Charles R. Sterne
Theophilus T. Thorne
Lemuel B. Wetmore

CASES REPORTED

CASES CITED

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPRINTS

BY THE ANNOTATOR

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, ch. 309, and subsequent statutes, now Revisal, 5361, which has been further amended by Laws 1917, chapters 201 and 292.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Editions. All the volumes from 1 to 164, inclusive, have been reprinted with annotations.

The first 7 volumes of N. C. Reports were not official, but, as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws 1871, ch. 112, and the duties were put on the Attorney General who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $1,500, $500 for room rent, and a clerk at $600 per annum.

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the amendments above referred to, being now C. S., 7671, was passed to

authorize the Secretary of State to reprint the volumes already out of print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme Court when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports these statements of cases (until a very recent date) were always made by the Reporters, and not by the judges, and the briefs were already omitted in our current volumes.

The Secretary of State at first tried the experiment of reprinting a few volumes without eliminating the unnecessary matter and without annotations, and without correcting the numerous typographical errors; but this proving unsatisfactory to the profession, and the expense entirely too great, after consultation with the Governor and Attorney-General, the then Secretary of State requested the writer to annotate the volumes in order to make them more salable and to reduce the expense of the work (which was necessary) by condensing prolix statements and omitting briefs of counsel. This has been done ever since. The annotations have been made, for the most part, without any aid, as Shepard's Annotations (which besides, required to be checked for possible errors) were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse Index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 164 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these *Reprints* there was no Reporter to be paid, either by profits of sale as formerly, or by salary as now, the reprints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of

the Reports then stored in Uzzell's Bindery, with the result that many additional volumes were required to be reprinted, and others that had already been annotated and reprinted were reprinted a second time, the annotations, however, being brought down to date.

The current Reports are sold at $1.50 from which the commission of 12½ per cent for selling is deducted, i. e., about 19 cents, making the net return to the State $1.31 per volume, while, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his clerk. The next Legislature will doubtless raise the price of the current Reports, if not of the Reprints also.

In all the more recent volumes the statement of the cases has been made by the judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation in the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix statement or of the record, which was often used instead of a statement, and by the omission of the briefs. Even in using the original reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports were very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English judges were usually, if not always, delivered orally from the bench and the reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the judges, under the guise, it is true, of "declaring the law," it has been often changed from what was announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the Courts allowed to be quoted as precedents. In France and all other countries the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code—appli-

cable, without comment. In English-speaking countries, in which alone the Reports of decisions are allowed to be cited, the number of the volumes of the Reports in 1890 were 8,000. These have now increased to 30,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris."; A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the Courts of the present day are more likely to be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary, and the profession and the Courts must inevitably be submerged beneath the flood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require three volumes a year. If the briefs and redundant statements were still inserted as in the earlier reports, it would require ten volumes per year, taxing the shelf room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all Courts to reduce the size of current Reports by the judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court. The General Assembly had already given a similar intimation by providing that "The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary." C. S., 1416.

RALEIGH, N. C., 1 December, 1920.

Walter Clark

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SEPTEMBER TERM, 1889

WILLIAM HUTSON ET AL. v. JOHN SAWYER ET AL.*

Assignment of Error—Wills—Probate—Devisavit Vel Non—Parties.

1. When a will is offered for probate, the proceeding is not a civil action, nor is it a special proceeding, but is *in rem*, to which there are, strictly speaking, no parties. When an issue *devisavit vel non* is raised, the court will require all persons interested in the matter to be brought before it. Any of them may withdraw if they see proper, but none of them have a right to take or suffer a judgment of nonsuit, or dismiss the proceeding.

2. If errors are committed in the progress of the investigation, the remedy is to note the exceptions, and, after judgment, appeal.

3. Although there may be no formal assignment of error, the Supreme Court will inspect the whole record and pronounce such judgment as in law ought to have been rendered.

DEVISAVIT VEL NON, tried before *Avery, J.*, at Spring Term, (2) 1887, of TYRRELL.

On the trial the propounders offered certain testimony, insisting that it was competent and proper to prove the affirmative of the issue; the *caveators* objected to its competency and sufficiency, the court sustained the objection, and thereupon the propounders excepted, submitted "to judgment of nonsuit, and appealed."

C. W. Grandy for propounders.
No counsel for caveators.

MERRIMON, J. The proceeding is not like an ordinary action or special proceeding to which, regularly, there are parties plaintiff and defendant, nor is the purpose of it to litigate a cause of action which the plaintiff may abandon or withdraw from the court by suffering a judg-

*AVERY, J., did not sit upon the hearing of this appeal.

ment of *nonsuit* or otherwise. It is a proceeding *in rem,* to which, strictly there are no parties. The court, in the way prescribed by statute, takes jurisdiction of the paper writing or script propounded for probate as the will of the alleged testator. The jurisdiction is *in rem,* and the chief purpose is not to settle and administer the rights of the parties claiming under or against the alleged will, but to ascertain whether the supposed testator died testate or intestate, and if he died testate, whether or not the script propounded, or any part of it, be his will.

When the issue *devisavit vel non* is raised, the court desires to have all persons interested before it to see the proceedings. When they are cited, they come into court, and may stand passively or take active part on either side of the contest, according as they may be interested, in favor of or adversely to the script propounded as the will; and any party thus before the court may withdraw from the proceeding, paying such costs as he may properly be chargeable with, but in that case the script
(3) is left with the court to be proven or disposed of according to law. In the very nature of the matter, a party before the court does not sustain such relation to the proceeding as to give him control of it or the subject-matter of the issue; he is there to see proceedings and take active part, if he will, in an inquiry as to a matter—the script—of which the court has control, and which it is its duty to settle and determine. The purpose is to determine the nature of the script for the benefit of all whom it may concern, and not specially for that of any particular person, whether he be before the court or not. The proceeding, the script, the issue, are not of the persons before the court; they cannot control or direct the same as parties; that is the sole province of the court as to the issue; they are not parties; and hence, whether they take part on one side or the other of it, they cannot take or suffer a judgment of nonsuit, nor can they dismiss the proceeding. *St. John's Lodge v. Callender,* 26 N. C., 335; *Sawyer v. Dozier,* 27 N. C., 97; *Enloe v. Sherrill,* 28 N. C., 212; *Whitford v. Hurst,* 31 N. C., 170; *Love v. Johnston,* 34 N. C., 355; *Syme v. Broughton,* 85 N. C., 367.

The appellants could not, therefore, suffer a judgment of nonsuit, as they undertook to do. If they could, and this Court should affirm the judgment appealed from, the consequence would be to withdraw the script from the jurisdiction of the Court, put an end to the proceeding, and leave the issue undetermined, and thus the purpose of the law would be defeated. Obviously the action of the court was erroneous.

The appellants, having excepted because of the rejection of evidence offered by them on the trial, should have waited until after a verdict and judgment thereupon, and then assigned errors and appealed. This is the proper course of practice in this and like cases.

There is no formal assignment of the error we have pointed out, (4) but it is the duty of this Court to inspect the whole record and give such judgment as in law ought to be given. Code, sec. 957; *Thornton v. Brady,* 100 N. C., 38.

Upon an examination of the record before us, we see that the judgment appealed from is not warranted by law. It contravenes the nature and purpose of the proceeding. It is, hence, erroneous, and this Court must so declare.

The judgment of nonsuit must be set aside and the issue tried and disposed of according to law.

Cited: R. R. v. Church, post, 533; *In re Young's,* 123 N. C., 360; *Davis v. Blevins, ib.,* 383; *Collins v. Collins,* 125 N. C., 104; *Powell v. Watkins,* 172 N. C., 247; *Starnes v. Thompson,* 173 N. C., 472.

R. F. OVERMAN ET AL. v. DAVID JACKSON.

Executor and Administrator—"Lawful Representatives"—Vendor and Vendee—Mortgage—Statute Limitations—Powers.

1. B. contracted to sell J. land. In the agreement it was provided that title should be retained till purchase-money was paid, when the land should be conveyed to vendee by the vendor "or his lawful representatives." It was also stipulated that, in default of payment, the vendor, "or his lawful representatives," might sell the land and apply the proceeds to the satisfaction of any sum due. *Held,* that the words "lawful representatives" meant the executors or administrators of the vendor, and conferred upon them not only the power to sell, but the power to convey.

2. While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, the statute prescribing the time within which actions to foreclose must be brought does not embrace actions arising out of executory contracts for sales of land.

3. In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of ten years (Code, sec. 158), and it only begins to run when the possession of vendee becomes hostile by a refusal to surrender after demand and notice.

4. Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced.

APPEAL from *McRae, J.,* a jury trial being waived, at Fall (5) Term, 1888, of PERQUIMANS.

The following facts were agreed upon:

On 20 March, 1871, George W. Brooks and David Jackson entered into an agreement, under seal, for the sale of the tract of land in the complaint mentioned, by the former to the latter, for the sum of $377.68, whereof $100 was paid and the residue was to be paid—$100 on 1 January next ensuing, a like sum one year thereafter, and $77.68 on 1 January, 1874, which being done, title was to be made to the vendee and meanwhile be retained as a security for the deferred sums.

The instrument provides that upon full payment said Brooks, "or his lawful representatives, will and shall execute a deed in fee simple conveying the lands described herein to said Jackson, or to such other person or in such way as the said Jackson may express his desire in writing."

It is further provided that, in case of default, "the said Brooks, or *his lawful representatives,* shall have the power to advertise said land and sell the same, after twenty days notice, at Woodville, Perquimans County, for cash, and apply the proceeds to the discharge of the then subsisting indebtedness."

The first two installments have been paid, but the last has not been paid, and the defendant, let into possession at the date of and under the contract, has remained in occupation ever since. The vendor
(6) died in 1882, having made a will in which he appoints his surviving wife sole executrix, who has caused the same to be proved, and qualified herself for the discharge of the assumed trusts.

On 3 March, 1883, the executrix, according to the terms of the contract, sold the land at public sale to the plaintiff R. F. Overman, and has made him a deed therefor. The associated plaintiffs are the children of the vendor, and, at the beginning of the present suit, 20 February, 1886, were of the several ages of 35, 28, 26, 23 and 20 years.

A previous suit, instituted on 5 March, 1883, by the plaintiff Overman alone, was prosecuted until Fall Term, 1885, of this Court, when it terminated in a nonsuit, and soon thereafter this action was begun. The replication to the answer, in express terms, says that the testator's will gives "his executrix power and authority to sell and dispose of any or such parts of his real estate as she deemed advisable," and that, by virtue of the contract and will, she had made sale of the premises; nor does this averment seem to have been controverted at the trial.

Besides other agreed facts, it was conceded that the matters in controversy were embraced in two questions, to-wit:

1. Whether the executrix of George W. Brooks had power to sell and convey the lands under the provisions of said contract.

2. Whether plaintiff's cause of action was barred by the statute of limitations.

Upon the first question stated, the presiding judge was of the opinion that the executrix had full power to advertise and sell, and that this power carried with it the right to convey to the purchaser in default of payment of the purchase-money; and upon the second question, he was of the opinion that the plaintiff's cause of action is not barred by the statute of limitations, and thereupon gave judgment in favor of the plaintiff Overman for the possession of the land, and to declare (7) him the owner thereof in fee simple.

Defendant appealed.

C. W. Grandy for plaintiffs.
R. H. Battle for defendant.

SMITH, C. J. If it be assumed that the testator has bestowed the power upon his executrix to sell and dispose of any part of his real estate, as the title to the disputed tracts remain vested in him as an abiding security for the entire purchase money, it devolved upon her to make it effectual by a sale of the land, and thus furnish the means of payment. This is indicated also in the contract itself, which authorizes the *"lawful representatives"* of the testator, who is the executrix, to act in case of his death, a provision carried into effect by the provision made in the will.

"The ordinary meaning of the words 'legal representatives,'" remarks *Chief Justice Gray,* in *Cox v. Currin,* 118 Mass., 198, "is executors and administrators, and we are of opinion that there is nothing in the terms of this indenture to induce the court to attribute to the settler an intention that they should have any other meaning," as, in the contract, there is nothing to show the terms not to have been used in its usual and obvious sense. But if the title has not been effectively transferred by sale of the executrix, or the will has not made some other disposition, it has descended to the other plaintiffs, who can recover of the defendant in the absence of an obstructing statute, and thus no defense can avail the defendant, nor can he complain of the judgment against himself.

2. The remaining ruling—the supposed subject matter of review—as involed in the judgment (for there are no specific exceptions set out in the record), relates to the effect of the lapse of time (8) upon the plaintiff's cause of action.

It is very manifest that if the relation of vendor and vendee, so assimilated to that of mortgagee and mortgagor in the essential rights and liabilities incident to each, be such as to render applicable subsecs. 3 and 4 of sec. 162, Code, which limit the time in which suits to foreclose and redeem property conveyed by mortgage or deed in trust, to the present case, the action of the plaintiff Overman would not be barred, because

ten years had not elapsed since the default before he commenced his suit.

But, as the relation of vendor and vendee is not within the words of the statute, though it possesses many features in common with that provided for in the statute, we do not feel at liberty to extend its terms and take in the case to which they do not apply. Proceedings to foreclose and redeem are thus limited and confined to *mortgages and deeds in trust*, and to these the time is restricted, and to none arising out of executory contracts of sale.

The only statute here applicable is that of sec. 158, Code, which prescribes a ten-year limit for causes of action not specifically provided for in preceding sections. But to the application of this statute the obvious objection presents itself that it must be put in operation by an adverse holding, and hence the possession is that of a tenant holding under the owner, rendered hostile by no demand and refusal to surrender or resistance offered to the owner's re-entry. *Barker v. Banks,* 79 N. C., 480; *Allen v. Taylor,* 96 N. C., 37.

Equally without support is the suggestion that if the debt is barred, so must be the mortgage to secure it. These are essentially distinct as affected by the statute of limitations, as is held in *Capehart v. Dettrick,* 91 N. C., 344; *Long v. Miller,* 93 N. C., 227.

No error.

Cited: Taylor v. Hunt, 118 N. C., 172; *Lyon v. Bank,* 128 N. C., 76; *Menzel v. Hinton,* 132 N. C., 663; *Worth v. Wrenn,* 144 N. C., 661; *Davis v. Pierce,* 167 N. C., 138.

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(9)

JOHN M. JONES AND HENRY G. SKINNER v. JOHN WILSON AND JOSIAH MIZELL.

Contract—Consideration—Evidence, Irrelevant.

1. The admission of testimony irrelevant to the issue is not sufficient ground for awarding a new trial, unless it appears the party objecting to its reception suffered, or might have suffered, prejudice thereby.

2. When at a sale under a deed in trust executed to secure debts, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt. *Held,* that there was sufficient consideration to support the agreement and the debtor was discharged from his obligation.

APPEAL from *MacRae, J.*, at Fall Term, 1888, of CHOWAN.

John Devereaux (W. M. Bond filed a brief) for plaintiffs. (14)
No counsel for defendant.

SHEPHERD, J. We are unable to see how the defendants were prejudiced by the admission of the testimony of the witness Skinner, to effect that the defendant Mizell had "recommended the material highly and had told witness that it was in good order." It appears to have been in reply to the testimony of Mizell "that (before the sale) he told Mr. Skinner that defendants had put a good deal of new material in there, and that plaintiffs would have little to buy." The issue was simply as to whether the defendants had delivered to the plaintiffs the property which they had purchased, and the testimony was entirely irrelevant. There was no exception to the charge, and we must assume that his Honor explained to the jury the proper meaning of the issue and called their attention to the testimony applicable thereto. There is nothing in the record which discloses that defendants "suffered or might have suffered any prejudice" by the admission of the testimony. *Glover v. Flowers,* 101 N. C., 134; *Wagner v. Ball,* 195 N. C., 323. The second exception is therefore overruled.

The other exceptions involve the correctness of his Honor's (15) charge upon the question of consideration.

There was testimony tending to show that the plaintiffs refrained from bidding at the sale because of the promise of the defendants "that if they bought in the property for less than the debt they would cancel the notes" of the plaintiffs, which were secured by a deed in trust upon the property. There was also testimony tending to show that the plaintiffs had an "outside bidder" who would have bid at least five thousand dollars. The property sold for only $4,400, and now the defendants wish to recover by counterclaim the balance due upon the notes. The defendants in support of their contention rely upon the cases of *Mitchell v. Sawyer,* 71 N. C., 70; *McKenzie v. Culbreth,* 66 N. C., 534. They urge that the value agreed to be accepted is capable of being made certain, that this amount is less than the debt, and that there was therefore no consideration. They argue that this case does not fall within the third exception mentioned in *McKenzie v. Culbreth, supra.* That case decided "that an agreement by a creditor to receive a part in discharge of the whole of the debt due to him by bond is an agreement without consideration and therefore void."

The exception mentioned was, that "if something other than money, and really of less value than the debt, is agreed upon and received in satisfaction, the court will not consider the value to be other than as the

parties have agreed upon." No money was agreed upon here, but the alleged agreement was that if defendants bought in the property for less than the debt they would cancel the notes. The consideration of this promise was that the plaintiffs should not bid. This, it would seem, was "something other than money," and the parties having themselves fixed the value, this value so fixed, the court says, in the cases mentioned, will not be considered. Apart from this the law, as declared in *McKenzie's case* and *Mitchell v. Sawyer, supra,* has been ab-
(16) rogated by the Code, sec. 574, which provides that the acceptance of a less amount than that which is due shall be a full and complete discharge. We therefore conclude that there is

No error.

JOHN F. DAVIS v. TIMOTHY ELY ET AL.

Reformation—Contracts, Executed and Executory—Rescission—Specific Performance—Statute of Frauds.

1. An *executory* contract for the sale of land will not be reformed, by enlarging the subject matter upon parol testimony, upon the ground of fraud, and enforced with the variation; but it may be *rescinded* upon such ground.
2. *Quære,* whether such reformation will be made even where the subject matter is not enlarged.
3. Parol testimony may, however, be received to show such matters in *defense* of an action for specific performance.
4. *Executed* contracts may, in proper cases, be corrected, either by enlarging or restricting the subject matter.

APPEAL from *Boykin, J.,* at Spring Term, 1889, of PASQUOTANK.

(20) *C. W. Grandy for plaintiff.*
Harvey Terry for defendants.

SHEPHERD, J. There is a hopeless conflict of authority upon the question, whether a court of equity will correct an *executory* contract on the ground of fraud or mistake, and enforce it with the variation.

In England, and several of the American States, such relief is denied, although, a defendant, for the purpose of *resisting* specific performance, may show that, by fraud or mistake, the written contract does not express the real terms of the agreement. In other States, this distinction is

repudiated, and the contract will be corrected and enforced, in proper cases, at the instance of either party.

Where such executory contracts, within the statute of frauds, are corrected and enforced, there is a further diversity—some courts holding that they will only exercise the power where the object is to *restrict* the subject matter of the contract, while others hold that the contract will be corrected, although its subject is *enlarged.* Of this latter opinion is Mr. Pomeroy (2 Pomeroy's Eq. Juris., 367), and other writers of great respectability. Opposed to this view, we have the English authorities (*Woollam v. Hearn,* White & Tudor's Leading Cases in Equity) and Bispham's Equity, Wharton's Evidence, sec. 1024, and many decisions in the United States, of which the leading case is *Glass v. Hurlbert,* 102 Mass., 24. In this case the Court says, "that when the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds; or when the term sought to be added would modify the instrument so as to make it operate to convey an interest or secure a right, which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense. *Jordan v. Lawkins,* 1 (21) Ves. Jr., 402; *Osborn v. Phelps,* 19 Conn., 63; *Clinan v. Cooke,* 1 Sch. & Lef., 22. But the fact that the omission, or defect, in the writing, by reason of which it failed to convey the land, or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. . . . Rectification, by making the contract include obligations or subject matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds, as if there was no writing at all."

This decision, in so far as it holds that the subject matter of the contract may not be enlarged, is supported by abundant authority.

Story Equity Jurisprudence is often cited to sustain the other view; but the argument there seems to be directed against the distinction between parties seeking and parties resisting specific performance. It refers to the decisions of *Chancellor Kent* in *Gillespie v. Moon,* 2 Johns., chap. 585, and *Kieselbrack v. Livingston,* 4 Johns., chap. 144. In neither of these cases was the subject matter enlarged. In *Gillespie's case* (so often cited), the correction made was the *striking out* of fifty acres from a written agreement which included two hundred and fifty. Bispham Equity, 445, says, "that in cases which fall within the statute, it is obvious that to carry the rule in *Gillespie's case* to the extent of hold-

ing that an agreement (for example) to convey fifty acres may, for the sake of justice and equity, be construed to mean a contract to convey one hundred, would be to repeal the statute of frauds and to give effect to a simple verbal agreement to sell land. Where, however, the contention of the complainant is that something which is actually embraced in the writing was not intended to be included therein, to suffer
(22) him to show this is not to enforce a parol contract in relation to land; it is simply to prove that a written contract did not embrace all that on its face it appeared to include. Such was the actual state of the case in *Gillespie v. Moon.*"

It may be remarked that, in most of the States where such relief is granted, the doctrine of part performance is recognized, and the proof required is but little short of that which is necessary to enforce a contract upon that ground.

In North Carolina, so far from correcting such executory contracts, within the statute, so as to *enlarge* their terms, the tendency of our decisions is to confine such corrective relief to *executed* contracts alone. We have been able to find no decision in point, but the words of *Hall, J.*, in *Newsom v. Bufferlow,* 16 N. C., 379, strongly show the disinclination of the Court to depart from the statute, except upon the most imperative demands of justice and equity.

The learned judge says: "It is altogether unnecessary to inquire in this case how far courts of equity have gone in carrying into effect written executory contracts, or varying them by parol evidence. Suffice it to say, that the reason why they have declined giving relief in many such cases, is that the plaintiff *had a remedy at law.* The reason is not applicable to executed contracts. In those cases the plaintiff has no remedy at law, and unless a court of equity will give relief, he can have no redress."

This distinction between executory and executed contracts is thus clearly put by Adams Eq., 171: "Where land is the subject of the erroneous instrument, the reformation of an *executed* conveyance is not precluded by the statute of frauds, for otherwise it would be impossible to give relief. But it does not appear that where the defendant has insisted on the benefit of the statute, the Court has ever reformed . . . an executory agreement on parol evidence, and specifically enforced it."

(23) Land is regarded as such a high species of property that exceptional safeguards have been devised for the preservation and security of its title, and these should not be departed from, unless such departure is absolutely necessary to subserve the ends of justice. Under the former system, the equitable relief we have mentioned was admin-

istered by the trained minds of learned judges, sitting as chancellors, who appreciated the grave evils which the statute was designed to prevent, and who gave full effect to the rule which required the clearest and most cogent testimony. Even then the relief in this State was confined, it seems, to *executed* contracts, and surely there is nothing in the new method of trying equitable issues which encourages us to leave the old moorings and venture upon a sea of trouble, confusion and insecurity.

On the ground of *necessity,* we correct conveyances by adding clauses of defeasance and words of inheritance. We also restrict, or enlarge, the subject matter, but we decline to do this in the case of executory contracts, where there can necessarily be no other object than, as in the case before us, to have it specifically enforced.

It is believed that no great hardstip can result from such ruling, as the Court will, upon rescission, endeavor to place the parties *in statu quo,* and damages may be given for the fraud and deceit. The Court is liberal in the adjustment of equities arising in such cases; but even if occasional instances of hardship occur, it is far better that these should be endured than that every title in the State should be exposed to the assaults of false and fraudulent oral testimony.

What we have said has no reference to the correction of ordinary executory contracts in aid of actions for *damages* at law, such as the correction of the terms of a bond, and the like. Equity will always make the correction, and the party can sue upon the corrected contract at law. The two jurisdictions being now blended, such (24) relief will be granted in a single action. It may be that, in cases of personal property, where there is a *pretium affectionis,* the contract may be corrected and specifically enforced; but it is unnecessary to pass upon that question here.

The relief sought in this action is to correct the contract so as to include the "Hall tract." It seems, from the complaint, that the alleged fraud consisted in certain false representations as to the number of acres made to the plaintiff when the final agreement was made. False representations are also alleged to have been made to Mr. Griffin, the draughtsman, but these are not specified, and we must assume that they were the same as those made to his principal, Davis. However this may be, we have here a plain case, where it is proposed, upon parol testimony, to correct an executory contract for the sale of land, by making it include a larger quantity than is stated in the writing.

The plaintiff does not wish to rescind, and offers the parol testimony solely for the purpose of reformation.

We think that to admit the testimony in such cases would be, as has been said, virtually repealing the statute of frauds and opening the door

to a flood of evils, the extent of which it would be impossible to estimate.

The plaintiff may enforce the contract in its present form, or he may rescind it, and ask for an adjustment of any equities which may have grown out of the transaction.

We think that the testimony was properly rejected, and that there is No error.

Cited: Davis v. Terry, 114 N. C., 30; *Dickey v. Cooper,* 170 N. C., 490.

(25)

NORFOLK SOUTHERN RAILROAD COMPANY v. DANIEL BARNES.

Contract—Sale—Vendor and Vendee—Common Carrier—Innocent Purchaser—Bailment.

A. sold to B. a buggy, and delivered it to a common carrier to be delivered to B. upon payment of the price; the carrier negligently permitted B. to obtain possession without paying the price, and while in possession, B. sold to C., who was a purchaser for value, without notice. *Held*—

1. That as soon as the vehicle was delivered to the carrier, *the right of property* passed to the vendee, but *the right of possession* remained in the vendor until the price was paid.

2. That by the negligent conduct of the vendor and his agent, the carrier, the right of property and the right of possession became united in C., and neither the vendor nor the carrier could maintain an action to recover the property.

3. But if the original contract had been one *in which no title passed,* a purchaser for value, and without notice, would not have been protected.

APPEAL from *Boykin, J.,* at Spring Term, 1889, of HERTFORD.

The National Buggy Company shipped over plaintiff's line four buggies, including the one in controversy, to Harrellsville, N. C., to be delivered to one W. J. Lassiter, upon his surrendering the bill of lading therefor. The plaintiff deposited the said buggies in its warehouse at Harrellsville, which was in charge and under the control of J. T. and B. F. Williams, their general freight agents at that point.

Lassiter received possession of said buggies, including the one in suit, from a servant of plaintiff and their said agents. The said servant was permitted to keep the key to the warehouse, and, at times, to deliver freight to owners in the absence of the agents. Lassiter did not surrender or offer to surrender, the bill of lading when he obtained possession of the property, nor had he paid the freight. Lassiter's posses-

sion was known to said agents. They raised no objection thereto (26) for two or three days, when they demanded possession, and Lassiter refused to surrender same. Lassiter was permitted to remain in possession for several weeks thereafter, at the expiration of which time he sold the buggy in question to the defendant for value, and without notice of any claim to the buggy by the plaintiff, or the manner and nature of Lassiter's possession.

Lassiter was engaged in buying and selling buggies in Harrellsville, and this was within the knowledge of plaintiff and its agents. The buggy in controversy was worth fifty dollars.

The court instructed the jury that, upon this evidence, plaintiff could not recover.

There was a verdict for defendant; judgment accordingly; motion for new trial; motion refused, and plaintiff appealed.

No counsel for plaintiff.
R. B. Winborne for defendant.

SHEPHERD, J. A. sells goods to B. and ships them by a common carrier to be delivered to B. upon the payment of the purchase money. By the negligence of the carrier, B. obtains possession of the goods without paying the money, and sells them to C., a *bona fide* purchaser, for value, and without notice. Can A., or his bailee, the carrier, recover the goods from C.?

This construction of the case upon appeal was conceded by the appellee, and is the most favorable to the plaintiff that can be made; for we think it very clear that if the plaintiff was holding the goods only for the payment of its freight charges, its lien could not be enforced against the innocent purchaser. As soon as the goods were delivered to the carrier, *the right of property* passed to the vendee, but *the right of possession* remained in the vendor until the price was (27) paid. *Ober v. Smith,* 78 N. C., 313; 1 Benjamin Sales, 260.

This possession he lost by the negligence of his agent, and we are of the opinion that he should not be permitted to recover against the defendant, who bought of the vendee in possession, for value and without notice. Of course, if the vendor could not recover, his negligent agent, the plaintiff can have no cause of action.

We think this case falls within the principle declared in *R. R. v. Kitchen,* 91 N. C., 39, "that where one of two persons must suffer by the fraud or misconduct of a third person, he who first reposes the confidence, or, by his negligent conduct, made it possible for the loss to occur, must bear the loss. This doctrine is recognized in *Barnes v.*

Lewis, 73 N. C., 138; *Vass v. Riddick,* 89 N. C., 6; *S. v. Peck,* 53 Maine, 284; and in *Herndon v. Nichols,* 1 Salk., 289." Had this, however, been a conditional sale, before the recent statute, and executory contract to sell, an ordinary bailment, or any other transaction which failed to pass the *title,* the innocent purchaser, however much he may have been misled by the possession and apparent ownership of his vendor, would not be protected. *Ballard v. Burgett,* Langdell Select Cases, 730. *Millhiser v. Eardman,* 103 N. C., 27, does not conflict with this view, as it was there held that, by the terms of the agreement, the title was not to pass until certain conditions were performed.

Here the title passed, and a delivery having been made by the negligence of the vendor's agent, the plainest principles of justice forbid a recovery.

As to the innocent purchaser, *the right of property* and *the right of possession* are united, and his title is therefore complete.

No error.

Cited: S. v. Graves, 121 N. C., 634; *S. v. Caldwell,* 127 N. C., 526; *Mfg. Co. v. R. R.,* 149 N. C., 263; *Bank v. Oil Co.,* 157 N. C., 303; *Tarault v. Seip,* 158 N. C., 378; *Pfeifer v. Israel,* 161 N. C., 414; *McCullers v. Cheatham,* 163 N. C., 63.

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(28)

ELISHA COPPERSMITH, ADMR. OF WM. COPPERSMITH ET AL. v. STEPHEN P. WILSON ET AL.

Administration—Distribution—Statute, Limitations.

Where administration was granted in 1866, and in 1872 two of the distributees, who were then of age, receipted the administrator in full for their shares, but in 1886 joined with the remaining distributees and an administrator *de bonis non* in an action for a settlement of the first administration. *It is held,* that the action was barred by the three years statute of limitation, as to the distributees who gave the receipts—the statute beginning to run, as to them, from the date of such receipts.

APPEAL from *Boykin, J.,* at Spring Term, 1889, of PASQUOTANK.

(30) *No counsel for plaintiffs.*
C. W. Grandy for defendant.

AVERY, J. Conceding that the exception was taken to the charge of the court in reference to the bar of the statute of limitations, and not to the form of the judgment simply (and this is the just and proper

construction to place upon the statement of case on appeal), we think his Honor erred when he instructed the jury that they (31) must respond to the third issue, No.

The defendant offered in support of the plea of the statute of limitations, the receipts of J. T. Coppersmith and W. G. Coppersmith, bearing date respectively in 1870 and 1872, and signed after they were twenty-one years of age. Supposing that the testimony established the fact that there were mistakes made in both settlements, or, at any rate, that both of them gave receipts in full, when Benoni Cartwright, in fact, paid to each a sum less than the full amount due upon an accurate statement of accounts between him and his *cestui que trust,* it would follow that an action would lie for the unpaid balance, the settlement having been made prior to the passage of the act of 1874-'5 (Code, sec. 574; *Koonce v. Russell,* 103 N. C., 179); but the statute of limitations began to run against each when the receipt was given to the administrator. Benoni Cartwright administered in 1866 and died in 1882. Elisha Coppersmith qualified as administrator *de bonis non* in 1886, and the action was brought on 20 February, 1886. When John T. Coppersmith gave a receipt in full in consideration of the payment of seventy dollars, in February, 1870, he was twenty-one years old, as was William G. Coppersmith when he settled with Benoni Cartwright and gave a similar receipt in consideration of the payment of $92.17, in 1872. The statute began to run against each one of them from the date of their respective settlements, and the right of action on the part of each was barred after the lapse of three years.

It does not appear, from the face of the receipt of Elizabeth Delow, when it was given. We do not, therefore, discuss the question whether she is affected by the statute or not. She was under coverture before she was twenty-one years old, and had been up to the bringing of this action.

The settlement with the two infant defendants Henry and Susan, seems to have been made with receivers appointed, or acting, for each of them. It does not appear by what authority the receivers acted in this transaction. We do not declare that the action is, or is (32) not, barred as to the *feme covert* Delow, or the plaintiffs Henry and Susan. We cannot anticipate the developments of a future trial. In the present status of the case, we can see how it might prove best on a future trial to submit a separate issue as to whether each of the distributees is barred by the statute of limitations, with such instruction as may be applicable to the facts developed on the trial.

The action was brought by the administrator *de bonis non,* to recover the value of some corn and cotton that, it is alleged, the former admin-

istrator did not account for; and, also, a further sum not accounted for by reason of a mistake in addition made in a statement of annual account filed by Benoni Cartwright, and carried into the settlements with the distributees. The administrator *de bonis non* is a necessary party, and the former settlements, with the consequences flowing from them, require the presence of the distributees. *Grant v. Bell,* 87 N. C., 34; *Branch v. Branch,* 5 N. C., 132.

If some of the distributees are barred by the statute, and some are not, the determination of the extent of the liability of the defendants may present some complicated questions for an accountant. While we decide nothing in relation to that matter, we suggest for the consideration of the parties and the court below, that it might prove more satisfactory to try the issue or issues arising out of the plea of the statute by jury, and reserve the questions of the value of corn and cotton unaccounted for, if any, and what sum was, by mistake, not accounted for on settlements with the distributees, if any, and how the unadministered fund should be distributed, for the consideration of a referee.

Error.

Cited: Holden v. Warren, 118 N. C., 327.

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(33)

W. C. HARDY v. J. B. CARR AND JAMES M. MAYO.

Pleading—Trial by Jury—Homestead—Vendor's Lien—Judgment by Default.

1. In an action by an endorsee to recover the amount due upon a promissory note against the maker, the latter set up the equitable defense of false and fraudulent representations by the original payee of the note and a failure of consideration. *Held,* that this raised a material issue of fact, which ought to have been submitted to a jury; and that it was erroneous for the court to render final judgment before this issue had been properly determined.

2. While land is not exempt, under the provisions of the Constitution and statutes providing for a homestead, from sale for its purchase money, no lien exists in favor of the vendor until he shall have reduced his debt to judgment, and had it docketed, as required of other judgments.

APPEAL from *Montgomery, J.,* at Fall Term, 1888, of EDGECOMBE.

The action begun on 13 July, 1888, is prosecuted against the defendants Carr and Mayo, the former maker, and the latter endorser, of a promissory not, in these words:

$2,889.38. WHITAKERS, N. C., 1 November, 1886.

One day after date, I promise to pay to James M. Mayo, or order, twenty-eight hundred and eighty-nine dollars and thirty eight cents, value received, being in part payment of the purchase money in premises and stock of goods at Kill Quick, or Hickory Hill, in Edgecombe County, with interest from date at the rate of six per cent.

Witness my hand and seal. J. B. CARR. [Seal.]

The note was, on 20 November, 1886, endorsed by the payee to the plaintiff.

The complaint alleges the consideration for which the note (34) was given was a stock of goods and a tract of land consisting of about 200 acres, and that no money has been paid thereon, and the whole amount is due and demanded.

The defendant Carr answers (the other defendant failing to do so), and, admitting the making and endorsement as charged, says, in article 4:

"That said note was executed by him to defendant Mayo, in consideration of his interest in the stock of goods then in the store of J. B. Carr & Co., at Hickory Hill (the two defendants being the members of that firm), and in further consideration of said Mayo having paid off certain claims against said firm in favor of Tucker, Smith & Co., and Daniel, Miller & Co., which claims the said Mayo then and there stated to respondent that he, said Mayo, had taken up with his own notes, so as to discharge respondent from all liability on account of the same."

He further says, he "is informed and believes that he has never been discharged from liability on such claims; and Mayo claimed no interest in the land described in the complaint, and it formed no part of the consideration of the note."

Upon this state of the pleading, without submitting the issues made therein, and after the defendant Carr and his counsel had departed from the court, was rendered the following judgment:

"This cause, coming on to be heard, and being heard, at this term of court, upon complaint and answer, and it appearing that service of the summons herein has been made upon the defendant Carr, and that defendant Mayo has accepted service upon said summons executed as to defendant Carr; and it further appearing that the plaintiff's complaint herein filed, is verified, and that defendant has answered thereto, it is now ordered and adjudged, upon the complaint and answer, (35) that the plaintiff is entitled to judgment, and that they recover of the defendant J. B. Carr and James M. Mayo, endorser of the note sued

upon, the sum of twenty-eight hundred and eighty-nine dollars and thirty-eight cents ($2,889.38), with interest thereon from 2 November, 1886, at six per cent., until paid, and cost of this action, to be taxed by the clerk.

"And, it further appearing that said note sued upon was given in part and contracted for the purchase money of a certain piece of land, lying and being in Edgecombe County, at Kill Quick, or Hickory Hill, containing, by estimation, 200 acres, which was purchased from R. H. Gatlin and wife, Penelope, adjoining the lands of V. B. Knight, E. M. Bryant, and others; it is, therefore, considered that said sum of $2,889.38, with interest, as above described, shall be and constitute a lien upon said land and premises; and it is further considered that the plaintiff recover the cost of this action, to be taxed by the clerk."

The appeal is taken by the principal debtor alone, the endorser having failed to set up any defense to the plaintiff's demand, and submitted to the judgment.

George V. Strong for plaintiffs.
S. F. Mordecai for defendant.

SMITH, C. J. The appellant sets up an equitable defense to the enforcement of the entire debt, because of the false and fraudulent representation as to the debtor's exoneration from certain liabilities, which was an inducement to the giving of the note and formed a part of the consideration, and because, in consequence, it would be inequitable to compel him to pay its full amount. This averment raises an inquiry to the determination of which a finding by the jury was necessary, and an issue should have been prepared and submitted, and it was
(36) wholly irregular in the court to render a final judgment. Moreover, the judgment is itself erroneous in declaring the land subject to a lien for the entire debt, or even for such part thereof as measures the price of the land. Land, by the statute, remains liable to be sold under execution for the purchase money, and cannot be exempted from this liability, but no lien is created, except as in other cases of docketed judgments. Constitution, Art. X, sec. 2.

It is error, therefore, to enter up judgment upon pleadings which raise an issue of fact without first having it settled by a verdict in a proper manner. We refer to but a single case in support of the rule: *Dickerson v. Wilcoxon,* 97 N. C., 309.

Error.

JAMES B. MARTIN v. THOMAS D. HOLLY.

Agency—Revocation.

The authority conferred upon an agent, as a general rule, may be revoked at any time, but such revocation will not deprive the agent of his right to compensation for services rendered while the relation of principal and agent existed, although the event upon which the agent's compensation depended did not occur until after his discharge.

APPEAL from *MacRae, J.*, at Spring Term, 1889, of BERTIE.

The plaintiff declared—

1. Upon a special contract to the effect that he was employed by the defendant to sell timber upon two tracts of land, the "Piney Woods tract and the Willow Branch Farm," and that if he sold (37) it for $25,000 the defendant was to pay him for his services.

2. That defendant employed him to sell said timber, and that plaintiff's services were reasonably worth $500.

The defendant admitted the contract; that the timber was sold, and that he received for said timber $26,000. He denied that the plaintiff made the sale. He alleges that the Piney Woods timber was sold in 1887, and that the Willow Branch timber was sold in 1888; that after the sale of the Piney Woods timber, the plaintiff threatened to sue him for $200 for his services; that in order to avoid a law-suit, he paid the same and discharged the plaintiff from his employment, in respect to sale of the timber. He denied that the plaintiff performed any services thereafter, or was instrumental in effecting a sale. He also denied that the said services were worth $500.

His Honor charged the jury, in substance, as follows:

"If, from the evidence, the jury believes that the plaintiff procured a purchaser for Willow Branch timber, able and willing to pay $18,000 for it, and if defendant sold to said purchaser at that price, the plaintiff complied with his part of the contract; that the contract being admitted, the defendant could not revoke it if the plaintiff had done anything in pursuance thereof; that if defendant sold to any one (38) with whom plaintiff had put defendant in communication for the purpose of effecting a sale, in pursuance of the contract, though plaintiff did not make the sale himself, he would be entitled to his commission."

To these instructions defendant excepted. Verdict and judgment for plaintiff, and defendant appealed.

John L. Bridgers for plaintiff.
J. B. Batchelor for defendant.

SHEPHERD, J. It was ingeniously contended by the learned counsel for the appellant, that the action, being founded on a special contract, the conduct of the plaintiff in demanding and threatening to sue for a part of the contract price, and his reception of the same after a sale of the Piney Woods timber, was, in effect, a rescission of the agreement, and that, for this reason, he is not entitled to recover. The plaintiff denied that he was discharged before he had rendered the services, and as to the part payment, he testified that "he and the defendant *did not differ* about whether he ought to have had commissions on the first sale." We cannot conclude, as a matter of *law,* that under these circumstances the part payment was, *ipso facto,* a rescission of the contract. The issue was general, embracing both causes of action, and no instructions upon this point were requested.

It is, therefore, only necessary for us to inquire whether there was error in the instructions as given by his Honor.

The plaintiff's counsel admitted here that the defendant did in fact discharge him, and revoke his power of attorney. But he insists that when this was done, the plaintiff had already performed services in pursuance of the contract, which resulted in a sale of the timber.

(39) There is no question but that an agency like this may be revoked at any time, but such revocation cannot defeat the right of the plaintiff to compensation for the services rendered in pursuance of the employment.

"Where a broker, authorized to sell at private sale, has commenced a negotiation, the owner cannot, pending the negotiation, take it into his own hands and complete it, either at or below the price limited, and then refuse to pay the commissions." *Keys v. Johnson,* 68 Penn., sec. 42.

Again, "a broker becomes entitled to his commissions whenever he procures for his principal a party with whom he is satisfied, and who actually contracts for the purchase of the property at a price acceptable to the owner." *Gentworth v. Luther,* 21 Barb., 145; *Kersey v. Garton,* 77 Mo., 645.

"An agent employed to sell real estate, in finding a purchaser, and bringing him and his principal into communication, and setting on foot negotiations which result in a sale, cannot be deprived of his right to compensation by a discharge prior to the consummation of the sale." *Gillet v. Carum,* 7 Kan., 156.

The principles thus declared fully sustain the charge of his Honor, and we are unable to see any grounds for a new trial.

Brookshire v. Brookshire, 30 N. C., 77, cited by defendant, is in no way inconsistent with the foregoing authorities. It only decides that a power of attorney under seal may be revoked by parol.

No error.

Cited: Mallonee v. Young, 119 N. C., 552; *Abbott v. Hunt,* 129 N. C., 406; *Clark v. Lumber Co.,* 158 N. C., 144; *Trust Co. v. Goode,* 164 N. C., 23; *Campbell v. Sloan,* 179 N. C., 81.

(40)

CAROLINE A. THIGPEN ET AL. v. H. L. STATON ET AL.

Contract—Statute Frauds—Evidence.

1. A parol contract for the sale of lands, or any interest therein, is good *inter partes,* and will be enforced if the party charged does not plead the statute of frauds; but where the plaintiff seeks to enforce such contracts, and the defendant denies its existence, or sets up another and different agreement, or specially relies on the statute, the contract will not be enforced.

2. J. conveyed to C. lands, reserving a life estate—both occupying the premises—and it was agreed between them, in parol, that C. should have the rents and profits in consideration that she would support J. for his life. In an action by C. against a stranger for a conversion of the rents. *Held,* that it was competent to show the agreement with J., and being proved, the courts would sustain it.

APPEAL from *MacRae, J.,* at Spring Term, 1889, of EDGECOMBE.

The plaintiff Caroline A. Thigpen alleged that she was owner in fee simple, and in possession of, certain tracts of land described in the complaint, and of the crops growing thereon, and that defendant Bourne, at the instance and procurement of the other defendants, wrongfully seized said crops, to her damage, etc.

These allegations were denied in the answer. There were other causes of action stated in the complaint, and denied in the answer, which, for the purposes of this appeal, are not necessary to be stated.

Issues were agreed upon by the parties. Those arising upon the first cause of action, and submitted to the jury, were as follows:

1. Was the plaintiff Caroline A. Thigpen the owner and in the possession of the lands described in the complaint at the time and as set out therein, or of any part thereof? If a part, what part?

2. Was the plaintiff the owner of the crops growing upon said (41) lands at said times, or any part thereof? If a part, what part?

3. Did the defendant Bourne, at the instance and procurement of the other defendants, wrongfully seize the crops then growing and remaining upon said lands and deprive said plaintiff of the use thereof, as alleged in the complaint?

4. What damage, if any, has plaintiff sustained by reason of such wrongful seizure?

The plaintiff offered in evidence to show title to the first tract of land described in the complaint, a deed from James Thigpen to herself for 100 acres, reserving to himself a life estate, dated 8 October, 1884.

She then introduced James Thigpen, who testified that he was the father of T. L. Thigpen—the husband of the *feme* plaintiff—and that he knew the land conveyed by him to the plaintiff C. A. Thigpen; that witness and plaintiff and her husband live together upon the said land. This witness testified further as to the seizure of the crops, etc., by the deputy sheriff, defendant Bourne being sheriff of Edgecombe County at the time of said seizure. Witness testified that he reserved to himself a life estate in the 100-acre tract.

The plaintiff then proposed to prove by this witness a parol contract between himself and Caroline A. Thigpen, that he, witness, would surrender the rents and profits of that land—the 100 acres—to her, in consideration of which she was to take care of him, the witness, for his life.

Objection by the defendant. Objection sustained, and plaintiff excepted.

The presiding judge stated that if the proposition was to prove such a parol contract for three years, or for a less time, that it would be admissible. Plaintiff's counsel stated that they could not make proof to such effect.

(42) The jury responded: To the first issue, "owner of 24-acre tract only"; the second issue, "owner of crops on 24-acre tract only"; the third issue, "Yes, on 24-acre tract; No, as to the others"; the fourth issue, "$500 damages."

The twenty-four acre tract was not a part of the land conveyed by James Thigpen to Caroline.

The plaintiff moved the court for a new trial, because of error in the rejection of the testimony offered in respect of the contract with James Thigpen as to rents, etc. Motion refused, and the plaintiff excepted and appealed. There was judgment for the plaintiff upon the verdict.

John L. Bridgers for plaintiff.
Don. Gilliam for defendant.

AVERY, J. A verbal contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, is good between the parties to it, and will be enforced, if they agree upon its terms, and the party to be charged does not plead the statute. *Green v. R. R.*, 77 N. C., 95. In controversies between them, the rule is, that where the plaintiff declares upon a verbal promise void under the statute of frauds, and the defendant either denies that he made the promise, or sets up another and different contract, or admits the the promise and pleads specially the statute, the contract cannot be enforced. *Holler v. Richards,* 102 N. C., 545.

The agreement between James Thigpen and the *feme* plaintiff, C. A. Thigpen, that she should support him during his life, in consideration of receiving the rents of the one-hundred-acre tract of land for the same period, is good *inter partes.* If it be conceded, that a stranger would be allowed to set up the plea, that such a contract is void, where the law casts the burden on the party, claiming the benefit of it, to show a good title against such stranger, the admission would (43) not affect this case.

The *feme* plaintiff holds the remainder, after the life estate of James Thigpen, by deed from him, and, with the agreement already stated, she lived upon the land with him and her husband, T. L. Thigpen. She alleged in the second paragraph of the complaint, that she was the owner of the crops, not by virtue of the title set out in the first paragraph, but as an independent fact, and the allegation being denied, the court properly submitted a distinct issue as to her right to the crops. It was competent to show the parol contract between plaintiff and James Thigpen, in order to establish her right to the growing crops. It was material as evidence, that she entered on the land and was cultivating it under a license from James Thigpen, and was entitled to the growing crop on that tract. The fact that she entered under the authority of James Thigpen, was evidence tending to show she was his tenant. *Medlin v. Steele,* 75 N. C., 154.

She had not declared in the second paragraph of the complaint how she derived her title to the crop, but had simply claimed that she was the owner, and had the present right to the possession, and this was a separate and distinct allegation, in no way connected with her claim of title to several tracts of land by virtue of deeds mentioned in the first paragraph. There was, therefore, no variance between the allegation and the evidence offered.

There was error in the refusal of his Honor to allow the witness to testify, as was proposed, for which a new trial will be granted.

Error.

Cited: Loughran v. Giles, 110 N. C., 426; *Faison v. Harby,* 118 N. C., 144; *Winders v. Hill,* 144 N. C., 617; *Henry v. Hilliard,* 155 N. C., 378.

(44)

THE STATE EX REL. R. H. SPEIGHT, COMR., v. JULIA STATON, ADMRX., ET AL.

Parties—Tax Collector—Official Bonds—Fence Law.

A statute was enacted in 1883, authorizing the imposition of a special tax, or assessment, to erect and maintain a fence around certain territory in the county of Edgecombe, and directed the tax collector (sheriff) of that county to pay the amount when collected to the chairman of a board of fence commissioners created by the statute. The chairman brought suit upon the collector's official bond to recover the sums alleged to have been collected, and which he had failed to pay. *Held*—

1. That, notwithstanding the bond contained the provision that the moneys received by the collector, by virtue of his office, should be paid to the county *treasurer;* the latter was not authorized to sue for the *fence tax,* for the reason that it was directed to be paid to another officer.

2. But that the chairman of the fence commission, though not named in the bond, might maintain the action under the provision of sec. 1891, Code; and it is intimated that he might have maintained it independently of those provisions.

ACTION, tried upon complaint and demurrer, before *MacRae, J.,* at Spring Term, 1889, of EDGECOMBE.

The action is prosecuted in the name of the State on relation of R. H. Speight, chairman of the board of commissioners charged with the construction and repairs of a fence erected in a portion of Edgecombe County, under chap. 367 of Laws 1883, to recover of the defendant Julia Staton, administratrix of John R. Staton, the deceased sheriff and tax collector, and the others, his sureties, the residue of the tax levied and collected under said act for the purpose aforesaid.

The official bond given by the intestate and the other defendants, the obligation undertaken, which it is sought to enforce, is, in words and figures, as follows:

"Know all men by these presents, that we, John R. Staton,
(45) principal, and James Hodges, Battle Bryan, Erastus Cherry, Henry Winborne and Joshua Killebrew, sureties, are held and firmly bound unto the State of North Carolina in the sum of forty thousand dollars, the payment whereof to be well and truly made, we

bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents. Signed and sealed this 30 November, 1883.

"The condition of the above obligation is such that, if the above bounden John R. Staton, sheriff of the county of Edgecombe, shall well and dilligently collect the county, school, poor and special taxes during his continuance in office, and shall faithfully and honestly account for and pay over the same to the county treasurer, as required by law, then the above obligation to be void; otherwise to remain in full force and effect."

The defendant entered a demurrer to the complaint, assigning, among other grounds therefor, that "it does not appear that R. H. Speight, chairman as aforesaid, has a right to collect said money, if any should be due, from said administratrix, or said John R. Staton, or the sureties on his said bond."

Upon the hearing, the court sustained the demurrer and gave judgment against the relator for costs, at the same time giving him leave to amend his complaint, and the relator appealed.

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

SMITH, C. J. The act of 1881, circumscribing certain territory within the county of Pitt, and forbidding stock to go at large therein, directs the construction of a fence around the boundary, and an assessment of a tax upon the real estate therein to build and (46) keep it in repair. The amendment of 1883, which attaches an adjoining portion of the territory of Edgecombe, containing the same essential provisions, constitutes a board of fence commissioners and appoints the members, to the chairman of which the tax collector—in the present case the sheriff—"is to pay over the same (tax when collected) to the chairman of the fence commissioners." Act 1881, sec. 3; act 1883, sec. 6. A large portion of the tax levied for the purpose aforesaid, has been paid by the defendant's intestate to the relator, and the complaint, stating the facts, which must be accepted as true, is for the failure to pay over the residue of the sum aforesaid.

The official bond, in the very words of the statute that requires it, embraces and is intended to protect "the county school, poor and special taxes," and to "account for and pay over the same to the county treasurer, as required by law" (Code, sec. 2072); and he is the proper party to receive and sue for and recover all the enumerated county taxes, except the *special tax* levied under the enactment—one of the class

denominated *"special,"* as distinguished from such as are usual and regular—the other special taxes levied upon property and persons in the entire county being, also, payable to the county treasurer. The condition of the bond is, therefore, in proper form to enforce the obligation to collect and pay over the taxes mentioned, except fence tax, and it omits to provide for the enforcement of the obligation to pay over them, as the statute commands, to the chairman of the fence commissioners. The special tax could not be recovered by the county treasurer, because he is not allowed to receive it; and if the present relator cannot, to whom the money alone is payable, it would seem that no one could, and, hence, there would be no security afforded by the bond to (47) assure fidelity in the discharge of the collector's official duty in reference to this fund.

Under such circumstances, we are not prepared to assent to the ruling below, that the relator, to whom alone this tax is to be paid under the law, cannot assert his claims thereto in the manner he is now doing. The fund is raised under a law which prescribes the person with whom the collector must account for what he collects, and the condition blending different special taxes under a single name fails to provide for the payment of those now under consideration to the legal and authorized public agent, and it may be questioned, whether he cannot maintain the action as relator and recover the money, which he alone has authority to receive.

To remedy mischiefs of the kind, was enacted the act of 26 January, 1843, which, with modifications adapting it to the new system, but not changing its substance, is brought forward in the Code, and forms sec. 1891. It declares that whenever any instrument shall be taken by, or received under, the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting "to be a bond executed to the State for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring the office or in making the appointment, or any *variance in the penalty or condition of the instrument from the provisions prescribed by law, shall be valid, and may be put in suit, in the name of the State, for the benefit of the person injured by a breach of the condition thereof,* in the same manner as if the office had been duly conferred, or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law."

This statute seems to enable the relator, though not named in the condition, to prosecute the bond to recover the moneys by law directed

to be paid to him, and which the sheriff has collected under his (48) office and the bond undertakes to secure.

The references made in the argument for the appellee, in support of the ruling, are all to rulings which refuse to give operation to the bond outside of a fair and reasonable interpretation of its terms, and by construction, make it embrace duties and obligations not mentioned. They also show that general words used in a condition provided for a general discharge of official obligations, will be confined to such as come within the range of those specifically set out. Murf. on Bonds, secs. 717, 718, and 719; *Eaton v. Kelly,* 72 N. C., 110.

The subject matter is discussed, and the cases in our own reports, examined by *Avery, J.,* in *County Board v. Bateman,* 102 N. C., 52 render it unnecessary to pursue the subject further.

Error.

Cited: Lacy v. Webb, 130 N. C., 546.

VIRGINIUS W. LAND v. THE WILMINGTON AND WELDON RAILROAD.

Penalty—Common Carrier—"Regular Depot or Station."

1. The terms "a regular depot," or "station," employed in section 1964 of the Code, contemplate fixed and established places on the line of a railroad, or other transportation company, equipped with suitable buildings and furnished with the necessary officers and servants for the regular transaction of business, for the receipt and delivery of freights, and the comfort and convenience of passengers.

2. Where it was shown that a railroad company had been in the habit of stopping at a certain locality to deliver mails; that it received such passengers there as might wish to embark on its trains, and that it had also been accustomed to receive and deliver freights for the accommodation of its patrons in the vicinity; that the place was designated as a station on its tariff schedule, but that it had no agent, office, warehouse, or other facility for the transaction of its business. *Held,* not to constitute "a regular depot," or "station," within the meaning of the statute.

APPEAL from *MacRae, J.,* at March Term, 1889, of HALIFAX. (49)

The action is brought to recover divers penalties which, the plaintiff alleges, the defendant Railroad Company incurred by the refusal of its agent to receive certain carloads of lumber at one of its regular stations on its road, called "Spring Hill," for transportation, etc., in violation of the statute (Code, sec. 1964).

R. O. Burton, Jr., for plaintiff.
W. H. Day and J. M. Mullen for defendant.

MERRIMON, J. The statute (Code, sec. 1964) prescribes that "agents or other officers of railroad and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a *regular depot, station, wharf, or boat-landing,* and shall forward the same by the route selected by the person tendering the freight, under existing laws; and the transportation company, repre-
(54) sented by any person, refusing to receive such freight, shall be liable to a penalty of fifty dollars, and each article refused shall constitute a separate offense." It will be observed that such tender must be made "at a *regular* depot or station," etc. The word "regular," as thus employed, is important and significant. It is descriptive and limiting in its meaning and application; it implies, in the order of business of such companies, a settled, established, recognized depot, or station, and such tender of freight there as contradistinguished from an irregular, temporary, or casual place, fitted up, in some limited degree, for the purpose of receiving freight for shipment, for the convenience or accommodation of the shipper, or the company, or for the same of both. Such temporary places are not adapted to, and fitted up for, nor are they intended to be used in the ordinary, orderly and continuous course of business. A great variety of circumstances and considerations might prompt a railroad company to depart from its regular course of business, especially when its road is new, in receiving various kinds of freight at places other than its regular depots and stations. It might be convenient—indeed, important—to its business to receive such freights as lumber, heavy timber, stone, brick, cotton, corn, or other ponderous freights, at irregular, temporary stations along the way, to be used for an occasion, for a week, or a month, or at intervals, as occasion might require. It might do so, not regularly, not for shippers generally, but for special considerations of convenience, or profit, when it could, or would, in its discretion. And it might provide side-tracks and other appliances for such temporary purposes. The statute clearly does not apply to and embrace such depots and stations. The word "regular," as employed, is intended to exclude such implication. If the purpose had been to include them, the appropriate language would be, "tendered at any and every depot, station," etc., or other like comprehensive terms.

The purpose not to include such irregular stations, is the more
(55) manifest because it would be impracticable, unreasonable and

unjust to require such companies to receive freight at places where it had not made preparations for the general reception of the same. It is not to be presumed, in the absence of statutory provision, that the Legislature intended to prevent them from receiving freights on the way, now and then, more or less frequently, as their and the shippers' convenience might prompt. There is nothing in the general statute, of which the section under consideration is a part, that suggests such purpose.

A "regular" depot or station of a railroad company, as contemplated by the statute, is a certain place situate alongside of or near to its railroad, fitted up by it with suitable buildings, erections, appliances and conveniences for carrying on generally and continuously, in an orderly manner, the business of transporting freights, as is usually done by such companies. Such buildings, and other things necessary for a regular depot or station, may be greater or smaller in number and extent, or more or less elaborate, than others of like kind and for like purposes; but whether they be sufficient or good, or indifferent, or are well or ill adapted to, and intended for, the purpose of prosecuting the business of transporting freights and passengers, receiving from shippers generally, and at all seasonable times, such freights as the railroad company is required to transport over its road, such depots or stations imply, ordinarily, such suitable and sufficient buildings, erections and appliances as may be necessary in receiving and delivering freights, and for the temporary protection of the same until they shall be transported or delivered to the persons entitled to have them, and that the company has a business office there, and suitable agents and employees to receive and deliver freights, to give receipts, bills of lading for the same, and to do the like and similar service. They are settled, recognized places, to which shippers of freights may, at all appropriate times, go to ship, or receive the same. The law so requires, (56) and such companies hold themselves out, at such places, to the public, as there ready and prepared to receive freights, and to do what should be done in respect to and about the same. It is at such places, shippers have the right, under the statute, to tender freights to the agents of such companies for transportation, and not elsewhere. *Kellogg v. R. R.*, 100 N. C., 158; *R. R. v. Flagg*, 43 Ill., 364; *S. v. R. R.*, 41 Conn., 134.

Now, applying what we have just said to the case before us, we think the court below properly instructed the jury, in substance, that the whole evidence produced on the trial, accepted as true, did not prove that the plaintiff tendered the freight, as alleged in the complaint, to the agent of the defendant, at a regular depot or station on its road.

It seems that, at one time, a considerable period before the tender of the lumber by the plaintiff, the defendant kept an office—a place of business—at the place designated as "Spring Hill"; but the witness for plaintiff does not say that a "regular" depot or station was there. On the contrary, his evidence tended to show that the defendant had received the plaintiff's lumber—not that of others—there, irregularly, from time to time, for a considerable while. The fact that the place was called "Spring Hill"; that the mail train stopped there regularly to deliver the mail; that the place was set down, in circulars and orders of the company, as a *station,* did not, necessarily, make it a "regular" station. Regular, orderly business must have been done there; the defendant must have professed to do such business there; had suitable buildings and appliances, agents and employees there to give bills of lading, receipts, and the like, to shippers going there to tender or receive freights at all appropriate times. There was no depot, no freight, no agents, no employees stationed there for such purpose at the (57) time of the alleged tender, or for a long while before that time, and this, we think, fairly appears from the evidence taken as true.

If the plaintiff intended to insist upon his right to compel the agent of the defendant to accept the freight, or subject the latter to the penalty for the agent's refusal to do so, then he should have tendered it at a "regular station." He can have such penalty only in the case prescribed by the statute. It imposes the penalty only when the tender and refusal were made at a "regular" station, such as that pointed out above.

Affirmed.

EDWARD SHIELDS v. MARGARET SMITH ET AL.

Witness—Evidence—Transaction with Deceased Persons.

The assignor (vendor) of a contract to convey land, is not a competent witness for the assignee, upon as issue between the latter and those claiming under the deceased vendee in respect of payments made to him by such vendee. Code, sec. 590.

APPEAL from *MacRae, J.,* at March Term, 1889, of HALIFAX.

In 1878 or 1879, W. H. Smith entered into a contract with Jacob Smith to sell and convey to him a parcel of land containing fifty acres, for 5,000 pounds of lint cotton, to be delivered in equal quantities in five successive years, upon the completion of which delivery a conveyance was to be made. This contract and all the interest of the vendor therein

was assigned by him, in 1883, to the plaintiff, under an agreement (58) that the title was to be retained as a security for the delivery of the residue of the cotton, then estimated to be 2,807 pounds of the value of $278. Jacob Smith died late in 1884, or early in the year following, leaving a wife and four children, who are defendants in the action. After the assignment, W. H. Smith and the plaintiff caused the fifty acres to be surveyed and laid off, with an express understanding that the estate should not be conveyed until the stipulations for the delivery of the cotton were fully complied with.

After the death of Jacob Smith, the plaintiff directed the vendor to prepare a deed conveying the land to the defendants, and to deliver the same to R. H. Smith, plaintiff's attorney, to be held as an *escrow,* and to deliver the same when the residue of the indebtedness of $278 was, with interest, discharged. The deed was, accordingly, so drawn, and delivered to R. H. Smith, who, before the contract was complied with, without plaintiff's consent, and, at the request of the defendant Margaret, delivered the deed to her, and she has caused it to be proved and registered. The prayer is, that said deed be declared inoperative and void, and that the land be sold to pay the residue of the indebtedness due therefor.

The defendants, answering admit the making the contract of sale, and the delivery of the cotton at divers times by Jacob Smith, towards payment therefor, and deny that there was any, or, if any, very little, due from him on the contract. They controvert all the other allegations of the complaint, except that numbered 9, and say that the deed by W. H. Smith was, and was intended to be, absolute and unconditional to the defendant Margaret. Several issues submitted to the jury, of which the only one material to the matter brought up for review on the plaintiff's appeal was as to the amount still due on the land.

Upon this inquiry, the plaintiff proposed to prove by the said W. H. Smith what payments had been made to him by the de- (59) ceased vendee during his lifetime. To this proof the defendant objected, as coming within the prohibition of sec. 590 of the Code, and as a transaction between the witness and the deceased.

The objection was sustained and the evidence refused, to which ruling the plaintiff excepts.

The defendants introduced and, after objection of plaintiff, were allowed to show by the defendant Margaret payments made by her on the land since the death of her husband. To this the plaintiff also excepts.

The jury rendered a verdict for the defendants, and from the judgment, pursuant thereto, the plaintiff appealed.

No counsel for plaintiff.
R. O. Burton, Jr., for defendants.

SMITH, C. J. The second exception is so obviously untenable as not to have been pressed in the argument before us, and we accordingly dismiss it from further consideration, and proceed to examine the other.

The section of the Code which the proposed proof, coming from the original owner of the claim, is held to contravene, has been the prolific subject of controversy in adapting it to various cases which have been before the Court, as is shown by the numerous citations annexed to the section. The ruling which excluded the testimony of the witness, the plaintiff's assignor, as to the payments made by the deceased, is clearly within the prohibitory terms, for he is one "under whom a party (the plaintiff) derives his interest," and the payments were, severally, "a personal transaction" between them. Apparently, the evidence sought was adversary to the plaintiff, as tending to diminish his demand, but as the other evidence on the point is not stated, it may have been (60) to reduce the payments in amount, and thus enlarge the unpaid residue and benefit the plaintiff. But the statute refuses to allow such witness to speak of a transaction, personal between himself and deceased, without reference to its effect upon the controversy, for the reason that the deceased ought, in reference to such, to be also heard, and therefore, closes the lips of each party.

With the policy of the enactment we have nothing to do, but our duty is limited to ascertaining its import and giving effect to the legislative intent expressed.

No error.

S. S. ALSOP, ADMINISTRATOR OF JAMES MOSELEY, v. W. F. MOSELEY ET AL.

Judgment Lien—Federal and State Practice.

1. The simple rendition of a judgment in the Supreme Court will not constitute a lien upon the judgment debtor's land. To create such lien, it is essential that the judgment shall be "docketed" in the county in which the land is situate, as directed by the statute.

2. Prior to the enactment by Congress of the act of August 1, 1888, to regulate the liens of judgments of the courts of the United States, and of the concurring act of the General Assembly of North Carolina (ch. 439, Laws 1889), the only way by which a judgment rendered in the Federal courts could acquire a lien on the debtor's real property, was by suing out a final process and enforcing it in accordance with the practice which prevailed in

this State anterior to the passage of the law which provides for the acquisition of a lien by docketing the judgment.

3. Nor did the act of Congress of June, 1872, entitled "An act to further the administration of justice," in the absence of the adoption of any of the rules there authorized, by the Federal courts in North Carolina, create any lien in favor of judgments rendered in those courts.

SPECIAL PROCEEDINGS, instituted before the clerk of the Supe- (61) rior Court of HALIFAX, for license to sell real estate to raise assets with which to pay the debts of the intestate, James Moseley. Issues of law and fact having been raised by the pleadings, the cause was transferred to the civil-issue docket and tried before *MacRae, J.*, at March Term, 1889.

The question was whether certain judgments recorded against the intestate in the Circuit Court of the United States for the Eastern District of North Carolina, and which had been assigned to the defendant Mary P. Alsop, were liens upon the land which were and ought to be subjected to sale, and the material facts pertinent thereto were agreed to be as follows:

1. James Moseley died intestate, domiciled in Edgecombe County, 4 March, 1885, and shortly thereafter administration was duly granted upon his estate.

2. That the personal property of the intestate was about $487, which has been applied to the payment of other debts of the intestate and charges of administration.

3. At November Term, 1877, of the Circuit Court of the Eastern District of North Carolina two judgments were rendered and docketed against John T. Alsop (who was the principal debtor) and said James Moseley and S. S. Alsop (who were sureties), to-wit, one in favor of P. A. Dunn & Co. for $500, with interest and costs, and the other in favor of Joseph W. Jenkins for $500, with interest and costs. The debts upon which said judgments were rendered were promissory notes, made on 16 and 23 August, 1875.

4. That the intestate, James Moseley, owned no real estate at the time said judgments were rendered, or thereafter, except his homestead, which was allowed and set apart to him on 2 June, 1876, in a tract or parcel of land situate in Halifax County, containing fifty acres, under executions issuing from judgments of Halifax Superior (62) Court.

5. Said Moseley sold off portions of said homestead tract from time to time, and on 26 June, 1883, he conveyed the remainder thereof, to-wit, forty-six acres, by deed of trust, to one T. N. Hill, trustee, in fee. Default being made by said Moseley in the payment of the debt secured

by said deed of trust, Hill, after due advertisement, and in pursuance of the power conferred upon him, sold the premises on 4 February, 1884, and the same was purchased by Spier Whitaker, to whom the trustee made a deed therefor in fee, 5 February, 1884; and afterwards, on 28 February, 1884, Whitaker conveyed the land to the defendant James R. Horne, in fee, who at once took possession, and has been in the adverse possession thereof ever since. The plaintiff and defendant Mary P. Alsop seek to sell this forty-six-acre tract of land to make assets for the payment of the aforesaid judgments, which they allege are a lien thereon (subject to the homestead interest), and have been since the date of the rendition and docketing of the same, as aforesaid.

6. That said Moseley left no widow, but several children, the youngest of whom became twenty-one years of age 30 May, 1887.

7. During 1877, and ever since that time, the regular terms of the United States Circuit Court for the Eastern District of North Carolina have been held on the first Monday in June and the last Monday in November in each year.

8. The following executions were respectively issued upon the aforesaid judgments: 15 January, 1878; *alias,* 22 September, 1880; *pluries,* 15 August, 1883, and again 10 December, 1885, and 21 June, 1887, upon all of which the marshal returned, "No property to be found."

(63) The plaintiff moved for judgment directing the sale of that portion of the tract of land allotted to James Moseley for a homestead, conveyed as aforesaid to and claimed by defendant Horne. But, his Honor being of opinion that no lien existed in favor of the judgment creditor at the time of the conveyance by James Moseley to Hill, trustee, or of the subsequent conveyance by said trustee to Whitaker, and by Whitaker to Horne, the motion was denied.

The plaintiff and defendant Mary P. Alsop appealed.

J. M. Mullen and R. O. Burton, Jr., for plaintiffs.
Spier Whitaker for defendants.

SMITH, C. J. The plaintiff's proceeding assumes that the judgment recovered in the Circuit of the United States created liens upon the land allotted as a homestead to the debtor, whose enforcement was suspended during the period of exemption, but now can be, because of its termination and exposure to the claims of the creditors. This is the sole proposition, denied in the ruling below, maintained here in support of the appeal from that ruling.

If these judgments had been rendered in the State Superior Court and docketed as directed by the statute (Code, sec. 435), the lien would

have attached to the debtor's estate in the land, and at the expiration of the period of exemption it could have been subjected to the debts without obstruction from the running of the statute of limitations meanwhile. *Morton v. Barber,* 90 N. C., 399, and cases preceding. But as the judgment did not, *proprio vigore,* under the former practice, bind the debtor's property, unless under process issued and acted on by a sale, and then the lien ran back and bound it as against his own attempted alienation, or putting an encumbrance upon it (*Jones v. Judkins,* 20 N. C., 591; *Harding v. Spivey,* 30 N. C., 63), so the Code, in introducing a change and giving a lien to the judgment itself, requires more than a mere rendition to be found in the papers consti- (64) tuting the judgment roll; and to have this effect it must be entered upon the docket as prescribed in section 433, Code. It may be so docketed in other counties, and thus form a lien upon real estate of the debtor situated therein. Code, sec. 435.

So essential and imperative is the requirement that the judgment be docketed to create a lien that it was deemed necessary to pass chapter 75, Laws 1881, which provides for the transmission of the substantial elements of a final judgment rendered in this Court to the various Superior Courts, and the docketing therein, in order to attach a lien upon the debtor's real estate. Code, sec. 436. In like manner, to give the same efficacy to judgements rendered and decrees pronounced in the Circuit and District Courts of the United States within the State, was passed the act of 1889, which allows such to be docketed in the several State Superior Courts for the purpose of creating liens upon the debtor's real estate in such counties, to the same extent as docketed judgments of the said Superior Courts, and requires the clerks of the last-mentioned courts to docket such transcripts when presented. This enactment was made to carry into effect an act of Congress entitled "An act to regulate the liens of judgments and decrees of the courts of the United States," approved 1 August, 1888.

These enactments not only provide for imparting equal efficacy to judgments recovered in the Federal Courts as is given by State legislation to judgments in the State courts, but involve a distinct recognition of the necessity of such additional concurrent legislation to create a lien upon the debtor's real estate. It follows that, previous thereto, no lien grew out of a judgment recovered in the Federal courts, and it was incidental to and associated with the suing out and consummating the final process for its enforcement under the conditions of the former State law.

In *Coughlan v. White,* 66 N. C., 102, decided soon after the (65) changes introduced in the new procedure act, it is held that an

execution issuing upon a judgment recovered in a court of the United States, whose *teste* overreached a judgment in the State court, was entitled to priority in the distribution of the funds realized under a sale and in the sheriff's hands.

So, in *Woodley v. Gilliam,* 67 N. C., 237, it was held that a sale by the marshal, under an execution, whose *teste,* running back to a judgment in the United States Court, prior to the docketing of a judgment rendered in Tyrrell Superior Court, and docketed in the Superior Court of Washington, having preference over the latter, passed the title to the purchaser. These rulings proceed upon the fact that the enactment giving liens to docketed judgments upon the debtor's land and superseding the lien created by the issue of an execution did not extend to the United States Court, in regard to which the old law still remained in force. This brings us to an examination of the effect of the act of Congress, approved 1 June, 1872, entitled "An act to further the administration of justice," which, as modified and incorporated in the Revised Statutes, secs. 915 and 916, is as follows:

"Sec. 915. In common-law causes in the Circuit and District courts the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or district Court, from time to time, may by general rules adopt such State laws as may be in force in the State where they are held, in relation to attachments and other process: *Provided,* that similar preliminary affidavits or proofs and similar security as required by such State laws shall be first furnished by the party seeking such attachment or other remedy.

(66) "Sec. 916. The party recovering a judgment in any common law cause in any Circuit or District Court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such courts are held, or by any such laws hereafter enacted, which may be adopted by general rule of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Does this enactment, perforce of its own terms, adopt the State law, or does it require these modifications to be ascertained and introduced by means of rules sanctioned by the courts of the United States into their practice? And does the conferred authority extend to the creat-

ing of a judgment lien, irrespective of any process emanating from those courts, to render it effectual and fruitful in results?

The first section, most obviously, is intended to conform the process or mode of proceeding to enforce judgments rendered in the United States courts to those in use in the State courts. In terms, it applies to remedies "by *attachment* or other process," an expression twice used in the section and clearly limiting its import and operation.

The other section is of wider scope and adopts all remedies afforded by State laws to judgment creditors who have recovered in the State court, and extends the same to creditors who have recovered judgments in common-law causes in the courts of the United States. Not only are *existing* remedies provided in the several States thus introduced, but the act is expansive and adapts itself to such as may be provided by future State legislation. Both sections, however, relate to remedial processes and are intended to harmonize the practice in both jurisdictions, when exercised in the same State.

There may arise some doubt in construing the qualifying (67) clause—"which may be adopted by general rules of such Circuit or District Court" and determining whether the words are restrictive of both preceding clauses, so as to require the adoption by rule before either becomes operative, or whether they are confined to and limit the next preceding clause only, so as to leave to the United States courts to adopt such future State enactments as they might deem proper.

With the divers rules of practice prevailing in different States, it would seem quite as important to designate, in the manner suggested, those appropriate to the United States courts and the practice therein, already in force in the State, as those which legislation might hereafter introduce in order to their harmonious operation. If this be the true rendering of the act of Congress, it is sufficient to say that no such rules of which we are advised have been made for introducing the new Code practice into that of their courts. But if the restriction be understood to apply only to future changes, we do not see how the enactment can reach the question of a judgment lien when no process is used in these courts to enforce it, by execution or otherwise.

The inquiry is not how far back the lien runs when there has been a sale under final process issuing from a court of the United States, but whether its existence will be recognized in a proceeding in a State court to convert lands into assets for the payment of a decedent's debts.

We are not prepared to give such potent and far-reaching effect to this legislation, in the absence of any action of the United States courts ascertaining and declaring by rules how far the provisions of the State

laws are applicable and can be safely introduced into and change the pre-existing system.

The citation from Freeman on Judgments, secs. 403 and 404, involves the construction of the Judiciary Act of 1789, which by express
(68) words adopted the then existing practice in the State courts continued in the subsequent act of 1792. They settled the general principle that when a lien is created by judgment merely entered in a State court, it will have the same effect when entered in a Federal court in like circumstances, and this whether by interpretation of the common law or introduced by statute, because of the assimilation of the practice under the different jurisdictions exercised in the same territory in order to harmony of action. But no such lien exists in this State by the common law under the former practice, and it results only from a statute which prescribes a condition essential to its existence, and that is that it be *first docketed* in a prescribed manner in each county wherein it is to operate. The judgment contained in the roll has no such effect, as decided at the last term, in *Holman v. Miller,* 103 N. C., 118. But until the recent adopting legislation the act was inapplicable to the Federal courts; and to give it efficacy in them, not only would the requirement of the docketing have to be dispensed with, but, in analogy, the lien would have to be co-extensive with the territorial jurisdictional limits of the court and become a lien upon the real estate in any of the counties constituting the judicial district. To give it this effect would be in contravention of the purpose of the act in furnishing information of such liens in any county by an inspection of the Superior Court docket. This would be more than to incorporate its provisions into the practice in the Federal courts—would, in fact, be legislation itself.

The appropriate remedy has been furnished in the late concurring legislation on the subject, and we feel constrained to deny the lien in the present case, and must affirm the judgment.

Affirmed.

Cited: Bernhardt v. Brown, 122 N. C., 593; *Riley v. Carter,* 165 N. C., 338.

(69)

B. R. BROWNING & SON v. BENJAMIN A. LAVENDER AND McMURRAY FERGUSON, TRUSTEES.

Equity—Injunction—Cloud Upon Title—Jurisdiction.

1. A court of equity will not interfere by injunction to restrain the sale of land, or by the exercise of its jurisdiction to remove a cloud upon the title, where it appears that the party seeking such relief is in possession, and that the proofs upon which he relies will be available in any action which may be instituted against him to recover the property. In such case he has an adequate remedy at law.
2. Where, however, the proofs upon which such party must rely for a defense of his interest are of such character that they may become lost by the lapse of time, and without them one claiming under the adverse title could recover in an action at law, the courts will interpose their equitable powers and grant the necessary relief.

ACTION pending in HALIFAX, heard before *MacRae, J.*, at chambers, on 6 February, 1889, upon a notice to show cause why an order restraining the defendants from selling certain land should not be continued till the final hearing of the cause. The cause was heard upon complaint, answer and exhibits, from which the following facts appear:

On 4 February, 1834, B. A. Lavender and Margaret T. Alston, in consideration of a marriage soon thereafter solemized between them, executed a marriage contract, by the terms of which certain slaves and interest in slaves and land that had been devised and bequeathed to her by the will of her deceased father, John Alston, were conveyed to Willis Alston and William Tannahill, trustees, to be held by them in trust for her sole and separate use during her life, and after her death to the use of her said husband, with power in said Margaret to give, grant and convey said property by any writing under her hand and (70) seal, and to dispose of the same by will.

The said Margaret died in 1859, having executed a last will, in which she mentions certain property as that which was conveyed by the marriage contract, accretions and other property into which it had been converted, including six of the eleven shares, into which the Pleasant Hill tract of land, devised by her father, had been divided. By the provisions of the said will of the said Margaret Lavender her mother was to be permitted to live on said Pleasant Hill tract without payment of rent during the life of the latter, if she chose, and at her death the interest of testatrix in said tract of land was to be sold by the trustee, one James W. White, appointed by her will, instead of said Tannahill and Alston, then dead, and her other property, as said trustee deemed advisable, and the proceeds of said sales so made by said trustee were to be invested by him and held to form a fund, out of the interest of

which her husband, said B. A. Lavender, was to be supported during his life, if sufficient, but a portion of the principal was to be used for his support if necessary.

The testatrix authorized her said husband, B. A. Lavender, during his life, to execute a written instrument, directing how the fund and property remaining at his death should be divided among her children and their issue, viz., that it should be equally divided between Benjamin Alston Lavender, her son, and her daughter, Florence L. Lavender, now the wife of William R. Curtin, or their issue, *per stirpes*. If one of her said children should die without children, the survivor, it was provided, should take the whole, and if both should die it was limited over.

It was alleged in the complaint that said Margaret Lavender owned at the time of her death eleven shares of said Pleasant Hill tract, only one of which shares was embraced in the marriage contract, and (71) that she had no power to make a will as to the other shares. It is stated in the answer that she owned at her death but six shares in said tract, one of which was devised to her by her father and the other five purchased with funds realized by sale of property bequeathed by her father and included in said contract.

The two children, the only heirs at law of the testatrix—B. A. Lavender and Florence, wife of William R. Curtin—are still living. James W. White, the trustee appointed by the testatrix in her will in place of Tannahill and Alston, has been dead for some years, and her husband, B. A. Lavender, has recently appointed the defendant McMurray Ferguson trustee in his stead. The mother of the testatrix is dead.

It is alleged in the complaint that B. A. Lavender executed, on the .....day of ..... , a deed, conveying to his daughter, Florence, wife of W. R. Curtin, 400 or 500 acres of said Pleasant Hill tract. The only answer is that filed by said Ferguson, as trustee, and he denies any knowledge or information of the execution of such a deed, and declares it void, if executed.

In 1880, 1881 and 1885 said Curtin and wife executed successive mortgage deeds, conveying said Pleasant Hill tract to the plaintiffs to secure the payment of certain indebtedness of said Curtin and wife to said plaintiffs. B. A. Lavender, the husband of the testatrix, on 9 November, 1880, executed a release to plaintiffs of said Pleasant Hill tract, after reciting the fact that his daughter and her husband had executed a mortgage deed conveying said tract; and also another similar release was executed by him on 3 November, 1881, reciting a later mortgage deed executed by his daughter and her husband.

The defendant McM. Ferguson contends that the said mortgage deeds and releases are null and void. The plaintiffs contend that the

testatrix had no power to appoint White trustee in place of (72) Tannahill and Alston, and her husband had no right to appoint the defendant Ferguson, and that the legal title to the property embraced by the marriage contract is in the heirs at law of Tannahill and Alston, the original trustees.

The plaintiffs allege that said B. A. Lavender, Sr., for the purpose of depriving the said Florence of her property and the plaintiffs of the benefit of her conveyances, has influenced the defendant Ferguson to advertise said Pleasant Hill farm for sale, which he has already done, with the avowed purpose of carrying out the will of the testatrix, but that said B. A. Lavender was still in possesson of half of said tract, which was sufficient for his support.

Both of the last-mentioned allegations of the complaint were denied in the answer.

The judge below dissolved the restraining order previously granted, on the ground that no such equity was shown as to entitle plaintiffs to extraordinary relief, and plaintiffs appealed.

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

AVERY, J. . It is familiar learning that where a party has an adequate remedy at law a court of equity will not grant extraordinary relief by way of injunction. When, therefore, the aid of the court is invoked to enjoin a sale of land, on the ground that it will cast a cloud on the title of plaintiff in possession of the land, and it is apparent from the admitted facts that a purchaser at such sale could not assert title derived from it without bringing an action for possession against complainant and raising thereby every question involved in the controversy as to equitable relief, this elementary principle applies and governs the case. *Southerland v. Harper,* 83 N. C., 200.

If the defendant Ferguson, claiming to act as trustee, should (73) sell the land, as he threatened to do, and the purchaser at such sale should bring his action against the plaintiffs, the latter would have ample opportunity to avail themselves of the defense that Ferguson was not lawfully appointed as trustee, did not hold the legal title in the land in controversy and had no right to sell under the provisions of the will of Margaret Lavender, or had power to convey only one of eleven shares. Indeed, the burden would be on the purchaser in that event to show affirmatively title in his grantor, Furguson. Meantime, until title should be clearly shown in the trustee, the plaintiffs would be in possession and in the pernancy of the profits.

If it appears in considering causes of this kind that the deeds, records or other evidences of title relied upon by a plaintiff will prove as available for the vindication of his rights at any future time as they now will, then both his present and prospective remedy at law is sufficient, and a court of equity will not interpose by injunction, nor will an action lie to remove the alleged cloud. Where the illegality or nullity of a deed or record, constituting part of the adverse chain of title, which is alleged to be a cloud on the complainant's title, is apparent upon its face, or the alleged defect appears of record from one or many instruments, and is in no way dependent upon testimony of witnesses that may be lost by lapse of time, there is no danger that irreparable injury will be sustained, and no sufficient reason for resorting to a court of equity for relief. *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis, ib.,* 332; *Murray v. Hazell,* 99 N. C., 168.

The controversy between plaintiffs and Ferguson, trustee, or his guarantee, must, in any conceivable event—even in the remote future
—depend upon the construction given by the courts to the con-
(74) tract made between B. A. Lavender and Margaret Lavender in contemplation of marriage, and the will and other instruments purporting to have been executed in pursuance of its provisions and relied on to establish the power of Ferguson as trustee to convey the title, originally admitted to have been in John Alston, to the lands in controversy, or any interest therein.

On the other hand, where a forged mortgage deed is wrongfully admitted to registration, and constitutes an apparent lien upon a tract of land, with power to sell for a spurious debt, it is settled that the person whose name has been forged to the mortgage deed, though in possession of the land purporting to have been mortgaged, may bring an action to have the deed canceled, as a cloud upon his title. *Byerly v. Humphrey,* 95 N. C., 151. The relief in that case is granted, because the proof available to show the forgery may be lost by the lapse of time, and a purchaser at a sale under the power contained in the forged deed must, in the absence of any evidence of its spurious character, recover in an action against one deriving title from the apparent mortgagor by reason of the estoppel. *Murray v. Hazell, supra; Byerly v. Humphrey,* cited for plaintiffs, is therefore, distinguishable from our case.

The judgment of the court below must be

Affirmed.

Cited: Peacock v. Stott, 104 N. C., 155; *McNamee v. Alexander,* 109 N. C., 245; *Hutaff v. Adrian,* 112 N. C., 260; *Farthing v. Carrington,* 116 N. C., 329; *Bostic v. Young, ib.,* 768; *McArthur v. Griffith,* 147 N. C., 549.

(75)

W. B. HOWERTON ET AL. v. JOHN T. SEXTON.

Appeal—Undertaking—Reference—Guardian and Ward—Partition—Payment—Bonds of Administration, Guardians, etc.

1. An appeal will not be dismissed where the undertaking was not filed within the prescribed time, but was filed before the transcript of the record was transmitted to the Supreme Court. Laws 1889, ch. 135, sec. 6.
2. A referee's finding of fact, under an order of reference by consent, is conclusive.
3. A payment made by a purchaser of lands, under a decree for the sale and partition of lands which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common, is proper and in pursuance of the statute. Code, sec. 1980.
4. The giving of the bonds required of guardians and administrators is not essential to the validity of the appointment itself; the failure to take the bond, however, subjects the officer whose duty it is to see that it is made, to the consequences of such omission.
5. Therefore, when D., having been duly appointed and qualified as guardian of one minor tenant in common, subsequently applied to be appointed guardian of another, and the clerk of the Superior Court simply inserted the name of the latter ward in the order making the former appointment, without requiring any further bond. *Held*, that such appointment was not ineffectual, and that payments made to such guardian by one who had no knowledge of the irregularity would be protected.

APPEAL from judgment upon exception to referee's report, by *Merrimon, J.*, at Spring Term, 1889, of NASH.

This cause was before the Supreme Court at Fall Term, 1884, upon an application to annul the proceeding for partition and the sale of land made to that end, upon the ground of numerous assigned defects and irregularities therein, which was denied and the validity of the proceeding upheld. The cause was remanded for an inquiry "as to the payment of the purchase money and the manner of its disposi- (76) tion," of which this Court was not then satisfied. *Howerton v. Sexton,* 90 N. C., 581.

Charles M. Cooke for plaintiffs. (82)
Jacob Battle for defendant.

SMITH, C. J. Preliminary to the hearing of the plaintiffs' appeal, the defendant's counsel entered a motion to dismiss it, on the ground that the undertaking required to perfect it was not executed until after the expiration of the sixty days allowed, after trial, for preparing the case, in explanation of the delay in which affidavits on either side

were read. The term of the court at which the trial took place, ended on 14 May, 1887, from which sixty days were allowed, and entered of record to each party, in which to perfect their appeals, and the plaintiffs' undertaking bears date 19 September, 1887, more than four months thereafter. It is unnecessary to inquire into the matters in excuse, controverted in some degree, and doubtless the result of mutual mis-
(83) understandings of counsel, since an answer to the motion is found in the enactment of the last General Assembly (Laws 1889, chap. 135), of which sec. 6 provides that "no appeal shall be dismissed in the Supreme Court on the ground that the undertaking on appeal was not filed or the deposit made earlier; provided, the undertaking shall be filed, or such deposit made, before the record of the case is transmitted by the clerk of the Superior Court to the Supreme Court."

The act declares, further, that its provisions "shall apply to causes now pending in the Supreme Court."

This removes the objection growing out of the delay in giving the security, and requires us to refuse the motion to dismiss.

While both parties complain of the overruling of their several exceptions, and the plaintiffs of the sustaining of the defendant's exceptions in part, we deem it most convenient to enter upon a consideration of the entire subject matter in controversy, and dispose of both appeals at once.

1. The defendant's exception is pointed mainly to findings of fact which, as the order of reference, made without objection, and transferred to the referee the determination of issues of fact as well as of law, substituting him in place of both judge and jury, are conclusively determined in the court below. This has been repeatedly decided. *Barcroft v. Roberts,* 91 N. C., 363; *Cooper v. Middleton,* 94 N. C., 86; *Rhyne v. Love,* 98 N. C., 486; *Battle v. Mayo,* 102 N. C., 413.

There is in the plaintiffs' sole exception to the adverse ruling, one involving a question of law which we are required to notice and dispose of, and that is the payment of the share of Sallie B. Draper to B. F. Draper as her guardian.

There is no controversy as to the validity of an order committing to him the trust of the guardianship, but objection is taken to his receiving her share of the fund, while the statute then in force (Bat.
(84) Rev., chap. 84, sec. 17) requires the shares belonging to "an infant, a married woman, *non compos,* imprisoned or beyond the limits of the State." . . . "to be so invested or settled that the same may be secured to such party or his real representative." Code, sec. 1908.

The answer to this exception is found in the judgment that the proceeds of sale be paid over to the several parties, tenants in common, as they were "entitled to the land according to law," and, of course, this was a direction to pay over the shares of infant owners to their guardian, who represents them, and such, we believe, is not only consonant with the general practice in the construction of the statute, but a correct interpretation of its meaning. For such delivery to a guardian who has given bond is a settling, and the share "is secured to such party or his real representative."

And so it is recoverable by the real representative, in case of death, in an action upon the guardian bond, as decided in *Allison v. Robinson,* 78 N. C., 222, and in other cases.

Certainly a payment to the guardian Draper was rightful and proper, as the only party entitled to receive his wife's share, as her guardian, and an acquittance of the defendant, who had assumed the place of purchaser.

This disposes of the plaintiffs' exception, and we now proceed to consider those of the defendant.

His first two exceptions, which, in effect, exonerate the defendant from liability for the share of W. B. Howerton, are sustained and the other five overruled. These may be grouped in one general complaint, that the defendant is charged with the payment of any sum to W. F. Howerton, expanded into several particulars, to-wit:

1. That B. F. Draper is not declared the legally appointed guardian to the infant, and as such entitled to recover his share.

2. Because the defendant is held to be derelict in not inquir- (85) ing fully into the manner of the alleged appointment before making such payment to him.

3. For that he was negligent in his duty as guardian *ad litem,* in not seeing that a proper order for the distribution of the fund was made.

The essential inquiry in disposing of these matters relates to the legality and regularity of the action of the clerk in appointing the guardian of W. F. Howerton, and its sufficiency to authorize his reception of the infant's share and giving effectual acquittance to the defendant.

The referee in his report sets out the order of appointment which is full and explicit, conferring upon the guardian all the rights incident to the appointment made of the guardian to both infants.

It invests the defendant with all the powers incident to the trust and necessary in taking into possession and managing the estate of each, and nothing in its form awakens suspicion, or is calculated to cause distrust. When the defendant gave his notes to Draper, the latter

assured him of his being appointed guardian, both to Sallie B. and W. F. Howerton, and when he paid his notes the letter of appointment was exhibited, and the defendant fully believed him to be guardian. With these findings, notwithstanding the irregularity of the appointment, which was unknown to the defendant, we think the defendant, acting in entire good faith, was warranted in recognizing the appointment and making a payment. He had a right to assume that the appointment was regularly made with an observance of the requirements of law, and with the full security of the bond given for the faithful discharge of the trust attaching thereto. Furthermore, we are disposed to hold the appointment itself effectual, for it is made in proper form, and the defect lies in the omission to take the bond, with surety, of the defendant, an omission not affecting its validity, but subjecting (86) the clerk to the consequences of such neglect.

The giving the bond, though required, is not essential to the efficiency of the act of appointment itself, and this principle is established in several cases where the letters of administration were granted on giving the proper bond, when none was, in fact, given. *Hoskins v. Miller,* 13 N. C., 360; *Spencer v. Cahoon,* 15 N. C., 225; *Spencer v Cahoon,* 18 N. C., 27; *Hughes v. Hodges,* 94 N. C., 56.

Judgment will be entered according to this opinion, in favor of defendant.

Affirmed on plaintiffs' appeal. Error on defendant's appeal.

Cited: Batchelor v. Overton, 158 N. C., 399.

A. J. P. HARRIS v. W. B. ALLEN AND F. C. HOLDEN.

Mortgage—Registration—Evidence—Homestead—Descriptive Words.

S., in 1884, being then a resident of the county of Wake, executed to the plaintiff a mortgage, conveying certain lands of (less value than $1,000), and *"all the personal property of every kind of which he was then possessed";* the deed was only admitted to probate and registered in Wake. Subsequently, the mortgagor removed to the county of Franklin, taking with him the personal property in controversy, a portion of which defendants claimed by virtue of mortgage, executed after the removal to Franklin, and duly recovered therein, and a portion under execution sale in an action to recover the possession. *Held*—

1. That it was not necessary to register the mortgage in Franklin County after mortgagor's removal thereto.

2. That the words "all the personal property," etc., were sufficient to pass the title to the chattels in existence and possession at the time of the conveyance, and that the parol testimony was competent to identify it.

3. That even if this were a proper case for marshaling assets, that power would not be exercised to the prejudice of the mortgagor's homestead.

ACTION for the recovery of a mule and wagon, tried before (87) *Avery, J.*, at the April Term, 1888, of FRANKLIN.

The plaintiff claimed under a mortgage executed to him by Robert Strickland and wife, registered in the county of Wake on 28 March, 1884. At the time of the execution and registration, the mortgagor lived in the county of Wake. The mortgage conveyed certain real estate in Wake County, and "all the personal property of every kind of which they possessed." About two years after the execution of the mortgage, the mortgagors moved to Franklin County, taking with them the property in controversy. The mortgage was never registered in Franklin County, and the mortgage debt has never been paid.

The jury found that the land was worth only $700, and that the homestead had never been laid off. The defendants claimed the wagon and harness under a subsequent mortgage, executed after the removal to Franklin, and duly registered. This property was sold, leaving a balance due, which defendants reduced to judgment. Under this judgment the mule was sold. The property was replevied by the defendants and sold. Defendants bought the mule at the sheriff's sale; it does not appear who bought the wagon.

C. M. Cooke for plaintiff. (89)
N. Y. Gulley for defendants.

SHEPHERD, J. *First Exception.*—For that the court charged (90) that the plaintiff's mortgage "being only registered in Wake County, was sufficient as against execution creditors, of whom the defendant was one."

The Code, sec. 1254, provides that mortgages upon personal property shall be registered in the county where the mortgagor resides. We know of no law requiring a new registration of mortgages of personal property whenever the mortagor changes his residence. *Weaver v. Chunn,* 99 N. C., 431.

Section Exception.—For that parol testimony was admitted to identify the property, "the said mortgage being insufficient as against creditors."

In support of this exception, the defendant relies upon *Atkinson v. Graves,* 91 N. C., 99, and *Rountree v. Britt,* 94 N. C., 105.

In the first case, there was a mortgage on "one bale of good middling cotton that I may make or cause to be made or grown during this year." *Held,* to be insufficient because "it does not designate and identify the property sought to be conveyed, so it could be separated from other property of like kind raised by the mortgagor." In *Rountree's case,* the mortgage was upon "my entire crop of every description." *Held,* to be insufficient, because the place where the crop was to be raised was not described. It was intimated, however, that parol testimony was competent to fit the description to the property and show the agreement of the parties. Neither case is in point, nor do they conflict, in the slightest degree, with the well settled law that the words "all the personal property of every kind of which (one) is possessed," will pass chattels in existence and possession at the time of the conveyance. Jones Chat. Mort., 65; Herman Chat. Mort., 75.

Third Exception.—"That the plaintiff should be compelled (91) to resort to the singly charged estate conveyed in the mortgage, before suing this defendant."

Even if this were a proper case for marshaling, the power would not be exercised to the prejudice of the homestead. "To apply the principle in such a case, would be but an indirect way of subjecting a homestead to the payment of the debts, when the very object of the law is to confer a homestead exemption, superior to all creditors, and ever consecrated, except so far as it may be impaired by the voluntary act of the claimant himself." *Ruffin, J.,* in *Butler v. Stainback,* 87 N. C., 216.

Fourth Exception.—This is not insisted upon in this Court.

The defendant objected in this Court to the form of the judgment. No error, in this respect, is assigned in the case upon appeal, and as the judgment rendered is not inconsistent with the record, it will not be disturbed.

Affirmed.

Cited: Strouse v. Cohen, 113 N. C., 352; *Bank v. Cox,* 171 N. C., 79.

COMMISSIONERS OF THE TOWN OF GREENVILLE v. OLD DOMINION STEAMSHIP COMPANY.

Pleadings—Evidence—Judge's Charge—Action to Recover Land.

1. Pleadings are not evidence upon the trial of issues raised thereby, unless they are introduced for such purpose.
2. Where the court instructed the jury that the plaintiffs had not offered sufficient evidence of possession to acquire title—the defendant having denied plaintiffs' title—and the case on appeal disclosed no such evidence. *Held*, not to be erroneous, although the defendant had, in its answer, deduced its title to a part of the land in controversy from the plaintiffs—the defendant having averred a good title in itself.

APPEAL from *Avery, J.*, at Spring Term, 1888, of PITT.

A. W. Haywood for plaintiffs (92)
Rodman & Son filed a brief for defendant.

SMITH, C. J. This action, begun on 8 September, 1882, is prosecuted to recover possession and damages for detaining the lot of land described in the complaint, the title and right to which is contested by the defendant company that claims itself to be the owner. The case sent up on the plaintiffs' appeal, singularly enough, shows the various deeds offered in support of the plaintiffs' title, with the accompanying explanatory evidence, and the defendant's exception thereto, with the rulings thereon, complained of—none of which are before us on this, the plaintiffs' appeal, and no exceptions whatever to them.

Upon the hearing of the evidence at the trial upon the issues derived from the contesting claims of the parties, the court being of the opinion against the plaintiffs' ability to maintain their action, intimated that, as the first defense of the defendant raised the question of title and put the burden on plaintiffs of showing a title good against all the world, the burden would be upon the plaintiffs—as they relied on the Susannah Evans deed, and had offered no grant from the State—to show, not only that the Susannah Evans deed covered the *locus in quo*, but, also, that the plaintiffs had had open, notorious and continuous adverse possession of the *locus in quo* under that deed for twenty-one years.

The court further stated that the jury would be instructed that the plaintiffs had offered no evidence of possession except the testimony of J. J. Cherry; that the Plank-road company, at some time, received freights at a landing that extended west of Short street, but there was no evidence how long such acts of ownership continued, nor whether a wharf was constructed and such ownership exercised as would have

(93) subjected that company to an action. Plaintiff submitted to a nonsuit and appealed.

The defendant relied upon his first defense, and insisted that the plaintiffs had not shown title out of the State, and, if he had done so, that the defendant and J. J. Perkins and Greene had shown possession for more than seven years, and it did not appear from what source Greene derived title.

The plaintiffs denied that the Greene deed to Perkins covered the *locus in quo*. The defendant contended that it did include it.

The judge stated that he would instruct the jury that there was no evidence of possession under the Evans deed for a sufficient period of time to divest title out of the State, and none was shown, except in the testimony of J. J. Cherry. Upon this point, aside from the direct statement of the judge, we find none in the reported testimony, and, therefore, must uphold the ruling, unless, as is argued here, there are admissions in the answer that dispense with the necessity of such proof. It does not appear that the answer was read to the jury as evidence in the cause, even if, upon an examination, an admission of plaintiffs' title to the disputed lot would be disclosed. Unless it was so read, it furnished no evidence on which the jury could act, and this should be made to appear to enable us to determine upon the correctness of the ruling. *Adams v. Utley,* 87 N. C., 356; *Grey v. Manuel,* 89 N. C., 83; *Brooks v. Brooks,* 90 N. C., 142; *Smith v. Nimocks,* 94 N. C., 243.

But, if permitted to look into the pleadings to see what is put in issue, it will be found that the defendant positively denies the plaintiffs' title to the lot, contradicting the averment to that effect in the complaint, while in another form of defense the answer concedes title to have been in the plaintiff to land, of part of which the defendant was in possession, yet deduces it thence to itself, so that, taking the answer as a whole, it controverts the plaintiffs' alleged ownership and

(94) declares that, it having once had it, it has, by conveyances, been transmitted to the defendant.

Further, the case comes before us upon an exception to the ruling that the plaintiffs have failed to show title out of the State by proving a supporting possession under the deeds for the required period to divest.

In this we find

No error.

Cited: Page v. Ins. Co., 131 N. C., 116; *Mfg. Co. v. Steinmetz,* 133 N. C., 193.

H. WEIL & BROTHER v. JOHN E. WOODARD ET AL.

Vacating Judgments—"Excusable Neglect"—Jurisdiction.

1. Upon an application to relieve a party from a judgment, because of mistake, surprise, or excusable neglect, it is the exclusive province of the judge hearing the matter to find the facts, and his finding is not reviewable.

2. When the judge grants the relief, *in the exercise of his discretion*, that conclusion is also not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect, may be reviewed, and if it be determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone by the statute.

3. When notice had been issued to the purchasers at a judicial sale to appear at a term of the court and show cause why the deeds theretofore made them by the commissioners appointed to make the sale should not be set aside and a re-sale directed, appeared as notified and were informed by one of the commissioners, who was also the attorney of the plaintiffs in the action, that no judgment would then be asked against them, and that he was satisfied the matter would be satisfactorily arranged before the next term, and the other commissioner assured them that it was entirely unnecessary for them to employ counsel, that they were ignorant persons, that they relied upon these statements and took no further steps to answer the motion, that at the next term, without their knowledge or consent, a decree was signed, but entered on the minutes allowing the motion. *Held*, to constitute such excusable neglect as would justify the court in setting aside the judgment.

MOTION to set aside a judgment, heard before *Armfield, J.*, at (95) February Term, 1889, of WILSON.

This action was brought to foreclose a mortgage of real estate, and a decree of foreclosure thereof, directing a sale of the land to pay the mortgage debt, and appointing commissioners to make such sale, execute deeds to the purchasers, etc., etc., was passed at the Fall Term of 1885 of the Superior Court. The commissioners accordingly, afterwards made such sale, at which the appellees, each respectively, purchased certain tracts of land so sold. They afterwards purported and intended, by an arrangement, which they insist was a valid payment, but which the appellants contend was not a valid and efficient payment, to pay to the commissioners, or particularly to one of them, the purchase money for the land they respectively so purchased, and the commissioners executed to them respectively, or to certain persons by their direction, deeds of conveyance to the land. Such sale was reported to the court, and confirmed by proper order at February Term thereof of 1886.

Afterwards, on 25 May, 1888, the plaintiffs notified the appellees, as such purchasers, that they would enter a motion at the June Term of that year of the court, "to set aside the deeds that had been made as aforesaid," and for an order directing a re-sale of the land sold to them respectively, upon the alleged ground that they had not paid the purchase money for the land which they respectively bid for it, and had not complied with the order of sale thereof, etc.

The appellees attended the last mentioned term of the court, and one of the commissioners assured them "that it was entirely unnecessary for them to employ counsel, and that the land had in each case been fully paid for, and could not be re-sold," and, at the same term, the other commissioner, who was then and had before that time been
(96) the counsel of the plaintiff in action, informed them "that no judgment would then be asked for against them; that he was satisfied that his co-commissioner would arrange matters before the term following, and the impression made on their minds (they being ignorant persons and entirely unacquainted with the forms of law), was that the purpose of Mr. Blount was to coerce his co-commissioner into a settlement, and that he certainly would not ask for an order of re-sale without further notice to them;" "they did not hear of the alleged order of re-sale till December last, and then, for the first time, they employed counsel in the matter of the motion."

Afterwards, at the November Term of the court of 1888, the court, at the instance of the plaintiffs, made an order requiring the appellees each to pay into court the sum of money he had bid for the land so purchased by him by a time specified, and in default of such payment, directing a re-sale of the land, etc. The appellees did not consent to such order, or know of the same, until in December next afterwards. There is no entry of record of the order of re-sale; the clerk of the court knew nothing of it and no record entry of it was ever made. It was withheld from the papers of the case by plaintiffs' counsel, "out of tender consideration for the feelings of his co-commissioner, who, it was hoped to the last, would adjust matters."

Afterwards, at the February Term of 1889 of the court, the appellees moved to set aside the order of re-sale of the land last above mentioned, upon the ground of their excusable neglect in failing to appear and make opposition to the grant of such order, etc. The court heard the motion, and having found the facts, from affidavits submitted, the material parts of which are substantially stated above, it ordered and adjudged "that the failure of the respondents (the appellees), to answer the affidavit of petitioners in the cause filed at June Term of
(97) 1888, by the plaintiffs, . . . was due to excusable negli-

gence on the part of the respondents, and that the two orders aforesaid (the orders of resale and reference) be now stricken out, and that the defendants are here allowed at this term to answer said petition." The appellants, having excepted, appealed.

Fred. A. Woodard and H. F. Murray for plaintiff.
Jacob Battle for defendants.

MERRIMON, J. It is the exclusive province of the judge of the Superior Court to find the facts of the matter in applications to "relieve a party from a judgment, order or other proceeding taken against him, through his mistake, inadvertence, surprise or excusable neglect," as allowed by the statute (Code, sec. 274), and such findings of the facts are not reviewable by this Court. And if the facts so found in any such case, in any reasonable view of them, constitute such "mistake, inadvertence, surprise or excusable neglect," and if the judge grants the motion, in the exercise of his sound discretion, this Court has no authority to reverse or disturb his action, because the statute makes the discretion his. It is, however, the duty of this Court, on appeal, to determine whether or not the facts as found by the judge below, in any reasonable view of them, constitute such "mistake, inadvertence, surprise or excusable neglect," and if they do not, then the order of the court allowing the motion will be reversed; or, if the court below denies the motion, upon the ground that the facts do not present a case for the exercise of his discretion in allowing or disallowing it, then this Court may review his decision, and if it decides that there is error, then the judge below must exercise his discretion and allow or disallow the motion.

This is settled by numerous decisions. *Branch v. Walker,* 92 (98) N. C., 91; *Foley v. Blank, ib.,* 476; *Beck v. Bellamy,* 93 N. C., 129; *Winborne v. Johnson,* 95 N. C., 46.

It seems to us clear that the facts found in the case show excusable neglect on the part of the appellees in their failure to interpose their objection to the motion of the plaintiffs for an order of re-sale of the land at the June and November Terms of 1888 of the court. They were not, regularly, parties to the action, and were not brought into it by summons; nor were they brought into it for any of its principal purposes; they were simply notified, not by the process or under the direction of the court, as to a matter and motion incidentally affecting them as purchasers of the land, and such a purpose as the plaintiffs might, in their discretion, abandon at their pleasure, without having the court make any order, or entry of record, or take any action in respect to it,

and hence, they might discharge the parties of the notification given altogether, or for a time specified, or until they should receive further notice. The appellees were not in court and parties to the action by virtue of any regular or other process of the court; they had only notice of the plaintiffs, which the latter could control.

The appellees, in pursuance of the notice to them, attended the court at the June Term thereof of 1888, but did not appear in the action. While they were there, intending to make resistance to the proposed motion of the plaintiffs for a resale of the land, the counsel of the latter, who had authority in law so to do, and who was also one of the commissioners who sold the land, assured them "that no judgment would then be asked for against them; that he was satisfied that his co-commissioner would arrange matters before the term following," and the impression was made on their minds by the counsel that the purpose

"was to coerce his co-commissioner into a settlement, and that
(99) he certainly would not ask for an order of re-sale without further notice to them." This is found as a fact. No further notice was given; nevertheless, at the next November Term of the court the order of re-sale was taken, but not spread upon the record; the clerk of the court did not know that the court had signed it, nor was it filed among the papers in the action, and the appellees knew nothing of it until in December next afterwards.

Now, in view of the nature of the proposed motion, the relation of the appellees to it when made, the character of the notice given them, the assurances given them that no action would be taken until further notice, coming from the plaintiffs' counsel, they might well—certainly not imprudently—delay to employ counsel until the plaintiffs had settled their purpose to move for the order of re-sale of the land, and give them further notice accordingly. Moreover, the other commissioner, who seems to have been in some serious default, assured them "that it was entirely unnecessary for them to employ counsel, and that the land had, in each case, been fully paid for, and could not be re-sold." This commissioner was one of the agents of the court, and, in a sense, of the plaintiffs, to sell the land, and the appellees being ignorant men—it appears that they were—might not, unreasonably, the more readily act upon the assurances given them by the plaintiffs' counsel. They certainly intended to resist the motion, and the facts show that they confidently expected to make serious opposition to it, and this the plaintiff and their counsel knew. Their purpose was not captious and trifling, but serious. We cannot hesitate to decide that the court below properly held that there was excusable negligence.

Affirmed.

Cited: Marion v. Tilley, 119 N. C., 474; *Vick v. Baker,* 122 N. C., 99; *Marsh v. Griffin,* 123 N. C., 669, 670; *Norton v. McLaurin,* 125 N. C., 187, 188; *Hardy v. Hardy,* 128 N. C., 183; *Osborn v. Leach,* 133 N. C., 428; *Lumber Co. v. Cottingham,* 173 N. C., 329.

(100)

J. B. WILLIAMSON ET AL. v. E. J. D. BOYKIN ET AL.

Res Judicata—Vacating Judgments—"Excusable Neglect"—Certiorari.

Where it appeared, upon a motion made in the Supreme Court to set aside a judgment therein rendered, refusing to grant the writ of *certiorari*, that the facts upon which the motion was based were known, or might, with reasonable diligence, have been ascertained, upon the hearing of the petition for the *certiorari*, the motion to vacate was denied.

AT February Term, 1888, of the Supreme Court, the defendants filed a petition for a writ of *certiorari* to bring up for review the judgment rendered in this action against them in the Superior Court of WILSON. (See 99 N. C., 238.)

That petition having been dismissed, they now move to set aside the judgment dismissing it, with a view to a reconsideration of the matter.

In support of the present motion, they offered affidavits tending to show that the sum referred to in the affidavits of respondents and in the opinion of this Court on the hearing of the petition, as being paid by way of compromise, were not, in fact, so paid, but for an entirely different purpose, and that the defendants had no knowledge that such judgments were intended to be, or had been, so applied, until after the dismissal of the petition, and, therefore, they had no opportunity to combat that contention.

The plaintiffs filed affidavits denying these allegations.

F. A. Woodard and George Rountree for plaintiffs.
George V. Strong and H. F. Murray for defendants.

AVERY, J. If this Court has the power to vacate such judg- (101) ment at all, on the ground of surprise or excusable neglect (as the petitioners contend it has), the petitioner has not, even if the allegations of his petition be admitted, shown such facts as would justify the exercise of the right in this case. The proposition, upon its face,

to first annul the order disallowing the motion for a writ of *certiorari*, and then rehear the petition, with such supporting affidavits as might be offered by the defendants, is certainly a novel one.

It is not necessary that we should determine whether we could grant such relief in any case. It is sufficient to state that, conceding the power to exist, the petitioners have failed to show, in any view, such merit as ought to induce us to exercise it. Both petitioners and respondents were before this Court, and had the opportunity to present affidavits of all persons who were cognizant of any material facts, and, from the nature of the case, they must have known the persons who were consulted or had knowledge of any agreement in reference to the right of appeal, made while the parties were imparling as to a compromise.

To hold that the losing party might have the controversy reopened now to strengthen his case, by the use of greater diligence in procuring affidavits, would be to make a precedent calculated to subvert the old maxim, *"Interest repulicae, ut sit finis litis."*

Petition dismissed.

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(102)

R. R. PINKSTON AND H. M. SHEARIN v. R. E. YOUNG.

Lien—Sub-contractors—Mechanics—Statute.

1. The lien in favor of sub-contractors, laborers and material men, contemplated in sections 1801 and 1802, Code, does not attach until the person asserting it shall have given the notice therein prescribed to the owner of the premises upon which the labor or materials were employed.

2. This rule is not affected by the amendatory act (ch. 67, Laws 1887), except in so far as it dispenses with the necessity for filing an itemized statement of claim before a justice of the peace or the clerk of the Superior Court. This act is directed against the contractor, and is intended to compel *him* to furnish to the owner of the premises the statement necessary to give notice of claims of sub-contractors and others.

APPEAL from a justice of the peace, tried before *Graves, J.*, at Fall Term, 1888, of VANCE.

The plaintiffs brought this action in the court of a justice of the peace, to enforce their alleged lien for materials of the value of $139, furnished and supplied to a contractor (one Linthicum), who had contracted to build, and had built, certain houses for the defendant, and had put such material in and about the houses he had so built, and failed to pay the plaintiffs for the same, as allowed, in certain cases, by the statute. Code, secs. 1801, 1802 and 1803, and Laws 1887, chap. 67.

The pleadings raised issues of fact, and, on the trial, the court instructed the jury as follows:

"The law requires a contractor to make and furnish to the owner of the building an itemized statement of the materials furnished, and not paid for, before he receives his pay. When this statement is filed, the owner of the building is put on notice, and the lien attaches from the time such statement is filed; but, if no such statement is (103) filed by the contractor, there is nothing to put the owner on notice, and no lien attaches, and the owner is not liable to the men furnishing materials, unless something more appears.

"The law does not require the sub-contractor, or man who furnishes materials, to rely on the contractor, but allows him, if he wishes, to give the owner notice of his claim, and the moment he gives this notice of his claim for materials, his lien attaches, and the owner cannot pay the contractor any money due him on the contract. The owner may pay the contractor in advance, and the owner and contractor may vary or change the terms of the contract before the lien attaches, but they cannot vary the contract after the lien attaches, to the injury of sub-contractors or persons furnishing materials.

"If the contractor Linthicum did not furnish an itemized statement to Young, then no lien attaches; and, if Young paid Linthicum before the plaintiffs gave notice of the claim, then he is not liable to the plaintiffs in this action.

"If Linthicum was indebted to Young, and, to pay such indebtedness, he undertook to put up the shelves and counters in the storehouses of Young, the defendant Young could not be liable to plaintiffs in this action, although they furnished materials used therein; but, if Linthicum contracted to put up the shelves and counters in Young's storehouses for $325, to be thereafter paid, the building would be subjected to the lien of the plaintiffs as soon as an itemized statement was filed by the contractor Linthicum, or as soon as plaintiffs gave notice to Young; but if Young paid Linthicum before such statement or such notice, he would not be liable, and no lien did attach."

The jury found, by their verdict, that the plaintiffs furnished the contractors named with materials which were used in the construction of the houses of the defendant, to the amount of $139.49; that the contractor did not file with the defendant any *itemized* (104) *statement* of the amount due to the plaintiffs for such materials; that the plaintiffs gave defendant notice that they had furnished such materials to the contractor on the first day of September, 1889, and that, at that time, the defendant did not have in his hand any money due the contractor.

The court gave judgment for the defendant, and the plaintiffs, having excepted, appealed.

T. T. Hicks for plaintiffs.
C. M. Cooke for defendant.

MERRIMON, J. The lien given in favor of sub-contractors, laborers and persons furnishing materials for improvement on real estate, by the statute (Code, secs. 1801, 1802), does not arise and become effectual unless the person entitled to have the same "shall give notice to the owner or lessee of the real estate, who makes the contract for such building or improvement, at any time before the settlement with the contractor," of "the amount of such labor done or material furnished." If, at the time of such notice, the owner or lessee of the land has not paid to the contractor the money due, or to come due, to him upon or on account of the contract, and shall refuse to retain out of the amount so due so much, if there shall be so much due, as shall be due or claimed by the party having the lien, the latter may proceed to enforce his lien, and any payments to the contractor will not have the effect to discharge the lien so arising. The statute so clearly provides.

The plaintiffs, clearly, are not entitled to have their alleged lien enforced under the statutory provision cited, because it appears that at the time they gave the defendant notice of their debt against the contractor for the material supplied by them, he had paid him, and owed him nothing on account of the contract.

(105) Plaintiffs, however, contend that the statutory provisions cited are so amended and modified by the subsequent enactment (Laws 1887, chap. 67), as to render their alleged lien ineffectual without such notice given by them. We cannot so interpret that statute. It is entitled "An act for the better protection of mechanics and laborers," and provides, in substance, that the "subcontractors lien law" (Code, chap. 41), shall be amended by adding thereto the sections enacted, which prescribe an additional method of creating and enforcing a lien in favor of mechanics and laborers. It does not purport in terms, or by reasonable implication, to repeal or modify the existing law, except that it provides that the sum due to the laborer, mechanic or artisan, shown in the itemized statement required, "shall be a lien on the building or vessel built, altered or improved, without any lien being filed before a justice of the peace or the Superior Court," as required by the statute (Code, sec. 1784). This additional method requires that it shall be the duty of the contractor "to furnish the owner of the property or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic, or

artisan employed by such contractor, architect or other person, or to any person for material furnished, and upon the delivery to the owner or his agent of the itemized statement aforesaid, it shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which shall be sufficient to pay such laborer, artisan, or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing material," etc.

It is further provided, that if any such contractor or architect shall fail to furnish such itemized statement, he shall be guilty of a misdemeanor, and, upon conviction, fined or imprisoned, or both, in the discretion of the court. This stringent provision is directed (106) against, not the owner of the property, but the contractor. The purpose is to compel the latter to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. There is no liability created on the part of the latter if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. It may be, that the contractor has paid him or secured the sum due him to his satisfaction. It would be alike unreasonable and unjust to create such liability on the part of the owner of the property in the absence of the statement required. It would tend strongly to prevent such owners from improving their property, and such a purpose cannot be attributed to the Legislature, in the absence of some language or provision making it manifest.

If the contractor shall so furnish the itemized statement, the laborers' lien will arise and be effectual, as prescribed. If he fails to do so, then the laborer may give the owner of the property notice, and thus create the lien in his favor, as allowed and provided by the statute (Code, secs. 1801, 1802).

He may do this anyhow, and it will be safer to do so, as the contractor may fail to do his duty in furnishing the statement required of him.

In this case the contractor did not furnish any itemized statement to the defendant, and, hence, the plaintiffs have no lien, as contemplated and allowed by the statute (Laws 1887, chap. 67). The instructions complained of are substantially correct, and the judgment must be

Affirmed.

Cited: Parsley v. David, 106 N. C., 234; *Lumber Co. v. Hotel Co.,* 109 N. C., 661; *Hardware Co. v. Schools,* 151 N. C., 511; *Payne v. Flack,* 152 N. C., 601; *Brick Co. v. Pulley,* 168 N. C., 375; *Building Co. v. Hospital Co.,* 176 N. C., 89.

(107)

JOHN B. KNIGHT v. RICHARD HOLDEN.

Arbitration—Possession—Costs.

K. and H., by agreement in writing, submitted all matters in dispute between them, "including the title and right of possession" to a tract of land, to the arbitrament of B., who awarded that, upon the payment of a certain sum by H. to K., the title to the land should be vested in H., and that thereupon K. should convey, and in default of payment the land should be sold by commissioners, and the proceeds applied to the satisfaction of the amount awarded to be paid. The land was sold and purchased by K., who brought suit to confirm him title and for other relief. The defendant assailed the award, and particularly that part which directed the sale, and upon the trial, it was adjudged so much of the award as directed the sale was void, but that plaintiff held the legal title to the land and was entitled to have it charged with the amount fixed by the award, and gave judgment against defendant for costs. *Held*—

1. That the arbitrator did pass upon the right to the possession, when he awarded that the title was in K., the right of possession following the title.

2. That defendant was properly adjudged to pay the costs.

APPEAL from *Graves, J.*, at September Term, 1889, of FRANKLIN.

While an action by the plaintiff against the defendant for the recovery of certain personal property, of which the latter had taken possession under a claim of right thereto, was pending in the Superior Court of Franklin, the parties, with a view to an adjustment of matters in controversy, entered into a written agreement to submit the same to arbitration.

(110) The defendant, at the trial, admitted the legal title to the *locus in quo* to be in the plaintiff, and set up an equitable title in himself, insisting that the award of the arbitrator is void, and that it certainly is void in so far as it provides for the sale of the land.

The action was tried before his Honor upon the pleadings, upon the suggestion that if he should sustain the award it would not be necessary to go any further in the trial of the case.

His Honor held that the award was void in so far as it provided for a sale of the land, and set it aside to that extent; and also held that the defendant must pay all the costs, though his Honor sustained the defendant in his equitable defense, and held that the plaintiff could not recover upon his legal title, but that he held the land in trust for the defendant to secure the amount of the award and costs ($275) due to him, and ordered a judgment accordingly, and all costs.

From this judgment the defendant appealed.

C. M. Cooke and N. Y. Gulley for plaintiff.

J. W. Hinsdale for defendant.

SMITH, C. J. The sufficiency of the terms of the submission (111) to sustain so much of the award as authorizes and directs a sale of the land upon the occurring contingency, adversely decided by the judge, is not before us, as the plaintiff, acquiescing therein, does not appeal; and it is plain that the excess of the arbitrator, being severable from the rest of his award, does not invalidate what is done within the terms of the reference. *Griffin v. Hadley,* 53 N. C., 82, citing *Cowan v. McNeely,* 32 N. C., 5.

It is insisted by the appellant that the award is inoperative and void, because it does not dispose of the question of title and right of possession. We do not concur in this view of the award. The title, if not in direct terms, by clear and irresistible implication, is declared to be in the plaintiff, and this was admitted at the trial. At the same time the land is declared to be charged with the sum of $275 due to the defendant. Possession follows title, and is drawn to it, nothing else appearing to the contrary; and so the award, in legal effect, in determining the one, determines the other. Hence the necessity of the sale to discharge the attaching encumbrance. The award, then, does pass upon both inquiries as fully as if expressed in more particular terms.

The last objection is to the judgment taxing the appellant with the cost of the action. In this we find also no error. The defendant resists the award as ineffectual *in toto,* and in this is overruled, and the same relief given as was attempted to be given by the arbitrator; so that, the present action was necessary to secure the fruits of the award, and the general rule prevails which taxes the unsuccessful party with the costs of the action.

The case relied on to sustain the contention of the appellant (*Vestal v. Sloan,* 83 N. C., 555) is not in point. There the defense was a trust to redeem the land, whose possession was sought to be recovered in the suit, and most of the costs were incurred in determining this controversy, in which the defendant prevailed. As, under a (112) divided system, this relief against an action of the legal owner to recover his land would have to be sought in a court of equity, the cost of which would fall upon him, so he must be charged when the same result is reached in an equitable defense relied on in the single action which now admits it. Here the defense is that the award is invalid and the defendant fails in his resistance to its enforcement, and, of course, ought to pay the costs his conduct has rendered necessary.

Affirmed.

Cited: Kelly v. R. R., 110 N. C., 432.

McG. MOBLEY v. E. W. GRIFFIN AND D. T. WATERS.

Pleading—Action to Recover Land—Homestead—Sale, Execution—Evidence.

1. Under a general denial in the present system of pleading, as under the general issue in the former practice, in an action to recover possession of land, any conveyance produced by the plaintiff as a link in his chain of title may be attacked by showing its invalidity to pass the title.

2. Where the plaintiff in an action to recover land deduces his title through execution sale, the burden is on the defendant to show that no homestead had been allotted to the execution debtor before sale; but where that fact appears, whether by the admission of the parties or by evidence proceeding from either of them, it will prevent a recovery although not specially pleaded.

3. The several methods of establishing a *prima facie* case, in actions to recover land, pointed out by *Avery, J.*

ACTION for the recovery of land, tried before *Connor, J.*, at the March Term, 1889, of MARTIN.

(113) The plaintiff claimed title to a tract of land described in the complaint, and alleged that the defendant was in the wrongful possession thereof.

The defendant Griffin disclaimed title, but the defendant Waters denied the plaintiff's title to the land and the wrongful possession thereof.

The plaintiff, for the purpose of showing title in himself, introduced—

1. The will of Martin Griffin, dated 1 April, 1796, duly admitted to probate.

2. The will of Edward Griffin, dated 18 October, 1843, admitted to probate at the July Term, 1857, of the Court of Pleas and Quarter Sessions of Martin County, devising the land in controversy to Ely H. Brewer, and then proved the death of Ely H. Brewer and that Mary Brewer was his sole heir at law, and as such entered into the possession of the land.

The plaintiff next introduced a judgment in the Superior Court of Martin County, dated 11 December, 1878, for the sum of $30.10, with interest thereon from 28 September, 1878, and costs, in an action wherein McG. Mobley, the present plaintiff, was plaintiff and the said Mary Brewer was defendant, and an execution issued on said judgment 26 December, 1878, to the sheriff of Martin County, which was returned, with the following endorsement:

"Levied this execution on Mary Brewer's (now Mary Terry) interest in the tract of land whereon she now lives, adjoining the lands of H. C. Hardison and others, containing 124 acres, more or less.

"31 December, 1878."

"I duly advertised the land levied on, according to law, and sold the same for cash, before the courthouse door in the town of Williamston, on 3 February, 1879, when and where McG. Mobley became (114) the last and highest bidder, in the sum of $36. After deducting the court costs and my commissions, I apply to this execution $30.10, which satisfies the same, and there is still in my hands the sum of forty cents.

"This 3 February, 1879. W. J. HARDISON, *Sheriff.*"

And then showed in evidence a deed from W. J. Hardison, sheriff, to himself, dated 3 February, 1879, and duly recorded.

It was in evidence, and admitted to be true, that the said Mary Brewer, who had, after the judgment, intermarried with one George Terry, had at the time of the levy and sale no other property; that she removed to the county of Washington and died since the institution of this action.

The defendant demurred to the evidence, and contended that the plaintiff could not recover, for that no homestead had been allotted to the defendant in the execution, and that the sale by the sheriff was void and passed no title to the plaintiff to said land.

Upon an intimation by the court that the sale was void, for the reason assigned, and that therefore the plaintiff could not recover, he submitted to a nonsuit and appealed.

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

AVERY, J. The general rule is that the burden is on the plaintiff, in the trial of actions for the possession of land, as in the old action of ejectment, to either prove a title good against the whole world or good against the defendant by estoppel. *Taylor v. Gooch,* 48 N. C., 467; *Kitchen v. Wilson,* 80 N. C., 191.

The plaintiff may safely rest his case upon showing such facts (115) and such evidences of title as would establish his right to recover, if no further testimony were offered. This *prima facie* showing of title may be made by either of several methods. Wait & Sedgewick on Trial of Title to Land, sec. 801; *Conwell v. Mann,* 100 N. C., 234; Malone Real Property Trials, 83.

1. He may offer a connected chain of title or a grant direct from the State to himself.

2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land

in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. *Graham v. Houston,* 15 N. C., 232; *Christenbury v. King,* 85 N. C., 229; *Osborne v. Johnston,* 65 N. C., 22.

3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. *Blair v. Miller,* 13 N. C., 407; *Christenbury v. King, supra; Isler v. Dewey,* 84 N. C., 345.

4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as against individuals for twenty years before the action was brought. Secs. 139 and 144, Code.

5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. Code, sec. 147; *Conwell v. Mann, supra; Melvin v. Waddell,* 75 N. C., 361.

6. He may connect the defendant with a common source of title and show in himself a better title from that source. *Whissenhunt v. Jones,* 78 N. C., 361; *Love v. Gates,* 20 N. C., 498; *Spivey v. Jones,* 82 N. C., 179.

(116) While the plaintiff in this action did not introduce a grant from the State, he offered a chain of title connecting himself with the will of Edmund Griffin, dated 1 April, 1796, and we infer, both from the record and the argument in this Court, that possession for twenty-one years under this title by Mary Brewer and those under whom she claims was shown or admitted in the court below. But, after making this admission, the defendant demurred *ore tenus* to the testimony, for that it had also been proven on the part of the plaintiff that the homestead of Mary Brewer, the defendant in the execution under which plaintiff bought at sheriff's sale, owned no other land at the time of the sale, and the land in controversy was sold as her property, without allotting her homestead; wherefore the sheriff's deed was void.

If the plaintiff had offered, in connection with his other evidence tending to show title, the sheriff's deed, with judgment, execution and proceeding by virtue of it, simply, but no testimony tending to show that a homestead had or had not been allotted to Mary Brewer, he would have made a *prima facie* case, upon which the defendant could not have asked for judgment of nonsuit.

Counsel for plaintiff contended on the argument in this Court that the defendant could not object to the validity of the sheriff's deed unless he had specially set up in his answer that it was void for the reason assigned.

Both under the Code pleadings and the more formal rules applicable in the trial of ejectment, it is competent, under a general denial or the general issue, to show that any deed offered by a party as evidence of title is void, for the reason that it was executed in the face of a statute prohibiting its execution, or by reason of a want of capacity in the grantor, or for fraud in the *factum*, as where the deed was executed by one at the time too drunk to know what he was doing, or by an ignorant man, who could not read, and to whom the deed was fraudulently misrecited. *Nichols v. Holmes*, 46 N. C., 360; *Perry v. Fleming*, (117) 4 N. C., 344; *Suttles v. Hay*, 41 N. C., 124.

In *Jones v. Cohen*, 82 N. C., 75, *Chief Justice Smith* lays down the rule as follows: "In ejectment, any deed produced as a link in the chain of title may be attacked and invalidated by showing incapacity in the maker, and this without any record specification of the nature of the obligation." Indeed, in all controversies as to title, evidence impeaching an alleged title deed is always as competent as that sustaining it. *Clayton v. Rose*, 87 N. C., 106; *Freeman v. Sprague*, 82 N. C., 366.

Wilson v. Taylor, 98 N. C., 275, was cited and relied upon to sustain the view advanced by the appellant. In that case, however, there was no evidence offered to show whether a homestead had been allotted or not, and after the close of the evidence the defendant contended that the burden was on the plaintiff to show affirmatively that the homestead of the debtor was laid off in land other than that sold, and thus establish the validity of his deed. In holding with the judge below, that the plaintiff was not required to make such proof as a part of his *prima facie* case, this Court sustained the rule already announced. The question of the competency of testimony impeaching the deed, in the absence of a special plea in the answer, was not raised, because no such evidence was in fact given or offered.

In *McCracken v. Adler*, 98 N. C., 400, it was admitted, as in the case at bar, that no homestead had been allotted to the defendant in execution, and the Court held that the sheriff's deed to the purchaser at the execution sale was void as against a defendant who had set up in his answer only a general denial of the plaintiff's title. There was

No error.

Cited: Lineberger v. Tidwell, post, 510; *Ruffin v. Overby*, 105 N. C., 83; *Bonds v. Smith*, 106 N. C., 566; *Buie v. Scott*, 107 N. C., 182; *Gilchrist v. Middleton, ib.*, 679; *Brown v. King, ib.*, 315; *Cox v. Ward, ib.*, 512; *Turner v. Williams*, 108 N. C., 212; *Dickens v. Long*, 109 N. C., 168; *McMillan v. Williams, ib.*, 254; *Averitt v. Elliott, ib.*, 564; *Herndon v. Ins. Co.*, 110 N. C., 283; *Dickens v. Long*, 112 N. C., 315;

Buie v. Scott, ib., 376; *Fulton v. Roberts,* 113 N. C., 428; *Walker v. Moses, ib.,* 530; *Wyatt v. Mfg. Co.,* 116 N. C., 283; *Alexander v. Gibbon,* 118 N. C., 808; *Allison v. Snider, ib.,* 956; *Deaver v. Jones,* 119 N. C., 600; *Collins v. Swanson,* 121 N. C., 68; *Marshburn v. Lashlie,* 122 N. C., 240; *Cawfield v. Owens,* 130 N. C., 643; *Bullock v. Bullock,* 131 N. C., 30; *Prevatt v. Harrelson,* 132 N. C., 251; *Caudle v. Long, ib.,* 676; *Atwell v. Shook,* 133 N. C., 391; *Marshall v. Corbett,* 137 N. C., 558; *Campbell v. Everhart,* 139 N. C., 513; *Mitchell v. Garrett,* 140 N. C., 399; *Bullard v. Hollingsworth, ib.,* 639; *Allen v. Howell,* 141 N. C., 114; *Rumbough v. Sackett, ib.,* 497; *Broadwell v. Morgan,* 142 N. C., 479; *Fincannon v. Sudderth,* 144 N. C., 594; *Sutton v. Jenkins,* 147 N. C., 17; *McCaskill v. Walker, ib.,* 198; *Chatham v. Lansford,* 149 N. C., 365; *McFarland v. Cornwell,* 151 N. C., 433; *Weston v. Lumber Co.,* 162 N. C., 168; *Raleigh v. Durfey,* 163 N. C., 160; *Barfield v. Hill, ib.,* 265; *Brock v. Wells,* 165 N. C., 173; *Land Co. v. Cloyd, ib.,* 597; *Fisher v. Toxaway Co., ib.,* 672; *Reynolds v. Palmer,* 167 N. C., 455; *McCaskill v. Lumber Co.,* 169 N. C., 25; *Buchanan v. Hedden, ib.,* 223; *White v. Edenton,* 171 N. C., 22; *Cross v. R. R.,* 172 N. C., 124; *Fleming v. Sexton, ib.,* 253; *Heath v. Lane,* 174 N. C., 120; *Pope v. Pope, ib.,* 288; *Ricks v. Brooks,* 179 N. C., 209; *Moore v. Miller, ib.,* 397.

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(118)

ARMISTEAD BURWELL ET AL. v. W. M. SNEED ET AL.

Cartway—Evidence—Opinion—Maps.

1. Maps which are not public maps, or not made in pursuance of any order in a cause, are not *per se* evidence of the facts which they represent. Under proper circumstances, their use may be permitted to aid a witness in explaining his testimony.
2. Upon the trial of an issue whether a proposed cart-way was necessary and reasonable, the opinions of witnesses are not competent, the question not being one of science, peculiar skill, or professional knowledge.
3. The fact that there is no public road leading to the premises upon which a petitioner for a cart-way resides, and that such way will be more convenient to him, will not warrant its establishment; it must be made to appear further that petitioner has no other way of egress and ingress, and that it is necessary, reasonable and just.

PETITION for a cartway, tried upon appeal before *Armfield, J.,* at May Term, 1889, of VANCE.

It appears that the principal petitioner is the owner of a tract of land embracing 148 acres and an additional adjoining tract of eight acres, on which is situate a grist mill, and that Corbin Burwell, who joins in the

petition, is a tenant of the principal petitioner and cultivates three or four acres of the smaller tract. A public road passes by, and there is outlet to it from the larger tract mentioned, but no public road touches, passes through or leads from the smaller tract.

The petitioners, alleging the material facts, pray that a cartway be kept open across the lands of the defendants, leading from the smaller tract to the Townesville road, which is a public road. The defendants made opposition to the petition, alleging that the petitioners had sufficient outlet, and that the cartway prayed for was not "necessary, reasonable and just," etc. Issues of fact were raised.

"On the trial in the Superior Court the plaintiffs offered to (119) introduce a map of the lands of Burwell, made by the surveyor appointed by the court of Mecklenburg County, Virginia, to survey said land for partition, upon which was shown the various roads alluded to. Defendants objected; objection sustained. Plaintiffs excepted.

"They also proposed to ask witness if, in his opinion, it would be necessary, reasonable and just to plaintiffs to have the road opened as prayed for. Defendants objected; objection sustained. Plaintiffs excepted.

"There was evidence tending to prove that the tenant petitioner had a way by which he could reach a public road over the principal tract mentioned, but it wasn't a very good one—was longer and less convenient, especially to patrons of the grist mill, situate on the smaller tract."

The jury found by the verdict that "there was no public road leading to the land (the smaller tract), and that it was not necessary, reasonable and just that the cartway should be laid out over the lands of the defendants."

Upon the conclusion of the testimony the plaintiffs requested his Honor to charge the jury that, taking all the evidence together, the defendants had shown no sufficient reason why the cartway should not be granted, which request his Honor declined.

Plaintiffs then asked his Honor to charge the jury that, taking the testimony altogether, they had shown the cartway was necessary, reasonable and just, and they should find the second issue in favor of the plaintiffs. His Honor declined to charge as requested. To the refusal of which prayer plaintiffs excepted.

"The plaintiffs moved for judgment upon the verdict, upon the ground that, the first issue having been found in their favor, there was no sufficient testimony to warrant the jury in finding the second issue in favor of defendants. Motion overruled. Plaintiffs excepted."

"Plaintiffs then moved for a new trial, upon the ground of error in excluding testimony offered by them and admitting in- (120)

competent testimony in favor of defendants, and in refusing to give instructions prayed for, and in giving those in the charge of his Honor. Motion overruled. Plaintiffs excepted."

The court gave judgment for the defendants, and the plaintiffs appealed.

A. W. Graham and R. W. Winston for plaintiffs.
A. C. Zollicoffer for defendants.

MERRIMON, J., after stating the case: The first and second exceptions cannot be sustained. The map was offered in evidence to prove the existence and location of certain alleged roads designated on it by appropriate *indicia*. It was not a public map, nor was it made in pursuance of an order of survey made in this case, nor was it to be used, so far as appears, simply to help a witness testifying to explain his testimony to the court and jury. It had no sanction or quality that made it of itself evidence. *Jones v. Huggins,* 12 N. C., 223; *Dobson v. Whisenhant,* 101 N. C., 645.

The inquiry before the court did not involve any question of science, peculiar skill or professional knowledge. Whether it is necessary, reasonable and just that a particular cartway shall be allowed involves facts plain and simple in their nature and application that ordinary jurymen readily understand and appreciate. In such cases and matters witnesses must testify as to facts; their opinions are not required nor allowed. *Bailey v. Pool,* 35 N. C., 404; *DeBerry v. R. R.,* 100 N. C., 310.

The court properly declined to give the jury the special instructions asked for, because there was evidence before them tending to prove that the cartway was not necessary; that the petitioner, the (121) owner of the land, had placed his co-petitioner and tenant on a part of the smaller tract of land with the view to enable him to obtain the cartway for his own convenience, and that he and his tenants had an outlet—more than one—to a public road, though by a longer, rougher and not so convenient a route as that proposed; and it was for the jury to determine the weight of this evidence, under proper instructions from the court. There was much evidence, more or less conflicting, as to the necessity for the cartway, as contemplated and allowed by the statute. Code, sec. 2056.

The plaintiff seems to have thought that, inasmuch as the jury found by their verdict that there was no public road leading to the smaller tract of land, on which the tenant resided, they should have found fur-

ther as a consequence that the proposed cartway was "necessary, reasonable and just." This is a misapprehension of the law applicable. The petitioner is not entitled to have a cartway simply upon the ground that no public road leads to his land, or because it will be more convenient for him to have it. It must appear, further, that it is "necessary, reasonable and just" that he shall have it; that he resides on the land and has no way to get to and from a public road without it. *Lea v. Johnston,* 31 N. C., 15; *Caroon v. Doxey,* 48 N. C., 23; *Burgwyn v. Lockhart,* 60 N. C., 264; *S. v. Purify,* 86 N. C., 681; *Warlick v. Lowman,* 103 N. C., 122.

As we have seen, there was evidence from which the jury might have found, as they did, that the cartway was not necessary; that really the owner of the land, and not the tenant, wanted it, and that he had an outlet directly from his land to a public road. It was the province of the jury, under proper instructions from the court, to so find, or to find otherwise from the evidence submitted to them.

The plaintiff further excepted, generally, that the court admitted incompetent evidence in favor of the defendant, and in the instructions it gave the jury, but no error is specified in terms or (122) by reasonable implication. Such exception is so uncertain and indefinite that it must go for naught. *McDonald v. Carson,* 94 N. C., 497; *Hammond v. Schiff,* 100 N. C., 161; *Dugger v. McKesson,* 100 N. C., 1; *Lytle v. Lytle,* 94 N. C., 522; *Pleasants v. R. R.,* 95 N. C., 195.

Affirmed.

Cited: Hampton v. R. R., 120 N. C., 537; *Andrews v. Jones,* 122 N. C., 666; *Marks v. Cotton Mills,* 135 N. C., 289; *Cowles v. Lovin, ib.,* 490; *Cook v. Vickers,* 144 N. C., 313; *S. v. Haynie,* 169 N. C., 283.

JOHN W. ALDRIDGE v. JAMES H. LOFTIN.

Execution—Claim and Delivery.

1. The clerk of the Superior Court has power to recall an execution improperly issued.
2. A levy by the sheriff on goods, when he allows them to remain in the hands of the debtor, or when the debtor regains possession after seizure, against the will of the sheriff, is not a satisfaction of the execution. A levy is only held to be a constructive payment to prevent a wrong.
3. Where, in claim and delivery, the plaintiff takes possession of the property, and a judgment is entered, by consent, that he is entitled to the possession,

and the defendant, by some means, subsequently gets possession of the property, the plaintiff is entitled to an execution to retake it.

MOTION before the Clerk of the Superior Court of LENOIR to recall an execution, heard on appeal by *Boykin, J.*, at chambers, on 12 December, 1888.

A civil action was brought for the recovery of a horse, or his value, in the Superior Court of Lenoir, and at February Term, 1888, the following judgment was entered:

(123) "This cause coming on to be heard, and it appearing to the court that the facts in the plaintiff's complaint are admitted by the defendant to be true: Now, therefore, it is ordered and adjudged that the plaintiff recover of the defendant the horse described in the complaint of this cause, and costs of this action.

JAS. E. SHEPHERD,
Judge S. C."

The sheriff had seized the horse and turned him over to the plaintiff on his filing the usual bond prescribed for the ancillary proceeding of claim and delivery. It did not appear that the defendant had filed any bond or gotten possession of the horse again.

On the judgment given in February no exception was issued by the clerk till on 11 December, 1888.

On the same day the defendant, through his counsel, Messrs. Loftin & Rountree, made an application to the clerk by motion for an order on the plaintiff to show cause at a subsequent time why the said execution should not be recalled and set aside.

The clerk granted the application and issued an order to the plaintiff to show cause on the following day, to-wit, on 12 December, 1888, why said execution should not be recalled and set aside, which order was served on N. J. Rouse, Esq., counsel for plaintiff.

On the following day, at the time appointed, came the defendant, through his counsel, Messrs. Loftin & Rountree, and made their motion to set aside the said execution, as above set forth, which motion was resisted by the plaintiff, through his counsel, N. J. Rouse, Esq.

The defendant contended that it appeared from the record and papers in this cause that the horse sued for, and for which this execution was issued, was delivered to the plaintiff by the sheriff, under claim and delivery proceedings in this cause; that the defendant did not

(124) replevy the horse, and that the horse was in the possession of the plaintiff at the time the judgment was rendered, and that that operated to satisfy the judgment, and that no further execution could be issued on that judgment.

This contention was resisted by the plaintiff, who contended that it did not appear from the papers in the cause and the record that the judgment was satisfied.

The motion was heard solely upon the papers and the record in the case.

After hearing argument by counsel for both parties, and considering the matter, the motion of the defendant to set aside the execution was denied; from which judgment defendant appealed to the judge of the district.

Boykin, J., made the following order upon appeal from the ruling of the clerk:

"At chambers in Clinton, North Carolina.—Upon considering the foregoing case on appeal, it is adjudged that there is error in the judgment of the clerk. Said judgment is therefore reversed. Let writ of restitution be issued by said clerk. The plaintiff may have judgment for costs against the defendant."

"In this action, the judge having transmitted his decision reversing the judgment of the clerk, herein rendered on 12 December, 1888, the parties, by their attorneys, appear before me this day."

The plaintiff appealed from the said judgment rendered by the judge to the Supreme Court.

N. J. Rouse for plaintiff.
George Rountree for defendant.

AVERY, J., after stating the facts: The clerk of the Superior Court has the power to recall an execution improvidently and improperly issued. Did the execution in this case fall within that description? The plaintiff, in addition to the ancillary proceeding, filed a verified (125) complaint, alleging in substance that he was the owner of the horse in controversy, and that it was unjustly detained by the defendant to plaintiff's damage. When the case was called for trial at February Term, 1888, the defendant having filed no answer, admitted, through counsel the facts alleged in the complaint, and thereupon the court gave judgment for the horse and for costs, but no alternative judgment for its value.

Although it appears that the seizure had been made by the sheriff, by virtue of the order of the clerk after the suit was brought and the horse was turned over to the plaintiff, it is an admitted fact that when execution for the first time was issued on the judgment, on 11 December, 1888, the sheriff found the horse in the hands of the defendant. How or when he passed into his possession, upon the facts legitimately

before this Court, we are left to conjecture. A judgment for a horse, and costs, upon a complaint alleging ownership and unlawful detention by defendant, which is unanswered, and admitted affirmatively to be true, is such a judgment as the court had power to render, and is not erroneous or irregular, because it appeared that the horse was seized and delivered by the sheriff to the plaintiff by virtue of an order of the clerk, made in the ancillary proceeding. Upon such a record it may be assumed that, for some reason satisfactory to the parties, no objection was made to the judgment for the delivery of the property. Looking for light solely to the record and statement of case on appeal, and leaving out of view any mention of extrinsic facts made by counsel in this Court, we might assume that, either by some arrangement or stratagem, the defendant acquired possession of the horse between the time of the seizure by the sheriff and the rendition of judgment. But the
(126) argument proceeds upon the idea that the possession changed in some way after the judgment was rendered. If that be true, the judgment for the horse cannot be held to have been satisfied, either because the return of the sheriff on the order of seizure traced him into the hands of the plaintiff and no replevin bond seemed to have been filed by defendant, or because the horse appears, without explanation, to have passed, since seizure, into the hands of the defendant. We cannot gather from the authorities cited any principle or analogy that can be brought to defendant's aid. If a plaintiff in ejectment, pending the action, took possession of the land in dispute, the defendant might have judgment of nonsuit, upon entering a plea to that effect since the last continuance. *Johnson v. Swain,* 44 N. C., 335. But if no such plea was entered the plaintiff was entitled to his judgment; and if the defendant re-entered within a year, a writ of possession might be issued and the defendant turned out, just as though the possession had never changed. This was in no sense a judgment for money, and by virtue of the execution issued on it the sheriff could only collect the sum incidentally recovered for costs.

Generally a levy by the sheriff on goods, when he allows them to remain in the hands of the debtor, or when the debtor regains possession after seizure, against the consent of the sheriff, is not deemed a payment of the execution. It is held that a levy will be considered a constructive payment, only to prevent wrong, as when a sheriff really seizes sufficient property to pay the debt and will not dispose of it. *In the matter of King,* 13 N. C., 341; *Binford v. Alston,* 15 N. C., 351.

We conclude, therefore, that there was no sufficient reason why the clerk should have recalled the execution. There was error in the judgment of his Honor directing the clerk to order a writ of restitution to

issue, because, as we have already stated, the plaintiff had the (127) right to have execution issue and have the horse seized. It is too late, after he assented, or did not object, to the rendition, to try to evade its enforcement or modify it in form, because of some change in his relations to the property in controversy. The order for a writ of restitution ought not to have been issued in this case, unless the judgment had previously been modified so as to constitute a recovery for costs only. There was no attempt to do this, either on the ground of excusable neglect or fraud.

There was error. The order of the judge, made at chambers, is reversed. Let this be certified, to the end that the order for the restitution of the property, made by the clerk, be vacated, and that an order for the restitution of the horse to the plaintiff may be issued.

Error.

Cited: Williams v. Dunn, 158 N. C., 401.

F. G. SIMMONS, EXECUTOR, v. GEORGE E. ANDREWS.

Case on Appeal.

Where, upon disagreement, the case on appeal was settled by the judge, who added to the case, "I do not remember distinctly what occurred; I believe that this statement is correct; therefore adopt it," it was remanded to the judge, in order to settle the case again.

APPEAL from *Shipp, J.,* at Spring Term, 1889, of JONES.

The plaintiff appealed. The case is stated in the opinion.

No counsel for plaintiff
C. M. Busbee for defendant.

MERRIMON, J. The defendant appealed from the judgment, adverse to him, to this Court, and served a statement of the case on appeal upon the appellee. The latter returned such statement, with specific objections thereto, as a substitute for it, and the appellant thereupon requested the judge who presided at the trial to settle the case, etc. The judge adopted the amendments of the appellee as the (128) case settled, at the end thereof, in these words:

"This day, 15 October, this matter has been called to my attention. I do not remember distinctly what occurred. I believe that this state-

ment is correct; therefore adopt it. I am sure that I did not assume authority to try facts without consent," and signed the same, adding over his initials the other words:

"There should be legislation upon this subject. It is impossible for a judge of the Superior Court to remember cases after they have long passed—in this case, without reminder for six months."

We think such settlement of the case very unsatisfactory, if not altogether insufficient. It is obvious that the judge was not satisfied with it; that he was in much doubt, because of reasons stated by him. He seems to have accepted the amendment of the appellee without much, if any, inquiry or scrutiny. He might have examined the record, the clerk of the court, the counsel, his notes, if these had been preserved; he may do so yet.

The case should be settled by the judge upon information satisfactory to him, such as enables him to do so free from such perplexing doubts and uncertainty as he might feel called upon to express. If he cannot so settle the case, it would be better that he should say at once he cannot settle it at all.

It may be that upon further inquiry the judge may be able to settle the case as we have indicated. To the end he may have opportunity to do so, the case must be remanded. The clerk of the Superior Court will notify him that it is remanded, and transmit to him a copy of this opinion, to be certified by the clerk of this Court.

Remanded.

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(129)

F. W. TRIMBLE AND JOHN H. TRIMBLE v. CLAUDE HUNTER ET AL.

Deed—Trust—Equitable Fi. Fa.—Lien, Creditor's—Marshaling.

H., being indebted to A., a commission merchant, for advances, executed a deed in trust, in which the amount of the indebtedness was precisely stated, and in which it was recited that A. then had on consignment certain tobacco, the proceeds of which were to be applied to the said indebtedness, and then conveyed certain growing crops and real estate to secure any balance due after the application of the proceeds of the sale of the tobacco. An unsecured creditor of H. recovered judgment upon his debt, and upon the return of execution unsatisfied, brought his action to compel a settlement of the trust, and to subject the excess of the property, after satisfying the secured creditors, to payment of his judgment. *Held*—

1. That H. had a resulting trust under the deed upon which the judgment, when docketed acquired a lien, but which could only be enforced by an action in the nature of an equitable execution.

2. That, although the amount due the secured creditors was inaccurately recited in the deed by mistake—a larger sum being due them—yet as against

creditors not parties to the deed, they were bound thereby, and that no parol agreement between them and the debtor, that any such excess should be secured by the conveyance, could be set up against the unsecured creditor.

3. That the debtor and secured creditors could not make any other disposition of the sales of the tobacco than that provided in the conveyance, to the prejudice of other creditors.

EXCEPTIONS to referee's report, heard before *Armfield, J.*, at May Term, 1889, of VANCE.

It appeared that the plaintiffs obtained judgment against the defendant Claude Hunter in the Superior Court of the county of Vance, at the May Term thereof of 1887, for $1,907.23, with the interest on $1,851.68 thereof from 23 May, 1887, and for $7.51 costs; that an execution issued upon such judgment and was returned wholly unsatisfied, and that such judgment debtor had no property in this (130) State other than such as shall presently be mentioned.

It further appeared that the said Hunter, on and before 10 July, 1886, was indebted to the defendants composing the business firm of Arrington & Scott, of Richmond, Va., and likewise to the defendants composing the like firm of John Arrington & Sons, of Petersburg, in the same State, in large sums of money; that to secure the payment of such indebtedness Hunter and his wife executed to the defendant William J. White their deed of trust, which was duly registered, and the following is so much and such parts thereof as need be reported here:

"This indenture, made and entered into on 10 July, 1886, between Claude Hunter and Lizzie Hunter his wife, of the county of Vance and State of North Carolina, of the first part, and Wm. J. White, of the county of Warren and State aforesaid, of the second part, witnesseth: That, whereas the said Claude Hunter is justly indebted to R. T. Arrington, S. P. Arrington, R. T. Arrington, Jr., and F. W. Scott, of the firm of Arrington & Scott, of the city of Richmond and State of Virginia, by account for money advanced and lent by them to him up to and including this date, in the sum of ten thousand and five hundred dollars, and to R. T. Arrington and S. P. Arrington, of the firm of John Arrington & Sons, of the city of Petersburg and State of Virginia, by account for money advanced and lent by them to him up to and including this date, in the sum of ten thousand dollars; and, whereas the said Claude Hunter has consigned and delivered to said Arrington & Scott forty cases and packages of leaf tobacco on their said account against him, to be sold by them for him, and the net proceeds of the sales, after deducting their commissions and charges for selling the same, to be applied to their said account against him, and has consigned and delivered to said Arrington & Sons forty-two cases and packages of leaf tobacco on

(131) their said account against him, to be sold by them for him, and the net proceeds of the sales, after deducting their commissions and charges for selling the same, to be applied to their said account against him; and, whereas, after the sale of the said leaf tobacco as aforesaid by the said Arrington & Scott and the said John Arrington & Sons, and after the application of the net proceeds of the same towards the payment of the said account, due as aforesaid by the said Claude Hunter to the said Arrington & Scott, and to the said John Arrington & Sons, there may remain balance due on the same; whereas the said parties of the first part desire to secure the payment of any such balance as may remain by a deed of trust upon real and personal estate: Now, this indenture witnesseth, That the said parties of the first part, etc., . . . have bargained, sold and conveyed, and do hereby bargain, sell and convey, unto the said party of the second part and his heirs and assigns forever, the following lots or parcels of land, situated in the said county of Vance, . . . and also all the right, title, interest in and to the tobacco crop now growing and being cultivated by the said Claude Hunter upon certain lands in said Vance County, near Henderson, on the lands of Walter Milne and J. W. Booth: To have and to hold, etc., . . . in trust, nevertheless, and for the purpose in this deed declared. If, after the sale of the said leaf tobacco as aforesaid, consigned and delivered as aforesaid by the said Claude Hunter to the said Arrington & Scott, and to the said John Arrington & Sons, and after they shall have applied the net proceeds of said sale to the said accounts against the said Claude Hunter, there shall remain any balance or balances due to either one or both of said firms on their said accounts against the said Claude Hunter, and the said Claude Hunter shall pay, or cause to be paid, to the said Arrington & Scott and to the said John Arrington & Sons, or their assigns, the said balances, with inter-

(132) est on the said balances at the rate of 8 per cent per annum, on or before 1 December, 1886, then this indenture to be void and of no effect. If, however, after the said sale of the said leaf tobacco by the said Arrington & Scott and John Arrington & Sons, and the application of the net proceeds aforesaid of the sales towards their said accounts against the said Claude Hunter, any balance or balances on the same shall remain unpaid, and if the said Claude Hunter shall fail to pay the same on or before 1 December, 1886, then the said party of the second part shall take possession of the said crops of tobacco now growing and being cultivated by the said Claude Hunter upon the lands aforesaid of Milne and Boothe, and sell the same in the open market in Henderson, North Carolina, for cash, and apply the net proceeds of the said sale proportionately to the payment of the said balance which may be due to the said Arrington & Scott and John Arrington & Sons,

and pay the surplus, if any should remain, to the said Claude Hunter, after deducting a reasonable compensation for his services; and if the proceeds of the sale of the said crops of growing tobacco, now growing and being cultivated by the said Claude Hunter, shall not be sufficient to pay said balance or balances, then it shall be lawful for the said party of the second part to sell the real estate, and the appurtenances herein conveyed and mentioned, at public auction, to the highest bidder, for cash, at the court-house door in Henderson, in said county of Vance, after having advertised the sale at the court-house door aforesaid and at four other places in said county of Vance for at least thirty days, and with the proceeds of the sale he is to pay whatever sum or sums may be due by said Claude Hunter to the said Arrington & Scott and John Arrington & Sons on the balance of which may be due to them by the said Claude Hunter on the aforesaid accounts, and surplus, if any, he is to pay to the said Claude Hunter, after deducting a reasonable compensation for his services in making the sale. It is agreed (133) and understood between the parties aforesaid that if it should turn out that, after a sale of said leaf tobacco, consigned and delivered as aforesaid by the said Claude Hunter to the said Arrington & Scott, the amount realized from said sale should be more than sufficient to pay their said account, then that they may pay the said John Arrington & Sons such excess, the same to be credited on the said accounts of the said John Arrington & Sons against said Claude Hunter, should anything be due thereon; and that, should it turn out that the amount of the sales of the said leaf tobacco, consigned to the said John Arrington & Sons by the said Claude Hunter, be more than sufficient to pay their said account against the said Claude Hunter, the said John Arrington & Sons may pay to said Arrington & Scott such excess, the same to be credited to the said account of the said Arrington & Scott against the said Claude Hunter, if anything should be due thereon," etc.

The plaintiffs brought this action to compel the defendants to an account and settlement of the debts due to the defendants creditors, mentioned in the deeds of trust set forth above, to compel such creditors to an account of the cases of tobacco and the crop of tobacco received by them and the sales thereof made by them, and to apply the proceeds of such sales in discharge of their debts as provided and directed in the deed of trust—to have the deed and the trust therein created discharged, and the land therein mentioned sold to pay the plaintiffs' judgment, first above mentioned, and to obtain general relief, etc.

The creditor defendants in their answer admitted some of the allegations of the complaint and denied others; they alleged that they had, in all things, observed the purpose and spirit of the trust mentioned,

and they filed accounts stated of sales of tobacco received by them, and the application of the proceeds of such sales in discharge of their
(134) debts in part, and they alleged that large balances thereof are yet unpaid, etc., etc.

In the course of the action, it was referred to a referee to take and state an account of the matters of account embraced by the pleadings and the trust. He took evidence, found the facts and conclusions of law arising thereupon, took and stated an account, and made report of the whole thereof. To this report, the plaintiffs filed divers exceptions to the findings of law and fact, as did, also, the defendants. The court overruled the plaintiffs' exceptions, except one of fact, and sustained the defendant's exceptions, except three, as to findings of fact, and gave judgment in favor of the defendants creditors and against the defendant Hunter, and directed a sale of the land, etc., etc.; and the plaintiffs, having excepted, appealed.

T. T. Hicks and E. C. Smith for plaintiffs.
J. B. Batchelor and W. A. Montgomery for defendants.

MERRIMON, C. J. There was a resulting trust in the deed of trust, to be interpreted in favor of the defendant Hunter, and he had, by virtue of it, an equitable estate, or interest, in all the land embraced by the deed. *Sprinkle v. Martin,* 66 N. C., 55. The docketed judgment of the plaintiffs was a lien upon that interest, but, for reasons clearly expressed in the case just cited, this lien could not be enforced by the ordinary process of execution. To do this, the plaintiffs were put to their action for that purpose, in which the trust provided by the deed could be settled and discharged, and the interests of the defendant Hunter could be devoted to the satisfaction of the plaintiffs' judgment, as far as they might be adequate for the purpose. Code, sec. 435;
Sprinkle v. Martin, supra; McKethan v. Walker, 66 N. C.,
(135) 95; *Hoppock v. Shober,* 69 N. C., 153; *Dixon v. Dixon,* 81 N. C., 323.

This action has the nature of an equitable execution. Its purpose is to enforce the plaintiffs' lien by first settling and discharging a prior lien upon the land, created by the deed of trust in favor of the creditor defendants, and, secondly, applying any surplus of the fund arising from a sale of the land, as far as the same may be adequate, to the discharge of the plaintiffs' judgment. To do this, requires that an account shall be taken to ascertain the amount of the debt secured by the first lien, and a sale of the land, unless the debtor shall pay the debts without

such sale. Hence, it becomes necessary to interpret the deed of trust and settle the rights, and the extent of them, of the creditors having the first lien under it.

This deed, though, clearly expressed in terms, is peculiar in some of its material provisions. It is true intent and meaning as *expressed in it* must prevail. The Court cannot go beyond it, as was contended it should do, and give effect to an intention of the maker, and the parties having benefit of it, not expressed in it, because, to do so would be to render nugatory, in great part, the deed—a chief purpose of which was to prevent and exclude merely verbal agreements and stipulations not expressed in it. These parties could not, by mere verbal agreement, have changed or modified its purpose; they could only have done so by deed, or other proper instrument in writing, executed and perfected before the lien of the plaintiffs attached. As soon as their lien took effect, the trust could not be changed in any respect, to their prejudice without their consent. By virtue of it, they at once came to have an interest in the land that could not be abridged or lessened in its extent or in its character by the defendants, by contract in writing or otherwise.

Then, what does the deed before us provide in favor of the creditor defendants? What of their debts are secured, and how are they secured, by its provisions? It appears from the recitals therein (136) expressed in clear, explicit and unequivocal language and phraseology, that the debts of the defendant debtor due to the creditor defendants, as composing two business firms, were ascertained definite sums of money due to such firms respectively on the day it was executed. Those debts were made up of, and embraced "money advanced and lent by them (the creditor firms) to him (the debtor defendant) up to and including this date" (the date of the deed). There is no recital, or expression, or provision, in the body of the deed, that, in terms or by implication, suggests a debt, greater or smaller, so due and owing, than those so expressly and certainly expressed; nor does it appear from the deed that the debtor defendant owed, or expected thereafter to owe, to the creditor defendants any debt or debts other than those mentioned; nor, as to these debts, was it agreed in writing that they should bear interest at the rate of eight per cent per annum. There was no stipulation in the deed as to the rate of interest they should bear.

The debts thus specified with particularity were not, as a whole, the debts secured by the trust created by the deed. It is further recited in the deed that, at the time it was executed, the creditor defendant firms had in their possession certain cases of tobacco to be sold by them for the debtor defendant; that they should sell this tobacco and apply the proceeds thereof to the payment of the debts already mentioned, to the extent

they might be sufficient for that purpose. It is manifest from the carefully and precisely expressed recitals, and, as well all the provisions of the deed in perfect harmony with them, that the tobacco mentioned should be thus devoted and applied, and not otherwise. The deed is based upon the assumption and express agreement that the proceeds of the sales of the tobacco should be thus applied. That it should be, was made a substantial consideration underlying and giving life and opera-
(137) tive effect to the deed.

In like explicit terms it is declared in the deed, and all and every of its provisions are to the same effect, that its purpose was to secure not the debts specified, but the *balance thereof* that the proceeds of the tobacco might not be sufficient to pay. It is declared that there *may be* such unpaid balance, and it recites that, "whereas the said parties of the first part (the debtor and his wife) desire to secure the payment of *any such balance* as may remain, by a deed of trust upon real and personal estate," etc., the property is conveyed "in trust, nevertheless, and for the purpose in this deed declared." It is then provided that, "if after the sale of the said leaf tobacco as aforesaid, consigned and delivered as aforesaid," etc., there shall remain a "balance" of the debts mentioned unpaid, etc., and the debtor shall pay this balance, "with interest on said *balance* at the rate of eight per cent per annum, on or before the first day of December, 1886, then this indenture to be void and of no effect. If, however, after the said sales of the said leaf tobacco by the said," etc., . . . and the application of the net proceeds aforesaid of the sales toward the said accounts against the said Claude Hunter, any *balance or balances* on same shall remain unpaid, etc., then the property shall be sold, etc., as directed, and the proceeds thereof applied as may be necessary to the payment of such "balance." It is too plain to admit of serious question that it was intended by the deed to secure only such "balance" of the debts mentioned, after applying to their payment the proceeds of the tobacco mentioned.

The deed conveyed a growing crop of tobacco. It is provided therein that this shall be sold when gathered, and the proceeds thereof applied to the payment of such "balance"; and if there shall not be sufficient for such purpose, *then and then only* shall the land be sold to pay the same.

(138) All the provisions of the deed, its terms and phraseology, all go to show and make manifest that its sole purpose was to secure such "balance" of the indebtedness specified, and that it should be operative and have effect only for that purpose.

No doubt the defendants debtor and creditors could agree to apply the proceeds of the tobacco, as it appears they did do in part, to the pay-

ment of debts other than those specified in the deed, or to other purposes, but the creditors could avail themselves of the trust only to secure so much of the indebtedness specified as the net proceeds of the tobacco were inadequate to discharge; and this is so, because the sole purpose of the trust was to secure such "balance" as indicated above.

In ascertaining the "balance"—the debt of the defendant and creditors secured by the deed—they can be allowed to charge interest only at the rate of six per centum per annum, because there was no agreement in writing that they should have a greater rate, not exceeding eight per centum per annum, as allowed by the statute (Code, sec. 3835). As to any ascertained "balance," they will be entitled to interest at the rate of eight per centum per annum, because it is so provided in the deed signed by the debtor. They will also be entitled to have commissions for selling the tobacco, including the crop gathered and sold, as agreed upon between themselves and the defendant debtor; and, also, to ordinary, reasonable charges and expenses incident to selling the tobacco in the regular course of business.

The plaintiffs are not parties to the deed of trust and are not bound by its recitals as to the amount of indebtedness of the debtor defendant to the creditor defendants. They have the right, therefore, if they can, to show that such indebtedness was less as to each firm than was stated in the deed. When such "balance" due the defendant creditors shall be ascertained and paid out of the proceeds of the sales of the land, any surplus thereof shall be applied to the payment of the plaintiffs' judgment to the extent the same may be sufficient for (139) that purpose.

We do not deem it necessary to advert directly to the numerous exceptions to the report of the referee. In view of what we have said, it is clear that the account was not properly taken and stated. We deem it expedient and better to direct that the account as stated be set aside, and that it be referred to the referee to retake and state the same in accordance with this opinion, and to this end he will be at liberty to hear and consider further evidence, if need be. *Grant v. Bell,* 90 N. C., 558.

Error.

Cited Morrisey v. Swinson, post, 562; *Bost v. Lassiter,* 105 N. C., 497; *Mayo v. Staton,* 137 N. C., 681.

AMOS SMITH v. H. H. COOR.

Mortgagor and Mortgagee—Crops, Removal of.

C., in 1882, sold and conveyed to S. a tract of land, and, to secure the purchase money, S. executed a mortgage which contained a covenant that all crops raised on the land should be a security for the payment of that portion of the purchase money falling due in that year, and should not be removed until it was paid. *Held*—

1. That the mortgage of the crops was invalid, except for those grown in the year next after its execution.

2. That the mortgagor was not indictable for removing the crops raised in 1886.

3. That, *as between mortgagor and mortgagee*, the latter might have entered and possessed himself of the crops and applied them to his debt, without being compelled to account for them as rents.

ACTION, tried at April Term, 1889, of WAYNE, by *Graves, J.*

The action was brought to recover damages for malicious pros-
(140) ecution of the plaintiff by the defendant, in that the defendant had sued out a warrant against the plaintiff for disposing of mortgaged property with intent to defraud the mortgagee. The property disposed of was a part of the crop raised by the plaintiff on the land he was in possession of under a purchase from defendant and his wife, H. A. Coor, which land the defendant and his wife had conveyed to the plaintiff, and the plaintiff had executed a mortgage to the defendant's wife to secure the purchase money, with the further provision that "all crops of any kind raised on said land to be security 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." The mortgage was executed 16 December, 1882, and the crop—for the disposal of which the prosecution was instituted—was raised during the year 1886. The note due for that year had not been paid in full at the time of the disposition of the crop by the plaintiff.

The judge charged the jury that, "if they believed that the condition of the mortgage sued on was broken, and the plaintiff had removed a part of the crop raised on said land, with intent to defraud the mortgagee of her rights under the mortgage, then there would have been probable cause for the prosecution of plaintiff by the defendant, acting as the agent of the mortgagee." The plaintiff excepted to this part of the charge of the judge, on the ground that the mortgage on the crops was invalid, except for crops raised the year next succeeding the execution of the mortgage.

Verdict and judgment for the defendant, from which the plaintiff appealed.

W. C. Monroe for plaintiff.
C. B. Aycock for defendant.

SHEPHERD, J. The defendant's counsel was candid enough (141) to concede that, if the crops for the year 1886 did not pass under the mortgage executed in 1882, there should be a new trial. The question was decided in *Wooten v. Hill,* 98 N. C., 49, and *S. v. Garris, ib.,* 733. It was held in those cases that the lien existed only as to the "crops planted, or about to be planted, in the year next following the execution of the conveyance." We are, therefore, of the opinion that there was no lien on the crop of 1886, and that, for this reason, the prosecution of the plaintiff by the defendant for its unlawful removal was unfounded.

If, however, the mortgagee had entered and possessed himself of the growing crops, he would not, as *against the mortgagor,* be compelled in equity to account for them as rents as in other cases. The agreement would authorize him to directly apply the crops to his mortgage indebtedness.

Error.

Cited: Taylor v. Hodges, 105 N. C., 348; *Loftin v. Hines,* 107 N. C., 360, 361; *Hurley v. Ray,* 160 N. C., 379.

ABRAM FRENCH & CO. v. C. F. GRIFFIN ET AL.

Contract—Partnership.

A firm made an order on plaintiff for certain merchandise to be delivered at a future day. The order was an "importation order," which, by custom of merchants, is not subject to countermand. Before the goods were delivered the firm was dissolved and notice given the plaintiff, and a member of the dissolved firm, also, wrote countermanding the order; but upon receiving a reply that it was impossible to do so, directed the goods to be shipped, and they were sent and received. *Held,* that all the members of the firm were bound by the contract.

APPEAL from a justice of the peace, tried before his Honor, *Graves, J.,* at Spring Term, 1889, of WAYNE, upon the following case agreed:

On 10 March, 1887, the defendants were co-partners under the name and style of C. F. Griffin & Bros., and on that day (142)

the plaintiffs, by F. A. Mowbray, their agent, agreed to deliver to the defendant merchandise, at the prices named, 1 September, 1887, amounting to $146.48, to be paid for in ninety days after date of bill for the same, to wit, on 12 January, 1888.

That, the order for said merchandise was an importation order, and the custom of the trade on such orders is that they cannot be countermanded, but this custom was then unknown to the defendants; said goods were delivered in good order to the defendant C. F. Griffin on or about 10 October, 1887, and no part of the same has been paid for, nor did the defendants, except C. F. Griffin, know that said order had been made.

That, on 22 March, 1887, the defendant firm dissolved, and on or about 25 March, 1887, notice thereof was made to plaintiffs.

The "order" referred to in the case was in this form:

10 March, 1887. Send by Norfolk
Sold by Mowbray. Care A. C. Line R. R.
Terms, 90 days.

IMPORTATION ORDER.

Delivered about 1 Sept.

C. F. GRIFFIN & BRO.,
Wilson, N. C.
523—2 crates, etc., etc.

On 22 June, 1887, the partner, C. F. Griffin, wrote to the plaintiffs requesting them to countermand the order, to which an answer was returned, under date of 28 June, in which plaintiffs say: "This was an order for importation sent out according to your assortment desired, and assorted entirely different from anything we can use. It is (143) not customary for us to accept countermands for importation orders made, as we are unable to countermand the orders ourselves after once having been placed, and, as is above said, the assortment will not suit our stock."

To this, the defendant C. F. Griffin replied on 1 July:

"It will be all right, send them on; I think I ordered them shipped 1 October. However, that will be early enough."

The goods were accordingly sent out, and this action is to recover the price thereof.

Upon this case the court gave judgment for the plaintiffs, and the other defendants D. H. and J. R. Griffin appealed.

No counsel for plaintiffs.
C. B. Aycock for defendants.

SMITH, C. J., after stating the case: The order was given and the contract entered into some days before the dissolution, and was binding upon all the members of the firm, so that it was unaffected by the notice of the fact given to the plaintiff soon after. Such notice would protect against further dealings in the name of the firm by any member of it to whom credit was given. The future delivery was in consummation of the partnership contract, and gave it efficacy as the act of all the members of it, and involving a common responsibility. This result follows, unless upon countermand the plaintiffs should have stopped and been content with compensation for damages sustained at that point. But the countermand given by F. C. Griffin, who continued to act for all in the execution of the common contract upon the plaintiffs' representation of the nature of their undertaking to fill the order, as understood among business men, and the impracticability of their countermanding their orders in getting the assorted articles was withdrawn, and they were directed to proceed in furnishing the goods under the defendants' order, as was done on or about 10 October. (144)

Without, therefore, giving undue effect to this special contract, according to the course of trade, upon general principles, its obligation rests upon all the parties who assumed it, and was not removed or impaired by the dissolution which soon after took place and which prevented the formation of new contracts on behalf of the firm by one or more members of it.

The delivery then completed the contract, and entitled the plaintiff to the price of the goods.

There is no error, and the judgment is

Affirmed.

D. W. RENCHER v. JACOB AYCOCK.

Evidence.

A party to an action offered in evidence certain letters written by a witness examined in his behalf, shortly after the occurrences which were the subject of controversy, with a view to corroborate the testimony of the witness; upon objection, the court excluded them unless proof was produced of their identity. *Held*, that the plaintiff failing to make such proof, the letters were properly rejected.

APPEAL from *Graves, J.*, at February Term, 1889, of JOHNSTON.

On the trial of issues of fact by a jury, the plaintiff was examined as a witness in his own behalf, and likewise the defendant was so examined

in his own behalf. There was much evidence, more or less conflicting. In reply, the wife of the plaintiff was examined as a witness in his behalf. She testified to material facts. At the close of her
(145) examination, "the plaintiff offered to put in evidence certain papers which he stated to the court were written by this witness, and proposed to prove by the witness that they were letters which, soon after the occurrences in question as they severally took place (to wit, the said demands by her husband and refusals by defendant to furnish hands), she wrote and sent to a lady friend of hers living at that time in Pender County, and that in these letters the witness mentioned the said occurrences and related the facts of them exactly, in substance, as they had been testified to by herself and her husband—the plaintiff stating to the court that the offering of these letters and this evidence was with the view to corroborate this witness, as showing declarations of hers soon after the transactions in question, consistent with her testimony here.

"This evidence was objected to by the defendant. The court said, 'properly identified, the letters would be competent, but not otherwise.' No evidence was given about the letters, and they were not allowed to be read to the jury, and the plaintiff excepted.

"Mrs. Rencher was not cross-examined, and her character was proven and admitted to be good."

There was a verdict and judgment thereupon for the defendant, and the plaintiff, having excepted, appealed.

No counsel for plaintiff.
C. B. Aycock for defendant.

MERRIMON, J., after stating the case: The plaintiff offered the letters as evidence, saying that he could "prove" them by the witness whom they were intended to corroborate. The defendant objected to such evidence. The court did not sustain the objection, but said, "properly identified, the letters would be competent; not otherwise." Thus, the plaintiff was encouraged, but he refused or neglected to identify
(146) the letters, as he at first said he could do by the witness before the court. Why he did so, does not appear. He seems to have abandoned his purpose to offer them, perhaps upon the ground that such evidence, generally, is not of much importance, and particularly so in this case, as the witness to be corroborated by it had not been cross-examined, and it appeared—was admitted—that her character was good. But whatever may have been his motive, he did not act upon the ruling and suggestion of the court; he did not offer to identify the letters, but after the jury had rendered their verdict adverse to him, he then insisted

that he ought to have a new trial because the letters were not admitted! That they were not was the *laches* of himself if he could have identified them by the witness named, or otherwise; it was not in any just sense the fault of the court, for it obviously, in effect, told him he might identify the letters and they would be received.

In our judgment, there is no legal or just ground upon which the exception can be sustained, and it would savor of trifling with a serious matter to allow a new trial for the cause assigned.

Affirmed.

Cited: Woody v. Spruce Co., 175 N. C., 547.

BERRY GODWIN v. WILMINGTON AND WELDON RAILROAD COMPANY.

Measure of Damages—Judge's Charge.

In an action against a railway company for negligently killing a cow, where there was no testimony as to the value of the dead body, it was not error in the court to instruct the jury that the plaintiff was entitled to recover, as damages, the value of the cow alive, less the sum he had received for its hide, notwithstanding he had been notified by the defendant to remove the carcass.

APPEAL from *Graves, J.*, at Spring Term, 1889, of JOHNSTON. (147)

This action commenced before a justice of the peace, to recover damages for killing plaintiff's cow. The justice gave judgment for plaintiff, and the defendant appealed to the Superior Court, where the following issues were submitted to a jury:

1. Was plaintiff's cow killed by the negligence of the defendant company? Answer: Yes.

2. What is the value of the cow? Answer: $48.50.

Thereupon the court gave judgment for the amount, and interest and costs, and the defendant appealed.

On the trial the plaintiff offered evidence tending to show that he was the owner of the cow, and its value was $50, and that it was killed by the negligence of the defendant.

It appeared in evidence that the cow was about six years old, and in good order, with a calf six months old; that plaintiff had been paid $1.50 for the hide, and had been notified to remove the carcass from the defendant's right of way, and this was the only evidence in regard to the value of the carcass.

There were no written prayers for instruction. There was no exception to any part of the instruction given, except that part which related to the measure of damages. Upon that question the court instructed the jury that, if it should be found that plaintiff was entitled to recover, the measure of damages was the value of the cow, less the $1.50 he had received for the hide. To this the defendant excepted.

No counsel for plaintiff.
A. W. Haywood for defendant.

SMITH, C. J. The direction given to the jury in measuring the damages was, of course, based upon the evidence before the jury, and we do not well see how it could have been otherwise. There was no proof of the value of the dead body of the animal, or that it was of any value
(148) beyond the price paid for the hide, or could have been put to any profitable use. The ruling is not at variance with that made in the case of *Roberts v. R. R.*, 88 N. C., 560. There, the proof from the owner of the dead cow was that her body was worth from $18 to $20, and the jury was instructed that this was a proper deduction from the value of the living cow, and the same principle, upon the proofs, is enunciated in the present case. Besides, there was no exception to the charge, except in this particular, and no specific instruction was asked, so far as the record discloses, on the point. *Willey v. R. R.*, 96 N. C., 408.

Affirmed.

A. D. PUFFER & SONS MANUFACTURING CO. v. J. M. BAKER AND K. C. HARGRAVE.

Contract—Bailment—Trial—Evidence.

1. Where a jury is waived, and the judge tries the facts, errors committed by him in the reception or rejection of evidence are reviewable upon appeal.
2. The admission of irrelevant testimony is not ground for a new trial, if it is apparent that it was harmless.
3. The plaintiffs and defendants entered into a contract, whereby the former "hired" and "leased" to the latter certain personal property for a fixed period, at a price ascertained, to be paid for in installments; it was stipulated, that upon the payment of the entire sum the title should vest in the defendants, but upon failure to pay any one of the installments the lease should terminate and the plaintiff might re-possess himself of the property. *Held*, (1) that this contract constituted a bailment; and (2) that the defendants might terminate it at any time by a refusal to pay the installments then due, and an offer to surrender the property.

APPEAL from *McRae, J.*, at Spring Term, 1889, of EDGE- (149) COMBE.

The plaintiffs, an incorporated company, commenced their action on 4 April, 1889, before a justice of the peace in Edgecombe County, to recover the several sums due on four notes, each for twenty-five dollars, and maturing on 3 August, 3 November, and 3 December of that year, and the fourth on 3 January of the next year. The first, the others differing only in the time of maturity, is in form as follows:

"$25.00 BOSTON, MASS., 3 May, 1888.

"3 August, 1888, after date we promise to pay A. D. Puffer & Sons Mfg. Co. or order twenty-five dollars, with interest at 6 per cent, as per a lease to us of certain goods this date—value received.

"This obligation is not to be taken as a payment of the property leased in connection hereunto, under any law in any State, but only as evidence of a certain amount to be paid whenever the signers shall desire to become owners of the property leased.

"No. 2. Due 3 August, 1888.

"BAKER & HARGRAVE.

"Tarboro, N. C."

Contemporaneously with the giving of these and other similar notes, the defendants executed the following paper, denominated a "Lease":

"Know all men by these presents, that we, Baker & Hargrave, of Tarboro, State of North Carolina, have hired, leased and received of A. D. Puffer & Sons Mfg. Co., of Boston, Commonwealth of Massachusetts, for the term, to wit, two years and two months, ending 3 July, 1890, subject to the conditions herein stated, the following described goods and chattels: One Bartholdi soda and mineral water draught apparatus, etc., and we do promise and agree with the (150) said A. D. Puffer & Sons Mfg. Co., their representatives and assigns, to pay them for the possession and reasonable use thereof for said term, the sum of seven hundred and thirty-two dollars, as rent, to be paid, cash seventy-five dollars, balance in the installments set forth in the several obligations given by us therefor, as follows:

"3 July, 1888, fifty-seven dollars; 3 August, 1888, twenty-five dollars, and twenty-four other notes, each for the sum of twenty-five dollars, and maturing, one on the 3d day of each succeeding month until they all become due and payable.

"It is further provided that upon full payment of the several obligations aforesaid, all claim and title to said property on the part of said A. D. Puffer & Sons Mfg. Co. shall cease, and the whole title shall vest in said lessee as owner; but upon any breach of the provisions of this

lease, especially upon failure by the said lessee to pay the several obligations, or either of them, as they become due and payable, then this lease, and any and all claims or right on the part of said lessee under the same, or to the further use and possession of said property, shall be thereby terminated, and the said A. D. Puffer & Sons Mfg. Co. may hereafter, at any time, enter the premises where said property may be and resume possession of the same, without process of law, or let or hindrance from lessee; and such of the aforesaid obligations as mature after said A. D. Puffer & Sons Mfg. Co. have resumed possession of said property, shall be taken and held to be void and returned to the lessee upon demand; said obligations are not to be taken as a payment for said goods and chattels under any law in any State, but only as evidence of the amount to be paid whenever the lessee should desire to become owner of the property."

On 3 November, when the second installment became due, the defendants wrote to the plaintiffs that they surrendered the fountain, fixtures, etc., and demanded the return of the undue notes, adding
(151) at the same time that the property was subject to their command.

The plaintiffs recovered judgment before the justice for the sum and interest due on the two first maturing notes only, and on the trial in the Superior Court, to which it was carried by plaintiffs' appeal, a similar judgment was rendered upon the facts found by the court by consent of parties, instead of by a jury verdict, and the appellants taxed with the costs of the appeal, from which the plaintiffs appealed to this Court. The errors assigned are—

1. The admission in evidence, after objection, of the following paper-writing:

"25 FEBRUARY, 1888.

"A. D. PUFFER & SONS MFG. CO.,
Manufacturers Soda Water Apparatus,
46 and 48 Portland Street,
Boston, Mass.

"Please forward to our address, Tarboro, N. C., on or about 1 April, 1888, the following described property: Bartholdi wall apparatus, etc., which we hereby agree to lease upon the following terms:

"For the first we will pay rent on delivery $75; following $57; balance $25 per month till paid for, with 6 per cent.

"And I further agree to sign the usual form of lease and obligations as used by the said A. D. Puffer & Sons Mfg. Co., and covering the above described goods and payments. They to have the right to take said property without legal process, and without liability to any person,

if said rent is not paid at the time aforesaid, or if said lease and obligations are not signed and returned to said A. D. Puffer & Sons Mfg. Co., upon their request after delivery of said goods.

"But when said rent has all been paid at the times thereof, (152) should we so elect, the title of said property shall be transferred to us, or order, by a bill of sale, in consideration of the payment by us, of the sum of 1 per cent; otherwise the same shall be returned to them at their expense. All orders are accepted subject to delays that may be occasioned by fire, strikes, or any other unforeseen causes.

A. D. PUFFER & SONS MFG. CO.,
(per L. Jernan)
BAKER & HARGRAVE.

2. The denial of the plaintiffs' right under the contract to recover the amount due on the excluded notes.

John L. Bridgers for plaintiffs.
Gilliam & Sons, by brief, for defendants.

SMITH, C. J., after stating the case: The writing, to the introduction of which before the court objection is made, was the initiation of the negotiation which terminated in the contract of 3 May, 1888, and seems to have been secured as a preliminary part of the transaction, perhaps shedding some light upon the provisions, but not to change or in any respect modify the agreement represented in the two papers; nor does it seem to have been allowed any force or weight in putting a construction upon their terms. It was, therefore, harmless, and could have had no effect upon the mind or influenced the opinion of the trying judge. It would be a reviewable error in the judge, while in the exercise at the same time of his own and the functions of the jury, to admit and act upon incompetent evidence in arriving at facts, for in passing upon their admissibility he virtually instructs himself in determining what may be considered as declared therein.

Yet immaterial evidence, not calculated to mislead in passing upon disputed facts, is not error. *Patton v. Porter,* 25 N. C., (153) 539; *Reynolds v. Magnus,* 24 N. C., 26.

More especially can no complaint be made of the ruling when it is manifest that the admitted script had no influence upon the legal result arrived at, which was based solely upon a construction of the other writings. The conclusion of the defendant's nonliability upon the last two notes was dependent upon the effect given to the writings, which together constitute the contract, about which there was no controversy.

2. This brings up the inquiry as to the correctness of the interpretation put upon the contract in its entirety. The explanatory condition annexed to the promise in the notes, evidently refers to the lease and repels the possible inference of a purchase and mode for paying for the apparatus, while the lease itself declares the contract to be one of hiring or bailment for a stipulated term, "two years and two months ending 3 July, 1890," and the promise is to pay them, the plaintiffs, "for the possession and reasonable use thereof, the sum of seven hundred and thirty-two dollars," partly in money, partly in time notes, of which those before us form part.

"It is further expressly provided that, while upon full payment of the sums specified, the title should pass to the defendants, yet that, upon any breach of the provisions of the lease, especially upon the failure of the lessee to pay the several obligations, or either of them, as they become due and payable, *then this lease and any and all claim or right* on the part of said lessee under the same, or to the further use and possession of said property, shall be thereby terminated," etc. The import of this language is too plain to admit of dispute. It creates a bailment which may last for a given period, but comes to an end, in which case the parties for the future occupy the same relations, as to the title to the property, as before the making of the contract and further payments are dispensed with.

(154) We think the contract was terminable by the lessees, and results from their failure to meet any one of the obligations.

The notice of defendants' intention to pay no more was, in legal effect, equivalent to such failures; in fact and *eo instanti,* ended the bailment and lease. The plaintiffs then became entitled to possession of the property, and the defendants to the surrender of the undue notes, and their exoneration therefrom was effected.

There is no error, and the judgment is

Affirmed.

Cited: Puffer v. Lucas, 112 N. C., 383; *Driller Co. v. Worth,* 117 N. C., 518; *Hamilton v. Highlands,* 144 N. C., 285; *Winborne v. Cotton Mills,* 171 N. C., 65.

J. W. PEACOCK v. HENRY STOTT.

Cloud Upon Title—Cause of Action—Jurisdiction.

1. An action to remove a cloud upon title cannot be maintained by one who is not shown to be in the rightful possession of the land, nor by one who has another adequate remedy.
2. Where it appears from the record that no cause of action exists, the Supreme Court will *ex mero motu* dismiss the appeal for want of jurisdiction.

PETITION TO REHEAR, filed at February Term, 1889.

C. M. Cooke and F. A. Woodard for plaintiff.
Jacob Battle for defendant.

AVERY, J. This is application to rehear a case decided at September Term, 1888. It is not contended for the plaintiff that the principle announced by the Court (101 N. C., 149) is incorrect in theory. But he insists that the complaint, if admitted to be true, would establish his right to demand judgment that the deed executed by Levi Bailey to Henry Stott be declared void, in order to remove a (155) cloud upon his title.

An action will not lie solely for the purpose of removing a cloud from the title of a party who is not shown to be in proper possession of the land in controversy, nor on behalf of a complainant who has another adequate remedy. *Southerland v. Harper,* 83 N. C., 200; *Busbee v. Macy,* 85 N. C., 329; *Murray v. Hazell,* 99 N. C., 168; *Byerly v. Humphrey,* 95 N. C., 151; *Browning v. Lavender, ante,* 65. The defendant does aver that he (defendant) is in the rightful possession. That averment is not in conflict with any allegation of the complaint, nor is any replication filed so as to raise an issue as to the property.

He could have alleged in plain terms, according to his own showing, that the deed from Levi Bailey to the defendant Stott was executed with intent to hinder, delay or defraud the creditors of said Bailey, and, on proof of that allegation, could have caused that deed to be declared void by the court, and thus, by avoiding the apparently older title of Stott to the legal estate in the land which he derived from Bailey—the common source of title—the plaintiff would have removed the only obstacle to his recovery in any action for possession. Indeed, he might, after alleging an unlawful holding on the part of defendant, have demanded a writ of possession in said action. As he had declared that he held the equity by virtue of the parol trust, and subsequently bought, at execution sale, the interest of Bailey, who held the legal estate, and that Bailey had, prior to his purchase at said sale, conveyed to the defendant Stott to

"prevent his creditors from reaching his land," it followed that the legal and equitable estates had united in the plaintiff, if all of these allegations were true, but he had failed to either allege the fraud distinctly, or to ask that the deed to Stott be declared fraudulent and void,
(156) or had failed to charge a trespass or wrongful possession on the part of the defendant Stott.

The deed to Stott could not be canceled unless the fraud was both alleged and proven, and the plaintiff could not obtain judgment for a writ of possession unless he had declared and established, by a verdict or admissions, that the defendant was in the wrongful possession. The complaint, therefore, did not state facts sufficient to constitute a cause of action, and the court did not have jurisdiction. In such cases, this Court must *ex mero motu* hold that there is a want of jurisdiction, and that the action must be dismissed, unless, by amendment made on leave, the plaintiff can acquire a standing in the court. *Tucker v. Baker,* 86 N. C., 1; *Knowles v. R. R.,* 102 N. C., 59.

We therefore adhere to the former ruling.

Petition dismissed.

Cited: McNamee v. Alexander, 109 N. C., 245; *Conley v. R. R., ib.,* 696; *Mortgage Co. v. Long,* 113 N. C., 127; *Farthing v. Carrington,* 116 N. C., 329.

J. B. ANDREWS AND G. C. FARTHING v. A. J. RIGSBEE AND J. S. MANNING.

Judge's Charge—Evidence.

In an action to recover the value of certain bricks alleged to have been wrongfully converted by the defendant, the pleadings raised an issue as to the plaintiffs' title to the bricks, and, on the trial, there was evidence tending to show that the defendant declared that it was immaterial to him to whom he delivered or paid for the bricks. *Held*, that, while this declaration was evidence proper to be submitted to the jury, it was error to instruct the jury that, if they found, as a fact that such a declaration was made, they should find the issue in favor of the plaintiff.

APPEAL from *Bynum, J.*, at March Term, 1889, of DURHAM.

The complaint alleged, in substance, that the plaintiff Andrews
(157) and the defendants, in March, 1887, entered into a written contract, in which it was provided that Andrews should manufacture brick at a certain place, the defendants furnishing necessary funds and fuel, and that he (Andrews) was to be entitled to a portion of the bricks

so manufactured; that, subsequently, he executed to his co-plaintiff a chattel mortgage, to secure advances of money, upon his share of the bricks, and that the defendants wrongfully took and converted Andrews' share to their own use.

The answer denied the material allegations in the complaint, and, specially, that Andrews ever acquired title to the bricks claimed by him, and which he had attempted to convey by the mortgage. They also further alleged that the plaintiff Farthing took his mortgage without notice that Andrews had not complied with his contract, and thereby had failed to acquire title to any portion of the bricks.

The issues submitted to the jury, and their responses to them, were as follows—

"1. Did the defendants convert to their own use the brick of the plaintiffs? Answer: Yes.

"2. If so, what damage have the plaintiffs sustained? Answer: Two hundred dollars.

"3. Did Farthing take his mortgage with notice of the contract, and that the part thereof referring to the 'second mill' was not performed? Answer: Yes."

On the trial "there was contradictory testimony between plaintiffs and defendants as to what occurred in a conversation between plaintiff Farthing and defendant Manning in April, 1887, and his Honor charged the jury that if they believed Manning read to Farthing the contract set out as part of the complaint, and said to him, 'I do not care whom I deliver Andrews' brick to, or to whom I pay the money for his brick; it is immaterial to me whether they are delivered or paid for to you or to Andrews,' then the jury should answer the first (158) issue, Yes."

To this charge the defendants excepted, and from a verdict and judgment thereon against them they appealed.

No counsel for plaintiffs.
W. W. Fuller for defendants.

MERRIMON, C. J. The pleadings put in issue whether or not the plaintiffs had any brick, as alleged by them, and the evidence of ownership, was more or less in conflict. Although Manning may have said to the plaintiff Farthing, "I do not care whom I deliver Andrews' brick to, or to whom I pay the money for his brick. It is immaterial to me whether they delivered or paid for to you or Andrews," it did not follow, as a necessary consequence, that the jury should respond to the first issue "Yes," because the conflicting evidence before the jury might, but

for the instruction of the court, have led them to conclude and find that the plaintiffs did not own the brick in controversy. The evidence was perhaps strong, but not conclusive evidence of the ownership of the brick, as the court seems to have supposed.

The agreement in writing read to Farthing was no more than some evidence—it was not conclusive. The defendants expressly denied in their answer that the plaintiff Andrews had complied with its material terms, or had made or owned any brick under or by virtue of it.

The defendants are entitled to a

New trial.

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(159)

HAYWOOD NORRIS v. ISHAM McLAM ET AL.

Cause of Action—Dismissal of Appeal—Reformation of Deed—Pleading.

1. The Supreme Court will examine the entire record upon an appeal, and if it appears therefrom that no sufficient cause of action is stated, it will *ex mero motu* dismiss the appeal.

2. To convert a deed, absolute upon its face, into a mortgage, it must be alleged that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage, nor will the courts interfere to relieve against a deed where the testimony tends to show that it was oppressive and involuntarily executed, unless the proper averments as to these facts are made in the pleadings.

APPEAL from *Armfield, J.*, at August Term, 1889, of JOHNSTON.

The plaintiff alleges that he executed on one Isham McLam, the ancestor of the defendants, a certain absolute deed in fee, conveying the land mentioned in the complaint; that, at the time of the execution of said conveyance, the plaintiff was indebted to the said McLam in the sum of sixty dollars, and that the said conveyance was intended as a mortgage; "that the plaintiff objected to the execution of the said conveyance in the form in which it was written, but that the said McLam said to him (that) it was a mere matter of form; that it was cheaper than a mortgage and that he, McLam, would reconvey the said land" to plaintiff upon the payment of the said sixty dollars. The plaintiff further alleges that the land is of much greater value than the debt, and that he has tendered the same and demanded a reconveyance. He prays to be permitted to redeem, and for "other and further relief." The answer denies all these allegations, and avers the full value was paid for the land. The statute of limitations was also pleaded, and the case was

submitted to the jury. Upon intimations of his Honor in respect to this plea, the plaintiff submitted to a nonsuit and appealed. (160)

C. B. Aycock for plaintiff.
Pou & Pou for defendants.

SHEPHERD, J., after stating the case: It is unnecessary to consider the correctness of his Honor's rulings, inasmuch as we are of the opinion that the complaint does not state facts sufficient to constitute a cause of action. It is the duty of this Court to examine the entire record, and if no cause of action is stated, to dismiss the suit *ex mero motu*. *Johnson v. Finch*, 93 N. C., 208, and the cases cited.

It is well settled "that in order to convert a deed absolute on its face into a mortgage, it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." *Streator v. Jones*, 5 N. C., 149; *Bonham v. Craig*, 80 N. C., 224; *Egerton v. Jones*, 102 N. C., 278.

There is an entire absence of any of these essential elements in the complaint, and the deed appears to have been written as the parties intended.

If, as suggested by the testimony, the relations of mortgagor and mortgagee existed in respect of the land, at the time of the execution of the deed, and that, by reason of such relations, the transaction was oppressive and involuntary, it should have been so stated in the complaint. "There must be *allegata et probata*, and under the new system, as under the old, the court cannot take notice of any proof unless there be a corresponding allegation." *Pearson, C. J.*, in *McKee v. Lineberger*, 69 N. C., 239.

For these reasons the nonsuit must stand.

Affirmed.

Cited: Everett v. Raby, post, 481; *Green v. Sherrod*, 105 N. C., 198; *Sprague v. Bond*, 115 N. C., 533; *Hall v. Lewis*, 118 N. C., 515; *Porter v. White*, 128 N. C., 44; *Locklear v. Bullard*, 133 N. C., 263; *Helms v. Helms*, 135 N. C., 167, 175; *Newton v. Clark*, 174 N. C., 394; *Williamson v. Rabon*, 177 N. C., 305.

(161)

B. F. MONTAGUE AND JOHN W. LEE v. T. K. BROWN.

Pleading—Pendency of Former Action—Practices Before Justices of the Peace.

1. The pendency of another action for the same cause, to be available as a matter of defense, must be specially pleaded, otherwise it will be considered waived. It may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the others growing out of the pleadings, with instructions to the jury that, if found for the defendant, the others need not be considered.

2. In actions before justices of the peace the pleadings may be oral, but if so, the substance of them must be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of that, also, must be given on the docket, in a plain and direct manner.

3. Under rule 6, sec. 840, the Code, the requirement that the plaintiff, in actions before justices of the peace, must show his right to recover, is, in effect, a general denial on the part of the defendant, and any evidence which may tend to contradict the plaintiff's allegations, may be received; but, where new matter is relied upon, the defendant is required to plead it specially.

APPEAL from a justice of the peace, tried at April Term, 1888, of WAKE, *Shipp, J.*, presiding. The cause coming on for trial the record states that "the defendant moved that the cause be dismissed for want of jurisdiction of this court." Question of jurisdiction reserved.

The case on appeal states that, "on the trial before *Shipp, J.*, the defendant, for the purpose of showing that the court did not have jurisdiction of this action, after objection by the plaintiffs, offered in (162) evidence the record of a suit brought in the Superior Court of Wake, by plaintiffs against defendant, in which a judgment of nonsuit was taken, and that the plaintiffs procured a summons in this action, before the nonsuit, on the same day, and that the summons was served upon the defendant in the bar of the court immediately after the nonsuit was entered." . . . "The defendant insisted before *Shipp, J.*, that the magistrate had no jurisdiction, and that this (Superior) court had none, because this suit is for the same cause of action of that pending in the Superior Court at the time the summons was issued in this action. *Judge Shipp* refused to admit the testimony for the purpose offered, or to submit to the jury any issue with a view to finding the facts on which the question of jurisdiction might arise, to which the defendant excepted." The action was then tried, resulting in a verdict for the plaintiffs, which was set aside and a new trial ordered.

When the case came on for trial again, before *Graves, J.*, at February Term, 1889, of Wake, the defendant renewed the motion to dismiss,

assigning the same grounds, but it being made to appear that *Judge Shipp* had, in fact, overruled the same motion, on the previous trial, the court refused to again entertain it. The defendant excepted; and there being a verdict and judgment against him upon the issues joined, he appealed.

E. C. Smith for plaintiffs.
C. M. Busbee for defendant.

AVERY, J. The record proper does not show that the motion to dismiss was ever, in fact heard before *Judge Shipp,* and there is no record of any exception to his ruling on the question of jurisdiction. It does not appear that the parties filed written pleadings, and the record shows no memorandum of the pleas entered by the defendant. But it does appear, that on the trial before *Judge Shipp,* the jury passed upon the same issue submitted on the last trial, and nothing else (163) was put in issue before the jury.

We gather from the Code (sec. 840, Rules 2, 3, 4, and 15, and sec. 876), that, under the rules provided for the courts of justices of the peace:

1. The pleadings may be oral or written, but *if oral, the substance must be entered by the justice on his docket.*

2. The complaint must state, in a plain and distinct manner, the facts constituting the cause of action. The answer may contain a denial of the whole, or any part, of the complaint, *and also notice, in a plain and direct manner, of any facts constituting a defense or counterclaim.*

3. The Code of Civil Procedure *respecting forms of actions, and parties to action, shall apply to justices' courts.*

In *Blackwell v. Dibbrell,* 103 N. C., 270, this Court held, that a defendant would not be allowed to show the pendency of a former action, when the only memorandum of his defense, entered on the docket of the justice of the peace, was, "general issue, and counterclaim amounting to $89.07." This was not *notice, in a plain and direct manner, of the facts constituting another defense.* In this case, the plaintiff's cause of action appears from the summons, but the defendant has not even entered on the record a denial of any part of the claim for which the action is brought. But the fact that the plaintiff was required to show his right to recover, was equivalent to a general denial on the part of the defendant. (Code, sec. 840, Rule VI.)

The pendency of another action when this began, must, under the former practice, have been set up by plea in abatement before pleading to the merits, and now it must be especially averred as a defense, and insisted on, preliminary to a decision upon the merits, though it may be

(164) pleaded in the answer, with the denials and allegations of the complaint and other defenses. *Hawkins v. Hughes,* 87 N. C., 115; *Blackwell v. Dibbrell, supra.* The issue as to the pendency of another action, will be considered as waived, if not insisted on till after a trial on the merits, but, when demanded, that and other issues may be submitted at the same time to the jury, with instructions, if they find the action was pending, as alleged, to refrain from passing on the other issue. When this case was called for trial before *Shipp, Judge,* at a previous term, the defendant moved the court to dismiss for want of jurisdiction, and, according to the record proper, the motion was reserved, a trial was had upon the merits, and the verdict was afterwards set aside and a new trial granted. At the February Term, 1889, it was admitted by the parties that, in fact, the motion to dismiss was disallowed by *Judge Shipp,* and an exception was entered to his ruling before the trial on the merits, and that the said order of the court, refusing the motion, and the exception of the defendant, ought to have been entered of record. *Judge Graves* would not entertain the motion to dismiss when renewed before him, because it had already been overruled by *Shipp, Judge.* The defendant had never, even if we consider the record amended *nunc pro tunc,* as he wishes, entered any memorandum of a defense, nor has he moved the court to be permitted to do so. It has always been within the sound discretion of the court to allow such a motion, and if no plea was entered, the requirements of the Code, sec. 840, Rule VI, that the plaintiffs should show the right to recover, gave the defendant the benefit of a general denial, and nothing more.

If the defendant had relied upon the plea of the statute of limitations or payment as a defense in this action, it will scarcely be questioned that it would have been essential to set them up specially as new (165) matter, at least by memorandum entered. *Long v. Bank,* 81 N. C., 41; *Ellison v. Ricks,* 85 N. C., 77. It is true, as a general proposition, that the facts relied upon in a formal answer, as a defense to an action, must be set forth with the same precision as is requisite in a complaint, *Rountree v. Brinson,* 98 N. C., 107. They should, at least, be clearly indicated or suggested by the memoranda entered on the docket of a justice of the peace. Under a general denial, any evidence that tends to contradict the allegations of the complaint, which the plaintiff must prove to sustain his action, may be given to the jury. But where the defense relied on is a new matter, evidence to support it is not competent unless it is specially pleaded. *Ellison v. Ricks, supra.*

The courts have been liberal in construing pleadings under the Code of Civil Procedure; but even at the February Term of the court, on the hearing before *Judge Graves,* the defendant still insisted on his motion to dismiss, addressed the court, and did not ask leave to enter his pleas.

He might have moved the court to be allowed to make the entry. "The defendant pleads the pendency of an action, founded upon the same cause, when this action was begun." If the court had allowed his motion, two issues, instead of one, might have been submitted; and if the jury found in reference to the first that such action was then pending, they could have been told that it would have been useless to find the amount due the plaintiffs in answer to the second issue. A defendant, in a justice's court, may elect whether he will file a formal answer or rest his defense upon memoranda; but it is due to the plaintiff that he should clearly indicate his ground of defense, so that the former may prepare for reply. In this case, the notice (if there was any) to the plaintiff, was that the defendants maintain that *Judge Shipp,* on hearing the evidence offered, ought to have allowed his preliminary motion to dismiss, before submitting the general issue to the jury, and that he relied upon his exception, taken at the last term, to his (166) order overruling that motion. After losing upon the merits, defendant cannot expect to be allowed a new trial, to set up a technical defense, as it must be considered, if he owes the debt.

For the reasons given, the defendants cannot claim the benefit of that defense, and the judgment must be

Affirmed.

Cited: Curtis v. Piedmont Co., 109 N. C., 405; *Averitt v. Elliott, ib.,* 563; *Hicks v. Beam,* 112 N. C., 645; *Smith v. Lumber Co.,* 140 N. C., 378; *Baxter v. Irvin,* 158 N. C., 281.

J. A. PARKER v. THE BOARD OF COMMISSIONERS AND TREASURER OF WAYNE COUNTY.

Revenue, State and County—Constitution—School Fund—Liquor Dealers—County Government—Taxation.

1. The requirement in the Constitution, Art. V, sec. 7, that every act levying taxes shall state the objects to which they shall be appropriated, has no application to taxes levied by the county authorities for county purposes.
2. While the General Assembly may regulate the amount and methods for raising county revenues, the present system of county government contemplates that the function shall be performed by the county authorities, subject to the limitations prescribed by the Constitution.
3. The Revenue Act of 1887 (ch. 135) was enacted for the purpose of providing revenue for State purposes only.

4. The license taxes imposed upon liquor dealers of the first and second classes, in the 31st section of the Revenue Act of 1887, and directed to be paid to the treasurer of the County Board of Education, for the benefit of the public schools in the county in which they were collected, were not *county*, but were *State* taxes; and the county authorities had authority to impose additional taxes thereon for county purposes subject to the restrictions in said act and the Constitution contained.

5. A levy by the county authorities in these words—"The rate of county tax is fixed at 25 cents on each $100 real and personal property; schedule B and C taxes same as State's and poll tax at constitutional acquirement"—*Held*, to be sufficiently specific.

(167) APPEAL from *Graves, J.*, at January Term, 1889, of WAYNE.

This action began in the court of a justice of the peace to recover the sum of $65, paid by and collected from the plaintiff as taxes in July of 1888, which, he alleges, were invalid, and as allowed by the statute. (Laws 1887, chap. 137, sec. 84.)

The following is so much of the case stated for this Court on appeal as it is necessary to report:

1. The county levy for the said year for said county was in the following words, to wit: "The rate of county tax was fixed at 25 cents on each $100 real and personal property; schedule B and C taxes the same as State's, and poll tax at constitutional requirement."

2. The plaintiff, on 1 July in said year 1888, was a liquor dealer in said county, duly licensed to sell spirituous liquors in the quantities aforesaid.

3. On or about the 10th day of said month of July, the sheriff of Wayne County collected forty dollars from plaintiff, as such dealer selling spirituous liquors in quantities of one quart and less for the said period, and twenty-five dollars for selling such liquors in quantities of one quart and less than five gallons for the same period.

His Honor ruled, first, that under the law in question (sec. 31, chap. 135, Laws 1887), the several counties were not restricted to the third class of license taxes (namely, for selling in quantities of five gallons or more), embraced in that section of the act, but had like authority to levy the license taxes named in the first and second classes, being those specified in the case agreed; secondly, that under secs. 6 and 7, Art. V, of the Constitution of this State, the object of said levy was stated with sufficient particularity by the board of commissioners of Wayne County and was constitutional and valid. To all of which the plaintiff (168) excepted.

Judgment for defendants, from which the plaintiff appealed.

Nixon & Galloway for plaintiff.

C. B. Aycock for defendants.

MERRIMON, J., after stating the case: The statute (Laws 1887, chap. 135), entitled "An act to raise revenue," prescribed and designated particularly tax to be levied and collected annually, while it continued in force, for purposes of the State—not for county purposes as such; it did not in effect, nor did it purport to raise county revenue. While, no doubt, the Legislature may, in its discretion, provide for raising county revenue in appropriate ways, the general statutory provisions in respect to counties (Code, chaps. 17 and 18) contemplate and intend that the county commissioners, with the concurrence of a majority of the justices of the peace, shall have power "to levy, in like manner with the State taxes, the necessary taxes for county purposes, but the taxes so levied shall never exceed the double of the State tax," etc. Code, sec. 707.

And the Constitution itself so contemplates (Art. V, secs. 1, 2, 6; Art. VII, secs. 7, 13); so that it is not to be taken that the statute first above cited provides for raising county revenue—certainly not, unless it shall appear that there is some clear provision to the contrary.

The thirty-first section of the statute last above referred to prescribes, as to persons selling spirituous liquors, that every person, company, or firm "shall pay a license tax semi-annually," in advance, on the first day of January and July, as follows: First, for selling in quantities of one quart, or less, forty dollars for each six months, to be collected by the sheriff and paid to the treasurer of the county board of education for the benefit of the fund for public schools in such county; second, for selling in quantities of one quart and less than five gallons, twenty-five dollars for each six months, to be collected by the sheriff and paid to the treasurer of the county board of education for the (169) benefit of the fund for public schools in such county; third, for selling in quantities of five gallons, or more, one hundred dollars for each six months, to be collected by the sheriff and paid to the treasurer of the State," etc.

The plaintiff contends, if we understand him correctly, that the first two taxes thus prescribed are *county* taxes—not State taxes—and, therefore, the defendants had no authority to levy a like additional tax for county purposes, other than that of education, as prescribed, as they undertook to do, and required him to pay the same.

This contention is unfounded. The tax thus levied and collected for school purposes is not, in any proper sense, a county tax; it is levied by the State, collected by the State authorities as a part of the school fund of the State, and is paid to the treasurer of the county board of education for convenience sake and to facilitate its distribution. The county authorities, as such, do not control and use or distribute it as county revenue.

The third and largest tax so prescribed was required, when collected, to be paid to the treasurer of the State for the ordinary purposes of the State treasury. That this interpretation is correct, appears not only from the statute under consideration, but from the general school law of the State as well. Moreover, that the purpose of the Legislature was that we have indicated, appears strongly from a clause of the thirty-first section of the statute, part of which is recited above, in these words: "*Provided,* that counties may levy not more than as much tax as the State under the provisions of this section." The purpose of this *proviso* was to prevent the counties from taxing dealers in spirituous liquors, as prescribed, more than the State, to the extent of double the State tax, if they should see fit to do, as allowed by the Constitution, Art. V, sec. 6.

Besides, under the statute, the Treasurer of the State—not county
(170) authorities—prescribed the license and stamp to be used by persons selling spirits by wholesale or retail.

Clearly, the court below held properly that the proper county authorities might impose a license tax upon all persons coming within the first and second classes of persons selling spirituous liquors under the statute in question, as well as upon those coming within the third class.

We are also of opinion that the order of the defendant commissioners, imposing the tax complained of, sufficiently indicated and specified the subjects of taxation embraced by it to be taxed. It is informal and summary, and it would, perhaps, be better if it were less so; but, in view of its nature and purpose, it obviously referred to "Schedules B and C," designating particular subjects of taxation and the taxes to be paid on account of the same of the revenue law then in force—that of 1887 first above cited. Thus the subjects to be taxed, and the taxes to be levied and collected, were made certain—as certain as the levy of the State taxes.

It was not necessary that the order should specify the particular purposes for which the taxes were levied; the law does not so require, in terms or effect. The constitutional provision (Const., Art. V, sec. 7) applies to taxes levied by the General Assembly—not to such as are levied by the county authorities for county purposes. It might be well if they would classify the purposes of the tax levy, as far as practicable, but they are not bound to do so.

Affirmed.

Cited: Tillery v. Candler, 118 N. C., 889; *Board of Ed. v. Comrs.,* 167 N. C., 116; *Parker v. Comrs.,* 178 N. C., 95.

(171)

MOSES CAREY v. VIRGINIA CAREY ET AL.

Evidence—Transaction and Communication with Deceased Persons.

The plaintiff brought an action against the heirs of C., alleging that he and C. had purchased jointly a tract of land, but for convenience the deed was made to C. alone, who afterwards mortgaged it to secure a loan, and that he (the plaintiff) had repaid a part of the loan, and he prayed judgment that the heirs of C. be declared trustees, etc. In support of his cause of action he offered the vendor and mortgagee as witnesses to prove the joint purchase and the borrowing of the money and repayment of the loan, and also offered his wife, to prove that a portion of the purchase money was paid by himself. *Held*—

1. That neither the vendor nor the mortgagee were competent witnesses for plaintiff to prove any transaction with C., they being expressly included in the prohibition of the statute (Code, sec. 590), by the description of persons, "from, through, or under whom such party (the party introducing them) . . . derives his interest or title by assignment or otherwise."

2. That the proposed evidence of the wife was competent, it not appearing that it embraced any transaction or communication with the deceased.

APPEAL from *Shipp, J.*, at November Term, 1888, of GRANVILLE.

The following is so much of the case settled on appeal as need be reported:

"Plaintiff alleged that he was the father of Simeon Carey, deceased, husband of the defendant Jennie, and father of the infant defendants; that prior to his death, Simeon and the plaintiff purchased from one D. W. Wheeler the tract of land, the subject of this action, but as a matter of convenience the deed thereto was made to Simeon alone; that Simeon thereafter mortgaged the land to one K. T. Roycroft to secure the payment of a sum of money, and that plaintiff paid to Roycroft a part of the money so borrowed by Simeon, and asked that the defendants be declared trustees to his use for one-half of said (172) land.

"Plaintiff first introduced D. W. Wheeler, and offered to prove that plaintiff and Simeon Carey bought from witness the tract of land in controversy. Defendants objected; objection sustained. Exception.

"Plaintiff then introduced K. T. Roycroft, and offered to prove that Simeon Carey borrowed from witness the sum of.....dollars, and to secure the payment of the same, executed to Roycroft a mortgage on the land, and that plaintiff paid to Roycroft a portion of the money so borrowed by Simeon. Defendant objected; objection sustained. Exception.

"Plaintiff then introduced Mrs. Carey, wife of plaintiff, and offered to prove that a portion of the purchase-money for said tract of land was

paid to D. W. Wheeler by the plaintiff. Defendant objected; objection sustained. Exception."

Verdict and judgment for defendant, and the plaintiff appealed.

John W. Hayes for plaintiff.
A. W. Graham and R. W. Winston for defendants.

MERRIMON, C. J., after stating the facts: It has been decided in many cases that the leading, if not the only, purpose of the statute (Code, sec. 590) is to render incompetent a person of the several classes therein specified, to be a witness upon the trial of an action, or the hearing upon the merits of a special proceeding, "in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication be-
(173) tween the witness and the deceased person, or lunatic," except in the case excepted.

One of the classes so rendered incompetent as witnesses in the cases prescribed, are persons "from, through or under whom such a party (the party to be benefited by the evidence to be elicited), or interested person, derives his interest or title, by assignment or otherwise," etc. The reason of this statutory provision is, that if the deceased person in such cases were living, he might contradict the witness, testifying adversely to him; he would certainly have knowledge of the "personal transaction or communication" with himself, and, as to it, he would be on an equal footing, as a witness in his own behalf, with the witness adverse to him.

The purpose of the Legislature in so rendering incompetent the person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, seems to be to prevent possible collusion between the interested party and the witness, in the absence of the deceased person, who, if alive, could be heard in his own behalf, and might contradict such adverse witness as to "a personal transaction or communication" between them. Whatever the purpose, the language employed to accomplish it is plain, strong and very comprehensive. It clearly and explicitly embraces all persons from whom the interested party *"derives his interest or title* by assignment, or otherwise." By these words is meant—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever

nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other way or manner. There is a manifest purpose not to allow the "executor, administrator, or survivor of a deceased person," or the person claiming under him, to be prejudiced to the advantage of an interested party, as to "a personal transaction (174) or communication" between him and a witness called to testify as to the same in behalf of such interested party. The language is so clear that very little is left to interpretation. Obviously, it is the duty of the Court to give effect to the legislative will so expressed. *Halyburton v. Dobson,* 65 N. C., 88; *Bullard v. Bullard,* 75 N. C., 190; *Tobacco Co. v. McElwee,* 100 N. C., 150.

The plaintiff offered, on the trial, to prove by the witness Wheeler that he and his deceased son purchased from the witness the land in controversy. He plainly claims an "interest" in it against the defendants, who are heirs at law of his deceased son, by virtue of the purchase from the witness; he alleges that he paid to him part of the purchase-money, hence, he "derives his interest" in the land, whether it be legal or equitable, from the witness, through the deceased son—the witness is the source of his interest, whatever it may be. It was proposed to have the witness testify as to a personal transaction or communication between himself and the deceased son, the father of the defendants, who claim under him. Nothing to the contrary appearing, it was proposed to prove such a transaction—this is just implication. If it were not such, the plaintiff should have so shown, and rendered the witness competent. It might possibly be that the son was not present at the purchase; that the witness did not communicate with him on the subject, and if this was so, the plaintiff had the right to prove the fact if he could. So far as appears, the witness was not competent to prove the purchase of the land, as proposed by the plaintiff, because the purchase was a personal transaction with the deceased father of the defendants, who claim under and derive their title from him, and because the plaintiff, claiming adversely to the defendants, derives his interest in the land from the witness, as do, also, the defendants. The first exception is, therefore, unfounded. *Lockhart v. Bell,* 90 N. C., 499; *Waddell v. Swann,* 91 N. C., 105; *Sykes v. Parker,* 95 N. C., (175) 232.

For the like reasons, the second exception cannot be sustained. The transaction which the plaintiff proposed to prove by the witness Roycroft was a personal one as between him and the deceased son. The plaintiff alleges that the money borrowed—the payment of which was secured by the mortgage of the land—was thus obtained, and was used to pay the purchase-money of it. He proposed to prove by the witness

that he paid part of the mortgage debt, and thus, in effect, paid partly, if not wholly, for his interest in the land. Thus, in a material sense, he "derived his interest" in the land, from the vendor to the son, through the latter, and, also, through the witness, the mortgagor. If the deceased son were alive, he might contradict the witness by testifying that the plaintiff did not pay part of the mortgage debt—that he paid the whole thereof himself.

The third exception must be sustained. It may be that the wife of the plaintiff might have an interest in the result of the action, but it was not proposed to prove by her "personal transaction or communication" between her and the deceased son. So far as appears, the latter was not present at the time of the payment of the money by his father to the vendor Wheeler, and knew nothing of it. If he were alive, so far as appears, he could not contradict this witness. It was competent to prove by her what the plaintiff proposed to prove.

There is, therefore, error. The plaintiff is entitled to a New trial.

Overruled in part: S. c., 108 N. C., 271.
Cited: Watts v. Warren, 108 N. C., 522.

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(176)

W. H. RYAN, TRUSTEE, ET AL. v. W. A. MARTIN ET AL.

Res Judicata—Mortgage—Action to Recover Land—Misjoinder of Actions.

1. In an action to recover land, the defendant, being unable to give the defense bond required, procured a third party to execute and deposit a mortgage in lieu thereof, as provided by section 117 of the Code. Pending the action, the mortgagor purchased at a tax sale a portion of the land in suit. The plaintiff recovered against the defendant, and, in attempting to enforce his recovery of costs and damages by a foreclosure of the mortgage, was opposed by the mortgagor's application to have a reference and adjustment of their relative interests in the land recovered, and to be credited with his share thereof. *Held,* that the application was properly denied—the mortgagor's interest, if any, being wholly foreign to the action, and he could not be allowed in this manner to interfere with plaintiff's rights under his judgment.

2. The former judgment in this action is explained and affirmed.

PETITION to rehear the case of *Ryan v. Martin,* 103 N. C., 282.

In that action, the plaintiff sought to recover the land described in the complaint therein. The defendants, having failed to give the undertaking necessary to enable them to defend, as required by the statute

(Code, sec. 237) in such cases, in lieu of the same, W. A. Martin and his wife, Jane Martin, the present petitioners, on 11 March, 1889, executed to the plaintiff in the action, as allowed by the statute (Code, sec. 117), their mortgage of certain lands of the said Jane C., to secure to the plaintiffs such costs and damages as they might recover from the defendants, etc. The plaintiffs recovered. It was adjudged that they were the owners of the land described in the complaint, and that they recover $245 for damages and costs. Thereupon, an execution was issued for such damages and costs, which was returned *nulla bona.*

Afterwards, the plaintiffs in the action served the present petitioner, the principal mortgagor in the mortgage above mentioned, (177) and her husband, with notice that they would move at the June Term of 1887, of the court in which the action was brought, "for order of foreclosure of the mortgage (that mentioned above) deposited by you (the mortgagors) to secure all such costs and damages as the plaintiffs should recover," etc.

Afterwards, the present *feme* petitioner made opposition to the motion when made, by answer filed thereto, alleging therein, that, pending the action, she had purchased a part of the land described in the complaint, and recovered by the plaintiffs, for arrearages of taxes due from the plaintiff on account of the same, and had the sheriff's deed for the land so purchased, and she demanded "judgment that a reference be made to ascertain, upon evidence, the value of the land not embraced in her purchase, and, also, the value of that portion owned by her, and report the amount equitably due the plaintiffs, and that relief be afforded her to the extent of the difference in value," etc.

Pending the action, and before the trial therein, the petitioner had moved the court to allow her to become a party defendant thereto and set up her right as such purchaser of part of the land, in opposition to the right of the plaintiffs to recover. The court denied her motion, and she did not except or appeal from such denial. Also, after the judgment in favor of the plaintiff, she brought her independent action, alleging her title by virtue of her purchase mentioned, etc., and asking relief by injunction. This action was decided adversely to her, and she did not appeal.

The court denied the petitioner's motion in the action for a reference, etc., and passed an order directing that the mortgage be foreclosed, and that lands be sold, etc., unless the money recovered by the plaintiff as damages and costs should be paid into court by a day specified, etc., and the petitioner, Jane C. Martin, appealed. (178)

Geo. V. Strong for petitioner.
E. C. Smith contra.

MERRIMON, C. J., after stating the case: This application to rehear. rests upon the ground that the court erroneously understood and based its decision on the supposition, that the land which the petitioner alleged she had purchased, pending the action, and, as to which she asked relief, and claimed advantage in it, was a part of the land embraced by the mortgage mentioned, which she and her husband executed to the plaintiff, whereas, on the contrary, it was part of the land mentioned in the complaint, which the plaintiff sought to and did recover.

The allegations of the petitioner in her answer in the action to the motion of the plaintiffs therein for an order to foreclose the mortgage and sell the land embraced by it, were not clear and definite. The learned counsel of the petitioner has helped us in our further scrutiny of the record, and we think our opinion was founded upon an erroneous view of the allegations of the petitioner. She meant to allege, and did so sufficiently, as we now see, that she had purchased part of the land recovered by the plaintiff at a sale thereof made by the sheriff; hence, what we said in our opinion, however proper in the view we took of the case as it appeared, must not go to the prejudice of the petitioner in any action or proceeding she may, in the future, bring to assert any right she may have by virtue of her alleged purchase.

We think, nevertheless, that the court below properly denied the application of the petitioner, as indicated above. The matter in litigation had been settled. The plaintiffs had recovered judgment for the land, for damages, and for costs. The purpose of their motion, com-
(179) plained of by the *feme* petitioner, was to obtain benefit of the mortgage executed by the petitioners to them to secure the damages and costs they so recovered, by a foreclosure of the same, a sale of the land, and a proper application of the proceeds of the sale in discharge of their judgment.

The *feme* petitioner contends that she has a right to set up in opposition to such incidental motion of the plaintiffs, her alleged tax title to a part of the land so recovered by the plaintiff, which she acquired pending the action, and to have certain rents and profits to which she is entitled by virtue of her title applied as an equitable setoff against the judgment of the plaintiff. This contention is unfounded. Her tax title is in no way or manner connected with, nor can it affect, the mortgage, its purpose, or the land embraced by it. It was not, in any aspect of it, the subject of the litigation in the action, nor was the petitioner a party thereto; indeed, the court refused to allow her to become such a party. She might, with as much reason and propriety, ask the court to allow her to set up her alleged title to any other lands of the plaintiff, and to have rents and profits thereof applied in liquidation of the plain-

tiff's judgment. Moreover, to allow her application would be to allow her to allege and litigate, as against the plaintiff, a cause of action entirely foreign to the mortgage and its purposes, and as well the incidental motion of plaintiff, complained of, that ought to and could only properly be the subject of a regular action. Separate and distinct causes of action, properly the subject of an action, cannot be thrust into an action pending in opposition to incidental motions, whether before or after trial and judgment. Such practice could only lead to absurdity and confusion. Indeed, there is neither procedure nor practice that allows it.

The *feme* petitioner alleges, in her answer to the plaintiff's motion, a cause of action, good or bad, which she may litigate in an action brought for the purpose, but she cannot do so in the way (180) she seeks to do.

So it turns out that judgment of this Court complained of is correct. It properly rests, not upon the ground we at first supposed, but clearly, upon other grounds appearing in the record, to which we have adverted in this opinion.

Petition dismissed.

ROBERT GILLIAM AND WIFE v. GEO. W. WATKINS, ADMINISTRATOR, ET AL.

Administration—Parties—Distribution.

An action to enforce the settlement and distribution of unadministered assets in the hands of a former administrator or executor must be prosecuted by an administrator *de bonus non.*

APPEAL from *Bynum, J.,* at April Term, 1889, of GRANVILLE, upon complaint and demurrer.

The plaintiffs allege in substance.

1. That Charles Duncan died intestate, leaving a considerable personal and real estate, and leaving him surviving Charles H. Duncan, David Duncan, Howell Duncan, Simeon Duncan, Isaac Duncan, Rebecca Duncan, Rebecca Dixon (wife of ..... Dixon), and plaintiff Sarah Gilliam, then, and now, wife of plaintiff Robert, his heirs at law, distributees.

2. That Howell Duncan administered on the estate of said Charles Duncan, with the defendants Geo. W. Watkins and John A. Watkins as his sureties.

3. That in the course of his administration, the administrator sold the real estate of his intestate for assets for the payment of the debts, etc., under an order of the court.

4. That, after paying all the debts of his intestate and the charges of administration, there was left in the hands of the administrator (181) a large sum of money for distribution amongst the heirs and distributees.

5. That the plaintiff Sarah was entitled to have paid to her as her share of said sum of money one ..... part thereof, to wit, ninety-nine dollars thirteen cents and five-eighths, and the whole of said sum is due and unpaid, with interest thereon.

6. That Howell Duncan departed this life some time in the year 187.., having first made and published his last will, and appointed as his executor the defendant Geo. W. Watkins, who took upon himself the office of executor; but the said executor has never paid to the plaintiff said sum so due her, or any part thereof, though he had assets in his hands applicable to said debt, and sufficient to satisfy and discharge it.

Wherefore, the plaintiff demanded judgment for the penalty of his testator's bond aforesaid, to be discharged upon the payment of the sum of ninety-nine dollars and thirteen and five-eighth cents, with interest, etc., and for such other and further relief as, in the opinion of the court, plaintiffs may be entitled to have.

Defendants demurred to the complaint, and assigned the following grounds:

1. That plaintiffs ought not to have and maintain their action against these defendants, because it appears on the face of the complaint that Howell Duncan, deceased, the testator of the defendant George W. Watkins, was the administrator of Charles Duncan, deceased, and that the said Howell, as administrator of the said Charles, died, leaving assets of his intestate unadministered in his hands; and that since the death of the said Howell, letters of administration *de bonis non* have not been issued by the proper authority to the plaintiffs, nor (182) to any one else, upon the estate of the said Charles Duncan.

2. That the right of action, if any exists, is not in the plaintiffs as heirs at law, or as distributees of the said Charles Duncan, but survives to and vests in the personal representation of the said Charles, deceased, whenever such representation may be properly appointed.

The court doth adjudge that the said demurrer was insufficient, and overruled the same, with leave to the defendant to file answer, from which defendant appealed.

No counsel for plaintiffs.
John Devereux, Jr., for defendants.

SHEPHERD, J. This action should have been brought by an *administrator de bonis non. Tulburt v. Hollar,* 102 N. C., 407; *Merrill v.*

Merrill, 92 N. C., 657; *Hardy v. Mills,* 91 N. C., 131; *University v. Hughes,* 90 N. C., 538.

The demurrer, therefore, should have been sustained.

Error.

Cited: Jones v. Wooten, 137 N. C., 423.

JOHN I. KILLEBREW ET AL. v. ASHLEY HINES ET AL.

Vendor and Vendee—Crops—Mortgagor and Mortgagee—Lien.

1. A vendor and vendee, for most purposes, occupy the relation of mortgagor and mortgagee.
2. The only sense in which a mortgagee can be said to have any interest in the crops growing on the mortgaged land, is that he has the right to them after he has taken possession, as an incident to his possession, but he will be held to strict account, and the crops can be charged with the mortgage debt only when the land is insufficient to satisfy it.
3. Where the mortgage has not entered, or where the crops are severed before his entry, he has no right to them.
4. While the mortgagee is seized of the legal estate, in equity the land is considered merely as a security for the debt, and the mortgagee as a trustee for the mortgagor.
5. Where the mortgagor has been permitted to remain in possession and cultivate the land, the mortgagee cannot, by entry and sequestration of the crops, defeat the claim of a creditor of the mortgagor who has made advances and acquired an agricultural lien.
6. The lien of a creditor who makes advances to the mortgagor to make the crop, is, by sec. 1799 of the Code, superior to that of a mortgagee of the crop.
7. An unregistered mortgage does not affect the rights of junior encumbrances, although they have express notice.

EXCEPTIONS to referee's report, heard by *McRae, J.,* at Spring (183) Term, 1889, of EDGECOMBE.

The plaintiffs contracted in writing on 1 January, 1882, to sell to the defendant Hines a tract of land, and the following is a copy of the contract:

"Articles of agreement, between John I. Killebrew and Joshua Bullock, of the first part, and Joshua Hines, Ashley Hines and Watson Hines of the second part, witnesseth: That the said Hineses are to pay to Killebrew & Bullock fifteen bales of good cotton each year for ten

years; then the said Killebrew & Bullock are to give the said Hineses a good deed in fee for the B. W. Barnes tract of land. In case the said Hineses fail to make a full payment any one year, the balance may stand over for the year, but if they fail any two years in succession, then the contract is void, and they will pay rent or pay a forfeit to the said Killebrew & Bullock.

"This contract is to hold everything made on the land, unless otherwise agreed by Killebrew & Bullock.

"Given under our hands and seals."

"The object of this agreement is: if the said Hineses pay us 150 bales of good cotton, we bind ourselves to make them a good deed for
(184) the whole of the B. W. Barnes tract of land—we bind ourselves and our administrators, this 1 January, 1882.

"KILLEBREW & BULLOCK.

"Witness:

"JAS. W. TAYLOR."

Under this contract, the Hineses went into possession of and cultivated the land embraced by the contract. Afterwards, on 18 December, 1882, this action was brought to recover from them, the Hineses, the possession of the crop produced in 1882, the same having been cotton, which had been baled, they having failed to deliver any cotton under the contract or as rent.

In aid of the action, the plaintiffs availed themselves of the provision remedy of *claim and delivery,* and under and in pursuance of the same, the sheriff seized thirty-six bales of cotton. Of these, twenty-four, as alleged, were produced on the land mentioned.

The defendant R. S. Wells was allowed to become a party defendant, and having given the undertaking required in such cases, the cotton was delivered to him. He answered, and alleged as a defense, that on 18 January, 1882, the Hineses executed to him agricultural liens for supplies to make the crop on the land, which were duly registered; that he furnished such supplies as were contemplated by such liens, etc., etc., and was, by virtue of the same, entitled to the cotton.

Afterwards, by consent of parties, it was referred to a referee to hear and determine the issues of law and fact, who made report, the material part of which is as follows:

"1. The plaintiffs, owning a tract of land called the Barnes tract, contracted on 1 January, 1882, to sell same to defendants Ashley
(185) Hines, Joshua Hines and Watson Hines, who thereupon took possession. A copy of said unrecorded contract is herewith filed, according to the terms of which said vendees agreed to pay plaintiffs on the purchase money fifteen bales of cotton in the year 1882.

"2. That no part of said fifteen bales was paid, except two bales paid by one Lyon Barnes, who occupied part of the land, and who, in 1882, paid plaintiffs two bales of cotton. That at the time said contract was made, it was agreed by all parties that Lyon Barnes' payment should be a credit on the fifteen-bale payment.

"3. That plaintiffs made certain advances to vendees, defendants, to enable them to make the crop on said Barnes' place, viz.:

Three tons kainit and one-half ton guano, worth	$64.00
Oats	10.00
Meat	3.80
Cross-saw	3.50
Total	$81.30

"4. That said vendees executed agricultural liens to defendant R. S. Wells upon the crops to be raised on the Barnes place in 1882, said Wells agreeing to furnish supplies to enable them to make said crops. Plaintiffs did not authorize said Wells to furnish said advances, and said Wells was notified, when he agreed to furnish said supplies, by one of the vendees, that plaintiffs would be entitled to thirteen bales of crop of 1882. Said liens were for different amounts and by different parties, viz.: Ashley Hines, to the amount of $265; Joshua Hines, to the amount of $200, and one-third of $400, equal to $133, total, $333; so that the total amount for which liens were given was $598. That said Wells, under said liens, made advances to the amount of said (186) liens.

"5. That, in 1882, said vendees raised on the land seventeen bales, not counting the Lyon Barnes account above, which seventeen bales were delivered to said Wells, and were worth, 1 December, 1882, the sum of $605.31.

"6. That thirteen bales of cotton were worth, 1 December, 1882, $462.80."

From these facts, the referee finds the following conclusions of law, viz.:

1. That plaintiffs had a right, under said contract, to demand fifteen bales of cotton of the crop of 1882, less the two bales paid them by Lyon Barnes.

"2. That plaintiffs' right to demand said thirteen bales was not divested by the liens executed to defendant R. S. Wells.

"3. That plaintiffs had no lien on the crops of 1882 to secure the advances made by them.

"4. That plaintiffs are entitled to recover from defendant R. S. Wells the sum of $462.80, with interest from 1 December, 1882 (that, the sum of $639.82), with interest on $462.80 from 15 April, 1889, till paid."

The plaintiffs filed the following exceptions to the report of the referee:

"1. He ought to have distinctly found that the advancement made by the plaintiffs to the defendants (amounts in value to $81.30 on 1 January, 1883) were made during the year 1882, to enable the defendants to cultivate the crops of that year in the lands described in the pleadings.

"That he also erred in not declaring, as a matter of law, that the plaintiffs, vendors and owners of the land, were entitled to the increase or produce of the land—that is, to all the cotton in controversy in this action (of the value of $605.31, with interest from 1 December, 1882),
whether the whole of this amount was or was not necessary
(187) to satisfy such portion of the debt for the land as was then
past due.

"3. That the referee erred in not allowing the plaintiffs the amount of their said advance ($81.30), and interest."

The defendant Wells filed the following exceptions:

"1. He errs in his conclusions of law, Nos. 1, 2 and 4.

"2. He errs in overruling the motion made by the counsel for the defendants, that the action had been dismissed by a former order of this court.

"3. He erred in that he failed to find the value of the rent of the said land for the year 1881."

The court overruled the exceptions, both by the plaintiff and the defendant Wells, and gave judgment in accordance with the report. The plaintiffs and defendants, having excepted, appealed.

The plaintiffs also filed exceptions to the judgment, whereof the following is a copy:

"1. His Honor erred in overruling the plaintiffs' first exception to the referee's report.

"2. His Honor erred in overruling their second exception.

"3. He erred in overruling their third exception.

"4. He erred in overruling their fourth exception."

The plaintiffs insist that his Honor ought to have decided—

"1. That the plaintiffs, as landlords, were entitled to judgment, not only for rent, but also for the advancements made by them.

"2. That the plaintiffs, as owners of the land and holders of the legal title, ought to have had judgment for the full value of the cotton seized at the commencement of this action and delivered to R. S. Wells, upon his intervening and giving bond."

John L. Bridgers for plaintiffs.
George V. Strong for defendants.

SHEPHERD, J., after stating the facts: The controversy in this (188) case is between Wells, whose advances in money and supplies (which are secured by a registered agricultural lien) contributed materially to the making of the crops, and the plaintiffs, whose claim is based upon the legal title to the land upon which the crop was made, as well as upon the particular provisions of the unregistered contract to convey.

It is well settled that, so far as the questions involved in this action are concerned, a vendee, let into possession under a contract of purchase, stands on the same footing as a mortgagor in possession. *Jones v. Boyd,* 80 N. C., 258.

In discussing, therefore, the interesting question before us, the reasons and authorities applicable to the one will necessarily apply to the other. Without passing upon the contention of Wells, that, by a proper construction of the agreement, the vendees were entitled to the possession for at least two years, and that nothing was due the plaintiffs until the expiration of that time, and adopting the interpretation claimed by the plaintiffs, that, upon the failure of the vendees to make the first payment, they were entitled to enter without notice, we will first consider the rights of the plaintiffs by virtue of the *ordinary* relation of vendor and vendee, or what is the same as to this case, that of mortgagor and mortgagee.

It was said in *Coor v. Smith,* 101 N. C., 261, and *Brewster v. Chappell,* 101 N. C., 251, that, by reason of the legal title being in the mortgagee, and his right to enter without notice, the products of the land belong to him. It would be more correct to say that the products may, upon certain contingencies, become a security for the debt. While the mortgagor is permitted to remain in possession, *he is the owner of the crops,* and entitled to receive the rents and profits without liability to account. *Dunn v. Tillery,* 79 N. C., 497. It is only when the mortgagee *enters* that he is entitled to the possession of the growing crops, and this is because they are *incident* to his possession of the soil. He is held to strict account for them, and equity only charges (189) them with the indebtedness when the land is insufficient to discharge it. It is in this sense only that the mortgagee can be considered as having any interest or "property" in the crops. It follows, therefore, that, if the crops have been severed before entry, or if, as in this case, there has been no entry at all, the mortgagee, even as against the mortgagor, has no legal right to recover them.

The cases cited in *Brewer v. Chappell, supra,* did not pass upon this question, but the authority chiefly relied upon is *Jones v. Hill,* 64 N. C.,

198, where it is said that "the mortgagee is entitled to the estate, with all the crops growing on it," and "that there is no injustice in this, because the land, including all its products, is a security for the mortgage debt, and, to that extent, the property of the mortgagee." That case is no authority for the proposition that a mortgagee, out of possession, may bring an action in the nature of replevin for the recovery of the crops. The plaintiff was the assignee of a mortgage creditor, and purchased the land at a sale under the mortgage. He purchased, says the opinion, "the land and all the crops *growing* on it." After his purchase, he demanded the possession of the land of a tenant, who was in under the mortgagor. This was refused, and he brought his action for the rent, claiming the sum of fifteen hundred dollars. Having asserted his right to the possession, he alleged that the defendant was insolvent and was disposing of the crops. The court extended its equitable aid by injunction to *prevent their removal.* Such relief is often given, either by injunction or by the appointment of a receiver, in actions of ejectment and suits for foreclosure. In ejectment, where the *absolute* owner is suing for possession, the relief is given because he is entitled to the present possession of the land, and, owing to the insolvency of the defendant, his right to the *mesne* profits will be defeated. In suits
(190) for foreclosure, the relief is only given where, by reason of the insufficiency of the value of the land and the insolvency of the mortgagor, the debt may be partially or wholly lost. In such case, as we will see hereafter, equity charges the growing crops and applies them to meet the deficiency. It may be that the crops can be thus charged, *as between the parties,* after severance, but before actual removal from the land. It is unnecessary, however, to pass upon this point, as no such case is presented here, and the rights of a third party have intervened. One of the reasons for granting equitable relief in the instances mentioned, grows out of this very capacity of the occupant to convert the products into personalty and pass the title to third persons.

When the mortgagee or vendor does not invoke the assistance of a court of equity, but relies solely upon his legal rights, he should not complain of the rigid and technical rules of the common law by which these rights are determined.

While a mortgagee is seized of the legal estate, in equity, as we have intimated, the lands mortgaged are considered only as a pledge or security for the debt, and the mortgagee is considered merely a trustee for the mortgagor. Greenleaf Cruise, Real Prop., 577; 2 Story Eq., sec. 1013; Adams Eq., 115.

"The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that, until foreclosure, the mort-

gagor continues the real owner of the fee." 4 Kent Com., 159. Accordingly, *Lord Mansfield* said that, unless possession has been taken of the premises, or a receiver has been appointed, the mortgagor is the "owner as to all the world, and entitled to all the profit made." *Chinnery v. Black,* 3 Doug., 390.

"The principle is well settled that a mortgagor is not liable for rents and profits." *Bank v. Reed,* 8 Pick., 462, citing *Cotton v. Melvin,* 15 Mass.; *Mead v. Lord Orrery,* 3 Atk., 244; *Keech v. Hall,* (191) Doug., 20; *Higgins v. York Buildings,* 2 Atk., 107.

In *Lord Orrery's case, Lord Hardwicke* remarks: "As to the mortgagor, I do not know of any instance, where he keeps the possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take legal remedies to get into possession. Nor does the mortgagee derive any profit from the land until actual entry, or other assertion of exclusive ownership, previous to which the mortgagor takes the rents and profits without liability to account." Greenleaf Cruise, Real Prop., Note 582; 4 Kent Com., 157.

Chief Justice Smith, in *Oldham v. Bank,* 84 N. C., 307, says, that a mortgage is an appropriation of real or personal property as a security for the mortgage debt, "and while the mortgagor, permitted to remain in possession, may take and use the rents and profits, the mortgagee, at least after default, may enter into or recover possession by action, in order that they may be applied to the reduction of his demand." To the same effect is *Dunn v. Tillery,* 79 N. C., 497, and "The Law in Relation to Crops," by Wade Rogers (So. Law Review, Oct. and Nov., 1882). This is also decided in *Freedman's Saving Co. v. Shepherd,* 127 U. S., 502, where it is said that, "even where the income is specially pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises, until he takes actual possession, or until possession is taken in his behalf by a receiver."

These authorities, and many others, which we could cite, abundantly show that, until entry, the mortgagee is not entitled to rents. If he is not entitled to rents, how is it possible that he can, before entry, recover the specific crops, which have been severed, and especially against the lienee, who has, by his advances, materially assisted in their (192) production?

The correct doctrine, we think, is well stated in the learned opinion of *Randall, C. J.,* in *Wooten v. Bellinger,* 17 Fla., 302. The Court said: "Equity makes the mortgage, as between the mortgagor and mortgagee, a charge upon the rents and profits, whenever the mortgagor is insolvent

and the security is inadequate. . . . In this respect, it is said, by some authorities, that 'the land, with all its produce,' is regarded as a security for the mortgage debt as between the mortgagor and mortgagee; and where the security of the land is hazardous, or clearly insufficient, a receiver may be appointed for the purpose of subjecting the rents and profits of the mortgaged land, thus charging the produce with an equity, *though, up to the time of sequestration, there was no lien upon it;* . . . yet, though the products may be subjected or charged in equity with unpaid interest, taxes, etc., they cannot be said to be incumbered so as to give a preference to the mortgagee or vendor claiming a lien upon the land *as against another creditor,* who may obtain an express lien upon the crops under the statute, or by chattel mortgage or execution. *Gilman v. Brown,* 1 Mason, 231; I Leading Cases Eq. (4 Amer., from 4 London Ed.) Tit. Vendor's Lien, 496, 502."

We must conclude, therefore, that if there be no entry or equitable proceeding by which the crops are *sequestered,* the mortgagee has no lien upon and cannot recover them in an action in the nature of replevin, either against the mortgagor or third persons.

Even after entry or sequestration, we hold that, where the mortgagor has been permitted to remain in possession and cultivate the soil, the lien for advances must prevail. We put this on the ground that this implied agreement to remain in possession must be presumed to have been made with reference to the general laws, and these provide (193) that the agricultural lien shall be superior to all others except that of the landlord.

Another reason is, that equity will not charge the crops so as to defeat the superior equity of the lienee, who has borne the expense of their cultivation and production. To hold that, under such circumstances, the mortgagee may enter and appropriate to his exclusive use the entire crop, would be dealing a fatal blow to a numerous class of agriculturists in this State, many of whom are so unfortunate as to have their lands encumbered by mortgages. If the mortgagee could enter at any time and apply the entire crop to his indebtedness, no one could be found to make advances to the mortgagor, and the result would be that a great part of the mortgaged land would remain uncultivated, while the mortgagor would be deprived of earning the means with which to redeem his property.

Such, we apprehend, was never the doctrine of North Carolina, and Laws 1889, chap. 476, protecting the holder of the agricultural lien against the mortgagee in such cases, was but declaratory of a correct exposition of existing laws.

Brewer v. Chappell and *Coor v. Smith, supra,* in so far as they are inconsistent with the principle declared in this opinion, are overruled.

Thus far, as proposed, we have considered this case as governed by the law applicable to the ordinary relation of vendor and vendee, or mortgagor and mortgagee, and our conclusion is that the action cannot, in such case, be sustained.

We will now proceed to inquire into the effect of the following clause of the agreement: "This contract to hold everything made on the land, unless otherwise agreed by Killebrew and Bullock," the vendors. As no crops were in existence, this cannot be considered as a (194) reservation of them so as to confer a lien, and the most favorable view to the plaintiffs is, that the words amount to a mortgage upon crops to be made. This is binding, without registration, as between the parties, on the crops planted the year next after the execution of the mortgage (*Wooten v. Hill,* 98 N. C., 49), but it cannot affect the rights of subsequent mortgagees, although they were fixed with actual notice. *Todd v. Outlaw,* 79 N. C., 235. Even if registered, it must, as we have seen, be subordinated to the superior lien conferred upon the defendant Wells by sec. 1799 of the Code.

We can see no injustice in this application of the statute. It was made in aid of agriculture, and its provisions extend not only to crops made on the land of the lienor, but to those made *on any land which he may cultivate.* It must be presumed, we repeat, that all contracts by which persons are permitted to enter upon and cultivate land, are made with reference to the general law upon the subject.

The position that the plaintiffs are entitled to priority as landlords is without merit, for the agreement expressly negatives such a relation until the expiration of two years.

It follows, therefore, that Wells must first be satisfied to the amount of his advances. If there be any balance, the plaintiffs are entitled to the same, to be applied as a part payment on the land. Judgment must be given accordingly, and the plaintiffs must be taxed with the costs of both appeals.

MERRIMON, J., concurring: It seems to be suggested, by implication, in the opinion of the Court in this case, that something, not specified, was decided in *Brewer v. Chappell,* 101 N. C., 251, and *Coor v. Smith, id.,* 261, inconsistent with what is decided in this case, and to that extent they are overruled. In my judgment, such suggestion is unfounded. Those cases were well considered by the Court and, I think, correctly decided. The application of the law in them is sustained (195) by reason and the authorities cited, and many others that might have been cited; and they are not inconsistent with, certainly, the substance of what is decided in this case.

In *Brewer v. Chappell, supra,* it is held that a mortgagor, in possession of the land, after the condition of the mortgage is broken, had no right to give an "agricultural lien" upon a prospective crop to be made on the land, as against the mortgagee, in the absence of a contract allowing him to do so, upon the ground that, at law, the mortgagee is the owner of the land, and the mortgagor remaining in possession after condition broken, in the absence of agreement to the contrary, is not in possession, as of right, but by permission of the mortgagee; his possession is that of the mortgagee, and the latter might turn him out of possession at his will and pleasure, without notice. *Coor v. Smith, supra,* rests upon the same principle. The *equitable rights* of the mortgagor were not adverted to in these cases, because it was not necessary to do so, and because such rights of the mortgagor are subject to the rights of the mortgagee, until the mortgage debt shall be discharged. Such is certainly the settled law of this State.

In *Williams v. Bennett,* 26 N. C., 122, *Chief Justice Ruffin* said that "the mortgagor was concluded by his deed; and after its execution his possession is by consent of the mortgagee, and is, in law, his possession." In *Jones v. Hill,* 64 N. C., 198, *Justice Rodman* said: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case, the mortgagor has been sometimes called a tenant at will or sufferance, and sometimes a trespasser, but he is properly neither; his position cannot be more correctly defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee, without notice. The mortgagee is entitled to the estate *with all the crops growing on it.* (196) There is no injustice in this, because the land, including all the products, is a security for the mortgage debt, and, to that extent, the property of the mortgagee. The mortgagor has no right to make a lease to the prejudice of the mortgagee; the lease is void if the mortgagee elects to hold it so. If the mortgagor could lease, he might altogether defeat the claim of the mortgagee." He cites many authorities in support of what he thus said. *Fuller v. Wadsworth,* 24 N. C., 263; *Whitehurst v. Gaskill,* 69 N. C., 449; *Hill v. Nicholson,* 92 N. C., 24; *Johnson v. Prairie,* 94 N. C., 773; *Dail v. Freeman,* 92 N. C., 351, recognize the same principle.

The same principle applies in the case of vendor and vendee—the latter in possession, being, in most important respects, on the same footing as the mortgagor in possession. *Allen v. Taylor,* 96 N. C., 37, and the cases there cited.

The decision in this case, as I understand it, does not contravene the rule of law as thus settled in this State. It plainly recognizes the right

of the vendor, in the absence of any contract, express or implied, to the contrary, to take possession of the growing—the unsevered—crop made by the vendee, and the equitable right of the latter to have the same devoted to the payment of the debt of the former, so far as it may be adequate. It further decides that, when the vendor allows the vendee to remain in possession of the land, and make a crop and *sever* the same, the former cannot recover the *severed* crop from the latter or third persons, and this rests upon the ground of the presumed assent of the vendor to allow the vendee to make and take the crop. The like rule applies to mortgagee and mortgagor. To allow the vendee or the mortgagor to encumber the crops at their will and pleasure, to the prejudice of the vendor or mortgagee, they might, as was said in *Jones v. Hill, supra,* "altogether defeat the claim of the mortgagee."

The statute (Laws 1889, chap. 476) changes the law so as to (197) allow vendees and mortgagors in possession of the land to give "agricultural liens" as against vendors and mortgagees. It does not give them the right to so mortgage their crops for other purposes.

Error.

Cited: Spruill v. Arrington, 109 N. C., 195; *Crinkley v. Egerton,* 113 N. C., 449; *Carr v. Dail,* 114 N. C., 285; *Hinton v. Walston,* 115 N. C., 8; *Bank v. Pearson,* 119 N. C., 496; *Ford v. Green,* 121 N. C., 72, 73, 75; *James v. R. R., ib.,* 527; *Leach v. Curtin,* 123 N. C., 88; *Cooper v. Kimball, ib.,* 124; *Credle v. Ayers,* 126 N. C., 14; *Freeman v. Bell,* 150 N. C., 149.

A. C. WOODRUFF ET AL. v. CALVIN BOWLES AND WIFE.

Assignment—Consideration—Deed—Evidence—Fraud—Husband and Wife—Marriage.

1. A deed of a husband to his wife will not be declared fraudulent upon its face by the court merely because it recites as a consideration eleven hundred dollars and natural love and affection.

2. The rule is, that, when fraud appears so expressly and plainly upon the face of the instrument as to be incapable of explanation by evidence dehors (as when it is manifest, from reading a conveyance, that it was made and intended to secure the ease of a debtor embarrassed with debt at the time of its execution), there is a conclusive presumption of fraud, and the court, without the intervention of a jury, will declare the deed fraudulent.

3. If, in the aspect of the evidence most favorable to the vendee, the deed is fraudulent in law, it is the duty of the judge to so instruct the jury—not otherwise.

4. The whole consideration of a deed will not fail because a part of it was feigned. The cases of *Stone v. Marshall*, 52 N. C., 300, and *Johnson v. Murchison*, 60 N. C., 286, were overruled in *Morris v. Pearson*, 79 N. C., 253.

5. A husband can make a valid voluntary conveyance to his wife if he retain property sufficient and available to pay his debts.

6. If the husband is insolvent, his voluntary deed to his wife, or his deed for a full and fair consideration, but with notice on her part that it is intended to defraud creditors, is valid.

7. If the husband, prior to the adoption of the Constitution of 1868, received the proceeds of the sale of his wife's land, with her consent, the money belonged to him; but it was competent for him, being solvent, to agree with her to invest it in land and make her a deed for it, and the courts will recognize the validity of such an agreement.

8. An assignment by a debtor of all his property, or what purports upon the face of the deed to be the whole of his property, ostensibly to provide for the payment of debts due to a portion or all of his creditors, but with intent to hinder, delay or defraud his creditors, or any of them, is fraudulent and void, though neither the trustee nor *cestui que trust* had any knowledge of the corrupt intent.

9. A mortgage deed, executed to secure the payment of money loaned, or of a valid pre-existing debt, but, also, with intent on the part of the mortgagor to hinder, delay or defraud his creditors, will be deemed valid, unless the beneficiary under the deed participated in the fraud.

10. When the grantee in an absolute deed pays a valuable consideration, he gets a good title, though the grantor may have executed the deed with intent to defraud his creditors, if the grantee had no knowledge of the fraudulent intent when it was executed.

(The reason for the difference in the rules applied to assignments, mortgages and absolute deeds discussed by *Avery, J.*)

(198) APPEAL from *Merrimon, J.*, at August Term, 1889, of IREDELL.

The plaintiffs claimed title to, and sought to recover of the defendants, the land mentioned and described in the complaint. On 21 May, 1888, the sheriff sold the land as the property of the defendant Calvin Bowles, under an execution upon a judgment of the Superior Court of Iredell County, in favor of A. P. Sharpe, administrator, and others, against Calvin Bowles, defendant, and others. The plaintiffs became the purchasers at the sale, and the sheriff executed to them a deed. The plaintiffs in order to show that the *feme* defendant claimed under Calvin Bowles, showed in evidence a deed from Calvin

(199) Bowles to her, of date 6 October, 1883.

The plaintiffs then introduced as a witness P. W. Eagle, who testified that, some time since 1880, he had heard Calvin Bowles talking—since the judgment against him; that he didn't intend to pay any more security money; that this was at Calvin's house, and in Mrs.

Bowles' presence; that he heard her complain that they were trying to get more out of them than was due them, and that they didn't allow them to have any more; that he heard complaints the day they were at Bowles' laying off his homestead; that both defendants said it was not necessary to lay off the homestead; that they intended to fight it out; that he heard Mr. Bowles say he had made the land over to his wife, and that the land once belonged to her and she wanted him to convey it back; that she said she had it made over to her to cover these debts; that he had heard that the money Calvin Bowles used to pay for the land was his wife's money.

One Harmon, a witness for the plaintiffs, testified in corroboration of Eagle.

The plaintiffs here closed, and defendants introduced as a witness one Blackwell, who testified that defendant Calvin bought the land from one Turner, and he (Blackwell) went his security for the purchase money; that Turner owed him, and he allowed this debt to Bowles to pay Turner with, and Bowles then gave him (Blackwell) his note, and turned over to him the deed he had received from Turner as collateral security; that he (Blackwell) kept the deed until 1869, when Bowles paid him off, and he surrendered the deed; that, two days afterwards, the deed was registered; that the first payment made to him was a horse Mrs. Bowles' father had given her; horse rated at $150.

The defendant Mrs. Bowles testified that her husband failed to pay for the land, and told her if she would take her effects and pay for it, she might have it; that her husband said he would have to sell it if she did not take it; that Blackwell went her husband's se- (200) curity for the land debt, and Turner owed Blackwell and gave him Bowles' note, and Bowles gave Blackwell his note; that her husband told her the land would be hers if she paid her effects on the land debt—this in fall of 1857; that the deed was made by Turner to her husband in 1855, and the exchange of notes was in 1857; that her husband kept the deed two years, and then delivered it to Blackwell, his surety for the purchase money, who held it until 1869, when, upon payment of the balance of the purchase money, the deed was handed back to Calvin Bowles; that the consideration paid for the land was $750; that at the time of the trade, her father had given her a horse, and that she allowed her husband to pay this horse on the land trade at the price of $150; that her husband also received, as administrator of her father's estate, $90 of her money from the sale of her father's personal property, and she allowed this to be applied towards the payment of the land debt; that she was, also, entitled to $60 from the other heirs of her father to make equality of partition, and this was paid on the land; that she re-

ceived another horse as the price of her land, at $140, and her husband sold this horse for $180, and paid it on the land—these payments all made before 1859; that one A. A. Sharp held, as a trustee for her mother during her natural life, the sum of $2,000, and, in 1858, her husband borrowed of this sum from the trustee, the sum of $259, which was also paid on the land; that, at the time her husband borrowed this money, the sum of $2,000 was apportioned among her mother's children by the trustee, and this $259 was the portion she (Mrs. Bowles) was to receive at her mother's death; her husband was to pay interest to the trustee until her mother's death; that, in 1870, she received $42 from the sale of her deceased brother's interest in her father's land—this money her husband received and used; that, when her husband conveyed the land to her in 1883, she and her husband considered all their various
(201) claims as a debt against him in her favor, and they constituted the consideration for the deed to her.

Mrs. Bowles demurred and contradicted the testimony of Eagle and Harmon, and said that she told them the deed from her husband to her was made to cover the debt her husband owed her under the agreement made with her; that if she would allow him to use her effects to pay for the land, he would make her a deed for it.

Calvin Bowles testified in corroboration of his wife's evidence, and said that it was agreed between them that if she would let what she got from her father go to pay for the land it should be hers, and that he executed a deed to her in fulfillment of that agreement. Calvin Bowles had no other land, and was not worth his lawful exemptions in personal property. It appeared that the $259 note was a part of the judgment under which the land was sold, and that Calvin Bowles owed other debts at that time.

The only issue passed upon by the jury was as follows:

"Was the deed of Calvin Bowles of 6 October, 1883, to his wife, Asenath Bowles, made to hinder and defraud the creditors of Calvin Bowles?"

It was conceded that if this issue should be answered in the affirmative it would not be necessary for the jury to pass upon the others.

The plaintiffs contended—

1. That the deed was fraudulent upon its face.

2. That, upon the defendant's own showing, the transaction was fraudulent.

3. That the property received by the defendant Calvin Bowles, before 1868, from the estate of his wife's father became his and could form no part of the consideration in the deed to his wife, nor could it be an indebtedness to his wife; that if any part of the consideration of the deed was feigned, it was void.

The court declined to give the first and second, and gave only (202) so much of the third as will appear hereafter.

His Honor told the jury that the deed did not appear upon its face to have been made with the intent on the part of Calvin Bowles to hinder, delay or defraud his creditors, and that the court would not be warranted in saying to them that the transaction was fraudulent (as a matter of law), and charged the jury as follows:

1. That it was for the plaintiffs to show that the defendant Calvin Bowles made the deed to his wife with intent to hinder and defraud his creditors.

2. That if he, being insolvent, made the deed to her without any consideration other than that of natural love and affection, the deed was fraudulent and void as to creditors.

3. That if he, being insolvent, made the deed for a valuable consideration and a full and fair price, but with the intent to hinder or defraud his creditors, and his wife knew of such intent at the time of the delivery of the deed to her, the deed was fraudulent and void as to the creditors of Calvin Bowles.

4. That if Calvin Bowles, being unable to pay his debts, conveyed the land to his wife for less than its reasonable value, the presumption was that the conveyance was fraudulent as to his creditors, and that, unless the defendant had rebutted the presumption, it was the duty of the jury to find the first issue in the affirmative; that the relationship between the defendants was evidence for the jury to consider of a fraudulent intent on the part of Calvin Bowles, known and participated in by his wife, and in this view of the case it was for the defendants to satisfy the jury that the deed was not fraudulent.

5. That at the time Calvin Bowles received the horse and moneys of his wife, proceeds of her real estate, the law was such that he became the absolute owner of them, free from any claims of the (203) wife whatever. But that it was competent for them to agree that such property should be the separate property of the wife; and if they had such an understanding and agreement in regard to it, and it was agreed further between them that the husband should use and employ it as his wife's property in paying for the land, and make her a deed to the land, and he did so use it, and in good faith conveyed her the land in pursuance of that agreement, and without any intent to hinder, delay or defraud his creditors, the deed would not be void as to his creditors. That the $259 which Calvin Bowles borrowed from the trustee of his wife's mother was not a debt due from him to his wife, and could form no part of the consideration for the conveyance to her by her husband of the land in dispute, but this fact in itself would not justify the

court in declaring the deed to be fraudulent and void. It was for the jury to say whether the evidence in the case satisfied them that the deed was made by Calvin Bowles with intent to hinder and defraud his creditors. If, after deducting the $259 from the amount of the consideration expressed in the deed, it appeared to them from the evidence that the deed was made to Mrs. Bowles for less than the land was reasonably worth, the presumption was that it was fraudulent; and unless the defendants had satisfied them that it was a fair and honest transaction between the defendants, they should find the issue in the affirmative.

6. That the defendant Calvin Bowles had the right to give his wife any property he owned, whether personal or real, and no matter whence he derived his title to the same. That if he received property by his wife, it was competent for him to give it back to her, to be her own, and then to agree with her in regard to the manner in which and the purposes for which it should be used. But he could not do this to
(204) the prejudice of his creditors or with the intent to defraud them.

The question here was whether the husband had agreed with his wife that the property which she received from her father and from his estate and from her brother's estate should be and remain the property of the wife, and that she should have the land in question if she would allow him to use her property in paying for it.

The plaintiffs excepted to the refusal of his Honor to charge as they requested, and to the charge as given, as follows:

1. Because the court erred in not holding the transaction fraudulent in law upon the evidence.

2. In not declaring the deed fraudulent on its face.

3. In not instructing the jury that, if part of the consideration upon which the deed from Calvin Bowles to his wife was made was feigned, the deed was void as to the creditors, if he was insolvent at the time.

4. That the court erred in instructing the jury that, if the wife paid a valuable consideration, no matter how small, and she did not know of the husband's intention to defraud, the deed would be good, even if the husband did intend to defraud his creditors.

5. That the court erred in charging the jury that, if the husband received the horse given his wife by her father, even at the hour or before he received it he agreed with her that the value of it should be a debt, it would become a debt and might form a part of the consideration to support the deed.

6. That the court erred in applying the same rule to all the other personal property and also the real estate, it being admitted, at the time the same was received, the defendant Calvin Bowles was indebted and insolvent and owned no other property, and it being in evidence

that the debt of $259 is a part of the debt upon which the judg- (205) ment was entered, under which the land was sold.

7. That the court erred in charging the jury that the defendant could give back to his wife a part of her property and then take it back, and the balance become an indebtedness to her, it being admitted that he was then insolvent and largely indebted and holding no property.

8. That the court erred in instructing the jury that, if the $259 debt was a part of the consideration in the deed from Bowles to his wife, it would not render the deed void as to creditors, but might be considered by them as evidence of fraud, and only raise a presumption of fraud that may be rebutted by the defendants, and in not telling them the transaction was fraudulent as to creditors if the defendant Bowles was insolvent.

These exceptions to the instructions given by his Honor to the jury were not filed until after the jury returned their verdict.

In so far as they undertake to set forth the charge to the jury, it will be seen by reference to the charge itself that they are inaccurate and do not for the most set forth substantially the charge.

The court called the attention of the jury to the testimony of the several witnesses who were examined, and recited it fully. There was no evidence that Calvin Bowles owed any debt, except the purchase money for the land, at the time he and his wife, as they testified, made the agreement by which her property was to be used to pay for the land and the land was to be hers.

The jury found the first issue in the negative. Plaintiffs moved for a new trial, which motion was denied. There was judgment for defendants. Plaintiffs appealed.

A. E. Holton for plaintiffs.

D. M. Furches, W. M. Robbins and M. L. McCorkle for defendants.

AVERY, J., after stating the facts: In the natural order of (206) treating the subject, the second exception should be the first considered. The plaintiffs contend that the court erred in failing to declare that the deed executed by Calvin Bowles, 6 October, 1883, to his wife was fraudulent upon its face and void in law, because the consideration cited therein was "eleven hundred and fifty dollars to him paid by said Asenath Bowles (the receipt of which is hereby acknowledged), and in consideration of natural love and affection."

Following and somewhat enlarging the classification of cases of this kind in *Hardy v. Simpson,* 35 N. C., 132, this Court, in *Brown v. Mitchell,* 102 N. C., 368, states the rule for distinguishing the cases where the duty devolved upon the court of declaring the fraud without

the aid of a jury, those cases where the admitted facts and circumstances raise a presumption of fraud and the issues are submitted for the jury to determine whether it is rebutted by the evidence; and, third, where a number of circumstances tending to prove the fraud are in evidence and the jury are left to say by their verdict whether they are sufficient to show to their satisfaction that the deed is fraudulent. The first of these propositions is as follows: "When the fraud appears so expressly and plainly upon the face of the deed as to be incapable of explanation by evidence dehors (as where it is manifest from reading a conveyance that it was made and intended to secure the case of a debtor embarrassed with debt at the time of its execution), there is a conclusive presumption of fraud, and the court, without the intervention of a jury, declares the deed fraudulent." According to the statement appended by the judge to the plaintiffs' assignment of errors, there was not even extrinsic evidence that Calvin Bowles owed any debt except the purchase money for the land when he made the agreement with his wife. The plaintiffs'

(207) counsel insist that where the consideration is in part good and in part bad, as where it is notes, some of which are valid and some feigned, the deed is void *in toto*, and this deed, in which the pecuniary consideration is coupled in conjunction with that of natural affection, falls under that condemnation. To sustain this view they cite *Stone v. Marshall*, 52 N. C., 300, and *Johnson v. Murchison*, 60 N. C., 286. In *Morris v. Pearson*, 79 N. C., 253, this Court expressly overruled *Stone v. Marshall* (and, by implication, of course, the latter case, in which the former is cited as authority as to the same principle), and approved the cases of *Brannock v. Brannock*, 32 N. C., 428, and *McNeill v. Riddle*, 66 N. C., 290, in which just the opposite rule is laid down.

We cannot conclude from the face of the deed that it was made for the ease and comfort of one embarrassed with debt. There is no internal evidence that the grantor was indebted to any person; nor is the legal inference to be drawn that the deed is vitiated and is to be treated as voluntary and fraudulent because to the pecuniary consideration is added that of natural affection. Indeed, if no valuable consideration had been mentioned, the grantor could make a valid voluntary conveyance to his wife if he retained property sufficient and available to discharge his liabilities. *Taylor v. Eatman*, 92 N. C., 601; *Worthy v. Brady*, 91 N. C., 265. For the first assignment of error we find no more support in the evidence and the law applicable to it. The issue of fraud was one for the jury, and the court could not withdraw it from their consideration without invading their province and disregarding the right of defendants under the Constitution. *Beasly v. Bray*, 98 N. C., 266.

If, in the aspect of the evidence most favorable to the defendants, or upon their own showing, the deed was fraudulent in law, it was the duty of the judge to so instruct the jury, and not otherwise. Relying upon the authority of *Black v. Justice,* 86 N. C., 511, and *Temple v. Williams,* 39 N. C., 39, the plaintiffs insist that all the prop- (208) erty and money delivered to pay the price of the land belonged, in contemplation of law, to the husband, and certainly that a portion of it was his *jure mariti,* and the whole consideration must in any view fail, because a part of it was feigned. We have already discussed the latter proposition, which is predicated upon the principle laid down in *Stone v. Marshall, supra.* In the two cases mentioned this Court held that where the wife's land was converted into money by a judicial sale for partition, before the adoption of the Constitution of 1868, and she suffered the husband to receive the fund due her without any stipulation as to how it should be held, it became personal property and belonged to the husband. In *Giles v. Hunter,* 103 N. C., 201, the Court say: "If the money arising from the sale of the land (made before the year 1868) was allowed, by her consent, to be paid to him (the husband), it became his property. If it was invested, with her consent, in other lands, and with no request on her part that the land purchased should be conveyed to her or for her benefit, and the husband took title to himself, the land vested absolutely in him, discharged of any equity in her." *Hackett v. Shuford,* 86 N. C., 144. But, on the other hand, where the husband and wife joined in the conveyance of a tract of land belonging to her in the year 1842, and it was agreed, verbally, between them that he should receive the purchase money and invest it for her in other lands, and the husband bought other lands with the proceeds of sale, but took title in his own name, this Court decided that he held as a trustee for the wife. *Dula v. Young,* 70 N. C., 450. And in that case, after his death and the death of his wife, her heirs at law held the land, free from the encumbrance of the husband's debts, and his administrators were not allowed to subject it as assets.

According to the testimony of the *feme* plaintiff, under an agreement with herself to account to her and invest for her benefit, she permitted her husband to receive and sell a horse delivered in (209) lieu of the purchase money for her share of a tract of land sold after the partition was made between her father's heirs. The husband, in pursuance of an understanding with her, sold the horse, as her agent, for $180, and paid that amount on the purchase money due for the land in controversy. With the same understanding, he received and applied in the same way $60 due her as her moiety of partition of the said land and $42 received as her share of a fund arising from a sale of the inter-

est of a deceased brother in her father's land. The horse, given to her by her father in the year 1857, became the property of the husband, as did the money ($90) received by the husband as the distributive share of the fund arising from the sale of personal property belonging to her father's estate. The residue of the purchase money, as she testifies, was $259, her portion of a fund of $2,000, which was to be divided at her mother's death among her children, and was borrowed by her husband from that fund before her mother's death.

Instead of the instruction asked, having previously given other instructions as to the insolvency of the husband, to which we will presently advert, his Honor told the jury that, under the law then in force, all of this property used in the purchase of the land belonged to the husband absolutely, but "it was competent for him to agree that it should be the property of the wife; and if they had such understanding and agreement in regard to it, and it was agreed further between them that the husband should use and employ it as his wife's property in paying for the land and make her a deed to the land, and he did so use it, and in good faith conveyed her the land in pursuance of the agreement, and without any intent to hinder, delay or defraud his creditors, the deed would
(210) not be void as to his creditors." This instruction, being preceded by the statement that the voluntary deed of the husband, if he was insolvent, was void as to creditors, is sustained by the principle announced in *Kee v. Vasser,* 37 N. C., 553, and in *Smith v. Smith,* 60 N. C., 581. Both of these cases are cited and approved in *George v. High,* 85 N. C., 102, as correctly laying down the law as to gifts from a husband to his wife. In this case the Court distinctly recognizes the right of the husband, being solvent, to make valid gifts to his wife, and such gifts of property or money to her were sustained by the courts of equity and enforced, after the death of the husband, against his personal representative.

These cases are cited by *Justice Ruffin* in *George v. High, supra,* "to show the *policy* of the courts of modern times in regard to this fiction as to the unity of person, and their *readiness to dispense with it* on account of its tendency oftentimes to defeat real justice and disappoint the most generous intentions of husbands."

After the explicit instruction that the voluntary deed of the husband to the wife was void if the husband was insolvent, the judge told the jury, further, that if, being solvent, he conveyed to her for a full and fair consideration, but with intent to defraud his creditors, and *his wife knew of such intent* at the time of the delivery of the deed to her, the deed was fraudulent and void as to his creditors. The counsel on both sides cite *Savage v. Knight,* 92 N. C., 493, in support of their respective

views, and thus we are again confronted with the question, "What is the difference in the rules of evidence applicable to absolute deeds, assignments for the benefit of creditors and mortgage deeds, when attacked for fraud?" As an apparent conflict of authorities may be satisfactorily explained by drawing the lines between them, we deem it pertinent to do so.

1. An assignment by a debtor of all his property, or what pur- (211) ports upon the face of the deed to be the whole of his property, ostensibly to provide for the payment of debts due to a portion or all of his creditors, but with intent to hinder, delay or defraud his creditors, or any of them, is fraudulent and void, though neither the trustee nor *cestui que trust* had any knowledge of the corrupt intent.

2. A mortgage deed, executed to secure the payment of money loaned, or of a valid preëxisting debt, but also with the intent, on the part of the mortgagor, to hinder, delay or defraud his creditors, will, nevertheless, be deemed valid, and enforced by the courts as against the claims of creditors other than the mortgagee or *cestui que trust,* unless the beneficiary under the deed had knowledge of and participated in the fraud.

"A voluntary assignment means an assignment of the debtor's property in trust to pay debts, as contradistinguished from a mere sale thereof, or pledge or hypothecation of the property to a particular creditor, as a mere security in the nature of a mortgage." *Deas v. Barchard,* 10 Paige, ch. 41. See, also, *Lavender v. Thomas,* 18 Ga., 668; *Battle v. Mayo,* 102 N. C., 440; *Dowd v. Means,* 128 U. S., 273; *Rathburn v. Patner,* 18 Barb. (N. Y.), 272; *Wilson v. Forsyth,* 24 Barb. (N. Y.), 120; *Barker v. Hull,* 13 N. H., 293; *Hewitt v. Hollins,* 11 Pen. St., 27. A mortgage deed differs from an assignment, in that it contains a clause of defeasance under which the property conveyed may revert to the mortgagor, while under an assignment the property transferred to the assignee is to be sold at all events. *Morden v. Babcock,* 2 Metcalf, 204. Moreover, a mortgage with power of sale in the mortgagee, or a self-executing mortgage, with the same power vested in a trustee, provides that the sale is to be made, if either a certain sum of money, or one which the instrument indicates the means of making certain, shall not be paid within a given time. So that it appears, from the face of the deed, that the amount of the incumbrance is indefinitely determined, or is ascertainable, by resorting to a source of informa- (212) tion indicated by its terms. *Hintsham v. Sumner,* 25 Pickering, 446. If the same rule were applied to mortgage deeds as to voluntary assignments, it would result inevitably in injury to credit, and thus seriously interfere with commercial transactions, because it would prove

perilous to loan money on real estate as security if the borrower were involved in debt, though the creditor could look only to recorded deeds and liens appearing of record for information as to the pecuniary condition of the former. The recent amendment to our registration laws, shows the legislative view that it would facilitate the negotiation of loans on such security, to afford the means of tracing title with chances of greater accuracy after the passage of the act.

3. When the grantee in an absolute deed pays a valuable consideration, he gets a good title, though the grantor may have executed the deed with intent to defraud his creditors, if the grantee had no knowledge of the fraudulent intent when it was executed.

As a reason for this difference between absolute conveyance and assignments, this Court, in *Savage v. Knight,* 92 N. C., 493, said: "A voluntary deed is the result of the operation usually of but one mind—that of the grantor—but a deed, purporting to convey the estate absolutely, is a contract, and requires the concurrence of the minds of both the grantor and grantee." In the case at bar, we are dealing with a conveyance absolute upon its face, and, therefore, the court properly instructed the jury that it was necessary to show participation on the part of the grantee in the fraudulent intent of the grantor (if they found the latter was not acting in good faith) before the jury could find, or the court could declare, the deed fraudulent.

In *Morris v. Pearson,* 79 N. C., 253, *Justice Rodman* says, in substance, that the apparent conflict of authorities upon the subject of declaring deeds void because a part of the consideration is shown
(213) to be erroneous, has grown out of the habit of confounding the consideration with the intent. Upon this idea we may readily reconcile with the views we have announced the authorities relied on by the plaintiff to establish his contention. The principles we have laid down will, at a glance, mark the line between this case and any others in which the conveyance attacked was a voluntary assignment.

It is certain that the plaintiff had no just cause to complain of the instruction, numbered four, given by the court, for, assuming Bowles to be solvent, the court did not tell the jury that the relationship of the parties to the deed, and the inadequacy of the price, if that paid was not a fair one, were badges of fraud or circumstances to be considered in connection with the testimony tending to show the deed was fraudulent, but instructed them that both the failure to pay an adequate price and the fact that the parties were husband and wife, raised a presumption of fraud and cast upon the defendants the burden of rebutting it by the evidence. Bump. on Fraudulent Con., 86; *Brown v. Mitchell,* 102 N. C., 368; Bigelow on Fraud, 136.

While we have not mentioned, specifically, each assignment of error filed by the plaintiffs—and, indeed, some of them are inconsistent with the statement of the case made by the court—we have considered and discussed every point properly raised by the exceptions to the charge of the court, and we find no error that should entitle the plaintiffs to a new trial.

It seems difficult to dispel from the minds of parties and counsel the idea that, in actions like this at bar, the appellate court can, in some way, vacate the finding of a jury that they think is plainly against the weight of testimony. The jury have decided the issue in this case in the light of a full and fair exposition of the law by the learned judge who presided, and their verdict must stand.

Affirmed.

Cited: Bobbitt v. Rodwell, 105 N. C., 243; *Booth v. Carstarphen,* 107 N. C., 401; *Ferrell v. Thompson, ib.,* 429; *Hudson v. Jordan,* 108 N. C., 14; *Rouse v. Bowers, ib.,* 183; *Beam v. Bridgers, ib.,* 279; *Osborne v. Wilkes, ib.,* 671; *Walker v. Long,* 109 N. C., 514; *Orrender v. Chaffin, ib.,* 425; *Peeler v. Peeler, ib.,* 631, 634; *Bonner v. Hodges,* 111 N. C., 68; *Davis v. Smith,* 113 N. C., 100; *Loyd v. Loyd, ib.,* 189; *Allen v. McLendon, ib.,* 324; *Walton v. Davis,* 114 N. C., 106; *Stoneburner v. Jeffreys,* 116 N. C., 83; *Sydnor v. Boyd,* 119 N. C., 485; *Mining Co. v. Smelting Co., ib.,* 418; *Redmond v. Chandley, ib.,* 579, 580; *Barber v. Buffaloe,* 122 N. C., 133; *Commission Co. v. Porter, ib.,* 698; *Eddleman v. Lentz,* 158 N. C., 73.

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(214)

WILLIAM PROPST v. W. G. FISHER, GUARDIAN, ET AL.

Evidence—Witness.

In an action by a mortgagor to foreclose, it was alleged that the plaintiff had executed a deed to the mortgaged premises, which he deposited with one M., an attorney, who represented him in the matter, to be delivered to F. when the latter paid the amount due under the mortgage, and that M., inadvertently, and without authority, delivered the deed before the money was paid. F. was afterwards adjudged a lunatic, and a guardian was appointed for him who was a party to the action to foreclose. There was a general denial of the complaint. *Held*—

1. That the mortgage deed was competent evidence against F. for the purpose of establishing the plaintiff's right to the relief he sought.

2. That M., the attorney who conducted the negotiations for the plaintiff, and represented him in the action, was a competent witness to prove transactions and communications between the plaintiff and F. in relation to the

agreement and the circumstances attending the execution and delivery of the deed to the latter, it appearing that he had no interest in the result of the action.

APPEAL from *Phillips, J.*, at April Term, 1889, of CABARRUS.

The substance of the complaint is as follows:

The plaintiff alleged that, in 1883, the defendant Harris and wife executed to him a mortgage upon certain lands; that, in 1884, the defendant J. S. Fisher purchased the equity of redemption, and, in order to perfect his title, it was agreed that plaintiff should sell the land by virtue of the power vested in him by the mortgage; that said Fisher was to bid off the land at the sum of $3,660, the amount due upon the mortgage; that the said sum was to be paid plaintiff after the sale in cash, and, upon the payment of said amount, the plaintiff was to cancel his mortgage and execute title to said Fisher, pursuant to the power in the mortgage; that plaintiff executed said deed, but it was delivered
(215) to Fisher without his authority, who put it in the possession of the defendants Hill & Fetzer, who now hold the same; the plaintiff alleged that he has received partial payment on the debt, but did not know at the time he received such payments that the said deed had been delivered. He further alleged that he has never canceled the mortgage. He asks that the land be sold, and that he be paid the balance due him, and other relief. The defendants denied these allegations.

The plaintiff tendered issues; the defendants objected, and the court submitted the following, to which the defendants excepted:

I. Did Ervin and Charles J. Harris execute the mortgage, as charged in paragraph 1 of complaint?

II. Did the defendant J. S. Fisher agree to bid off said land at the sale at the price of $3,660, to be paid in cash to said Propst, and to be applied to the satisfaction of the notes or bonds due by said Ervin and Charles J. Harris to said Propst, and was the payment of said bid to be a condition precedent to the conveying of any title by said Propst to said Fisher, as charged in paragraph 2 of the complaint?

III. Did the defendant J. S. Fisher bid off said land at said sale in pursuance of said agreement?

IV. Did the plaintiff Propst, in expectation of a compliance by said Fisher with his contract, cause a deed for the land, bearing date 20 December, 1884, to be prepared, and was said deed delivered to said Fisher without the knowledge, consent or authority of said Propst, as charged in complaint?

To all these issues the jury responded in the affirmative.

The case had been, theretofore, referred to the clerk, by consent, to ascertain the amount of unpaid purchase money. It was agreed to

take the clerk's finding, and that no issue was necessary as to the (216) amount which was due from J. S. Fisher to plaintiff of the purchase money.

The plaintiff offered in evidence a mortgage given by C. J. and E. Harris, conveying the lands mentioned in complaint to plaintiff, to secure certain notes therein mentioned.

The defendants objected. Objection overruled and defendants excepted.

Plaintiff next offered in evidence a deed from E. and C. J. Harris to J. S. Fisher.

Defendants objected. Objection overruled and defendants excepted.

The plaintiff next offered as a witness W. G. Means, Esq., who stated that he was a practicing attorney; that, as such, the plaintiff spoke to him in the latter part of the year 1884 to collect or foreclose the mortgage of E. and C. J. Harris; that he drew the advertisement of sale, to take place 20 December, 1884; that plaintiff and J. S. Fisher had a conversation in presence of witness in J. S. Fisher's office.

The defendants objected to the witness testifying as to any transaction or communication had with J. S. Fisher, upon the ground that J. S. Fisher is now a lunatic. (Plaintiff admitted that J. S. Fisher is a lunatic.)

The witness, upon preliminary examination, stated that he did not now, nor at any other time, have any interest in this action, or in its result, and that his fee for services was in no way dependent upon this action or its result, when the court overruled defendants' objection and defendants excepted.

The witness stated that he was the attorney who was spoken to by Propst to foreclose or collect the Harris mortgage. That, in conversation between Propst and Fisher, in the office of the latter, on 19 December, 1884, Fisher then and there agreed to bid off this land the next day for $3,660, which sum was about the amount due on the Harris notes, and which had been assigned to plaintiff. Fisher (217) expressed some doubt about getting a complete title, because of the length of time of advertisement of sale, and said to Propst that if the Harris boys would give him a deed for their rights he would buy the land the next day under the sale as advertised. C. J. Harris was then sent for, and he came in the office and was told what had taken place, and the matter was fully explained and talked over, and it was agreed that this course be pursued.

The deed from the Harris boys to Fisher, which was read in evidence, was then written, and it was taken by C. J. Harris to Ervin, his brother, to sign. He brought it back the following morning signed. At the

same time the deed from Propst to Fisher was drafted. Both deeds were prepared and left with witness after execution.

The sale took place on the 20th. There was only one bid made, and that was made by Fisher in the sum of three thousand six hundred and sixty dollars. Fisher stated to Propst in his office the evening before that he would pay $3,660 in cash. On the 20th I called out at sale the terms as cash. When Fisher bid off the land I went to my office and got the deed from Propst to Fisher, that was prepared the day before and left in my possession, with a memorandum of boundaries, and the deed from the Harris boys to Fisher, from which I had gotten the boundaries, together with some other papers I had in my possession, and gave them all to Fisher, telling him I had to leave town and for him to give them to Propst. Propst was at the sale, and when I got back to Fisher's office Propst was not there, and I had to leave town, and told Fisher so, and I gave him the deed and other papers, with instructions to hand them to Propst. I had no authority whatever to deliver the deed, and no instructions from Propst to do so.

(218) Upon cross-examination, witness stated that he was not Propst's regular attorney; that Propst employed him in this matter to draw up the deeds and write out the advertisement in legal form. "On the evening of the 19th, Propst left the deed in my office, and I gave it to Fisher the next day, as I have stated."

There was other evidence tending to show that the deed was delivered to Fisher by Means without authority or knowledge of Propst, and that Propst was never informed that the deed had been delivered to Fisher until he saw it registered, near three years afterwards; but as there was no exception to the other evidence and no exception to the judge's charge it is not material to be stated.

The defendants introduced no witnesses. There was a verdict for plaintiff.

The court gave judgment upon the issues, from which defendants appealed.

The errors assigned relate only to the trial of the issues.

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

SHEPHERD, J., after stating the case: 1. We are unable to appreciate the objection of the defendant to the issues which his Honor submitted to the jury. They fairly presented the questions raised upon the pleadings, and we are, therefore, of the opinion that the exceptions of the defendants, in this respect, are without merit.

2. Neither can we find any error in the admission of the mortgage executed by Harris and wife to the plaintiff, and the deed conveying their equity of redemption to Fisher. The mortgage was an essential part of plaintiff's case, as it was under that instrument alone that he acquired any interest in the property. The deed to Fisher was a part of the transaction in reference to the sale of the land, and (219) was clearly relevant.

3. The remaining exception relates to the competency of the witness Means. The defendant Fisher is now a lunatic, and is represented in this action by his guardian. The witness never had any interest in the land in controversy; he simply acted as the attorney of the plaintiff, and he is not affected in any way by the result of this suit. Unquestionably, he is not precluded from testifying under sec. 590 of the Code.

Affirmed.

Cited: Hall v. Holloman, 136 N. C., 36.

J. B. CARVER AND WIFE v. W. O. BRADY AND A. G. BRADY.

Injunction—Mortgage—Usury—Notice.

1. A mortgagee will not be restrained because he failed to give mortgagor ninety days' notice of his intention to foreclose. Such notice is unnecessary.
2. Before one can ask the court, by injunction, to restrain a sale under mortgage, on account of usurious interest charged, he must pay what is justly due, principal and interest. He who would have equity must do equity.

APPLICATION for an injunction, heard by *Gilmer, J.,* at May Term, 1889, of CUMBERLAND, to prevent the defendants from selling the plaintiff's land under mortgage, as set forth in the complaint used as an affidavit.

The court refused to grant the injunction, and plaintiff excepted.

The plaintiff insisted that the court should restrain the defendants from selling until they had given plaintiff ninety days no- (220) tice of their intention to foreclose.

The court refused to so order, and plaintiff excepted.

The plaintiff insisted that the order of the court should restrain the defendants from collecting anything more than the principal money of his debt, because the defendants had received and reserved and taken usurious interest, and had thereby forfeited all interest, as provided by law.

The court declined to so rule, and plaintiff excepted and appealed.

Thomas H. Sutton (N. W. Ray filed a brief) for plaintiff.
J. W. Hinsdale for defendants.

SHEPHERD, J. 1. "The plaintiff insisted that the court should restrain the defendants from selling until they had given the plaintiff ninety days notice of their intention to foreclose." It has been fully settled by this Court that such notice is unnecessary. *Bridgers v. Morris,* 90 N. C., 32; *Manning v. Elliott,* 92 N. C., 48.

2. The plaintiff further insisted "that the order of the court should restrain the defendants from collecting anything more than the principal money of his debt, because the defendants had received and reserved usurious interest, and had thereby forfeited all interest, as provided by law." The contract here was to pay eight per cent interest, and this the plaintiff must pay, together with the principal, when he seeks the equitable aid of the court. This question is settled in *Cook v. Patterson,* 103 N. C., 127, where it is said that, "when the plaintiff asks the court to interfere and grant an injunction till the true amount can be ascertained, he is deemed subject to the rule that one who seeks equit-
(221) able relief must do equity. The court will, therefore, compel him, as a condition upon which the aid of the court is extended to him, to pay the amount that is justly due." *Manning v. Elliott, supra; Purnell v. Vaughan,* 82 N. C., 134; *Simonton v. Lanier,* 71 N. C., 498.

We see no reason to depart from the principles declared in these well considered cases.

Affirmed.

Cited: Carter v. Slocumb, 122 N. C., 477; *Corey v. Hooker,* 171 N. C., 231.

A. M. LONG v. E. H. C. FIELDS.

Jurisdiction—Deceit—Warranty—Contract.

Where the complaint contained two causes of action—one for deceit in the sale of a horse, and the other for a breach of warranty—in each the damages claimed being laid at less than one hundred and fifty dollars, and there was verdict against the plaintiff on the first, but for him on the second, assessing damages at sixty-five dollars. *Held,* that the Superior Court had jurisdiction.

ACTION, tried at September Term, 1889, of RICHMOND, before *Merrimon, J.*

The plaintiff alleged for a first cause of action—

1. That on ..... day of July, 1883, one Clem. Moon, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to one D. M. Morrison, who was acting as agent for and in behalf of plaintiff, that the horse which Moon then offered to sell was sound and worked well in harness.

2. That plaintiff, relying upon said representations, was thereby induced to purchase said horse, and, through his agent (Morrison), gave Moon in exchange for said horse a certain horse of the plaintiff's and five dollars in money.

3. That, at the time, Moon was the general agent for the de- (222) fendant Fields in selling and exchanging defendant's horses, and was such agent in the sale and exchange of said horse, which was the property of defendant.

4. That the said representations made by Moon were false, in that said horse was not a sound horse, nor one that worked well in harness, but that said horse had on his wethers a fistula, which Moon, to deceive plaintiff, fraudulently represented to be only a common saddle-sore, very recently made, and said horse kicked, balked, and was, at times, ungovernable in harness, and was thereby worth greatly less than said Moon had represented.

5. That Moon well knew that said representations which he then and there made were false.

6. That afterwards, the plaintiff, relying upon said representations, attempted to use said horse, when he became ungovernable, and, without any fault of the plaintiff, ran away, greatly injuring and breaking plaintiff's vehicle, and plaintiff was put to great expense in having the vehicle repaired.

7. That by reason of the premises, the plaintiff was deceived, misled and injured to his damage one hundred and fifty dollars.

For a second cause of action, the plaintiff alleged the same facts, with the further averment that the defendant's agent falsely and fraudulently warranted the horse to be sound and would work well in harness, etc.

That, by reason of the premises, the plaintiff was misled and injured to his damage $150; wherefore, the plaintiff demands judgment for the sum of $150 and costs of this action, and for general relief.

The answer was a general denial of all the allegations of the complaint. The issues, findings of the jury, and judgment, were as follows:

1. Did Clem. Moon, agent for defendant Fields, falsely represent to one D. M. Morrison, agent for plaintiff, that the mare (223) exchanged for the horse of the plaintiff was sound and worked well in harness; and did said Morrison rely upon said representation, and was he thereby induced to make said purchase or exchange? No.

2. Did the defendant's agent, Clem. Moon, warrant the said mare to be sound and would work well in harness? Yes.

3. What damages, if any, is the plaintiff entitled to recover? Sixty-five dollars.

This cause coming on to be heard, upon the verdict of the jury assessing plaintiff's damages at $65, which will appear by the verdict, as recorded, it is now, on motion of plaintiff's counsel, adjudged that the plaintiff recover of the defendant the said sum of $65 and the costs of this action, from which defendant appealed, assigning as grounds:

1. That the court erred in rendering judgment for the plaintiff on the verdict.

2. That the court erred in not rendering a judgment for the defendant, on the verdict.

3. That the court erred in rendering a judgment for plaintiff, for the reason that the verdict finds that there was no tort, and that there was only a contract, and the sum demanded in complaint was less than $200, and the amount of damages ascertained by the verdict was less than $200.

C. W. Tillett for plaintiff.

T. A. McNeil for defendant.

AVERY, J., after stating the facts as above: It has been settled by a line of decisions in this Court, and manifestly upon mature consideration, that, where there is a warranty of soundness in the sale of (224) a horse, the vendee may declare in tort for a false warranty and add a count in deceit, or, under the new procedure, a second cause of action in the nature of deceit, and though the sum demanded be less than two hundred dollars, the action will not be deemed one founded on contract, and the Superior Court will have jurisdiction. *Bullinger v. Marshall,* 70 N. C., 520; *Ashe v. Gray,* 88 N. C., 190; *ib.* (rehearing), 90 N. C., 137; *Harvey v. Hambright,* 98 N. C., 446.

Affirmed.

Cited: Bowers v. R. R., 107 N. C., 722; *Fields v. Brown,* 160 N. C., 300.

THE STATE EX. REL. G. W. HOBBS v. NATHAN BAREFOOT ET AL.

Limitations, Statute of—Sheriff—Official Bonds—Sureties—Amercement.

1. An unlawful sale by a sheriff of property exempt from execution, is a breach of his official bond.
2. The statute of limitations applicable to causes of action arising from such breach, begins to run from the date of the unlawful sale.
3. When an amercement had been imposed upon a sheriff for a false return made more than six years previous. *Held*, that an action upon his official bond to recover the penalty was barred by the statute of limitations.

ACTION on the sheriff's bond, tried at the February Term, 1889, of SAMPSON, before *Shipp, J.*, upon the following facts agreed:

1. The defendant Nathan Barefoot was elected sheriff of said county for the term of two years, beginning on the first Monday of December, 1876, and ending on the first Monday in December, 1878, and the other defendants were his sureties on his renewed bond, executed and filed on 7 January, 1878.

2. On 4 March, 1878, an execution issued from the Superior (225) Court of said county, wherein L. C. Hubbard was plaintiff, and one John A. Hargrove was defendant, to the said sheriff, which was, in fact, returned by the sheriff to the Fall Term of said court, 1879, with his official action endorsed thereon; and, at October Term of said court, 1886, under leave of the court, obtained in an action brought by L. C. Hubbard and the relator G. W. Hobbs, against the said sheriff, for a false return endorsed on said execution, the sheriff amended his original return, and thereupon, at the instance of G. W. Hobbs, the then owner of the judgment on which the execution had issued, the amended return was adjudged insufficient in law, and it was adjudged by the said court, at May Term, 1887, that Hobbs recover of the said sheriff the sum of one hundred dollars for failure to make due return of said execution, and execution duly issued on said last judgment against said Nathan Barefoot, which was returned unsatisfied.

3. On said 4 March, 1878, another execution, wherein one John Boyette was plaintiff, and the said John A. Hargrove was defendant, issued from said court to said sheriff, and was, in fact, returned at the Fall Term of said court, 1879, with his official action endorsed thereon, which return was, at the February Term, 1888, of said court, amended, under leave of the court, obtained in an action for an alleged false return endorsed on said execution; and thereupon, at the instance of G. W. Hobbs, the then owner of the judgment on which said execution and

issued, the said amended return was adjudged insufficient in law, and that the said Hobbs recover of said sheriff the sum of one hundred dollars for failure to make due return of said execution, on which judgment and execution duly issued against Barefoot, which was also returned unsatisfied.

4. That, before said execution came into the hands of said sheriff, the homestead of the said John A. Hargrove had been duly set
(226) apart and allotted to him, who thereafter sold the same to the relator G. W. Hobbs; and, under these and other executions in his hands for collection, the said sheriff, on 4 March, 1878, sold the interest of said Hargrove, who, before said sale, had conveyed the said homestead to said G. W. Hobbs, and who, after said sale, in May, 1880, brought an action against said sheriff for the illegal sale of said homestead, and, at February Term, 1888, obtained judgment for six hundred and twenty-five dollars, and interest from said time, and costs, on which judgment execution duly issued against said sheriff, and was returned unsatisfied.

5. That the defendant sureties were not parties to any of the proceedings against said sheriff.

6. That the action was begun 13 September, 1888.

7. That the amended return on said execution, in favor of L. C. Hubbard, was made on Saturday, 16 October, 1886.

8. That the amended return on said execution, in favor of John Boyette, was made on 27 February, 1888.

9. That the defendant N. Barefoot's office as sheriff expired on the first Monday of December, 1878, and he was re-elected for a term of two years, ending first Monday of December, 1880, when he retired from office, and has not since held the office.

Upon the foregoing facts, it was submitted to the court for judgment, whether or not the plaintiff's cause or causes of action are barred by the statute of limitations; and, upon consideration, his Honor was of opinion that the plaintiff was not entitled to recover, and that the action was barred by the statute of limitations—to which ruling the plaintiff excepted, upon the following grounds:

1. That the court held, in reference to the matters and things set out in the second paragraph of the complaint as a breach of said bond (being the same, in substance, as set out in paragraph second of above statement of facts), that the same was barred by the statute of
(227) limitations, for that more than six years had elapsed from the execution of said bond to the commencement of this action. In this the plaintiff submits there is error, in that the statute did not begin

to run until undue return made of said execution, in October, 1886, less than two years before the commencement of this action.

2. That the court held, in reference to the matters and things set out in the third paragraph of the complaint as a breach of said bond (being in substance the same as set out in paragraph three of above statement of facts), that the same was barred by the statute of limitations, for that more than six years had elapsed from the execution of said bond and the commencement of this action. In this the plaintiff submits there is error, for that the statute did not run until undue return made of the execution therein recited, to-wit, February, 1888, less than one year before the commencement of this action.

3. That the court held, in reference to the matters and things set out in paragraph four of the complaint as a breach of said bond (being the same in substance as paragraph fourth of above statement of facts), that the same was barred by the statute of limitations, for that more than six years elapsed from the execution of said bond to the commencement of this action. In this the plaintiff submits there is error, for the statute did not begin to run until the judgment therein recited was rendered against the sheriff for damages for an illegal sale of said homestead, to-wit, February, 1888, less than one year before the commencement of this action.

No counsel for plaintiff.
Ernest Haywood for defendant.

SHEPHERD, J., after stating the case: (1) The unlawful sale of the homestead was made in 1878, and a judgment was rendered against the sheriff, by reason thereof, in 1888. No action was (228) ever brought on the official bond of the sheriff for any of the causes set in the complaint, except the present suit, which was commenced in September, 1888. The unlawful sale constituted a breach of the bond, and the relator could have sued upon the same at once under the Code, sec. 516. The statute was then put in motion, and more than six years having elapsed before the commencement of this action, his Honor very properly held that the cause of action was barred.

(2) It may be that the "undue returns" upon which the other two causes of action are founded, were so connected with the laying off of the homestead that they fall within the above section of the Code. In which case they would likewise be barred, as an action is there given directly against the sheriff and his sureties. But as this does not distinctly appear, we will consider these causes of action with reference to the Code, sec. 2076, which provides that "the sureties to a sheriff's bond shall be liable for all fines and amercements imposed on him in the

same manner as they are liable for other defaults in his official duty." No counsel appeared for the appellant in this Court, but we take it that he would have urged that the bond would not become liable until the fines or amercements were actually imposed. Suppose that this construction of the statute be conceded, it certainly could not save the relator unless he obtained his judgment, or, at least, brought his action against the sheriff within six years after the default.

In this case *nine* years elapsed after the "undue returns" were made before the judgments were rendered against the sheriff. There is no allegation as to when the suits were brought. If they were commenced within the six years, it was the duty of the relator to have shown it. *Hussey v. Kirkman,* 95 N. C., 63. This he failed to do; so, in any point of view, we hold that the causes of action are barred.

Affirmed.

Cited: Nunnery v. Averitt, 111 N. C., 395; *Koonce v. Pelletier,* 115 N. C., 235; *Graham v. O'Bryan,* 120 N. C., 465; *Parker v. Harden,* 121 N. C., 58; *House v. Arnold,* 122 N. C., 221.

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(229)

WILLIAM S. ROUSE v. SHADE WOOTEN AND J. W. ISLER.

Lien, Agricultural and Laborer's—Contract—Landlord—Cropper.

While one who labors in the cultivation of a crop, under a contract that he shall receive his compensation from the crops when matured and gathered, has no estate or interest in the land, but is simply a laborer—at most, a cropper—his right to receive his share is protected by the statute (Code, secs. 1754, 1757), which, for certain purposes, creates a lien in his favor, and which will be enforced against the employer or landlord, or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested.

APPEAL from *Bynum, J.,* at August Term, 1889, of LENOIR.

The plaintiff alleged that the cotton and rice in controversy were delivered and belonged to him as his share of the crop produced on his father's farm in the year 1888, which he helped to cultivate. He further alleged that the defendants got possession of and converted the same to their own use, etc.

The defendants denied such allegations, and alleged that the property belonged to them; that they acquired title to the same by virtue of their "agricultural lien," duly registered, executed on 16 May, 1888, to secure

money and supplies furnished to the plaintiff's father to enable him to make his crop of that year.

On the trial of the issues raised by the pleadings, the plaintiff testified, in part, as follows:

"I am twenty-three years old, and stay at my father's; stayed there during the year 1888; ate at his table and worked on his farm. My father was to give me one-fourth of the crop for my work on his farm during that year. The contract was entered into between my father and myself about 1 January, 1888. My father furnished the land, the team, supplies, and a portion of the labor. I was to work my- (230) self and to receive one-fourth of the crop grown. I worked until the crop was laid by; I then went to school some, but paid for one-fourth of the work of housing the crop, it being the agreement that I was to supply a hand in my absence. My father gave a lien-bond to defendants that year; heard him say he did. We made the contract and I commenced work before the lien-bond was given."

J. L. Rouse testified: "I am father of plaintiff, and own the land on which the rice in controversy was raised. The plaintiff worked with me in 1888. About the first of January, 1888, I hired my son, the plaintiff, to work. He proposed to work for so much money. I told him the land might or might not make a crop; so I agreed to give him one-fourth of the crop for his labor on it. This contract with my son was entered into before I gave the lien-bond to defendants. After crop was made, I delivered to plaintiff one bale of cotton, which was one-fourth of cotton raised, and also set aside to him his part of the rice—twenty-six sacks—which were put in a crib in my yard."

The defendants, among other things, requested the court to instruct the jury as follows:

"An agreement, before beginning cultivation, to give a portion of the crop to him who labors thereon is executory, and if the landowner before maturity of the crop executes an agricultural lien for advancements to carry on and raise said crop, then the property in the crop vests in the lienee and the laborer is left to an action for damages against the landlord."

The court declined to give such instructions, and the defendants excepted. There was a verdict and judgment thereupon for the plaintiff, from which the defendants appealed.

George Rountree for plaintiff. (231)
N. J. Rouse for defendants.

MERRIMON, C. J., after stating the case. The plaintiff had no estate in the land of his father, as his tenant, and, hence, no vested property

interest in the crop produced on his farm in 1888, until the same was matured and gathered and part thereof set apart to him as his share. The crop was not his; he was simply a laborer employed in helping to produce it, in his father's service, with an agreement whereby he was to receive a part of the crop, when gathered, as his hire. The evidence of both the plaintiff and his father goes to show that the former did not lease or intend to lease the land; he did not agree to pay rent of any kind. On the contrary, he was to receive compensation—not in money, but by taking a part of the crop. At most, he was simply a "cropper."

In *Harrison v. Ricks,* 71 N. C., 7, it is said: "A cropper has no estate in the land; that remains in the landlord. Consequently, although he has, in some sense, the possession of the crops, it is only the possession of a servant, and is, in law, that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop." To the like effect, is *Hudgins v. Wood,* 72 N. C., 256; see, also, *McNeely v. Hart,* 32 N. C., 63; *Brazier v. Ansley,* 33 N. C., 12.

Nevertheless, the statute (Code, secs. 1754, 1757), in a measure, protects the right of such cropper to such part of the crop as he may be entitled to have, by virtue of his agreement, oral or written, with the lessor, landlord or other person on whose farm he agrees to serve, and does serve, as such cropper, in the cultivation and production of the crop. The statute does not, in express terms, give and secure to him a lien upon the crop, but it certainly does so to some extent in effect. He is classified in sec. 1754, cited above, with lessees and tenants (232) "for agricultural purposes," and sec. 1754 provides that, "whenever the *lessor* or *his assignees* shall get the actual possession of the crop, or any part thereof, otherwise than by the mode prescribed in the preceding section, and said lessor or his assignees shall refuse or neglect, upon notice, written or oral, of five days, given by the lessee or cropper, or the assignees of either, to make a fair division of said crop, or to pay lessee or cropper, or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then in that case the lessee or cropper, or the assignees of either, shall be entitled against the lessor, or his assigns, to the remedies given in an action upon a claim for the delivery of personal property, to recover such part of the crop as he, in law, and, according to the lease and agreement, may be entitled to. The amount or quantity of said crop claimed by said lessee or cropper, or the assignees of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action.

The remedy thus given is not only against the lessor but his assigns as well, and its purpose is to enable the cropper to recover his share of the crop in kind. The action so allowed is given against the lessor or employer, and, also, against any person to whom he may assign, or sell, the crop, or any interest therein, as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. Such assigns take the crop, or lien upon the same, subject to the right of the cropper to have his share thereof. The purpose is to protect and enforce the right of the cropper to his part of the crop for his own benefit, and for the benefit of his assigns, if he shall sell his part, as he may do. The lessor, landlord or employer cannot consume or dispose of the crop himself, nor can his assigns, nor can they encumber it, to the prejudice of the cropper. Any sale of, or lien created upon it, is made subject to his right; otherwise the remedy thus given would be meaningless and nugatory—and empty pretense and mockery of him whose labor had (233) contributed to the production of the crop. The statute does not intend this. It intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, and that he shall certainly reap the just benefit of his toil.

It may be said that persons who take "agricultural liens" cannot have knowledge of such rights of the cropper, as his contract is not required to be registered. But they must take notice of the cropper's rights, just as they do the like rights and labor contracts of agricultural tenants. They take such liens at their peril; they should make proper inquiry before taking them. It is their folly, or misfortune, if they do not. It might be better to require notice of a cropper's contract to be registered, as required in case of the laborer's lien, but the statute does not so require. *Burr v. Maultsby,* 99 N. C., 263.

The plaintiff, therefore, was entitled to have his share of the crop, unaffected by the defendant's lien upon it, and the owner thereof, the father, was bound to set apart and deliver the same to him, as it appears he did do. Hence, the plaintiff had title to the property in controversy, and the defendants had no right to, or interest in it, by virtue of their lien upon the crop.

It may be, in view of the evidence, that the plaintiff might have been deemed to have assented to the lien, and thus concluded by it as to the defendants, but no question in that respect is raised by the pleadings, or appears in any part of the record.

Affirmed.

(234)

C. R. PATE v. A. W. KENNEDY.

Executors and Administrators—Guardian—Penalty.

The provision of the statute (Code, secs. 1410, 1413, 1414, and 1590), requiring that all sales of personal estates by executors and administrators, and all sales and rentings of personal and real property by guardians, shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such executors, guardians, etc., and if they fail to observe them, they become liable for the penalty provided to any one who will sue therefor.

APPEAL from *Bynum, J.*, at August Term, 1889, of LENOIR.

The defendant, before this action began, was the guardian of Lillie E. Pate, an infant, and, as such guardian, "rented, *privately,* the land of his ward."

The plaintiff sues to recover the penalty of $200, which he alleges the defendant incurred in failing to observe the statute (Code, secs. 1590, 1410, 1414), in so "privately renting" the land of his ward.

The defendant insisted that what he so did was not done in violation of any statute of this State. The court held otherwise—that he had incurred the penalty—and gave judgment against him, whereupon he excepted and appealed.

George Rountree for plaintiff.
N. J. Rouse for defendant.

MERRIMON, C. J., after stating the case: It is very clear that the court below held properly that the defendant had incurred the penalty, as alleged in the complaint. The meaning and purpose of the statute prescribing and allowing it in the cases provided for are not doubtful.

(235) Its language is plain, clear and unequivocal, and little is left to interpretation. It provides (Code, sec. 1590) that "all sales and rentings shall be made and conducted in the same manner, upon like terms and notice, and under the same rules and regulations and the same penalties as prescribed for sales made by administrators and collectors." This provision, taken in connection with other provisions of the statute, obviously refers to the "*sales and rentings*" of property, real and personal, of the ward, with which the guardian is charged, and of which he has control by virtue of his office. He generally has possession and control of his ward's property. It is his duty to manage it with care and prudence. It sometimes becomes necessary that he should sell parts of it and let the land for proper rents. He is not allowed to make such sales and lettings privately. On the contrary, he is expressly required to make them publicly, in the way sales are made by executors, administrators and collectors. The statute (Code, sec.

1410) prescribes plainly that "all sales of personal estate by an executor, administrator or collector shall be *publicly* made, on a credit of six months, or for cash, after twenty days notification posted at the courthouse and four other places in the county." It is further provided (Code, secs. 1413, 1414) that "the proceeds of all sales of personal estate and rentings of real property by public auction shall be secured by bond and good personal security," and that "all sales or rentings provided for in the preceding section (sec. 1413) shall be between the hours of ten o'clock A. M. and four o'clock P. M. of the day on which the sale or renting is to be made; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same." Guardians are expressly made subject to the "same penalties" thus prescribed and allowed, when and if they fail to so make all their "sales and rentings."

The purpose of these precise and stringent regulations is to give notice to the public of the time, place and terms of such "sales and rentings," and thus encourage and promote competition and obtain (236) better prices and higher rents for the property sold or let, and, also, to prevent the exercise of possible bad judgment, imprudence, lack of caution, collusion and fraud on the part of guardians, executors, administrators and collectors. This purpose is deemed very important. The law intends that it shall be observed and prevail; hence the severe penalty prescribed. In possible cases it might be more convenient, perhaps better, to make private sales and lettings, but the law does not, cannot, provide for such cases; it provides general rules and regulations, to be observed and applied uniformly in all cases.

The counsel of the defendant made an elaborate argument to satisfy us that the statutory provisions above mentioned and recited are modified, in material respects, by like statutory regulations that prevailed immediately before the present Code became operative, and which, he insisted, still prevail to a modified extent. This contention is unfounded, because the statute (Code, sec. 3868) declares that "all public and general statutes not contained in this Code are hereby repealed, with the exceptions and limitations hereinafter mentioned. This exception provision in no way affects the subject under consideration.

It is said that the present statute is not generally observed. We trust this is not true; but if it is, unlawful practice cannot have the effect to repeal the statute, nor can it justify the court in doing so, in effect, by unwarranted interpretation. If it is unwise, or too severe, the remedy lies only in appropriate legislation. It is our duty to administer the statute law of the State as we find it. It is not our province as a Court to declare that it is wise and expedient, or otherwise.

Affirmed.

(237)

D. L. RUSSELL v. FRANK D. KOONCE.

Agency—Contract—Damages.

If one falsely represents himself as the agent of another, and, in that capacity, enters into a contract with a third party, which the alleged principal repudiates, the agent does not thereby become liable upon the *contract*, unless he receives the consideration, in which event an implied promise to pay arises, but he may be liable *for damages* arising from his false assumption of authority.

APPEAL from *Connor, J.*, at the April Term, 1887, of NEW HANOVER.

The plaintiff brought this action against the defendant and one Anthony Davis, to recover compensation for professional services rendered Davis, upon the request of the defendant Koonce, who, it was alleged, was authorized to contract for Davis in that behalf.

Davis denied that he ever employed the plaintiff or authorized his co-defendant to do so, and Koonce, admitting that Davis had given him no such authority, and that he had requested the opinion of the plaintiff upon the matter submitted, denied the existence of any contract, express or implied, on his part, to pay for said services. He further pleaded, by way of counterclaim, *new matter,* arising out of another transaction with plaintiff, and occurring subsequent to the plaintiff's cause of action, to which plaintiff interposed a demurrer.

(240) *S. C. Weill for plaintiff.*
John Devereux, Jr., for defendant.

SMITH, C. J., after stating the case: The demurrer was properly sustained to the defendant's counterclaim, and that for the reason stated, that it arose out of transactions occurring after the institution of the action as appears upon its face. The refusal to allow an amendment, which, as defendant insisted, would connect it with the plaintiff's
(241) cause of action, was unreviewable exercise of a discretionary power vested in the judge. The responses of the jury to the issues submitted to them, without objection, cover the entire ground of controversy.

The writings which, as exhibit "A," are annexed to the case, were not offered in evidence during the trial, nor were any instructions asked for by the appellant until the jury, after hearing the charge, had retired, and at this stage of the trial these papers were offered to be heard and the presiding judge declined to receive them. In this there is no error.

The pleadings and the evidence show no personal contract to have been entered into by the appellant to bind himself to pay for the professional services desired, but he represented himself as authorized by Davis, who had the benefit of them, to employ the plaintiff, and throughout he professed to act as agent only. The defendant does not become individually liable because his authority to bind his principal is disowned by the latter, unless the consideration is received by the agent, out of which arises an implied promise to pay. *Potts v. Lazarus,* 4 N. C., 180; *Delius v. Cawthorn,* 13 N. C., 90. In such case the agent may become personally answerable upon the contract, but otherwise the action must be for damages for his false assumption of authority to act.

The present action proceeds upon the idea that, if the principal be not bound, the agent is, for the services rendered; or, in other words, if the contract does not bind the one, it binds the other. The result in damages may be the same, but the liability does not rest upon any such foundation, for the obvious reason that no such personal contract is formed. No objection is made on this score, and we let the judgment stand, as no exception is taken, but with the explanation made above. There is no error, and the judgment is

Affirmed.

Cited: LeRoy v. Jacobosky, 136 N. C., 449.

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(242)

BETTY J. BRYAN v. A. B. JEFFREYS ET AL.

Arbitration—Award—Depositions—Estoppel.

1. Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, as provided by sec. 1357 of the Code, it was held that an objection to its reception might be taken on the trial of the action.

2. Where the submission to arbitration was under seal, and conferred upon the arbitrators therein named authority to call in a third party in case they could not agree. *Held,* (1) that the selection of such third party before any disagreement, and his participation in the award, did not vitiate it; and (2) that it was not necessary that his appointment should be under seal.

3. Where one of the parties to an arbitration has performed a part of the award, he is estopped from afterwards assailing it because it transcended the scope of the agreement upon which it was based.

4. The fact that arbitrators included in their award a sum not in dispute, but which was the basis of the disputed transaction, and without which the

award would have been incomplete, will not make it void, and especially so when the agreement to refer submitted the question "of the amounts and sums due between" the parties.

APPEAL from *Bynum, J.*, at April Term, 1889, of GRANVILLE.

On 16 November, 1886, the plaintiff and R. M. Jeffreys, one of the defendants, entered into the following agreement:

"Whereas, matters have arisen between Mrs. B. J. Bryan and R. M. Jeffreys, both of said county and State, touching the amounts and sums due between them on account of the rental of her Governor Bell place in said county, which said matters they are unable to settle and decide between themselves; and, whereas, each party desires to avoid litigation:

(243) "Now, therefore, they do each mutually agree and bind themselves unto each other as follows:

"1. That all matters in dispute between said parties be and they are hereby referred to W. D. Smith and Robert L. Crews, as arbitrators—their award, in writing, to be final and conclusive, and, if they cannot agree, to have the power to call in a third party, the award of any two of them, in writing, to be final and conclusive.

"2. And, to secure a faithful compliance with the terms of this agreement, and as a part hereof, each party executes the attached bond in the sum of five hundred dollars, the terms, conditions and stipulations of which are to be taken as a part of this agreement.

"Witness our hands and seals," etc.

The "bond" referred to was executed contemporaneously, the defendant A. B. Jeffreys being the surety for the performance by R. M. Jeffreys of the conditions and obligations undertaken by the latter.

Among other things, it was stipulated that the plaintiff and R. M. Jeffreys should "stand to and abide by the award of said arbitrators, when made, and, specially, pay to each other any sums of money that may be by said arbitrators adjudged to be due each."

Before entering upon their investigation, the persons named as arbitrators selected Mr. Hays as the "third party," who joined them in hearing the matters in dispute and in making the award. His selection and appointment were not in writing.

Amongst other matter included in the award was the following:

"That, in a settlement had between said Mrs. Bryan and said Jeffreys, on or about 1 May, 1886, of matters relating to the farm for 1885, there remained in hands of said Jeffreys $545.76, which it was then

(244) agreed between him and Mrs. Bryan should remain in his hands, and that he should account for the same, with eight per cent interest thereon from that time until paid"; and adjudged that there

was due the plaintiff the sum of $....., which had been reduced, at the time this action was brought, by payments made by R. M. Jeffreys, to $66.

Defendant offered to read in evidence the deposition of R. M. Jeffreys. Plaintiff's counsel objected, upon the ground that the notice of opening and passing on the deposition by the clerk had not been given as required by sec. 1357 of the Code. The facts were: That the deposition had been received by the clerk, who had inadvertently torn the envelope, started to take out the papers, saw what they were, returned them to the papers in the case without reading, and told defendants' counsel of the mistake; no notice had been given by the clerk to the plaintiff's counsel of the intention to open and pass upon the deposition, and it had not been passed upon by the clerk. The objection was sustained, and defendant excepted.

Upon the close of the testimony, defendants' counsel asked the following instructions:

1. If the jury believe that the submission was to two, with leave to select a third only in case they disagree, then the award is void, and the defendants are not bound.

2. If the jury believe that the submission is under seal, the selection of an umpire, to be valid must be under the seal of the two arbitrators.

3. That the bond upon which the action is brought is void.

That the embracing of the item of $545.76 by the arbitrators, about which there is no dispute in the award, renders it void.

The court refused the instructions, and instructed the jury it was a matter of which they were the sole judges, under the evidence; and if they were satisfied, by a preponderance of the evidence, (245) that the defendants were indebted to the plaintiff, they should so find. There was a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

R. W. Winston for plaintiff.
A. A. Hicks for defendants.

SHEPHERD, J. In the course of the trial the defendants offered in evidence the deposition of R. M. Jeffreys. It appeared that no notice was ever given to the plaintiff, and that the deposition had not been passed upon by the clerk as provided in the Code, sec. 1357. His Honor very properly refused to admit it, and the defendants' exception in this respect must be overruled.

The defendants asked certain special instructions, which, being refused, are made the subject of three exceptions:

1. "That if the jury believe that the submission was to two, with leave to select a third only in case they disagree, then the award is void." This request was based, we suppose, upon the testimony of R. T. Crews, one of the arbitrators, to the effect that Mr. Hays, the umpire, was appointed before they commenced the investigation, or had any disagreement. The refusal of the court to give the instruction is fully sustained by the case of *Stevens v. Brown,* 82 N. C., 462, where it is said that "it matters not at what time during the progress of an arbitration the umpire is appointed. It is within the discretion of the arbitrators to appoint him before or after disagreement. .Where the submission to the award of two persons authorized the appointment of an umpire by them if they disagree, it was held they might choose an umpire before they entered upon the inquiry." *Bates v. Cooke,* 17 E. C. L., 407.

(246) The defendants' counsel, however, takes the distinction that, while the umpire may be appointed before disagreement, he has no right to act until a disagreement occurs. If the latter had no right to act, his joining in the award did not vitiate it. "The award in our case is either the award of the umpire or the award of the arbitrators. Take it either way, and it is good. If the appointment of the umpire by the arbitrators was proper at the time he was chosen, then it was his umpirage, and their joining with him will not vitiate, for a mere stranger may join in the award or umpirage without invalidating the proceeding. But if, on the other hand, the arbitrators had no right to choose an umpire before disagreement, then it would be their award, and the fact of the umpire's joining in it would not vitiate it." *Stephen v. Brown, supra.*

2. "That, the submission being under seal, the selection of the umpire must be under the seal of the arbitrators." This was not required by the terms of the submission, and, we think, was unnecessary. "At all events, it is too late to interpose that ground after the award is made" (*Knowlton v. Homer,* 30 Me., 552), and especially is the party estopped where, as in this case, he has partly performed the award. Morse on Arbitration, 274.

3. "That the bond sued upon is void." It must be admitted that the bond is very inartificially drawn, but the context clearly shows the character in which the parties signed and their respective liabilities. This is unlike the case of *Osborne v. Colvert,* 83 N. C., 365, because, there, all of the contending parties were obligees [obligors] and all were answerable for the default of each; so that, the person to whom any sum might have been awarded would himself have been liable for its payment. The bond in our case shows very plainly that the defendant signed as surety for R. M. Jeffreys, the condition being that said R. M. Jeffreys should abide by and perform the award. The exception is without merit.

4. The remaining exception is that the arbitrators should not (247) have considered the item of $545.76, that being the result of a settlement for 1885 and not being a matter in "dispute." We cannot give the terms of the submission such a restrictive meaning. The articles of submission recite that, "Whereas matters have arisen between Mrs. B. J. Bryan and R. M. Jeffreys, . . . touching the *amounts and sums due between them* on account of the rental of the Governor Bell place, . . . which said matters they are unable to settle and decide between themselves: . . . Now, therefore, all matters in dispute are hereby referred," etc. The balance, $545.76, due Mrs. Bryan for the year 1885 was left in the hands of R. M. Jeffreys, to be accounted for by him, and it was clearly necessary for the arbitrators to consider it in order to arrive at the "amounts and sums due between them."

Upon examining the whole record, we have been unable to perceive any error in the rulings of his Honor, and the judgment, therefore, must be

Affirmed.

Cited: Patton v. Garrett, 116 N. C., 858; *Robertson v. Marshall,* 155 N. C., 171.

(248)

C. F. VICKERS ET AL. v. R. S. LEIGH ET AL.

Deed, Correction of—Evidence.

E. executed a deed to his two children (naming them), in which it was recited and provided that he had "given and granted unto my said children a certain tract of land (describing it). I do hereby appoint S. guardian of my said children, with full power and authority as the law may direct to guardians, and, whenever my said children may come to the age of twenty-one, will be entitled to take possession of said land, free from all costs, . . . At the same time, it is to be considered that the above deed of gift will not take place till my death and the death of my wife." *Held,* that the deed contained conclusive intrinsic evidence of the vendor's intention to convey to his children a fee-simple estate, after the death of himself and wife, and that the necessary technical words had been inadvertently or ignorantly omitted, and that, in an action to correct the deed in that respect, the court would, upon an inspection of the instrument, grant the relief.

ACTION tried at the June Term, 1889, of DURHAM, before *Bynum, J.*

The plaintiffs' assignor, John Hinton Ellis, was the son of one Nathan Ellis, and the plaintiffs are the heirs at law of Anne Maria Vickers, a daughter of Nathan Ellis, through whom both parties claim title. The

plaintiffs alleged that the word "heirs" was by mistake omitted from a deed executed by said Nathan Ellis to his children, the said Anne Maria and John Hinton Ellis, dated 16 February, 1824, and asked judgment that said deed be reformed. The deed is as follows:

"*To all people to whom these presents shall come:* I, Nathan Ellis, of the county and State aforesaid, send greeting: Know ye, that I, the said Nathan Ellis, for and in consideration of the natural love and affection which I have and bear unto my children, Anne Maria and John Hinton, by my present wife, Patsy Leigh, and for other
(249) good causes and considerations hereunto moving, have given and granted, and do, by these presents, give and grant unto my said children, above mentioned, a certain tract or parcel of land, lying and being in the county of Orange, on the waters of the Third Fork, containing one hundred acres, more or less, where Richard Leigh now lives, late the property of John Leigh, deceased; and I do hereby authorize and appoint my brother-in-law, Sullivan Leigh, guardian of my said children, above mentioned, with full power and authority, as the law may direct to guardians, and whenever my said children, above mentioned, may come of the age of twenty-one, will be entitled to take possession of said land and premises, free from all costs; but it is to be considered that should my said wife, Patsy Leigh, have other children by me, to come in with my other children, Anne Maria and John Hinton, and be entitled to have an equal part of said land, at the same time it is to be considered that the above deed of gift will not take place until my death and the death of my wife, Patsy Leigh.

"In witness whereof, I have hereunto affixed my hand and seal, this 16 February, 1824."

(250) The issues and responses to them are as follows:

1. "Was the word 'heirs' omitted, by mistake of the draughtsman, from the deed of 1824 of Nathan Ellis to his children?" Answer: "Yes."

(251) 2. "Did Sullivan Leigh purchase the land in suit at the sheriff's sale, 23 May, 1836, under an agreement made with Nathan Ellis before the sale that he (Sullivan Leigh) would buy and hold the same as trustee for Nathan Ellis and his heirs, and that upon repayment of the purchase money he would reconvey to the said Ellis and his heirs?" Answer: "No."

3. "Has the purchase money so paid by Sullivan Leigh been repaid to him?" Answer: "Yes."

4. "Was the deed of Nathan Ellis to his children (made 16 February, 1824) intended by him to convey the land therein described to them and their heirs?" Answer: "Yes."

5. "Did Sullivan Leigh, by his conduct, words or acts, suppress bidding at the sheriff's sale, in 1836, by representing that he was buying the land for Nathan Ellis and his wife?" Answer: "Yes."

6. "Have ten years elapsed since the commencement of the parol trust alleged by the plaintiffs?" Answer: "Yes."

7. "What is the annual rental value of the land?" Answer: "Eleven hundred dollars."

Upon the verdict as rendered by the jury, and their findings (253) in response to the issues submitted, defendants moved for judgment, and excepted to the refusal of the court to sign the judgment offered.

His Honor charged: In this case there is no direct evidence that Sullivan Leigh, prior to the sheriff's sale, made any verbal agreement with Nathan Ellis or Patsy Ellis, or their children, that he would purchase the land for them and allow them to redeem on payment of the purchase money, and there is no evidence of any kind that he ever made any such agreement with the children; and, before the jury would be warranted in finding such an agreement between Sullivan Leigh and Nathan Ellis and his wife, the circumstances relied on to show that fact must be sufficiently strong, clear and convincing to prove that fact to their satisfaction.

In this case there is no evidence that the money used in purchasing the land at sheriff's sale in 1836 was furnished by Nathan Ellis or his wife or children, and no evidence of inadequacy of price; and the question for the jury is, Is the evidence sufficiently strong and convincing that Sullivan Leigh did agree with Nathan Ellis and his wife to buy it and allow them to redeem it, and did they redeem it, or did Sullivan Leigh buy it and let Ellis and his wife and their children, John Hinton and Anne Maria, hold it for their life? (256)

His Honor added to defendant's ninth instruction, "and the burden is upon the plaintiffs by clear, strong and convincing evidence, to satisfy the jury that they had not abandoned it."

The plaintiffs tendered a judgment, to be signed by the judge, reforming the deed by writing the words "and their heirs" after the names of the grantees, and also declaring Sullivan Leigh a trustee and requiring him to convey to plaintiffs.

The defendants moved the court to declare that there was no sufficient evidence of the mistake or of the parol trust, and that the finding that the purchase money had been repaid to Sullivan Leigh was inconsistent with the findings in response to the issues and was not warranted by the evidence.

The court rendered judgment as follows:

"It is thereupon considered and adjudged by the court that, upon the evidence before the jury, and their finding in response to the issues, the plaintiffs are not entitled to have the deed corrected, and that, notwithstanding the verdict of the jury, the defendants are entitled to judgment of this court. It is therefore adjudged and decreed that the defendants are the owners in fee simple of the lands described in the pleadings, after the death of John Hinton Ellis; that until the death of John Hinton Ellis the plaintiffs are the owners of the land; that the defendants are not entitled to the immediate possession of the one-half interest of Anne Maria Vickers, the deed of Nathan Ellis to John Hinton Ellis and Anne Maria Ellis vesting in them an estate for their joint lives and the life of the survivor, and that until the death of John Hinton Ellis the defendants take nothing, and at the death of John Hinton Ellis the defendants are entitled to the remainder in fee simple; that the defendants are not entitled to any rents and profits arising from the
(257) land until after the death of John Hinton Ellis; that the defendants recover their costs."

Both parties appealed.

W. W. Fuller for plaintiffs.

John W. Graham and John Manning for defendants.

AVERY, J. The trend of judicial decisions for years has been toward relaxing the rigor of the common-law rule, that without words of inheritance no estate of greater dignity than for life could be created by deed. While devises were held, after the statute of wills, to be but a species of alienation, the courts construed them more liberally than deeds; and where, without the use of the word "heirs," as by inserting the word "forever," the testator indicated an intent to pass an estate in fee, it was held, on the ground that testators were generally *inops consilii*, that the instrument should be so interpreted as to effectuate his purpose. Then followed the liberal principle in the act of 1784 (Code, sec. 2180), that a devise of real estate to any person should be held to be a devise in fee, unless it plainly appears from some part of the will that the testator intended to convey an estate of less dignity. The liberal tendency of the age in reference to deeds culminated in the act of 1879 (Code, sec. 1280), providing the same rule of construction for deeds as for devises. But prior to the passage of that statute this Court had in numerous cases held that where the word "heirs" was inserted out of the *habendum* in a deed, unless it plainly appeared to be a part of the covenant of warranty or of quiet enjoyment, the deed would be construed by transposing it to its proper place, in order to create an estate

in fee, and this ruling was predicated upon the idea of carrying (258) out the apparent intent of the grantor as nearly as the rules of law would admit. *Phillips v. Thompson,* 73 N. C., 543; *Phillips v. Davis,* 69 N. C., 117; *Hodges v. Fleetwood,* 102 N. C., 122.

Citing Coke and Kent, *Judge Daniel,* in *Armfield v. Walker,* 27 N. C., 580, says: "It is a rule of law that if two constructions can be placed on a deed, or any part of it, that shall be given to it which is most beneficial to the grantee."

The idea of giving effect to the grantor's purpose, gathered from every part of the deed, led this Court, in administering the principles of equity, to announce the doctrine that when the court was entirely satisfied from the declared purpose and nature of a deed, and the context of that portion where the word "heirs" would naturally belong, that it was the intention of the grantor to convey a fee simple, and the omission was an oversight, there was a plain equity to have the mistake corrected. *Rutledge v. Smith,* 45 N. C., 283.

The facts appearing from the face of the deed are very clearly indicative of the intent of Nathan Ellis, the grantor. After reserving an estate for the joint lives of himself and wife, he conveys the remainder to the two children, at that time the only issue of his marriage with his said wife, but with a proviso that any child thereafter born of the marriage with her should take an equal share with the two already *in esse.* The deed further provides that Sullivan Leigh, the brother of his wife (under whom the defendants claim), should, as guardian of the children, have authority incident to that relation over the land till they should arrive at the age of twenty-one, when they would "be entitled to take possession of said land and premises, free from all costs." It is most unnatural to conclude that a father, having provided a maintenance for life for himself and wife, and *attempted by deed* to appoint a guardian for the two children, who are the only issue of the marriage, should convey to them simply a life estate, limited upon that (259) reserved for himself and wife, and leave the remainder in fee simple, undisposed of, when he seemed to be making permanent provision for the present and prospective issue of his marriage, after the death of his wife and himself.

So, looking to the nature of the deed, and the plain purpose of providing for his infant children after the death of his wife and himself, that is apparent from its terms, we must declare, in furtherance of this manifest purpose, ascertained from the wording of the deed, that there was a mistake of the draughtsman in failing to insert after the names of the said children, in the deed above mentioned, the words "and their heirs, forever."

It is not necessary for us to consider all the exceptions relied upon by the parties in presenting their respective appeals in this Court. His Honor should have held, upon an inspection of the deed executed by Nathan Ellis, 16 February, 1824, and admitted to have been properly proven and registered, that it should be corrected as already indicated. It would follow that the plaintiffs were entitled to judgment that the deed be reformed as directed, and for costs of action. The fact that his Honor submitted the first and fourth issues to the jury, involving questions of law, does not impair the rights of the defendants, as the jury decided them correctly. A large number of exceptions relied on by the defendants become immaterial now, for the reason that they related to testimony offered to prove by parol the mistake that we have held is shown with sufficient clearness by the language of the deed. Exception numbered 20, based upon the refusal of the court to give instructions asked by the defendants, and numbered 4 and 8, or to tell the jury, as requested at the close of the evidence, that the plaintiffs had not offered sufficient testimony to support a finding that there was a mistake in response to the first issue, are of this character, though the
(260) judge did tell the jury, in substance, what was asked, and disregarded the finding in response to the first issue, after verdict.

The verdict on the second issue was in favor of the defendants, and they have not suffered by reason of any error in the admission of testimony tending to establish the parol trust. It is therefore unnecessary to consider objections to its competency, and this disposes of exceptions numbered from 9 to 19, both inclusive, and the exceptions to the refusal of the court to give instructions Nos. 4, 5, 9, and 10, asked by the defendants.

The first objection grew out of the competency of a juror, because he was interested as a creditor in a fund for which W. W. Fuller, as receiver, had brought suit. The juror was not a party to an action pending and at issue in court, and therefore did not come under the description in the disqualifying statute. The exception will not be sustained.

The objection to the admission of the deeds read in evidence was not insisted upon. If it had been, however, we see no reason for excluding them when first offered, as at that preliminary stage his Honor could only pass upon the question whether the deeds had been proven and registered as required by the statute. The relevancy of such deeds, generally, cannot be made manifest till a later period in the development of a case.

The deed from Nathan Ellis to John Hinton Ellis and Anne Maria Ellis, executed 16 February, 1824, having been duly proved and registered, was, of course, competent, as the whole controversy depended upon the construction given to it.

There was no error in admitting the other deeds introduced to show that the defendants claimed title from Nathan Ellis, the same source from which plaintiffs derived title. These deeds were offered as a foundation for attaching a parol trust to the purchase of Sullivan Leigh; but, as the jury found, in accordance with the instructions given by the court, that there was no agreement on his part to purchase for Nathan Ellis, the admission of the testimony has wrought no injury to the defendants, and will not avail them as ground for asking a (261) new trial or a judgment on the verdict.

We conclude, therefore, that in defendant's appeal there was no error. In plaintiffs' appeal there was error, and the judgment must be reversed. The plaintiffs are entitled to judgment declaring and correcting the mistake in the deed, as pointed out, and for costs.

Error on plaintiffs' appeal; on defendants' appeal, no error.

Cited: Anderson v. Logan, 105 N. C., 270; *Wilhelm v. Burleyson,* 106 N. C., 386; *Cox v. Ward,* 107 N. C., 509; *Mitchell v. Mitchell,* 108 N. C., 543; *Moore v. Quince,* 109 N. C., 89; *Ray v. Comrs.,* 110 N. C., 172; *Rackley v. Chestnut, ib.,* 264; *Hodges v. Wilkinson,* 111 N. C., 63; *Helms v. Austin,* 116 N. C., 753; *Everett v. Newton,* 118 N. C., 921; *Allen v. Baskerville,* 123 N. C., 127; *Pinchback v. Mining Co.,* 137 N. C., 180; *Smith v. Proctor,* 139 N. C., 319; *Bryan v. Eason,* 147 N. C., 289; *Real Estate Co. v. Bland,* 152 N. C., 289; *Cullens v. Cullens,* 161 N. C., 347; *Beacom v. Amos, ib.,* 366; *Lyon v. R. R.,* 165 N. C., 145; *Torrey v. McFadyen, ib.,* 239; *Carter v. R. R., ib.,* 248; *Brewer v. Ring,* 177 N. C., 485.

THE TOWN OF DURHAM v. THE RICHMOND & DANVILLE AND THE NORTH CAROLINA RAILROAD COMPANIES.

Appeal—Injunctions.

The plaintiff alleged that the defendants were unlawfully constructing a portion of their track in a street to which it (the plaintiff) has acquired an easement, and asked that an injunction be granted. The defendants denied the allegations upon which the relief was sought, and, upon the matter at issue, there was much conflicting evidence. Upon the preliminary hearing, an order was made enjoining the defendants from further construction within certain prescribed area until the hearing. From this defendants appealed. Subsequently, the plaintiff moved to extend the operation of the injunction to other parts of the said street, which motion, being heard upon proof and counter-proof, was refused, and the plaintiff appealed. ***Held***—

1. That both appeals were premature and should be dismissed.
2. The courts will not dissolve injunctions till the hearing, where it is apparent from the pleadings and proofs that there is serious dispute about the facts, and doubts as to the relief sought.

MOTION for an injunction, before *Gilmer, J.*, at chambers in DURHAM, on 27 June and 2 July, 1889.

Both parties appealed from the rulings of his Honor.

(262) The plaintiff (the town of Durham) alleged in the complaint that the town had acquired an easement for a street in a part of the original right of way of the North Carolina Railroad Company, the lessor of the defendant company now operating the road, and that said street, which the town had acquired a right to use, by virtue of condemnation proceeding, conducted according to law, as well as by prescription, by dedication and by estoppel, and that the defendant (the Richmond and Danville Railroad) was operating the road as the lessee of the other defendant, and was proceeding, in violation of law, to lay a sidetrack along said street, and thereby inflict irreparable injury on the plaintiff by impeding the passage of persons and vehicles along said street and rendering worthless valuable property fronting on it.

The defendants deny that the plaintiff had acquired in any way a right to use any portion of said right of way of 100 feet on each side of the center of this track as a street, as claimed by plaintiff, and averred that the use of it had been only permissive; that it had not been condemned or dedicated, nor had the plaintiff acquired an easement in any way.

(263) *W. W. Fuller for plaintiff.*

John W. Graham, W. A. Guthrie, and C. M. Busbee for defendants.

(264) AVERY, J. Both appeals have been brought up unnecessarily, if not prematurely, and neither of them will be sustained by this Court.

Upon the finding by the judge below of the fact that the defendant railroad company was not trespassing upon the strip 32 feet wide, extending along the original right of way, which the plaintiff claimed was lawfully condemned, under the provisions of its charter, or is held by prescription or dedication by them as a street, the company has constructed and is operating its new track along what is known as Peabody Street, as originally projected, and can therefore afford to await the finding by the jury, in the exercise of their proper functions, of all of the facts material to a decision of the issues of law involved in the action. Meantime the questions whether a grant can be presumed

against the company, under a just construction of section 150 of the Code, or whether the land had been dedicated to public use or lawfully condemned, or whether an easement has been acquired in it by estoppel, will remain, as they are, open for discussion and decision.

On the other hand, the order continuing the injunction in force to the hearing as to the 32 feet described must be sustained, though we will not attempt, in the face of the conflicting testimony, to extend its operations beyond the boundary line marked by his Honor in the hearing below. This Court has repeatedly refused to dissolve injunctions till the hearing, when it appeared from the pleadings or affidavits offered that there was a serious dispute about the facts, and doubts as to the right to extraordinary relief. *Whitaker v. Hill,* 96 N. C., 2; *Caldwell v. Stirewalt,* 100 N. C., 205. When the facts shall have been ascertained in the usual way, the injunction may be either dissolved or made perpetual.

The plaintiff may or may not satisfy a jury by preponderance of testimony of the truth of the allegations upon which its right to the easement depends, and which would lead to the conclusion (265) that the street, properly located, includes a sidetrack constructed by the defendant, and thus show the defendant to be a trespasser. After a second hearing, the judge of the district has adhered to his findings of fact, on the proofs before him, that the new sidetrack is not on the territory that he finds to be covered by the alleged condemnation proceedings; and until a jury shall have found the facts differently, we will proceed upon the idea that his Honor's conclusions of fact were correct. The motions were heard on *ex parte* affidavits, and it is more proper, when we can, in such cases, without injustice to the parties, withhold our opinion as to the facts, to await the action of a jury upon issues submitted to them.

The cause will be remanded, to the end that the facts be ascertained by a jury.

Remanded.

Cited: Moore v. Sugg, 112 N. C., 235; *R. R. v. Mining Co., ib.,* 663; *Jones v. Buxton,* 121 N. C., 286.

HERMAN R. BALTZER AND WILLIAM G. TAAKS v. THE STATE OF NORTH CAROLINA.

Jurisdiction—Claim Against the State Constitution.

1. The jurisdiction conferred upon the Supreme Court by Art. IV, sec. 9, of the Constitution to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, who may provide for the judgment of the claims, if it sees proper to do so.

2. The amendment incorporated into Art. I, sec. 6, of the Constitution in 1880, prohibiting the General Assembly from paying, or assuming to pay, directly or indirectly, any debt incurred by authority of the Convention of 1868, or by the Legislature at the special session of that year, or of the regular session of 1868-69, and 1869-70, took away the jurisdiction of the Supreme Court, under Art. IV, sec. 9, to hear claims against the State, founded upon obligations alleged to have been incurred by the State by virtue of ordinances and statutes passed within the prescribed time.

3. This amendment to the Constitution of North Carolina does not conflict with the Constitution of the United States.

4. The bonds issued by the State of North Carolina in aid of the Chatham Railroad Company, pursuant to the provisions of ch. 14, Laws 1868, were null and void.

(266) ACTION brought in the Supreme Court, under Article IV, section 9, of the Constitution, to establish an alleged claim of the plaintiffs against the State and have the value of certain bonds appropriated to its satisfaction. The cause was argued at the last term, but the opinion was not announced until the present term.

The case developed by the pleadings is substantially as follows:

"The Chatham Railroad Company" was a corporation organized under and in pursuance of the statute (Private Laws 1860-61, ch. 129), and the name thereof was afterwards changed by the statute (Laws 1871-72, ch. 11) to that of "The Raleigh and Augusta Air Line Railroad Company." But before this change of name the statute (Laws 1863, ch. 14) provided, in favor of this company, as follows:

"The General Assembly of North Carolina do enact:

"SECTION 1. That, to enable the Chatham Railroad Company to finish their road, the Public Treasurer is hereby authorized and directed to deliver to the president of the said railroad company the coupon bonds of the State of one thousand dollars ($1,000) each, to an amount (267) not exceeding two million dollars ($2,000,000), signed by the Governor, countersigned by the Public Treasurer and sealed with the great seal of the State, bearing six per cent interest, the principal

payable at the end of thirty years from the date thereof, and the coupons of interest payable semi-annually, in such form as the Public Treasurer may direct; principal and interest payable at such time and place as he may prescribe.

"SEC. 2. Before the Public Treasurer shall deliver any of the said bonds hereby authorized, the president of said Chatham Railroad Company shall deposit with the Public Treasurer the coupon bonds of the company signed by him and sealed with the company's seal, for the same amount and bearing the same interest and date, the principal and coupons payable at the same time and place as those of the State hereinbefore directed to be issued and paid over to said company; and to secure the same, principal and interest, of said bonds issued by the company, the State of North Carolina shall have by this act a lien upon all the estate of the same, real or personal, which they may now have or may hereafter acquire, between the point of intersection with the Western Railroad and the South Carolina State line, including that at both points, together with all rights, franchises and powers thereto belonging or that may hereafter belong to said company, in respect to that portion of the line, which lien shall be more effectually secured by a first mortgage executed by said company to the State and registered in the register's office in the county of Wake and in the office of the Secretary of State; and in case of failure of said company to pay the semi-annual interest on their bonds for twenty-four months after such interest shall become due, or to pay the principal on said bonds for twelve months after their maturity, the Board of Internal Improvements, for and in behalf of the State, may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale, so as to protect the State.

"SEC. 3. The Chatham Railroad Company may at any time (268) before maturity discharge the bonds of said company deposited with the Public Treasurer by substituting in lieu thereof coupon bonds of the State, or other indebtedness of the State, or payment in national currency."

The State bonds thus authorized were issued and delivered to the railroad company mentioned, and this company executed and delivered to the Public Treasurer for the State its first-mortgage bonds for the like amount, and executed its first mortgage to secure the same, as contemplated by the statute just recited, which was duly registered, for the purpose therein specified.

Afterwards, in the course of business, the plaintiffs became the owners of 140 State bonds so issued, receiving the same from a party who bought from them the iron for the railroad of the railroad company mentioned,

which iron was placed upon their road. It was conceded that these bonds and all the State bonds so issued were unwarranted by the Constitution of this State and are void.

Afterwards the plaintiffs brought their action in the Circuit Court of the United States to compel the party from whom they received the bonds last mentioned (the railroad company and others) to pay them for the iron so supplied by them. This action was determined adversely to them in the Circuit and Supreme Courts of the United States. (See *Baltzer v. R. R.*, 115 U. S. R., 634.)

About 15 August, 1873, as allowed by the third section of the statute above recited and other statutory provisions afterwards enacted, the railroad company surrendered to the Public Treasurer of the State 1,703 of the invalid State bonds so received by it, and in place of the balance of the 2,000 of them so received by it, it delivered to the Public Treasurer 297 valid bonds of the State, each of the denomination of

(269) $1,000, which last mentioned bonds were burned by the authorities of the State, as was done ordinarily with such bonds when discharged. The defendant alleges that the plaintiffs had full notice of the surrender of the State bonds to its Treasurer, and of the first-mortgage bonds to the railroad company, and might have interfered and set up opposition then to his claim, but failed to do so, etc.

The plaintiffs, among other things, allege in the complaint as follows:

"18. And these plaintiffs further state, upon information and belief, that the said 297 valid coupon bonds of the State thus deposited are a trust for the benefit of the holders of said 297 high-numbered bonds, and are not and never have been the property of the said State, and that the said State is in no way entitled to the use and benefit thereof, but said State holds them only as a trust for those who advanced the consideration upon the faith of the validity of the said high-numbered bonds, and that it received the said valid bonds and held them subject to the trust, as aforesaid, and that they are in fact the property of these plaintiffs and of other holders of outstanding high-numbered bonds, and that said State has no right, title or claim thereto.

"19. And these plaintiffs further state, upon information and belief, that the said State has obtained and holds the said valid State bonds, deposited with it in the aforesaid exchanges and substitution, without parting with any value whatever, other than the original issues of high-numbered bonds claimed to be invalid, as aforesaid, and that the State has at all times declined to acknowledge the validity of the said high-numbered State bonds, and still continues to so decline, and that the said deposit is, in law and equity, a deposit of the said valid State bonds in trust for the benefit of the plaintiffs and the other holders of the

said high-numbered State bonds, and that the said State is accountable to these plaintiffs for their *pro rata* share of the valid bonds thus as aforesaid deposited." (270)

The defendant alleges numerous grounds of defense. The pleadings are very voluminous, but the above statement is sufficiently full for the purpose of a proper understanding of the opinion of the Court.

Before the argument began, the counsel for the State moved "to dismiss the action and claim of plaintiffs, upon the ground that this Court has no jurisdiction of the subject-matter of the action."

T. C. Fuller and F. Kingsbury Curtis for plaintiffs.
The Attorney-General and C. M. Busbee for defendant.

MERRIMON, J., after stating the case: The Constitution (Art. IV, sec. 9) provides that "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory. No process in the nature of execution shall issue thereon. They shall be reported to the next session of the General Assembly for its action." This provision constituted part of the Constitution as established in 1868, and gives this Court such jurisdiction, generally, of claims against the State. It was afterwards, in the year 1880, modified by an amendment of the Constitution (Art. I, sec. 6), which provides, among other things, as follows "Nor shall the General Assembly assume, or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at the special session of the year one thousand eight hundred and sixty-eight or at its regular session of the year one thousand eight hundred and sixty-eight, one thousand eight hun- (271) dred and sixty-nine, and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debts of the State, unless the proposition to pay the same shall have first been submitted to the people, and by them ratified by a vote of all the qualified voters of the State at a regular election held for that purpose."

This amendatory clause was interpreted by this Court in *Horne v. State,* 84 N. C., 362, in which it was held that the Court's jurisdiction of claims against the State was so abridged as that it did not thereafter have jurisdiction of the class of claims coming within the inhibition of the clause above recited. The ground of that decision is, that inasmuch as the General Assembly was prohibited by the Constitution "to assume

or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond of the class specified," it would be an act of supererogation, an act obnoxious to the charge of presumption for this Court, in the face of the unmistakable will of the people, declared in the organic law of the land, to recommend to the Legislature the payment of this claim. That case was well considered, and it seems to us that it is in entire harmony with the spirit and effect of the clause of the Constitution interpreted, and, indeed, a necessary consequence growing out of it. It would be idle, futile and ridiculous for this Court to declare and adjudge the validity of a claim against the State, and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim. The obvious purpose of the jurisdiction so conferred was to have the Court settle and adjudge the legal validity of claims, to the end the Legislature may provide for their payment. But wherefore adjudge that a claim is valid if the Legislature cannot provide for its payment? The purpose and the jurisdic-
(272) tion are swept away by the amendment mentioned as to the claims embraced by it.

If, then, the claim of the plaintiffs comes within the inhibition last mentioned of the Constitution the Court has not jurisdiction of it, and the motion of the counsel of the State to dismiss the action must be allowed. Does the claim come within that inhibition? We think it does, and for the reasons we will now proceed to state.

It was properly conceded that what purported to be two thousand bonds of the State, each of the denomination of one thousand dollars, issued and delivered to the Chatham Railroad Company, were nullities, and of themselves created no obligation upon the State to pay them, and that they come within the inhibitory clause of the Constitution mentioned. They are therefore not within the jurisdiction of the Court.

The plaintiffs, in the course of business, took and have 140 of such bonds, representing $140,000 and the interest due thereon. Their claim, however, as they contend, is not founded directly, if at all, upon them, but they contend that they were entitled in equity to have the money they represent paid to them out of the proceeds of the sale of the first-mortgage bonds of the railroad company deposited with the State to indemnify it against loss, if it should have to pay the invalid bonds. They contend, further, that inasmuch as the railroad company returned to the State its invalid bonds mentioned, except 297 of them—and as to these, it paid to the State in lieu of them their face value in other valid bonds of the State, which the State received and burned in the course of its practice as to its bonds paid and discharged; and inasmuch

as thereupon the State returned and surrendered to the railroad company its first-mortgage bonds mentioned, they are entitled to have the State pay the money so due them. They insist that the State paid nothing for its valid bonds, to the amount of $297,000 paid to it by the railroad company in lieu of the first-mortgage bonds of the same (273) amount, and in substitution for 297 of the State's invalid bonds mentioned, not surrendered; that the State so received its valid bonds, as and in contemplation of law they constituted a trust fund for the benefit of its holders of the outstanding 297 invalid bonds.

We express no opinion as to the correctness of this contention of the plaintiffs. Whatever may be their equitable rights, we think it clear that the State did not intend to receive its valid bonds in lieu of its invalid ones and in substitution of the same amount of the first-mortgage bonds of the railroad company, and *to hold and treat them as a trust fund for the plaintiff* and others having like claims. There is neither statute nor other legislative declaration showing such purpose, in terms or by reasonable implication. The contrary appears. At the time the valid bonds were so received by the State there prevailed great public confusion and financial distrust, growing out of disorders resulting from the late Civil War and the notoriously reckless and fraudulent legislation of the years 1868 and 1869. We know this, from the clear history of that time in this State, as well as from enactments of the Legislatures themselves. The valid bonds of the State had no settled value; they were sold in the market for prices purely speculative. In such time of public distress and discontent no one could foresee when or how the valid debt of the State could be paid; no one expected that its void bonds, many of them tainted with the grossest fraud, would be paid at all.

While the State, through its constituted authorities, soon after their issue, regarded and treated the bonds issued to the Chatham Railroad Company as invalid, it was apprehended, not unreasonably, that they might be purchased innocently, in some instances, in the course of business, at some price, and in other instances by mere specu- (274) lators in the markets, who would insist upon their validity and payment, and that the State would be greatly annoyed and harassed in a variety of ways, putting it to great trouble and expense to defend itself against such unfounded claims. In view of this state of things, the valid bonds were so received, not for the purpose of paying, directly or indirectly, the invalid ones, but to indemnify the State against cost and expenditure incurred in resisting them. Hence the valid bonds were treated as the absolute property of the State and burned, having served their final purpose. The intention was not to provide a fund to pay the invalid bonds, but to guard against them ever thereafter.

In view of such purpose, can there be a reasonable doubt that the inhibitory clause of the Constitution under consideration was intended to embrace not only the invalid bonds themselves, but as well and certainly every claim and liability, legal or equitable, founded upon, growing out of, or substituted for them? In view of that purpose, if the General Assembly should pass an act providing for the payment of the plaintiffs' claim, would not such an act, in legal contemplation and effect, provide for such indirect payment of the invalid bonds held by the plaintiffs as is prohibited? Can it be that the inhibition intends to leave the General Assembly at liberty to provide for the payment of the equitable claims substituted for the invalid ones held by the plaintiffs? Can this be, in the absence of any provision to that effect, and the further fact that the State disposed of, surrendered, the first-mortgage bonds of the railroad company and treated as its own property its valid bonds substituted for them, as to which the plaintiffs' alleged equity arises? We think not. The purpose of the inhibitory clause is very comprehensive; it contains but a single exceptive provision, and that is in express terms. The terms employed in it are as broad
(275) and sweeping as they can be. The language is: "Nor shall the General Assembly *assume or pay* or authorize the collection of any tax to pay, either *directly or indirectly, expressed or implied,* any debt or bond incurred or issued," etc. By the terms "any debt," so employed, is not meant a *debt* in the technical sense, as to form and character, but, in a general sense, that of any liability *incurred* to pay money to a party claiming it—that of a claim. Now, if the plaintiffs' claim—their debt, in a general sense—exists and is well founded, and the State is liable for it—is bound in equity or otherwise to pay it—such liability was incurred by the General Assembly in 1868, because the contract constituting the groundwork of it, and out of which it springs, was then concluded and made effectual. The statute cited, authorizing the exchange of bonds between the State and the railroad company, was enacted in August of that year; the exchange was made and the liability now insisted on was incurred then, if at all.

The studied comprehensiveness of the inhibition further appears from the other words, "to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued," etc.—that is, such debts or bonds shall not be paid *as such,* nor shall they be paid in any way, "indirectly," as under the guise or semblance of another debt or bond, or transaction, or any other substituted liability or obligation growing out of the debt or bond, or arising otherwise, whether such indirect payment be "expressed" in terms or in any way "implied." The comprehensive purpose is to prohibit and prevent the payment of the debts

and bonds referred to in any possible way, unless with the sanction of the people, expressed by a majority of the qualified voters of the State.

It is no sufficient answer to what has been said to say that the plaintiffs do not ask the State to pay its invalid bonds held by them—that they only ask it to pay their *claim,* on the ground that it is properly chargeable *in equity* for their benefit, with its valid bonds, (276) which it received from the railroad company, as above explained, in lieu of part of its invalid bonds, and in place of part of that company's first-mortgage bonds, all of which were improperly surrendered to it by the State, and out of which they were entitled to have their claim satisfied, as they contend. This argument is without force, because, as we have already seen, the State held and treated the first-mortgage bonds of the company as for its sole benefit; surrendered them to the company, receiving in lieu for them part of its invalid bonds and certain of its valid bonds, which latter it held and treated as its absolute property and burned them, thus clearly showing that it did not recognize its liability in any way to pay the plaintiffs' claim or any claim like it. In pursuance of its agreement with the railroad company, it received and intended to receive its valid bonds in the place of its invalid ones. To pay the valid ones thus received would, it seems to us, in contemplation of the inhibitory clause under consideration, be to pay, indirectly, the invalid ones they represent, whether the purpose be expressed or implied. We cannot doubt that the purpose is to forbid and prevent such payment; hence, without reference to the merits of the plaintiffs' claim, in any aspect of it, this Court has not jurisdiction thereof.

It was contended in the argument that the inhibitory clause of the Constitution which we have applied is inoperative and void as to the plaintiffs, because it denies and destroys their remedy, and was therefore in conflict with the Constitution of the United States.

This contention is unfounded. Parties cannot sue or have their action against the State, except as the same may be allowed by the Constitution or statute, and they must accept or have their judicial remedy only in the cases and as to the matters and causes of action prescribed.

The remedy prescribed and allowed by the Constitution (Art. (277) IV, sec. 9), invoked by the plaintiffs, is not a judicial remedy in any proper sense. This Court has, by virtue of this provision, jurisdiction "to hear claims," but its decisions as to them are not conclusive—are "merely recommendatory." No process, final or otherwise, can be issued upon them. The Court has no authority to enforce them in any way. The simple purpose is to have the Court decide that such claims are legal, or illegal, in proper cases.

This Court decided in *Horne v. State,* cited *supra,* that an abridgement of its jurisdiction as to claims against the State, even after the suit had been brought, was not inhibited by the Constitution of the United States. That case followed and cited with approval *R. R. v. Tennessee,* 101 U. S., 337; *R. R. v. Alabama, ib.,* 832—both these cases being almost directly in point.

We think we ought to add that if the facts are, as they appear strongly in the pleadings, indeed such, the plaintiffs' claim, as against some party, is one of real merit. They supplied the iron now on the railroad of the railroad company mentioned, and it seems that they have been paid but a small part of the large sum of money it cost them. We do not mean to intimate that the State is liable, legally or otherwise, for their debt, but surely some party ought to pay it.

The motion to dismiss the claim must be allowed.

Action dismissed.

Cited: Baltzer v. State, 109 N. C., 188; *Garner v. Worth,* 122 N. C., 253.

Affirmed on Writ of Error, 161 U. S., 240.

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S. S. ALSOP v. THE SOUTHERN EXPRESS COMPANY.

Penalty—Common Carrier—Express Companies—Statute—Reasonable Regulations—Consignor and Consignee.

1. Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock p. m., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock each day. *Held,* that a regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed, would not protect the company in an action brought to recover a penalty incurred by violation of the statute (Code, sec. 1964) requiring all transportation companies to receive goods of the kind and nature usually transported by them whenever tendered.

2. The words "under existing laws," in the subsequent clause of the statute referred to, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines.

3. The words "whenever tendered" can only be qualified by supplying the elipsis, "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made."

4. Where the company relies upon the defense that the tender was not made during business hours, it is within the exclusive province of the jury, looking to the customs of business men at the place of tender, to determine whether it was made within such hours.

5. Railroad companies are compellable by law to admit the agents of express companies, with their safes, on their trains.

6. Express companies are required to deliver money or goods transported by them as soon as practicable after they reach their destination, within business hours, at the residence or place of business of the consignee, or such other place as he may designate within reasonable distance of the station where they are received.

7. If no statute had been passed, the courts could not, considering the difference in the relation of carriers and their customers two hundred years ago and a consignor and express company of the present day, hold that a regulation requiring one who comes to a station to ship money by invitation should be subjected to the risk of guarding his money during the night, was reasonable, when the responsibility of the company, as consignee, renders it essential to make preparations for the safety of money and valuable packages received and held as consignees, with the liability of carriers.

APPEAL from a justice of the peace in an action to recover a (279) penalty of fifty dollars, under the provision of sec. 1964 of the Code, tried at Spring Term, 1889, of HALIFAX, before *MacRae, J.*, on the following case agreed:

1. The defendant is a common carrier and transportation company, duly chartered and doing business in the State of North Carolina.

2. That on 9 January, 1889, the plaintiff tendered to the defendant's agent at Halifax (a regular station on the Wilmington and Weldon Railroad Company's line, from which the defendant company shipped freight by express), whose duty it was to receive freight and money at said station for shipment, the sum of $70, in money, for shipment by said company to Battleboro, a station at which there was an express office and agent, and the agent declined to receive the same on said day.

3. The defendant company, by virtue of their charter, were regular carriers, engaged in the transportation of money and other articles by express.

4. That when said money was tendered, for shipment, to the defendant's agent, he informed the plaintiff that he could not receive it for shipment on that day; that an order had been issued a few days previous from the superintendent of the company, directing agents not to receive money for shipment by express unless the same was tendered prior to the arrival and departure of the train going in the direction of the point of destination on which the company shipped such articles.

5. That the said money was tendered to the agent for shipment (280)

after the departure of the train for Battleboro, and that the agent informed the plaintiff that he would receive said money on the following morning and transport it to its destination.

6. That there was only one train passing Halifax, going towards Battleboro, during the day of tender, on and by which the defendant transported express.

7. That said money was received for shipment two days thereafter, and shipped by defendant to its destination.

8. That the notice to the agents of the company not to receive shipments of money unless tendered prior to the departure of the train, was sent out in the form of a circular letter to the agents, and that the public had not been notified of such notice, nor did the plaintiff know of such regulation until so informed by the agent.

9. That the train for Battleboro left Halifax at 12:55 P. M., and said money was tendered at 2 P. M. on said 9 January.

On the foregoing facts agreed, it was considered by the court that the defendant is a transportation company within the meaning of sec. 1964 of the Code, and that money was an article of the nature and kind received by such company for transportation.

It was further considered that said company might receive money for the transportation under reasonable regulations as to the time during the day when it would receive the same, and that it was reasonable to require that money tendered for transportation to said company should be tendered before the arrival and departure of the train on which the same was to be transported.

(281) Judgment against the plaintiff, from which he appealed.

R. O. Burton for plaintiff.
W. H. Day for defendant.

AVERY, J., after stating the facts: This controversy depends upon the construction given to sec. 1964 of the Code, which is as follows: "Agents or other officers of railroads and *other transportation companies,* whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, *whenever tendered at a regular depot,* station, wharf or boat-landing, and shall forward the same by the route selected by the person, *tendering the freight under existing laws,* and the transportation company represented by any person refusing to receive such freight, shall be liable to a penalty of $50, and each article refused shall constitute a separate offense.

The plaintiff tendered to the defendant's agent at Halifax (a regular station on the Wilmington and Weldon Railroad line, from which the

defendant company shipped freight and money) $70 in money for shipment to Battleboro, another station on said line of railway, at which the defendant company had an office and an agent, and the agent refused to receive it, because the company had ordered its agents not to receive money except on the same day prior to the arrival and departure of trains going in the direction of the point to which the shipment was destined. The tender was made at 2 o'clock P. M., and a train carrying express freight had passed at 12:55 P. M. on the same day. According to the schedule, the next train, by which the defendant shipped money and freight, would pass on the next day at 12:55 P. M.

If the parties had not so agreed, the law would have determined, that money was an article of the nature and kind usually received by express companies for transportation, and, moreover, that (282) it was the peculiar business of corporations of this character to carry money and small but valuable packages. *Express Co. v. R. R.*, 5 Myers Fed. Dec., sec. 1511. While express companies, as declared by *Justice Miller* (*Express Co. v. R. R.*), do not carry bulky freight, it is not the business of railway companies to carry money, and the latter cannot be held liable for its loss, while being transported in the trunk of a passenger, beyond the amount which a prudent man would deem proper and necessary for traveling expenses. *Jordan v. R. R.*, 5 Cush., 69. So it is peculiarly the business of express companies to carry and collect money along the lines of our railways.

The meaning of the portion of sec. 1964 of the Code, that is material to the settlement of this controversy, could not be plainer; if by dispensing with verbiage that is unnecessary, because applicable to other corporations, it should be summarized thus: "Agents or officers of express companies shall receive money, *whenever tendered* for shipment at a regular station, where such companies have agents and are accustomed to receive goods for transportation." If we adopt this fair and reasonable interpretation of the language of the law, it would only remain for the Court to decide whether the regulation with regard to the hours of business is reasonable, and one that would be sustained as within the purview of the powers of the company.

When we had banks issuing bills under charters granted by the State, they were required to redeem their bills when tendered with gold or silver coin, but the courts construed the requirement to mean when offered for redemption within such business hours as the banks had a right to prescribe. But it has been held these hours must be reasonable and adapted to the peculiar nature of the business that the corporation is transacting with the public in general. In *Marshall v. Express Co.*, 7 Wis., 1, the Court held that though a bank might pre- (283)

scribe hours of business from 9 o'clock A. M. to 4 o'clock P. M., yet they could not compel an express company to conform strictly to such hours in the delivery of money, and that a tender to the bank of money packages at 5 o'clock P. M. would be good if the jury found that a reasonable hour for making it. In the same case, the Court says further: "It was therefore, very proper for parties to prove, and the *jury to consider,* the usual mode of doing the particular business in question (that of receiving and forwarding packages by express) in reference to the time of the arrival and departure of trains, with which the consignor, consignee and carrier in this case are shown to be familiar. Because notes due the bank on a particular day must be paid before the usual hour of closing the bank on that day it by no means follows that a mechanic making repairs on its building must quit work at that time, or that he must present his bill within the prescribed period." While granting the power of the banks to make reasonable regulations, generally, they could say further, "the rules prescribed and the hours of business designated must be reasonable and adapted to the exigencies of the particular business in reference to which they are established." Such was the view of the common law, presented with irresistible force and great clearness by the learned judge who delivered this opinion, now cited as a leading case, upon the right to establish hours of business, and upon the question, whether, when prescribed, the law will enforce conformity to them, as reasonable, on the part of other persons and corporations dealing with the framers of such regulations.

It will be noted that the Court there held that a tender at a reasonable hour, and a refusal to receive by the bank, relieved an express company of the responsibility of insurers, and changed their relation to the bank to that of a mere mandatory, liable for gross negligence
(284) only, though the teller of the bank to whom the money was offered declared that his bank had a regulation as to hours, and refused to receive it because of such rule, and because the cashier was absent and had the key to the safe. But in the fact of a statute requiring them to receive money "whenever tendered," the defendant company's agent should not be allowed to meet the plaintiff, who comes to deal with him by invitation, and decline to receive his money for shipment, because of a regulation of his company, declared reasonable "under existing law." Such a rule would enable a defendant company, by late receipts and speedy delivery, to rid itself of the responsibility and reap rewards of its work with the minimum of risk at both ends of the line.

It is clearly a question for the jury, under the instructions of the court, in cases like this at bar, as it was in that, to determine, whether

looking to the custom of business men generally, at the particular place (here, Halifax) as to hours of repose and times of taking meals, the tender (at 2 o'clock P. M.) was made at a reasonable hour. The most liberal construction would not allow the courts to limit the operation of the words "whenever tendered" by supplying any other ellipses after them than "within the usual hours adopted by the public for the transaction of such business, at the place where the tender is made." This rule avoids the inconvenience of offers of goods at midnight or at meal-time, while it steers clear of the other extreme of neutralizing the force of the whole enactment, by holding that the words "under existing laws," in the next clause of the section, limits the time of tender as well as of forwarding, and that the old common law governing the receipt of goods by boats and wagons still exists and is applicable today to these gigantic corporations.

The study of the several statutes relating to the receipt and shipment of goods by corporations will shed further light upon the legislative intent in enacting sec. 1964 of the Code. By the act of 1871-72, chap. 138, sec. 35 (Code, sec. 1963), it was prescribed (285) that railroad companies should furnish sufficient accommodations for such freights and passengers as should, "within a reasonable time previous thereto, be offered for transportation," and should be liable in damages to the party aggrieved for neglect or refusal to provide such means of transportation. Subsequently, the Legislature seems to have realized that the requirement to furnish accommodations within a reasonable time was but a reaffirmance of the common law (leaving the courts to say what time was reasonable), and therefore, passed the Act of 1874-75 (Code, sec. 1766), fixing the limit of delay in shipment at five days after delivery by the consignor. This law was pronounced constitutional in *Branch v. R. R.*, 77 N. C., 347, and railroad companies were held liable for the penalty for delay in shipping freight, as prescribed in that section. Then it was (when the opinion was rendered in *Branch v. R. R.*, in the year 1877) that the discussion arose as to the right of a consignor to compel a railway corporation to receive freight when offered for shipment and store it in its warehouse till cars could be procured to transport it.

The act of 1879 (Code, sec. 1964) was passed to meet the suggestion that the ancient principle, laid down as applicable to the cumbrous old conveyances two hundred years ago, still survived and conferred on the railroad companies the power to compel the shipper to camp with his wagon at the station and guard his goods till the last hour of time fixed by law, and receive them only when the train was on the eve of departure. But the statute was so drawn as to include not only com-

panies and steamboat lines under the general description, but also "other transportation companies whose duty it is to receive freight," and to require them to receive "all articles of the nature and kind re-
(286) ceived by such company for transportation, whenever tendered," thus plainly indicating a purpose to include express companies, because they claimed the exclusive right to transport money and goods of certain kinds.

The manifest intent of the Legislature was to force all corporations coming under the description in the statute to take goods, when offered for shipment at a regular station, with the full measure of liability growing out of its custody, even if they should not be shipped till near the expiration of the five days, and then *forward* them *under existing laws*, fixing the legal relations of consignor and consignee, and the duties and liability of the carrier company and its connecting lines. Evidently the evil intended to be remedied was the refusal to take goods or money immediately, when offered for shipment to an agent of one of these companies, and the history of the legislation in aid of shippers but adds emphasis to the unmistakable expression of this purpose.

But the interpretation contended for, that the words, "under existing laws," should be construed as qualifying the words "whenever tendered," instead of the word "forward" only, would lead—if the common law is correctly interpreted by defendant's counsel in connection with the statute—to the strange conclusion that the obligation of an express company to receive money tendered for shipment remains now just what it was before the act of 1879, and the company can, under regulations declared reasonable by the courts, still fix the hour of receipt, just as it was before, and thus render nugatory by their rules the provision of the law imposing a penalty. Railway companies are inseparably connected with other transportation companies in the act, and therefore it is just as competent for the courts to declare a regulation that compels a consignor to hold his cotton in his wagon for four days, awaiting the arrival of freight cars, to be reasonable and lawful as one that forces a person to retain and guard his money till before the departure
(287) of a train on the next day. If it is unlawful to force one of these corporations to place in its office or warehouse goods of the nature that it is accustomed to carry, in violation of its regulations, because of the liability incident to its receipt, the rule must apply equally to all others comprehended under the description contained in the section, and clothe all with the power to repeal or modify the law by such reasonable rules as would prove sufficient to obviate the penalty.

But it is further contended that if the companies comprehended under the section in question do not formulate any rules to govern their

agents in the receipt of freight, the principles of the common law would apply to them. And thus, under this view, the same satisfactory result would be reached by the defendant, if it be held that the law of today, applicable to this new species of transportation agency, which permeates the world with its officers and agents, everywhere delivering money, jewels and other valuable goods, is the same that governed the receipt of packages by a carrying cart in the time of Bracton, or the tender of goods to a vessel sailing from Liverpool two hundred years ago.

If, for the sake of argument, it be admitted that the General Assembly meant to inaugurate no change, but simply to publish the vain and empty declaration that transportation companies would hereafter, just as heretofore, receive freight under "existing laws," and consequently under any regulation made by the companies and adjudged reasonable by the courts, would it follow that the courts would declare the rule under which a wagoner engaged in carrying goods could compel his customer to wait till the horses should be hitched reasonable and applicable to express companies? The result of giving the sanction of the court to such a rule would be that these companies could induce an individual, by inviting his patronage, to come to one of their regular stations to entrust his money to their care, and then compel him to stand guard over his treasure a whole night in order to protect the (288) company from a risk that it can better afford to incur than the customer. But in order to a proper discussion of this view of the subject it is necessary to understand that the nature, powers and liabilities of express companies have been defined by the courts.

An express company is a species of common carrier to which have been accorded privileges, and which, from the nature of its business, incurs great responsibility. These companies originated in the necessity, when the growing commerce of the world began to be conducted through the agency of railroads and steamboats, for securing the safe carriage and speedy delivery of small but valuable packages of goods and money. *Witbreck v. Holland,* 45 N. Y., 13; 7 A. & E., 781-784; 5 Meyers Fed. Dec. Carriers, sec. 1511. They are essentially different from railway companies, not only in the fact that the latter carry more bulky freight, but they collect money and do other things, that would be held *ultra vires* if attempted by a railroad company. 5 Myers Fed. Dec. "Carriers," 1509. It has been held that a railroad company could not refuse to carry for an express company, according to the peculiar methods of their business, and would be compelled by the courts to admit the messengers of all these companies to its cars with its safes on equal terms, and without inspection of their safes. 5 Myers Fed. Dec. Carriers, sec. 1508; *ib.*, sec. 1519. If a railroad company engage in these branches of the

express business, authorized by their charters, they must not deny to express companies equal privileges with themselves as to that business. 5 Myers Fed. Dec. Carriers, sec. 1508; *ib.* secs. 1515 to 1521; *Gomblos v. Philadelphia, etc.,* 9 Phil., 411; *Ex. Co. v. Texas,* 6 Fed., 426; *Messenger v. R. R.,* 18 Am. R., 754; *Express Co. v. R. R.,* 3 Am. & En. R. Cases, 594.

(289) Apart from the construction of our statute, it is the duty of the express companies to receive all goods offered for transportation, upon the payment or tender of their charges, but prepayment will be considered waived if not demanded. *Nav. Co. v. Bank,* 6 Howard, 344. They are required, too, to have adequate facilities within a reasonable time, and cannot be exonerated for delay on account of increased expense, though not foreseen and not entirely unreasonable. *Condiet v. R. R.,* 54 N. Y., 500. An express company could, in the absence of a statutory requirement, refuse goods on account of an unusual rush of business, especially when the goods offered for transportation are of a perishable nature. Hare on Contracts, 155. But these are the rules without reference to any such enactment as that before us for construction.

When goods are received by an express company without any special or valid contract limiting its liability, it insures the safe and speedy personal delivery of the articles received at the place of destination, if on its route, or, if not, then at the end of its route. *Witbreck v. Holland,* 45 N. Y., 13; Bishop on Con., secs. 432, 591, 596. Even if the goods are placed in a warehouse, if not shipped immediately the liability as insurers begins on the receipt for them. 7 A. & E., 546, 558. A high degree of care is required of an express company in the delivery of goods. They must deliver them as soon as practicable after they reach their destination, within business hours, to the consignee at his residence or place of business, unless he authorize or direct delivery to be made at some other place within reasonable distance of the station. *Marshall v. Ex. Co., supra; Witbeck v. Holland,* 45 N. Y., 13. After the consignee receives notice from the company of the arrival of his goods, he is not bound to call at the office for them, but need only notify the company of his residence, place of business, or where he may

(290) be found, and the liability of the company as insurers remains till delivery, or tender of the goods, at the place designated, within business hours, and failure by consignee to receive or pay charges. *Witbreck v. Holland,* Pr. (N. Y.), 273; 7 A. & E., pp. 567 to 570. If in the interim between its arrival at its destination and the delivery, as the law requires, a package of money should be stolen from the agent, the company would be liable to the consignee. Supposing that a friend

had sent by express one thousand dollars from Battleboro to the plaintiff Alsop at Halifax, and the latter lived several miles out of the town, we can readily see that it might require more than twenty-four hours for the company to rid itself of liability as a common carrier, and meanwhile it would be strangely negligent if it failed to provide a safe for the security of valuable property and money received for its customer and held as an insurer.

With this review of the relation that the defendant sustains to the public, under other circumstances necessitating the provision at all offices where money is received of the means to make it safe and secure from thieves till delivery, it is submitted, that if the court is to determine (leaving the statute out of view) whether a citizen, who comes from the country unprepared to protect his property, shall be required, rather than a company provided with safes, servants and secure rooms, to incur the risk of the custody of a sum of money, it should be guided by reason and look to the situation of the parties and the preparation that the law intends shall have been made by each or either for assuming the responsibility. Experience has shown that the principles of the common law are pliable, and a few fundamental rules have been expanded so as to furnish the basis of important branches of the law governing us at this day. This is notably true as to corporations. But while the ancient landmarks of the law are worthy of veneration, and should be examined with conservative care in determining how they meet the exigencies of a progressive age, we should not be (291) so subservient to precedent as to blindly follow it when no longer sustained by reason. It strains the faith of the young student when he attempts to follow *Lord Coke* in his discoveries of all the hidden diversities in the text of *Lord Lyttleton,* and when we profess to find, in the mouldy black-letter volumes of past centuries, a principle that, with prophetic ken, was formulated to meet and solve a problem arising out of the adjustment of the relations between the people and one of the greatest and most useful corporations in the world, we must, if we would avoid shocking the common sense of mankind, find a rule founded on reason. The fact that a captain and crew of a vessel, according to the English authorities, had the right, in 13 William III, to refuse to receive freight offered for shipment until the vessel was ready to sail, furnishes no analogy that can be safely applied to govern the relations of the plaintiff and defendant. The case of *Lane v. Cotton,* 1 Lord Raymond, heard at Easter Term, 13 William III, decided this principle, and is the only authority cited in Story on Bailments, sec. 508, to sustain the rule announced by the author.

It may have been just at that remote period to require the shipper, who had protected his goods on the way to the point of delivery, to con-

tinue his oversight over them rather than force a driver, whose attention was required to be devoted to the preparation for his journey, or the master of a vessel, who, with his crew, was engaged in repairing and inspecting it and laying in supplies for a voyage, to take them prematurely, for that would have made it requisite for them to prepare a place for storage, which they need not otherwise provide. But an express company, as we have seen incurs, from its nature, such liabilities as to require a place of storage at every station, so guarded as to insure the safety of property consigned to its care, and it is not unreas-
(292) onable to require the same care of money tendered for shipment during business hours. *Cessante ratione, cessat et ipsa lex.*

If therefore, the statute were not written in plain terms, and if the history of legislation on this and kindred subjects did not indicate that the manifest meaning of the language was what the Legislature intended to express, still we ought to bring this question to the touchstone of reason, based upon a broad view of the condition of the parties interested, and decided it as an original one—of the first impression—between a new and important public agency and a citizen, just as the English judges considered the question involved in *Mars v. Slue* (cited in *Lane v. Cotton, supra*), and bearing in mind that it is more just to impose a risk upon a body politic abundantly prepared to incur it, than upon an individual who has placed his goods in peril on the invitation of the corporation.

It is admitted that railroad companies have the power to provide different cars for excursionists, who purchase tickets at reduced rates, from those occupied by passengers paying more per mile, and, also, that they have the right to assign a separate car for colored people, as decided by this Court; but should our Legislature pass a law prohibiting, in plain terms, such discrimination, the courts would be compelled to enforce the law, if not pronounced unconstitutional. Such a law could not be ignored utterly in a discussion of these subjects after its passage.

It seems safe, therefore, to conclude that:

1. The first clause of sec. 1964 is in itself a full and complete expression of the legislative intent that goods shall be received *whenever tendered,* and that the language cannot, by any accepted rule of interpretation, be limited further than to require that the tender shall be made during hours that cannot be reasonably claimed, according to the
(293) usages of business men at the place of tender, for repose or for taking meals.

2. The words *"under existing laws"* can be construed to qualify the word "forward," and to mean that, at least when the law is applied to railroad companies, the goods shall be shipped within five running days

from delivery (as required by the Code, sec. 1966), and subject to the law fixing the relations of consignor and consignee, the carrier and its connecting lines, while the construction contended for would give the statute no effect, but leave the law as it was before its passage.

3. If no statute had been passed, the courts could not, when the relations of plaintiff and defendant were so widely different from those existing between the carrier of the last century and his customer, have declared that an express company could not be compelled to receive goods till the hour of shipment, in conformity to the ancient rule, or that the transportation company could arbitrarily determine, by regulations prescribed for the government of its agents, exactly how it would, *ex gratia,* or with a view entirely to its own convenience, allow a departure from the old rule by giving further time.

There is error, as the defendant did not rely affirmatively on the defense, or insist on a finding that the tender was made at a time other than in *business hours.* The judgment on the facts found must be for the plaintiff.

Error.

CLARK, J., concurring: At common law common carriers were under no compulsion to receive goods or freight till ready to ship the same. *Lane v. Cotton,* 1 Ld., Ray, 652. Nor, after acceptance of the goods for shipment, were they liable for delays if the goods were shipped within a reasonable time, and what was "a reasonable time" depended upon the facts and circumstances surrounding each particular case. These regulations sprang out of the former condition of things when (294) the modes of transportation were of a more primitive order. The law-making power in this State has modified the common law rule in both particulars.

In 1874-75 the Legislature enacted the statute, which is now sec. 1967 of the Code, making a delay of more than five days in shipping goods after accepting them *per se* unreasonable delay, and affixing a penalty of $25 for each days' delay beyond that limit. This act has been held constitutional, and has found judicial construction in several cases with which the profession is familiar. *Branch v. R. R.,* 77 N. C., 347; *Keeter v. R. R.,* 86 N. C., 346; *Branch v. R. R.,* 88 N. C., 570.

It still remained in the power of common carriers to nullify the Act of 1874-75, by exercising the common law right of not receiving goods till their own convenience should be suited or they should be in readiness to ship. For this reason, doubtless, the Legislature passed the act of 1879 (now Code, sec. 1964), which provides that "railroads and other transportation companies, whose duties it is to receive freights, shall

receive all articles of the nature and kind received by such company for transportation, *whenever tendered* at a regular station," etc.

The words "whenever tendered," upon a reasonable construction, signify "whenever tendered" in the ordinary business hours of such companies at the place of tender. If the object had been to prescribe merely the place where the tender should be made, the statute would have naturally read *"if* tendered at a regular station," etc. *"Whenever* tendered" has, clearly, reference to the time of tender and to the common law rule which gave the carrier the right to defer accepting goods till ready to ship. The regulation adopted by the defendant company that it will only receive packages each day just before the departure of the train going in the direction of the desired shipment is in direct
(295) conflict with the statute. To give it validity would enable transportation companies, by regulations adopted in their own interest and for their own convenience, to repeal an act of the Legislature passed in the interest of and for the convenience of the public. An analogous case is the decision in *Branch v. R. R.*, 88 N. C., 573, which held to be invalid a regulation "Goods to be shipped at the convenience of the company," which had been inserted by the defendant in its bills of lading, in hope of avoiding the penalties of sec. 1967.

It is our duty to give the statute such construction as will effectuate the legislative will. Should its execution, according to a fair and legitimate construction, impose any hardship upon transportation companies, the remedy is to be sought in a modification of the act by the Legislature, and not in its virtual repeal by judicial construction.

Error.

MERRIMON, C. J., dissenting: I do not concur in the opinion of the Court, and will state some of the grounds of my dissent.

The defendant is a common carrier of numerous kinds and classes of freights, including gold and silver, coined and uncoined, treasury notes, bank notes, public and private securities, gems, jewelry, and the like. It is not, however, such carrier of all kinds and classes of freights; it carries mainly such as require to be transported quickly, and, generally, such as are not very ponderous.

A leading and distinctive feature of its purpose is to transport and deliver such freights as it carries certainly, promptly and expeditiously. It is not a warehouseman or depository of freights of any kind; it simply and only receives the same for such transportation and it holds, or should hold them, for that purpose as short a time as practicable
(296) in the orderly course of business. In the nature of its business it is to be charged with freights for the purpose, and only for the purpose, of transportation and liabilities properly incident thereto.

It has the right to prescribe reasonable and appropriate rules and regulations not in contravention of law for the conduct of its business, having in view the safety, protection and preservation of freights carried by it, and, as well, the protection of itself against fraud, injury and undue risk and liability. It may require that shippers shall deliver their articles to be transported within a reasonable time next before in the order of business the same shall be put on the vehicle or other means of transportation—usually railroad cars—and sent on their way to their destination. The shipper has no right to compel the defendant to accept freights an unnecessary and unreasonably long time before the time of starting the same on the way. Thus, if the train of cars on the railroad should start at 12 o'clock M., the shipper could not compel the defendant to receive ordinary express freight the evening next before that time, and thus compel it to assume the risk of keeping it during the night and morning following. This is so, because the nature of the business does not require that the defendant shall have the freights during that time, and such risk does not come within the nature and purpose of the defendant as a common carrier. It has the right, by appropriate and reasonable regulations, to require that the articles to be shipped shall be delivered to it within the time necessary to enable it to ship the same by the express on its next ensuing trip. Reasonable time to prepare the freight for such shipment must be allowed—not more can be required—for the mere convenience or advantage of the shipper, or to enable him to avoid a risk and put the same on the defendant, that justly ought to rest upon himself.

If the law were otherwise, the shipper of money or other things (297) of great value, and hazardous in their keeping, might subject the defendant to a risk for hours—in some cases, for a day and night, or longer perhaps, not necessary or properly incident to its business and duties, and which the shipper himself ought to bear. Thus, one intending to send by the next express $100,000 in gold coin, might, the evening next before the day it would start at 12 o'clock M., on purpose to avoid risk himself, compel the defendant to assume the risk of keeping the money during the meantime, not because such keeping was incident or at all necessary to its business or duties, but to disburden the shipper. It would be alike unnecessary, unreasonable and unjust to thus burden the defendant. We cannot conceive of a reason of justice, of necessity or policy that makes it necessary or proper to do so.

The defendant was bound to receive the money tendered to its agent for transportation by the plaintiff within a reasonable time next before the departure of the next express going in the direction of the destination of the money; that is, within such time as the defendant's agent could,

in the order of business, receive the money and prepare it for shipment. What such reasonable time is, cannot be determined by any uniform or precise rule. This must depend upon a variety of facts and circumstances, the place, the volume of business done there, the articles to be shipped, and like considerations. The time must be sufficient to receive and ship the goods by the next express, as above indicated. *MacRae v. R. R.,* 88 N. C., 526; *Britton v. R. R., ib.,* 536; 1 Red. Railways, sec. 26, *et seq.;* 2 Pars. Contracts, 174, 5 Ed.; *Lane v. Cotton,* 1 Ld. Ray., 352.

The plaintiff tendered the money early in the evening next before the day the next express was to go at 12 o'clock and 45 minutes of that day, and he insists that he had the right then to present and have it
(298) received, and as the agent refused to receive it then, the defendant at once became liable for the penalty prescribed and given by the statute (Code, sec. 1964) and sued for in this action. The question whether this contention is well founded, or not, must be determined by a proper interpretation of the statute just cited. It prescribes that, "agents or other officers of railroads and other transportation companies whose duties it is to receive freights shall receive all articles of the nature and kind received by such company for transportation *whenever tendered* at a regular depot, station, wharf or boat-landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company, represented by any person refusing to receive such freight, shall be liable to a penalty of fifty dollars, and each article refused shall constitute a separate offense." It is conceded that the material words, "whenever tendered," used are not to be taken literally. To so treat them would lead to practical and ridiculous absurdity. As employed, they do not imply at any and all times, as when the agent is taking his meals, while he may be reposing at night—at midnight, or daybreak, or at sunrise, or on Sunday. These words must receive a reasonable and just interpretation in the light of the business to which the statute applies, and which it is intended, in some measure, to regulate. Thus interpreted, I think they fairly imply, whenever the freight shall be tendered to the agent or officer of the company in the regular, orderly course of business, when the articles to be shipped ought to be received for that purpose—that is, within the time it is the duty of the carrier, having in view its nature and purpose, to receive the freights tendered. These words do not imply that the carrier shall receive the freights so tendered and keep them in a warehouse for an indefinite and unnecessary length of time, before, in the order of business, they can be shipped on the way to their destination. It is not the business of such companies, as common
(299) carriers, to thus store and keep freights—it is their business

and purpose to transport them promptly, and the purpose of the statute is to compel them to do this by imposing penalties in case they fail to do so. It was not the purpose of the Legislature to enlarge the scope of the duties and purposes of such companies—there is nothing in the statute that so provides, in terms or by just implication—the simple purpose was to compel them to a prompt and faithful discharge of their common-law duties. This Court has so repeatedly decided. *Branch v. R. R.*, 77 N. C., 347; *Whitehead v. R. R.*, 87 N. C., 255. In this view, the words, "whenever tendered," must mean whenever tendered as I have pointed out above. This seems to me to be the only reasonable meaning of the words as employed. Any other interpretation of them would leave their meaning so loose and indefinite as to render their application impracticable.

Other words of the statute, as well as its spirit, strengthen the view I have thus expressed. The statute applies to companies "whose duties" —not simply in the sense of business—are to receive freights, to receive them in the order of business when they must be received to be promptly shipped on the way. Such freights must be "tendered at a *regular* depot, station," etc., the shipper "tendering the freight under *existing laws*," not simply under statutory regulations, but as well under general principles of law applicable, such as that which requires that freights shall be received only within a reasonable time next before they are to be sent on the way to their destination. The interpretation given these words harmonizes, too, with the other statutory provision (Code, sec. 1963), prescribing rules of transportation for railroad companies, wherein it is provided that such companies "shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, *within a reasonable time previous thereto,* be offered at the place of starting," etc. This provision is simply in affirmance of a (300) general principle applicable, and it indicates the spirit and purpose of sundry statutory regulations that apply to railroad companies, and other companies that are common carriers, including that under consideration.

It is said that this interpretation of the statute would not accommodate the convenience of persons who might occasionally go a considerable distance to ship money or other like things. This objection is without force. It was not the duty of common carriers to provide for such exceptional cases, and, as we have seen, the statute does not enlarge the scope of this duty; its purpose is to compel a due discharge of the same. All shippers are placed on the same and equal footing, and it is their duty to observe and learn the orderly course of business—it is their own neglect, if they will not. In the absence of any particular regulation

as to the time freights should be tendered, the law provides that it shall be done within such reasonable time as will enable the carrier to ship the goods on the way by the next express after the tender.

The precise rule and practice of the defendant to be observed in receiving freights for shipment does not appear, but it does appear affirmatively that the plaintiff did not tender the money to be shipped, to the agent, within a reasonable time next before the departure of the next express going in the direction of the destination of the money. It was tendered fifteen or twenty hours, or more, before the next departure, a night intervening. The agent expressly notified the plaintiff of the rule, and that he would receive the money if tendered the next morning. The defendant had the right to decline to receive it until the next day in the forenoon—it was not bound to receive and keep it for the plaintiff during the night; if it had been received the next morning, ample time—several hours—would have been afforded to prepare it in all respects for shipment by the next express.

Cited: Carter v. R. R., 126 N. C., 442; *Garrison v. R. R.*, 150 N. C., 579, 582; *Lumber Co. v. R. R.*, 152 N. C., 73; *Reid v. R. R.*, 153 N. C., 492; *Reynolds v. Express Co.*, 172 N. C., 491.

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(301)

WILLIAM K. DAWKINS ET AL. v. MARY JANE DAWKINS ET AL.

Judicial Sale—Lapse of Time—Acquiescence—Judgment—Irregularity.

1. The doctrine laid down in this case 93 N. C. 283 reaffirmed.
2. Where heirs have received their share of the purchase money of land sold under an irregular order either in the capacity of heirs or otherwise they will be deemed to have acquiesced in the sale and the courts will not set it aside.
3. After the lapse of a long time parties interested will be presumed to have acquiesced in the order.
4. Courts will not compel a purchaser at such irregular judicial sale to surrender the land until he has been reimbursed the purchase money paid by him; and if he has been in *possession* for a *long time under* such *title* he will not be compelled to surrender it upon any terms unless the parties show good cause for their delay in asking relief.
5. The proceedings of the courts should not be interfered with after long lapse of time only for the *most weighty* reasons.

WHEN this case was before this Court, by a former appeal (*Dawkins v. Dawkins*, 93 N. C., 283), some of the questions, both of law and fact,

and some of the findings of fact, were so imperfectly presented by the record that the Court found it very difficult to reach satisfactory conclusions, and remanded it, with authority to the court to allow amendments of the pleadings, and to do whatever it might deem necessary to relieve the case from embarrassment and meet the ends of justice, and it was especially directed, "that a reference may be had to ascertain whether any of the heirs of George Dawkins have received their shares of the purchase money paid into the office by Randolph McDonald, and, if so, who they are, and what amounts they have received, whether in full or in part of their shares, and if in part, what part, etc.

Afterwards, in the court below, it was so referred, and the (302) referee made report, the material part of which is as follows:

"An action was brought in the Superior Court of law for Richmond County, by the then C. & M. in equity, to enforce collection of the purchase money on said bond, and judgment was rendered at Spring Term, 1874; the amount of said judgment was paid into the office of the clerk of the Superior Court, on 30 October, 1874. None of this money has been paid to, or received by, the heirs of George Dawkins, Jr., as such.

"The following persons, who are parties to this action, have received the amounts as stated as heirs of Jesse Dawkins (their receipts in each case so expressing), to wit: Wm. K. Dawkins received on 30 October, 1874, $143.10, in full of his share as heir of Jesse Dawkins and assignee of the interest of George Dawkins, Sr.; Sarah A. Dawkins received 5 May, 1875, $48.44, in full of her share as an heir of Jesse Dawkins; S. S. Covington, Effy J. Covington, and Flora B. Caddell received, 10 August, 1875, $32.29 1-3, in full of their share as heirs of Jesse Dawkins; Mary Jane Dawkins received, 3 May, 1876, $49.60, in full of her share as heir of Jesse Dawkins, and Margaret Ann Caddell received, 15 November, 1876, $16.14, in full of her share as heir of Jesse Dawkins."

Upon consideration of this report, the former orders and opinions of this Court, and the whole case, the court dismissed the petition praying that the judgment therein mentioned be set aside. The petitioners, having excepted, appealed.

Burwell & Walker for plaintiffs.
C. W. Tillett for defendants.

MERRIMON, C. J., after stating the facts: Among other things, we said in the opinion in the former appeal in this case, "but we do not now decide that the order of 1874 shall be vacated, for how- (303) ever irregular it may be, it may be sustained as a valid order if the heirs of George Dawkins have given their sanction to it by receiving

their shares of the purchase money. It would be a gross injustice to the heirs and assignees of McDonald to set aside the order of 1874, and have the title made to them without a full indemnity to McDonald or his assignees; but, if they had offered, or were still to offer, the indemnity, we think their acquiescence in the original order would debar them from setting up any title to the land."

What is thus said rests upon the grounds that, if the heirs of George Dawkins, who, in his lifetime, purchased the land in question, each received his share of the purchase money therefor, he must, on that account, be deemed and held to have impliedly assented to, and acquiesced in, the irregular order complained of, directing the title to the land to be made to Randolph McDonald, who paid the purchase money as surety for George Dawkins, the purchaser; and, also, upon the further ground of long acquiescence—ten years—without complaint or any notice of dissatisfaction on their part, so far as appears. It would be unjust in a high degree to allow the heirs to receive the purchase money and have the title to the same made to them without reimbursing the surety the purchase money he had paid; and, moreover, it seems to us that it would be unjust, after the surety had so paid the purchase money, and, under an irregular order of the court, had obtained title to the land and had had possession of it for years, then to compel him to surrender the same upon receiving the money he had paid as such surety, unless this should be done for the most weighty considerations.

The Court will not allow parties to temporize, trifle and acquiesce in irregular proceedings in actions, taking benefit of them for an unreasonable length of time, to the prejudice of other parties, especially after rights of third parties have supervened. In this case, so far as (304) appears, there was no reasonable excuse for the long delay to move to set the judgment in question aside.

It is said that the petitioners did not receive the purchase money paid into court by the surety, as heirs of George Dawkins, deceased, and this so appears from their respective receipts given for the same. But, nevertheless, they were heirs of George Dawkins, and each received his or her share of the purchase money of the land paid by Randolph McDonald, the surety of their ancestor, and this was the material fact. They could not avoid the consequences of receiving the money by a mere shift as to names and forms.

It is further insisted that the surety, Randolph McDonald, did not pay all the purchase money for the land. It does not appear, affirmatively, that he did; it appears that W. K. Dawkins paid $193.10 of it; but whether he paid it on his own account, or as administrator of George Dawkins, deceased, does not appear affirmatively. It is singular and

strange that no complaint was made on this account years ago, nor is any excuse shown for such long delay, nor is any explanation given now to show that some arrangement was not made, to the satisfaction of the parties interested, at the proper time and in the proper way. The order was acquiesced in for many years, and it must be taken that there was proper ground for it, else it would not have been, and interested parties having knowledge of it would not have allowed it to remain undisturbed for so long a period.

We trust that the petitioners have suffered no wrong in the matter of their motion, but if, by possibility, they have, it is because of their own laches. The proceedings of courts are not to be disturbed, after a long lapse of time, for light causes, especially when the interested parties had knowledge of, and took benefit of them, directly or indirectly.

It is found as a fact that the parties—the petitioners—did not (305) have *"legal* notice" of the order complained of, but it appears that they, in fact, knew of it, and received the purchase money that gave rise to it.

Affirmed.

Cited: Vick v. Wooten, 171 N. C., 122.

THE MERCHANTS AND FARMERS NATIONAL BANK v. J. H. MCELWEE AND MARY V. MCELWEE, EXECUTRIX OF MARY M. ALEXANDER.

Amendment of Pleading—Contract, Evidence—Purchase Money of Land.

1. The refusal to allow an amendment in the court below is not assignable for error.
2. In the absence of fraud, or mutual mistake, *properly alleged*, parol evidence is not admissible to "contradict, add to, modify or explain" a written contract.
3. Where only a part of a contract, *not required by law to be written*, is in writing, parol evidence is admissible to prove the *unwritten* part.
4. Proof that certain notes, which recited that they were executed for the purchase money of land, were partly for some other consideration, would "contradict, add to, or modify" the written contract, and, in the absence of an allegation of fraud, or mutual mistake, is not admissible.

APPEAL from *Brown, J.,* at May Term, 1889, of IREDELL.

The complaint is upon an executory contract (a copy of which is annexed to the complaint) for the purchase of land, wherein Mary M.

Alexander, the testatrix of the defendant Mary V. McElwee, contracted to pay a specified sum for said land and executed notes therefor.
(306) The plaintiff asks judgment for balance due on said notes, and a sale of the land, if payment is not made by a day to be fixed by the court. The answer admits the written contract set up, but avers that defendants are informed and believe that the notes referred to in the contract and sued on, were not given for the purchase money of the land only, but by an agreement, made at time of signing, said contract embraced a certain judgment in the United States Court held by plaintiff against one Carlton and the defendant J. H. McElwee, which plaintiff agreed to assign to defendant's testator; that the plaintiff afterwards receipted and canceled said judgment, and defendants ask to have the amount of such judgment credited upon the notes sued on. There is no allegation in the answer that this contemporaneous agreement was omitted from the written contract by fraud, accident, or mutual mistake.

There are other allegations in the complaint and answer, but they have no bearing upon the question raised by the appeal.

After both parties announced their readiness for trial, and after the pleadings in the cause had been read, the defendants moved the court to be permitted to amend their answer, by inserting therein an allegation "that the judgment was omitted from the contract sued on by mistake and inadvertence."

The court declined to allow such amendment.

The defendants then tendered the following issues:

1. At the time of the execution of the contract appended to plaintiff's complaint, was it agreed between Mary M. Alexander and the plaintiff that the judgment on McElwee & Carlton was to be assigned to her?

2. Was any reference to said judgment left out of the contract by the inadvertence or mistake of the parties?

3. What was the amount of said judgment of which satisfaction
(307) was so entered?

4. What amount did the plaintiff receive, or should have received, from the notes of D. H. Bell, deposited as collateral security?

The court submitted issue No. 4 tendered by the defendant, and declined to submit issues numbered 1, 2 and 3, because the answer failed to allege that the said judgment was omitted from the contract sued on through mistake, inadvertence, or fraud of the parties.

The defendants excepted.

There was a verdict and judgment thereon for plaintiff, from which defendants appealed.

W. M. Robbins and Geo. E. Wilson for plaintiff.

W. D. Turner for defendants.

CLARK, J., after stating the facts: The refusal of the motion to amend rested in the sound discretion of the court, and is not reviewable. *Henry v. Cannon,* 86 N. C., 24, and numerous cases there cited. Indeed, it seems that the defendant made no exception thereto at the time, and it is waived. Code, sec. 412 (2); *S. v. Gee,* 92 N. C., 756. The only error assigned is the refusal to submit the issues tendered by the defendants relative to the alleged agreement by plaintiff to assign the Carlton & McElwee judgment as part consideration of the notes. The contract purports to embrace the whole agreement of the parties. In one of the latest cases on this subject (*Meekins v. Newberry,* 101 N. C., 17), the present Chief Justice says: "It is a settled rule of the 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."

In cases where the law does not require the contract to be in (308) writing, if only a part of the contract is reduced to writing it is competent to prove the unwritten part by parol. But that principle has no application here. The contract contains an agreement by defendants' testator to pay the sum named "for the property," and recites and describes the notes as executed for such purchase money. Proof that they were given in part only for the purchase money of the land, would "contradict, add to, or modify," the written agreement of the parties. In the absence of an allegation in the answer, that the consideration of the note was incorrectly recited, or a part of it omitted, by fraud, accident, or mutual mistake, such proof was inadmissible. *Etheridge v. Palin,* 72 N. C., 213; *McMinn v. Patton,* 92 N. C., 371; *Ray v. Blackwell,* 94 N. C., 10; *Cadell v. Allen,* 99 N. C., 542.

It was no error, therefore, to refuse to submit issues upon an equitable defense not properly set up in the answer. *Parker v. Morrill,* 98 N. C., 232; *Moffitt v. Maness,* 102 N. C., 457.

Affirmed.

Cited: Pollock v. Warwick, post, 641; *Posey v. Patton,* 109 N. C., 458; *Taylor v. Hunt,* 118 N. C., 172; *Jeffreys v. R. R.,* 127 N. C., 383; *Gwaltney v. Assurance Soc.,* 132 N. C., 928; *Cobb v. Clegg,* 137 N. C., 157; *Knitting Mills v. Guaranty Co., ib.,* 569; *Potato Co. v. Jenette,* 172 N. C., 5.

GEORGE H. NISSEN v. THE GENESEE GOLD MINING COMPANY.

Reference—Jury Trial—Contract—Parol Evidence—Material Ruling on Law.

1. When a party in his answer prays for a reference, and when it is ordered, makes no objection, this is a waiver of his right to a trial of the issues by a jury.
2. A reference not excepted to is a reference by consent, and neither party is entitled to a jury.
3. The ruling of a judge upon a referee's finding of facts is not reviewable.
4. When it is found, as a fact, that a contract was partly in writing and partly *oral*, parol testimony is admissible to prove the oral part.
5. This court will not review a ruling of law which does not affect the party, even if erroneous.

ACTION, tried at March Term, 1889, of DAVIDSON, before *Brown, J.*

The cause had been referred to Hon. John H. Dillard. Defendant filed exception to his report, and moved to submit certain issues to a jury. It appearing that defendant had made no objection to reference, had acted on it, and prayed for it in his answer, the court denied the motion. Defendant excepted.

The court overruled each exception, adopted the findings of fact and law of the referee, and confirmed the report, and rendered the final judgment. Appeal by defendant.

L. M. Scott and W. S. Ball for plaintiff.
F. C. Robbins and M. H. Pinnix for defendant.

CLARK, J. The Constitution, Art. IV, sec. 13, provides: "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding (310) of the judge upon the facts shall have the force and effect of a verdict by a jury."

The defendant in his answer prayed for a reference, and when it was ordered, made no objection or exception. This was clearly a waiver of his right to a trial of the issues by a jury. *Armfield v. Brown,* 70 N. C., 27; *White v. Utley,* 86 N. C., 415; *Grant v. Hughes,* 96 N. C., 177.

"The motion (for a reference) was not opposed, that is, was assented to. The reference was, therefore, by consent, and is the mode of trial selected by the parties, and is a waiver of the right of trial by jury. After a reference is so made neither party, as a matter of right, is entitled to a jury." *Atkinson v. Whitehead,* 77 N. C., 418. Being in legal

effect a reference, by consent, the court committed no error in refusing to submit the issues of fact to a jury.

The judge below overruled the exceptions filed to the findings of fact by the referee, and adopted such findings as his own. The ruling of the judge, upon the findings of fact by a referee, is not reviewable. Cons., Art. IV., sec. 13, above cited. *Keener v. Finger,* 70 N. C., 35; *McPeters v. Ray,* 85 N. C., 462; *Vaughan v. Lewellyn,* 94 N. C., 472; *Rhyne v. Love,* 98 N. C., 486.

The defendant files an exception to the ruling of law in admitting parol testimony as to part of the contract. The referee found as a fact, and his finding was approved by the judge, that the contract was partly in writing and partly oral. The testimony was properly admitted, therefore, to prove the oral part of the agreement between the parties. *Terry v. R. R.,* 91 N. C., 236; *Cumming v. Barber,* 99 N. C., 332. The defendant, also, excepted to the following ruling as to the law by the referee:

"The defendant having accepted and gone into the use of the second twenty-stamp mill, and yet using the same, the defendant, as a matter of law, could not recoup or deduct from the contract price (311) of $8,000, except for the difference in value of the mill with the cam shafts too short, and battery foundation of defective timber, and the sum stipulated in the contract; whereas, he should have found that, . . . if plaintiff be entitled to recover at all, he would be entitled to recover the contract price, less the cost of remedying the defective cam shaft and battery foundation, and the other defects in said mill."

A sufficient answer to this is the following finding of fact by the referee:

"No proof being furnished by which to estimate the difference in value in the respects mentioned in the last ruling above, no deduction can be allowed defendant for said alleged defects."

It can make no difference to the defendant whether the rule of law laid down by the referee, or that insisted on by himself, is correct. There being no evidence to prove the deduction or recoupment which defendant seeks, the rule by which it should have been measured, had it been proven, became a mere abstraction.

The distinguished jurist who acted as referee in the cause, showed his usual care and accuracy in the performance of his duty, and we find no error.

Affirmed.

Cited: Smith v. Hicks, 108 N. C., 251; *Colgate v. Latta,* 115 N. C., 138; *Taylor v. Hunt,* 118 N. C., 171; *Sams v. Price,* 119 N. C., 573; *Bresee v. Crumpton,* 121 N. C., 124; *Jones v. Rhea,* 122 N. C., 725; *Balk*

v. Harris, 132 N. C., 16; *Ivey v. Cotton Mills,* 143 N. C., 194; *Bruce v. Mining Co.,* 147 N. C., 644; *Stern v. Benbow,* 151 N. C., 462; *Audit Co. v. Taylor,* 152 N. C., 274; *Kernodle v. Williams,* 153 N. C., 476; *Rogers v. Lumber Co.,* 154 N. C., 112; *Anderson v. Corporation,* 155 N. C., 134; *York v. McCall,* 160 N. C., 283; *Palmer v. Lowder,* 167 N. C., 335; *Bland v. Harvester Co.,* 169 N. C., 420; *Spencer v. Bynum, ib.,* 123; *Farrington v. McNeill,* 174 N. C., 422.

(312)

S. V. PICKENS v. RICHMOND AND DANVILLE RAILROAD COMPANY ET AL.

Railroads—Damages for Expelling Passengers—Tender of Fare—Necessary Force—Common Carrier—Contract.

1. Officers of a railroad company have a right to expel a passenger who refuses to pay the fare, but no more force than is necessary should be used.
2. If a passenger refuses to pay his fare, forces the officers in charge of the train to stop and put him off at a point other than a *regular* station, or at which there would have been no delay but for the necessity of ejecting him, they may refuse the tender of his fare, and they may refuse his fare and put him off if he puts them to the trouble of stopping before he makes tender.
3. When he gets off at a regular depot and gets a ticket, this constitutes a new contract, and will entitle him to passage, with a tender of the money due for passage up to that point, and, according to some authorities, without it.

APPEAL from *Connor, J.,* at the February Term, 1889, of HENDERSON.

Among other things, the court charged, at plaintiff's request:

(321) "If you find that while the train was standing at Campton, and before it had moved, the plaintiff, at any time, tendered or offered to pay the fare from Spartanburg to Hendersonville, the conductor should have received it and permitted the plaintiff to continue his journey, and his refusal to do so was wrongful, and his expulsion, if you find that he was expelled after making such a tender, was unlawful, and your answer to this issue should be in the affirmative."

(322) *J. B. Batchelor for plaintiff.*
D. Schenck and F. H. Busbee for defendants.

(323) AVERY, J. The plaintiff's first cause of action was founded on the failure and refusal of the defendant companies to perform the contract arising out of the purchase by plaintiff at Hendersonville,

North Carolina, of a return ticket from that place to Jacksonville, Florida, and his ejection from the car of the Spartanburg & Asheville Railroad Company, on his return, at a place called Campton, on their road, because he had failed to sign said ticket and have it stamped by the agent at Jacksonville, according to the contract printed in it. The second cause of action was, the alleged wrongful expulsion of the plaintiff and the refusal of the agent of the defendant, after he had been ejected from the train, and while he was being expelled, to accept the tender of money made by him for his fare.

We cannot consider the reasonableness of the regulation in reference to signing and stamping the plaintiff's ticket, for in the discussion of this appeal that cannot now be treated as an open question. The judge below instructed the jury as to the nature of the contract and the alleged waiver of it by the railroad companies, and the jury found the issue arising out of that cause of action for the defendants. The plaintiff did not appeal and the defendants assign as error only, the refusal of the court to give the instruction asked, and the giving of that substituted for it upon the issues involved in the second cause of action.

Following the general current authority in the United States, this Court has held that the officers of a railroad company have a right to expel a passenger who refuses to pay the railroad fare, provided no more force is used than is necessary in ejecting him. *Clark v. R. R.*, 91 N. C., 512; *Skillman v. R. R.*, 13 Am. & En. R. Cases, 31; *R. R. v. Wright*, 34 Am. Rep., 277; *R. R. v. Pierce*, 3 Am. & En. R. Cases, 340; 38 Am. & En. R. Cases, 556, and note; *Petrie v. R. R.*, 42 N. J., 449. In *Clark v. R. R., supra,* the Court says further, in reference to the (324) expulsion of a passenger who has refused to pay, "Nor when the officer has stopped the train and he is descending the steps and is about to pass out will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct, by breaking his own contract to pay when called on, and it is not regained by his repentance at the last moment and after he has caused the inconvenience and delay to the company by his wrongful act."

If the tender of fare is made by a passenger or any other person for him before the train is stopped to expel him, the company must accept it and allow him to remain, but after the train has been stopped for that purpose, he cannot reimpose upon the company the obligation to perform a contract which he had violated in the first instance, by an offer of the money that he ought to have paid when demanded. *Hoffman v. R. R.*, 52 Iowa, 342. If persons were allowed, out of mere wantonness or mischief, or in order to test a legal question, to decline to pay fare, till a train is stopped to eject them, and then, at the moment of expulsion or

immediately after, to reinstate themselves in all their original rights as passengers, by a tender of the usual fare, it would often subject the public to inconvenience, travelers to danger of accident, and corporations to useless risks, simply to gratify caprice, or malice, or a disposition to speculate.

It is a well settled principle, in which nearly all the authorities in this country concur, that, where the recusant passenger forces the company to put him off at a point other than a regular station, or at which there would have been no delay but for the necessity of ejecting him, the conductor must refuse his tender of fare after he is put off, and, even if during the delay he gets upon the train again to make the tender, may expel him a second time if he chooses to do so. 3 Hood's R. L., (325) secs. 361, 362, and notes; *Hoffman v. R. R., supra.* When a person is put off a train for refusal to pay fare at a regular station, or so near it that he can reach it while the train is stopping there, and buys a ticket from such depot to some point in the direction in which he is traveling, the weight of authority is in favor of the rule that he can be required, even then, to pay charges for the distance that he previously rode on the train without a ticket, and be ejected for refusal to do so. 3 Hood's R. L., sec. 361; *Stone v. R. R.,* 29 Am. Rep., 458 (47 Iowa, 83).

We think that there was error in the instruction given by the judge below. After careful scrutiny of the evidence of every witness we fail to find any testimony tending to show that tickets were sold at Campton and to justify the instruction predicated upon the idea that it was a regular station. But, conceding that tickets were sold there, and that passengers sometimes got on and off there, it is in evidence, and not disputed, that the particular train on which the plaintiff was traveling, would not have stopped at Campton but for the purpose of expelling him from it. If that be true, both reason and authority sustain the right of the conductor to put him off, and to refuse him readmission, just as he might have done at any point on the line where there was not even a house.

If Campton was a regular station, and while the train was detained there the plaintiff had bought a ticket to Hendersonville, and again entered the train and tendered the fare from Spartanburg to that point, in money, with the ticket, that state of facts would have presented a very different question. The ticket issued by its agent would have constituted a new contract on the part of the company, by which, with the tender of the amount previously due, and according to some authorities, without it, the company would have been compelled to transport him on its train to Hendersonville. But it is not essential that we (326) should pass upon that question.

So far as this train was concerned, on this particular occasion, the conduct of the plaintiff was the only cause for stopping it at Campton. When the detention was due solely to his refusal to perform the implied contract, growing out of his getting on the train by paying the usual fare to his destination, the law will sustain the company in insisting that he shall pay the penalty of such persistent refusal by being himself subjected to inconvenience without compensation.

His Honor should have instructed the jury that, as the train was stopped only for the purpose of putting the plaintiff off, he was not entitled to recover damages for the refusal to accept fare after the train stopped or for again ejecting him while the train was standing there. *O'Brien v. R. R.*, 80 N. Y., 236.

There is error for which a new trial will be granted.

Error.

Cited: Rose v. R. R., 106 N. C., 169; *Browne v. R. R.*, 108 N. C., 42; *Roseman v. R. R.*, 112 N. C., 716; *Mason v. R. R.*, 159 N. C., 187; *Norman v. R. R.*, 161 N. C., 340; *Mott v. R. R.*, 164 N. C., 371.

RALPH PICKETT ET AL. v. J. F. LEONARD.

Devise—After Executed Deed—Construction.

A testator devised to his son eighty acres of land, certainly designated, and afterwards, during his lifetime, conveyed to him, by deed, a portion of the land embraced in the devise. *Held*, that the only effect of the deed was to place title in the devisee, during the testator's life, to the part so conveyed, and the will, which was in affirmance of the deed as to the part conveyed by it, passed title, at testator's death, to the part not so embraced.

ACTION to recover land, heard before *Brown, J.*, at March Term, 1889, of DAVIDSON, upon facts agreed.

W. H. Pinnix for plaintiffs. (328)
F. C. Robbins for defendant.

MERRIMON, C. J. The testator, at the time he executed his will, devised therein to his son, the defendant, eighty acres of land certainly designated. In his lifetime, and after the execution of his will, he conveyed by deed to this son a part of the land so devised to him. What the testator's motive for this was does not appear, but, whatever it may have been, he did what he had power to do. This deed did not affect the devise, except to the extent of the land conveyed by it. As to that,

it had the effect to place the title thereto in the defendant in the testator's lifetime. In effect, as to the land, the will was no more than an affirmance of the deed. There is nothing in the will that, in terms or
(329) by implication, modifies or qualifies the devise; so it took effect and became operative, as far as it might do so, at the time of the testator's death. It did not pass the title to the land embraced by the deed, because the deed itself did that in the testator's lifetime. If, however, for any cause, the deed was ineffectual, then the devise passed the title to that land. The devise passed the title to the defendant to so much of the eighty acres embraced by it as the deed did not include. This is the plain meaning and effect of the terms of the devise, and there is nothing in the will that provides otherwise, nor is there any reason in law why it should not.

The defendant contends that the effect of the deed was to make the north and south line, specified in the devise, the line of the west side of the land embraced by the deed; so that he is entitled to the eighty acres situate just west of the latter line. This was, clearly, not the intention of the testator. His purpose is to be ascertained from the devise, and it specifies the testator's "outside line running north and south," as it existed at the time he executed his will.

We are very sure that the court failed to interpret the devise in question correctly. The defendant is entitled, as we have indicated above, to eighty acres of land, including in this quantity the land embraced by the deed mentioned. The judgment must, therefore, be set aside, and a judgment entered according to this opinion.

Error.

(330)

AARON A. WISEMAN v. COMMISSIONERS OF MITCHELL COUNTY.

Dismissal of Appeals—Rules of Court.

1. Failure to prosecute an appeal for two terms is sufficient ground for dismissal, unless, for sufficient cause shown, the case shall be continued. Motion to reinstate, upon notice, may be heard not later than the next term.
2. Rules of this court are not merely directory; it is the duty of appellant to prosecute his appeal according to the rules.

MANDAMUS, tried before *MacRae, J.*, at the Spring Term, 1887, of MITCHELL, upon complaint and answer and facts agreed.

Motion was denied and plaintiff adjudged to pay the costs. Plaintiff appealed.

The facts are sufficiently set out in the opinion of the court.

T. A. Love for the plaintiff.
No counsel for defendants.

CLARK, J. This appeal was docketed 17 July, 1887. It has not been prosecuted in this Court. Rule 15 of the Rules of this Court provides, among other things, as follows: "But cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the costs of the appellant, unless the same for some sufficient cause shall be continued," with a proviso that the appellant may move, not later than the call of the district at the next term, to reinstate, on notice to the appellee, and showing sufficient cause.

No cause for a continuance has been shown. It is the duty of appellants to prosecute their appeals in this Court promptly, as the law requires. When they fail to do so the appellee has the right to have the appeal dismissed, so that he may have the benefit of his judgment and be saved the expense and annoyance of protracted and unnecessary litigation. *Brantley v. Jordan,* 92 N. C., 291. Or if (331) the appellee does not feel enough interest to make such motion, the Court may *ex mero motu* dismiss the appeal, that its docket be not cumbered with cases in which no one has any concern.

In a recent case, *Walker v. Scott,* 102 N. C., 487 the present Chief Justice called attention to the mistaken impression, which seemed somewhat to prevail, that the Rules of the Court are "merely directory and to be ignored, disregarded and suspended almost as a matter of course." He points out that they are deemed essential to the protection of the rights of litigants and the due administration of justice and will be observed and enforced.

Appeal dismissed.

NOTE.—*Young v. Young* and *Fisher v. Mining Co.*, from IREDELL, were dismissed for the same reason.

Cited: Cox v. Jones, 113 N. C., 277; *Martin v. Chambers,* 116 N. C., 674; *Calvert v. Carstarphen,* 133 N. C., 27; *Lee v. Baird,* 146 N. C., 363; *Phillips v. Junior Order,* 175 N. C., 133.

A. H. LINDSEY v. THOMAS SANDERLIN.

Appeal—Assignment of Error.

The Supreme Court will not consider exceptions where no assignment of error has been properly made below.

APPEAL from *Boykin, J.*, Spring Term, 1889, of CURRITUCK.

C. W. Grandy for plaintiff.
L. D. Starke for defendant.

SHEPHERD, J. The argument of the plaintiff's counsel was addressed to the general character of his Honor's charge in reference to negligence. We regret that we are precluded from passing upon that question. There is not only a failure to assign error (see *McKinnin v. Morrison, post,* 354, and *Carlton v. R. R., post,* 365), but the case expressly states that the instructions given were not excepted to.

The judgment therefore must be

Affirmed.

Cited: Barber v. Buffaloe, 122 N. C., 131.

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(332)

A. H. KEARNS v. CHAS. L. HEITMAN.

Justice of the Peace—Jurisdiction—Splitting up a Cause of Action—Money Had and Received.

1. Where money was collected by one of two joint owners of several *notes*, the other owner cannot bring separate actions for his half of each note collected so as to give a justice of the peace jurisdiction—the action, being for money had and received, must be for the *aggregate* amount so collected and due him.

2. An action might have been maintained for the half of *each note* as it was collected, but when *all* were paid, the plaintiff became entitled to half of the "*gross sum*" paid, and, as that exceeded two hundred dollars, a justice of the peace had no jurisdiction.

APPEAL from a justice of the peace, tried before *Merrimon, J.*, at September Term, 1889, of IREDELL.

The defendant owned divers promissory notes aggregating a large sum, and sold and assigned a one-half interest in each of them to J. W. Finch, and the latter afterwards, for value, sold his interest in certain of them to the plaintiff.

The defendant afterwards, and before the bringing of the action, collected the notes wherein the plaintiff had a one-half interest, and the plaintiff's share of the money so collected was largely in excess of $200.

The plaintiff brought this action in the court of a justice of the peace, to recover from the defendant a part of his share of the money so collected by him, believing and contending, that he had the right to divide his demand into four several parts, each for a sum less than $200, and thus give the court of a justice of the peace jurisdiction, inasmuch as each of the notes so collected was for a sum less than $200 and within such jurisdiction.

The defendant insisted by his answer and on the trial, that the plaintiff's demand was for a gross sum of money much greater than $200, and he could not divide the same into four parts so as to (333) give the court of a justice of the peace jurisdiction of each part, and moved to dismiss the action. The court denied this motion, and gave judgment in favor of the plaintiff for $179.54, and for costs. The defendant having excepted, appealed to this Court.

M. H. Pinnix for plaintiff.
F. C. Robbins for defendant.

MERRIMON, C. J. As soon as the principal defendant collected any one, or all, of the promissory notes in which the plaintiff had a half interest, one-half of the money as such, so collected, became that of the plaintiff, and the law at once implied a promise or obligation of the defendant to pay the same to the plaintiff, and this apart from, independent of, and without regard to, the note or notes collected, or any contract in respect to them. All the money so in the hands of the defendant at any time—not parts of it, as item one from one source, and item two from another source, and so on, but as a whole—belonged to the plaintiff, and his demand against the defendant was not for part, but for the whole of it. The defendant, having the money, was chargeable with it as a whole, as money had and received to the plaintiff's use. and a single action, not two or severally in favor of the plaintiff to recover it.

It is not the purpose of the present action to recover one-half of a promissory note within the jurisdiction of a court of a justice of the peace—it is not to recover money due by contract to pay a particular sum, or to recover the price of goods or other things sold on a particular, distinct occasion, or time, but it is to recover money of the plaintiff in the hands of the defendant, as to which the law implies a promise or liability of the latter to pay the former, not in parts, but the whole

(334) thereof that he may have at any one time, no matter from what source it arose or came, or whether the sources be few or many.

This case is unlike *Caldwell v. Beatty,* 69 N. C., 365, and *Boyle v. Robbins,* 71 N. C., 130. These cases rest upon the ground that a series of separate charges for goods sold and delivered at different times, or labor performed at different times, may each be a separate cause of action and the subject of a distinct action, though all embraced in the same account, the reason assigned being that there is a succession of several distinct contracts as to each item of charge.

This is a case wherein the law implied and raised the promise and liability on the part of the defendant to pay to the plaintiff any sum of money he received for him at once on receiving it, and the latter might have brought his action for the same certainly, upon demand and refusal to pay, but if he delayed to do so until the defendant received other moneys for him, then the implied liability was enlarged; it attached at once to the further sums of money so received, not as a separate and distinct liability, but as one liability for the whole sum of money in his hands. The law does not unnecessarily imply, nor will it give, a multiplicity of causes of action and distinct actions to enforce the same. It is thorough in its purposes and operations to establish, secure, and administer rights, but it avoids and eschews, as far as practicable, whatever is unnecessary, redundant and vexatious, however and whenever the demand for such thing may arise.

As to when the several and distinct actions may be maintained, and when not, for distinct items of charge, made at several times and embraced in the same account, see the cases cited, *supra, Magruder v. Randolph,* 77 N. C., 79; *Jarrett v. Self,* 90 N. C., 478; *Moore v. Nowell,* 94 N. C., 268.

The evidence of the plaintiff produced on the trial, accepted as true, proved that the plaintiff's cause of action, not severable, was
(335) greater than $200, exclusive of interest, and, therefore, was not within the jurisdiction of a justice of the peace, and the court should, on that account, have granted the motion of the defendant to dismiss the action.

The judgment must be set aside and the action dismissed.

Error.

Cited: McPhail v. Johnson, 109 N. C., 573; *Smith v. Lumber Co.,* 140 N. C., 377; *S. c.,* 142 N. C., 30.

J. McC. BUIE v. SAMUEL BROWN.

Pleadings—Frivolous Answer—Amendment.

1. An answer which raises a material issue, even though evasive and not fully responsive to the allegations of the complaint, is *not* frivolous.
2. While it is better that every pleading should be formal, orderly, and precise, yet it is sufficient if intelligible.
3. The allegations of a pleading should be liberally construed (Code, sec. 260), and if they are indefinite the court may require them to be made certain and definite, either *ex mero motu*, or upon application of a party interested. (Code, sec. 261.)

MOTION for judgment upon the pleadings heard before *Clark, J.*, at May Term, 1887, of ROBESON.

The plaintiff alleged, in substance, that at the time specified he contracted to sell to the defendant the tract of land described in the complaint for the price therein mentioned; that all the purchase money had not been paid; that he had obtained judgment before a justice of the peace for the balance thereof which had not been paid; that he had offered to make to the defendant a good title for the land upon the payment to him of the balance of the purchase money; that he had demanded of the defendant that he give him possession of the land, etc.

The defendant admitted in the answer the contract to sell the land to him; the price to be paid therefor; he did not admit the (336) alleged judgment or positively deny the same, but he alleged that he had fully paid the purchase money and owed the plaintiff nothing on account of it. He further alleged that the plaintiff had so encumbered the land by a mortgage thereof that he cannot make a good title to the same; that the defendant had placed valuable improvements on the land, etc. He demands judgment that the plaintiff make to him title for the land, and if he cannot, then that he have judgment against him for the purchase money he has paid, and for general relief, etc.

The court adjudged the answer *frivolous* and gave judgment for the plaintiff. The defendant having excepted appealed.

No counsel for plaintiff.
William Black for defendant.

MERRIMON, C. J., after stating the case: It seems to us very clear that the answer was not frivolous. On the contrary, it raised material issues of fact that should have been submitted to a jury in the orderly course of procedure, and alleged equities which, if they exist, ought to be administered in the action.

It is true, the allegations of the answer are not so precise or positive as they might or properly ought to be, but the substance of the purpose and the nature of the defense relied upon appear with tolerable certainty.

It would be very much better if every pleading should be formal, certain, orderly, precise and as positive as its nature and the subject matter of it will allow, but, nevertheless, if it is intelligible, and the court can see the substance of its purpose and the matter pleaded, it should be upheld. The court ought not to hasten to condemn and disregard
(337) it. Indeed, the statute (Code, sec. 260 requires that, "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties;" and it further provides (sec. 261) that, "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." The purpose of the statute is to help the pleadings in proper cases by amendment with a view to promote justice. The court may *ex mero motu* direct appropriate amendments to be made, or it may do so upon the application of a party interested.

The answer of the defendant to the allegation in the complaint in respect to the judgment for the balance of the purchase money is not definite or satisfactory—it seems to be insincere and evasive—but the court should not, on that account have treated the whole answer as frivolous. Indeed, it should have required the defendant to make his answer in such respect certain, and so in other respects as well. It may be that the answer is false, but, treating it as a pleading—it is serious—raises important issues of fact, and discloses substantial grounds of defense.

The judgment must be set aside, and further proceedings had in the action according to law.

Error.

Cited: Martin v. Goode, 111 N. C., 290; *Allen v. R. R.,* 120 N. C., 550; *Wilson v. Brown,* 134 N. C., 407; *Whitaker v. Jenkins,* 138 N. C., 482; *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 472; *Bank v. Duffy,* 156 N. C., 86; *Talley v. Granite Co.,* 174 N. C., 448; *Muse v. Motor Co.,* 175 N. C., 470; *Bristol v. R. R.,* ib., 511.

(338)

W. B. CUSHING v. W. H. STYRON.

Attachment—Proceedings Before the Clerk—Appeal—Amendment—Jurisdiction.

1. Orderly method of procedure before the clerk in attachment proceedings, and appeals therein, discussed by *Merrimon, C. J.*
2. The clerk has power to permit an amendment affecting the substance of an affidavit in attachment proceedings.
3. Where the clerk refuses to allow an amendment, he may, and should, state his reason for such refusal, even after appeal to the court in term.
4. Where the parties agree that the judge shall hear the appeal in term, he acquires jurisdiction of the whole case, and should finally dispose of it on its merits, without remanding it to the clerk.

APPEAL from *Shipp, J.*, at April Term, 1889, of NEW HANOVER, upon a motion to vacate a warrant of attachment.

In the course of the action the plaintiff availed himself of the provisional remedy of attachment. The defendant appeared and moved to discharge the same. The plaintiff, admitting that the affidavit to obtain the warrant of attachment was defective, moved before the clerk of the court to amend the same in a material respect. The clerk denied the motion and gave judgment that the attachment be discharged, but in such judgment he failed to state the ground of such denial. From this judgment the plaintiff appealed to the judge. Within three days after the rendition of the judgment, the clerk, on motion of the plaintiff's counsel, made and signed his statement of the case on appeal, in which he stated that he denied the motion to amend upon the ground that he was of opinion that he "had no right to permit such amendment," etc. The defendant's counsel had no notice of the filing of such statement among the papers in the case. By consent, the appeal was (339) afterwards heard by the judge in term time, the defendant objecting that the clerk had no authority to make the statement mentioned, on the ground that it was made subsequent to the rendition of the judgment, in the absence of his counsel, and that the clerk could not thus explain the grounds of his judgment.

The court—the judge in term—reciting that the clerk having stated that he was of opinion that he had not, as matter of law, the right to permit the amendment mentioned, and that he therefore refused the same, "adjudged that the said judgment (of the clerk) be reversed and that this cause be returned to the said clerk, with instructions to him to exercise his discretion and to grant or refuse the amendment asked for, as to him may seem right and proper in the exercise of a reasonable discretion," etc.

The defendant excepted and appealed to this Court.

T. W. Strange for plaintiff.
A. W. Haywood for defendant.

MERRIMON, C. J., after stating the facts: The clerk of the court, acting as and for the court, had authority out of term to grant the warrant of attachment (Code, sec. 351), and likewise to allow all proper amendments in that respect and connection. (Code, secs. 251, 273.) From his decision an appeal lay to the judge, which might be taken within ten days after the entry of the order or judgment complained of, and within three lays after the appeal was taken it was the duty of the clerk to "prepare a statement of the case, of his decision and of the appeal," and sign the same. He should, within that time, have exhibited this statement to the parties or their attorneys. If it were satisfactory, the parties or their attorneys should have signed the same. If
(340) either party objected to the statement as partial or erroneous, he should have put his objection in writing, and this objection should have been attached to the statement of the case. Within two days after this was done, the clerk should have sent such statement and the objections and copies of all necessary papers, by mail or otherwise, to the judge for his decision. (Code, secs. 252, 253, 254.) *Palmer v. Bosher,* 71 N. C., 291.

The clerk failed to observe these statutory regulations. The judge, seeing this, should at once have returned the statement to the clerk, with directions to submit it to all of the parties or their counsel, as the statute directed, and then return the same, with objections, if any, to him.

There is not substantial reason why the clerk should not have stated the grounds of his judgment denying the amendment, after an appeal was taken. Indeed, it was proper and necessary that he should do so, to the end the judge might review his judgment and correct the errors complained of if they were such. The statute (Code, sec. 254) directs that he "shall prepare a statement of the case"—that is, a statement presenting the grounds of objection and exceptions to his orders and judgments objected to.

But it was not necessary to return the statement of the case to the clerk in this case, because the parties agreed that the judge should hear the appeal in term time, as he did do. This gave him complete control of the matter in every aspect of it. The whole action was before him, and he could grant or deny the amendment of the affidavit in the exercise of a sound discretion. The jurisdiction of the whole action, including all the incidental and ancillary proceedings, was that of the court—not that of the clerk thereof; he was acting out of term for the court

and as its servant. As the court had such jurisdiction, and the judgment entered by the clerk was objected to and appealed from, the motion to amend the affidavit was not determined. It was open (341) still, and the court—the judge in term—might have heard it upon its whole merits and have granted or denied it; indeed, it should have done so. There was no necessity for nor propriety in sending the matter back to the clerk. The court itself could have disposed of the matter much more acceptably than the clerk, and conclusively. *Marsh v. Cohen,* 68 N. C., 283.

The court had power to allow the amendment affecting the substance of the affidavit. This has been decided repeatedly and broadly. *Brown v. Hawkins,* 65 N. C., 645; *Penniman v. Daniel,* 93 N. C., 332; *Branch v. Frank,* 81 N. C., 180; *Bank v. Blossom,* 92 N. C., 695.

The court properly held that the objection to the statement of the clerk as to the grounds of his denial to the motion to amend the affidavit could not be sustained; but inasmuch as all the parties were before the court in term time, it should have heard the motion and allowed or denied it upon its merits. So much, therefore, of the order as directs the clerk to allow or deny the motion must be reversed, and the court in term time will allow or deny it, as indicated in this opinion.

Cited: Sheldon v. Kivitt, 110 N. C., 410; *Howland v. Marshall,* 127 N. C., 429; *Power Co. v. Lessem Co.,* 174 N. C., 359.

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A. J. K. THOMAS, ADM'R OF J. A. F. WATTS, v. J. B. CONNELLY ET AL.

Clerk of Superior Court—Default—Official Bond—"Virtue" and "Color" of Office—Administration.

1. Upon default by a clerk of the Superior Court in respect to money received by him *"by color of his office,"* the sureties on his official bond become liable.
2. Money paid to, and received by him as clerk, without legal authority, is *"by color of his office."*
3. Although an administrator has no authority to deposit with the clerk, or right to require him to receive the proceeds of the sale of land to make assets, yet, if he does receive it, he does so *"by color of his office."*
4. Distinction between "virtue" and "color" drawn by *Merrimon, C. J.*

CASE agreed, at May Term, 1889, of IREDELL, before *Brown, J.*

The plaintiff is the administrator of the estate of J. A. F. Watts, who died intestate in the county of Iredell in 1883. By his special proceeding, brought in the Superior Court of that county, against the heirs at law of his intestate, on 8 February, 1887, he obtained license to sell certain of the real estate of his said intestate to make assets to pay debts of the latter, and costs, etc. Sale of the land was made, and the following is a copy of the order of the court confirming such sale:

"This cause coming on for further direction, and it appearing that A. J. K. Thomas, administrator of J. A. F. Watts, on 23 April, 1887, sold the land described in the complaint to William E. Morrison at the price of $13 per acre, one-fourth for cash and the remainder on a credit of six months, and he took bond, with surety, for the said remainder of the purchase money, and the sale price appearing to be just and reasonable, and the security good, it is therefore ordered and

(343) decreed that the said sale, in all things, be confirmed, and that the said A. J. K. Thomas proceed to collect said bond when it becomes due, and that he apply a sufficiency of the proceeds thereof to the payment of such debts and charges of administration as the personal estate and the proceeds arising from the sale of the other lands heretofore sold by him may have been insufficient to discharge, after first deducting the costs of this proceeding. If any surplus shall remain in the hands of the said A. J. K. Thomas after the payment of the said debts and charges, the same to be considered as real estate and is to be disposed of by the said Thomas, administrator as aforesaid, among such persons as would have been entitled to the land itself, according to law.

"It is further ordered by the court, upon the payment of the purchase money, the said A. J. K. Thomas, administrator aforesaid, is to execute a deed to the purchaser for said land. And this cause is retained for further orders.

"This 14 May, 1887."

The defendant J. B. Connelly was duly qualified as clerk of said Superior Court in December of 1886, and gave his official bond in renewal on the first Monday in December of 1887, with the other defendants in this action as sureties thereof. Afterwards the plaintiff, having sold the land in pursuance of his license so to do, and having collected the purchase money thereof, deposited with the defendant clerk of said court a part of the money so collected, and the latter entered a receipt on a docket of the court for a part of the same, whereof the following is a copy:

"7 May, 1888. Received of A. J. K. Thomas, administrator of J. A. F. Watts, two hundred and twenty dollars, in part of proceeds of sale of land of the estate of J. A. F. Watts.

"J. B. CONNELLY, *C. S. C.*"

And for another part of the same he gave the plaintiff a receipt, of which the following is a copy:

"Received of A. J. K. Thomas, administrator of J. A. F. (344) Watts, $600, in payment of part of sale of land belonging to the estate of J. A. F. Watts, known as the Waugh place, sold to W. E. Morrison and bid transferred to F. A. Watts.

"J. B. CONNELLY, *C. S. C.*"

The following is a part of the "case agreed" and submitted to the court for its judgment thereupon:

"4. The plaintiff, administrator aforesaid, had not up to the time of depositing the sums of money before mentioned, nor has he at any time since, made a final settlement of the estate of his intestate.

"5. That said J. B. Connelly, clerk as aforesaid, on or about 15 August, 1888, made default in his said office as clerk aforesaid, and has failed to pay over said sums and has fled the State and gone to parts unknown, after resigning his said office and having, prior to such resignation, appropriated the aforesaid sums of money to his own use.

"Now, therefore, upon the foregoing facts, it is agreed between the parties hereto that if the court shall be of the opinion that the plaintiff is entitled to recover of the defendant Wallace and others, as sureties on said clerk's bond, in this action, on the above agreed facts, judgment shall be rendered against the defendant J. B. Connelly and his sureties aforesaid for the sum of eight hundred and twenty dollars ($820), with interest on the same from 15 August, 1888, until paid, and costs of action.

"But if the court should be of the opinion that the plaintiff is not entitled to recover of the sureties aforesaid on said clerk's bond, upon the aforesaid agreed facts, then judgment shall be rendered for the defendants and their reasonable cost."

The court gave judgment, whereof the following is a copy: (345)

"The court considers that if the money was paid to the clerk under section 1543 of the Code, only the legatees, etc., therein referred to, or heirs at law, could receive it. It appears from the case as stated to have been deposited with the defendant Connelly by the plaintiff administrator before the intestate's debts were paid and in contravention of the decree of sale and confirmation. The plaintiff was acting in his

own wrong. It is admitted to have been *'deposited,'* and, the court presumes, for the convenience of the administrator. The mere affixing the letters 'C. S. C.' will not make the bond liable. The court is of opinion that *'this plaintiff'* cannot recover of the bond. It is adjudged that the plaintiff recover of J. B. Connelly eight hundred and twenty dollars ($820), with interest from 15 August, 1888, and costs. It is adjudged that the other defendants go without day."

The plaintiff, having assigned error, appealed to this Court.

M. L. McCorkle and L. C. Caldwell for plaintiff.
W. D. Turner and W. M. Robbins for defendant.

MERRIMON, C. J., after stating the facts: The question presented by the assignment of error in this case is, Are the defendants, sureties to the official bond of the defendant, late clerk of the Superior Court, liable for the default of the latter in respect to the money received by him as such clerk from the plaintiff? The answer to the question depends upon the proper interpretation of the purpose and condition of the clerk's official bond, and also to what extent, if at all, such clerk may become chargeable officially with moneys received by him by *color* of his office.

The statute (Code, sec. 72) prescribes that the clerk of the Superior Court shall give a bond, with sufficient sureties, "in a penalty of ten thousand dollars, payable to the State of North Carolina, and (346) with a condition to be void if he shall account for and pay over according to law all moneys and effects which have come or may come into his hands *by virtue or color of his office* or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession by *virtue or color* of his office, and shall in all things faithfully perform the duties of his office as they are or thenceforth shall be prescribed by law." The purpose of this provision is very broad and comprehensive. It requires every clerk of the Superior Courts to give bond, with sufficient sureties, to secure the faithful discharge of his official duties, and especially, among other things, to secure the accounting for and paying over according to law of all moneys and effects that may be or come into his hands "by virtue or color of his office." The condition of the bond required, and the liability of the sureties thereto, are coextensive with the duties and obligations of the clerk, as such, however these may arise.

Such clerk is an important and responsible public officer; his duties are varied and serious, affecting the public and individuals. In a variety

of ways moneys, rights, credits, securities and other things of value belonging to others go into his hands, and the law charges him with the same for such persons or for their benefit. The statute is careful to make the bond extend to and embrace within its scope and purpose not only such "moneys and effects" as may come into his hands by *"virtue"* of his office, but as well and as certainly to such as may so come by *"color"* thereof, and likewise to such additional *"duties of his office"* as may be prescribed by law, after the execution of the bond. There seems to be a studied purpose to make the bond embrace and to create liability of the sureties thereto on account of all "moneys and effects" that come into the hands of the clerk, as such, whether (347) they so come strictly according to law or not.

Such comprehensive liability of the sureties did not exist until the enactment of the Code of Civil Procedure (C. C. P., sec. 137). It has been extended once or twice since then, in some respects. Thus it appears that the enlargement of such liability was not made through inadvertence or misapprehension, but of purpose. There can be no doubt as to this, and the purpose must be allowed to have just effect.

Contrary to our first impression on the subject, the clerk did not receive the money in question by *virtue* of his office. He had no legal authority to receive it. In contemplation of law—statutory provisions—it could not properly pass into the hands of the clerk; certainly it could not, in the absence of some judical order directing that it should. It was part of the proceeds of land sold at the instance of the plaintiff administrator to make assets to pay debts, etc., of *his* intestate. The judgment confirming the sale of such land directed the present plaintiff relator to use so much of the proceeds of the sale thereof as might be necessary to pay the debts and charges of administration, etc.; that any surplus of the fund so arising should be deemed real estate, and that the plaintiff should dispose of the same, according to law, to such persons as would have been entitled to the land itself but for the sale. The judgment of confirmation of sale, etc., was a proper one, and it had the effect to vest the proceeds of the sale of the land in the present plaintiffs for the purpose therein specified, and only for such purpose. This is so, because the statute (Code, sec. 1405) prescribes that "all proceeds from the sale of real estate (of the testator or the intestate, as the case may be), as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid the executor, administrator or collector to such persons as would have been entitled to the (348) land had it not been sold." So that, regularly and properly, the plaintiff was charged with the money in question; he was not required,

in any case, to pay it or deposit it with the clerk of the court, nor had he authority or right to require the clerk to receive it. There is no statutory regulation that so provides. The court below seems to have thought that the fund might be deposited with the clerk, not improperly, after the plaintiff had completed the administration of the estate in his hands, as allowed in the case provided for in the statute (Code, sec. 1543). This is a misapprehension of the meaning of that provision. It only applies to "any moneys belonging to the *legatees or distributees* of the estate of his testator or intestate," etc. The fund in question did not belong to the legatees or distributees, but to the heirs at law of the intestate, or to such persons to whom they had disposed of their rights.

We are, however, of opinion that the money in question came into the hands of the defendant, who was clerk, as clerk, by *"color* of his office," and that therefore the defendant's sureties are bound to the plaintiff for the same. The clerk, clearly, signed the receipts officially, and intended to do so. The letters "C. S. C.," usually and appropriately employed by such officers to indicate their official signatures and official acts, appended to his signatures to the receipts; his office, its nature and purposes; the recitals in the receipts; the reference to the sale of the land, to the special proceeding in which it was sold; the designation of the plaintiff as administrator of the intestate named—the nature of the whole transaction—all these things go to show that the clerk received the money as clerk, and that he and the plaintiff, at the time, in good faith, believed that he had authority to receive it as clerk and hold it for proper purposes. It does not appear, nor is it suggested, that there was the slightest bad faith on the part of the clerk or the plaintiff. Indeed, in view of the nature of the fund, the clerk
(349) might not, unreasonably, have thought he had the right and that it was his duty to receive the money. Well-informed lawyers have insisted before us that he had such authority.

Thus the clerk received the money by "color of his office," in the sense of the statute, and the condition of the bond sued upon expressly embraces money so received by the principal in it. So receiving money implies that it is not received by virtue of his office or according to law, in the case and in the way allowed and required by law, but otherwise. To receive money by "color of his office," in the sense of the statute, certainly embraces the case where the clerk received it in good faith and might reasonably believe he had the right and it was his duty to receive it for proper purposes. We need not decide now that it embraces other cases, because, as we have seen, the clerk, in the case before us, received the money in question, believing, not unreasonably, that it was his official

duty to receive it. That such is the true meaning of the statute is the more apparent from the provision therein, that the official bond of the clerk shall embrace moneys received by him under an order or decree of the court, although such order or decree shall be void for want of jurisdiction of the court to grant the same, or for other irregularities. The purpose is to embrace within the scope of the bond all moneys received by the clerk, as such, in good faith, for a supposed lawful purpose, although it may turn out that it was improperly received and without legal sanction. *Broughton v. Haywood,* 61 N. C., 380.

The plaintiff relator can maintain this action. He is entitled to have the money in controversy, to the end he may pay the remaining unpaid debts and charges, if any, of the estate wherewith he is charged, and any surplus to the heirs at law of his intestate, or such person as may, through them, be entitled to the same.

There is error. The judgment as to the defendant's sureties (350) must be reversed and judgment entered in favor of the plaintiffs in accordance with the stipulation in the case agreed and submitted to the court for its judgment.

Error.

Cited: Sharpe v. Connelly, 105 N. C., 88; *Presson v. Boone,* 108 N. C., 83, 85; *Daniel v. Grizzard,* 117 N. C., 108; *Stanley v. Baird,* 118 N. C., 83; *Smith v. Patton,* 131 N. C., 398; *Hannah v. Hyatt,* 170 N. C., 638.

ARTEMUS McNAIR ET AL. V. J. T. POPE ET AL.

Receiver—Final Judgment—Agricultural Lien—Intervener—Disposition of Rents in Hands of Receiver.

Pending an action to enforce a parol trust in certain lands, finally determined in defendants' favor, a receiver was appointed, who collected the rents for 1886, 1887, and 1888. On 1 January, 1886, preceding such appointment, the plaintiff, then in *possession of said land, claiming it as his own,* executed an agricultural lien to secure advances to be made during that year: *Held*—

1. That, although defendants recovered judgment for the land, yet, as no order for the disposition of the rents had been made, the cause was still for that purpose, and the lienees were entitled to intervene and be paid out of the rent of 1886 for advances made up to the appointment of the receiver.
2. That, as the lien did not cover the products of 1887 and 1888, the rents for these years should be paid to defendants.
3. The *circumstances* under which any after advances were made should be reported to the court, so that it may see whether the lienees are entitled to be paid for them.

APPEAL from *Phillips, J.*, at May Term, 1888, of ROBESON.

The object of this action was to enforce an alleged parol trust, and the issues were decided adversely to the plaintiffs, and it was adjudged that the defendants were the owners and entitled to the possession of the land in controversy. *McNair v. Pope,* 100 N. C., 404. Pend-
(351) ing the action at Spring Term, 1886, William Stubbs was appointed "receiver of the rents and profits and issues of said land, with the usual power vested in receivers in like cases" (*McNair v. Pope,* 96 N. C., 502), and the said receiver entered upon the performance of his duties. On 1 January of the same year (1886) the plaintiffs, being in possession of the land, executed an agricultural lien to A. & W. McQueen, who made advances to them during the said year.

The receiver has made the following report:

"The undersigned receiver, who has heretofore been appointed by a decree in this cause to take charge of the lands described in the pleadings in this cause, would respectfully report that he has received and disbursed as follows, on account of the rents and profits, viz.:

1886.			
Nov. 16.	Collected as per statement filed	$641.72	
	Expended in collecting	141.86	
	Balance		$499.86
1887.			
Nov. 1.	Rent received		100.00
1888.			
May 21.	Rent note		175.00
			$774.86
	Paid attorney		20.00
			$754.86

"Your receiver would, therefore, report that he has $589.86 cash on hand and a note for $175 as a rent note, and he has received nothing for his services, and therefore prays for directions as to whom to turn over the funds on hand, for his discharge, and for an allowance for his services. "WILLIAM STUBBS."

(352) The following judgment was rendered:

"This cause coming on to be heard, etc., it is considered, adjudged and decreed by the court that the said A. & W. McQueen be allowed to come in and make themselves party defendants in this cause,

and this cause be referred to the clerk of this court to ascertain what amount, if any, was advanced by the said A. & W. McQueen to the said Artemus McNair and Jonathan McNair under the agricultural lien executed by the said Artemus and Jonathan McNair to the said A. & W. McQueen, 1 January, 1886, and what amount, if any, is now due for said advancement.

"The defendant A. H. McLeod moved for judgment for the possession of the land and directing the receiver to pay over to him the money in his hands. The court adjudges that said McLeod recover possession of the land in accordance with the certificate of Supreme Court, but denies the motion directing the payment of the money in the hands of receiver to said McLeod."

Defendants except, and ask the court to find the facts upon the motion in the cause, and to find the facts whether or not, at the time of the execution of the agricultural lien, the plaintiffs were the tenants of A. H. McLeod and how much they owed him for rents.

From the judgment of the Supreme Court affirming the judgment of this court, and the records of the case, the court declined to find any additional facts other than the affidavit of A. McQueen, which is filed and found to be true.

The defendants except. Appeal to the Supreme Court. Notice waived. Appeal bond in sum of $25 adjudged sufficient.

F. A. McNeill and W. F. French for plaintiffs. (353)
William Black for defendants.

SHEPHERD, J., after stating the facts: His Honor very properly allowed A. & W. McQueen, the agricultural lienees, to intervene and assert their alleged rights in the fund held by the receiver. It is true that there had been a final determination of the issues raised upon the pleadings, but no order had been made as to the rents which had been collected by the receiver, and so far as these were concerned the cause was still open for further directions.

The order of reference to the clerk and the refusal of the court to direct that the entire fund should be paid to the defendants were correct. There was error, however, in withholding from the defendants the rents for the years 1887 and 1888. These should have been paid to the defendants, as the agricultural lienees can, in no aspect of the case, be entitled to any part of them, their lien only covering the products of the year 1886.

It appears from the record, and is conceded here, that the plaintiffs were in possession of the land, claiming it as their own, until the receiver

entered. It is very clear that the lienees are entitled to be paid for any advances they may have made up to that time, and the amount of these will be ascertained by the clerk under the order of reference.

If there were any advances after the action of the receiver, the circumstances under which they were made should be reported, so that the court can determine whether the lienees are entitled to be paid for the same.

Modified and affirmed.

Cited: Roughton v. Duncan, 178 N. C., 6.

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(354)

A. J. McKINNON v. JOHN H. MORRISON.

Pleading—Counterclaim—Contracts—Torts—Warranty—Issues—Judge's Charge—Exception—Evidence—Negligence—Verdict—Judgment in Supreme Court.

In an action to enforce a lien given to secure the purchase money due on a horse, the lienor set up a counterclaim for damages—(*a*) for breach of warranty; (*b*) for failure to insure the life of the horse as agreed, which plaintiff moved to strike out in this Court. *Held*—

1. While in a *proper case* a motion to strike out certain parts of a pleading may be allowed in this Court, this is not such a case.

2. A counterclaim for damages either *ex delicto* or *ex contractu* may be pleaded if it "arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim." Code, sec. 244, subsec. 1.

3. It is sufficient if an issue is submitted in the language of the pleading—if it is desired in another form the court should be asked to amend the pleadings so that it may arise in the form desired.

4. It is "well settled" that a general broadside exception to the judge's charge on the ground, either (*a*) that it incorrectly states a rule of law, or (*b*) that it is an expression of opinion upon the facts, or (*c*) to an *omission* to charge upon some particular aspect of the case, when no special instruction was asked for in writing, will not be entertained. The error complained of must be *specifically assigned*, either in a bill of exceptions, or, preferably, on a motion for a new trial.

5. This ruling is not in conflict with sec. 412, subsec. 3 of the Code, which *only provides* that the charge need not be excepted to *"at the time,"* as in other exceptions, but does not relieve a party from specifically assigning error on the *appeal.*

6. Only so much of the charge as distinctly bears upon the specific exception need be sent up in the record.

7. The *refusal* or failure of the judge to give an instruction specially *prayed in writing, and in apt time*, is "deemed excepted to."

8. Testimony that defendant informed plaintiff that the horse was *ailing*, is competent as corroborative of defendant's other testimony that plaintiff was to keep the horse insured.

9. The failure of the defendant lienor to notify plaintiff that the policy of insurance had lapsed does not affect his right to damages. The doctrine of contributory negligence has no application to contracts, but rather to torts, and is based upon grounds of public policy.

10. When a policy of insurance is no part of the *contract* entered into by the parties, but is taken out in pursuance of it, its contents, if accepted by either party, were competent evidence to corroborate or contradict the evidence as to *what was the contract.*

11. The refusal to set aside a verdict as against the weight of evidence is not reviewable.

12. Section 957 of the Code, requiring the Supreme Court to give such judgment as shall appear to be proper from an *inspection of the whole record*, has reference only to essential parts of the record proper, as pleadings, verdict and judgment.

ACTION for the enforcement of an agricultural lien for ad- (355) vancements under the statute, tried before *Shepherd, J.*, at October Term, 1888, of ROBESON, upon issues under the defendant's affidavit and notice filed with the sheriff.

Defendant's bond, dated 17 January, 1887; due 1 October, payable to plaintiff in the sum of $130; also a mortgage on the horse of same date, and an agricultural lien of same date, registered within thirty days, introduced in evidence. The agricultural lien was to secure the bond given for the horse, furnished after the execution of the lien as advancements under said lien. No other advancements furnished. Lien covers crop seized. On these points no denial.

The defense set up was that the horse's eyes were warranted and they proved defective, so much so that the horse went blind; further, that the plaintiff agreed, as a part of the terms of the sale, that he would insure the horse's life for twelve months, but failed to keep the premiums paid up; that the horse having died, the defendant found that plaintiff had permitted the policy to lapse, and defendant set up a counterclaim for the $90, amount of the policy, and also for damages for breach of warranty as to the soundness of horse's eyes.

J. H. Morrison, the defendant, testified: "I saw there was (356) some defect about the horse's eyes. Plaintiff, as an inducement to the trade, agreed that he would be responsible for any failure in the eyesight, and pay the difference in value by reason of any failure of the eyesight. Plaintiff also, as an inducement to the sale, agreed to take

out a policy of $90 on the life of the horse. I took the horse home and worked him. In about ten days the eyes of the horse became inflamed. I carried him back, and McKinnon and I did not agree to the amount to be deducted. He then asked me to take the horse back, and he would see if he could get a horse to exchange with me, but we could never agree.

"The evening before the horse died (six weeks after the trade) I told plaintiff that the horse was sick, and that we had better make some definite arrangements. (Objection to this testimony by plaintiff.)

"On Monday after the horse's death I learned for the first time that the policy had been forfeited; horse's eyes damaged $100. I signed the application for the insurance on the horse; McRae was agent. The company (insurance) notified me before the horse died that the premium, $1.30, was due. I did not pay the premium nor did I notify the plaintiff. I saw McKinnon several times after I received the notice from the company that the premium owed was due, but I did not ask him to pay it, nor did I tell him that I received the notice. The notice you have is not the one served on me. I don't remember saying that the policy would be forfeited. I worked the horse; drove him to Maxton several times. McKinnon was to pay the premiums. (Objection by plaintiff; overruled; exception.) I was to have nothing further to do with it after signing the application."

Col. McRae: "Defendant Morrison made the application for the insurance on the horse at the instance of McKinnon; said plaintiff said he wanted to insure; that he was going to sell him the horse. McKinnon was to pay the premium. (Objection by plaintiff; overruled; (357) plaintiff excepts.) Defendant Morrison signed the application for the insurance; defendant said, 'This is all I have to do with it.' Plaintiff knew when the premium was due. When the policy came I notified plaintiff to come and get it, and he said let it stay and he would come and get it. McKinnon knew that the premiums were to be paid quarterly. Neither plaintiff nor defendant saw the policy until after the death of the horse. Plaintiff said he was to pay the fees. (Objection by plaintiff; overruled; exception.) A blind horse is worth half price."

Ed. McRae: "Horse was blind; was worth $25."

R. M. Field: "Horse practically blind; worth $25."

A. J. McKinnon, the plaintiff, testified: "The value of the horse at the time of sale was $130. Defendant agreed to give me that price for the horse, and executed his note and mortgage and lien to secure it; defendant and I traded. We went to McRae to take out policy; McRae worked out the first premium and I paid it then. There was nothing said, that I heard, about who was to pay the other premiums. I got

no notice from the insurance company nor defendant that the premium was due; did not know it was due; I would have paid it if I had known it was due. McRae told me policy was there; I told him to keep it; he had all my papers for safekeeping. I examined policy after horse died, and I could not have ascertained from it when the premium would be due. I did not agree to pay any premium but the first. Before we traded defendant doubted the horse's eyes; I said I would warrant the horse's eyes, but nothing else. I traded the defendant another horse in place of the first one, and carried him down to the defendant, and he refused to take it. The horse was damaged $30 on account of his eyes; he never went blind. Defendant drove the horse to Maxton and return the day before he died, and told me his eyes had gotten almost well. McRae told Morrison that he would have to insure the horse, as (358) he was the owner; that was the insurance law."

Geo. Norment: "I knew the horse well before McKinnon sold him; there was nothing the matter with his eyes."

The pleadings in the case introduced in evidence.

The policy introduced in evidence.

The plaintiff insisted that there should be an issue, "Did plaintiff agree to keep the horse insured?" Separate from the issue, "Did plaintiff agree to insure the horse for twelve months?"

The plaintiff asked the court to instruct the jury as follows:

1. The defendant having admitted that he had notice that the premium was due before it was due, and that he did not pay the same; that he saw the plaintiff several times after he received notice, and did not inform him that he must pay premium, or that premium was due—that defendant cannot recover for insurance, as he was guilty of negligence.

2. That if plaintiff has been negligent, yet if defendant, by reasonable care and prudence, could have averted the loss, then defendant would not be entitled to damages for or on account of the lapse of the insurance policy.

3. That the policy, by its terms, shows that Morrison was to pay the premiums, and cannot be contradicted, and defendant is bound by it.

4. That if plaintiff could not have told from the policy when premium was due then he would not be liable.

The other instructions asked by the plaintiff were given. In lieu of these four instructions the court charged the jury:

"That if they were satisfied McKinnon agreed to insure the horse, and keep him insured for twelve months, that then they would respond to the fourth issue 'Yes'; otherwise, 'No.' That if McKinnon agreed at the time of the trade, and it was a part thereof, that he (McKinnon) would take out and keep up, at his expense, a policy of insurance

(359) on the life of the horse, and it was then and there agreed between him and Morrison that Morrison was to have no further connection with the insurance, but that McKinnon was to attend to it and keep it up, and that McKinnon was then and there informed by McRae, the insurance agent, when the premium was to be paid, and the policy afterwards lapsed by McKinnon's failure to pay the premium, then the amount of the policy must be deducted from the value of the horse, after first deducting any depreciation on account of blindness, to the extent only of the actual value of the horse, and they would answer fifth issue 'Ninety dollars.' "

His Honor submitted the following issues to the jury, in addition to the issues in regard to damages for breach of warranty as to the eyesight, about which no point is raised on the appeal:

1. Did the plaintiff agree to insure the life of the horse and keep the same insured for twelve months? Answer: "Yes."

2. What damage has the defendant sustained by reason of the breach of this agreement? Answer "Ninety dollars."

Motion by plaintiff for new trial:

1. For refusal to submit the issue "Did plaintiff agree to insure the horse?" disconnected with the issue, "Did he agree to keep him insured for twelve months?"

2. For refusal to give instructions asked for.

3. For error in charge as given.

4. For admission of improper testimony.

5. For the expression of opinion.

6. For that the findings of the jury are inconsistent and contrary to the weight of the testimony.

Motion overruled. Judgment, and appeal by plaintiff.

William Black for plaintiff.

F. A. McNeill for defendant.

(360) CLARK, J., after stating the facts: The plaintiff moved in this Court to strike out "that part of the answer which sets up a counterclaim for damages, this action being in contract." In a proper case such motion here is allowable, because a counterclaim is a cross-action, and if the court below did not have jurisdiction advantage can be taken of that defect in this Court. *Tucker v. Baker,* 86 N. C., 1; *Bryant v. Fisher,* 85 N. C., 69.

The plaintiff's motion is on the ground that damages, being for a tort, cannot be pleaded as a counterclaim to an action on a contract. But damages are not necessarily for a tort. There are damages *ex delicto* and damages *ex contractu* for breach of contract. The counterclaim

here set up belongs to the latter class. *Froelich v. Express Co.*, 67 N. C., 1. Were this not so, still it is properly pleaded, as it "arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim." Code, sec. 244, subsec. 1; *Bitting v. Thaxton*, 72 N. C., 541. The motion to strike out the counterclaim must be denied.

The first exception to evidence, that defendant informed plaintiff that the horse was ailing, is without good ground. Its bearing was to corroborate defendant's other evidence that plaintiff was to keep the horse insured, and was notice to him of the necessity of keeping the premiums paid up.

The other three exceptions to evidence were properly overruled. The first two were as to statements by witnesses that McKinnon's agreement was to pay the premium, and the last was to an admission by McKinnon to that effect. We fail to see the force of the exceptions.

The issue as to the insurance was submitted in the language of the pleadings, and was proper, unless an amendment had been asked and allowed in the discretion of the court.

Nor do we find anything in the case which tends to sustain the exception that the court expressed an opinion upon the facts. The exception made is too general to be considered. It was the duty of the appellant in his assignment of error to point out the language in (361) the charge which he claims to be such expression of opinion.

The first and second prayers of instruction were based upon the idea that defendant was guilty of contributory negligence. The cases cited by the learned counsel for the plaintiff are applicable in actions of tort, where it is shown that the party injured contributed by his own wrong, or by his negligence in not using reasonable care or prudence to avert the loss. "The rule which denies relief to a plaintiff guilty of contributory negligence is based less upon considerations of what is just to the defendant than upon grounds of public policy, which requires, in the interest of the whole community, that every one should take such care of himself as can reasonably be expected of him. It is a part of the same policy which regards suicide as a crime, which punishes vagrancy and idleness, and which has led some States to deal with confirmed spendthrifts as a species of lunatics. Waste or recklessness, even in respect to one's own property, is an injury to the State, and, indeed, to the whole world. And though political economy has demonstrated the uselessness of attempting, by means of direct penal legislation, to reform such evils, it does not condemn those rules of law which, by making carelessness the means of its own punishment, teach caution, without attempting an impracticable severity." Sherman & Redfield Negligence, sec. 42.

The doctrine of contributory negligence has no application to a case like this. The defendant claims damages for breach of contract—not in tort. If the contract was as alleged by defendant, then there was no obligation on him to notify plaintiff when premiums would fall due. It did not interest the public that he should do so, and his failure to do it was not negligence. If the contract was as alleged by plaintiff,
(362) there was simply no breach of it by him, and defendant could not recover on his counterclaim.

The third and fourth exceptions were properly refused for the same reason. If plaintiff's version of contract was correct, then these instructions could have no application. If (as the jury found) the defendant's statement was the true one, it was the plaintiff's own fault that he took out an incorrect or incomplete policy. The policy was no part of the contract, but was an act done in pursuance of it. Its contents, if accepted by the parties, or either of them, was competent to corroborate or contradict the evidence as to what was the contract.

The objection that the verdict was against the weight of the testimony was for the consideration of the court below, and its decision is not reviewable. The jury found that the breach of warranty as to the eyesight was $65, and by failure to insure $90, but the court instructed the jury that both claims for damages, if allowed, could not exceed $130, the agreed value of the horse. As the court gave defendant judgment for costs only, the plaintiff has no ground to complain that he was damaged by any apparent inconsistency in the verdict.

The only exception remaining to be passed upon is "to the charge as given."

A general exception to the charge without assigning errors specifically will not be considered in this Court. The cases to this effect are numerous: *Lytle v. Lytle,* 94 N. C., 522; *Williams v. Johnston,* 94 N. C., 633; *Fry v. Currie,* 91 N. C., 436; *Bost v. Bost,* 87 N. C., 481; *Pleasants v. R. R.,* 95 N. C., 195; *S. v. Nipper,* 95 N. C., 653; *McDonald v. Carson,* 94 N. C., 497; *Barber v. Roseboro,* 97 N. C., 192; *Boggan v. Horne,* 97 N. C., 268; *Sellers v. Sellers,* 98 N. C., 13; *Caudle v. Fallen,* 98 N. C., 411; *Leak v. Covington,* 99 N. C., 559; *Hammond v. Schiff,* 100 N. C., 161; *Dugger v. McKesson,* 100 N. C., 1; and there are others.

(363) Subsection 2, section 412, of the Code, requires that exceptions to evidence and other matters of objection must be entered *"at the time,"* if not, they are waived. *S. v. Ballard,* 79 N. C., 627; *Shields v. Whitaker,* 82 N. C., 516; *Scott v. Green,* 89 N. C., 278.

Subsection 3, of same section, modifies that rule as to exceptions to the charge. It has been construed explicitly in *Lytle v. Lytle* and other cases *supra.* Instead of requiring that exceptions to the charge shall

be noted *"at the time"* it provides that the charge is deemed excepted to. This avoids the unseemly spectacle of counsel interrupting the retirement of the jury, by making exceptions in their hearing to the charge, and replying, as it were, to the instructions of law laid down to them by the court. At the same time it preserves to the losing side the right to have exceptions to the charge noted when it shall become necessary. It is, none the less, the duty of counsel to make out specifically an assignment of errors in the charge when making up the case on appeal. Such is the rule observed in this Court when it is claimed that there is error in the charge given. Indeed, a better practice would be to assign such errors on a motion for a new trial. It would be but fair to the appellant himself, as well as to the other side, to do this. It may be that, if the errors in the charge were called to the attention of the presiding judge he would himself award a new trial, and save parties the expense and delay of an appeal. When the error is an *omission* to charge as to some particular aspect of the case, it cannot be assigned as error and become the subject of review, unless an instruction was asked for and called to the attention of the court. *S. v. Bailey,* 100 N. C., 528; which case cites *Simpson v. Blount,* 14 N. C., 34; *Brown v. Morris,* 20 N. C., 565; *S. v. O'Neal,* 29 N. C., 251; *Arey v. Stephenson,* 34 N. C., 34; *Hice v. Woodard, ib.,* 293; also to same effect are the later cases, *Davis v. Council,* 92 N. C., 725; *Branton v. O'Briant,* 93 N. C., 99; *Fry* (364) *v. Currie,* 91 N. C., 436; *S. v. Debnam,* 98 N. C., 712; *Terry v. R. R.,* 91 N. C., 236; *Moore v. Parker,* 91 N. C., 275. If the prayer for instruction is asked *in writing,* and in apt time, its refusal or a failure to charge it is deemed excepted to.

The statute (Code, sec. 957) requiring the Supreme Court to render such judgment as shall appear to be proper from an *inspection of the whole record,* has reference only to the essential parts of the record, such as the pleadings, verdict and judgment, in which, if there be error, the Court will correct it, though it be not assigned. *Thornton v. Brady,* 100 N. C., 38.

We have taken the trouble to cite several of the reiterated decisions of the court that it may be seen that the law is "well settled" in this respect.

When specific assignment of error to the charge is made it is only necessary to state, in the case on appeal, the part of the charge excepted to, and so much more as may be necessary to its proper understanding. When there is no error assigned to the charge, or (which is the same thing) an unpointed broadside challenge to the "charge as given," it is not usually necessary that the record be cumbered with any part of the charge.

We find no error, and the judgment below must be

Affirmed.

Cited: *Lindsey v. Sanderlin, ante,* 331; *Carlton v. R. R., post,* 369; *Turner v. Turner, post,* 573; *Pollick v. Warwick, post,* 642; *Whitehurst v. Pettipher,* 105 N. C., 42; *Taylor v. Plummer, ib.,* 58; *Helms v. Green, ib.,* 265; *Taylor v. Nav. Co., ib.,* 490; *Walker v. Scott,* 106 N. C., 62; *Southerland v. R. R., ib.,* 106; *Rose v. R. R., ib.,* 169; *McMillan v. Gambill, ib.,* 362; *S. v. Parker, ib.,* 714; *Everett v. Williamson,* 107 N. C., 211; *McFarland v. Improvement Co., ib.,* 369; *Thompson v. Tel. Co., ib.,* 458; *Lowe v. Elliott, ib.,* 719; *S. v. McDuffie, ib.,* 887; *S. v. Fleming, ib.,* 909; *Smith v. Smith,* 108 N. C., 368; *Euliss v. McAdams, ib.,* 513; *Bank v. Rogers, ib.,* 578; *S. v. Brabham, ib.,* 798; *Bottoms v. R. R.,* 109 N. C., 72; *Hinson v. Powell, ib.,* 538; *Emry v. R. R., ib.,* 599, 602; *Hooks v. Houston, ib.,* 627; *Humphrey v. Church, ib.,* 139; *Markham v. Markham,* 110 N. C., 364; *Hopkins v. Bowers,* 111 N. C., 179; *S. v. MacKnight, ib.,* 693; *S. v. Frizell, ib.,* 724; *Ward v. R. R.,* 112 N. C., 179; *Davis v. Duval, ib.,* 834; *Tillett v. R. R.,* 116 N. C., 939; *Kendrick v. Dellinger,* 117 N. C., 494; *Driller Co. v. Worth, ib.,* 522; *Bernhardt v. Brown,* 118 N. C., 709; *S. v. Downs, ib.,* 1243; *Branch v. Chappell,* 119 N. C., 83; *Andrews v. Tel. Co., ib.,* 405; *Burnett v. R. R.,* 120 N. C., 518; *Hampton v. R. R., ib.,* 538; *S. v. Ashford, ib.,* 589; *Brown v. Brown,* 121 N. C., 10, 11; *Wilson v. Wilson,* 125 N. C., 527; *Joines v. Johnson,* 133 N. C., 491; *Cowles v. Lovin,* 135 N. C., 491; *Cameron v. Power Co.,* 137 N. C., 100; *Hicks v. Kenan,* 139 N. C., 338; *Comrs. v. Erwin,* 140 N. C., 194; *Simmons v. Davenport, ib.,* 410; *Tyner v. Barnes,* 142 N. C., 112; *Sawyer v. Lumber Co., ib.,* 163; *Slaughter v. Machine Co.,* 148 N. C., 473; *Mason v. Cotton Co., ib.,* 517; *Jackson v. Williams,* 152 N. C., 205; *S. v. Yellowday, ib.,* 797; *S. v. Houston,* 155 N. C., 432; *S. v. Davenport,* 156 N. C., 611; *Trollinger v. Fleer,* 157 N. C., 85; *Pate v. Bank,* 162 N. C., 509; *Hendricks v. Ireland, ib.,* 525; *S. v. Robertson,* 166 N. C., 365; *Webb v. Rosemond,* 172 N. C., 851; *Power Co. v. Power Co.,* 175 N. C., 680; *S. v. Herren, ib.,* 759; *Futch v. R. R.,* 178 N. C., 284; *S. v. Bryant, ib.,* 708.

W. C. CARLTON v. WILMINGTON AND WELDON RAILROAD COMPANY.

Negligence—Damages to Livestock—Prayer for Relief—Charge.

1. Livestock are not expected to show the same judgment on the approach of a train as human beings.

2. The test of negligence in this case is not whether proper effort was used after the animal was discovered upon the track, but whether, by the exercise of proper outlook, it could have been discovered in time to have prevented the killing.

3. When the charge given contains the substance of the prayer for instruction, there is no just ground for complaint that the exact words were not followed.

4. When the action was brought within six months of the killing, the statute raises a presumption of negligence, and the burden of proving it is not upon the plaintiff.

5. A general exception, without specifying error will not be considered in this Court.

APPEAL from *Bynum, J.*, at August Term, 1889, of DUPLIN. (365)

Plaintiff claimed damages for the killing of his mare by negligence of defendant in running its cars and engine.

It was not controverted on the evidence that the plaintiff's mare was knocked off a railroad embankment in the daytime by the defendant's passenger train and killed. The plaintiff's evidence tended to show that the mare, by proper lookout, could have been seen by the engineer a distance of a mile and a half, the railroad being very straight at that point, and running through a level country. One of plaintiff's witnesses testified that he saw the mare on the embankment, on the walk by the side of the track, when the train was half a mile off; that the embankment was one hundred and fifty yards long, ten feet high, and very steep, and that the whistle did not blow till the engine was within fifty yards of the mare; that she jumped and was almost immediately struck by the train, and that no effort was made to stop the train (366) or slacken its speed.

The testimony of the defendant went to show that the mare came up the embankment twenty yards ahead of the engine, and too late to stop the train, which could not have been stopped, at the rate it was going, under three hundred and fifty yards.

There were no exceptions to the evidence.

The instructions asked by the defendant were given by the court except the following:

1. It is not required of an engineer, in running trains, to stop his train when persons are on the ground near the track, nor is there greater deference due to livestock than to human beings.

2. If the defendant used every effort to stop the train and avoid the accident after the mare was discovered then there was no negligence, and the plaintiff cannot recover.

3. If an engineer in charge of a locomotive drawing a train discovers cattle, either upon the track or approaching the same as if they were coming upon the track, blows his whistle, reverses his engine and does all in his power to stop, and fails to do so, he is not negligent, and the plaintiff cannot recover.

The court, in lieu thereof, instructed the jury:

"It was the duty of the defendant to keep a lookout for stock on the track in daylight, and when discovered to use all the means it could, consistent with the safety of the passengers and the operators on the train, to avoid injuring or killing them; that the main questions for the jury in this case were:

"1. Was the horse on the track of the defendant company sufficiently long, after she could, by the exercise of an ordinarily diligent outlook, be seen by defendant, or its employees running the train, to have
(367) been discovered, for the train to have had its speed slackened or, if necessary to prevent the killing, stopped?

"2. Were all the means that could, with safety to the passengers and operators, have been used, used by the defendant after the horse could by an ordinarily diligent outlook have been discovered, to prevent the killing?

"3. The question as to the time the horse was discovered on the track by the engineer or other employees of the defendant company is not when it was actually seen, but when, by the exercise of ordinary care and diligence in looking out, it could have been seen, and this is a question of fact for the jury to find from the evidence, and the burden is upon the plaintiff to show to their satisfaction, by a preponderance of the testimony, that the outlook was not such as it should have been, under the instructions above given, and that in consequence of the negligence of the defendant, the horse was killed.

"4. If by an ordinarily careful outlook the horse could have been discovered in time to have allowed the train to be stopped before killing the horse, and it was not so stopped, it would be negligence, and the plaintiff would be entitled to a verdict on the first issue, and your verdict should be 'Yes,' provided you find, from the evidence, that the horse was on the top of the embankment.

"5. If the jury find from the evidence that the horse came up on the track or embankment of the defendant company too near the engine and cars for the engineer, by the use of the appliances under his control, and which he could use with safety to the passengers and employees, to stop the train before striking the horse, they will answer the first issue 'No.'"

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

The defendant assigned error in refusing to give the instruc-
(368) tions requested, and in those given.

W. R. Allen for plaintiff.

A. W. Haywood for defendant.

CLARK, J., after stating the case: The first prayer for instruction asked and refused is based upon the idea that livestock on the approach of the locomotive will show the same judgment and discretion as human beings under the same circumstances. "It was reasonably certain that the horse would be frightened," said the late *Chief Justice,* in *Snowden v. R. R.,* 95 N. C., 93, "when he saw what was rapidly, in appearance, coming upon him, and would not remain quiet when it passed in three feet of him. He would be quite as apt, as he did in fact, after rushing a short distance along the ditch, to leap upon the road as upon the opposite bank. This possible, if not probable action, would suggest itself to any careful and considerate person, and the necessity of being on the lookout and taking proper precautions, such as slowing the locomotive, to guard against mishap and danger." But appellant's proposition is too unreasonable to need citation or discussion. The charge as given, in lieu of the first prayer, is correct.

The second prayer for instruction was substantially given, with the proper modification that the test was not whether proper effort was used "after the mare was discovered," but "after, by the exercise of a proper outlook, she could have been discovered." *Wilson v. R. R.,* 90 N. C., 69.

The third prayer was substantially given. The defendant has no ground to complain because the exact language of his prayer is not given, if it is in substance given. *S. v. McNeill,* 92 N. C., 812; *Conwell v. Mann,* 100 N. C., 234. Indeed, the charge as given is open to the exception that it is too favorable for the defendant, in that the jury were instructed that the burden was on the plaintiff to show that the horse was killed in consequence of the negligence of the defend- (369) ant. The action having been brought within six months after the cause of action accrued, the statute raised a presumption of negligence on the part of the defendant, and the burden is on it to rebut such presumption. Code, sec. 2326; *Pippen v. R. R.,* 75 N. C., 54; *Wilson v. R. R.,* 90 N. C., 69.

There is no error in the refusal of instructions, nor is there any in the charge, of which the defendant can complain. It is proper, however, to say that a general exception to a "charge as given," without specifying error, will not be considered in this Court. This has been repeatedly held by this Court in numerous decisions, and has been reaffirmed in *Dugger v. McKesson,* 100 N. C., 1; *Hammond v. Schiff,* 100 N. C., 161; *McKinnon v. Morrison, ante,* 354.

Affirmed.

Cited: Randall v. R. R., post, 415; *Lindsey v. Sanderlin, ante,* 331; *Bullock v. R. R.,* 105 N. C., 189; *Deans v. R. R.,* 107 N. C., 690, 692;

Randall v. R. R., ib., 755; *Meredith v. R. R.,* 108 N. C., 618; *Hinkle v. R. R.,* 109 N. C., 479; *Ward v. R. R., ib.,* 360, 366; *Clark v. R. R., ib.,* 452; *Pickett v. R. R.,* 117 N. C., 630; *Doster v. R. R., ib.,* 662; *Styles v. R. R.,* 118 N. C., 1089; *McArver v. R. R.,* 129 N. C., 384; *Snipes v. Mfg. Co.,* 152 N. C., 46.

GEO. HARRIS AND WIFE v. WILLIAM SNEEDEN ET AL.

Damages—Costs—Pleading—Trespass—Possession.

1. Under the present system of pleading a demand for specific relief is immaterial, it being the duty of the court to grant such relief as the pleading and facts, proved or admitted, may demand.
2. Where the cause of action is defectively stated in the complaint, it may be aided by the facts alleged in the answer.
3. A formal prayer for relief is not now essential; the court will render such judgment as the *facts*, proved or admitted, demand, not inconsistent with the pleadings, notwithstanding the party may have misconceived his remedy.
4. In an action for trespass upon land the plaintiff, not in actual possession, must prove title to the premises when, no adverse possession being shown, the title draws to it the constructive possession, but possession alone will support an action for forcible trespass—in such case, the burden is on the plaintiff to show actual possession.

(370) ACTION, tried at September Term, 1889, of NEW HANOVER, before *Bynum, J.*

In order to a clear and proper understanding of what is alleged in the complaint, and either denied or admitted in the answer, enough of the complaint and answer is given below to set out the facts.

It was admitted that plaintiffs were husband and wife.

The plaintiffs alleged:

"2. That the plaintiff *Julia O. Harris is the owner of,* and she, or the plaintiff George, has been, *for about seventeen years, in possession of a certain tract* of land in New Hanover County, described as follows: An island in the sound, eastward of Wrightsville village, formerly known as the Sneeden Island, or Hammocks, which island is bounded on the east by the main or banks channel; on the south by Wrightsville channel; on the west by Raccoon channel, and on the north by the channel which runs from Wrightsville Inlet westwardly towards the mainland."

The defendants denied the second allegation of the complaint to be true, and, on the contrary, they asserted that the defendant William H. Sneeden, in behalf of himself and other heirs of Stephen Sneeden, de-

ceased, since the death of the said Stephen Sneeden, "have *always claimed* and *had* the *title to and rights of possession of said property known as the Sneeden Hammocks, and more particularly set forth and described in the second allegation of the complaint;* and, while they never lived upon said property, because, by reason of its nature and situation it is not habitable for any length of time without danger to health, *yet they have been in the actual possession of and exercised such rights of ownership over said property as it was capable of,* to wit, have used it for a fishery, have fed their hogs and cattle upon it, cut wood upon it, and exercised other rights of ownership over it, among which they have permitted others to use the property, and have rented it to persons to cut timber upon; and such possession during all these years has never been disturbed until the sheriff of New Hanover County (371) arrested the defendants and placed them in jail."

Plaintiff Julia O. Harris claims title through various *mesne* conveyances under Stephen Sneeden. Defendant claimed as heir of Stephen Sneeden and denied plaintiffs' title.

Plaintiffs say that the land was conveyed to John A. Sanders in 1857 by Stephen Sneeden, and that in 1859 it was conveyed to one Sanders by E. D. Hall, sheriff, by deed under execution, and that he took possession and held until 1870, since which time plaintiffs and their agents and their tenants have been in absolute and undisputed possession and ownership.

Defendants deny the above allegation, and say that Sanders never was in possession, or even owned, or treated the land as his own. They deny that Stephen Sneeden ever acknowledged such possession or ownership. They say that Stephen Sneeden died owning and possessing said property, and at his decease it descended to his heirs at law, who are the defendants. They deny that plaintiffs, or any one for them, ever owned or took possession of the land until they (defendants) were forcibly ejected by sheriff in this action. They deny "any trespass" by them, and allege themselves to have been in lawful possession. They deny, also, any slander of title or wrongful or malicious acts respecting the lands.

The plaintiffs further alleged:

"10. That recently there has been much public discussion as to the probability of a railroad being built to the island and beach above mentioned, and as to the increased value 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 afore-* (372)

said, and circulated threats for 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 a large number of people,* and the title of plaintiffs has been thereby grossly slandered and they greatly damaged."

To which defendant answered:

"10. The defendants, answering the tenth 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 Harris 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 the 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, among others plaintiffs' attorney, A. G. Ricaud, until unlawfully ejected by the sheriff as aforesaid, under an arrest and bail proceeding in this cause."

The issues and responses to each were as follows:

1. Was the plaintiff J. O. Harris the owner of the premises under a good and sufficient title? "Yes."

2. Was the plaintiff in possession of the premises at the time of the alleged trespass and speaking of the words charged as slander of title? "Yes."

3. Did the defendant forcibly enter upon the possessions of the plaintiff? "No."

(373) 4. Were the words spoken by the defendant false and malicious? "No."

5. Was the entry made by defendant wantonly? "No."

6. Has defendant slandered the title of plaintiff? "No."

7. What damage has plaintiff sustained by the words and acts of defendant? "None."

Before the court settled the issues defendants' counsel argued to the court that this was an action for slander and not trespass, while plaintiffs contended that it was both trespass *quare clausum fregit* and slander.

Court charged jury that they would find third issue in the negative unless they were satisfied plaintiffs had the *possessio pedis* or actual

occupation at the time of defendant's entering on the premises; that if they found that plaintiffs only had such possession as the title draws they would find this issue in the negative.

The plaintiffs moved on the verdict for judgment for nominal damages and for costs. This the court refused and gave judgment as follows:

The jury having found the five last issues in favor of the defendants as herein appears:

It is now adjudged that this plaintiff take nothing by his writ, and that the defendant be allowed to go without day and recover his costs of the plaintiff.

After verdict plaintiff moved to amend the complaint by inserting the following additional clause:

"That the defendants unlawfully entered upon the said premises without leave of the plaintiffs, and took possession of the same, breaking the close of the plaintiffs, and thereby committing a trespass upon the same to the great damage of plaintiffs."

This amendment the court refused to allow.

After motion for a new trial, which was refused by the court, plaintiffs appealed from the judgment as rendered. (374)

Appellant assigned for error:

1. The refusal to render judgment according to plaintiffs' motion.
2. The refusal to allow the amendment prayed for.

S. C. Weill for plaintiffs.
T. W. Strange for defendants.

AVERY, J., after stating the facts: Issues are framed in order to enable a jury to determine disputes as to the material facts arising out of the denial in an answer of the allegations of a complaint. Every material allegation of the complaint not controverted by the answer shall, for the purpose of the action, be taken as true. Code, sec. 268.

The facts upon which the judgment of the court is predicated are the findings of the jury and the admissions, either direct or by failure to deny, made in the pleading. The plaintiffs moved the court for judgment for nominal damages, because it was found by the jury that the *feme* plaintiff was the owner and was in possession of the premises at the time of the alleged trespass, and it was admitted in the answer that at the time when the defendants entered they erected a small building and occupied it. The ownership, the constructive possession of the plaintiffs and the acknowledgment by defendants of entering unlawfully and building and living in a house on the land would constitute a sufficient foundation for a judgment for nominal damages and costs in favor

of the former, if the allegations of the complaint, aided by the answer, were sufficient to support the findings of fact.

It is conceded that the title and possession of plaintiffs were controverted by the answer, and the responses to the first and second issues were favorable to the plaintiffs. Did the plaintiffs sufficiently allege
(375) that the defendants had committed a simple, as distinguished from a forcible, trespass? If they did, or if the language of the complaint is not very clear—but the defendants have answered in such a way as to amount to a denial that their entry was unlawful because it was under a good title, though they admit actual entry without force—plaintiffs are entitled to the judgment demanded. *Garrett v. Trotter,* 65 N. C., 430; *Knowles v. R. R.,* 102 N. C., 66; *Johnson v. Finch,* 93 N. C., 205.

In *Knight v. Houghtalling,* 85 N. C., 17, *Justice Ruffin,* for the Court, says: "We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of their contract. But we understand that under the Code system the demand for relief is made wholly immaterial, and that it is *the case made by the pleadings* and *facts proved,* and not *the prayer* of the *party,* which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now *no general prayer need be expressed* but *is always implied.*" In *Dempsey v. Rhodes,* 93 N. C., 128, the present *Chief Justice,* delivering the opinion, says: "Indeed, in the absence of any formal demand for judgment, the court will grant such judgment as the party may be entitled to have consistent with the pleadings and proofs."

It is clear that the plaintiffs have alleged in paragraph ten of the complaint an unlawful entry and trespass, which is denied in the answer. In order to make this appear distinctly we can put in parenthesis or omit all surplusage in the material portions of paragraphs numbered ten of complaint and answer, and show that the addition of the language charging force merely qualifies the declaration for simple trespass
(376) included in the complaint, and that defendants deny that they have trespassed with or without force.

The plaintiffs complain "that defendants entered upon their premises, the island aforesaid, . . . and proceeded to erect a building on the land." The defendants answer "that in the midst of this discussion they learned, for the first time, that the plaintiff George Harris set up some claim, or pretense of claim, to 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,* . . . and continued to occupy the same . . . until *unlawfully ejected by the sheriff, as aforesaid, under an arrest and bail proceeding in this cause.*" By the admission thus made it not only appears that the plaintiffs have alleged a simple trespass, but the defendants interpreted the paragraph (10) of the complaint to charge them with an unlawful entry upon land in the constructive possession of plaintiffs. Hence defendants did not in their answer content themselves with denying that plaintiffs had the *actual possession,* but confessed the entry without force, and justified it under title in the defendant Sneeden. True, they deny that the entry was accompanied by any force, threats or demonstration of force, and if they had simply added an averment that the plaintiffs were not in the actual possession it would have demonstrated the fact that they understood the declaration of the cause of action to be in the nature of forcible trespass. But when the defendants, after having denied the title of the plaintiffs and controverted their rights under particular conveyances in previous paragraphs of their answer, averred in paragraph ten that they entered peaceably, in pursuance of the advice of counsel, to assert *their own title,* and *erected* and *occupied a house* on the land, they acknowledged the entry and attempted to avoid the claim of constructive possession by setting up title in themselves, which they were advised was good. The doctrine of aider would, therefore, apply even if it is not perfectly clear that the plaintiffs meant to charge a simple trespass. *Knowles v. R. R., supra;* (377) *Garrett v. Trotter, supra; Johnson v. Finch, supra.*

In simple trespass the plaintiffs, where not in actual possession, must show a good title to the premises in dispute, and the legal title, when shown, will draw to it the possession, if there is no adverse possession. *London v. Bear,* 84 N. C., 266; *McCormick v. Moore,* 46 N. C., 16; *Cohoon v. Simmons,* 29 N. C., 189. On the other hand, possession alone will support, and actual possession must be shown to maintain an action for forcible trespass. *Patterson v. Bodenhammer,* 33 N. C., 4. The plaintiffs, if they had intended to declare for forcible trespass, would have been content to claim that they were in the actual possession of the land when the alleged entry was made with force and threats, etc.; but in setting out their claim of title they evinced a purpose, evidently understood by the defendants, to prove and rely on constructive, if they could not show actual, possession.

But if the plaintiffs did not understand what was the appropriate relief to which the facts alleged, if proven, would entitle them until after verdict, it does not impair their right to such judgment as the facts found and admitted would warrant the court in rendering. In *Patrick*

v. R. R., 93 N. C., 426, the late *Chief Justice Smith*, for the Court, says, as to the holding of the court below: "These rulings seemed to be a very strict enforcement of the former and superadded principles of pleading, and to ignore the adjudication made in *Jones v. Mial*, 82 N. C., 252, and subsequent supporting cases, which declare a plaintiff *entitled to such relief as the facts stated in the complaint will admit, while he may misconceive* the way in which *it is to be afforded.*" In *Moore v. Nowell*, 94 N. C., 265, this Court held that it was not error where a plaintiff stated more than one cause of action in one paragraph, and that if the allegations of a complaint indicated the proper judgment
(378) the court would grant it *"without regard to an inappropriate demand for judgment, or in the absence of any formal demand."*

The argument against the right of plaintiffs to judgment for nominal damages proceeds upon the idea that a plaintiff cannot recover in an action for possession of land where title and possession are not shown to be in himself, and that no issue involving the question of simple trespass was submitted. Out of the abundance of caution the plaintiffs moved the court to be allowed to amend, so as to state more clearly and separately that defendants had unlawfully entered, breaking plaintiffs' close. They had already demanded damage and costs as their relief. The defendants denied, and put the plaintiffs to the trouble and expense of proving title in themselves and the possession that a perfect title draws, while they charge, and the defendants acknowledge, that the latter entered upon the lands so held in the possession of the former, and built a house and occupied it.

It is not denied that a simple trespass is thus conclusively shown. But it is contended for the defendants that it is not alleged in the complaint, because the plaintiffs say, not only that defendants unlawfully entered upon their close, but their entry was accompanied with force, and that they have slandered the title of the plaintiffs. To sustain this view would lead us backward towards the technical distinctions and formalities of the old pleading, where the law has declared the forms of action shall be abolished.

We think, therefore, that his Honor erred in refusing to give judgment in favor of plaintiffs for nominal damages.

Error.

Cited: Skinner v. Terry, 107 N. C., 109; *Bond v. Wool, ib.*, 152; *Presson v. Boone*, 108 N. C., 87; *Gudger v. Penland, ib.*, 600; *Faulk v. Thornton, ib.*, 319; *Loughran v. Giles*, 110 N. C., 425; *McQueen v. Bank*, 111 N. C., 515; *Fowler v. Osborne, ib.*, 409; *Wiggins v. Kirkpatrick*, 114 N. C., 300; *Springer v. Shavender*, 116 N. C., 20; *Moore v. Angel, ib.*, 845; *Mizzell v. Ruffin*, 118 N. C., 72; *Simmons v. Allison,*

ib., 767; *Sams v. Price*, 119 N. C., 574; *Parker v. R. R., ib.*, 686; *Collins v. Pettitt*, 124 N. C., 736; *Gattis v. Kilgo*, 125 N. C., 135; *Staton v. Webb*, 137 N. C., 43; *Lumber Co. v. Lumber Co., ib.*, 443; *Bryan v. Hodges*, 151 N. C., 415; *Bryan v. Canady*, 169 N. C., 582; *Swain v. Clemmons*, 175 N. C., 243.

J. C. HEMPHILL v. LIZA MOORE, ADMINISTRATRIX OF GEORGE J. MOORE.

Notice—Injunction—Relief Against Mistake or Inadvertence.

1. One who has been duly made party to a pending action is bound to take notice of all motions, orders, etc., made therein during term time.
2. Special notice of motions, proceedings, etc., as for an injunction, is only required when made or to be heard out of term; but, in such cases, if the opposing party voluntarily appears, in person or by attorney, he will be ordinarily deemed to have waived notice.
3. Where a party has been prevented, by inadvertence or mistake, from making resistance to such motions, etc., the court may, in its discretion, give him an opportunity to be heard.

APPEAL from a restraining order granted by *Philips, J.*, at Fall (379) Term, 1889, of McDOWELL.

At the appearance term of the court the plaintiff filed his complaint and the defendant filed her answer thereto, and an order of reference was entered. At the next succeeding term, in the course of the action, the plaintiff, in open court, moved, upon affidavit, deemed pertinent and sufficient, for an injunction. One of the counsel of the defendant appeared and opposed the motion.

The following is the material part of the case settled on appeal:

"Counsel for the defendant voluntarily entered an appearance for the purpose of resisting the motion for an order restraining the defendant until the hearing. The facts set forth in the affidavit were admitted to be true by defendant's counsel in open court. Upon this admission and after full argument the motion was granted.

"After the order had been signed granting the injunction, counsel for the defendant gave notice that they would pray for an appeal upon the ground that the order was issued improvidently, being without notice. The court, with the consent of the plaintiff's counsel, then offered again to allow the defendant to file affidavits to the merits and to (380) open up the case, if the allegations were denied or the equities of plaintiff contested, which counsel refused to do, but stated that they would rely on want of notice as the ground of appeal."

Thereupon the defendant appealed.

No counsel for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

MERRIMON, C. J., after stating the case: It was suggested, on the argument here, that this action was improvidently brought, because the plaintiff might have obtained the relief sought by it and the motion in question in a pending special proceeding. But no question in that respect is presented by the assignment of error or by the record proper. The single ground of exception is that the order granting the injunction was made without notice to the defendant.

The statute (Code, sec. 340) prescribes that "an injunction should not be allowed after the defendant shall have answered, unless upon notice or upon an order to show cause," etc. In the present case the defendant was in court and bound to take notice of what was done pending the action in its course in term time, and she did actually appear, by her counsel, and resist the motion for an injunction. She had notice and acted upon it. *Sparrow v. Davidson,* 77 N. C., 35; *University v. Lassiter,* 83 N. C., 38.

Where a motion is made in the course of an action in term time, and by inadvertence or mistake a party fails to take notice as, regularly, he ought to do, the court upon application might and in a proper case should, in its discretion, grant the opposing party opportunity to be heard and make opposition, as the court did offer to do in this case. If time to prepare to make opposition should be required and neces-
(381) sary the court might grant it. It is in case of motions and proceedings in an action out of term time that a special notice to the adverse party must generally be given. But in such cases, if the opposing party should appear, by himself or his counsel, he would ordinarily have been deemed to have taken actual notice and to have waived formal notice. The law intends to afford all parties to actions and proceedings just opportunity to be heard in all proper respects and on like occasions, whether they be plaintiffs or defendants, but it will not encourage obstinacy or a disposition in them to be merely vexatious in and about the litigation.

There is no error in the order appealed from.

Affirmed.

Cited: Coor v. Smith, 107 N. C., 431; *S. v. Johnson,* 109 N. C., 855; *Harper v. Sugg,* 111 N. C., 327; *Zimmerman v. Zimmerman,* 113 N. C., 434; *Stith v. Jones,* 119 N. C., 430; *Patrick v. Dunn,* 162 N. C., 20; *School v. Peirce,* 163 N. C., 426; *Wooten v. Dairy Co.,* 169 N. C., 66; *Hardware Co. v. Banking Co., ib.,* 746; *Jones v. Jones,* 173 N. C., 283.

THEODORE GORDON AND WIFE v. AUSTIN COLLETT, RUFUS AVERY ET AL.

Contract—Issues—Statute Frauds.

1. A parol contract for the sale of land is not void, but voidable at the election of the party charged therewith.
2. It is the duty of the court to submit to the jury every material issue raised by the pleadings unless waived by the parties.

APPEAL from *Philips, J.,* at the Fall Term, 1889, of BURKE, for the recovery of a debt, and to subject land to the payment thereof. The facts upon which the action is founded are set out in *Gordon v. Collett,* 102 N. C., p. 532, in which the former appeal in this case was considered.

Plaintiff tendered the following issues:

2. Did the defendant Collett, by agreement with Mrs. Avery, abandon and renounce his contract of purchase of the land in (382) controversy?

3. If so, was such abandonment and renunciation before the execution of the mortgage by Collett and wife to the plaintiff, and if so, on what date?

4. Did the defendant Collett abandon his contract of purchase with M. C. Avery in favor of Rufus Avery prior to the execution of plaintiffs' mortgage?

The court refused these and submitted the following issues:

In what amount, if any, are the defendants Collett and wife indebted to the plaintiffs?

What amount of purchase money is due upon the land?

To the first of these issues the jury responded $295.62, with interest on $253.90 from 5 August, 1889, and to the second "seven and 84-100 dollars to Rufus Avery."

The plaintiffs offered evidence as set out in *Gordon v. Collett,* 102, *supra,* and other evidence which was admitted, and defendants excepted.

Defendant Rufus Avery offered to prove by himself that defendant Austin Collett, by his acts and conduct prior to 27 October, 1885, abandoned his contract of purchase of the land in controversy. Upon objection by plaintiffs this was ruled out by the court. Defendants excepted.

Defendants offered other evidence tending to show such abandonment and in support of his fourth issue, tendered and refused by the court. This was likewise ruled out and excepted to.

S. J. Ervin for plaintiffs.

J. T. Avery and J. B. Batchelor for defendants.

MERRIMON, C. J. In the former appeal in this case (*Gordon v. Collett,* 102 N. C., 532) we said: "In his answer Rufus Avery expressly alleges that Austin Collett, a long while before he executed the mortgage to the plaintiffs, abandoned his parol contract of purchase of the
(383) land, and consented to allow him to pay for it and take the title, and there was some evidence produced on the trial tending to prove this allegation. Collett might thus abandon his executory contract or transfer it to another. We can see no reason why he could not. The contract to convey was not a conveyance of the title to the land, and might be abandoned. If the allegation just mentioned was true then Collett conveyed nothing by his deed of mortgage to the plaintiffs, because he had nothing to convey, not even an equity. The plaintiffs in their reply expressly deny the allegation of the answer just mentioned and thus a material issue of fact was raised by the pleadings. The defendants did not waive the trial of this issue, nor did the court submit it to the jury." Nor did the defendant Rufus Avery waive such issue on the last trial in the court below. On the contrary, he offered evidence tending to prove such alleged abandonment in his favor of the unwritten contract of sale of the land in question, first made between M. C. Avery and the defendant Collett, and asked the court to submit to the jury the issue in that respect, plainly raised by the pleadings. The court, however, refused to submit such issue and, likewise, to receive the evidence.

Why it was so refused does not appear. It seems, judging from the argument here of the appellee's counsel, that it may have been of opinion that Collett could not abandon his unwritten contract of purchase of the land, or assign it to the defendant Rufus Avery, otherwise than by a writing. But this Court had expressly decided otherwise, and it was the duty of the court below to observe the law as applied by this Court. It may be that such refusal was occasioned by something that appeared on the trial, but does not appear in the record.

This unwritten contract mentioned was not void necessarily, it was only voidable at the instance of the party to be charged thereby, and the same may be said of the unwritten assignment thereof. That
(384) such contracts are not absolutely void, but only voidable, has been settled by a great multiplicity of decisions in this Court.

If the unwritten contract was so assigned to Rufus Avery and *he paid the purchase money for the land,* as he alleges he did, it may be that when, afterwards, the contract was sufficiently put in writing to render it effectual, as explained fully in *Gordon v. Collett, supra,* it inured to his benefit. But we are not now called upon to decide any question in that respect.

There was evidence produced on the trial tending to prove that the defendant Collett paid a large part of the purchase money of the land. There was also evidence tending to prove that Rufus Avery agreed for a special consideration to pay the purchase money for Collett, and in default of the latter to pay that consideration he should have the title to the land made to him. Indeed, the evidence—much of it—was confused and conflicting, but this did not preclude or render unnecessary the trial of a material issue raised by the pleadings, when the defendant offered evidence—some evidence, it must be so taken—bearing upon it, and demanded that it should be submitted to the jury. It might be that the latter would believe the evidence offered and rejected, and find the issue in favor of the complaining party. Precisely what the evidence offered and rejected was does not appear. It is stated in the case that the defendant offered evidence tending to prove material facts, pertinent, as suggested, and the court refused to receive it, and it must be taken that evidence pertinent and proper was offered. It seems that the court deemed it wholly impertinent and not applicable to any issue submitted, or that ought to have been submitted.

There is error such as entitles the defendants to a

New trial.

Cited: *S. c.,* 107 N. C., 362.

J. L. WHETSTINE v. J. F. WILSON, ADMINISTRATOR OF S. C. WILSON

Special Contract—Statute of Limitations—Quantum Meruit—Family Relationships—Consideration.

1. Work and labor done and damage and inconvenience suffered for a father by a son-in-law and daughter, his wife, is a sufficient consideration to support an action upon a *quantum meruit.*

2. If there was a special contract to pay them in land for their services, upon failure so to do they are still entitled to be paid what their services are worth. The law implies a promise to pay when one fails to perform his part of a *special* contract.

3. Where husband and wife brought action for services rendered the father, and the latter were nonsuited, and then the husband, within twelve months brought another action alone. *Held,* he was not bound by the statute of limitations.

APPEAL from *Phillips, J.,* at Fall Term, 1889, of BURKE. (385)

The action began before a justice of the peace to recover the

value of work done by the plaintiff for the intestate of the defendant in his lifetime, "by hauling and chopping wood and making fires and waiting on S. C. Wilson (the intestate) in his last sickness, and for feeding his stock, for the space of three years preceding his death, to the amount of three hundred dollars." The defendant denied such indebtedness, pleaded the statute of limitations and counterclaim. The plaintiff recovered and the defendant appealed to the Superior Court.

The following is so much of the case settled on appeal as need be reported:

"It was admitted that the plaintiff was a son-in-law of said S. C. Wilson; that S. C. Wilson died in June, 1885, leaving eight children, of whom the wife of the plaintiff was one; that J. F. Wilson was appointed his administrator on 26 August, 1887, and that soon after his appointment a suit was brought by the plaintiff and his wife, E. A. Whetstine,

(386) for services rendered by the plaintiff and plaintiff's wife, and that said action terminated by a judgment of nonsuit on 5 March, 1888, and that the present action was begun on 21 September, 1888.

"E. A. Whetstine, wife of the plaintiff, was introduced as a witness, and testified that she was a daughter and heir of S. C. Wilson; that in 1880 she and her husband were living in McDowell County; that her father came to see them and told them that if they would come to his place in Burke County and would live on it and take care of him he should have all of his land on the west side of Paddy's Creek; that the plaintiff and witness did go to his place and take care of him, wait on him and cut and haul his wood and nurse him in his last sickness; that he took sick in November, 1884, and got some better in the month of February, 1885, but finally died in June, 1885; that said services were worth $100 a year; that plaintiff and witness had been in possession of the land on the west side of Paddy's Creek as a tenant of S. C. Wilson, from the time of their coming to Burke County up to the death of Wilson, and had paid rent therefor; that they were in possession of the said land now and paid rent therefor.

"The defendant, upon this testimony, insisted that the plaintiff's action was barred by the statute of limitations, and that the former action of J. L. Whetstine and E. A. Whetstine did not prevent its bar, as it was not the same action, but had different plaintiffs, to wit, this plaintiff and his wife.

"The defendant also insisted that the plaintiff, if he had rendered services as testified, rendered them upon a special contract with his intestate, and in payment therefor was entitled to have the land, and that the law could not employ or substitute a different contract from that which the parties had made for themselves. The court intimated

an opinion that, upon the evidence, the plaintiff was not entitled to recover, upon which intimation the plaintiff submitted to a judgment of nonsuit and appealed." (387)

I. T. Avery for plaintiff.
S. J. Ervin for defendant.

MERRIMON, C. J., after stating the facts: The complaint was oral and informal, such as is allowed in the court of a justice of the peace, where this action began. The cause of action was not alleged as founded upon a special contract, but upon a *quantum meruit* for work done for the intestate of the defendant in his lifetime and at his instance.

The evidence relied on in support of the plaintiff's cause of action, accepted as true, as it must be for the present purpose, fairly interpreted, did not prove an unwritten special contract on the part of the plaintiff to do labor for the intestate of the defendant, and in consideration thereof, on the part of the intestate, to convey to the plaintiff the land mentioned. It was not so agreed in terms, nor by reasonable implication. The intestate agreed on his part that "if they (the plaintiff and his wife) would come to his place in Burke County, and would live on it and take care of him, he (the plaintiff) should have all the land," etc. When should he have it? At once, upon the so going of the husband and wife? It is not at all probable the intestate intended to part with the title to the land before they had taken "care of him," or that they understood or expected that he would do so; such is not the reasonable implication. He was an old man—that is a fair inference; he wanted—needed some one—his daughter particularly—to take care of him, and indefinitely, while he lived. The terms of the contract are general and indefinite, but the just implication of it was that if the plaintiff and his wife would "take care of" the intestate as contemplated he would make a will and therein devise the land mentioned to plaintiff. He did not make a will; he did not perform his part of the contract at all; he was (388) in default, and hence, if the plaintiff and his wife did service for him, as contemplated by the contract, or did service which he accepted and had benefit of, the plaintiff is entitled to reasonable compensation for such service. As the intestate failed to perform his part of the special contract the law implied a promise and obligation on his part to pay the plaintiff reasonable compensation for the services rendered by him in pursuance of it. *Miller v. Lash,* 85 N. C., 51; *Jones v. Mial,* 82 N. C., 252.

It does not appear that the plaintiff and his wife were living in and as members of the family of the intestate, and no presumption arises that the services rendered by them were not to be paid for as such.

The plea of the statute of limitations cannot avail the defendant. The wife of the plaintiff was not a necessary party plaintiff in the first action mentioned. The present plaintiff was the plaintiff in that as well as the present one, and the cause of action was the same, substantially, in both. The statute was not a bar to the first action, and as this one was begun within its twelve months next after the nonsuit in the former one, it is unaffected adversely by the lapse of time. Code, sec. 100; *Martin v. Young,* 85 N. C., 156.

The judgment of nonsuit must be set aside and a new trial allowed. Error.

Cited: Bank v. Loughran, 122 N. C., 671; *Patterson v. Franklin,* 168 N. C., 78.

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(389)

J. S. MILLER ET AL. *v.* JOHN PIERCE.

Contract—Vendor and Vendee—Statute—Frauds—Evidence.

A written contract for the sale of land may be rescinded or abandoned by parol, but, before the courts will enforce such rescission or abandonment, there must be shown something more than a mere oral agreement of the parties; there must appear such positive and unequivocal acts and conduct as are clearly inconsistent with the contract.

APPEAL from *Boykin, J.,* at February Term, 1888, of ALEXANDER.

Thomas Miller, the ancestor of the plaintiffs, on 8 May, 1858, executed to the defendant a bond for title, covering the *locus in quo.* Under this bond the defendant entered and has been in possession ever since.

The plaintiffs sue in ejectment, and the defendant insists that he has paid the purchase money, and prays that a title be made to him. There was no evidence of actual payment, but he relies upon the presumption arising from possession and lapse of time. There was evidence that the contract had been rescinded by parol.

The following issues were, without objection, submitted to the jury:

1. Has the defendant abandoned the contract evidenced by the bond for title?

2. Has the defendant paid the amount of purchase money of the land described in the bond for title?

The material part of the testimony is to be found in the opinion.

The defendant contended that the contract could only be rescinded by writing, and that in law it had not been abandoned.

There was a verdict on both issues for the plaintiffs, and from (390) the judgment thereon the defendant appealed.

D. M. Furches (C. H. Armfield filed a brief) for plaintiffs.
M. L. McCorkle for defendant.

SHEPHERD, J., after stating the facts: The jury found that there was no actual payment of the purchase money, and that the contract of sale had been abandoned. If the latter finding is correct, the question of presumption of payment is eliminated from the case, as there can be no presumption of the payment of a contract which has been rescinded. The sole question for our consideration is whether a written contract for the sale of land can be discharged by matter *in pais*. This subject has been very much debated by the judges of England, and for a long time their opinion upon the question was left in doubt. It is now, however, regarded as settled. Mr. Brown, in his work on the "Statute of Frauds," says: "And this opinion, that a parol discharge of a written contract within the statute of frauds is available in equity to repel a claim upon that contract, to which the mind of Lord Hardwicke came so reluctantly, is since firmly established by many authorities." To the same effect is 1 Gr. Ev., 302; Phillips & Ames Ev., 776; *Cumming v. Arnold,* 3 Met., 494.

The strong intimation of this Court in the same direction, in *Faw v. Whittington,* 72 N. C., 321, based, we think, upon correct reasoning, renders it unnecessary for us to discuss at length this interesting question. *Bynum, J.,* in that case, says: "While the general rule is that the same formalities are required by the 'Act to create and transfer an interest in land,' distinction is made between contracts to 'sell and convey,' which are the words used in the act" (Battle's Revisal, ch. 50, sec. 10), "and contracts or agreements made between vendor (391) and vendee, mortgagor and mortgagee, after that relation between them is established, and which are intended to terminate that relation."

While we are of the opinion that the contract may be discharged by matter *in pais,* there must, however, be something more than the mere oral agreement of the parties. "It is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract." *Faw v. Whittington, supra.* This requirement is fully met in the present case, as there is testimony tending to show that the vendee had been in the possession of the land for a great number of years as a tenant of the vendor and his representatives. There is also testimony of other acts inconsistent with the continuance of the contract.

There were no specific exceptions to the charge of his Honor, but we remark that he seems to have submitted the case to the jury with much fairness to the defendant. The only point which seems to have been

made upon the issue in question is the one which we have discussed, and this issue having been properly found for the plaintiffs it is unnecessary, as we have said, to examine the other exception.

Affirmed.

Cited: Holden v. Purefoy, 108 N. C., 167; *Boone v. Drake,* 109 N. C., 82; *Taylor v. Taylor,* 112 N. C., 31; *Sitterding v. Grizzard,* 114 N. C., 111; *Gorrell v. Alspaugh,* 120 N. C., 368; *Hemmings v. Doss,* 125 N. C., 402; *Robinett v. Hamby,* 132 N. C., 356; *May v. Getty,* 140 N. C., 316; *Redding v. Vogt, ib.,* 568; *R. R. v. McGuire,* 172 N. C., 281; *Public Utilities Co. v. Bessemer,* 173 N. C., 485; *Power Co. v. Power Co.,* 175 N. C., 679.

(392)

T. F. COSTNER v. J. W. FISHER.

Contract—Merger.

The plaintiff, in settlement of an account due from the defendant, accepted the latter's bond upon condition that he would pay it in monthly installments. The account was not receipted, and plaintiff testified that the bond was taken only as security. *Held*—

1. That, irrespective of the intentions of the parties, the debt on account was merged into the bond.
2. That if the debt had not changed its form and dignity, yet the acceptance of the bond was an agreement on the part of the creditor to suspend his remedy on the account until the expiration of the period of payment provided in the bond.

APPEAL from *Connor, J.,* at Fall Term, 1889, of GASTON.

The plaintiff brought his action before a justice of the peace for the recovery of $135.35, due by account and note, under seal. When the cause was called for trial the plaintiff entered a *nolle prosequi* as to the cause of action upon the note. The plaintiff testified, in substance, that the bond was given for the amount due upon the account, and that he accepted it on condition that the defendant would pay him $10 a month; that the bond was intended merely as a security, and that he did not receipt the account.

The court held that "the cause of action upon the account was merged into the note, and that the same not being due the plaintiff could not recover."

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

W. A. Hoke for plaintiff.
R. W. Sandifer for defendant.

SHEPHERD, J., after stating the facts: His Honor was clearly (393) right in holding that the account was merged in the bond. *Gibson, C. J.,* in *Jones v. Johnston,* 3 Watts & Sergt., 277, says: "Extinguishment by *merger* takes place between debts of different degrees, the lower being lost in the higher, and, being by act of law, it is dependent on no particular intention. . . . No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt, for no agreement would prevent an obligation from merging in a judgment on it, or passing *in rem judicatum.* Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor, for to allow a debt to be at the same time of different degrees and recoverable by a multiplicity of inconsistent remedies would increase litigation, unsettle distinctions and lead to embarrassment in the limitation of actions," etc. This high authority fully sustains the ruling of his Honor.

Even if there were no merger, the taking of the bond, payable at a certain time, implies an agreement to suspend his remedy on the account for that period. 2 Danl. Neg. Ins., 1272; *Putnam v. Lewis,* 8 Johns, 389; *Frisbie v. Lerned,* 21 Wend., 450, and other cases cited in *Bank v. Bridgers,* 98 N. C., 67.

Affirmed.

(394)

J. M. STOKES v. HENRY TAYLOR.

Pleading—Account—Contract—Amendment—Statute of Limitations.

1. The common-law rule that every pleading should be construed against the pleader is reversed by the present code system, which requires that all pleadings shall be liberally construed with a view of substantial justice between the parties.

2. If the facts which constitute the alleged cause of action are stated substantially in the complaint, or can be reasonably inferred therefrom, but the pleading is defective in matter of form, the proper remedy is by a motion, before trial, to require the pleader to make the necessary amendment. The objection will not be sustained if made by demurrer or upon exception to evidence.

3. Where the plaintiff alleged a contract to pay for services performed, and, upon the trial, failed to prove a special contract, but did prove the performance of the services and their value. *Held,* that he was entitled to recover upon *quantum meruit* without amending the complaint.

4. In order to constitute a mutual running account, there must be an understanding or agreement between the parties, express of implied, from the nature of the dealings, that the items of an account shall be applied as payments upon the others. Mere disconnected and opposing demands are not sufficient.

5. The statute of limitations begins to run from the date of the last item of the account.

APPEAL from *Armfield, J.*, at Spring Term, 1889, of WATAUGA.

The facts are stated in the opinion. There was judgment for plaintiff, from which defendant appealed.

J. B. Batchelor and Bingham & Caldwell for plaintiff.

George V. Strong, J. F. Morphew, and Linney & Bower for defendant.

(395) CLARK, J. The allegation of the complaint is that the defendant is justly indebted to the plaintiff $1,440 "for services performed as clerk in defendant's store from 1 April, 1878, to 1 April, 1884, at $20 per month, subject to a credit of $140, which plaintiff is indebted to defendant by book account." The answer denies the allegation of the complaint and pleads also the statute of limitations.

On the trial the plaintiff testified that in the spring of 1878 he entered the service of defendant for an indefinite period of time, with the understanding that he was to be paid whatever his services were worth, and, with that understanding, remained with the defendant about six years, and that his services were worth $20 a month. To this evidence defendant objected, on the ground that the complaint set forth a special contract for six years service at $20 per month, and plaintiff should not be allowed to prove as upon a *quantum meruit,* or an implied contract.

Evidence admitted, and defendant excepted.

The court instructed the jury that, upon the complaint, plaintiff would be allowed to prove either a special or implied contract, and he could recover on either if the evidence justified it, and plaintiff was not restricted to proof of a special contract.

Under the common-law rules of pleading, the requirement of accuracy and precision was often pushed to the extreme. There have been cases where the rights of the litigants were determined, not on the merits of the controversy, but on such technicalities as the pleader having unfortunately used the word "had," in the past tense, instead of "have," in the present tense. Even in the modern reports of Meeson and Welsby instances of almost equal absurdity and refinement are to be found. These ideas were entirely abrogated in this country by the Codes of Civil Procedure wherever adopted. In England, after a series of improvements, beginning in 1834, when the celebrated "Rules of Hilary

Term" were adopted, the British Parliament has swept them out (396) of the English law and has introduced the substance of the American Reformed Civil Procedure. Pomeroy Civil Remedies, sec. 509. The rule of the common law was that every pleading should be construed strongly against the pleader. The Code system is just the reverse. "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." Code, sec. 260.

In the dissenting opinion of the very learned late *Chief Justice,* in *Jones v. Mial,* 79 N. C., 167, he lays down the proposition that technical distinctions obtaining under the former system of pleading and practice, between declarations on special contracts and on the common counts in *assumpsit,* are abolished by the "more rational and simple system of the present Code," and that when "the essential facts are contained in the pleadings, whether the remedy is on the special contract or on the common counts, it ought not to be denied." On a rehearing, this view was sustained by a unanimous Court, *Dillard, J.,* delivering the opinion. The Court held that the plaintiff, having alleged the facts and asked recovery on a special contract, could recover on a *quantum meruit* without amending his complaint.

In *Sussdorf v. Schmidt,* 55 N. Y., 319, the complaint alleged an agreed compensation for services, but at the trial plaintiff was permitted to prove as upon a *quantum meruit.* This was held no error, or, at most, an immaterial variance. To the same effect are numerous other decisions in the States where the Code system prevails.

It is true that a plaintiff cannot abandon the averments in his complaint and recover upon a different state of facts, unless amendment is allowed. *Grant v. Burgwyn,* 88 N. C., 95.

In *Shelton v. Davis,* 69 N. C., 324, *Pearson, C. J.,* says that, while a plaintiff "can sue for a horse and recover a cow," it is necessary that the plaintiff obtain an amendment, which the court can (397) always allow, except when "it would substantially change the claim or defense." To same effect are *Oates v. Kendall,* 67 N. C., 241; *Bullard v. Johnson,* 65 N. C., 436.

The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a course of action are stated in the complaint or can be inferred therefrom by reasonable intendment, though the allegations are imperfect, incomplete and defective, and such insufficiency pertains rather to the form than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial (as was asked in this case), but by a motion, before the trial, to make the averments more definite by amendment. Pom. Civil Rem., sec. 549; Code, sec. 261; *Moore v. Edmiston,* 70 N. C., 510.

We have seen, however, in *Jones v. Mial,* 79 N. C., 167, and *Sussdorf v. Schmidt, supra,* that where the allegation is of an express contract, proof as upon a *quantum meruit* was allowable upon the facts in those cases without amendment, it being an immaterial variance. The pleadings in the present case come, however, rather within the rule laid down by *Merrimon, J.,* in *Lewis v. R. R.,* 95 N. C., 179, for the "facts are so broadly stated that the plaintiff can recover either upon the special contract or upon a *quantum meruit.*"

Second Exception.—The plaintiff introduced evidence tending to show that after he quitted the service of the defendant he continued to get merchandise from defendant, which was charged to his account, as had been done during his service with defendant, which articles of merchandise, or some of them, were bought and charged within three years of the bringing of this action. It further appeared that no settlement had been made between the plaintiff and the defendant during the six years service or thereafter, and plaintiff offered evidence tending to show that he and defendant had at different times talked of a settlement,
(398) and that during said period he had continued to get goods from defendant upon his account, with the understanding upon the part of the plaintiff that said account for goods was to be adjusted in a final settlement between the parties; that during the six years service the plaintiff had taken up in the defendant's store merchandise amounting, with a few articles purchased after the six years, to the sum of $140, and that from time to time during the six years, continuously, the plaintiff was charged upon the books of defendant with goods bought as aforesaid; that all such time the account of the plaintiff remained unsettled, and no part of the compensation that plaintiff claims for services was paid or adjusted, and all the time plaintiff expected that his account with defendant for goods bought was to go as a part payment for his services; and, further, that the goods bought from defendant and charged to plaintiff's account after term of services had expired and within three years of the bringing of this suit were bought with the understanding on the part of the plaintiff that they were to be applied in part payment of plaintiff's claim for services. Plaintiff, among other things, testified that defendant, on one occasion, after the six years had expired, offered to let plaintiff have a horse upon a note which the plaintiff then held against defendant for services rendered prior to the beginning of the six years service, which horse defendant desired to go as a credit upon the (plaintiff's) claim for services rendered during the six years.

The defendant's counsel asked the following special instruction at the close of the evidence, to wit:

"That in this case, from all evidence, the plaintiff's cause of action is barred by the statute of limitations, and the plaintiff cannot recover."

The court declined to give this instruction, but gave the following instructions: "That the complaint might be interpreted to mean an action brought on a special contract or an implied contract; that in either case the law as to the statute of limitations is the same; (399) that where one agrees to perform services without any limit as to the period of time he is to be employed, and the services continue for a number of years, the cause of action accrues at the end of each year, and the whole claim of plaintiff is barred in this case by the statute of limitations, unless there was a mutual account between the parties, kept by either of them, having reference to each other, the last item of which must be within three years of the bringing of this action. If you so find, then none of this claim is barred. This mutual account need not be in writing, but might be scored on a wall, or marked on a stick, or kept in mind, provided it consisted of various items of work and labor, or of goods sold and delivered."

To the refusal of the judge to give the special instruction asked, and also the instruction given, the defendant's counsel excepted.

Unless there was a mutual running account with some item in it within three years before suit was brought, plaintiff's claim is barred. Code, sec. 160; *Robertson v. Pickerell,* 77 N. C., 302.

The mere fact of the existence of disconnected and opposing demands between two parties does not create a "mutual account." There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. The understanding of the plaintiff alone would not be sufficient. The principle is that when there is an express agreement to that effect, or an implied agreement from the nature of the dealings and transactions between the parties, the items of the one account are partial payments upon the other, and the statute of limitations begins to run only from the last item. Such an agreement may be inferred when one party, with the knowledge of the other, keeps an account of the debits and credits. *Green v. Caldcleugh,* 18 N. C., 321; *Hussey v. Burgwyn,* 51 N. C., 385; *Mauney v. Coit,* (400) 86 N. C., 463.

Whether or not there is any evidence is a question of law. If there is any evidence, its sufficiency is for the jury. We think there was evidence tending to show that there was a mutual running account between the parties, the last item of which was within three years before suit was brought. It was not error in his Honor to refuse the instruction prayed, and the matter should have been submitted to the jury, under proper instructions as to what constituted a "mutual account."

The instruction sent up is defective in that particular. But the assignment of error is not for any erroneous or insufficient charge as to what would constitute a "mutual account." The error assigned is for

refusal to give the instruction asked and for the substituted instruction given on that aspect of the case. We are to presume that the charge, in all other respects, was satisfactory to the defendant, and that the judge only sent up that part of it to which error was assigned.

Affirmed.

Cited: Fulps v. Mock, 108 N. C., 605; *Hood v. Sudderth,* 111 N. C., 222; *Roberts v. Woodworking Co., ib.,* 433; *Spence v. Cotton Mills,* 115 N. C., 211; *Grady v. Wilson, ib.,* 347; *McEwen v. Loucheim, ib.,* 351; *Webb v. Hicks,* 116 N. C., 603; *Wester v. Bailey,* 118 N. C., 194; *Holden v. Warren, ib.,* 327; *Brittain v. Payne, ib.,* 991; *Roberson v. Morgan, ib.,* 994; *Schulhofer v. R. R., ib.,* 1097; *Sams v. Price,* 119 N. C., 574; *Parker v. R. R., ib.,* 686; *Allen v. R. R., ib.,* 714; *Beach v. R. R.,* 120 N. C., 507; *Allen v. R. R., ib.,* 550; *Gillam v. Ins. Co.,* 121 N. C., 372; *Parker v. Express Co.,* 132 N. C., 130; *Wilson v. Brown,* 134 N. C., 407; *Wright v. Ins. Co.,* 138 N. C., 491; *Alley v. Howell,* 141 N. C., 115; *Blackmore v. Winders,* 144 N. C., 216; *Brewer v. Wynne,* 154 N. C., 471; *Bank v. Duffy,* 156 N. C., 86; *Gregory v. Pinnix,* 158 N. C., 151; *Bray v. Brady,* 161 N. C., 329; *Mitchem v. Pasour,* 173 N. C., 488; *Hollingsworth v. Allen,* 176 N. C., 630; *Lumber Co. v. Trust Co.,* 179 N. C., 215.

JONATHAN HORTON v. L. L. GREEN.

Rules of the Supreme Court—Printing Record—Dismissal of Appeal—Constitution.

1. The rule of the Supreme Court requiring certain parts of the record to be printed is not unreasonable, and upon failure to comply with it the appeal will be dismissed, but may be reinstated upon good cause shown.

2. Nor is the rule unconstitutional. The Constitution, Art. 4. sec. 12, gives to the General Assembly power to regulate proceedings in all the courts "*below the Supreme Court,*" but confers on this Court the exclusive power to regulate its own procedure.

3. Discussion of the reasonableness of the rule by *Clark, J.*

(401) MOTION to dismiss appeal for failure to print the parts of the record required by the rules.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
G. N. Folk and Theo. F. Davidson for defendant.

CLARK, J. It appears that the record has not been printed as required by the rules of this Court, and the appeal must be dismissed.

The Constitution, Art. I, sec. 8, provides, "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."

Article IV, sec. 12, of the Constitution, in furtherance of the same idea, provides that the General Assembly "may regulate by law, if necessary, the methods of proceeding in the exercise of their powers of all the courts *below the Supreme Court,* so far as the same may be done without conflict with other provisions of this Constitution."

To the judgment and experience of this Court alone is delegated by the organic law the power of establishing rules to regulate its procedure and provide for the dispatch of the business coming before it.

Five years since the press of business, the example of courts of last resort in the other States, and the evident facility it would afford for the more careful consideration, and the more speedy reporting of causes coming before it, impelled this Court to adopt Rules 28 and 29. The parts thereof material here provide as follows: "(28) Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned in the record in each civil case shall be printed. The counsel for the appellant shall designate such parts of the record as are required to be printed, . . . and such printed matter shall consist of the statement of the case on appeal, and of the exceptions appearing in the record (402) to be reviewed by the Court." . . . "(29) If the record in an appeal shall not be printed, as required by this rule, at the time it shall be called in its order for argument, the appeal shall, on motion of appellee, be dismissed; but the Court may, after five days notice at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals; provided, nevertheless, that this and the next preceding paragraph shall not apply to appeals in criminal actions or appeals *in forma pauperis.*"

Experience, which is the best test, has proven the wisdom of this rule. It enables the Court to obtain a readier and more accurate understanding of the cause than could be had by the examination of voluminous pages of manuscript, not always the most legible. It enables the counsel of both parties and each member of the Court to have the record in hand for reference during the argument. It lightens the labor alike of counsel in the preparation of the argument, of the Court in considering the judgment and writing its opinion, and of the Attorney-General in making up the statement of facts for the volume of reports. The average cost to litigants is less than the tax fee formerly allowed in this Court.

With the steady increase of population and wealth, and consequently of litigation, this rule will become more and more necessary, and at some future day will have to be extended to require the entire transcript and the briefs of counsel to be printed, as is already required in most of our sister States. Our rule is very moderate in its requirements, since only the "statement of the case on appeal and exceptions appearing in the record to be reviewed" are necessary to be printed, and not even that in State cases and pauper appeals. Should good cause be shown or excusable neglect the Court, on motion, reserves the right to reinstate.

(403) We have stated this much to show the reasonableness and necessity of the rule, for the power of the Court to make it is as clear as that it is our duty to rigidly adhere to it after it is adopted, and enforce it impartially as to all cases coming under its operation. The late *Chief Justice Pearson* was accustomed to say of the rules of Court, "There is no use in having a scribe unless you cut up to it."

In the case at bar a considerable part of the transcript proper is printed, but the "fifteen copies" required by the rule to be printed are not on file. The object intended to be served by the rule, of facilitating the consideration of the case by the whole Court, and in other respects, is not met. This matter has already been carefully considered in *Rencher v. Anderson,* 93 N. C., 105, and *Witt v. Long,* 93 N. C., 388, and we reaffirm the ruling therein laid down. In the latter case the Court stated that it would treat a mere colorable compliance with the rule as a failure to observe it.

PER CURIAM. Affirmed.

Cited: Whitehurst v. Pettipher, 105 N. C., 40; *Avery v. Pritchard,* 106 N. C., 345; *Hunt v. R. R.,* 107 N. C., 448; *Edwards v. Henderson,* 109 N. C., 84; *S. v. Edwards,* 110 N. C., 511; *Herndon v. Ins. Co.,* 111 N. C., 385; *Carter v. Long,* 116 N. C., 47; *Wiley v. Mining Co.,* 117 N. C., 489; *Driller Co. v. Worth, ib.,* 522; *Fleming v. McPhail,* 121 N. C., 184; *Bird v. Gilliam,* 125 N. C., 79; *S. v. Council,* 129 N. C., 515; *Calvert v. Carstarphen,* 133 N. C., 27; *West v. R. R.,* 140 N. C., 620; *Lee v. Baird,* 146 N. C., 364; *In re Brown,* 168 N. C., 420.

J. G. WARLICK v. SARAH LOWMAN.

Code, Sec. 2056—Cartway—Evidence—Procedendo—Judgment.

1. A petitioner is not entitled to have a cartway laid out over the lands of another, under section 2056 of the Code, simply because it would give him a shorter and better outlet to a public road; and if the evidence shows only that the desired cartway is shorter than the outlet in use, it should be denied.

2. When the jury find such cartway is a necessity, because there is no other, then evidence of the length and nature of the route proposed, as compared with others, is competent to show that the demand is reasonable and just.

3. Instead of issuing a *procedendo* to the lower court, the better practice is that it issue to the Superior Court where the appeal was tried.

PROCEEDING, begun before the board of supervisors of Icard (404) Township, Burke County, for a cartway, brought by successive appeals to the Superior Court of said county, and tried before *Philips, J.*, at Fall Term, 1889, of BURKE.

The petitioner, J. G. Warlick, was introduced as a witness, and testified to the location of his dwelling, and that there was no way of getting to and from it except by going over the lands of the defendant or of one Margaret Gross; that the land owned by said parties entirely surrounded his farm and dwelling, and that both the defendant and Margaret Gross had forbidden him to go over their lands, and there was no public road or any way of getting to and from his dwelling-house to any public road; that by permission of Margaret Gross he had at one time attempted to build a road over her land, but on account of a very high hill (plaintiff living in the midst of the South Mountains) he had to give up the attempt, as he could not get a loaded wagon over the road; that permission to use the same had been recalled by Mrs. Gross, and she forbade him to use it longer.

There was much other testimony.

On cross-examination plaintiff was asked if he had not told William Matthis, while working on the Gross road, that when he got it worked out it would be a shorter road and a better road than the Lowman road (the Lowman road being the road prayed for in the petition first, and used by the defendant from 1879 up to a short time before the institution of the proceeding, when it was shut up by defendant, who had forbidden him to go over her land any more or over said road). In reply to this question witness testified he could not remember that he had told any such thing, for, as a matter of fact, the Gross road which he worked on was about four hundred yards longer than the Lowman road.

(405) One W. A. Wilson testified as a witness in behalf of the plaintiff, and on his direct examination was asked which road was the longer, the Lowman road or the Gross road.

The defendant objected to the question; objection overruled, and defendant excepted.

Witness stated that the Gross road was the longest.

There was evidence that two private ways or neighborhood roads passed within about five hundred yards of plaintiff's house over the lands of Margaret Gross, and to get to either of these roads from plaintiff's dwelling-house and farm he would have to pass over the land of Margaret Gross, who had forbidden him to go over her land for any purpose. There was, also, evidence that one of these roads ran over the land of six parties, and the other over the lands of four parties; that both of these ways were obstructed by gates and bars, one road having three gates and one pair of bars, the other two gates and one pair of bars, and one an impassable ford, and had been abandoned.

Plaintiff proposed to prove by witness the length of said road, as compared with the cartway prayed for in petition, and the distance from plaintiff's dwelling to the public road by each.

Defendant objected; objection overruled.

Witness testified that over the cartway prayed for the distance from the plaintiff's dwelling-house to the public road would be about one-half mile; over one of the other roads it would be two miles, and over the other three-fourths of a mile, and the Gross road one mile.

Defendant excepted.

There was testimony on the part of the defendant tending to show that the plaintiff could travel over the Gross road and over the other road to the public road, and defendant denied that plaintiff had been forbidden by Mrs. Gross. She denied forbidding him.

(406) His Honor, in instructing the jury, stated that mere convenience would not entitled the plaintiff to a cartway, as prayed for in the petition, and the fact that the cartway prayed for would be a shorter and more convenient way of getting to the public road than by going over the Gross road, or the other two roads, would not entitle him to the cartway; that his right to it must be founded upon necessity, and if he had any other unobstructed way of getting to the public road, or a parol license to go over either the lands of Gross or Lowman, or any one, he would not be entitled to a verdict.

The jury found a verdict in favor of the plaintiff, and from the judgment rendered thereon the defendant appealed.

S. J. Ervin for plaintiff.
I. T. Avery for defendant.

CLARK, J., after stating facts as above: All the exceptions taken on the trial are to the admissibility of evidence offered to show that the cartway prayed for would be shorter than that suggested by the defendant over the Gross land. Section 2056 of the Code is in derogation of the rights of landowners, and a petitioner is not entitled to have a cartway laid out over another's land simply because it would give him a shorter and better outlet to the public road. If he already have a private way, or by parol license an unobstructed way, across the land of another, the petition should be denied, and evidence tending to show that the desired cartway would be shorter than the outlet in use should be excluded as immaterial. *Warlick v. Lowman,* 103 N. C., 122, and cases there cited.

It is alleged in this case that the plaintiff had no other outlet of any kind whatever. This, it is true, was denied by the defendant. The jury, however, might and did find with the plaintiff that the road asked for was a "necessity," by reason of there being no other, and in that event evidence as to the length and nature of the route, if laid out over defendant's land, as compared with one laid out in a different (407) direction, was competent as tending to show that the demand was "reasonable and just." The court instructed the jury as to the bearing of the evidence objected to, and we do not think they could have been misled.

The defendant excepted, also, to the form of the judgment, but did not specify wherein there was error. This has always been held to be too general. It is proper, however, to say that if the exception is, as we suppose, to retaining the cause in the Superior Court instead of issuing a *procedendo* to the lower court, this was formerly the settled practice. *Schoffner v. Fogleman,* 44 N. C., 280; *Caldwell v. Parks,* 61 N. C., 54. . While our present statute (section 2056) is in some respects dissimilar, still, on appeal, the trial in the Superior Court is *de novo,* and the issues of fact are to be found by a jury.

We see no good reasons requiring the proceedings to be remanded to the county commissioners that they may in turn remand to the township board of supervisors. A writ to the sheriff, commanding him to summon a jury, lay off the cartway and assess the damages can issue as well from the Superior Court as from the township board of supervisors. This will avoid another possible appeal from the latter upon a confirmation of the report. It is the course consonant with former precedents, and has the advantage of being the simplest, speediest and most economical mode. It cannot in any way prejudice the rights of either party.

Affirmed.

(408)

GEO. W. LONG v. WILLIAM C. OXFORD, EXECUTOR.

Statute Limitations—Costs—New Promise—Administration.

1. A written acknowledgement, or new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations, under section 172 of the Code.

2. When the court found as a fact that the defendant executor for eleven years resisted payment of the debts sued on, because he doubted the genuineness of the acknowledgement, or new promise, set up by plaintiff in reply to defendant's plea of statute of limitations. *Held*, that the defendant might have had an inspection of the paper containing such alleged promise, and there was an unreasonable delay of payment, and the defendant was liable for costs.

EXCEPTIONS to report of referee, heard by *Shipp, J.*, at the July Term, 1889, of ALEXANDER.

The facts are stated in the opinion.

M. L. McCorkle, D. M. Furches, and F. L. Cline for plaintiff.
R. Z. Linney and E. B. Jones for defendant.

CLARK, J. There are only two points taken by the defendant's exceptions.

First Exception.—Does the paper-writing of 5 September, 1876, have the effect of removing the statutory bar interposed by the defendant's answer against the plaintiff's right of recovery? The said writing is in the following words and figures, to wit:

"Samuel Reed, debtor to G. W. Long by book account for goods bought in 1859 up to the present date, amounting to two hundred and fifty dollars ($250) or upwards. I do this day acknowledge the debt and will pay the same. This 5 September, 1876.

"SAMUEL (his × mark) REED.

"Witness: W. W. DOWNS."

(409) We think the new promise is sufficient. It is in writing, as required by the Code, sec. 172. It refers to a book account for goods bought from 1859 to date, amounting to $250 or upwards. This is sufficiently certain by aid of the maxim *"id certum, quod certum reddi potest." Smith v. Leeper,* 32 N. C., 86. A mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained," would be. *Peebles v. Mason,* 13 N. C., 367.

Faison v. Bowden, 76 N. C., 425, relied on by appellant, differs from this. In that case the promise was indefinite in amount and referred to nothing, either as to the nature of the debt, its consideration or the time when contracted, by which it could have been made definite and certain.

Second Exception.—The defendant objected to the judgment against him for costs. Suit was brought in 1877, and the cause has been in court ever since. The judge below finds that "payment was unreasonably delayed," and adjudges that plaintiff recover costs. The finding of fact by the court below is not reviewable, but were it otherwise we see no cause to doubt the correctness of his Honor's ruling. The plaintiff at Spring Term, 1878, pleaded the new promise in reply to the defendant's answer, which set up the statute of limitations. The defendant knew that under the statute such new promise is required to be in writing. He could have procured an order for inspection of it if he doubted its genuineness. Code, sec. 578; *McGibbony v. Mills,* 35 N. C., 163; *Justice v. Bank,* 83 N. C., 8; *McLeod v. Bullard,* 84 N. C., 515. He did not do that, but for eleven years he has continued to resist payment. Surely this is unreasonable delay.

Affirmed.

Cited: S. c., 108 N. C., 281; *Woodlief v. Bragg, ib.,* 573; *Taylor v. Miller,* 113 N. C., 343; *Lee v. McKoy,* 118 N. C., 523; *Shoe Store Co. v. Wiseman,* 174 N. C., 718.

(410)

J. W. RANDALL v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Presumption—Statute, Construction of—Railroad—Injuries to "Livestock."

1. The statutory presumption of negligence for killing livestock, when the action is brought within six months (Code, sec. 2326), is not rebutted by showing that the livestock were under the control of a *person* at the time.

2. The language of the statute is broad enough to include such case as well as when the livestock were running at large.

3. The force of the presumption applies only when the facts are not known, or when, from the testimony, they are uncertain.

4. It is the duty of a person approaching a railroad track to take every prudent precaution to avoid collision; and it is the duty of the engineer

to blow his whistle or ring his bell at a reasonable distance from the crossing, in order to enable travelers to avoid danger.

5. In construing statutes, where words having a known technical meaning are employed by the Legislature, that restricted or specific interpretation will be given them, but otherwise they will be interpreted according to their ordinary import; and, where there is no ambiguity, and the meaning is clear, not even the preamble or caption of the statute will be resorted to for the purpose of construction.

ACTION, tried before *Clark, J.*, at July Term, 1889, of MADISON.

The action was brought to recover damages for the negligent killing of three oxen, belonging to plaintiff, by the defendant's engine, running on the W. N. C. Railroad.

The plaintiff testified that he was traveling on the public road, returning from a station on defendant's road, between 8 and 9 P. M., in July, 1888, and driving the oxen yoked up to a cart. At one point, about one hundred yards from the station, and just above a regular crossing of the road, the public road ran very close to the railroad; that just
(411) above and below this point the public road diverges further from the railroad track; that the train was out of schedule time and came down the road, meeting the team of the plaintiff; that just as plaintiff reached this narrow point where the public road ran close by the side of the railroad he heard a slight blow from the engine, and almost immediately the engine came around a curve on the mountain, sixty or seventy yards off; that the blow was not the ordinary station blow nor sufficient to give warning, and that for the regular road crossing close by no blow was given; that if the regular station blow or the crossing blow had been given he could have stopped his oxen before he got to the place where the public road ran close by the track; that there was a large pile of wood behind which he could have stopped; that the blow for the crossing not having been given, in ignorance of the approaching train, he had advanced to the narrow point where on one side was the railroad and on the other the steep side of the mountain. The train suddenly coming around the curve, the noise and blazing headlight so frightened the oxen that in attempting to get out of the way three of them got on the track and were killed. Defendant company took charge of the beef and sold the hides. The oxen were worth to him $150, and on the market would have sold for $140 to $165. They were killed in July, 1888, and this suit was begun in August of same year.

The engineer testified that he blew the station blow, and as loud as usual, and at the usual place, and after he had blown it he felt his engine strike something; that he did not see the oxen at all; that he was at the usual place on the engine and on the lookout; that when he stopped at the station he went back and found that three oxen were killed; that he

was driving the engine at the usual speed and with care, but saw nothing on the track; that he did not blow for the crossing.

The defendant asked the court to charge: (412)

1. That as the oxen were not straying nor at large, but yoked to a cart and under charge of a driver, the statute raising a presumption of negligence in such cases does not apply.

2. That if the presumption of negligence did arise it was rebutted by the plaintiff's own evidence.

3. That there was no evidence to go to the jury; that there being no substantial conflict of the evidence the court should, on the evidence, direct a verdict to be entered for the defendant.

The court declined to so instruct the jury, and charged them, among other things, that it being admitted that defendant's engineer killed the cattle, and the suit having been brought within six months, the statute raised a presumption of negligence, and the burden was on the defendant to rebut that presumption; that at crossings it was the duty of the defendant's engineer to give notice by blowing his whistle, but that if the station whistle was blown in sufficient time and loud enough for the plaintiff to have stopped his team before approaching the crossing and the narrow spot leading to it, and the plaintiff did not heed the warning but pressed on, and his oxen, becoming frightened, got on the track and were killed, the presumption of negligence was rebutted, and the jury should find for the defendant; but if the station whistle was not blown in due time, and the plaintiff, without warning, drove his oxen to the narrow place where the engine coming around the curve, frightened his oxen so that they jumped on the track and were killed; or if the jury should find that if the regular whistle for the crossing had been blown, the plaintiff could and would have stopped before getting to the narrow place where the railroad was on one side and the mountain on the other, then the presumption of negligence would not be rebutted.

Verdict for plaintiff. Motion for new trial, assigning as error the refusal to charge as requested and the part of the charge above given. Judgment; appeal. (413)

No counsel for plaintiff.

F. H. Busbee (D. Schenck filed a brief) for defendant.

AVERY, J., after stating the facts: Code, sec. 2326, provides that "when any cattle or other livestock shall be killed by the engines or cars running on any railroad it shall be *prima facie evidence of negligence* on the part of the company in any action for damages against said company: *Provided,* that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued."

The court below was asked to instruct the jury that when the cattle killed were yoked to a cart and in charge of a driver the statute does not apply, and no presumption of negligence arises from the fact of the killing. The charge given in lieu, that the law presumed negligence upon the admitted facts, constitutes the grounds of the first exception.

Where words have a known technical meaning it must be adopted in construing a statute, but apart from that they must be interpreted according to their ordinary import, and where there is no ambiguity, but the meaning is clear and certain, not even the preamble or the caption of a statute can be called in aid for the purpose of construction. *Adams v. Turrentine,* 30 N. C., 147; *Blue v. McDuffie,* 44 N. C., 131.

The definition of cattle given by Worcester is "a collective name for domestic quadrupeds, *including the bovine tribe, also horses, asses, mules, sheep, goats and swine,* but especially applied to bulls, *oxen,* cows, and their young." Lest the term might be understood in its restricted sense as applying to the bovine species, the Legislature added the words (414) "other livestock," which is more comprehensive than the generic meaning, but the term "cattle" includes oxen, according to either definition. The courts must always assume that the Legislature is capable of expressing and does express its real intent, according to the ordinary sense of the words, and adopt it in construction when it is clear. Potter's Dwarris, 219; *S. v. Massey,* 103 N. C., 356. If there had been any purpose to limit the operation of the statute to cattle straying without protection and free from control, there was sufficient intelligence among our law-givers to restrict its application, or to except all livestock at the time hitched to a wagon or conveyance, or bridled and controlled by any person. If the courts now interpolate any such restrictive terms, and thereby change the plain and natural import of the law as it is written, it would be judicial legislation, which is the most dangerous and insidious mode of invading the province of a coördinate branch of the State government and usurping its powers, because there can be no redress for such a wrong, carelessly done under the color of the rightful authority to construe statutes, and in corrupt hands the manner of encroachment might become a method.

The late Chief Justice, in *Doggett v. R. R.,* 81 N. C., 459, enumerated among the benefits of the law the protection it afforded to owners of livestock killed, when there was no witness who knew the circumstances attending it; but that the court did not intend to limit its application to cattle or livestock straying free from control, and to cases where there were no witnesses to the transaction, appears clearly from the unmistakable language used in stating the final conclusion reached. "The force of the presumption only applies when the facts are not known, or *when, from the testimony, they are uncertain.*"

In the case at bar the important fact, upon which depended the question of negligence, was in dispute. The plaintiff testified that the engineer did not give the ordinary station blow at the usual place, while the engineer testified that he did, and therefore there was (415) uncertainty about the facts, and the presumption, according to the doctrine laid down in that case, did not lose its *"force."* His Honor left the jury to determine whether the testimony for the defendant was to be believed rather than that offered for plaintiff as to the question of negligence, and was sufficient to overcome the artificial weight given to proof of the fact of killing by the statute. After approving, generally, *Doggett v. R. R.*, the court, in *Durham v. R. R.*, 82 N. C., 354, cite the very words we have already quoted from the former case, showing a purpose to still allow full "force" to the presumption, where the facts are, by reason of conflicting testimony, rendered uncertain. See, also, *Roberts v. R. R.*, 88 N. C., 560; *Wilson v. R. R.*, 90 N. C., 69; *Horner v. R. R.*, 100 N. C., 230; *Carlton v. R. R., ante,* p. 365.

The train passed at an unusual hour along a narrow canyon where the wagon road ran, at some points, close beside defendant's track and at others diverged a little distance from it. The plaintiff had passed the station and then gone over a crossing near which the wagon road, for a very short distance, was located in the narrow space between the mountain and the track, when he heard a slight blow from the engine, and almost immediately it passed around a curve on the mountain only sixty or seventy yards ahead of him, and the noise and blazing headlight so frightened the oxen that in attempting to get out of the way three of them jumped upon the track and were killed. This occurred less than six months before the action was brought.

The plaintiff further testified that if the regular station blow or the crossing blow had been given at the usual point he could have stopped his oxen behind a large pile of wood before he reached the narrow place, and could have saved them, but that, because the blow was not given, he had advanced to the place where on the one side was the steep (416) mountain and on the other the track of the railroad company. The engineer testified that he blew *the station blow,* and *as loud as usual,* and *at the usual place.* On the decision of the issue of fact thus raised the whole controversy depends. *Troy v. R. R.*, 99 N. C., 298.

When a person in charge of a wagon and team approaches a public crossing it is his duty to look and listen and take every prudent precaution to avoid a collision, even though the approach be made at an hour when no regular train is expected to pass. The same degree of care and caution should be exercised by one who is about to drive into such a narrow and dangerous pass as is described by the witnesses, if he would avoid the responsibility for any injury that may result from his care-

lessness. But it is the duty of the engineer to blow the whistle or ring the bell at a reasonable distance from such a crossing as was described by the witnesses in order to give warning to travelers on the ordinary highway running across and near it, and enable them to guard against danger. It is always required of an engineer, if he would relieve the company from liability for negligence, to blow the whistle, as a warning, at a reasonable distance from the crossing of a public highway or a station which his train is approaching, and is doubly important where the track winds around curves, between a mountain and river, by the side of a public road; and if travelers on such highway are subjected to loss by injury to their livestock at a crossing or narrow pass like that described by the witnesses, in consequence of his failure to give such warning as they had a right to expect, the company is liable in damages for such negligence. 2 Wood R. L., sec. 323; *Kelly v. R. R.*, 29 Minn., 1; *R. R. v. Garty*, 79 Ky., 442; *Penn Co. v. Krick*, 47 Ind., 368; *R. R. v. Jundt*, 3 Am. and En. R. Cases, 502; *Strong v. R. R.*, 61 Cal., 326; *Hoar v. R. R.*, 47 Mich., 401; *Troy v. R. R., supra.*

(417) We do not see the force of the objection that the oxen were actually injured, not at a crossing, but at a narrow place where the public highway is jammed between the mountain and the railroad track. In all the cases cited, *supra*, the doctrine is laid down (even in the absence of a statute) that it is negligence to omit to give a signal by blowing the whistle or ringing a bell in reasonable time, when a train is approaching a station, and in one of them (*R. R. v. Jundt, supra*) it was held that a railroad company was liable where, in consequence of failing to have a flagman at a city crossing, as a notice to persons driving along a street parallel with the track that a train was approaching, two horses being driven by the plaintiff, a female, were met by the train *just before* reaching the crossing and frightened so that they ran away and injured her. The failure to have a flagman at the crossing was held evidence of negligence, because the plaintiff had been accustomed to cross there and naturally expected, and had a right to expect, the usual warning of danger. In our case the plaintiff knew the usual place for blowing the signal, and testifies that he was misled by the neglect of the engineer to give the signal at that point. Besides, we have forborne to decide whether the same reasons exist for warning travelers driving in ordinary vehicles in sufficient time to allow them to escape from a narrow pass like that described by witnesses that have induced the courts to hold that in the exercise of ordinary care timely notice must be given that a train is nearing a crossing. The importance of giving signals in such cases becomes greater when any peculiar circumstances in a given locality enhance the danger of omitting to do so. *Penn Co. v. Krick, supra.*

The case of *R. R. v. Feathers,* 10 Lea. (Tenn.), was one in which the court gave a construction to a statute requiring a signal to be given by engineers one-fourth of a mile from crossings; that it was enacted especially to prevent injuries at the crossings. The case at bar (418) rests upon the broader principle and reasoning adopted in *R. R. v. Jundt,* that some notice must be given of the approach of a train when travelers on the highway are put in jeopardy at crossings, and railroad companies must be held liable for damages for failure to give the usual warning, whereby one aware of the custom is misled so that he subjects himself or his livestock to peril and is damaged in person or property.

The material question is not where the injury was inflicted, but what was its proximate cause, and if the plaintiff, relying upon the custom of the company to give a particular signal at a certain time, placed himself in a dangerous position and suffered injury, the company is liable for negligence.

The circumstances were such as to suggest caution, both to the plaintiff and the engineer, when the train passed suddenly around a sharp curve along a projecting mountain. We think that the jury have determined, in the manner prescribed by law, which one of them failed to exercise ordinary care. If the plaintiff could have taken refuge behind a woodpile, where the highway had diverged some distance from the track, and thus have saved his team harmless but for the failure of the engineer to blow at the usual place, the negligence of the company was the proximate cause of the injury, and the plaintiff was entitled to recover the value of the oxen killed. If he blew the whistle at the usual place, and did not wait till the engine was either sixty or seventy yards of plaintiff, the injury was not due to defendant's negligence. His Honor left the jury to find from the testimony what was the truth as to the time of the blowing of the whistle, and thus to settle the controversy.

Affirmed.

MERRIMON, C. J., dissenting: It seems to me that in this case (419) the Court adheres too strictly to the mere letter of the statute interpreted without adverting sufficiently to its spirit and purpose, and thus reach an erroneous conclusion. The statute prescribes that "when any cattle or other livestock be killed or injured by the cars running upon a railroad it shall be *prima facie* evidence of negligence on the part of the company in an action for damages against said company," etc. It will be observed that its terms as to the cattle and livestock so killed or injured are general, without specifying anything as to the circumstances or condition of the stock at the time the injury was done. Are such terms to be taken in their broadest and literal sense? Does the statute extend to every such killing? Does it embrace the case where

the owner of stock shall drive his cattle covertly on the road to be killed, to the end he may recover damages on account of the same? Does it extend to such killing of a horse, or mule, or ox while the owner was riding or driving the same? I think not. The object and purpose of the statute show clearly that it was not intended that it should apply to stock killed or injured while bridled, harnessed or yoked, and under the immediate guidance and control of the owner thereof, or some other person.

In an action for damages for such injury to cattle, there being proof of the injury, the statute at once in effect declares that it was the result of negligence on the part of the defendant railroad company, unless it can prove there was no negligence on their part. This it is required to prove negatively. The statute thus applies only to such stock. Why is it so limited? Why was it not made to apply to the like killing of or injury to a person? Why not to injury so done to property of any kind? These questions are pertinent and significant. There was a strong, practical reason for so limiting its application. In this State such stock have generally been allowed to run loose, unrestrained, day and night, in the fields and forests through which railroads were located. (420) Such roads in this State have not been fenced or otherwise enclosed. Cattle so at large went upon them unrestrained and were, in many instances, recklessly and negligently killed or injured by cars passing rapidly over such roads—sometimes in the night, sometimes in the day. No person saw the killing, or knew of the circumstances attending the same, except the engineer or other agents of the railroad company, and he alone knew that there was or was not negligence of the company, and he had strong motives to testify that there was no negligence. Hence it was difficult, in many cases wholly impracticable, for the injured party to prove negligence, when in fact it existed. This became a serious public grievance. It, and no more, constituted the mischief to be remedied, and hence the statute. It properly applies and was intended only to apply to such cases. There was no necessity or reason why it should apply to such cases where a horse or other animal was so killed or injured in the presence and under the control of the owner, or some person in charge of them. In that case the party injured, or some other person for him, saw and knew the circumstances of the killing or injury, and could testify in a proper action as to the same—could prove the negligence of the company if indeed there was negligence. There was no more reason in such case for the statute than in a case of the like killing of a man; indeed, in some instances, not so much, and the same may be said as to the like injury to property generally. This Court has, in effect, so repeatedly decided. In *Doggett v. R. R.*, 81 N. C., 459, the late Chief Justice said: "Where injury to

stock straying off is done by trains running at night, as well as by day, and known only to the defendant's employees, this (to make proof of negligence) was an almost impossible requirement. The owner would not know how, when, or where the injury was done, while the servants of the road would possess knowledge of the facts. Hence (421) the General Assembly enacted the statute cited above, thus shifting the burden of proof from the plaintiff to the defendant, and requiring the latter to show the circumstances and repel the legal presumption. But when the facts are fully disclosed and there is no controversy as to them, the court must decide whether they make out a case of negligence, and if they fail to do this the defendants are not to be held liable. Such, we understand, to be the purpose and effect of the statute, and that, all the facts appearing, the defendant is charged or acquitted as negligence appears or is disproved." To the like effect are *Durham v. R. R.*, 82 N. C., 352, and *S. v. Roten*, 86 N. C., 701; *Pippen v. R. R.*, 75 N. C., 54.

Where words having a general and comprehensive meaning, as in this case, are employed in a statute they must be taken, applied and their meaning ascertained, in connection with the reason and purpose of it, and they may be enlarged or narrowed as to the scope of their meaning in order to effectuate the legislative intent clearly appearing. The subject, the reason and purpose of the statute indicate the sense in which the Legislature employed such words, and give them point and particular force and effect. 1 Bl. Com., 61; Pot. Dwar. on Stats., 175, 184, 185; *Hart v. Cleis*, 8 John, 44; *Brewer v. Blaugh*, 14 Ret., 178.

Unquestionably the court shall not make or unmake a statute, but it is its province, its duty, to give it just and reasonable interpretation and effect, according to the legislative intent thus appearing.

Cited: S. c., 107 N. C., 748, 755; *Hinkle v. R. R.*, 109 N. C., 473; *Gilmore v. R. R.*, 115 N. C., 660; *Cram v. Cram*, 116 N. C., 293; *Pickett v. R. R.*, 117 N. C., 630; *Alston v. Davis*, 118 N. C., 210; *Styles v. R. R., ib.*, 1089; *Russell v. R. R., ib.*, 1108; *S. v. Groves*, 119 N. C., 823; *Mesic v. R. R.*, 120 N. C., 491; *Powell v. R. R.*, 125 N. C., 374; *Edwards v. R. R.*, 132 N. C., 101; *S. v. Patterson*, 134 N. C., 614; *Cooper v. R. R.*, 140 N. C., 213; *Stewart v. Lumber Co.*, 146 N. C., 63; *Norris v. R. R.*, 152 N. C., 510; *Exum v. R. R.*, 154 N. C., 418; *Hanford v. R. R.*, 167 N. C., 279; *Borden v. R. R.*, 175 N. C., 410; *Briley v. R. R.*, 174 N. C., 785.

(422)

JOHN W. PARTON v. ELIZABETH BOYD ET AL.

Costs—Discretion—When Reviewable—Equitable Action.

In an action for specific performance it appeared that the defendant refused to account with plaintiff for certain credits agreed to be applied on the purchase of the land contracted to be sold and conveyed by the defendant; it also appeared that there was, after applying the credits, a balance due defendant. The court below rendered judgment against plaintiff for the balance so due, but against defendant for all costs. *Held*, (1) that the action was equitable in its character and belonged to that class enumerated in sec. 527 of the Code; (2) that it was within the discretion of the court to award costs against the defendant, and this discretion was not reviewable.

ACTION, tried at Fall Term, 1889, of HAYWOOD, before *Clark, J.*

The action was brought to compel the specific performance of an executory contract in writing in respect to the land specified in the complaint. The principal defendant had in her possession certain credits of the plaintiff that she agreed to collect and apply the money in discharge of the debt for the purchase money agreed to be paid by the plaintiff to her for the land. She collected the credits but failed to so apply the money. The plaintiff alleged the contract of sale of the land; that the defendant had so collected the credits mentioned; had failed to account with him for the same; that he had demanded an account to ascertain whether any balance of the purchase money remained unpaid; that he offered, on so accounting, to pay any such balance; that he demanded that the defendant, on the payment of any such balance, should make title to him for the land, and that the former refuse to account, etc.

The defendant, in her answer, denied *seriatim* the allegations of the complaint, and alleged the indebtedness of the plaintiff to her on sundry accounts, etc. There was a reference to take an account, which (423) was taken and reported, and there was no exception thereto.

Judgment was entered in accordance therewith, in favor of the plaintiff, as to title to the land, upon the payment of the ascertained balance of the purchase money; and judgment was entered against the plaintiff in favor of the defendant for that balance, and that sale of the land should be made, if need be, to pay the balance. The court gave judgment against the plaintiff for all the costs, and as to this only he excepted and appealed to the Court.

Geo. H. Smathers for plaintiff.
No counsel for defendant.

MERRIMON, C. J., after stating the case: The cause of action in this case is equitable in its nature, and the action is one in which the Court

will administer the diverse rights of the parties coming within its scope as they may appear, giving judgment in favor of the plaintiff in one or more respects, and in favor of the defendants in others, and allow costs in favor of one party or the other, or require the parties to share the same in its discretion.

This action is not one of those classes of actions in which the plaintiff is entitled to costs, as of course, if he recovers, as allowed by the statute (Code, secs. 525, 526), or in which the defendant is so entitled if the plaintiff fails to recover. Hence it is one of those in which costs may be allowed, in the discretion of the court, as allowed by the statute (Code, sec. 527). The purpose of this provision is to give the court authority, in cases like the present one, to allow costs, as the justice of the case may require. *Gulley v. Macy,* 89 N. C., 343.

The purpose of this action was not to recover real property, nor did a claim of title to such property arise upon the pleadings, nor did the court certify that such title came in question at the trial, nor did the action, in any aspect of it, come within the statute. (Code, sec. 525.) (424) Its purpose was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract. Clearly the action comes within the statute (Code, sec. 527), and, therefore, the court could allow costs therein in its discretion.

The court gave judgment against the plaintiff for costs, and the presumption is, nothing to the contrary appearing, that it did so in the exercise of its discretionary authority. Such exercise of authority is not reviewable here. The statute does not so provide. To so review it would be to substitute the discretion of this Court for that of the court below. If the court gave such judgment upon the ground that it was bound in law to do so, and this appeared, then it would be reviewable, not otherwise.

Affirmed.

Cited: Bond v. Cotton Mills, 166 N. C., 24; *Hooper v. Davis, ib.,* 237; *Yates v. Yates,* 170 N. C., 535.

(425)

I. H. PECK v. H. C. CULBERSON.

Jurisdiction—Estoppel—Exemption—Vendor's Lien.

1. The plaintiff brought an action before a justice of the peace to recover balance—less than $200—due upon a note given in purchase of land. The defendant answered, alleging that there was a failure of consideration, growing out of the plaintiff's fraudulent representations in respect of

the title, and demanded judgment that the action be dismissed because the title to real estate was involved. Upon the proofs, the justice refused to dismiss, and rendered judgment for the plaintiff, from which defendant appealed, and in the Superior Court, the judgment was reversed and action dismissed. Thereupon, plaintiff brought his action for same relief in Superior Court. *Held*, that, notwithstanding the judgment dismissing the action may have been erroneous, it was *res judicata;* that the defendant was estopped thereby from alleging a want of jurisdiction in the Superior Court, and that, under section 838 of the Code, the Superior Court had jurisdiction of the cause. (*Merrimon, C. J.*, dissenting.)

2. The doctrine of vendor's lien does not prevail in this State. The Constitution simply provides that property shall not be exempt, in the hands of the purchaser, from sale upon execution for the purchase money.

ACTION, tried before *Merrimon, J.*, at Spring Term, 1889, of CHEROKEE.

This action was begun in the Superior Court, and plaintiff asked judgment for $100 balance due on a note given for the purchase money of land, and that the land be condemned for the payment thereof. The defendant answered, admitting purchase of the land and execution of the notes, but alleged a failure of consideration, in that the plaintiff had falsely and fraudulently represented that the title to the land was perfect, when he well knew it was not, and by reason of such defective title he had been damaged more than the $100 balance claimed on the purchase money, and set up a counterclaim. The reply denied all the allegations of the answer. The plaintiff filed an amendment to the complaint, setting up that he had brought suit for this same cause
(426) of action at first before a magistrate; that defendant had filed the same defense there as in this case, and in writing, and asked to have the action dismissed because title to real estate would come into controversy, and offered proof; that the magistrate had refused the motion and gave judgment for $100 in favor of plaintiff; that on appeal by defendant to the Superior Court, *Gudger, J.*, had reversed the magistrate's judgement and dismissed the action on the ground that title to land was in controversy. Thereupon plaintiff had begun this action in the Superior Court, and he invoked the benefit of section 838 of the Code. There was no answer filed to the amended complaint. The presiding judge, being of the opinion that the complaint did not disclose any equitable element, but was a simple action for the recovery of a sum less than $200, held that the Superior Court had no original jurisdiction, and dismissed the action, and plaintiff appealed.

J. W. Cooper for plaintiff.
No counsel for defendant.

CLARK, J., after stating the facts as above: This was an action for a balance of $100 due on a note given for the purchase money of land, and though the plaintiff asks in his complaint that the land be condemned for the payment of his debt, the jurisdiction is determined, not by the remedy he asks, but by what the facts alleged in his complaint will entitle him to demand. There is no vendor's lien for purchase money of land in this State. *Womble v. Battle,* 38 N. C., 182; *Cameron v. Mason,* 42 N. C., 187; *Simmons v. Spruill,* 56 N. C., 9. The Constitution does not change this, but simply provides that no property shall be *exempt from sale* under execution issued on a debt contracted for the purchase thereof. *Smith v. High,* 85 N. C., 93.

Upon the original complaint it is clear the Superior Court had (427) no jurisdiction unless title to land is in controversy, as there was no equitable element set out, and the "sum demanded" was less than $200. Code, sec. 834. The plaintiff relies upon his amended complaint, which is not denied, and claims that by reason of the judgment in the former action that title to land is in controversy, that fact is already adjudicated between the parties. Section 838 of the Code, in substance, provides that when an action is begun before a magistrate, and the defendant pleads that title to real estate is in controversy, and upon proof the action is dismissed upon that ground, the plaintiff may prosecute an action for the same cause in the Superior Court, and the defendant shall not be admitted in that court to deny the jurisdiction.

It is true that in this case the magistrate overruled the defendant's plea, but on an appeal by the defendant to the Superior Court that court found that the title to real estate was in controversy, and dismissed the action on that finding, as appears by the judgment. Such action of the Superior Court, reversing the magistrate's judgment, has in purview of section 838 exactly the same effect as if the judgment of dismissal had been originally entered in the magistrate's court, as the appellate court declared should have been done. The judgment that a magistrate's court did not have jurisdiction of this same cause of action, and that title to real estate would come in controversy, was procured by defendant's persistence, and in a suit between himself and the plaintiff. It is *res judicata.* It may be that such judgment was erroneously made, but that cannot be inquired into in this collateral way.

It would be hard to imagine a case in which section 838 would apply, if not to this. It would be a hardship if a defendant could have an action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the Superior Court, he should be allowed to plead that title to the land did *not* come in contro- (428)

versy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendant's motion, it is adjudged in the magistrate's court that title to real estate will come in controversy, such finding shall be conclusive between same parties in the new action. A somewhat similar rule prevails in criminal actions when the defendant pleads, in abatement to the jurisdiction, that the indictment is pending in the wrong county. If such plea is found for defendant, and the cause is removed to the county suggested by him, this is conclusive upon a trial in the latter county (Code, sec. 1194); and on a plea in abatement for a misnomer, if the name set up by defendant is admitted or found for him, it is conclusive and cannot be afterwards denied.

It was error to dismiss the action, and the court should have proceeded to a trial upon the merits.

Reversed.

MERRIMON, C. J., dissenting: The Constitution (Art. IV, sec 27) provides that "The several justices of the peace shall have jurisdiction under such regulations as the General Assembly shall prescribe for them, of civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy," etc.

The statute (Code, sec. 834) prescribes that "Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract except (1) wherein the sum demanded, exclusive of interest, exceeds two hundred dollars; (2) wherein the title to real estate is in controversy."

The other statute (Code, sec. 922) prescribes that "The Superior Court shall have original jurisdiction of all civil actions where-
(429) of exclusive original jurisdiction is not given to some other court," etc.

This action began in the Superior Court, and the cause of action alleged is one hundred dollars, the balance due upon a promissory note executed by the defendant to the plaintiff. It is not alleged in the complaint as amended that the title to real estate is in controversy. It therefore plainly appeared from the record that a justice of the peace had exclusive original jurisdiction of the cause of action, and the Superior Court could not have original jurisdiction of it. Both the Constitution and the statutes so provided. In such a case parties cannot consent to give jurisdiction, nor can they waive objection to it, because the jurisdiction in such cases is settled and established by the law and is not otherwise given.

When it appears from the record that the court cannot have jurisdiction of the cause of action alleged in the pleading it should, on motion of a party or *ex mero motu,* dismiss the action unless the defect can be cured by appropriate amendment asked for by a party. When they do, their acts are nugatory and void.

It is said however, that the plaintiff brought his action before a justice of the peace, founded on the same cause of action; that the defendant there suggested and alleged that the title to real estate was in controversy, and it was so adjudged on appeal in the Superior Court and the action dismissed, and therefore the Superior Court had original jurisdiction conferred by the statute (Code, sec. 838). This, it seems to me, is a serious mistake. The Legislature could not so confer jurisdiction because the constitutional provision forbids it, certainly in effect. But properly interpreted the statute does not so undertake or intend to provide.

It prescribes that "when an action before a justice is dismissed upon answer and proof by the defendant that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the Superior Court, and the defendant shall (430) not be admitted in that court to deny the jurisdiction by answering, contradicting his answer in the justice's court." This does not imply that the plaintiff may bring his action in the Superior Court and allege a cause of action for less than two hundred dollars arising upon contract, and the court shall have jurisdiction of the same. It simply means that the plaintiff may so bring his action and allege his cause of action *as admitted and settled as to its character,* at the instance of the defendant in the court of justice of the peace, and that in the Superior Court the defendant shall not be allowed or heard to deny his answer in the former court or to question the plaintiff's claim as it is alleged. The plaintiff in this action should have alleged that in connection with the debt alleged the title to real estate came in question, and that it was so settled in the court of the justice of the peace. This allegation, if it had been made in the complaint, the defendant could not put in question, because the statutory provision last cited would not allow him to do so. Thus it would have appeared upon the face of the pleading that the court had jurisdiction.

Cited: Draper v. Allen, 114 N. C., 51; *Shingle Mills v. Sanderson,* 161 N. C., 454.

(431)

W. L. MOOSE ET AL. v. C. J. CARSON ET AL.

Municipal Corporations—Easement—Vested Rights—Constitution—Adverse Possession—Streets—Towns and Cities—Eminent Domain.

1. Where a municipal corporation conveys land, bounded by established streets or alleys, and the grantee enters upon and improves it, a subsequent conveyance by the corporation of the land covered by such streets or alleys, whereby the easement of the appurtenant owner is interfered with, is void.

2. Such grantor will be precluded from reasserting any right to actual possession, at least so long as streets or alleys are used by the public.

3. Even when a conveyance of such easements by an individual is not formally accepted by the town authorities, if parties have been thereby induced to buy and improve lots upon them, the dedication is deemed irrevocable.

4. Adverse possession of a street or public square does not ripen into title as against the public.

5. Owners of town lots, under grant of the town, cannot be deprived of their easement appurtenant in the streets adjacent for the benefit of the town, nor can the General Assembly give such power.

6. A statute or ordinance which attempts to divest a person or corporation of private property for private purposes, or for public purposes, unless upon just compensation, and in a manner provided by law, is unconstitutional.

7. The law protects the title to easement in a street as fully as it does the title to the land.

8. A municipal corporaion has no more right, even with the authority of the General Assembly, to lessen or diminish the width of the street than to convey it absolutely.

9. If the original conveyance did not operate to pass title to the street, when executed, the Legislature could not, pending suit, impart to it such vitality as to relate back to the commencement of the action and establish a right to recover possession.

(432) ACTION for the recovery of land, tried at the Spring Term, 1889, of ALEXANDER, before *Clark, J.*

The land on which the town of Taylorsville, the county seat of Alexander, is situated, was conveyed to James Thompson, chairman of the court of pleas and quarter sessions, and his successors in office, on 11 June, 1847.

On 23 January, 1888, A. A. Hill, mayor of the town of Taylorsville, and W. R. Sloan, chairman of the board of county commissioners of Alexander, "in consideration of one hundred dollars to A. A. Hill paid

by said parties of the second part (the said Sloan joining in the conveyance to convey any interest the county may have), convey to the plaintiffs, J. C. Moose, W. L. Moose and J. F. Teague, a portion of said land, including all of East Back street lying between North Main street and North Back street (both of which streets East Main crosses), except an alley sixteen feet wide next to defendants' lots."

The defendants and those under whom they claim bought lots bordering on and bounded by the portion of East Back street covered by deed of plaintiffs, and in controversy in 1848, under the county authorities, and have occupied the lots since 1853. When the ancestor of defendants bought, East Back street had been laid off sixty-six feet wide.

The plaintiffs claim in this action all of the original street covering the front of the defendants on East Back street except the alley in their immediate front mentioned in the case agreed.

The defendant C. J. Carson is the only heir-at-law, and D. P. Carson is the widow of J. M. Carson, and they claim title through the deeds, which were produced in evidence. A copy of the old town plat or survey was also shown in evidence. It is admitted that the town was located and laid off as indicated, in lots and streets, in 1847, and the *locus in quo* was conveyed by deed, and that many of the streets remain unused to this day. The land in controversy is that part of East (433) Back street described in plaintiff's deed and embraced between North Main street and North Back street. The width of East Back street is admitted to be sixty-six feet, and that defendants are now in possession of all East Back street lying between North Main street and North Back street, except a small part inside of lot fences Nos. 35 and 36, not in controversy, but defendants claim no advantage by reason of possession of the street. At the time plaintiffs purchased the town authorities left an alley of sixteen feet adjoining defendants' lots Nos. 15 and 16, and running back from North Main street to North Back street. It is also admitted that lots Nos. 15 and 16, abutting said East Back street were purchased by the defendants and those under whom they claim after the town was laid off into lots and streets, as indicated in the plat, and have been in possession of the defendants and those under whom they claim ever since the purchase in 1848, and the defendant's deeds cover the said lots.

The exhibits above referred to are not essential to the proper understanding of this case.

Upon the facts the court was of opinion that the plaintiffs were not entitled to recover, and gave judgment accordingly that defendants go without day and recover costs. The plaintiffs except to the judgment and appeal.

E. C. Smith for plaintiffs.
R. Z. Linney (by brief) for defendants.

AVERY, J., after stating the facts: It is well settled principle that where a corporation, acting through its properly constituted authorities or an individual, sells or conveys a town or city lot bounded by streets or alleys, marked out on a plat, and the grantee enters upon it and expends money in improving it, he is entitled to a right-of-way over (434) such street or alley as appurtenant to the land, and any subsequent conveyance by his grantor or those claiming under him of the portions of such streets or alleys by which the grantee's lot is bounded will be held void. *Pratt v. Law,* 4 Myers Fed. Dig., Contracts, 1046; *Chapain v. Brown,* 10 Atk., 639; *Sarky v. Municipality,* 61 Am. Dec., 221; *Port Hudson v. Chadwick,* 52 Mich., 320; *Harrison v. Augusta Factory,* 73 Ga., 447.

The grantor thus dedicates the land, covered by a street, to the use of the public, and will be precluded by such appropriation from reasserting any right to the actual possession of the land, at least so long as it remains in the public use. *Kennedy v. Jones,* 11 Ala., 63; *Proctor v. Lewiston,* 25 Ill., 153; *Adams v. Saratoga,* 11 Barb. (N. Y.), 414; *Penny Pot Landing v. Philadelphia,* 16 Penn., St. 79 Re. Pearl Street; 11 Pa. St., 565. When, by laying off streets, third parties have been induced to buy lots adjacent to them and build on the lots by an individual grantor, the dedication to the public use has been held irrevocable, although the streets may not have been formally accepted by the authorities of a town in which they lie. *Grogan v. Hayward,* 4 Fed., 161.

No one can acquire as a general rule, by adverse occupation, as against the public, the right to a street or square dedicated to the public use. *Hoadley v. San Francisco,* 50 Cal., 265; *People v. Pope,* 53 Cal., 437.

We may deduce from the rules of law already stated the further principle that the owners of a lot having a property or easement appurtenant in the adjacent streets, with reference to the advantages of which they expended their money for the land and the improvements put upon it, cannot be deprived of their rights by a sale for the benefit of the town that was in effect, though not nominally, one of the grantors (435) through whom they claim title; nor has the Legislature the power to deprive them of such appurtenant rights by authorizing such grantor, whether a person or a corporation, to again enter upon and sell such streets to others. The General Assembly cannot, without a violation of the Constitution, divest or provide for divesting, by law, the right of a person to his property, for the purpose of vesting such right in another person or corporation merely for *private use at*

all, and it has no power, under the organic law, to provide for taking private property for *public purposes* without just compensation, to be ascertained in a mode pointed out by the law.

The appurtenant right of the owner of a lot in the street that formed its boundaries at the time when he or those under whom he claims bought it originally, with reference to such outlets, is protected against the reassertion of the grantor's claim to it just as fully as is his title to the lot conveyed, even though the State may undertake by law to sanction the re-entry on the streets by one claiming under his title. Neither the mayor of the town of Taylorsville nor the county commissioners of Alexander County, by virtue of the authority derived from sec. 1, ch. 86, Private Laws 1887, to hold lands conveyed to the town, nor under the more explicit power to sell streets, that in terms is given by ch. 8, Private Laws 1889, are empowered to make a valid conveyance to any part of a street, with reference to which, as a boundary, the defendants or those under whom they claim bought lots in 1848 and improved them in 1853. *Pratt v. Law, supra, Adams v. R. R.,* 39 N. W., 629; *Brooks v. Riding,* 46 Ind., 15.

The said mayor or commissioners cannot diminish the width of such streets from sixty-six feet, as laid off when the lots were originally sold, to sixteen, by conveying fifty feet of East Back street, and extending from North Main to North Back street, and leaving an alley of only sixteen feet as a passway for the defendants along their front. Their ancestor took with his title all the appurtenant advantages of a street sixty-six feet wide, and the tendency of converting it into (436) an alley would or might be to impair the value of their property for the benefit of the town and without compensation to them. *Adams v. R. R., supra;* 2 Dillon on Con., sec. 675, p. 674, note 1.

The defendants do not own the fee in the street on their front, but hold only an appurtenant easement therein, and the municipal corporation that sold the lots occupy the same relation to them as would an individual grantor who had originally sold to them, or to those under whom they claim, and he could, neither with nor without authority purporting to be derived from the Legislature, have reasserted his right to the streets laid out by him before selling. *New Orleans v. United States,* 10 Peters, 717; *Grogan v. Hayward, supra.*

The plaintiffs have shown no such title as would warrant the court in granting a writ of possession. If the fee were vested in the town, which is not conceded, there would still be wanting in the plaintiffs, its grantees, the right to prevent possession and occupancy of a street dedicated to the public. *Cincinnati v. Lessee,* 6 Peters, 431.

It is not necessary to decide whether the mayor of the town of Taylorsville, by joining the chairman of the board of county commissioners,

could, by virtue of a private sale, make a valid conveyance of any land belonging to the town, when the statute (Code, sec. 3824) gave the power to the "mayor and commissioners of any incorporated town to sell at public outcry, after thirty day's notice." If the original conveyance did not operate to pass the title to the street, when executed, the Legislature could not, pending this suit, impart to it such vitality as to relate back to the commencement of the action and establish plaintiffs' right to recover. The municipality derives its powers from the express grant of the Legislature, and exercises and enjoys them, subject to the (437) legislative right of revocation; but, in controlling the property of the corporation, the General Assembly is restricted by the fundamental principle that private property cannot be taken for public use without just compensation, nor can a town be invested with authority to violate its implied contract (either directly or through its grantee, who is in privity with it) to provide a street sixty-six feet wide for the advantage of a lot conveyed by one who held in trust for the benefit of the town.

Affirmed.

Cited: White v. R. R., 113 N. C., 621; *Tate v. Greensboro,* 114 N. C., 404; *S. v. Fisher,* 117 N. C., 740; *Smith v. Goldsboro,* 121 N. C., 354; *Southport v. Stanly,* 125 N. C., 467; *S. v. Higgs,* 126 N. C., 1022, 1028, 1030; *Turner v. Comrs.,* 127 N. C., 155; *Davis v. Morris,* 132 N. C., 436; *Hughes v. Clark,* 134 N. C., 460, 464; *Milliken v. Denny,* 135 N. C., 22; *Hester v. Traction Co.,* 138 N. C., 293; *Milliken v. Denny,* 141 N. C., 227; *Tise v. Whitaker,* 144 N. C., 514; *S. v. Godwin,* 145 N. C., 465; *Staton v. R. R.,* 147 N. C., 435, 440; *Church v. Dula,* 148 N. C., 265; *Elizabeth City v. Banks,* 150 N. C., 413; *Balliere v. Shingle Co., ib.,* 637; *New Bern v. Wadsworth,* 151 N. C., 312; *Butler v. Tobacco Co.,* 152 N. C., 419; *Crowell v. Monroe, ib.,* 401, 403; *Moore v. Meroney,* 154 N. C., 161; *Green v. Miller,* 161 N. C., 30; *Raleigh v. Durfey,* 163 N. C., 162; *Sexton v. Elizabeth City,* 169 N. C., 390; *Threadgill v. Wadesboro,* 170 N. C., 643; *Allen v. Reidsville,* 178 N. C., 527; *Wittson v. Dowling,* 179 N. C., 545.

JOHN PAALZOW v. THE NORTH CAROLINA ESTATE COMPANY.

Pleading—Contract—Construction—Demurrer—Trespass—Conversion.

1. A written contract will be construed by looking at the entire instrument.
2. General terms in a contract may be limited by special provisions showing the real intent of the parties.
3. Where the plaintiff agreed to sell to the defendant "all" the trees on a certain tract, and it appeared from other portions of the contract that the parties understood a certain specified number was only intended to be embraced by the terms of the sale, this understanding will govern.
4. An allegation that defendant unlawfully converted sixty trees in excess of the number sold him to his own use, and, by said unlawful and wilful removal and trespass, etc., plaintiff has been endangered, is sufficiently explicit.

THIS was a case heard by *Shipp, J.*, at the July Term, 1889, of CATAWBA, upon complaint and demurrer.

The complaint stated that on 29 March, 1888, plaintiff and Houston, defendant's agent, entered into a contract, the material parts of which are as follows:

"It is hereby contracted and agreed between John Paalzow, of (438) Hickory, Catawba County, North Carolina, on the first part, vendor, and Maj. J. F. Houston, manager North Carolina Estate Company (Limited), of Morganton, Burke County, North Carolina, on the second part, purchaser, with regard to the walnut timber on the estate of Mr. J. E. Wilfong, of Rock House, in the county of Catawba, North Carolina, as follows:

"*First*—That said John Paalzow, of the first part, sells to the said Maj. J. F. Houston, of the second part, one hundred and twenty-five walnut (black) trees on the property, as aforesaid, for the sum of twenty-five hundred dollars ($2,500)—that is to say, all the black walnut trees situated and growing in what is known as the 'Canebrake Bottom' and on timbered lands of said J. E. Wilfong, at Rock House, as aforementioned, always excepting such walnut trees as measure, at a height of two feet from the ground, a circumference round the bark of less than twenty-four inches; and that is the basis of this contract.

"*Second*—That, on the understanding that $2,500, as aforementioned, represents the value of the one hundred and twenty-five walnut trees, as aforesaid—that is to say, the trees of black walnut timber, as described in Mrs. John Paalzow's proposal, dated Hickory, 25 March, 1888, as situated on the lands of J. E. Wilfong—a deduction in dollars, calculated on this basis, be made in proportion from the last payment hereafter set forth for each and every tree falling short of said number of one hundred and twenty-five black walnut trees aforementioned.

"Third—That the payment of said $2,500 be in four installments—

"First payment of $666.60 to be made to said vendor, John Paalzow, by purchaser, Maj. J. F. Houston, on the legal title to said walnut timber being made to the said purchaser.

(439) "Second payment of $1,000 (2d) be made thirty days after payment of the first payment.

"Third payment of $416.60 (3d) to be made in thirty days after payment of second payment.

"Fourth payment of $416.60 to be made similarly, or ninety days after first payment.

"Fourth—That said John Paalzow hereby secures to J. F. Houston the right of way over the Rock House property to haul the trees, without injury to the property or crops," etc.

The first installment was to be paid "on the legal title being made to the said purchaser." Houston, on his part, agreed to move the trees in twelve months.

The complaint also stated that the defendant paid $2,500 for 125 trees, and that defendant went upon the land and cut and sold and took possession of 60 other trees not mentioned in the contract.

The plaintiff demands damages for trespass and for unlawfully converting said sixty trees, in excess of the number sold him, to his own use.

To this complaint the defendant filed the following demurrer:

1. That it appears upon the face of the complaint, by reference to the contract set forth in paragraph 3 thereof, entered into between plaintiff and defendant's agent on 29 March, 1888, that the defendant purchased of plaintiff all the black walnut trees situated and growing in what is known as the "Canebrake Bottom" and timbered land of J. E. Wilfong, at Rock House, Catawba County, excepting such walnut trees as measure, at the height of two feet from the ground, a circumference around the bark of less than twenty-four inches, at the agreed price of $2,500; but it also appears in said complaint that said purchase money has been paid, and that the amount sued for is in excess of said sum contracted and agreed to be paid and which was paid, and it is not alleged

(440) that any of the walnut trees used by defendant, under and by virtue of said contract, were smaller than or other than the ones sold defendant, or that any of said walnut trees so cut and used by defendant measured, at a height of two feet from the ground, a circumference around the bark of less than twenty-four inches.

2. That it is not charged in said complaint that defendant accepted, used or cut any walnut timber in excess of the number of 125 trees; and it is alleged that said walnut trees, in excess of said number, amounting to sixty trees, were not used by defendant, but were wrongfully and tortiously attached by the sheriff of Catawba County and his deputies

to satisfy creditors of defendant, but it is not alleged that defendant procured said attachment to issue or said levies to be made, and no liability is upon this defendant by reason of the same.

3. That it is not alleged or shown that the legal title to said walnut timber has been handed to defendant, and the same is a precedent condition to any liability by defendant.

The court overruled the demurrer, and the defendant appealed.

F. L. Cline for plaintiff.
Isaac T. Avery and S. J. Ervin for defendants.

CLARK, J. The contract is not very carefully drawn, but, upon consideration of the whole contract, we are of opinion that the agreement was for the sale of 125 trees, of dimensions named, at the price of $2,500. While it is clear that it was the opinion of the parties that such number would embrace "all the black walnut trees" of that dimension growing on the land, yet those words are not to be construed by themselves. Being general words, they are limited by the evident agreement of the parties that the number of the trees sold did not exceed 125. The (441) second paragraph of the contract recites that, "on the understanding that $2,500 represents the value of the 125 black walnut trees aforesaid," etc. The contract further provides for an abatement at that rate ($20 per tree), should the number of trees fall under the stipulated 125. Twice in the same contract reference is made to the fact that the contract is "on the basis of 125 trees," of the dimensions named. There is no provision, it is true, for the payment for trees in excess of that number. It was open to the defendant whenever he got his 125 trees to stop; and if he chose not to do so, but to cut more trees than he had bought, he is liable for their fair value.

The complaint alleges that the defendant "unlawfully converted said sixty trees, in excess of the number sold him, to his own use, and by said unlawful and willful removal" and trespass, etc., plaintiff has been damaged. We see no force, therefore, in the second ground of demurrer.

As to the third ground of the demurrer, this is not an action for the value of the 125 trees sold and for which plaintiff contracted to convey the legal title, but for the alleged unlawful conversion of sixty trees in excess of the contract number.

The court below rightly overruled the demurrer, and defendant has leave to set up his defense to the merits by answer.

No error.

Cited: Womack v. Carter, 160 N. C., 290.

(442)

W. J. WALLACE v. WESTERN N. C. RAILROAD COMPANY.

Evidence—Common Carriers—Burden of Proof—Contributory Negligence—Damages.

1. The burden of proving contributory negligence is placed, by statute (Acts '87, chap. 33), upon the defendant, and it was competent for the Legislature to enact it.

2. The defendant can avail himself to anything in plaintiff's evidence tending to disprove contributory negligence, but this does not change the burden of proof as fixed by statute.

3. Inquiring into a plaintiff's age, earnings, past earnings and kind of service are all competent, as elements, in considering the *quantum* of damages; but what were his *accumulated* earnings are immaterial.

4. Where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts; and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body and mind, which are the immediate and necessary consequences of the injuries.

ACTION, tried at Fall Term, 1889, of MCDOWELL, before *Phillips, J.*, for damages for personal injuries by defendant.

The facts are reported in same case in 98 N. C., 494, and 101 N. C., 454.

The issues submitted were:

1. "Was plaintiff injured by the negligence of defendant, as alleged in the complaint?" Answer: "Yes."

2. "Did the plaintiff contribute to his injury by his own negligence?" Answer: "No."

3. "What damage, if any, has plaintiff sustained?" Answer: "Three thousand dollars."

Among many other things, the plaintiff testified: "At that time (meaning the time he was hurt) I was getting $1.50 and board.
(443) I was always at work, the weather permitting." His business was that of a carpenter.

Defendant's counsel asked what his net earnings at his trade were.

Plaintiff objected to the question. Objection sustained.

Defendant excepted, and assigned as error that the question was competent to show the real value of his services to his family, under *Kesler v. Smith,* 66 N. C., 154.

The defendant offered no evidence, and at the close of plaintiff's evidence asked that the following instructions be given the jury, to wit:

1. That a passenger on a freight train accepts passage on the same, taking the risk of the usual incidents and conduct of a freight train, if managed by prudent and competent men.

2. That in the management and movement of a freight train the jerking is inevitable and is not to be ascribed to negligence or want of skill or improper management on the part of the agents of the company.

3. That it is not expected that a company will provide its freight trains with all conveniences and safeguards against danger that are required in the operation of passenger trains.

4. It is usual and proper for a passenger to remain in his seat, and especially so on freight trains, while being transported.

5. That if the plaintiff, by remaining in his seat, could have avoided the injury, and his getting up was the cause of the same, then he contributed to his injury by his negligence.

6. There being no dispute about the fact that the plaintiff did get up from his seat and was injured by reason thereof, the court should find, as a proposition of law, that he contributed to his injury by his negligence, and direct the second issue to be found for the defendant.

7. That there is no evidence the locomotive was overloaded. (444)

8. In assessing the damages the plaintiff is entitled to recover, the jury should award the plaintiff compensation only for the injuries he suffered.

9. That the burden of proof, in the light of the evidence in this case, is upon plaintiff to show negligence on the part of the defendant, because there is excited in the mind of the court by his (plaintiff's) evidence a suspicion of contributory negligence on his part; and, further, in the light of the evidence in the case, the burden of proving contributory negligence is not upon the defendant, but upon the plaintiff to disprove the same. This is so, because the plaintiff's own evidence does raise a suspicion of negligence on his part.

10. That the fact that a man is injured does not give him a right to recover damages from the defendant.

The court gave the jury the first, second, third and tenth instructions, as prayed for by defendant's counsel, and gave the fourth instruction, modified as follows, viz.:

"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 while being transported."

The court gave the eighth instruction prayed for, as modified in the written charge.

The defendant excepted to the refusal of the court to give the jury, in charge, the fifth, six, seventh and ninth instructions, as contained in

defendant's prayer, and because the fourth instruction was modified by adding, "when he has reason to believe there is danger in any other position than being seated"; and further, because the eighth instruction was not given as asked.

The court charged the jury as follows, to wit:

(445) "The plaintiff in this action seeks to recover damages for injuries sustained by reason of the alleged negligence of the defendant.

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is incumbent upon the plaintiff to show such a state of facts, to the satisfaction of the jury, as would entitle him to recover.

"This he may do by direct proof, showing to the jury that the defendant was negligent in the management and running of the train, and that the injury was the result of that negligence, or that he was rightfully on the cars of the defendant, and that he was in his place provided for passengers, using the usual watchfulness and care that a prudent man would exercise, under like circumstances, on a mixed train of the character described by the witness, and was injured. In this last case the burden would shift to the defendant to show that the injury was not the result of the negligence of the defendant.

"If the train was negligently and carelessly handled, so as to produce unusual jars and jerks of a severity unusual to mixed trains of the one described, and the company carrying passengers on such train did not exercise every reasonable care and take every reasonable precaution against injury or danger to the life of such passengers which the appliances for that mode of transportation will admit of, it is negligence; and in passing upon this question this jury can look at the evidence of the length of the train and the overloading, the condition of the track, the stalling at the grade, and everything else that has been brought out in evidence on the trial. [Read from decision 98 N. C., at page 498,

beginning with paragraph, 'A caboose,' at bottom of page 498,

(446) down to and including 'travel,' in third line of page 499.] Though the jury should find there was negligence, and answer the first issue 'Yes,' and that the defendant did not use every reasonable precaution against injury or danger to the life of passengers which the appliances for that mode of transportation will admit of, yet the plaintiff would not be entitled to recover if he did not exhibit the necessary watchfulness and use that care which a prudent man would exercise under like circumstances on a train of this character to avoid the injury.

"It is well settled that a person cannot recover for an injury to which he contributed by his own want of ordinary care. If his own carelessness was the contributory and proximate cause of the injury, he is not entitled to recover damages.

"The burden of showing contributory negligence on the part of the plaintiff rests upon the defendant company, but the defendant may avail itself of any evidence offered by the plaintiff to establish that fact as effectually as if it was offered by itself.

"Does the evidence offered by the plaintiff, then (the defendant introduces no evidence), constitute contributory negligence, and was that negligence the proximate cause of the injury?

"If the evidence in this case satisfies the jury that the plaintiff knew, or, by ordinary care could have known, that the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would be the result, and then, without thinking about the train being backed, and without paying any attention to whether it was or not, left his seat and got up in the car and was thrown down and injured, when he would not have been had he kept his seat, his negligence was the proximate cause of the injury, and he would not be entitled to recover. *Smith v. R. R.*, 99 N. C., 245.

"If the jury should answer the first issue 'Yes' and the second issue 'No,' then they will consider the third issue, as to damages; and in this class of cases the plaintiff is entitled to recover as damages (447) one compensation for all injuries past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time or loss from inability to perform ordinary labor or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of both bodily and mental powers, or for actual suffering, both of the body and mind, which are the immediate and necessary consequences of the injury.

"There is no evidence, however, offered that anything was paid for actual nursing or any amount was paid for medical attendance."

The court gave this last paragraph in the form of a question to counsel.

When counsel for plaintiff stated they did not ask that the jury should consider the nursing or medical attendance in making up their verdict as to damages, the judge added:

"You need not consider these items in making up your verdict, if you should arrive at that point."

The defendant excepted to the charge of the court.

The defendant assigns the following as errors of law committed by the court:

1. The court's refusal to allow the defendant to ask the plaintiff what his net earnings were in the exercise of his trade. It was competent upon the question of damages to be assessed in favor of the plaintiff.

2. The court's refusal to instruct the jury, as required in the fourth instruction prayed by the defendant, that it was "usual and proper for a passenger to remain in his seat, and especially so on freight trains, while being transported."

3. The court's refusal to instruct the jury, as prayed in the fifth instruction of defendant, "that if the plaintiff, by remaining in his seat, could have avoided the injury, and his getting up was the cause (448) of the same, then he contributed to his injury by his negligence."

4. The court's refusal to instruct the jury, as requested in the sixth prayer of defendant, "there being no dispute about the fact that the plaintiff did get up from his seat and was injured by reason thereof, the court should find as a proposition of law that he contributed to his injury by his negligence, and direct the jury to find the second issue in favor of the defendant."

5. The court's refusal to instruct the jury, as prayed, "that there is no evidence that the locomotive was overloaded."

6. The court's refusal to instruct the jury, as prayed in the eighth prayer of defendant, "that in assessing the damages the plaintiff is entitled to recover the jury should award the plaintiff compensation only for the injuries he suffered."

7. The refusal of the court to instruct the jury, as prayed in the ninth prayer of the defendant, "that the burden of proof, in the light of the evidence in this case, is upon the plaintiff to show negligence on the part of defendant, because there is excited in the mind of the court by his (plaintiff's) evidence a suspicion of contributory negligence on his part; and, further, in the light of the evidence in the case the burden of proving contributory negligence is not upon the defendant but upon the plaintiff to disprove the same. This is so because the plaintiff's own evidence does raise a suspicion of negligence on his part."

8. The laying down to the jury in the court's charge abstract propositions, without applying the principles to the facts in this case.

9. In not saying to the jury there was no evidence of the length of the train, it only being shown it was a long train.

10. In not instructing the jury they could not consider, on the question of damages to which he was entitled, what plaintiff had paid for medical aid and nursing. The court should have gone further than to say there was no evidence of the amount paid. (449)

There was a motion for a new trial, which was overruled, and the court gave judgment for plaintiff. And in his motion for a new trial the defendant's counsel especially limited his exceptions to the "refusal to charge as requested," and to the charge as given by the court, stating that it was all matter of record, the evidence being taken down and the charge of the judge being reduced to writing. The assignments of error were filed after the verdict of the jury.

There was an appeal by defendant.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
F. H. Busbee and C. M. Busbee for defendant.

CLARK, J. When this case was here the first time (98 N. C., 494), the evidence being substantially the same as now sent up, the Court held that the judge below erred in instructing the jury that there was no evidence of contributory negligence, and that such issue should have been submitted to the jury. When the case was again before this Court (101 N. C., 454), while it went off upon another point, the same exceptions to the charge upon the first two issues were made substantially as now, and this Court said: "In respect to other assignments of error 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 have been 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." As the evidence now is almost literally the same with the addition, by plaintiff, of the omitted fragment of testimony which then procured the defendant a new trial, we think that this is conclusive of all the points raised by defendant's assignment of errors applicable to the first and second issues, except the seventh and (450) eighth assignments.

The statute (ch. 33, Laws 1887) places the burden of proving contributory negligence upon the defendant. This only affects the remedy and impairs no vested right. It was competent for the Legislature to enact it. It was not error, therefore, to refuse to charge, as asked by defendant, "in the light of this case the burden of proving contributory negligence is not upon the defendant, but upon the plaintiff to disprove the same." The defendant can avail himself of anything appearing in plaintiff's evidence which tends to disprove contributory negligence, but this does not change the burden of proof as fixed by the statute.

Nor can we sustain the eighth assignment of error. His Honor's charge was a careful application by him of the principles of law appropriate to the different phases of fact as they should be found by the jury.

It is urged, however, there was error in the court's refusal to allow defendant to ask the plaintiff what his net earnings were in the exercise of his trade. *Kesler v. Smith,* 66 N. C., 154. What plaintiff's accumulations had been was an immaterial matter. He might have chosen to spend his earnings or to hoard them. That could not affect the damages sustained by reason of his injuries. Nor would it make any difference whether he had a large family dependent on him or not, except in cases where the circumstances would entitle the plaintiff to recover exemplary damages. 2 Wood Railways, 1242. An inquiry, however, as to his earnings in his business is competent. It is not itself a rule of damages. There are many other elements of damages to be considered, and "upon all the circumstances it is for the jury to say what is a reasonable and fair compensation which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained." Lord Cole-
(451) ridge in *Phillips v. R. R.,* 42 L. T. Rep., N. S., 6. In the same opinion, which is a very clear and able exposition on this subject, his Lordship directs the attention of the jury to the amount of plaintiff's earnings as one of the material circumstances to be considered by them.

In *Nash v. Sharp,* 19 Hun., 365, *Pratt, J.,* says: "Evidence of the nature and extent of the party's business, or how much he was *earning from his business or realizing from fixed wages,* is proper upon the question of damages."

"The age and occupation of the injured person, the value of his services, that is, *the wages which he has earned* in the past, whether he has been employed at a fixed salary or as a professional man are proper to be considered." 2 Wood Railways, 1240, and cases there cited.

The rule is indeed well settled, and had the jury been cut off from the information which could properly be brought out by the inquiry, it would have been our duty, without disturbing the findings of the jury upon the first two issues, to have directed a new trial upon the third issue as to the amount of damages, as was done in *Burton v. R. R.,* 84 N. C., 192. But on examination of the record we find that the plaintiff had replied immediately before the excluded inquiry to a question by defendant's counsel, "At that time I was getting $1.50 per day and board. I was always at work, the weather permitting." This, we take it, was a clear statement that his net earnings were $1.50 per day, when the weather permitted, in his trade of "bricklayer and plasterer." If the question excluded was intended to repeat the inquiry already answered it was no error to exclude it. If it was meant by it to inquire what

were his net earnings at his trade after supporting himself and family it was incompetent. That a man's wages may be required in the support of his family, without leaving him any "net" earnings, in no wise diminishes his damages in losing his capacity to earn them. If the object was to show that $1.50 was more than his usual earnings the question should have been so framed, or this purpose stated (452) by counsel.

As to the sixth assignment of error, the court charged the jury:

"In this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury." And added: "There is no evidence, however, offered that anything was paid for actual nursing, or any amount was paid for medical attendance. You need not consider these items in making up your verdict if you should arrive at that point."

The proposition of law laid down seems to be a *verbatim* quotation from 3 Sutherland on Damages, 261, and is sustained by the numerous authorities there cited. Upon an examination of the record we find no ground to sustain the tenth assignment of error. The court instructed the jury not to consider those items in making up their verdict, if they should come to that issue.

Affirmed.

Cited: Hansley v. R. R., 115 N. C., 611; *Burns v. R. R.,* 125 N. C., 308; *Osborn v. Leach,* 135 N. C., 633; *Clark v. Traction Co.,* 138 N. C., 83; *Ruffin v. R. R.,* 142 N. C., 129; *Boney v. R. R.,* 145 N. C., 250; *Brown v. R. R.,* 147 N. C., 138; *Britt v. R. R.,* 148 N. C., 39; *Rushing v. R. R.,* 149 N. C., 160, 163; *Patterson v. Nichols,* 157 N. C., 415; *Hargis v. Power Co.,* 175 N. C., 34; *Muse v. Motor Co., ib.,* 471; *Kirkpatrick v. Crutchfield,* 178 N. C., 351.

(453)

THE STATE EX REL. J. W. HAMPTON v. O. T. WALDROP.

Election—Registration—Voter—Evidence—Office.

1. Registration is essential to the exercise by a citizen, possessed of the other legal qualifications, of his right to vote, and, when duly made, is *prima facie* evidence of the right.

2. Where the registration book of an election precinct had been lost, and could not be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently, and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and no one who was entitled to vote was excluded. *Held*, that the election was not invalid, and that those persons who received the majority of such votes were entitled to be inducted into the offices for which they had thus been chosen.

ACTION, tried at Spring Term, 1889, of POLK, before *Clark, J.*

The plaintiff relator alleged that he was duly elected to be sheriff of Polk at the regular election held in November, of the year 1888; that, nevertheless, the county commissioners of that county refused to induct him into that office as he requested them to do, and as in law they should have done, on the first Monday in December of that year, but professed and undertook to elect the defendant to that office and induct him into office for the term of office then next ensuing.

The defendant denied that the plaintiff was so elected, and alleged that he was elected, etc.

It was agreed of record that the court should find the facts from the evidence produced, and it did so.

It was admitted that if the vote cast at the voting place called "Lewis's Store" should be counted the relator was duly elected. It appeared that the regular registration book of qualified voters at that voting
(454) place had been lost; that the registrar, who had known and who was familiar with the book, was furnished with a new registration blank-book; that he put in the same the names of such persons as he knew had been duly registered in the lost book, and registered in this new book the names of such other persons as were entitled to register.

The plaintiff then offered in detail to show that no one voted at "Lewis's Store" who was not duly registered, either on the book used or on the lost registration book; that no one voted but those entitled to vote, and that no one entitled to vote was excluded.

The defendant objected to this as a waste of time, stating that his witness, Mr. Green, had stated that in substance and that as to the election his point was solely that the registration book for that precinct

was lost and no new registration book had been ordered, and hence the vote at "Lewis's Store" was illegal and should not be counted.

The court found that the relator received a majority of the votes legally cast at the election mentioned, and was duly elected, and gave judgment in his favor, and the defendant, having excepted, appealed.

W. J. Montgomery for plaintiff.
J. A. Forney and M. H. Justice for defendant.

MERRIMON, C. J., after stating the case: The right to vote at an election is not perfected and does not arise in its completeness until the voter, otherwise eligible, has been registered as the law requires. Registration is essential. The Constitution (Art. VI, sec. 2) so expressly provides, and this Court has so repeatedly decided. *Southerland v. Goldsboro,* 96 N. C., 49; *Rigsbee v. Durham,* 99 N. C., 341, and cases there cited.

Registration is evidence—*prima facie* evidence— of the voter's (455) right to vote, but is not conclusive. His right may be challenged before the judges of election, where he claims the right to vote, and the registrar, before the election, and at any time before and at the election as allowed by the statute (Code, sec. 2677), and his right may be afterwards questioned, in any proper connection and way, in an action or other judicial proceeding.

The registration book should be present and used for the purposes prescribed by law at the voting place, while the election is in progress and until all the votes are received. It should not—cannot—be dispensed with in any case if it can be produced; but if it be lost, destroyed by accident, or made way with by fraud or for fraudulent purposes, the mere fact that by reason of such causes it is not present at the election, as it should be, cannot deprive a registered voter of his right to vote. He had registered—had perfected his right to vote by registration; he was a registered voter, as much so as if the registration book was present, and while the book is the proper and the better evidence of the fact, it is not the only evidence. He may offer evidence of the fact, if need be, by his own testimony, that of the registrar and of such person or persons as were present and saw him registered. If in such case the judges of the election should be satisfied that he was then properly registered he should be allowed to vote, and he should be, although it might turn out that the absence of the registration book might, in some way and for some cause arising, destroy the validity of the election at that voting place. This is so because it might be, as in this case, that all the registered voters voted or had opportunity to vote. The law favors the right to vote, and encourages the just exercise of that right. The spirit of the political

institutions of this country is that the government shall be controlled and administered by officers and agencies elected from time to
(456) time by the free voice of the people, expressed by the lawful electors at the ballot box.

It is admitted that if the vote cast at the election in question held at "Lewis's Store" was valid, then the relator was elected as he alleges. It appears that the regular registration book of that place, containing a list of the names of the registered voters there, had been lost some time before that election and it was, hence, not present and used at it. It is admitted, however, that all the voters who voted there had been duly registered, either in the lost registration book or in the new one used by the registrar; "that no one voted but those entitled to vote, and that no one entitled to vote was excluded." It is not suggested that the absence of the lost book in any way facilitated unlawful or fraudulent voting, or prevented legal voters from voting, or in any respect prevented a fair election; it is simply contended for the defendant that the absence of the lost book and the fact of its loss rendered the election illegal and void. For reasons already stated we think this contention is unfounded. The statute does not provide that the election shall be void, at all events, if the registration book is not present at the election. Its presence is required for the purpose of facilitating the election—to promote honest voting and prevent dishonest voting—by its use in the way prescribed. It is intended to serve the purpose of a valuable and important help to the officers holding the election, and should and must be present when it may be. But if for any cause those who ought to produce it cannot, and the election is nevertheless held fairly and honestly—all lawful voters vote, or have fair opportunity to do so—the election is not void but valid, and the vote so cast should be counted.

It appears that the registrar was furnished with a new registration book. In this book he entered a list of the voters registered in the lost book, so far as he could remember them, and likewise the names
(457) of such as were qualified and entitled to be registered, but had not been registered before that time. This was not unlawful, but certainly, as to the newly registered voters, a substantial compliance with the statute (Code, sec. 2675).

The relator was therefore elected, as he claimed to have been. The county commissioners could not impair or destroy his right to be inducted into the office to which he was so elected by appointing the defendant to be sheriff. They had no authority to declare that he was not elected. When he presented to them his proper certificate of election and showed to them that he had accounted as the former sheriff for public moneys wherewith he was charged, as required by law, it at once

became their duty to induct him into office according to law. *Roberts v. Calvert,* 98 N. C., 580; *Hannon v. Grizzard,* 96 N. C., 293.

It was further contended that the relator was the former sheriff of the county named, and had failed to pay the proper officers the taxes due from him, as required by the statute (Code, sec. 2068), and that he was therefore ineligible to be sheriff. This was not made the ground of the refusal of the county commissioners to induct him into office. They did not afford him opportunity to show that he had paid such taxes, as he alleged he had done. They appointed the defendant to be sheriff on the ground that the relator had not been elected as he claimed.

But in that view there was no merit in such objection because the evidence was competent, and the court below properly found as a fact that the relator had, at "the date of said election, settled and fully paid up to every officer the taxes which were due from him."

Affirmed.

Cited: Harris v. Scarborough, 110 N. C., 238; *Hill v. Skinner,* 169 N. C., 410; *Woodall v. Highway Com.,* 176 N. C., 391.

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(458)

THE STATE EX REL. E. A. PATE ET AL. v. D. N. OLIVER ET AL.

Administration—Evidence—Lease— Merger— Counterclaim— Application of Assets—Liability of Administrators and Executors—Conditional Sale.

1. Where an intestate had made no effort for seventeen months prior to his death to enforce the collection of a docketed judgment, and his administrator did not move in the matter for more than three years, when, upon motion for leave to issue execution, the judgment debtor proved to the satisfaction of the court that he had paid the judgment. *Held,* that the administrator should not be charged with that amount.

2. That the evidence of the judgment debtor was competent, on the motion to issue execution, to prove that he had paid the judgment to the intestate.

3. Where an intestate at the time of his death was carrying on a large turpentine business, and had leased from various parties for the current year a number of "boxes," at a stipulated price, and his administrator sold the unexpired leases, together with the turpentine in box, at public sale, when the lessors became the purchasers. *Held,* that under the peculiar circumstances of the case, such sale and purchase did not distinguish the rent or merge the contract of lease in that of the purchase, but the liability of the lessee's estate for the rent for the entire term continued in force.

4. Where an estate is solvent, no counterclaim against an action, by the personal representative, beyond the ratable proportion of him who pleads the counterclaim to the assets, will be allowed.

5. If the personal representative *voluntarily* yields to the entire amount of a counterclaim when the estate is insolvent, he will be liable to the other creditors for the excess of the ratable portion.

6. But if he honestly resists such counterclaim, and it is adjudged against him by the court having cognizance of the matter, he will be protected, though such judgment be erroneous and he did not appeal from it.

7. Where there is valid lien upon property sold by a personal representative, he is required by the statute (Code, sec. 1416) to apply the proceeds of the sale first to the satisfaction of such lien.

8. Where the intestate, in furtherance of a purpose to purchase a tract of land, became the assignee of a debt which was a charge upon it, and by an arrangement with the other parties in interest, assumed to pay a balance which was necessary to complete his purchase, which balance he was adjudged to pay into court. *Held*, that he thereby became the owner of an equity in the land, and his personal estate was primarily chargeable with the amount so adjudged to be paid, and his personal representative was authorized to discharge it from the personal estate, if sufficient.

9. An administrator will not be charged with the rental value of property found at the death of his intestate in the possession of the latter, where he obtained possession of it under a conditional sale, and the vendor resumed possession and sold for balance of purchase money—particularly when it appeared that the arrangement was beneficial to the estate.

(459) ACTION, tried before *Phillips, J.*, at January Term, 1888, of ROBESON, upon exception to a referee's report.

E. H. Paul died on 2 June, 1881, and the defendant, D. N. Oliver, administered upon his estate a few days thereafter, entering into a bond in the sum of $16,000, with the other defendants as sureties. This action is brought on that bond by several creditors of Paul. Worth & Worth, who had a suit pending against G. W. Williams, trustee, and D. N. Oliver, administrator, for the purpose of having certain lands sold for the payment of debts, are also parties to this action.

There was a consent reference, and the referee having reported, many exceptions were taken to his rulings. These were all passed upon by *Clark, J.*, at a previous term, and upon the coming in of the reformed report, according to his rulings, it was confirmed by *Phillips, J.*, who rendered judgment, from which the defendants appealed.

The other facts relating to the exceptions passed upon are stated in the opinion.

T. A. McNeill for plaintiffs.

C. W. Tillett (Jones & Tillett by brief) for defendants.

SHEPHERD, J. In passing upon the numerous exceptions in (460) this case we deem it unnecessary to reproduce all the facts presented in the elaborate and intelligent report of the referee. Only so much as is necessary to a proper understanding of our rulings will be stated.

First Exception.—The plaintiffs insisted upon charging the administrator with $105.54, the amount of a judgment against John McQueen in favor of R. & J. C. McCaskill, which had been assigned to the intestate in February, 1880.

Execution issued on said judgment in October, 1879, and the homestead of the judgment debtor was set apart and a levy made on the excess. The said judgment being dormant, the defendant administrator on 18 September, 1884, instituted proceedings to obtain leave to issue execution upon the same. The judgment debtor filed his own affidavit to the effect that he had paid to the intestate the full amount due upon the said judgment. The court adjudged, "upon the affidavits and proofs," that the judgment was satisfied. The defendant administrator admitted that up to the time of his motion he had taken no steps to collect the judgment. Neither had the intestate taken any such steps, although he was the owner of the judgment some sixteen or seventeen months before his death. The "other proofs" recited in the judgment of the court are not set out, but we must assume that there was other testimony upon which it acted.

The affidavit of the judgment debtor, however, was competent testimony (*Latham v. Dixon,* 82 N. C., 55), and if believed was sufficient in itself to support the adjudication. There is nothing in the record to show that the administrator had any evidence by which he could have rebutted the proof offered by the defendant. On the contrary, it appears that an account of $75 against the judgment debtor was found upon the books of the intestate, and that in an action brought by the administrator to recover the same the said McQueen recovered, upon a counterclaim, "a larger amount" against him. We are unable to see how the estate has lost anything by the alleged *laches* of the (461) administrator for had he made his motion before the expiration of three years, he would have encountered the same proof, on a motion to enter satisfaction, as he has met in his motion for leave to issue execution. The exception is overruled.

The *second exception* was abandoned in this Court.

The *third exception* is based upon the following findings of the referee:

"E. H. Paul bought a steam sawmill from Talbot & Sons, and signed a contract, copy of which is hereto annexed. Said mill was on the grounds when Oliver administered. Talbot & Sons took charge of the

mill soon after and sold it 18 July, 1881. Talbot & Sons had papers to show how much had been paid on said mill. The amount due was $1,393.65, with interest at eight per cent. The last note was due 1 October, 1881. The mill was worth $25 per month. When sold it brought $1,600, of which sum $206.35 was paid to the administrator of Paul, and accounted for by him. That said administrator never attempted to rent, lease or run said mill after he qualified. Talbot & Sons made no deduction from the amount due for use of said mill. Oliver, administrator, did not require Talbot & Sons to bring suit against him for said mill. The referee does not charge the administrator with anything more than the $206.35 above."

It is not insisted that the administrator should have paid the balance due on the mill and thus preserved it as the property of the estate, but the exception is addressed solely to the failure of the referee to charge the administrator with its rental value. The exception is as follows:

"That (the report) does not charge the administrator with the rental of the steam mill from the death of E. H. Paul (2 June, 1881) to 1 October, 1881, or even to 18 July, 1881."

(462) The contention seems to be that Talbot & Sons should not have been allowed to enter until 1 October, 1881, when the last note became due, but that as they did enter they should have been charged by the administrator with rent, as in the case of a mortgagee who enters before condition broken.

Granting that they did not have the right to enter, and that the administrator should not have consented to it, we do not see how the estate has suffered by the transaction. The referee finds that when Talbot & Sons entered there was due upon the mill $1,393.65, *with interest at eight per cent.* The contract was dated 2 December, 1880, and provided that the notes should bear interest from the date of the delivery of the property. Assuming that it took from the first of January, 1881 (the time mentioned in the contract), to make the delivery, the interest due on the $1,393.65 from that date up to 1 October, 1881, would be more than sufficient to pay the rent at $25 per month from the date of the entry up to the maturity of the last note; and the referee finds that the Talbots accepted the principal alone and paid the balance of the purchase money to the administrator.

Apart from this, however, we think that under the circumstances the surrender of the property was not unreasonable and, as it does not appear that the administrator could have profitably rented the mill during the interval of a few days between his administration and the entry of the Talbots, we see no principle upon which he can be charged with the rents from that period.

Moreover we are of the opinion that the contract was not a mortgage but a conditional sale, under which the vendors had a right to enter upon the failure to pay the purchase notes as stipulated. *Frick v. Hilliard,* 95 N. C. 117, we think fully sustains this view. In this contract there are no words of conveyance whatever, nor any retention of a lien, and it is expressly provided that the title shall remain in the vendors until the whole of the purchase money is paid. The excep- (463) tion is overruled.

Exceptions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26.—These exceptions may be considered together as they involve, in a great measure, a discussion of the same principles. It appears that at the time of his death the intestate was largely engaged in the turpentine business and had leased from various parties for the year 1881 turpentine "boxes" for certain stipulated sums. These leases were for the entire year, though the rent was payable at different periods. When the administrator qualified in June, 1881, it was not deemed expedient to carry on these extensive operations involving, as they did the expenditure of much capital and requiring the exercise of peculiar skill and judgment. "It was," says the referee, "a risky business, and especially so unless managed by a party experienced in the business." The administrator, therefore, did not attempt "to work the boxes at all, but advertised regularly the turpentine on the trees and in the boxes, and the unexpired leases thereon, and sold them for cash." To this action on his part there is no exception, but the plaintiffs object to the disposition made by the administrator of the assets so realized.

In many instances the lessors became the purchasers both of the turpentine and the unexpired leases, the same having been sold separately. In actions brought by the administrator to recover the purchase money the lessors interposed as a set-off or counterclaim the amount agreed to be paid by the intestate as rent for the whole year. After deducting the amount due for the purchase of the turpentine and unexpired terms judgments were rendered against the administrator for the balance due upon the said leases. In other cases the administrator voluntarily settled with the lessors on the same principle as that upon which the judgments were founded.

There can be no question but that a lessee, under an express (464) contract, cannot discharge himself by his own act. "Hence, as long as the lease continues, and as far as he has assets an executor is held liable in debt as well as in covenant for accruing rent, and the assignment of the term by himself or his decedent affords of itself no immunity." Schouler's Ex. and Admrs., 376.

While conceding this to be true, it is contended by the plaintiffs that the purchase of the unexpired terms by the lessors worked a merger of the same an extinguishment of the rent.

The authorities cited by the plaintiffs (*Krider v. Ramsey,* 79 N. C., 354, and others to the same effect) fully sustain the position that where there has been a surrender of the term the rent is extinguished, but we do not think that these familiar principles apply to our case. So far from being a surrender by the administrator, and an acceptance on the part of the lessors, they distinctly dealt with each other upon the basis that the estate was not to be released from its liability for the rent, and that the leases were to continue. If third persons had purchased, it is very clear that the liability would have continued, and it is equally clear that if the lessors had bid a larger amount than the rent they would have been liable. The doctrine of merger and extinguishment of rent by the purchase of the reversion, or the surrender of the particular estate, is based principally upon the impossibility of a party paying rent to himself for his own property, and can have no application to a case like the present where, from the very nature of the transaction, the liability of the estate for the rent was recognized. While the purchase and entry have destroyed the term for many purposes, they cannot we think, under these circumstances, have the effect of extinguishing the express contract of the intestate to pay the rent for the entire year.

(465) Having determined the liability of the estate for the rent, we will now consider whether this liability constituted a set-off or counterclaim to the actions of the administrator for the purchase money of the turpentine and the unexpired leases. The estate is insolvent, and in such cases it is well settled that no counterclaim can be allowed which will give an undue priority to any creditor, and thus defeat the rights of the others to have the assets applied *pro rata* to their claims. *Rountree v. Britt,* 94 N. C., 110; *Mauney v. Ingram,* 78 N. C., 96.

The application of the proceeds of the sale of the unexpired terms as set-offs falls within the condemnation of the foregoing principle. They should have been collected and applied, like other assets, to the payment of the debts. Where this has not been done, and the administrator has voluntarily allowed them as set-offs, he should be charged with them less the *pro rata* part to which the debts to which they were applied were entitled. The report will be so reformed.

Where, however, such proceeds have been so improperly applied by virtue of judgments duly rendered against the administrator we think he should be exonerated. It is true that courts may look behind judgments and see whether they were properly rendered, in order to charge an administrator, but this will not be done where the administrator

resisted the claim in good faith and acted as a prudent man would have done with his own under the same circumstances. *Patterson v. Wadsworth,* 89 N. C., 407: "Certainly (says *Ruffin, C. J.*) an administrator who honestly defended a suit is to be protected by the judgment obtained against him *per testes* and *in invito,* although the claim on which the judgment was founded may have been unjust." *Smith v. Downey,* 38 N. C., 278.

But it is said that the administrator should have appealed, and that for his failure to do so he is chargeable for the erroneous judgments of the justice's court. Surely this cannot be the test of liability in such cases. If such be the law administrators would be made (466) *insurers* of the correctness of the judgments of all courts except this, and they would be justified in appealing in all cases, no matter how trivial, and thus much unnecessary litigation would be encouraged, the settlement of estates delayed, and many of them wasted by costs and counsel fees. "All that a sound public policy requires (of administrators) is that they shall act in good faith and use ordinary care." *Manly, J.,* in *Nelson v. Hall,* 58 N. C., 32. They are "answerable only for that *crassa negligentia* or gross negligence which evidences *mala fides.*" *Nash, J.,* in *Deberry v. Ivey,* 55 N. C., 370; *Patterson v. Wadsworth,* 89 N. C., 407. In this case the administrator litigated the claims in good faith, and under the circumstances we do not think he is chargeable.

The case of *Barnawell v. Smith,* 58 N. C., 168, cited by plaintiff's counsel, was where *no resistance* was made to an improper judgment. In *Williams v. Maitland,* 36 N. C., 92, the administrator was charged by reason of his negligence in not advertising for claims, as required by law, and not pleading such advertisement in bar of a "dishonest debt." In *McLean v. McLean,* 88 N. C., 395, it was *admitted* that the note upon which the judgment was rendered was executed by the administrator, and it was held that his sureties were not liable. None of these cases sustain the proposition that where there has been a *bona fide* resistance that the administrator is liable if he does not appeal. There may be cases where the apparent resistance is but a cover for collusion and fraud, and where the debt is so manifestly unjust as to raise a presumption of fraud against the administrator upon his failure to appeal. This is not such a case, and for the reasons given the exceptions are overruled.

The proceeds of the sale of the turpentine, however, do not (467) stand upon the same principle as the proceeds of the sale of the unexpired terms, as the lessors had a *lien* upon the turpentine for the

rent due them. Code, sec. 1762; *Avera v. McNeill,* 77 N. C., 50. It was the duty of the administrator to apply the proceeds to the payment of the same. Code, sec. 1416.

In reference to voucher No. 40 the facts are as follows:

"R. S. French being indebted to King & Myrover, executed a deed in trust upon certain land to secure the amount, as set out at page....., record. King died in 1869, and Brown, executor, reduced the notes due King to judgment, and sold under execution the trust estate of R. S. French, trustor, and took sheriff's deed to himself in trust for the heirs of King. Brown and King's devisees sold the land to Paul and executed their deeds for the same on 24 March, 1874. Myrover, becoming dissatisfied, instituted action against Brown, Paul and the devisees of King, and such proceedings were thereupon had as is reported in 73 N. C., 609. This Court declared that the said sale was void, but that Brown and his grantee, Paul (the intestate), acquired an interest in the King debt 'to the extent that the purchase money paid by them for the land went in extinguishment of that debt,' and that, to that extent, they were declared to be in equity the purchasers and assignees of said King's debt. Judgment, in accordance with this decision, was rendered in Robeson, at Fall Term, 1875. This judgment directed that Frank McNeill, as commissioner, should advertise and sell the land and distribute the proceeds among the parties entitled. The case was not brought on the docket until Spring Term, 1881, when on the motion of Paul, based upon affidavit, the judgment was so modified that the commissioner, instead of selling said land, should execute a deed to Paul upon his paying into court the sum of $1,486.65. This (468) amount, it appears, was the balance of the King debt which had not been paid, Paul having satisfied the court that he had acquired all the interests of the other parties interested in the land and the debts charged upon the same. It was adjudged in said decree that Paul pay the above amount into court. This judgment 'was duly docketed' on the judgment docket of said county. In May, 1875, Paul executed to Williams & Murchison a mortgage on said land to secure a large debt due them. In May, 1881, another mortgage was executed to said parties by Paul, securing another considerable debt due them by him. Paul died in June, 1881, and after the defendant administered he paid the amount of said judgment into court, and the same was drawn out by John G. Smith, the administrator *d. b. n. c. t. a.* of said King. In 1882 Williams & Murchison sold under their mortgages a part of said land for enough to discharge the lien, and the balance, some two thousand dollars, was paid into court. The remainder of this land is still unsold."

In passing upon this voucher we do not think it necessary to enter into an elaborate examination of the doctrine of exoneration, as applied to the administration of estates of deceased persons. It is sufficient to say that in the absence of any controlling direction by a decedent to the contrary, the personal estate is primarily liable for the debts of the deceased, although, as in the case of a mortgage or docketed judgment, the creditor has a lien upon the real estate. *Murchison v. Williams,* 71 N. C., 135. This is the order of liability established by law, and is not to be disturbed unless the testator plainly expresses a contrary intention. "The law fixes the burden on the personality, and this can be only altered by the testator; and the intention on his part to alter it is not inferred upon slight grounds. Charging the land is not sufficient. However anxiously it is done that will not of itself have the effect of exempting the personality." *Robards v. Wortham,* 17 N. C., 178. There is no will in this case, and there is no question but that the general rule we have mentioned is applicable. (469)

The contention, however, is that the money paid into court by the administrator was not a debt of the intestate, but was chargeable primarily on the land, and "that the nature of the act by which the purchaser of lands, subject to an encumbrance, makes his personal estate liable, must be a direct personal communication and contract with the mortgagee." In support of this position authorities collected in the notes to the *Duke of Ancaster v. Mayor,* White & Tudor's L. C. Eq., are cited to the effect that where one purchases land encumbered by mortgage, the land alone is liable unless the purchaser has in his lifetime done something by which he has made the mortgage debt his own. Without inquiring whether such a doctrine prevails in this State, especially in view of the Code, sec. 1415, we are of the opinion that this case does not fall within the principle contended for. The whole conduct of the intestate shows his intention to complete his title to the property. To this end he purchased all the legal and equitable interests outstanding, and on his own motion obtained a decree of the court which in effect made him the equitable owner of the land charged with the amount due the King estate. This amount it was *adjudged* he should pay into court, and it was this amount which his administrator has paid. By the decree the intestate, as we have stated, became the equitable owner of a large estate, a part of which, being sold under the mortgages of Williams & Murchison, has, it is said, more than discharged their debt, thus relieving the personal estate to that extent and leaving a considerable sum in money and the remaining part of the land for the benefit of the general creditors.

Not only, in our opinion, did the intestate by his transactions assume the amount due the King estate, but we think that if there had been no such assumption on his part the administrator would not be (470) liable in paying off the said charge if the result, as is contended, proved beneficial to the estate. In such a case equity would interpose and protect him. We are further of the opinion that the intestate having acquired the equitable title to the land charged with the said balance, the administrator was authorized by the Code, sec. 1415, to pay off and discharge the said lien. The foregoing are the objections most pressed on the argument before us, but we have considered them all and our conclusion is that the exceptions should be overruled.

The exception to the finding of his Honor that the case of H. L. Myrover was not "dropped" from the civil docket, and also the exceptions as to certain notes and accounts having been returned as desperate, involve a consideration of facts, and the findings of his Honor are conclusive.

The remaining exceptions are to the failure of the referee to report the facts as to certain claims filed against the estate. It does not appear that the facts were so reported in the claims of Beard, Robinson & Co., D. Paul, Z. Filmore and J. C. McEachin. The exceptions as to these are sustained. The exception as to the claim of Benedict, Hall & Co. was abandoned in this Court. If there are any other claims in which the facts are not reported, and which have been excepted to on that ground, it will be the duty of the referee to report the same.

The judgment will be modified in conformity to it, each party to pay his costs in this Court.

Modified and affirmed.

Cited: Costen v. McDowell, 107 N. C., 551; *Davis v. Mfg. Co.,* 114 N. C., 328; *Mahoney v. Stewart,* 123 N. C., 111; *University v. Borden,* 132 N. C., 489; *Whitlock v. Alexander,* 160 N. C., 474; *McNair v. Cooper,* 174 N. C., 568; *Twiddy v. Mullen,* 176 N. C., 17.

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(471)

W. G. WILSON AND WIFE v. E. S. FOWLER.

Action to Recover Land—Undertaking—Defense Bond—Statute.

1. In an action to recover land, the statute (Code, sec. 237) was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that they had examined his case and were of opinion he "had a good defense to the action."

2. Refusal of the court, upon such affidavit and certificate, to allow him to plead, answer or demur without giving security, because it also appeared that he was worth real estate to the value of one hundred and twenty-five dollars, was *error*.

3. Nor does the statute provide that in such cases the court may require a less sum than two hundred dollars. The purpose of the law is to provide for persons too poor to give the undertaking ordinarily required, and the court has no discretion in the matter.

4. The law in this respect is not changed by the Code, sec. 117. It simply provides for a mortgage in lieu of security.

5. The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief.

ACTION to recover land, tried before *Clark, J.*, at Fall Term, 1889, of HAYWOOD.

The defendant made his affidavit, stating therein that he was not worth the sum of two hundred dollars, the amount of the undertaking required of him before being allowed to plead, answer or demur, in any property whatsoever, and that he was unable to give the same. His counsel certified that they had examined his case and were of opinion that he had "a good defense to the action."

It appeared to the court that the defendant had real estate of the value of one hundred and twenty-five dollars, but no other property whatever.

The court refused to allow the defendant to plead, answer or (472) demur unless he would give a mortgage of the real estate last mentioned as allowed by the statute (Code, sec. 117) in certain cases, and he excepted. The court gave judgment for the plaintiff, and the defendant appealed.

J. C. L. Gudger (by brief) and Theo. F. Davidson for plaintiff.
George Smathers for defendant.

MERRIMON, C. J., after stating the case: The proviso of the statute (Code, sec. 237) dispenses altogether with the undertaking required of the defendant in actions to recover land or the possession thereof by that section. The terms of the proviso are clear, explicit and exclusive. It declares "that no such undertaking shall be required" in the case provided for. The words *"no such"* are used in the broad sense of not any like that required. There is nothing in the statute that suggests the contrary, or that an undertaking for a less sum than two hundred dollars in amount may be required in any case. The purpose is to allow per-

sons thus poor to make defense in such actions without giving any undertaking. Hence it is said, in *Dempsey v. Rhodes,* 93 N. C., 120, that if the defendant should make his affidavit as required, and his counsel should make the necessary certificate as to the merit of his defense, he would have "the right to answer, and it did not rest in the discretion of the court to refuse to allow him to do so." The cases cited in that case are to the like effect.

The statute (Code, sec 117) does not authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allows the party of whom an undertaking may be required in such cases to give such mortgage instead of it, and the former must be for the same amount as the latter.

(473) It was insisted that the certificate of the defendant's counsel was not sufficient, because it did not in terms state that in their opinion "the plaintiff is not entitled to recover." But they did so state in effect; they said that in their opinion he had "a good defense to the action." If he had such defense how could the plaintiff be entitled to recover in this action? This statute does not require that the counsel shall certify that the plaintiff was not entitled to recover in any action; he is not required to examine and express an opinion as to merits of the plaintiff's cause of action further than to be able to express the opinion that he is, for sufficient cause, not entitled to recover in the present action. If the defendant has an effectual defense that does not reach the possible merits of the plaintiff's action he is entitled to the benefit of it. The certificate is to the effect that the plaintiff is not entitled to recover in this action. *Taylor v. Apple,* 90 N. C., 343.

The court should have allowed the defendant to plead, answer or demur without requiring an undertaking. To the end he may have opportunity to do so the judgment must be set aside, and further proceedings had in the action according to law.

Error.

(474)

T. T. BALLINGER, ADMINISTRATOR OF WILLIAM BALLINGER v. T. K. CURETON, ADMINISTRATOR OF GOVAN MILLS.

Parties—Presumption—Possession—Administration—Burden of Proof.

M. executed to "B., executor of R. B.," a bond for the payment of money; B. died and his administrator brought action for the recovery of the amount due. *Held*—

1. That B.'s administrator could not maintain the action, and that it should have been brought by the administrator *de bonis non* of R. B.

2. That while the possession of a bond, made payable to another party, will ordinarily raise a presumption, as against the obligor, that he who has that possession is the rightful owner, and will enable him to maintain an action thereon in his own name, yet where, upon the face of the instrument, it appears that the person to whom it was given took it in a fiduciary, capacity, the possession by the personal representative raises no presumption that his intestate had become the owner in his individual capacity, and the burden is upon him to show affirmatively a transfer of ownership.

ACTION, tried at the Spring Term, 1889, of POLK, before *Clark, J.*

The action was brought by William Ballinger, the intestate of the plaintiff, T. T. Ballinger, to recover of the administrator of Govan Mills, one of the obligors, the amount due by virtue of the following note:

"$2,855. Twelve months after date we, or either of us, promise to pay William Ballinger, executor of Richard Ballinger, or bearer, twenty-eight hundred and fifty-five dollars, with interest from date, for value received of him, as witness our hands and seals, this 26 October, 1859.

"GOVAN MILLS. (Seal.)
"J. A. WALKER. (Seal.)
"MR. JOS. SMITH." (Seal.)

William Ballinger, who brought this action, was the admin- (475) istrator of Richard Ballinger, and was the payee in the bond. At a subsequent term, before the complaint had been filed, William Ballinger died, and the plaintiff administered on his estate. T. K. Cureton, Sr., administrator of Govan Mills, died also, and T. K. Cureton, Jr., was appointed and qualified as administrator *de bonis non* of Govan Mills, and is now the defendant in the action.

The plaintiff alleged in the complaint filed "That T. T. Ballinger, administrator of William Ballinger, holds a sealed note on Govan Mills, deceased, of which the following is a copy," setting out, after said allegation, the aforesaid bond.

The plaintiff further alleged that said note "was still due and owing; had not been paid, nor any part thereof." The complaint contained no other allegation as to the real ownership of the note sued on.

Evidence having been offered to prove the handwriting of Govan Mills, the bond was admitted and read in evidence. The plaintiff then offered in evidence the following endorsement, to wit: "Paid to Bobo & Carlyle, attorneys for Wm. Ballinger, on this debt three hundred and forty-six 9-100 dollars. 14 June, 1879."

T. M. TRIMMER, *Clerk.* (Seal.)

The plaintiff offered evidence of Capt. Carlyle, who testified that he was one of the firm of Bobo & Carlyle, who had had the note mentioned in the pleading in their hands for collection; that the creditor, Richard Ballinger, and his executor, Wm. Ballinger, and also all the obligors were citizens of the State of South Carolina, and all of them were dead except Smith; that he was well acquainted with the handwriting of Govan Mills, deceased; that the signature of said Mills to said (476) note was in Govan Mill's proper handwriting; that he was also well acquainted with T. M. Trimmer and with his handwriting; that said Trimmer was clerk of the court of Spartanburg County, South Carolina, at the date of the entry on the back of said note of the credit for $346.09; that said entry and signature were all in the proper handwriting of said T. M. Trimmer; that the firm of Bobo & Carlyle had at one time this identical note in their hands for collection, and at the time the credit was given and he as attorney received the amount stated of $346.09, as a payment on said note at the time mentioned, and that the credit was a *bona fide* credit.

The plaintiff thereupon rested his case.

The court stated to plaintiff's counsel that as his own evidence showed that the bond was due to Richard Ballinger, creditor, and was held by "William Ballinger as his executor," the administrator *de bonis non* of Richard Ballinger would be the party to bring the action, and not the administrator of Wm. Ballinger, as the evidence thus stood, and remarked that counsel could if he choose take a nonsuit and appeal if he so desired. Counsel declined to take a nonsuit. The court directed the jury, upon the evidence, to answer the issue submitted, *i. e.*, Is defendant indebted to plaintiff, if so, how much? in the negative, and gave judgment accordingly.

Appeal by plaintiff.

T. P. Devereux and W. A. Hoke for plaintiff.

J. A. Forney, W. H. Baily, M. H. Justice and W. J. Montgomery for defendant.

AVERY, J., after stating the facts: The administrator of William Ballinger is not entitled to recover unless his intestate had a good cause of action when he sued out the original summons. William Bal- (477) linger held the note which, upon its face, was made payable to him as executor of Richard Ballinger. There is no presumption of law arising from possession that he held in his individual right rather than in his fiduciary capacity, when the express terms of the instrument show that he received it as executor, and neither the alle-

gations of the complaint nor the evidence tends to prove that the legal or equitable right passed to him, personally, by reason of any settlement recognized by law as valid. If plaintiff's intestate had held a negotiable bond, payable to any person other than his testator, Richard Ballinger or himself, as his executor, then, in the absence of proof of any such relation to the obligee as that growing out of the trust in this case, the presumption would have arisen in an action brought by him against the obligor that he was the real party in interest and entitled to recover the sum due; but the burden was on the plaintiff to show affirmatively a transfer of ownership of the note from himself, as personal representative, to him individually. The rule applicable in this case was laid down by *Justice Ruffin,* for the Court, in *Rogers v. Gooch,* 87 N. C., 442. "The provision of the statute (Bat. Rev., ch. 45, sec. 130; Code, sec. 1511) is that every action brought by an executor or administrator upon a cause of action or right to which the estate is party in interest shall be brought in his representative capacity, and under the Code there is no middle ground, for whenever the action can be brought in the name of the real party in interest *it must be so done.*" In that case the Court, after citing *Eure v. Eure,* 14 N. C., 203; *Setzer v. Lewis,* 69 N. C., 133; *Davis v. Fox, ib.,* 435, and *Alexander v. Wriston,* 81 N. C., 191, say that if it was not altogether certain before it is made absolutely certain now by the statute already mentioned and section 55, C. C. P. (Code, sec. 177), that an action on such a note could only be maintained by an administrator *de bonis non* of the (478) testator.

This case is readily distinguishably from that of *Holly v. Holly,* 94 N. C., 670. Indeed, the principle decided there sustains the view we have stated. The facts in that case were that Augustus J. Holly held, at the time of his death, two notes executed by G. W. Womble and payable to his brother, W. J. Holly, not endorsed by said payee. The court held that the presumption of ownership would have arisen in an action brought by A. J. Holly or his executor against Womble, the obligor, but not as against the obligee, and that the mere possession gave rise to no presumption of an assignment of the notes by the obligee to the holder. The court cited with approval the case of *Roberston v. Dunn,* 87 N. C., 191, in which the same rule is laid down. But in this case the intestate of plaintiff did not hold a bond in which another was named as obligee, but one which was payable by its terms to himself as executor, and he cannot rely on a presumption of law to contradict the instrument when he offers no explanation. When the facts in any case are known or admitted, and are inconsistent with a presumption raised by law in the

absence of evidence, it has been held by the courts that such presumption is rebutted. *Doggett v. R. R.*, 81 N. C., 459.

It appearing from the face of the note that when executed it constituted a part of the trust fund held by William Ballinger, as executor, he was required by the Code, sec. 1511, to sue for it in his representative capacity, and cannot now avail himself of a presumption that arises only in the absence of such direct proof of ownership.

In *Rogers v. Gooch, supra,* the administrator of a personal representative was not permitted to maintain an action in his own name on a bond that was not allowed the latter as a credit, and the amount of which was charged to him in an action against him for settlement (479) of the estate. He had not paid the amount with which he had been declared chargeable, and it was therefore decided that the action must be maintained by the administrator *de bonis non* of Mrs. Phillips, and not by the administrator of her executor, Rogers, who was the payee, in his fiduciary capacity, named in the note. That case is, therefore, exactly in point. This action should have been brought by an administrator *de bonis non* of Richard Ballinger.

Affirmed.

Cited: S. v. Miller, 112 N. C., 886; *Triplett v. Foster,* 115 N. C., 336; *S. v. Baldwin,* 152 N. C., 831; *S. v. Pollard,* 168 N. C., 124.

E. EVERETT v. ELIJAH RABY.

Action to Recover Land—Estate in Equity—Trust—Creditors' Bill—Judgment—Execution.

1. When A. purchased and paid for land, and had title made to B. for the purpose of defrauding his creditors, and judgments were obtained against him, and the land sold under execution. *Held,* the purchaser got no title.
2. When one has only a *right in equity* to convert the holder of the legal estate into a trustee, and call for a conveyance, there is not such a trust estate created as is subject to sale under an ordinary execution.
3. The remedy of the judgment creditor, is an action in the nature of a creditor's bill to subject the land to the payment of debts.
4. When, upon the inspection of the whole record, it appears that the judgment was unwarranted upon the facts, this will, *ex mero motu,* reverse it.

(480) ACTION, tried at Fall Term, 1889, of SWAIN, before *Clark, J.* The facts are stated in the opinion.

A. M. Fry for plaintiff.
F. C. Fisher for defendant.

SHEPHERD, J. The complaint alleges that J. B. Raby purchased and paid for the land described in the complaint, but for the purpose of defrauding his creditors procured the title to be made to his father, the defendant. Judgments were obtained against the said J. B. Raby, and under them executions issued and were levied upon the lands. The plaintiff purchased at a sale under these executions, and brings this action for the possession, and also to have the defendant declared a trustee for his benefit. No answer was filed, and judgment was rendered in accordance with the prayer of the complaint, from which the defendant appealed.

It is hardly necessary to cite authorities to show that the interest of J. B. Raby could not be sold under execution. The distinction between an *estate* in equity and a mere *right* in equity, in this respect, is well stated in *Hinsdale v. Thornton,* 75 N. C., 382. In this case *Pearson, C. J.,* says: "When one has an estate in equity, viz., a *trust estate,* which enables him to call for the legal estate without further condition save the proof of the facts which establish his estate, this trust estate is made the subject of sale under *fi. fa.* But where one has only a *right in equity* to convert the holder of the legal estate into a trustee and call for a conveyance, the idea that this is a trust estate, subject to sale under *fi. fa.,* is new to us."

In the present case the judgment debtor did not have even a *right* in equity, as it is alleged that the trust was infected with fraud; in which case the court would not act at the instance of either party. *Page v. Goodman,* 43 N. C., 16.

There can be no question as to the sale being void, and that (481) the remedy of the creditors is an action in the nature of a bill in equity to subject the land to the payment of their debts. *Jimmerson v. Duncan,* 48 N. C., 538; *Gowing v. Rich,* 23 N. C., 553; *Gentry v. Harper,* 55 N. C., 177; *Morris v. Rippy,* 49 N. C., 533; *Love v. Smathers,* 82 N. C., 369.

It is but just to say that this point was not made before his Honor, but as it is our duty to inspect the whole record (*Norris v. McLain, ante,* 159), and as the defect is inherent, we think it better to put our decision upon this ground without noticing the questions of practice raised in the court below.

The judgment should be set aside as unwarranted by the allegations of the complaint.

Error.

Cited: Guthrie v. Bacon, 107 N. C., 338, 339; *Gorrell v. Alspaugh,* 120 N. C., 367; *Mayo v. Staton,* 137 N. C., 681; *Lummus v. Davidson,* 160 N. C., 486; *Rouse v. Rouse,* 167 N. C., 210.

MARGARET WALKER ET AL. v. IOLA SCOTT ET AL.

Appeal—Case and Exceptions—Statute.

1. Where the transcript of a record was deposited in the post-office in ample time to have reached the Supreme Court before entering on the call of the calendar of the district to which the case belonged, but by some delay in the mails did not reach its destination until after the time for docketing. *Held*, that the excuse was reasonable, and the appeal would not be dismissed.
2. Appeals, in the legal sense, are not taken until the adjournment of the court; up to that time the proceedings of the court are *in fieri*.
3. The statute (Laws 1889, ch. 161) extending the time to perfect appeals applied to appeals then pending, and extended to the time of the appellee to file exceptions, as well as the time of the appellant to prepare and serve his case.
4. Where, therefore, the appellant had served his case after the time within which he might have done so under the statute, as it stood originally, but within the ten days as provided in the Act of 1889, and the appellee had no opportunity to file exceptions. *Held*, that although the appeal was saved by the act of 1889, nevertheless the appellee was entitled to the statutory period of five days in which to file his counter-case.

(482) APPEAL from *Boykin, J.*, at Fall Term, 1888, of CHEROKEE. See same case, 102 N. C., 487.

Theo. F. Davidson for plaintiffs.
E. C. Smith and J. W. Cooper for defendants.

CLARK, J. At last term the appellees moved to dismiss this appeal, and assigned as one of the grounds that it had not been docketed before the call of the district to which it belonged. The appellants obtained leave to show reasonable excuse for such failure. *Walker v. Scott,* 102 N. C., 487.

At this term the appellants show by affidavits, which are uncontradicted, that the transcript of the record on appeal was mailed in ample time to have reached the office of the clerk of this Court, and have been docketed before the docket for that district was perused (Rule 5). The delay was caused by some irregularity of the mails. The excuse is reasonable, and the motion to dismiss on that ground is denied. As the appeal was taken several months previous, we do not see though why the appellant should not have had the record sent up earlier, and avoided the risk of delay by possible irregularities of the mail. The attention of clerks of the Superior Courts should be called to section 551 of the Code, which requires them to send up a transcript of the record in each

case on appeal within twenty days after the case agreed by counsel or the case settled by the judge is filed. This act should be strictly observed.

In the court below it was found, at Fall Term, 1889, upon appellant's own testimony, that the case on appeal was served on 2 November, 1888, and that the court at which the cause was tried adjourned 27 October. It was in evidence that the cause was tried on 24 Octo- (483) ber, and it was controverted whether the appeal was entered on that day or on 27 October, the day the court adjourned. This was immaterial. The appeal in a legal sense was not taken till the court adjourned, for till then the proceedings was *in fieri,* and the appeal inchoate. *Turrentine v. R. R.,* 92 N. C., 642. The five days in which the case on appeal was to be served on appellees are to be counted, therefore, from 27 October, the day on which the court adjourned. Section 596 of the Code provides that in the computation of time the first day is to be excluded and the last is to be included, unless the last day be Sunday, when it is excluded. Saturday, 27 October, is the *terminus a quo* from which the time is to be counted. Excluding that day the fifth and last day upon which the service could have been made was Thursday, 1 November. Service of the case upon appellees on 2 November, therefore, was too late as the law then stood.

It is contended, however, that ch. 161, Laws 1889, ratified 25 February, 1889, extending the time on which a case on appeal can be served to ten days, cures the defect and restores the rights which appellants had lost by their delay. The power of the Legislature to pass such curative statutes is clear. *Strickland v. Draughan,* 91 N. C., 103; *Tatom v. White,* 95 N. C., 453.

It was seriously questioned whether the concluding words of the act, "the same shall apply to pending appeals," refer to the *proviso* in the statute (which concerns only appeals *in forma pauperis*) or to the whole statute. Giving it the latter construction, as the appellants insisted, still it certainly could not have been the legislative intent to restore the appellants' rights, which had been lost by their failure to serve their case on appeal within the five days, and cut off the rights of the appellees, who, relying upon the appellants' case not having been served in time, had served no countercase. Upon a reasonable (484) and just construction of the intendment of the statute, which must be held to apply equally in favor of appellant and appellee, under the peculiar circumstances of this case the appellees are equitably entitled to have their views of the case presented.

The appellees will, therefore, be allowed five days after the certificate of this opinion is filed in the office of the clerk of the Superior Court of

Cherokee County to file their exceptions, should they desire to do so, to the appellants' case on appeal, *nunc pro tunc;* and if the parties cannot agree upon the statement of the case it will be settled by his Honor, *Judge Boykin,* under the requirements of section 550 of the Code. The transcript of the "case on appeal," when agreed upon by the parties or settled by the judge, will be certified to this Court, that the case may stand for argument at next term.

PER CURIAM, it is so ordered.

Cited: S. c., 106 N. C., 58; *McGee v. Fox,* 107 N. C., 768; *Sondley v. Asheville,* 110 N. C., 89; *S. v. Price, ib.,* 602; *Lowe v. Harris,* 112 N. C., 493; *Arrington v. Arrington,* 114 N. C., 114, 116; *Rosenthal v. Roberson, ib.,* 596; *Delafield v. Construction Co.,* 115 N. C., 23; *Causey v. Snow,* 116 N. C., 498; *Guano Co. v. Hicks,* 120 N. C., 29.

JACOB H. DAVIS AND STEPHEN DAVIS v. LUTSON STROUD.

Action to Recover Land—Evidence—Bond for Title—Possession—Trespass—Variance.

1. Where possession is relied upon to perfect title to land, such possession must be shown either by proof of known and visible boundaries of the claim; by the definite calls in a deed, or by making certain, by evidence *dehors,* an ambiguous description in a deed.

2. In an ordinary action to recover land, the plaintiff must locate the property sued for with reasonable certainty, and then prove the defendant's unlawful possession or trespass thereon.

3. Where W. sold a tract of land to D., who, after conveying several parts thereof to other parties, abandoned his purchase, surrendered his evidence to title and gave up possession, and W. contracted to sell to H., the "residue" of the tract sold to D., and executed title bond in pursuance thereof. *Held,* (1) that in an action by those claiming under H. for possession against one alleged to be a trespasser, they must distinctly locate the "residue" by competent proof of the quantities of land sold by D. to other parties while in his possession; (2) that the conveyances to such other parties being the best evidence of their boundaries, parol or secondary proof was not admissible, in the absence of evidence of the loss or destruction of such conveyances, and (3) that boundaries of such "residue" were identical with those alleged in the complaint.

(485) ACTION to compel a conveyance of a legal title by defendant to plaintiffs of a tract of land, and for possession, tried at the August Term, 1889, of LENOIR, before *Bynum, J.*

In the original complaint the plaintiffs claim that they are the owners and entitled to the possession of a tract of land lying in Lenoir County, situated in Trent Township, adjoining the lands of Stephen Davenport and others; bounded on the north by Lewis Davenport, on the south by Lewis Dismond and Jim Jones, and on the east by Jim Noble, and on the west by John Davenport, and known as the Hardy Davis tract of land, "beginning at a black gum in Opossum branch and runs north 28 degrees west 44 poles to a stake; thence north 53 degrees east 140 poles to a stake," and then by various specific calls set forth in the complaint (which need not be given) to the beginning. In their amended complaint the plaintiffs allege that about 1845 the late John C. Washington gave and delivered to Hardy Davis (under whom they claim) a bond to make title *to the land described in the plaintiffs' original complaint, upon the payment of four promissory notes for one hundred dollars each,* which bond has been enrolled and is made a part of the complaint. On the trial the plaintiffs offered in evidence the bond for title, dated 27 December, 1845, executed by John C. Washington to Hardy Davis, in the usual form, binding the vendor to convey to Davis, (486) on payment of four notes, falling due respectively on 2 January of the four years 1847, 1848, 1849, and 1850, a tract of land described as follows: *"The residue of a tract of land which the said John C. Washington has heretofore sold to Spencer Davenport, lying in this county and adjoins the said H. Davis, York Howard and perhaps others, and is the balance only of said tract that said Spencer Davenport has not heretofore conveyed to sundry persons, and which residue the said Hardy Davis has this day purchased for four hundred dollars,"* etc.

It was admitted that plaintiffs and those under whom they claim went into possession under the bond from John Washington forty-one years before the trial, and remained on the land until 1871 or 1872.

Plaintiffs introduced as a witness Ira D. Heath, Sr., who testified as follows: "I was living on land at the time Davis bought land from Washington. Spencer Davenport was on land; he gave it back to Washington; could not pay for it. Davis told me he had bought it, and requested me to leave it. Hardy moved on it forty-one or forty-two years ago; stayed on it till the war came on; he had been back since; his family stayed there; no one has been in possession after Davis and his family went in until Stroud took possession; he had it some four or five years. Davenport gave up land to Washington. Davis told me he had bought from Washington. I moved out and Davis moved in. Davenport settled me on land; he told me he had given up papers to Washington; this was just before Davis went into possession." The plaintiffs then proposed to ask witness if he knew the land described in

the bond, for the purpose of identifying the land as the land described in the complaint. Objected to, upon the ground that the descrip-
(487) tion in the bond is not sufficient to allow of identification. Objection sustained, and plaintiffs excepted.

Plaintiffs here recalled the witness, who testified, after objection by defendant, that he was acquainted with the land sold by Washington to Davenport; that he never read the deed or heard it read. "It adjoins Mr. Oliver Herring's land, William Davenport's and Spencer Davenport's; it contained five hundred acres. Hardy Davis' land runs from 'Possum Branch to Marshall Tillman's; then to Richard Noble's; then back to where it began. Don't know land sold by Spencer Davenport to William Davenport. The 500-acre tract joins Spencer Davenport's old tract, William Davenport's, Oliver Herrings's, Bryan Davenport's, Marshall Tillman's, Richard Noble's, and back to Spencer Davenport, and it includes the description in the complaint."

Defendant admitted that plaintiffs, and those under whom he claims, went into possession under bond from Washington forty-one years ago and remained there until 1872 or 1873.

Plaintiffs then introduced one Boyd as a witness, who testified as follows: "Eight or nine years ago I rented the turpentine trees on land from Jacob Davis. The land sold by Spencer Davenport to William Davenport was bounded on the west by Lewis Desmond, Irvin Jones, Lewis Ivey Stroud—this as far as I know. I rented turpentine boxes and know boundaries that way."

Plaintiffs next introduced Stephen Davenport, who testified as follows: "Know the boundaries of the land sold by Spencer Davenport to William Davenport. I have a deed calling for land of that description."

Witness was asked to describe the land. Objection, upon the ground that the deed is the best evidence. Objection sustained, and exception.

Plaintiffs, after producing a great deal of testimony as to the occupancy of the land by themselves and those under whom they claimed, and on other matters not material to the question decided by the court,
(488) closed their evidence, and the court intimated to them that they could not recover, because they had not identified the lands attempted to be described in the bond for title executed by John C. Washington to Hardy Davis by any competent testimony, and suggested to them to take a nonsuit.

The plaintiffs declined to take a nonsuit, and insisted upon their right to have a finding by the jury on the issues.

The court instructed the jury to answer the issues submitted in favor of the defendant.

Plaintiffs moved for a new trial, assigning for error the rulings of the court on the evidence, and the instructions given, which motion was denied, and the court gave judgment for the defendant, from which the plaintiffs appealed.

No counsel for plaintiffs.
George Rountree for defendant.

AVERY, J., after stating the facts: It is sometimes difficult to decide, from such a mass of testimony and exceptions as we have in this case, including even the objections entered for the defendant, the principle that governs a case. But we concur in the conclusion reached by the judge below, and the plaintiffs are not entitled, in any aspect of the case, to recover, for reasons that seem to us obvious.

The burden was upon the plaintiffs to show a better title, derived from John C. Washington, either legal or equitable, for the land described in the complaint, than that of defendant, claimed from the same source. In order to make a *prima facie* showing of such title, it was necessary not only to offer testimony tending to identify the description contained in the bond for the title, by its boundaries, but tending to prove that those boundaries contained precisely the same land covered by the courses and distances specifically set forth in the first paragraph of the original complaint, and that the defendant was wrongfully in (489) possession of some part of it when the action was brought.

It is admitted that the plaintiffs, and those under whom they claim, had lived for forty-one years on the land described in the bond. But title cannot be acquired by possession under a claim indefinite in its extent. The limits to which title is claimed to be matured must be shown, either by the definite calls of a deed, by making certain by apparent proof an ambiguous description, or by testimony tending to establish the known and visible boundaries of the claim. There was no testimony that the court could have submitted to the jury tending to identify the limits of the "residue" of the tract of land sold by Washington to Davenport and not previously conveyed by the latter to sundry persons, although the door was open unusually wide for the admission of such evidence. Of course, the defendant could not be shown a trespasser without first locating the land on which it was alleged to have been committed. But if the outlines of the tracts already sold by Davenport to sundry persons could have been shown, and apparent proof had also been offered to establish the boundaries of the conveyance from Washington to Davenport, and of the tract covered by that ambiguous description—"the residue"—it would have still remained to locate a trespass on it. *Gilliam v. Bird,* 30 N. C., 280.

Had the "residue" of land mentioned in the bond been located, so as to cover the defendant's possession, there would have been still a fatal variance between the allegation and the proof, if there was no evidence to show that the boundaries referred to in the amended complaint, as containing the specific description of the land sued for, were identical with those located. *Carpenter v. Huffsteller,* 87 N. C., 273.

Affirmed.

Cited: Brown v. King, 107 N. C., 315; *Currie v. Hawkins,* 118 N. C., 598, 599.

(490)

B. B. LENOIR ET AL. v. THE VALLEY RIVER MINING COMPANY.

Appeal—Argument.

It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been—especially where the record is voluminous and assignments of error indefinite—the court will require it to be reargued.

APPEAL from *Boykin, J.,* at Fall Term, 1888, of CHEROKEE.

No counsel for plaintiffs.

J. W. Cooper and Edward McCardy for defendant.

MERRIMON, C. J. It is the duty of parties, and important to them, especially in cases of moment, to see that their appeals are prosecuted in this Court industriously, and thoroughly argued. Such arguments are not only valuable helps to the Court, but in some cases they are essential to a proper understanding and decision of them. Parties should earnestly endeavor to present their cases before the Court in the most intelligible manner practicable, especially as this is the Court of last resort, settling the law in its application to cases indefinitely. It is of the highest importance that it shall be settled correctly.

We have examined the record in this case with considerable scrutiny. It is voluminous and confused. The assignments of error in several important respects are indefinite and scarcely intelligible, as we see them. We are unable, so far, to interpret them satisfactorily. The elaborate brief of the appellant has reference to only a part of the errors assigned, and the counsel present said little more than read it. The case was not argued at all for the appellees. It seems to be of considerable (491) importance and merits to be thoroughly argued. Indeed, we

think it due to the parties to direct that it be reargued for the appellants, and argued also for the appellees at the next term. To that end the case must be continued. The clerk will give the parties notice of this order.

It is so ordered.

Cited: S. c., 113 N. C., 514.

H. T. HUDSON, JR., v. CHARLESTON, CINCINNATI AND CHICAGO RAILROAD COMPANY.

Negligence—Burden of Proof—Evidence—Master and Servant.

1. The burden is upon the servant who sues his master for damages, resulting from the use of defective machinery furnished by the latter, to establish *prima facie* (1) that the machinery was defective; (2) that the defects were the proximate cause of the injuries; and (3) that the master had knowledge of them, or might, by the proper exercise of care and diligence, have acquired such knowledge.

2. When a *prima facie* case is thus established, the burden of showing that the plaintiff knew, when he entered upon the service, or discovered, or might have ascertained by the exercise of reasonable diligence before the infliction of the injuries, that the machinery was unsafe, and continued in such service, is imposed upon the defendant. This being shown, the law adjudges it to be contributory negligence, and, upon that ground, the plaintiff cannot recover.

3. The statute (Laws 1887, ch. 33) which requires that, when contributory negligence is relied on as a defense, it shall be set up in the answer, applies to actions brought by an employee against his employer.

4. Where, therefore, the plaintiff brought suit to recover damages for injuries received while in the service of a railroad company, resulting from a defective locomotive engine, it was held to be error to instruct the jury that, if they found the engine was defective, unsafe and insecure, it devolved upon the defendant to show that its condition was not, and could not, by the exercise of reasonable care, have been known to its agents and officers.

ACTION for damages for an injury sustained by the defendant, (492) which was tried at August Term, 1889, of CLEVELAND, before *Connor, J.*

W. A. Hoke and C. W. Tillett for plaintiff. (500)
Platt D. Walker for defendant.

AVERY, J. Where a servant rests his claim to damages against his employer upon the ground that he has been injured by defective machinery, furnished by the master to be used in the course of his employment, the burden is cast upon him, as plaintiff, to prove negligence *prima facie*, or subject himself to judgment of nonsuit. It is a well settled rule that he cannot relieve himself of the *onus* thus imposed upon him until he offers testimony tending to show:

1. That the appliance or machinery was defective.
2. That the injury was due to such defect as the proximate cause.
3. That the attention of the master had been called to the defect, or that in the exercise of a degree of care commensurate with the character of the machine he ought to have had knowledge of it. *Thompson* (501) on Neg., p. 996, sec. 12; *ib.*, p. 984, sec. 11 (2); *Gibson v. R. R.*, 46 Mo., 163; *R. R. v. Thomas*, 42 Ala., 672.

Some writers who are generally recognized as authority contend that the servant is required to show affirmatively, also, that he did not know of the fault in the machinery to which the injury was due, and that it was not so apparent that he could, with ordinary observation, have discovered it. 3 Hard. R. L. Cases, sec. 385; Woods' Law of M. & S., sec. 382; Beach on Con. Neg., sec. 123. The weight of authority, as well as the force of sound reasoning, sustain the rule, however, that it is incumbent on the defendant—if it would avoid liability for injuries caused by machinery furnished to the servant, when its agent knew or ought to have known of its dangerous condition—to aver in the answer and to prove on the trial that the latter knew when he entered the service, or discovered during the term of service and before he was injured, or, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, might have known that the appliance complained of was unsafe. 2 Thomp. on Neg., p. 1008, sec. 15; *Onus Probandi*, 127, 128; *Greenleaf v. R. R.*, 29 Iowa, 14. In Shearman & Redfield Negligence (sec. 99) the rules as to the *onus probandi*, in cases of this kind, is stated as follows: "In actions brought by servants against their masters the burden of proof as to the master's knowledge, or culpability in lacking knowledge, of the defect which led to the injury, whether in the character of a fellow-servant or the quality of the material used, rests upon the plaintiff. But the plaintiff, having proved the fault of the master in this respect, the burden of proving that the plaintiff also knew of such defect, and commenced or continued his service with such knowledge, rests upon the defendant. This fact being proved, it is then for the plaintiff to show, if he can, that the defendant induced him to continue his work by promising to remedy the (502) defect."

While a servant, in contemplation of law, contracts with reference to the danger of injury from fellow-servants in a common employment, and to the peril incident to the use of unsafe appliances, to which his attention is called before contracting, yet, if he first discovers this dangerous condition after accepting employment, and willfully continues to incur the risk incident to the service, such voluntary exposure of his person is held to be contributory negligence on his part, and he is held not to be entitled to recover damages for an injury due to such defects, because of his own carelessness, and not on the ground that he agrees to subject himself to hazards of which he could not have known. Patterson R. & L., sec. 327; Wharton on Negligence, sec. 197; *Pleasants v. R. R.*, 95 N. C., 195. Our statute (Laws 1887, ch. 33) requires that contributory negligence, when relied on as a defense, shall be set up in the answer and proved on the trial, and makes the rule applicable where an action is brought by an employee against his employer. We think, therefore, that his Honor erred when he instructed the jury that if they found that the engine was defective, unsafe, and insecure, it devolved upon the defendant to show that its condition was not and could not, by the exercise of reasonable care and caution, have been known to its officers and agents. The learned judge who tried the case seems to have been misled by misconstruing the language used by the Court in *Warner v. R. R.*, 94 N. C., 250. The burden of proof was not directly nor, as we conceive, even incidentally discussed in that case. The questions were, first, whether complaint contained a statement of facts sufficient to constitute a cause of action, and, second, whether, if it was a defective statement of a cause of action, the answer was such that the doctrine of aider applied so as to cure any defect in the complaint. The Court decided, upon the first point, that the complaint contained a sufficient statement of (503) a cause of action when the plaintiff alleged, in the third and fourth paragraphs, that the defendant company "conducted itself so carelessly, negligently and unskillfully in this behalf that it provided and used an unsafe, defective and insecure locomotive," and "that for want of due care and attention to its duty in that behalf, etc., . . . the boiler, connected with the engine of said locomotive, by reason of the unsafeness, defectiveness and insecurity thereof, exploded," in consequence of which explosion plaintiff's intestate was killed "without any negligence or want of care on his part." It was held, in substance, that this was a sufficiently specific declaration that the death was caused by the carelessness of the defendant, and that the fact that the defendant either knew, or by the exercise of ordinary care might have ascertained the dangerous condition of the engine, was evidence to sustain the general allegation of carelessness in providing defective machinery for the servants of the company, but was not an essential part of the allegation itself.

The second point decided was that if the complaint contained a defective statement of a cause of action, the defendant had averred in his answer, first, that the engine had been repaired and was in good condition; and, second, that if it was unsafe when it exploded, it became so after it was repaired and inspected, "without the knowledge thereof on the part of the defendant," and the defects were cured under the rule as to aider.

In *Cowles v. R. R.*, 84 N. C., 309, it is true that the judge who tried the case below instructed the jury that it was the duty of the defendant company "to furnish safe cars, supplied with necessary machinery and appliances to render them secure; and if the jury believed that it had failed in this, and thereby the plaintiff had been injured, without any neglect or want of skill on his part, then they should find the
(504) issues submitted in favor of the plaintiff, without regard to the conduct of the engineer." But the Court say: "The defendant's exception, as argued before us, *does not go to any portion of his Honor's charge as given, but only to his refusal to give that specially asked for.*" The instruction asked was intended to raise the question whether the testimony did not disclose the fact that the injury was due to the carelessness of a fellow-servant of the plaintiff. It was therefore entirely unnecessary that this Court should determine whether the charge of the judge was erroneous for failure to tell the jury that it was incumbent on the plaintiff to show that the defendant company either knew, or by reasonable diligence might have discovered the condition of its cars. The court declared that the testimony was too meager to determine whether the engineer occupied the relation of fellow-servant to the plaintiff, and, as the defendant had failed to show error, the verdict must stand. In the discussion of abstract principles that follow this announcement, the Court used the language which, counsel insist, imposes liability on a railroad company for injuries to its employees, caused by unsafe machinery, whether the company had either notice or opportunity to discover the defect or not. We understand the Court to have assumed in the argument in that case that the company did know of the dangerous condition of the cars, because, upon the admitted facts, the defect was so obvious that it must have been seen on inspection. This view seems clearly correct, when we consider that the learned justice who delivered the opinion said, in conclusion, in reference to the case of *Gibson v. R. R.*, 46 Mo., 163: "This last case has been treated by Thompson, in his work on Negligence, as a leading one on those subjects, and we think that our conclusions in this case are in accord with the principles enunciated in those cases." The judge who tried that case below told the jury that if they found "from the evidence that
(505) the apparatus for coupling, by which the plaintiff was injured,

from its make and construction, was unsafe, and *the defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence,* the defendant is liable," etc. (see p. 167). In commenting upon this instruction, which had been excepted to, the appellate Court said (p. 167): "But the instruction given for the respondent is well supported by authority and is founded on reason. *If, by reasonable and ordinary care and prudence, the master may know of a defect in the machinery he operates,* it is his duty to be advised, and not needlessly expose his servants or employees to hazard, peril or mutilation." The qualification as to the liability of the master in this case is therefore the same given by Thompson, Wharton, Beach, Wood, and other leading text-writers, and insisted on by the defendant in the prayer for instruction.

It is not essential that we should consider any of the other errors assigned, but as the case may come before us again it is best to advert to two other exceptions. We think there was no error in refusing to charge, as requested, that there was no evidence that the engine was unsafe or defective, or that the injury was caused by the dangerous condition of the engine. The testimony of the witnesses Hudson, Ferguson, Huske, Jackson, and Sullivan tended to show that the engine was in a dangerous condition; and that of Bard, Bynum, Murray, and Hudson that the injury might have been due to the fact that it was not subject to the control of the engineer. It is not within our province to pass upon the weight of the evidence. We only decided that it was sufficient to require the court to submit the case to the jury. There was error in the instruction as to the burden of proof, for which there must be a new trial.

Error.

Cited: Mason v. R. R., 111 N. C., 487; *Chesson v. Lumber Co.,* 118 N. C., 67; *Ward v. Mfg. Co.,* 123 N. C., 254; *Coley v. R. R.,* 128 N. C., 537; *Ausley v. Tob. Co.,* 130 N. C., 36; *Pressley v. Yarn Mills,* 138 N. C., 433; *Ross v. Cotton Mills,* 140 N. C., 122; *Cotton v. Mfg. Co.,* 142 N. C., 531; *Shaw v. Mfg. Co.,* 143 N. C., 133; *Nelson v. Tobacco Co.,* 144 N. C., 420; *Cotton v. R. R.,* 149 N. C., 230; *Blevins v. Cotton Mills,* 150 N. C., 499; *Shives v. Cotton Mills,* 151 N. C., 293; *West v. Tanning Co.,* 154 N. C., 48; *Pritchett v. R. R.,* 157 N. C., 100; *Bradley v. Coal Co.,* 169 N. C., 256; *Klank v. Granite Co.,* 170 N. C., 72; *Deligny v. Furniture Co., ib.,* 199, 203; *Orr v. Rumbough,* 172 N. C., 758.

(506)

J. W. LINEBERGER ET AL. v. F. A. TIDWELL ET AL.

Deed, Execution and Probate—Privy Examination—Husband and Wife—Seal—Justice of the Peace—Statute—Issues.

1. Under a general denial, it is competent to show that any deed relied upon by the adversary party to establish his title to land is invalid.

2. While the husband must join in the execution of a deed conveying the wife's land, and acknowledgment or proof of execution thereof by both must precede, in point of time, the privy examination of the wife, it is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer.

3. The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, otherwise regular. The statute, in respect to requiring him to attach a seal, is directory only.

4. The Supreme Court will not interfere with the discretion of the trial judge in shaping and submitting issues, if it appears that an opportunity is given the parties to present their evidence and the law applicable thereon to the jury, and they were raised by the pleadings.

ACTION to recover possession of land, tried at the August Term, 1889, of CLEVELAND, before *Connor, J.*

The plaintiffs alleged title in themselves, and wrongful possession and damage on the part of the defendants in the usual form, and then averred more specifically that the defendants executed a mortgage deed to J. W. McMurray & Co., in 1887, conveying the land in dispute to secure the payment of a sum of money due, and on their failure to perform the conditions the land was sold, according to the terms of the deed, when plaintiffs became the purchasers, and said J. W. McMurray & Co. conveyed to them in 1888, before this action was brought. The de-
(507) fendants rely, in their answer, on the ground that, as they allege, the land was the separate property of the *feme* defendant, and that the mortgage deed to McMurray & Co., through which plaintiffs claim, was signed by her husband, the male defendant, without previous consultation with or notice to her, and that thereupon the justice by whom the privy examination was taken came to her house, leaving her husband in Shelby, several miles distant, and induced her to sign the mortgage deed, previously signed by her husband, and that she is an ignorant woman—cannot read or write—and did not understand that she was binding her land to pay her husband's debt, but thought she was only conveying crops for the year 1887.

The defendants tendered the following issues:

1. Was the land the separate property of the wife, the *feme* defendant?

2. Was there a joint execution of the instrument by the husband and the wife before the prior examination of the wife was had?

3. Was there a joint acknowledgment of the instrument by the husband and the wife before the privy examination of the wife was taken?

4. Did the *feme* defendant ever sign, or execute, or acknowledge the execution of the instrument in her husband's presence before her privy examination was taken?

5. Did the *feme* defendant ever give her voluntary assent to the instrument separate and apart from her husband?

The plaintiffs tendered the following issues:

1. Are the plaintiffs the owners of the land described in the complaint?

2. Are the defendants in the wrongful possession thereof?

3. What damage have plaintiffs sustained?

Which were submitted to the jury, and the defendants excepted.

The plaintiffs offered in evidence a note and mortgage deed, (508) describing the land in controversy, from F. A. Tidwell and wife to J. J. McMurray & Co., dated 12 January, 1887, with probate bearing same date, and recorded 27 January, 1887.

The defendants objected for that (1) there was no proper acknowledgment of the execution of the same; (2) that the certificate of probate by the justice of the peace had no seal to it—official or private; (3) that said mortgage was not entitled to registration.

The court overruled the objection and admitted the mortgage. Defendants excepted.

It was admitted that the land conveyed in the mortgage and deed was the separate estate of the *feme* defendant.

The defendant, F. A. Tidwell, testified: "On the day the mortgage was executed I was in Shelby. My wife was at home. I had said nothing to her about the mortgage before leaving home that morning. I saw her next that evening about sundown. The land belonged to my wife. I owed McMurray & Co. the note. After signing the mortgage I acknowledged it and gave it to Mr. Bostic and had him to go out and get my wife to sign it if she would. I did not know whether she would sign it."

Sarah E. Tidwell testified: "Mr. Bostic brought the mortgage to my home for me to sign. I thought that it was on the crop. No one was present except Mr. Bostic. My husband left home that morning. I did not know that it was a mortgage on my land. I cannot read or write. I had executed a former mortgage to Mr. Lineberger, but did not know what it was. Mr. Bostic read a part of the mortgage to me; did not read it all. I did not comprehend anything about it."

The plaintiff introduced J. T. Bostic, who testified: "I am the justice of the peace who took the examination of Mrs. Tidwell. Mr. Tidwell signed the mortgage in McMurray's store in my presence. I (509) wrote his name and he made his mark. He acknowledged it and told me to go out and get his wife to sign it; that he had told her all about it and it was all right. She was at home, two miles from town. I went there and told her that I had a mortgage that Mr. Tidwell wanted her to sign to Mr. McMurray; it was for an amount that I named to her; that it was on all of her land on her home place. I then read the mortgage over to her. She said that Mr. Tidwell had told her about it and that it was all right; that she wanted the debt paid. She signed it and I made the examination and put the certificate on it after I came back to town. I am satisfied that she understood what she was signing. I have taken her examination before. No one else was present."

Mrs. Tidwell was recalled and testified: "I did not tell Mr. Bostic that my husband and I had a conversation about the mortgage. I had no such conversation."

The *feme* defendant requested the court to instruct the jury that upon the whole evidence there had been no lawful execution of the mortgage.

The court declined to do so, and instructed the jury that "if they believed upon the evidence that the *feme* defendant at the time she signed the mortgage knew and understood what she was doing, what the mortgage contained, what land she was conveying, to whom and for what purpose she was conveying the land, and that the privy examination was taken as testified to by the justice of the peace, the mortgage was executed according to law, and they should find the first issue in the affirmative," to which the defendant excepted.

The certificate of the justice of the peace of the acknowledgment and privy examination and order of probate by clerk, and registration, were in due form.

There was a verdict as set out in the record, and judgment (510) accordingly, from which defendants appealed.

M. H. Justice for plaintiffs.
W. A. Hoke for defendants.

AVERY, J. The main purpose of the action is to establish the plaintiffs' title and right to present possession of the land in dispute. The general denial by the defendants raises, as usual, the issues of title, possession and damages. It is competent for a defendant to show, under the general issue as to ownership, that a deed relied on by the plaintiff to establish title is void, because it was executed in the face of a statute prohibiting its execution, or in such form or manner as amounts to a

failure to comply with the mandatory requirements of the law. *Jones v. Cohen,* 82 N. C., 75; *Mobley v. Griffin, ante,* 112; "evidence impeaching an alleged title deed is always as competent as that sustaining it."

This Court will impose no limit to the exercise of discretion on the part of the judge below in settling the issues, except that they shall be raised by the pleadings, that the facts established by the responses to them shall constitute a lawful basis for the judgment, and that an appellant shall not be denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury through the medium of some issue. *Emry v. R. R.,* 102 N. C., 225. The judge had the right to settle the issues and submit those framed to the jury. In this case it does not appear that at any subsequent stage of the trial the defendants were deprived of the privilege of presenting any view of the law arising on the evidence by reason of the form of the issues.

The title to land, that is, the separate property of a *feme covert,* cannot be divested out of her except by a deed to which both husband and wife are parties, proved or acknowledged as provided by law as to both, or by a deed made by an attorney in fact in pursuance of a (511) power of attorney, executed by both and proved in the same way. Code, secs. 1256 and 1257; *Ferguson v. Kinsland,* 93 N. C., 339. "The requirement that the husband should execute the *same deed* with his wife was to insure his protection against the wiles and insidious acts of others, while her separate and private examination was to secure her against coercion and undue influence from him." *Ferguson v. Kinsland, supra.* In *Southerland v. Hunter,* 93 N. C., 310, the late Chief Justice says: "We have at the present term decided, in the case of *Ferguson v. Kinsland,* not only that the deed which conveys the estate of a married woman must be executed by both, but it must *be proved to have been executed by the husband or must have been acknowledged by him* according to the act of 1869, which governs this attempted probate, or proved or acknowledged as to both parties under the act in force (Code, sec. 1256) *before the private examination is had.*"

The deed is none the less effectual to pass the title of the wife because the husband not only executes it before she does, but after execution sends the officer to take her acknowledgment and privy examination at a point several miles distant, provided that she does then voluntarily assent and her acknowledgment and privy examination is taken and certified in form substantially the same as that prescribed by the Code, sec. 1246 (7), by a competent officer.

The proof of acknowledgment by him must precede in the order of time the examination of his wife, but it was not essential under the provisions of the law in force before the Code was enacted (Rev. Stat.,

ch. 37, secs. 10, 11), nor is sec. 1256 of the Code fairly susceptible of the construction that both are required to acknowledge the deed at the same moment. *McGlennery v. Miller,* 90 N. C., 216. That section (1256) requires that "every conveyance, power of attorney, or other in-
(512) strument affecting the estate, right or title of any married women in lands, tenements, or hereditaments, must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and as to the wife, and the privy examination of the wife, touching her voluntary assent to such conveyance, power of attorney, etc., . . . shall be taken separate and apart from her husband." While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the law which we have quoted that the act of acknowledgment by both should be contemporaneous. Indeed, the words "jointly executed" are used in *Ferguson v. Kinsland* in reference solely to writing in "the same deed."

The last scene necessary to the valid execution of such a deed by the wife is certainly one that the law does not intend shall be witnessed by the husband. Proof of execution by him must be made on his acknowledgment, taken before that of his wife, and her privy examination must be subsequent to both, but the law fixes no definite interval that must elapse between these acts, and it is not even essential that the probate as to the husband should be taken and certified to by the same officer who conducts the privy examination of the wife.

But the learned counsel contended that the probate was defective, and the deed inadmissible as evidence, because Bostic, the justice of the peace by whom the acknowledgment and privy examination was taken, did not attach his seal to the certificate. It is true that this Court, in *Welch v. Scott,* 27 N. C., 72, held (resting the opinion solely upon the doctrine of *stare decisis*) that a seal was essential to the validity of a criminal warrant. But the act of 1868-69 (ch. 178, subch. 1, sec. 5; Code, sec. 1134) allowed the magistrate to issue a proper criminal warrant "with or without seal." Code, sec. 909 (act of 1868-69, ch. 191), prescribed forms of proceedings in civil action before justices of the peace, but we find
(513) no seals attached to the forms of summons, warrant of attachment or process that are prescribed, and a substantial conformity to which is in terms required by that section. We see no reason, however, why a warrant of attachment or summons should be held invalid if a magistrate should attach a private seal as well as his official signature. Subsection 7, sec. 1246, of the Code provides that the certificates of privy examination of married women shall be *"substantially"* as follows, and the form given concludes with the words, "Witness my hand and seal (private or official), this (day of month), A. D. (year). Signature of

officer (seal)" The word "substantially" is used in this connection, as it often is, in the sense of comprehending all of the form given that is necessary or essential. Where a justice of the peace takes the examination the law presumes that the clerk of the Superior Court of the county, in whose office his subscribed oath is filed, knows his signature. Code, sec. 821. But the clerk can judge of the genuineness of his certificate none the more accurately because a private seal may be attached. Indeed, this principle is recognized on the two forms that follow and constitute a part of the same section. For the purpose of registration of the deed *in the county* for which the justice is appointed, the clerk is required, on inspection of the form and signature, simply to adjudge it correct and order the registration. But where the proof of privy examination is taken out of the county in which the land is situate, the clerk must certify in addition both to the official character and genuineness of the attestation of the person who signed the certificate. So that the law presumes not only that the clerk knows the signature of a justice of the peace of his county, but that all citizens of the county are sufficiently acquainted with it to respect process that he may be empowered to issue by virtue of his office. It is not material (514) that a seal should be added, and when appended it does not furnish the means to officers or private persons of passing more readily upon the genuineness of the certificate. The clerk of the Superior Court, as well as every other citizen of a county, is bound to respect a criminal warrant or other process, lawfully issued by a justice of the peace for that county, and is expected to know his signature. A bench warrant issued by a judge of the Superior Court or justice of the Supreme Court runs in the hands of an officer empowered to serve it to every county in the State. We can conceive of no substantial benefit to be derived from adding a private seal to the signature of any official instrument by a justice of the peace, a judge of the Superior Court, or justice of the Supreme Court, when the signature is presumed to be known as far as his authority extends, while his private seal is not. We conclude that so much of the statutory form as provided for the use of a private seal is merely suggestive or, at most, directory, not mandatory.

We see no error in so much of the charge of the court as refers specifically to the evidence of the witness Bostic. The jury were left free to pass upon the testimony where there was any conflict between that of the *feme* defendant and that of witness. The statement of Bostic that he took the acknowledgment of her husband in Shelby, and leaving her husband there, went several miles into the country and took her acknowledgment and privy examination at her home, is not disputed. If the jury believed that the husband was not present, his Honor told them that the validity of the probate would not be affected by that fact, and

in that view as to the law he is sustained by this Court. The conflict between her testimony and that of Bostic is not material in its bearing upon the issues.

Affirmed.

Cited: Waller v. Bowling, 108 N. C., 294; *Grubbs v. Ins. Co., ib.,* 478; *Hanes v. R. R.,* 109 N. C., 494; *Smith v. R. R.,* 114 N. C., 763; *Barrett v. Barrett,* 120 N. C., 129; *Slocomb v. Ray,* 123 N. C., 574; *Aiken v. Lyon,* 127 N. C., 177; *Graves v. Johnson,* 172 N. C., 179, 182.

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(515)

RICHARD B. ODOM AND CORINNE B. ODOM v. NATHANIEL J. RIDDICK.

Insanity—Idiots and Lunatics—Notice—Purchaser for Value—Evidence—Burden of Proof—Fraud—Void and Voidable Conveyances.

1. The law presumes that all persons are sane, and the burden is upon him who alleges insanity, in avoidance of any act, to establish that fact.
2. A purchaser from one who, in fact, is without mental capacity to contract, for value, and without notice of the disability, or of facts which might reasonably put him upon inquiry, will be protected.
3. A purchaser for value, and without notice, from one who had acquired by fraudulent devices a conveyance, regular and sufficient upon its face to pass the title, obtains a good title, though it might have been adjudged void as against his vendor.
4. Even where the purchaser has knowledge of the mental incapacity of the vendor, but it is shown that no fraud was practiced, or undue influence exercised, and that the price paid was a full and fair one, and the vendor was benefited by the transaction, the conveyance will, ordinarily, not be set aside—certainly not without restoring the parties to the positions they occupied before entering into the contract.

ACTION for the recovery of the possession of the land described in the complaint and for damages for its unlawful detention, tried before *MacRae, J.,* upon issues found by a jury and exceptions to a referee's report, at Fall Term, 1888, of GATES.

Prior to 21 February, 1866, Oliver Odom was seized in fee simple of the land in controversy, known as the "Walton Place," containing about five hundred acres and situate in Gates County.

On 21 February, 1866, Oliver, by his conveyance, in proper form, and reciting a valuable consideration, conveyed the land to his brother,
(516) Richard B. Odom, who in 1869 conveyed to Mills Roberts, and the latter subsequently conveyed to the defendants.

Oliver Odom died, intestate, in the year 188.., leaving the plaintiffs his only heirs at law, who prosecute this action, alleging that their ancestor was at the time he executed the conveyance to his brother in February, 1866, and for a long time theretofore, and continuously thereafter until his death in the Asylum for the Insane at Raleigh, "utterly insane and incapable to make a deed or other contract which would in any way affect his estate," and that his deed to his brother Richard was without any consideration whatever.

The defendants denied the allegations of the plaintiffs, except that one in which they were described as the heirs of Oliver, and further alleged that "even if the said Oliver was of nonsane mind on 21 February, 1866, yet the said deed ought not to be avoided by the court because it was to the manifest benefit of his estate. It was made to his only brother, who thereafter supported the said Oliver and his family on and out of the proceeds of the land, and with the advice and assistance of counsel learned in the law, who had for many years been his adviser and business agent, and upon full consideration, and because defendants and those under whom they claimed, other than the said Richard, purchased in good faith, for a full and fair price, and without knowledge of the alleged insanity of the said Oliver at the time of the execution of the deed of 21 February, 1866."

The issue of insanity was submitted to a jury as follows: "Was Oliver H. Odom, at the time of executing the deed of 21 February, 1866, of sufficient mental capacity to make the same?" Answer: "No."

Thereupon the case was referred by consent of all parties to David A. Barnes, with power, sitting as chancellor, to decide upon the facts and all matters of law and equity arising upon the pleadings and testimony, with liberty to either party to except to the referee's rulings on such matters of law and equity, and appeal therefrom There- (517) upon the referee heard the case and made the following report:

"After hearing the testimony, which is herewith reported, and the argument of counsel, I find the following facts and conclusions of law:

"1. No fraud was practiced upon Oliver Odom, or undue influence exercised to induce him to make the deed to his brother, R. B. Odom. He acted upon the advice of Jas. W. Roberts, Esq., who had been his attorney for years, who was well acquainted with his affairs, and who knew the amount of his indebtedness to his brother Richard.

"2. Oliver Odom, at the time he made the deed in question to Richard, owed said Richard the full consideration expressed in said deed.

"3. The price paid was a full and fair consideration for said land.

"4. Richard Odom was aware of the mental weakness of his brother.

"5. Oliver Odom was then insolvent.

"6. Oliver Odom was benefited by the making of the deed to Richard, as himself and family thereby received a home and support for ten years, together with the services and protecting care of Richard, who remained there and devoted his time and attention mainly to them. Judgments due creditors amounting to more than one thousand dollars were paid off, principally from the proceeds of the farm, while under the management of Richard.

"7. Neither Mills Roberts or either of the defendants knew that Oliver Odom, when he made the deed to Richard, had not sufficient capacity to make said deed.

"8. Richard Odom, when he made the deed to Mills Roberts, owed him thirteen hundred dollars, and at Robert's death still owed said debt.

"9. The defendants were innocent purchasers and paid a fair
(518) value for the portions of the land which they respectively purchased.

"10. On 20 March, 1876, by an order of the Superior Court of Gates County, upon an *ex parte* petition of the heirs of Mills Roberts, R. B. Odom *et al.,* the land in question, except the portion purchased by the defendant Briscoe, was sold at public auction; that portion occupied by defendant Brown was purchased by him for three hundred and eleven dollars; that part of the home place now occupied by the defendant Riddick was purchased by R. M. Riddick and James T. Walton for one thousand five hundred and ten dollars, who afterwards conveyed to defendant Riddick for the consideration of one thousand eight hundred dollars. R. B. Odom and heirs of Mills Roberts had previously conveyed to defendant Briscoe the portion of the land occupied by him for the consideration of three hundred and fifty dollars.

"11. The portion of the land occupied by the defendant Riddick has been enhanced in value by reason of improvements seven hundred and fifty dollars, and the rents thereof for the past twelve years aggregate in value the sum of eighteen hundred dollars.

"The portion of the land occupied by the defendant Briscoe has been enhanced in value by reason of improvements six hundred and fifty dollars, and the rents thereof for the past twelve years aggregate in value five hundred dollars.

"The portion of the land occupied by the defendant Brown has been enhanced in value by reason of improvements six hundred and eighty-nine dollars, and the rents thereof for the past twelve years aggregate the sum of three hundred and fifty-five dollars."

Upon this state of facts I find the following conclusions of law:

"1. The deed from Oliver Odom to Richard B. Odom is not absolutely void, but only voidable that it was avoidable to pass an estate to

said Richard, and is valid until, by action of the grantor or his (519) heirs, the same is avoided.

"2. That the deed from Oliver Odom to Richard B. Odom of 21 February, 1866, be avoided and declared void upon condition that the plaintiffs, within six months, pay to the defendants the amount of their purchase money and interest, and the enhanced value of the lands caused by their improvements less the rents during their occupancy.

"3. That the defendants Riddick, Briscoe and Brown are entitled to receive from the plaintiffs the following amounts as a condition upon which the deed from Oliver Odom to Richard B. Odom is to be avoided, namely: To N. J. Riddick, one thousand five hundred and forty-seven dollars and twenty cents ($1,547.20); Eastan Briscoe, seven hundred and forty dollars ($740); and W. H. Brown, eight hundred and sixty-five dollars ($865), each of said sums to bear interest from Spring Term, 1888, of Gates Superior Court, until paid."

Exceptions were filed by the plaintiffs and defendants to the report, but after argument it was adopted by the court and judgment rendered in accordance therewith, from which both parties appealed.

L. L. Smith for plaintiffs.
R. H. Battle for defendants.

CLARK, J. The reference was by consent. By its terms the referee was vested "with power, sitting as a chancellor, to decide upon the facts and all matters of law and equity arising upon the pleadings and testimony, with liberty to either party to except as to the referee's rulings on such matters of law and equity, and to appeal therefrom." The parties reserved the right to except only to the referee's rulings as to the law. By any reasonable construction his findings of fact were to (520) be conclusive. He found as a fact that the defendants purchased the land for value, and without notice of any mental incapacity on the part of Oliver Odom. Had the defendants purchased directly from Oliver Odom for value, and without notice of his mental incapacity to make a deed, a court of equity would not ordinarily set aside the deed. *Riggan v. Green,* 80 N. C., 236.

We do not see that the condition of the defendants is any worse because they bought mediately and not immediately. The presumption of law is in favor of sanity, and this presumption is so strong that when a want of it is claimed, even in a capital case, the burden is on the defendant to prove it, the presumption of sanity being stronger than the presumption of innocence. When, therefore, a purchaser sees a regular chain of title, formal in all particulars, upon the registration books, executed by grantors of full age and not *feme coverts,* he has a right

to rely upon the presumption of sanity; and if, without any notice, or matter to put him upon inquiry, and for fair value he takes a deed, he should be protected. Any other doctrine would place all titles upon the hazard.

If the title of an innocent purchaser for value without notice can be upset for the alleged mental incapacity of one grantor, it can be done, though the grantor may have been a very remote one. The evidence must necessarily be sought among those friendly to the heirs of such grantor—the neighbors and acquaintances of the party of alleged incapacity—and it would be difficult for the grantee in possession to furnish proof of the sanity of every grantor through whom he claims. Every man who shows the abnormal condition of mind which incapacitates him to make a conveyance of his property is sure to attract the attention of those around him who have the power, and sometimes exercise it, to conceal the fact. It is a safer rule to require his heirs
(521) or those acting for them to take prompt steps to have the deed set aside and parties placed *in statu quo* before the property is conveyed to other parties and while the facts are capable of full investigation, than to subject a remote grantee to maintain the integrity of his title by rebutting allegations of incapacity in any one of a long line of grantors.

A purchaser for value from one whose deed is declared by the jury to be fraudulent and void gets a good title if he has no notice of the fraud in his vendor's deed. *Young v. Lathrop,* 67 N. C., 63; *Wade v. Saunders,* 70 N. C., 270; *Davis v. Council,* 92 N. C., 725; *Perry v. Jackson,* 88 N. C., 103.

The fact that it is found here that the defendants' grantor obtained the deed, without fraud or undue influence, for a full and fair price, and acting under advice of Oliver Odom's counsel, who had been his attorney for years, surely cannot be allowed to put the defendants in a worse plight than they would have been placed if their grantor had procured the conveyance by fraud and undue influence.

The great teachers of English law say that persons of nonsane memory, etc., "are not totally disabled to convey or purchase, but only *sub modo.* Their conveyances are voidable but not void." 2 Black Com., 291, and 2 Kent Com., 451. The deed of a person of unsound mind, not under guardianship, *conveys the seizin. Wait v. Maxwell,* 5 Peck, 217; *Crouse v. Holman,* 31 N. C., 30, and cases cited. Story Eq. Juris, sec. 227, says: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise *non compos mentis,* is fraud. Such persons being incapable in point of capacity to enter into any valid contract, or to do any valid act, every person dealing with them, knowing

their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights." To same purport Adams's Eq., 183, and cases cited. This places the doctrine upon an intelligible basis, and delivers the courts from the evident injustice and insurmountable inconvenience of declaring that all contracts made with one apparently sane, but (522) who proves to have been insane, void *ab initio* for want of a consenting mind. This doctrine would give a lunatic or his heirs restoration of property sold by him without return of the money received for it, as was actually held in *Gibson v. Soper,* 6 Gray, 729, and *Rogers v. Walker,* 6 Penn. St., 371. The correct rule is stated by *Mr. Story* in sec. 228: "If a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will be done to the other side and the parties cannot be placed *in statu quo.*" Buswell on Insanity, sec. 413, says: "A completed contract for the sale of land made by an insane vendor, without fraud, or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or in equity, in favor of the vendor or his representatives, except the purchase money be restored and the parties rully reinstated in the condition in which they were prior to the purchase. This rule appears to be unquestioned in the English courts."

To the same effect is the able opinion of *Horton, C. J.,* in *Gibbon v. Maxwell,* 34 Kan., 8, decided in 1885, in which numerous authorities are reviewed and commented upon, and also *Behrens v. McKenzie,* 23 Iowa, 333, in which the opinion is delivered by a very eminent judge (Dillon) and *Corbit v. Smith,* 7 Iowa, 60; *Allen v. Berryhill,* 27 Iowa, 534; 2 Pom. Eq. Juris., sec. 946; see, also, *Scanlan v. Cobb,* 85 Ill., 296; *Young v. Stevens,* 48 N. H., 133; *Eaton v. Eaton,* 8 Vroom, 103; *Freed v. Brown,* 55 Ind., 310; *Carr v. Halliday,* 40 N. C., 167. In *Bank v. Moore,* 78 Pa. St., 407, a lunatic was held liable upon a note discounted him by the bank, and *Paxton, J.,* says: "It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties and retain both the property and the price. Here the bank in good faith loaned the defendant money (523) on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate." To same purport is *Person v. Warren,* 14 Barb., 488; *Allis v. Billings,* 6 Met., 415. The courts have gone further, and held that when the contract is fair and *bona fide,* executed and completed, and the parties cannot be again put *in statu quo,* and there was no notice of mental incapacity, the court will not set aside the contract at all. *Molton v. Camroux,* 2 Exch., 487, affirmed on appeal, 4 Exch., 17; *Cruger v.*

Skinner, 1 McCarter, 389; *Neil v. Morley,* 9 Ves., 478. Also Lord Chancellor Truro in *Price v. Berrington,* 3 M. and G., 498, and Lord Cranworth in *Elliott v. Ince,* 7 DeG. M. and G., 474.

It is clear from these authorities that the conveyances of an insane person, not previously declared insane, are voidable merely and not void; that the right to set them aside is based upon the ground of fraud, and that the court will not usually interfere unless there has been fraud or a knowledge of the insanity by the other party, and will then place the parties *in statu quo.* When, therefore, as in this case, the grantee knew of the mental incapacity of the grantor, but it is found as a fact "that no fraud was practiced upon Oliver Odom, or undue influence exercised to induce him to make the deed; that he acted under the advice of his lawyer, who had been his counsel for years; that the price paid was a full and fair consideration for the land, and that the grantor was benefited by the making of the deed, as he and his family thereby received a home and support"; it would seem that a court of equity would not set aside such conveyances, even as between the parties thereto, and certainly not without restoring the *status quo ante. Selby v. Jackson,* 6 Beavan, 192.

(524) "Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis,* and always interfere to set aside their contracts, however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, *or for the benefit of such persons." Riggan v. Green,* 80 N. C., 239.

The deed to Richard Odom passed the legal title and was voidable by Oliver Odom or his heirs only, upon the ground of fraud, in taking title from one whom the grantee knew to be mentally incapacitated. The property has been conveyed for a fair value to innocent parties who took without notice. It has been held in the leading English case of *Greensdale v. Dare,* 20 Beavan, 234, by the Master of the Rolls (since Lord Romilly) that if a conveyance is made by an alleged lunatic under undue influence and for an inadequate consideration a purchaser from such grantee for a valuable consideration, and without notice, would be protected, as any other purchaser, for value and without notice, from a fraudulent alienee. The court instances the insecurity of purchasers if any other doctrine should be laid down. *Ashcroft v. DeArmond,* 44 Iowa, 229, is not exactly in point, but illustrates the proposition that deeds from an undeclared lunatic are voidable on the doctrine of fraud. It holds that where the grantee of a lunatic took for value and without notice a subsequent purchaser from such innocent grantee for value, though with notice of the original grantor's incapacity, would not be affected, and cites the well established doctrine laid down in Kerr on Fraud and Mistake, 316, and cases there quoted. Indeed, the facts in

Riggan v. Green, supra, are almost identical with those in this case in every particular, and that case should be conclusive of this.

As to exception sixth of the plaintiff it is sufficient to say: 1. Roxana B. Odom is not a party to this action; her rights, if any, are not set up in the complaint, and the plaintiffs claim under their father, and not under her. 2. The deed from Oliver to Richard Odom was (525) executed 21 February, 1866, two years and a half before the married women's rights were enlarged by the Constitution of 1868, and more than a year before the act was passed restoring to married women the common-law right of dower, 2 March, 1867. There was no necessity then for a wife to join her husband to convey his land. *Sutton v. Askew,* 66 N. C., 187; see, also, Code, sec. 2115.

Our conclusion, therefore, is that upon the facts found judgment should have been entered for the defendants. This disposes of both appeals.

In the plaintiff's appeal, no error; in the defendant's appeal, error.

Cited: Chamblee v. Broughton, 120 N. C., 176; *Creekmore v. Baxter,* 121 N. C., 33; *Cox v. Wall,* 132 N. C., 737; *Allred v. Smith,* 135 N. C., 445, 458; *Sprinkle v. Wellborn,* 140 N. C., 173, 5, 6; *Beeson v. Smith,* 149 N. C., 144; *West v. R. R.,* 151 N. C., 235; *Godwin v. Parker,* 152 N. C., 175; *Cox v. Boyden,* 155 N. C., 527; *Ipock v. R. R.,* 158 N. C., 448; *Watters v. Watters,* 168 N. C., 414; *Craddock v. Brinkley,* 177 N. C., 127.

THE DURHAM AND NORTHERN RAILROAD v. TRUSTEES OF BULLOCK CHURCH.

Eminent Domain—Condemnation of Land—Damages—Evidence—Appraisement.

1. Upon an inquiry in a summary proceeding by a railroad company to condemn land belonging to a church for the purpose of constructing its road, evidence of the value of the land prior to the construction of the road, and subsequent thereto, *for church purposes,* and, also, evidence that the congregations accustomed to worship there were disturbed, and facilities for the accommodation of their horses and vehicles were destroyed or impaired, whereby the utility and value of the land was diminished as church property, is competent in ascertaining the damages to be assessed.

2. The opinion of the witnesses who have, by their opportunities, qualified themselves to testify on such matters, is competent as to the fact and *quantum* of damages.

3. Where the appraisers appointed to assess the damages reported the amount thereof at three hundred dollars, to which the owner of the property did not except, but the railroad company did, upon the ground that such assessment was excessive, and appealed to the Superior Court, where the jury returned a verdict for a greater sum. *Held*, that judgment could not be properly rendered for a greater amount than the original assessment, as the only issue on the appeal was, whether such assessment was *excessive*.

(526) THE plaintiff brought its summary proceeding to condemn land of the defendants for the purpose of right of way for its railroad. Commissioners were appointed to view the land and assess damages. They did so and made their report, assessing damages to defendant at three hundred dollars, to which the plaintiff excepted and objected upon the ground that the damage assessed was excessive.

In the Superior Court issues were submitted to a jury. On the trial the parties examined divers witnesses. Certain of those examined by the defendants, respectively, testified as follows, the plaintiff excepting to parts of their testimony, as indicated in the course of their examination:

The defendants introduced M. L. Winston, who testified: "I have been accustomed to attend Bullock church all my life; have examined the boundaries. There is a ditch around three sides of the church land. The lot is a *parallelogram,* with the longest side on the railroad, the other three sides bounded by private property. The public highway has been taken and occupied by the railroad and the highway put upon church land, that is, on land condemned for right of way."

Defendants proposed to show that the land was used for the purpose of hitching horses, etc.

Plaintiff objected; objection overruled; exception.

"Some horses are hitched on the east line; some on north and south ends, on the church lands. There is nearly three-fourths of an acre left. Before railroad was laid out have seen two or more horses hitched

(527) to the same tree, besides many buggies and other vehicles being on the ground. The owner of the adjacent land cut a ditch about eighteen inches deep on the church line on all three sides, except next to railroad. The church is about 34 x 54 feet, and about 100 feet from the railroad. I have been at the church when the train passed. There is a very large membership.

Defendants then proposed to show the value of the property before the railroad was built.

Plaintiff objected; objection overruled; plaintiff excepted.

Witness stated that before the road was built he valued the property at about $1,000; now thought it was worth $600. "Taking off the land

condemned makes the lot more oblong, being smaller in the rear. Church stands on slight hill; a depression behind the church; churchyard is well wooded. The church is not cut off from the highway. I was one of the commissioners appointed to assess the damages. I am not a member of the Methodist church; I am a minister of the Christian church. Before the land was condemned they had barely enough for church purposes. Taking off one-fourth of the land would depreciate the value of the building."

H. R. Gooch, witness for defendant, stated "that the lot was in the shape of a parallelogram, with the railroad on the long side of it. Sometimes (before the railroad was built) there was not room enough in the lot for church purposes, and there is not enough now; horses could see train from any part of lot, unless they were put behind the church; have been there during services."

The defendant proposed to show the effect of running trains by the church during services.

Plaintiff objected; objection overruled; exception.

"The attention of the congregation was diverted from the minister to the passing train. The only way of approach to the church is by the way alongside of the railroad, a ditch having been cut around the other three sides of it. The property was worth $1,250 for church purposes, and was so valued in report to conference. I consider (528) the railroad has damaged it fully one-half."

On cross-examination witness said: "I am a member of that church; attention is sometimes diverted by persons coming in; church has not been valued since the report to conference. The congregation is falling off. Some leave their teams at home and walk, and some have gone to other churches. It is now worth but little for church purposes."

There was a verdict and judgment for the defendants assessing damages at four hundred and fifty dollars, and the plaintiffs appealed.

John Devereux, Jr., for plaintiff.
R. W. Winston for defendants.

MERRIMAN, C. J., after stating the case: We need not trouble ourselves to settle here the particular rules to be observed in assessing damages under the statutory provisions of this State against railroad companies occasioned by the location of the right of way for their railroads across the land of individuals, because the plaintiff requested the court, among other things, to instruct the jury "that the defendant is only entitled to recover such actual damages as result from the taking of the land and such damages as directly flow therefrom," and it gave this instruction. Indeed, it gave all the instructions asked for by the plain-

tiff, with slight modification, to which there was no objection. The plaintiff cannot therefore complain of the instructions given.

For the present purpose, treating the instructions as correct, we are of the opinion that the exceptions to evidence cannot be sustained. The evidence, in respect to hitching horses, objected to, was not offered for the purpose of showing damages, special, or otherwise, to horses,
(529) as suggested on the argument, but for the pertinent purpose of showing that the value of the small parcel of land of the defendants was impaired by reason of the fact that passing trains on the railroad would tend to frighten and render unruly and unsafe horses fastened to trees and other things near to and about the church during, just before and after church services. It is of common knowledge that it is convenient and essential at country churches to have sufficient room near to them to fasten horses where they will stand quietly and safely while the worshippers are assembled at worship. The land in question was devoted to and used as a place for public worship. It was useful and valuable for that purpose, and the defendants were entitled to damages if trains passing over the road rendered it less valuable for the necessary incidental purpose of hitching horses. The impairment of the value of the land in such respects constituted an element of damage that directly flowed from the location of the road on it. That horses might be fastened to trees and other convenient things on the small parcel of land, in view of the purpose to which it was devoted, rendered it in some measure valuable. The location of the road on it rendered it less valuable for that essential purpose; created the necessity for erecting stalls, screens and the like for horses, at an outlay of money that otherwise would have been unnecessary. In this view the evidence was certainly competent. *R. R. v. Wicker,* 74 N. C., 220.

Unquestionably it was competent to show what the land was reasonably worth before the location of the railroad on it, preparatory to showing what it was worth after the road was constructed and used. This is a common, reasonable and necessary way of proving the *quantum* of damages when it appears that the construction and use of the road produces the difference in value. Wood R. R., p. 899; 3 South. on Dam., 441.

(530) The value of land, as of all kinds of property, is much a matter of opinion, and a witness should have knowledge of such value, gained from experience, information and observation to fit him to testify in that respect. Otherwise his opinion will be at random, worthless and misleading. But the objection here was not to the qualification of the witness to testify, it does not so appear, and it would be unfair to merely infer that such was the ground of objection. It may be that he was qualified; that he had bought and sold land in that neighborhood;

that he had knowledge of sales made by others from time to time, and particularly of church property. So far as we can see, in the absence of objection on that account, the witness was qualified—the presumption if he was—else objection would have been made for the reason he was not. Wood R. R., p. 941, *et seq.*, 2 *ib.*, 945, 946.

Nor has the third exception substantial force. If the result of the location of the road on the land close to the church was to disturb and distract the attention of the worshippers accustomed to assemble at the church, when assembled for the purpose of worship, so as to impair or destroy the usefulness of the property for church purposes, to which it was and had been devoted, the property was on that account less valuable, unless it was more valuable for some other purpose, and that it was is not suggested. Indeed, the evidence tended to show that it was of trifling value for any other purpose.

The purpose of the evidence was not, as contended on the argument, to show how much or how little the worshippers, severally or collectively, were, would or might be shorn of religious impressions and advantages, but to show that the property was less valuable in that worshippers would not go there, but would find some safer, more quiet and agreeable place to worship, until the church as a place of worship would be deserted and of little or no value for church purposes, until the church building would be useful only to be torn down and the (531) lumber devoted to other purposes, and the land would be worth for any other purpose only a nominal price. While the chief purpose of church organizations is to extend religious advantages and afford opportunity to worship Almighty God, through their officers and agents, they own much valuable property, both real and personal, to be affected favorably or adversely, as to its pecuniary value, like similar property owned by individuals, and the law takes notice of and protects it just as it does the like property of individuals in material respects. Injury to such property, in a respect that impairs its usefulness for the purposes to which it is devoted, constitutes an element of damage recoverable when such injury is the direct cause of the act complained of or when it flows directly from that act as a consequence. If the effect of the location and use of the plaintiffs' road had been to ruin the church building in question, would not the defendants have had their remedy? Most assuredly they would. If such effect has seriously injured its usefulness, not in a spiritual point of view as to worshippers there, but as a church property, shall they not have redress? If the road is so near to the church that passing trains of cars disturb the people, distract or divert their attention, for one cause or another, so that they cannot or will not properly worship there, shall the defendants not have redress for the injury so in the nature of the matter done the property as a place of

worship? Is the property on that account not less valuable? Would any church organization give as much money for the property, with such disadvantage so wrought, for church purposes as it would otherwise do? Obviously it would not. Did such injurious effect, great or small, flow as a consequence directly from the location and use of the plaintiff's road? If it did such effect constitutes an element of damage cognizable in this proceeding. The purpose of the evidence excepted to was (532) to prove that it did, and it had that tendency. It was therefore competent. Wood R. R., p. 925, *et seq.*

The commissioners who viewed the land assessed the damage at three hundred dollars. The plaintiff objected and excepted to this assessment as excessive. Thereupon, the parties waiving irregularities in the course of the proceeding, the question of the *quantum* of damages was submitted to a jury in term time, and they assessed the damages at four hundred and fifty dollars. The defendants did not except to the assessment made by the commissioners. Hence, in this Court, the plaintiff contended that the court below could not give judgment for a greater sum than three hundred dollars.

The report of the commissioners to assess the damage when made and filed gave character and point to the proceedings as to damage. "Any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court either party to the proceedings may appeal to the court at term, and thence after judgment to the Supreme Court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper," etc. Code, sec. 1946. Acting upon this provision the plaintiff excepted to the report solely on the ground that the assessment was excessive. The defendants did not except at all, and thus impliedly signified their satisfaction with the assessment as made.

It might have been questioned whether regularly the issue raised by the plaintiff's exception to the report ought strictly to have been submitted to a jury, but it might be, certainly by consent, and this was given. At all events, by implication, there was no objection. *R. R. v. Wicker,* 74 N. C., 220; *R. R. v. Phillips,* 78 N. C., 49.

(533) Informally an issue not put in writing was submitted to the jury. What it was does not appear, except by inference. It seems that it was in substance "What damage has the defendants sustained?" But this question was not raised by the exception and the state of the record. The inquiry was limited to the question whether or not the assessment was excessive, and if so, to what extent. If the defendants thought it too small they should have excepted, at the proper time or afterwards, by permission of the court. The plaintiff's excep-

tion did not have the effect to vacate the report and put the question of damages at large. It was sufficient and continued to have force, so far as appears, until for proper cause, the court should set it aside or modify it in some respect, and it still has effect.

The last objection was not made in the court below, but as the error appears in the record proper of the proceeding we take notice of and correct it. *Thornton v. Brady,* 100 N. C., 38; *Hutson v. Sawyer, ante,* 1.

The jury have by their verdict in effect found that the assessment of damages by the commissioners was not excessive. The judgment must therefore be set aside and judgment entered in the court below in favor of the defendants for three hundred dollars.

Modified and affirmed.

Cited: R. R. v. Mfg. Co., 166 N. C., 176; *S. c.,* 169 N. C., 162, 165, 166; *Lambeth v. Thomasville,* 179 N. C., 456.

(534)

EVERETT O. MOORE v. THE SILVER VALLEY MINING COMPANY ET AL.

Injunction—Corporation—Charter—Stockholder—Domicil—Laches.

1. The plaintiff must allege facts sufficient to sustain his *cause of action,* before an *injunction* will be allowed.
2. Individual stockholders in their own name are not the proper parties to assert the rights of a corporation; action should be brought by and for the corporation itself. If its officers or other stockholders fail to do their duty in that respect, the remedy is, as a general rule, to be sought within the corporate organization.
3. Where there is cause for complaint by stockholders against others, they should first resort to the remedy prescribed in their charter; and failing in this, they will have a right to proceed against the delinquents, and, in proper cases, injunction will be granted to protect the rights of parties.
4. A good cause of complaint in such cases is fraud or serious injury done, or about to be done, by some of the stockholders or officers, for which there is no adequate remedy given under the charter.
5. It should be alleged and proved that the plaintiffs are *bona fide* owners of stock and have taken proper steps within the company to assert their rights; it ought also to appear that proper legal steps have been taken in the state which is the domicil of the corporation and defendant corporators, before the aid of the courts of a foreign state will be afforded.
6. When, as in this case, a variety of remedies was open to plaintiff for many years and he did not pursue any of them, he is chargeable with gross *laches,* and the courts will not interfere by injunction for his relief.

MOTION for injunction in an action begun in DAVIDSON, and heard at chambers by *Merrimon, J.,* on the Fall Circuit, 1889.

(541) *T. B. Eldridge for plaintiff.*
M. H. Pinnix, N. B. Bond, and F. C. Robbins for defendant.

MERRIMON, J. The plaintiff must allege in his complaint facts sufficient to constitute a cause of action in his favor, legal or equitable, or both legal and equitable in its nature. Otherwise the defendant may move to dismiss the action, or the court will *ex mero motu* dismiss it because, in such case, there is nothing alleged in the pleading that raises the jurisdiction of the court as to the subject-matter of the action and to which it can attach.

And so, also, when the plaintiff asks for relief by injunction in the course of the action as a provisional remedy therein, he must, if he has not at the time of the application filed his complaint, set forth (542) in his application—his affidavit—ordinarily, such a cause of action. The court will not—cannot—proceed in the action, unless its jurisdiction as to the parties and the subject-matter of it appears in some way allowed by law. Jurisdiction is essential, and it must appear by the record. The court must see a cause of action at least substantially alleged.

We are of opinion that the plaintiff failed to allege a cause of action in himself, and therefore the court ought not to have granted the injunction as to which the appellant complains.

Accepting the plaintiff's allegations as true, for the present purpose, he is not nor does he purport to be the owner of the lands and the judgment mentioned in the complaint in controversy. They belong to the Silver Valley Mining Company of Baltimore, of which he is a stockholder, and that company, in the absence of statutory regulation otherwise, is the proper party to assert its rights and seek redress for any invasion of the same by action. In the nature of the matter it would contravene every principle of intelligent procedure, be impractical and absurd to allow ordinarily one or more of the stockholders of a corporation to bring actions to recover property, or the value of it, that belongs to it, or to recover damages for injuries to it, or its property, or to collect debts due to it. Such actions imply corporate disorganization and the absence of corporate integrity and entity. If corporate officers or agents will not or fail to exercise their corporate powers and authority in the discharge of their duties and obligations to the stockholders of the corporations or others, the body corporate does not thereby cease to exist, nor can it be ignored as an effective instrumentality for its purposes. The law, statutory and otherwise, supplies ample means whereby to render it operative without necssarily destroying it, or an abandonment of it as a corporate being. The remedy of its stockholders and (543) others interested in it is made effective by, through, for, or against

it, as the case may be or require. In cases like the present one the complaining stockholder, or stockholders, should take such action in their company as its charter and by-laws might allow, and, these not affording adequate remedy, he, or they, should bring his, or their, action against the corporation and the offending officers of it, to the end such officers should be compelled to a proper discharge of their duties, or be displaced and others put in their places. Pending such action, the court might—would in proper cases—protect the rights of the corporation, and, through it, the same of the corporators, by the appointment of receivers. And, having in view the same ends, one or more stockholders might, in possible cases, bring an action in their own names to protect the rights of the corporation, and through it their own rights in common with those of all the other stockholders. The right to bring and the occasion of bringing such actions arises only when and because the proper corporate officers will not, for some improper consideration, discharge their duties as they should do. But stockholders, as such, may not bring such actions at their pleasure and have their rights as individuals growing out of the corporation settled and administered. Such actions are allowed because of necessity and for the benefit of the corporation and its stockholders. Hence it was held in *Hawes v. Oakland,* 104 U. S., 450, that to entitle a shareholder in a certain waterworks company to maintain an action in his own name, it must appear, first, that something has been done or is threatened to be done by the directors which is beyond the authority conferred by the charter or law under which the company was organized; or, secondly, that such fraudulent transactions are threatened or contemplated by the directors, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or other shareholders; or, thirdly, that the directors, or (544) a majority of them, are acting in their own interest, in a manner destructive of the company or the rights of the other shareholders; or, fourthly, that the majority of the shareholders are oppressively and illegally pursuing, in the name of the company, a course of action in violation of the rights of the other shareholders, which can only be restrained by a court of equity; and, fifthly, that the complaining party must have made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock by him was vested in him at the time of the transactions of which he complains, or was thereafter transferred to him by operation of law. The case just cited was afterwards cited and fully approved by the same court, in *Dimpfill v. R. R.,* 110 U. S., 202, and it was therein further held that it must appear that the plaintiffs had exhausted all the means in their power to obtain redress of the grievances within the corporation itself. These and other similar cases, as well as the reason

of the matter, show that the cause of action in favor of the complaining stockholders does not arise, and he cannot maintain an action in respect thereto unless such facts exist and appear by a proper averment. *Planters' Line v. Wagner,* 71 Ala., 581; *Showan v. Zion,* 79 Ky., 300; *Taylor v. Holmes,* 127 U. S., 489.

In the present case it is alleged that the plaintiff purchased certain certificates of stock of the Silver Valley Mining Company, of Baltimore, indorsed in blank, but certificates have not been issued to him. It is questionable whether he is a stockholder and entitled to act as such. It seems that, at most, he is only the equitable owner of the shares of stock. When he so purchased them does not appear. It does appear, however, that he got them long after most if not all the fraudulent transactions complained of. It should appear that he was the *bona* (545) *fide* owner of the stock; that he bought the same in good faith, and not for mere vexatious purposes.

It is not alleged, nor does it appear in any way, that the plaintiff had ever taken steps within the company last mentioned to correct the grievances of which he complained, although he had known of them for years; nor does it appear that he has ever demanded and required of its officers that they take proper action to prevent them or obtain redress on account of the same. It is alleged that certain officers of the company were the authors of and participators in the alleged frauds and mismanagement, and that they refused to take action. But this allegation is indefinite, unsatisfactory and evasive. It seems to be founded upon the allegation that the officers were the authors of and participants in the fraud, and hence would not take such proper action. This is not sufficient. It should be alleged, frankly, plainly and with particularity, that the plaintiff had demanded and required of such officers that they should correct the grievances alleged, and take steps to obtain redress, and that they thereupon refused so to do. It might have been that an earnest effort would have induced or driven such officers to a proper discharge of their duty. Such effort should have been made, and it ought to appear by proper averment that it had been.

Nor does it appear that plaintiff or any other stockholder had brought any action or taken any legal steps in the courts of the State of Maryland to obtain redress for the company, himself and the stockholders on account of the alleged wrongs. The company was in and of that State, and all the other defendants except the appellant were there. It ought to appear in such case that such legal steps had been taken. An action like the present one should be in aid of a proper one in the proper court of the State just mentioned. The plaintiff seeks unnecessarily and improperly to bring a foreign corporation into this State as (546) a defendant in this action, and have the courts here interpret its

charter and by-laws and the regularity and sufficiency of its proceedings and the laws of the State of Maryland bearing on the same. Ordinarily the courts of the latter State properly have the exclusive jurisdiction of such matters and things; this should be settled by the proper courts there. There is total absence of necessity for such extraordinary procedure here, and the courts of this State will not unnecessarily entertain an action for such purpose. An action such as the present one—there being proper ground for it—should be in effect auxiliary in its nature, in aid of proper actions and proceedings, as indicated above, in the courts of Maryland. *Wilkins v. Thorn,* 60 Md., 258; *Nail Co. v. Linden Spring Co.,* 142 Mass., 349; *Halsey v. McLean,* 12 Allen, 438; *Smith v. Ins. Co.,* 14 Allen, 436; *Kansas Cons. Co. v. R. R.,* 135 Mass., 34.

Accepting the case as presented, the plaintiff must have been cognizant for many years of the grievances of which he complains. A variety of remedies were open to him. It does not appear that he ever in any way took steps to arrest or seek redress on account of the same, nor is any reason or cause assigned for or explanation given of such delay. This is singular and suggestive of a want of good faith. In the meantime, rights of third persons—so far as appears, innocent persons—have supervened. The plaintiff is clearly chargeable with gross *laches,* and upon well settled principles of equity he cannot now be allowed to prejudice such rights.

We need not consider whether the appellant corporation was or was not duly organized, because, as we have seen, the plaintiff has failed to allege such a cause of action in favor of himself as entitles him to maintain this action.

There is error. The order appealed from must be set aside and the motion for an injunction, pending the action, denied.

Error.

Cited: Jones v. Comrs., 107 N. C., 265; *Heggie v. B. & L. Assn., ib.,* 590; *Howard v. Ins. Co.,* 125 N. C., 54; *Merrimon v. Paving Co.,* 142 N. C., 550, 552, 554; *Mitchell v. Realty Co.,* 169 N. C., 518.

(547)
JOSEPH BRITTAIN, ADMINISTRATOR, v. JOHN A. DICKSON ET AL.

Executors and Administrators—Real Estate—Assets—Judgments—Limitations—Heirs—Creditors.

1. Where an administrator qualified in 1862 and died in 1869, and an administrator *de bonis non* was appointed in 1886, the estate must be settled according to the law as it stood before 1 July, 1869.
2. The authority of an administrator *de bonis non* relates back to the death of his intestate, but he cannot be held responsible for assets which did not come into his hands or by reasonable diligence he could not have collected.
3. Where it is *clear* that an administrator could not recover, he ought not to bring suit.
4. Judgments against the personal representative cannot be questioned by the heirs or next of kin unless for fraud or collusion.
5. An estate is open until it is settled; *stale* claims are as good as others unless barred by the statute.
6. Where the heirs and next of kin allowed six years during the life of the administrator to elapse, and waited twelve years for an administrator *de bonis non to* be appointed, and no effort was made to procure a settlement of the estate, the law will not help them except in cases prescribed by statute.
7. Specialties, when reduced to judgment, are merged, and the statute barring judgments will then apply.
8. The statute governing the presentation of claims to an administrator applies also when the claim has been reduced to judgment; and when judgment was obtained and docketed in 1869 against an administrator, and no effort was made to assert this claim until 1886. *It was held*, that it was barred by the ten years statute of limitation unless the claim was admitted by administrator, or action was brought upon it, in one year afer the expiration of the ten years on the appointment of administrator as prescribed by statute.
9. Where it appeared that a former administrator was insolvent, his bond lost and sureties unknown. *It was held*, that it was not necessary for the administrator *de bonis non* to bring an action against the administrator of such administrator before making application to make real estate assets.
10. Ordinarily any controversy respecting a debt against the estate should be determined before granting license to sell for assets.

(548) THIS is an application for a license to sell land to make assets to pay debts, etc.

(549) *I. T. Avery for plaintiff.*
S. J. Ervin for defendant.

MERRIMON, C. J. The intestate of the plaintiff died in 1861, and letters of administration on his estate were duly granted to the

former administrator in August, 1862, who afterwards died in (550) 1869. The plaintiff was, afterwards, on 23 December, 1886, appointed and qualified as administrator *de bonis non* of the same intestate. The estate must therefore be settled according to the law applicable in such cases next prior to July, 1869, except as "to the courts having jurisdiction of any action or proceeding for the settlement of an administration or to the practice and procedure therein." Code, secs. 1433, 1476; *Glover v. Flowers,* 101 N. C., 134; *Gaither v. Sain,* 91 N. C., 304; *Glover v. Flowers,* 95 N. C., 57; *Dancy v. Pope,* 68 N. C., 147.

The administration of the estate of the intestate was not completed by the first administrator; he left it open and unsettled. Hence it became and continues to be the duty of the plaintiff administrator *de bonis non* to complete the administration in all respects, and to that end his power, rights, authority and duties relate back to the death of his intestate. He is bound only by the lawful acts done by his predecessor in and about the estate. It is his duty to get possession of all the remaining personal property, including rights and credits, to sell the property, collect the debts due and apply the money thus realized to the discharge of all unpaid debts and liabilities with which the estate in his hands is properly chargeable and in the orderly course of administration. He should also particularly require the administrator or executor of the first administrator to account to him for all property and effects of his intestate that he had not properly administered, and, if need be compel him to do so by appropriate legal steps. If, however, the first administrator had wasted such assets or made other default, and he, or if he be dead, his estate be clearly and certainly insolvent, and if the sureties to his administration bond be so insolvent, or if he gave such bond and the same was lost or destroyed, and the sureties could not, by active diligence, be ascertained, then the facts being clear, it would not be neces- 551) sary that he should bring action, because it would be fruitless and put the estate to useless costs. The administrator should in such respects be very vigilant, otherwise he would be held accountable for his *laches.*

In this case it is found as facts that the former administrator was insolvent at the time of his death; that he gave a proper bond, with sureties; that the bond was lost or destroyed, probably by the casualties of war, and that it cannot be ascertained who were the sureties thereto. If this be so, it would be worse than useless for the plaintiff to bring his action, thus causing fruitless delay and costs. Why, to what end, bring suit? In such case it is wiser and better in every respect to proceed in the course of administration as if the matter had been settled by action. But, to warrant such course, the facts should be clear and satisfactory.

The judgments of recent date mentioned, other than that of Thomas G. Walton, seem not to be questioned, nor can they be, by the defendants as the heirs of the intestate, unless because of fraud or collusion, and so far as appears, they are properly chargeable against the estate in the hands of the plaintiff. If there are no personal assets of the intestate, or not sufficient to pay them, then it is the plaintiff's duty to apply for and obtain a license to sell the land descended to the heirs, or so much thereof as may be necessary to make assets to pay the debts remaining unpaid. *Speer v. James,* 94 N. C., 417; *Syme v. Badger,* 96 N. C., 197.

It is earnestly insisted in the argument that the debts upon which these judgments are founded were of long standing and stale, and therefore the creditors, after such long lapse of time, are not entitled to have them paid. This contention is not well founded. The law contemplates, intends and requires that the estate of every decedent, if he have any, shall be duly administered, and it remains open, unsettled and to be settled until the latter shall be done. Mere lapse of time in such (552) cases cannot affect the rights of creditors or others, otherwise than as may be prescribed by statute. That an estate is not settled and closed within a reasonable time is because of the neglect or *laches* of those interested in it as next of kin, or legatee, or heir, or devisee, or creditor, and the law will not encourage such neglect by helping a party who seeks to take benefit of it. It is the duty of parties interested to see that the estate is so administered and closed according to law; and if they will not, they must suffer such prejudice as may happen to them by reason of their *laches,* however the same may arise. Here the next of kin and the heirs of the intestate allowed six or seven years to elapse pending the lifetime of the first administrator, while it seems, he wasted the assets, or allowed them to be dissipated, that he ought to have applied. He died and no administrator *de bonis non* was appointed until after the lapse of twelve years. The bond of the first administrator had been lost or destroyed, and the name of the sureties thereto had been forgotten. No effort was made, it seems within a reasonable time, or at all, to restore the lost record as to the appointment of the administrator and his bond. All this was gross neglect, and the creditor who on that account fails to establish his debt and have it paid must suffer loss, and so must the heirs, if they cannot make good their defense. The law will not help them as to time, except in the case and the way prescribed by the statute. *Whit v. Ray,* 26 N. C., 14.

The judgment of the creditor, Thomas G. Walton, was obtained on 24 March, 1869, and it must be treated here and for the present purpose as an absolute judgment, because the court so held it to be. This was excepted to by the plaintiff, but he did not appeal, and if he assigned error it is not before us for review and correction. If the plaintiff in-

tended to insist upon his objection he should have appealed. He (553) is not entitled to the benefits of the defendant's appeal, except as he may in some way be benefited thereby incidentally.

The specialties upon which the last-mentioned judgment was founded were merged therein, and it became a new *causa litis,* and as contemplated by the statute (Code, sec. 136), it was subject to the statute (Code, sec. 152) barring actions on judgments after the lapse of ten years after the rendition of the same. *Gaither v. Sain,* 91 N. C., 304; *Smith v. Brown,* 99 N. C., 377.

Hence any action on this judgment was barred by the statute, as contended by the defendants, unless it was suspended by reason of the fact that there was no administration of the intestate from 1869 until 23 December, 1886, when the plaintiff was appointed, and the judgment creditor brought his action within one year next after the issuing of the letters of administration to him, founded upon such judgment, or unless the judgment creditor filed his claim within the time just mentioned with the plaintiff, and the same was admitted by him as prescribed and allowed by the statute (Code, sec. 164). This statute provides that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time and within a year after the issuing of letters testamentary or of administration. But if the claim upon which such cause of action is based be filed with the personal representative within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar," etc.

Although the cause of action, the judgment, under consideration does not come within the letter of this statutory provision, it does within its spirit and purpose. It is not reasonable to suppose that the intention was to allow the creditor to so sue the first administrator and (554) not have the like remedy against the administrator *de bonis non.* The creditor could not bring his action against the administrator of an administrator, but against the administrator *de bonis non* of the intestate of the first administrator. It is so decided, certainly in effect, in *Smith v. Brown,* 99 N. C., 377; *Dunlap v. Hendley,* 92 N. C., 115.

It does not appear from the record whether the judgment was barred or not. It may be that it was filed with the plaintiff in apt time and admitted by him. It must therefore be re-referred to the referee to find the material facts and report the same to the court below for its further action.

It appears that the former administrator was "totally insolvent"—had been several years before his death—and his estate had been so ever

since that time; his bond as administrator was lost or destroyed, and his sureties thereto were unknown. For the reasons already stated, it was not necessary to bring an action against his administrator before making the present application. *Badger v. Jones,* 66 N. C., 305; *Latham v. Bell,* 69 N. C., 135; *Smith v. Brown, supra; Lilly v. Wooley,* 94 N. C., 412.

It does not appear, except by rather vague inference, that there are no personal assets of the intestate. It is found merely that none have come into the hands of the plaintiff. It is not found, as it should be, that he made diligent search and inquiry and could find none.

The exceptions, other than those embraced by what we have said, are immaterial, and we need not advert further to them.

If there are no personal assets, or not sufficient, the plaintiff is entitled to a license to sell so much of the real estate as may be necessary to make sufficient assets to pay the debts ascertained to be due and unpaid; but any controversy in respect to any particular debtor's debts, especially if the same be for a considerable amount, should ordinarily be deter-
(555) mined before granting the license; otherwise the court might direct a larger quantity of land to be sold than necessary.

The judgment must be set aside and further steps taken in the proceedings in accordance with this opinion.

Error.

Cited: Brawley v. Brawley, 109 N. C., 527; *Brittain v. Dickson,* 111 N. C., 529; *James v. Withers,* 114 N. C., 479; *Monger v. Kelly,* 115 N. C., 295; *Lea v. McKoy,* 118 N. C., 522, 526; *Stonestreet v. Frost,* 123 N. C., 646; *Edwards v. Lemmonds,* 136 N. C., 331; *Brown v. Wilson,* 174 N. C., 671.

D. G. MORISEY v. JOHN E. SWINSON.

Action for Foreclosure—Correction—Equitable Procedure—Reference Under Code—Constitution—Rents.

1. Where a plaintiff seeks to correct a deed in his own favor, the court should refuse its aid unless he is willing that other mistakes therein should be corrected which would be against his interests. He who would have equity must do equity.

2. The findings of fact by a referee are in the nature of a special verdict subject to be reviewed by the judge, and, when necessary, set aside, but when confirmed by the judge they are not reviewable in this Court.

3. Consent reference under the Code binds both parties until it is vacated by common consent.

4. It is proper that the agreement to refer should specify in terms the "issues of law and fact"; but where the purpose is obvious, the strict words of the statute will not be required.

5. The Constitution has not abolished the principles of equity, and where the statutory procedure thereunder is silent, or inadequate, the practice in the late courts of equity may be invoked.

6. The jurisdiction in courts of equity to correct material mistakes is unquestionable.

7. Under the present method of civil procedure, rents are recoverable up to the time of *trial.*

ACTION, tried at the Fall Term, 1889, of DUPLIN, by *Bynum, J.*, upon report of referee.

The action was brought to foreclose a mortgage of land exe- (556) cuted by the defendant to the plaintiff on 29 November, 1867, to secure the payment by the former to the latter of "seven hundred dollars, due by bond or note, with interest from some time in 1857, as on reference to said bonds will more fully appear," etc., as recited therein. Among other things, the plaintiff alleges in his complaint that the recital in the mortgage as to the "bond or note" "was inserted therein by mistake and inadvertence of both parties" thereto; and he demanded judgment that the mortgage be corrected so as to recite simply an indebtedness in the amount specified, no such bond or note having been executed or intended; that the mortgage as corrected be foreclosed, the land sold, etc., and he asked for general relief, etc.

W. R. Allen for plaintiff. (560)
H. L. Stevens for defendant.

MERRIMON, C. J., after stating the case: The purpose of this action is to correct the deed of mortgage in question in certain respects on account of mutual mistake, to foreclose the same, and to that end, to have an account taken, etc. The cause of action is wholly equitable in its nature, and hence the court must exercise its authority and jurisdictional functions as a court of equity, applying such statutory provisions as may be applicable. Indeed, the jurisdiction is so extensive that the court may administer the rights of the parties as to the matter in litigation to the extent they come properly within the scope of the action, whether the same be legal or equitable, or both. There exists directness and thoroughness in the prevailing method of civil procedure. One of its distinctive and leading features is to avoid circuity of action and

method, and to administer the rights of parties, whether legal or equitable, or both, or mixed, in their nature as to the matter in litigation, in one action.

The statute (Code, secs. 404-423) provides three methods of trial—trial by jury, trial by the court, and trial by referees. Any party may insist upon the trial by jury of the issues of fact properly raised by the pleadings. Trial by the court may be had in the cases and as prescribed by the statute (sections 416-419). Trial by referees of the issues arising in the action, whether of fact or law, or both, may be had by consent of the parties in writing. The statute (sec. 420), in this respect, provides that "all or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, except in actions to annul a marriage or for divorce and separation." Such
(561) trial does not, cannot, have the effect to withdraw the action or the cause of action from the jurisdiction of the court. The referee, by consent of the parties, becomes a mere adjunct, and acts in the place of the court, and, in appropriate cases, in the place of the court and jury, in respect to the trial. The referee must make report of his action, and the proceedings before him, to the court, and, for cause, the judge may "review such report and set it aside, modify or confirm the same, in whole or in part, and no judgment shall be entered on any reference except by order of the judge." Code, sec. 423; *McNeill v. Lawton,* 97 N. C., 16.

When for cause such a report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. The order of reference having been entered by consent, this could not be withdrawn, except by common consent, and consent entered of record is a sufficient consent in writing. *Fleming v. Roberts,* 77 N. C., 415; *Barrett v. Henry,* 85 N. C., 321; *White v. Utley,* 86 N. C., 415.

The findings of fact by such referee are in the nature of a special verdict, subject to review by the judge, and subject to the right of a party to move to set the same aside and to have a new trial before the same referee. And the findings of fact as settled by the judge are conclusive and not reviewable in this Court. If the judge does not formally find the facts, it is presumed that he accepts the facts as found by the referee. This applies to cases equitable in their nature, as well as to cases at law, because the parties chose such method of trial, as they might do under the statute. *Barrett v. Henry, supra; Barcroft v. Roberts,* 91 N. C., 363; *Usry v. Suit, ib.,* 406; *Mining Co. v. Smelting Co.,* 99 N. C., 445; *Wessell v. Rathjohn,* 89 N. C., 377.

The parties to this action, by common consent entered of
(562) record, referred the same to a referee, named and selected by

themselves. The order of reference is broad and comprehensive in its terms. It clearly embraced all the issues of fact and law raised by the pleadings. The "action" was referred. This order is not appropriate in its terms; it ought to have in terms referred the issues of fact and of law, etc., but the purpose is obvious, as it is said that the reference is "under the Code." The referee and the parties seem to have so treated the reference as to its scope, and it must be so treated now.

In the exercise of such powers conferred by the statute, as well as in the application of general principles of procedure of courts of equity, the court had authority to make the order modifying the first report of the referee and recommitting to him the matter referred, with appropriate directions. The court had complete jurisdiction of the report when filed, and it was not bound to pass in detail upon the several exceptions to it. Indeed, upon seeing the report, for cause appearing upon its face, it might set it aside, or modify it, or direct the referee to take further action in certain respects specified. The statute contemplates the free exercise of such broad authority in appropriate cases. The power to do so is essential in the application of principles of equity and the effective administration of equitable rights; and, when need be, in the absence of statutory regulations, the court may and will adopt methods usual in courts of equity under the former method of procedure in this State. The Constitution has not abolished the principles of equity; indeed, it could not; on the contrary, it fully recognizes them, and they must be applied as far as may be under the existing statutory method of procedure; but when it is silent or inadequate, by the methods and practices of the late court of equity in this State. *Grant v. Reese,* 82 N. C., 72; *Barrett v. Henry, supra; Grant v. Bell,* 90 N. C., 558; *Trimble v Hunter,* 104 N. C., 129.

It is therefore unnecessary to advert to the numerous exceptions (563) of the plaintiff to the order above referred to, filed at the time it was entered, especially as the substance of them is made the grounds of exception to the last report of the referee.

The plaintiff's principal ground of objection and exception is stated as follows:

"1. For that the referee fails to find as a fact that at the time said mortgage was executed the exact amount due from the defendant to the plaintiff could have been ascertained from papers in the possession of the parties, and from the judgment docket of the county in which said mortgage was executed. J. E. Swinson testified that the balance due was the balance upon said judgment, and D. G. Morisey testified that he had in his possession a paper from which the amount could have been ascertained. There was no evidence to the contrary.

"5. For that the referee, in his first conclusion of law, holds that the recital in said mortgage of an indebtedness of $700 should be corrected; whereas he should have held that, as the parties had full opportunity to learn the exact amount due at the time the mortgage was given, the defendant has shown no facts entitling him to this equitable relief."

To say the least, this exception was ungracious. The plaintiff himself asked to have the mortgage deed corrected in his own favor, because it falsely recited that the mortgage debt was due by "bond or note," whereas in fact there was no such bond or debt, and the recital was inserted by mistake, but he was not content to allow a similar mistake to be corrected in favor of the defendant! It is not surprising that the just judge declared, in the order above referred to, that "he who asks equity must do equity." But there was evidence that warranted the finding of the referee that the mortgage debt was much less than that recited, and that *Trimble v. Hunter,* 104 N. C., 129.

It is therefore unnecessary to advert to the numerous exceptions (563) of the plaintiff to the order abov referred to, filed at the time and formally drawn by an unskilled hand of a third party, in the absence of proper data, part of which was several miles distant, and that the negligence in failing to have such data was due to the carelessness of the plaintiff as much as that of the defendant. Shall the former be allowed to have technical advantage and benefit of his own *laches* in such case, to the injury of the defendant? Surely not. There was evidence from which the referee and the court might find distinctly that there was mutual mistake, and we cannot, as we have seen, review their findings of the facts.

Upon the findings of fact the court properly corrected the deed in favor of the defendant as to the amount of the mortgage debt. The jurisdiction of courts of equity to correct mutual mistakes in deeds and like instruments, where such mistake is admitted or distinctly proven, is clear and unquestionable. *Newsom v. Bufferlow,* 16 N. C., 379; *Brady v. Packer,* 39 N. C., 430; *Stamper v. Hawkins,* 41 N. C., 7; *Kornegay v. Everett,* 99 N. C., 30; Ad. Eq., 170 *et seq.*

The plaintiff likewise complains that the referee charged him too much for rents of the land mentioned in the report. The charges in this respect were based upon the findings of fact, and these we cannot review or disturb.

The plaintiff further complains that the referee charged him with rents up to the time he finally took his account after the action began. This objection is unfounded. Under the present method of civil procedure, the rents are treated as growing out of and incident to the land, and are recoverable up to the time of the trial. Moreover, this is allowed in order to avoid circuity of action, as contemplated by the spirit and

purpose of the Code of Civil Procedure. *Whissenhunt v. Jones,* (565) 78 N. C., 361; *Burnett v. Nicholson,* 86 N. C., 99; *Grant v. Edwards,* 88 N. C., 246.

We advert now to the defendant's appeal. His principal ground of complaint is that the referee found as a fact that the fair rental value of the land mentioned in the report was seventy-five dollars, but failed to charge the plaintiff with that sum annually for the time he had possession and control of it. It seems that the referee meant by the finding that such rent would be fair and reasonable if the premises could be readily and regularly let, but he found further that the plaintiff took possession of the land at the request of the defendant, and agreed that he "would do the best he could with it," the property not being desirable or much in demand by responsible tenants. He finds as a fact that, "considering all the circumstances and surroundings," the sum charged is "a fair rent." We cannot review this finding of fact. The defendant's other exceptions are based upon alleged erroneous findings of fact in respect to numerous and various items of charge. They involve no question of law.

The referee, it seems to us, has faithfully examined and passed upon the merits of an old and defective mortgage and numerous stale transactions incident to and growing out of it. As far as we can see, his conclusions are reasonable and just; he has done the parties substantial justice. If in any respect he has failed to do so, it is because of the *laches* of the parties themselves in allowing their mutual dealings, very indefinite and uncertain in their character, to remain unsettled and in a very confused condition for a long period of time.

What we have said disposes of both appeals.

Affirmed.

Cited: S. c., 106 N. C., 221; *Smith v. Hicks,* 108 N. C., 251; *McDaniel v. Scurlock,* 115 N. C., 298; *Warehouse Co. v. Ozment,* 132 N. C., 847; *Junge v. MacKnight,* 135 N. C., 113; *S. c.,* 137 N. C., 286; *Cuthbertson v. Morgan,* 149 N. C., 78; *Rogers v. Lumber Co.,* 154 N. C., 109; *Dunn v. Patrick,* 156 N. C., 250; *S. v. Bailey,* 162 N. C., 585; *Hardware Co. v. Lewis,* 173 N. C., 300.

(566)

THE STATE EX REL. W. W. TURNER and J. M. TURNER, ADMINISTRATOR *of* HENRY TURNER v. BENJ. TURNER ET AL.

Evidence—Burden of Proof—Settlement—Guardian—Administration—Judge's Charge.

1. The *ex parte* settlement made by guardians, executors and administrators with the courts having jurisdiction of such matters, are, when accepted by the court, *prima facie* correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking them to establish, by a preponderance of testimony, their incorrectness.

2. It is not erroneous for the judge to direct the attention of the jury to the contention of a party to the cause made in the argument of his counsel, founded upon a calculation of an account alleged to be due, when that fact grew out of the evidence introduced and was material to the controversy, especially when no objection was made to the argument.

APPEAL from *Merrimon, J.*, at August Term, 1889, of IREDELL.

(571) *D. M. Furches and W. D. Turner for plaintiffs.*
T. B. Bailey, W. M. Robbins, and M. L. McCorkle for defendants.

SHEPHERD, J. The question involved in this action is the correctness of the settlement made by J. M. Turner, guardian of M. D. Turner, with the removed guardian, Benjamin Turner. The former received from the latter the sum of $1,656.30 and executed to him a receipt for the same "in full of claims against him as former guardian of M. D. Turner as per settlement with the court." This settlement was made under the order of the county court, which had appointed two of its justices to make the same, and whose report was duly confirmed.

The court charged the jury "that the fact that the . . . settlement was accepted and confirmed by the Court of Pleas and Quarter Sessions, and ordered to be recorded, was a very strong presumption that it was correct." To this instruction the plaintiffs excepted—

1. Although such *ex parte* settlements are not binding upon creditors, next of kin, etc., they are recognized by the courts as *prima facie correct*, and the burden is on the attacking party to show them to be otherwise. Strict proof and the assignment of specific errors in such cases are not required, as in actions to surcharge and falsify "stated accounts," but there is a *legal* presumption in their favor until they are successfully assailed by a preponderance of testimony. This view is fully sustained by the cases of *Becton v. Becton*, 56 N. C., 423; *Temple v. Williams*, 91 N. C., 83; *Grant v. Hughes*, 94 N. C., 236.

These authorities say that there is a "*prima facie* presumption" in favor of the correctness of such settlements. By this we understand that the law presumes that they are correct until the contrary is shown. Such is the meaning of *prima facie* evidence, which "is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced." (572) *Emmons v. Bank,* 97 Mass., 243.

"It is that which suffices for the proof of a particular fact until contradicted or overcome by other evidence." Thus, if *ex parte* accounts are filed under sections 1399, 1402, 1617 of the Code, they are to be taken, *as a matter of law,* to be correct until shown to be erroneous.

Now, if we apply this rule to the charge of his Honor, it is apparent that if he erred at all it was in favor of the appellant, for had the jury disbelieved the impeaching testimony, or if none whatever had been introduced, they would, under the instruction given, have been at liberty to have found against the settlement; whereas, as a matter of law, they could not have so found under such circumstances. In other words, the court charged, in effect, that there was a presumption of *fact,* when it should have charged that as a matter of *law* the settlement was *prima facie* correct, and should stand unless shown to be otherwise.

It will be observed that his Honor very properly held that only a preponderance of testimony was sufficient, which is the same degree of proof that is required in ordinary suits for account and settlement against executors, administrators, guardians, etc. We are therefore of the opinion that the exception is untenable.

2. Neither do we see any error in his Honor's telling the jury that they might consider the result of the calculation mentioned by him. This argument was made to the jury without objection, and did not at that time seem to be obnoxious to the plaintiffs.

It appears that in an action brought by the ward against the bond of J. M. Turner it was adjudged that the ward should recover the sum of $3,500. The plaintiffs contended that the difference between this amount and the $1,656.30 received by J. M. Turner covered the errors made in the settlement, and for which the said J. M. Turner was held liable for not collecting. (573)

In support of the alleged errors the plaintiffs relied almost entirely upon the testimony of the former guardian, who admitted his unfaithfulness to his trust. The defendants had a right to argue his credibility to the jury, and to call their attention to any circumstance which sustained even slightly the correctness of the settlement. The fact that the $1,656.30, and compound interest thereon, amounted to about the sum of $3,500 when the judgment was taken for the latter amount was not, from what appears in this record, irrelevant to the inquiry.

3. As to the alleged error in charging the ward with board and clothing, it is sufficient to say that no such question seems to have been raised before his Honor, and no error in this respect is assigned. *Dorsey v. Moore,* 100 N. C., 41, and *McKinnon v. Morrison, ante,* 354. This may also be said of the first point which we have considered, but as there was an implied admission on the argument that the question was raised below, we have thought proper to pass upon it.

Affirmed.

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(574)

GEORGE H. NISSEN v. JOHN T. CRAMER.

Libel—Slander—Privileged Declarations—Malice—Evidence—Burden of Proof.

1. The principle which absolutely exempts witnesses, counsel and a party who conducts his cause in person, from liability in actions for libel and slander, for whatever they may say, in the course of a judicial proceeding relevant or pertinent to the matter before the court, will protect a party who, at the time of the alleged slanderous utterances is represented by counsel, and embraces, also, an agent who represents his principal in the proceeding.

2. A person who files a sworn information before a judicial officer, charging another with having committed a crime, is also absolutely protected as to all relevant statements in his affidavit, but where he lodges his charge verbally, with an expressed purpose, never executed, or filing a formal information, he is presumptively protected, and the burden is on one suing him for slander to establish actual malice.

WHILE an action between Geo. H. Nissen (the plaintiff in this action) and the Genesee Gold Mining Company was being tried before the Hon. J. H. Dillard, as a referee, under an order of the Superior Court of Davidson, the plaintiff therein during his examination as a witness testified that John T. Cramer, the agent of the Genesee Gold Mining Company, "wanted me to give him $500 for giving me the contract," referring to a disputed item of $500, which was a material issue in the case. Cramer was present, acting as the agent of the Genesee Gold Mining Company and assisting its counsel in the management of the defense. When the plaintiff made the declaration set forth above Cramer, in an audible voice, easily heard throughout the apartment by a number of persons therein, said, "That's a lie."

(575) The plaintiff thereupon brought this action, alleging that the defendant intended, and did thereby falsely and maliciously charge him with the crime of perjury.

The defendant admitted the speaking of the words, but said they were uttered in a low tone, were not addressed to any one, and were not spoken with intent to injure plaintiff or charge him with perjury.

On the trial the plaintiff offered testimony tending to show malice on the part of the defendant, and among other matters, with that view, proposed to introduce a letter written by defendant to Messrs. Talbot & Sons, of Richmond, Va., in which he spoke of the plaintiff's purpose to "beat" and swindle his principal, the Genesee Gold Mining Company.

The court excluded the letter on the ground of its immateriality.

To the charge of his Honor, which is set out in the opinion of court, the plaintiff excepted.

Verdict and judgment for defendant. Plaintiff appealed.

L. M. Scott and W. S. Ball for plaintiff.
M. H. Pinnix and F. C. Robbins for defendant.

AVERY, J. The plaintiff's exceptions raise the question whether the defendant, representing a corporation as agent at a trial before a referee, is protected in saying of the testimony of plaintiff, who had been examined as a witness, "That's a lie," when counsel was present, also appearing for the corporation, and whether under the admitted circumstances the privilege, if it existed at all, was absolutely or only *prima facie* a protection, for if there was only a presumption of good faith the plaintiff might rebut it by showing the existence of actual malice when the language was used.

Chief-Justice Ruffin, in *Briggs v. Byrd,* 34 N. C., 380, says that (576) the phrase "privileged communication" means words "uttered in a legal proceeding, or on some other occasion of apparent duty, which *prima facie* imports that the party was actuated by a sense of duty and not by malice, which is generally to be implied from speaking words imputing a crime to another."

It was conceded on the argument, and at all events it is settled law, that one who appears in person on his own behalf, or on behalf of another, or counsel representing a party on the trial of an action, may say in the progress of the trial anything in reference to the character or conduct of the opposing party or witnesses that is relevant and pertinent to the question or issue before the court or jury, without incurring any liability whatever in an action for slander predicated upon the language used. The occasion gives absolute protection if the utterances are not irrelevant. *S. v. Leigh,* 14 N. C., 127; *Shelfer v. Gooding,* 47 N. C., 175; Townsend on S. & L., sec. 224; *Ring v. Wheeler,* 7 Cowen, 731; *Jennings v. Power,* 4 Wis., 372; *Lester v. Thurman,* 51 Ga., 118.

The inference of malice is not drawn, as a matter of law, when irrelevant words are written or spoken by parties or counsel in the due course of judicial proceedings, and such words "are not actionable unless it affirmatively appear that they were malicious and without reasonable or probable cause." *Lawson v. Hicks,* 38 Ala., 279.

In *Briggs v. Byrd, supra,* this Court held that there was a presumption of good faith in favor of one who made a verbal charge of larceny to a justice of the peace against another, with the expressed purpose, not afterwards carried out, of filing a formal affidavit embodying the charge, and that in an action for slander, founded upon the statement to the justice, the plaintiff must prove the existence of malice when the words were uttered. On the other hand, it is a well established rule
(577) that when one actually lodges information before a judicial officer that he is informed that another has committed a felony or infamous offense, the informer is absolutely protected against an action for slander based upon his affidavit, and a person claiming to have sustained injury has no remedy unless the facts will enable him to maintain an action for malicious prosecution. *Holmes v. Johnson,* 144 N. C., 44; *Flint v. Pike,* 10 Cow., 380; *Hastings v. Lash,* 22 Wend., 310. Both parties and witnesses are protected in civil tribunals against accountability in actions for slander for anything contained in the pleadings, affidavits or depositions filed in the record, or testimony given on the trial, that are pertinent to the questions or issues arising in the action. Townsend on S. & L., secs. 221 to 224; *Lea v. White,* 4 Sneed, 111.

It follows from the principles that we have stated that if the defendant had the same privileges when his counsel were present with him before the referee, that the law accorded to him when appearing in his own behalf, no action would be maintained against him for the language used in reference to the plaintiff. In the case of *Badgely v. Hidges,* 1 Penn. (N. J.), 233, the court said (when the very same words were uttered of a plaintiff, who had just testified, by a defendant conducting his own defense): "This judgment cannot be sustained. It is abundantly evident from the record that the words spoken in these first counts were spoken in a court of law, in the progress of a trial, and in the course of justice; that the language *was uncivil and merited the censure* of the justice before whom the testimony was given is very clear, but it is not actionable. Nothing is more common than for a *party to say in his defense that the evidence given against him is not true, and that he can prove it.*" This case, decided over eighty years ago, has been cited and recognized as authority since the opinion was rendered.
(578) Townsend on S. & L., sec. 224. There can be no doubt that as acknowledged agent of a defendant corporation he enjoyed all the privileges of an actual party. This Court held that a master, not an

attorney, had a right to appear for his slave, and insist that what a complainant had sworn in reference to the slave was false, and that an action could not be maintained against him for slander in charging that the testimony was false. *S. v. Leigh,* 20 N. C., 126.

In *Shelfer v. Gooding, supra, Judge Battle* states the principle deduced from an examination of the whole line of authorities as follows: "However it may be held with respect to the responsibility of *counsel* or *a party* uttering words against the character of a witness or the opposite party in the course of a trial, not relevant to the cause, we think that we have shown by abundant authority that *a counsel or party is entirely protected against an* action for slander for *whatever he may choose to say relevant or pertinent to the matter before the court, and that no inquiries into his motives will be permitted."* See, also, Bigelow on Torts, 161.

Mr. Townsend (in his work on "Slander and Libel," sec. 224) says: "A party in a proceeding in a court of justice may ordinarily conduct the prosecution or defense *in person or by counsel or attorney;* in either case, whatever a party may reasonably believe necessary to successfully maintain his suit or his defense he may speak in the course of the proceedings without being subject to an action for slander."

We fail to find any authority for limiting the privilege of a party to those cases in which he conducts the trial on his own behalf. Therefore, we must look to the reasons for first shielding parties and counsel from liability in order to determine whether a party present, but represented also by counsel, should enjoy the benefit of the rule, because his situation brings him within the reason for establishing it. As we have seen, this Court, in *Briggs v. Byrd,* extends the protection to every one placed by a legal proceeding or otherwise in such relation, per- (579) sonal or official, to a cause as to make it a duty to say something defamatory of a party or witness. Bigelow on Torts, 162. The defendant was, as is admitted, the general manager as well as the agent of the Genesee Gold Mining Company, and was present, advising the counsel of the company in the trial before the referee, and when the plaintiff Nissen testified that Cramer wished him (Nissen) to give him (Cramer) $500 for awarding Nissen a certain contract, then it was that Cramer, in an audible tone, uttered the words charged. If the testimony of Nissen was material (and the defense that it was irrelevant was not, as it seems, insisted on) then the apparent motive of Cramer was to protect the company he represented by contradicting it, and he is no more liable to answer in damages in this action than one of his counsel would have been had he uttered the words imputed to Cramer at that time. Though the courts as a rule refuse to hear parties on their own behalf when they are represented by counsel, any court has a right, in

the exercise of a sound discretion, to do so. As in the case of *Badgely v. Hidges, supra,* the defendant doubtless merited censure for using such language from the learned jurist who was acting as referee, but if he permitted both the counsel and the manager, who was for the purpose of the trial, the company, to speak, it is not the province of this Court to say that the party permitted, or not prevented, or punished for speaking on his own behalf, shall not be protected, at least against any presumption of intentional or malicious slander in the use of the pertinent words spoken.

The best considered opinions of the highest courts in this country concur in, according to parties and their counsel, this absolute privilege of total immunity from liability for words pertinent to the issue and spoken in the course of a judicial investigation or trial, in part at least,

because of the excitement naturally incident to the proceedings,
(580) and the supposed power of the presiding officer to restrain abuse,

as well as for the important purpose of leaving counsel free and unfettered in discharging their duty to clients. *Judge Cooley* (in his work on Torts, p. 212) cites with approval the language of *Chief Justice Shaw* on this subject, which is as follows: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable themselves, are not actionable if they are applicable and pertinent to the subject of the inquiry. And in determining what is pertinent much latitude must be allowed to the judgment and discretion of those who are entrusted with the conduct of a cause in court *and a much larger allowance made for the ardent and excited feelings with which a party or counsel, who naturally and almost necessarily, with his client, becomes animated by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved.* And if these feelings sometimes manifest themselves in invective and exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that *this is said to a judge who hears both sides.* . . . Still this privilege must be restrained by some limit, and we consider that limit to be this, that a *party or counsel* shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third party which have no relation to the cause or subject-matter of the inquiry." *Hoar v. Hood,* 3 Met., 193; *Lawson v. Hicks, supra.* The same reason exists for making some allowance for the excitement incident to the occasion whether defendant Cramer was appearing in proper person or by attorney for the corporation, especially when we consider that the answer of the witness Nissen contained a charge (in making

which he was protected by absolute privilege from an action) that (581) this defendant Cramer had attempted dishonestly to provide a bonus for himself while acting as the agent of another.

His Honor instructed the jury as follows: "The plaintiff alleges in his complaint that the Genesee Gold Mining Company was present and represented by counsel and its agent, and admits that the agent present was the defendant Cramer. If the defendant was representing the Genesee Gold Mining Company in the plaintiff's action against it, he had the right to contradict what the plaintiff swore, and to say it was a lie, and would not be liable to an action of slander unless he took advantage of and used the occasion to speak the words maliciously; but the plaintiff must prove that the defendant spoke the words maliciously, and such proof must show malice at the time the words were spoken, and that under the circumstances surrounding their utterance the law would not presume malice from the use of the words themselves."

If, as we believe, the defendant company or its agent, when permitted by the court to speak in the course of a trial or judicial proceeding, was protected, as the counsel would have been, against all inquiries into his motives in uttering any words that were relevant and pertinent, however defamatory of a witness offered for the opposing party, there is certainly no ground for complaint on the part of the plaintiff when the court allowed him the opportunity to show, if he could, that the language which was pertinent was in fact used to gratify malice which the defendant at the time entertained towards the plaintiff.

We think that there was no error in the refusal to admit the letter offered. It was not relevant as evidence of the utterance of the defamatory language alleged to have been used, nor admissible as tending to show malice.

Affirmed.

Cited: Gudger v. Penland, 108 N. C., 599, 600; *Cawfield v. R. R.,* 111 N. C., 599; *Gattis v. Kilgo,* 128 N. C., 409; *Perry v. Perry,* 153 N. C., 267; *Baggett v. Grady,* 154 N. C., 344, 345; *Thornberg v. Long,* 178 N. C., 591.

(582)

R. C. G. LOVE ET AL. v. JASPER MILLER ET AL.

Contract—Warranty—Waiver.

1. M. contracted to sell and deliver to L. a quantity of cotton in bales, "to be of the average grade of middling" or above—none to grade below "low middling." *Held*, that this constituted a warranty by the vendor that the cotton should be *in fact* of that quality, and not that it should be so according to any particular method of inspection.

2. The fact that the vendee had an opportunity to inspect the cotton, and did inspect some of it at the time it was delivered, did not, under the circumstances, and in view of the peculiar character of the article, amount to a waiver of the warranty.

ACTION, tried before *Clark, J.*, at Spring Term, 1889, of GASTON, to recover damages of the defendants for an alleged breach of contract in the sale of 100 bales of cotton to plaintiffs.

The plaintiff, R. C. G. Love, swore that his firm, doing business in Gastonia, N. C., had contracted to supply certain cotton mills with cotton; that the firm ordered 100 bales of cotton from the defendants, to be of the average grade of "middling" or above, and no part of the same to grade below "low middling and nice, good stains or tinges, and not more than one bale in four or five as low as that," to be delivered at Gastonia at 11½ cents per pound, instructing defendants at the same time to select fifty of the best bales and retain it until further orders, and to ship the other fifty at once to Gastonia; that soon thereafter defendants gave notice of the shipment of the fifty bales to Gastonia, whereupon plaintiffs ordered thirty-five of the selected fifty bales to be shipped directly to Carpenter Bros. at Maiden, in Lincoln County; that as soon as the fifty bales reached Gastonia he discovered that it was a very inferior lot of cotton, and wrote to defendants complaining of it,

(583) and requesting them not to ship them any more until the matter could be adjusted; and further asking one of the defendants to come to Gastonia and inspect the cotton with him and see if they could not adjust their differences; that plaintiffs had paid for the eighty-five bales at the contract price as soon as notified of its shipment; that soon thereafter Jasper Miller, one of the defendants, came to Gastonia, and upon inspection of the cotton, so far as the same could be done by drawing samples from the bales, took back five of them, and paid the plaintiffs for them, and also paid for some shortage in weight, assuring witness that the remaining fifty bales, thirty-five of which had been shipped to Carpenter Bros., were so far above the grade contracted for that they would bring the whole lot up to it, and that plaintiffs were induced by this assurance to accept the remaining forty-five bales; and

it was upon condition that the remaining fifty were to be as represented that the forty-five were accepted; that soon thereafter Carpenter Bros. returned to plaintiff nineteen of the bales shipped them on the ground that the cotton was so inferior that they could not work it in their mill; that plaintiffs then sold and delivered fourteen bales of the cotton to George Phifer and the remainder, except two bales, to Wilson & Rankin; that the cotton sold to Phifer was so inferior witness was compelled to settle with him at 7½ cents per pound, and that he was also compelled to make large concessions to Wilson & Rankin.

Plaintiffs then offered other witnesses—cotton mill owners and superintendents—who swore that the cotton was below any grade they knew anything about; that some of it could not be worked at all, while that which could be used could only be so used when mixed with other and better grades, and that a sample of the cotton drawn from the bale in the usual way was not a fair specimen of the inside of the bale, and that its true character could only be discovered by opening the bale.

The defendant, Jasper Miller, swore that when he went to (584) Gastonia to settle the matter in dispute about the first shipment, the taking back of the five bales by him and the payment therefor to plaintiffs, and the payment for the shortage in weight, was a complete settlement of all matters of difference with regard to said fifty bales, and that he did not promise that the fifty bales yet to be delivered should be so far above the contract grade that it would bring the whole lot up to the contract grade; that plaintiffs never saw the cotton itself, nor any samples thereof, until it was delivered. He then offered a book kept by him, showing the grade, date of purchase and from whom purchased, etc., of every bale of cotton bought by his firm, and swore that the cotton delivered to plaintiffs sampled up to the contract.

The defendants offered other witnesses, who supported Jasper Miller in his testimony as to the quality of the cotton sold.

It was also in evidence that it was the custom in the cotton trade that where a bale was sold upon inspection of the outsides, or by sample, and it turned out to be "plated," the seller should make good the difference in value.

Defendants asked the court to charge:

"1. That as a general rule no warranty of the quality of a chattel is implied from the mere fact of sale. The rule in this State is *caveat emptor,* by which is meant that when the buyer has required no warranty he takes the risk of quality upon himself."

This instruction was refused, and his Honor charged instead, "that if a person agrees to purchase articles to be delivered by a certain time, and which are promised to be of a certain good quality, and after payment for the same, and after it is too late to return them without preju-

dice to himself, he finds out they are of inferior quality, he may sustain an action to recover damages on account of the inferior quality of the articles, although he has taken and used them. And further, (585) where a vendor represents an article as possessing a value which, upon proof, it does not possess, he is liable as on a warranty, expressed or implied, although he may not have known such information to be false, if such representation was intended not as a mere expression of opinion, but the positive assertion of a fact, upon which the purchaser acts. And this is a question for the jury."

"2. That so far as an ascertained specific chattel already existing and which the buyer has inspected is concerned, the rule *caveat emptor* admits of no exception by implied warranty of quality."

"3. That where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent and not discernible on examination, at least where the seller is neither the grower nor the manufacturer. If, therefore, the jury believe that the plaintiffs inspected the fifty bales of cotton constituting the first shipment, and after such inspection and examination accepted the same, he cannot in this action recover of the defendants damages because of any unknown or latent defects which may have been afterwards discovered in said cotton, but which at the time were not known by the seller and not discovered by the buyer. That without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects, and a contrary rule is nowhere laid down."

His Honor said that "if the jury believed the agreement of the plaintiffs was to take the lot for better or for worse then instruction two would be true; but if it was a conditional acceptance, and the condition was not complied with by defendants, it would not be true." As to three, his Honor refused to charge this, but charged instead that "when cotton is baled and the defects not discernible from the outside, the seller would still be liable for latent defects, notwithstanding an ex- (586) amination by the buyer, unless the contract was that the buyer was to take the cotton for better or for worse."

"4. That in the sale of chattels by description it is a condition precedent to the seller's right of action that the thing which he offers to deliver or has delivered should answer the description. In applying this rule to the sale of cotton by a particular description under the 'American Standard Classification,' by which it is admitted that the contract in question is to be governed, it is only necessary that the goods, by sample, be up to the terms of the contract. The seller is not in such case responsible for latent defects in respect to which the rule *caveat emptor* applies."

This his Honor refused, stating that the bargain in this case was to have cotton of a certain grade, and not merely samples.

From the refusal of his Honor to charge as requested, and from the charge as given, the defendants excepted.

There was a verdict and judgment thereon for the plaintiffs. Appeal by defendants.

G. F. Bason and C. W. Tillett for plaintiffs.
R. W. Sandifer for defendant.

SHEPHERD, J. This appeal presents for our consideration the following questions:

1. Was there a warranty as to the quality of the cotton?

The defendants contracted to sell and deliver to the plaintiffs' order one hundred bales of cotton, "to be of the average grade of middling and nice, good stains or tinges, and not more than one bale in four to be as low as that."

That this is a warranty is well settled by the case of *Lewis v. Rountree,* 78 N. C., 323, in which the following language of *Miller, J.,* in *Jones v. Just,* L. R., 3 Q. B., 197, was approved: "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they (587) shall reasonably answer such description, and if they do not it is unnecessary to put any other question to the jury." "It is not meant," says the Court, "that words of description are always a warranty. But the cases in which that is held have something special to take them out of the rule and to show that in those cases it was not so intended." There are no such exceptional circumstances in this case, and we have no hesitation in declaring that there was a warranty that the cotton should be of the quality described by the terms of sale.

2. Did the warranty extend to latent defects, or was it only to the effect that the cotton was to be of a certain grade by the usual mode of inspection?

In *Lewis v. Rountree, supra,* the contract was for the sale of "strained rosin," and the purchaser was permitted to make his selection of 517 barrels out of a lot containing more than two thousand. He had implements with which to cut in and inspect the barrels, and he did inspect and select about twenty samples. After sale and shipment it was found, upon inspection in New York, that the lot did not correspond with the samples and that all of it was not *strained* rosin. The court said the fact "that plaintiffs had an opportunity to inspect the rosin before or when it was delivered, and did in fact select the particular barrels out of a large number, *did not amount to a waiver* of the warranty that it

should be of the specific description. This is reasonable. It is almost impossible, or at least very difficult, to tell from any inspection of a barrel of rosin, short of breaking it up into fragments, whether it contains dross, that is, chips, dust, etc., or not. And to break it up makes it unfit for transportation and unmarketable." These remarks are applicable to the examination of cotton when baled, and this view is sustained by the testimony of the witness Phifer, who said "that a sample of the cotton drawn from the bale in the usual way was not a fair
(588) specimen of the inside of the bale, and that its true character could only be discovered by opening the bale."

Our case is even stronger than the one we have cited, as here the plaintiff had no opportunity to inspect the cotton until after the delivery. The warranty was not that the cotton should be of good middling grade according to any particular method of inspection, but that it was *in fact* to be of that quality. The principles declared in *Rountree's case* are fully sustained by a recent decision—*Miller v. Moore,* 83 Geo., 684. The action was for a breach of warranty in the sale of several carloads of corn. *Bleckly, C. J.,* says: "The descriptive words by which the sale was made were 'No. 2 white mixed corn, bulk.' These words comprehend quality as well as variety, and import a warranty on the part of the seller as to both. Corbin's note 24 to Benj. Sales, 844; *Gould v. Stein* (Mass.), 22 N. E., 47; *Whitaker v. McCormick,* 6 Mo. App., 114; *Woolcott v. Mount,* 36 N. J. Law, 496; *Bridge v. Wayne,* 1 Starkie, 504. Nor will inspection by the buyer before acceptance deprive him of the protection of the warranty as to latent defects."

3. The remaining question as to the waiver of the breach of warranty by not offering to return the cotton is also settled by the case first mentioned.

We are unable upon a perusal of the record to find any error.

Affirmed.

Cited: Alpha Mills v. Engine Co., 116 N. C., 802; *Ferrell v. Hales,* 119 N. C., 213; *Finch v. Gregg,* 126 N. C., 177; *Reiger v. Worth,* 130 N. C., 269; *Woodridge v. Brown,* 149 N. C., 304; *Swift v. Meekins,* 179 N. C., 175.

(589)

WALTER BREM, TRUSTEE, v. JOHN W. COVINGTON.

Assignment—Contract—Agency—Evidence—Consideration—Interest—Parties—Pleading.

C. being indebted to A, for a balance due on account of cotton sold on commissions, the latter, in writing, directed him to "give B. any money due us and let him receipt you for the same." B. presented the order when C. at first promised to pay, but afterwards refused, alleging that he had paid it in full. *Held*—

1. The fact that the payment by C. to B. would have relieved him of his liability to A. constituted a sufficient consideration to support an action upon his promise to pay.

2. That the order was, in effect, an equitable assignment of the balance due A., and could not be revoked by him without B.'s consent.

3. That, after notice, C. could not discharge his liability to B. by payment to A.

4. It was not necessary that C. should "accept" the order; and parol evidence that it was, in fact, an assignment of the debt was competent.

5. That interest should be computed on such balance from the day the order was presented.

6. That the fact the plaintiff sued as trustee when the sum was due him, individually, would not prevent his recovery.

ACTION, tried at February Term, 1889, of MECKLENBURG, *Clark, J.*, presiding.

The defendant received, in the fall of 1883, from J. T. Allred & Co. considerable quantities of cotton to sell in the market, as their agent, and account for the proceeds, less certain sums of money to be due to him. The account thus raised was unsettled, and a balance being due to Allred & Co. they gave the present plaintiff an order for such balance, whereof the following is a copy:

"Please allow Mr. Brem to see a statement of our account in full, and give him any money due us, and let him receipt you for the same."

The plaintiff alleges that he presented this order to the defendant on or about 9 February, 1884, and the latter promised to pay (590) him such balance as might be found on an examination of his books to be due to the makers of the order, but that he afterwards refused to pay. This action is brought to recover such balance, for an account to that end, etc.

The defendant denies that he so promised, and alleges that he paid all sums due to his principals, etc.

On the trial the plaintiff testified, in his own behalf, that on 9 February, 1884, he was trustee under a deed of trust made to him by J. T.

Allred & Co. to secure certain creditors in said deed of trust mentioned; that witness himself was not of the creditors named in said deed; that one of the debts secured by the trust was due to Brem & McDowell, and that the "Brem" of said concern was the wife of witness; that the money or property in the hands of defendant was not part of the property conveyed in the deed of trust; that said deed was made before any of the cotton was received by defendant from Allred & Co.; that on the said 9 February, 1884, witness, as trustee in said deed of trust, went to the place of business of J. T. Allred & Co. and received from them the above-mentioned order, with the understanding that any money received by him thereon was to be credited on the debts secured by the trust deed; that witness presented this order to defendant on the day it was signed, viz., on said 9 February, 1884, and defendant then told witness he would pay him any money that might be due Allred & Co. as soon as he could write up his books and get returns from a lot of cotton received from them which he had shipped to Wilmington; that defendant did not then show his books or accounts to witness, or make any statement thereof, but that some time afterwards witness met defendant in Charlotte

(591) and demanded the money due him on the order, when defendant told him he had paid it all over to Allred & Co.

On cross-examination witness said that he did not tell the defendant in what capacity he held the order, nor why it was given to him, nor whom witness represented.

On redirect examination the plaintiff's counsel asked the question, "In what capacity did you present the order to defendant?"

This question was objected to by defendant. Objection overruled, and defendant excepted; and witness answered that he presented the paper as trustee but did not tell the defendant so, nor how he held the paper.

Defendant was offered as a witness in his own behalf, and was asked by his counsel the question, "What occurred between yourself and Allred & Co. after the plaintiff came to you with the paper or order?"

This evidence was offered with the view of showing that afterwards Allred & Co. revoked the order, and that the defendant thereupon paid the money in his hands to Allred & Co.

The question was objected to by plaintiff. The court held that there was no evidence tending to show that Brem was agent for Allred & Co., and in the absence of such proof the evidence offered was irrelevant, and it was thereupon excluded. Defendant excepted.

The defendant requested his Honor to charge the jury:

1. If the jury believe the evidence there was no consideration for the promise or undertaking of the defendant to pay to the plaintiff the amount due by defendant to Allred & Co., and the jury should respond to the first issue "No"; that is, in favor of defendant.

2. That an acceptance of the order was necessary to create any liability on the part of defendant.

3. That as plaintiff sues as trustee, and the order was given to him individually, and any promise made to plaintiff was made to him individually, there is a material variance between the allegations and the proofs, and the plaintiff cannot recover, and the jury should (592) find the issue in favor of the defendant.

These prayers for instruction were refused, and the defendant excepted.

His Honor charged the jury: "That if on 9 February, 1884, the plaintiff presented the order to the defendant, and the defendant promised to pay the same when his books were posted and he had received returns from the cotton sent to Wilmington, the plaintiff would be entitled to recover the sum of $347.22, less any sum the defendant had paid to Allred & Co. before notice of the order. It is not necessary in order to recover that the plaintiff should show that defendant accepted the order, as it was an equitable assignment of the funds in his hands belonging to Allred & Co., and if defendant paid any money to them after notice of the order he would still be liable to the plaintiff. The order being an equitable assignment, it can make no difference that Allred & Co. afterwards attempted to revoke it, and the defendant paid the money to them, provided he had notice of the order on 9 February, 1884, as testified by Brem. The jury will allow interest on such sum as they may find to have been in defendant's hands on the day the order was presented, after allowing credit for any sum paid to Allred & Co. before that time."

Defendant excepted to his Honor's rulings and the charge.

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

G. F. Bason for plaintiff.
Platt D. Walker for defendant.

MERRIMON, C. J., after stating the case: The evidence objected (593) to and embraced by the first exception was scarcely material or important, but if it could have become so it was harmless, because the witness said no more than he had already said in substance—that he did not tell the defendant in what capacity he presented the order, although, in fact, he presented it as trustee.

The second exception to evidence is groundless, and for the reason stated by the court below. There was no evidence to show that the plaintiff was agent of the makers of the order, or that they had power or authority arising in any way to revoke the same.

The court properly declined to give the jury the special instruction asked for by the defendant. If that had been material there was a consideration to support the promise of the defendant to act upon the order and pay the balance referred to in it to the plaintiff, in that the order, in effecting the assignment of the balance, relieved him from further liability to the makers of the order, whose agent he was, as to any balance due from him to them. Nor was it necessary that the defendant should accept the order. It was an informal instrument, and was some evidence of an assignment of the balance mentioned therein in the hands of the defendant to the plaintiff. The order does not purport on its face to embrace or embody the whole contract of assignment of the balance of the money referred to in it to the plaintiff (it only embraces so much as affected the defendant), and it was competent to give oral evidence as to the assignment, in the absence of written evidence.

On looking to the complaint we find that the allegations of the cause of action are comprehensive, and they do not confine the plaintiff to a recovery upon the order merely; he sues to recover the balance mentioned by virtue of an assignment thereof. That he may maintain such (594) an action under the present method of civil procedure is well settled. *Ponton v. Griffin,* 72 N. C., 362; *Willis v. White,* 73 N. C., 484; *Moore v. Nowell,* 94 N. C., 265. And for the reason just stated the plaintiff might show that the assignment was made to him as trustee, and the purpose of the trust, if need be.

Obviously, if the balance mentioned in the order was assigned to the plaintiff, and the defendant had notice of such assignment, he could not pay it or any part of it to the makers of the order, because the indebtedness belonged to the plaintiff, and he alone had the right to accept money or aught else in discharge of it.

The instruction of the court to the jury in respect to interest was substantially correct. The debt was due when the plaintiff presented the order to the defendant. It directed that payment be then made. As this was not then done the defendant was at once chargeable with interest. Code, sec. 530; *Devereux v. Burgwin,* 33 N. C., 490; *Farmer v. Williard,* 75 N. C., 401; *Patapsco v. Magee,* 86 N. C., 350; *Jolly v. Bryan, ib.,* 457, and *McRae v. Malloy,* 87 N. C., 196.

Affirmed.

Cited: Sugg v. Farrar, 107 N. C., 127; *Hawes v. Blackwell, ib.,* 201; *Howell v. Mfg. Co.,* 116 N. C., 813; *Godwin v. Bank,* 145 N. C., 328; *Craig v. Stewart,* 163 N. C., 533.

(595)

C. C. DURHAM v. C. C. WILSON.

Homestead—Execution Sale—Vendor and Vendee—Purchase Money—Jurisdiction—Presumption—Res Judicata—Practice Before Justice of the Peace—Trial by Jury—Waiver.

1. The fact that the debt embraced in a judgment was contracted for the purchase of the land sold by virtue of an execution issued thereon may be proved by parol.
2. If the judgment of the court recites the fact that the debt was contracted for the purchase of land (as provided in sec. 234 *et seq.*, Code), such recital is conclusive as between the parties to the record.
3. And where that fact is recited in a judgment rendered by a justice of the peace, though the pleadings may have been oral, it is likewise conclusive —the presumption, in the absence of anything to the contrary appearing, being that the judgment was rendered after a trial in which the recited fact was duly established.
4. Although the statute (Code, sec. 234) gives the defendant a right to have the issue, whether the debt sued on was contracted for the purchase of land, tried by a jury, if he so demands, yet, if after being duly summoned, he fails to appear and answer, he waives that right.
5. When such issue is made, it does not raise such a controversy involving title to real estate as divests the jurisdiction of a justice of the peace.
6. A sale of land under execution issued upon a judgment rendered for a debt contracted for the purchase money thereof, is valid without a previous allotment of a homestead.

ACTION, tried at Spring Term, 1889, of CLEVELAND, before *Clark, J.*

The action was brought in the usual form to recover land, alleging title in the plaintiff and wrongful withholding of possession on the part of the defendant. The defendant denied that the plaintiff was owner, but admitted possession (claimed to be rightful) in himself.

There were other allegations of the complaint, some of which (596) are admitted, and others denied, in the answer. Two issues, the first involving the question of ownership on the part of plaintiff of the land in controversy, and the second the wrongful withholding of possession by the defendant, were framed for the jury.

From the admissions in the pleadings and the evidence the following facts appeared to be undisputed:

On 3 October, 1885, the plaintiff sold and conveyed to the defendant by an absolute deed in fee simple the land in controversy, and the defendant executed two notes, each for the sum of $100, payable to the plaintiff, which as plaintiff now alleges (and defendant denies) were given for the purchase money of the land in controversy.

On 14 January, 1888, the plaintiff recovered judgment on each of said notes. The judgment on one note was for the sum of $108, with interest at eight per cent on $100 from 14 January, 1888, till paid. In

the other case judgment was recovered for $118, with interest on $100 till paid. Each of said judgments embodied the following language: "This judgment is upon a note given as a part of the purchase money for thirty-two acres of land in Township No. 6, Cleveland County, adjoining the lands of John Justice, being the place whereon C. C. Wilson now lives, and known as the A. A. Wilson place, it being the land deeded C. C. Wilson by C. C. Durham, 3 October, 1885." The pleadings in the court of the justice of the peace were oral in both cases.

On the same day (14 January, 1888) transcripts of both judgments were certified to the Superior Court of Cleveland County and duly docketed. On 26 January, 1888, execution was issued on each of said judgments by the clerk of said Superior Court, reciting in each
(597) execution the language of the judgments as set forth above in reference to the consideration of the notes, and commanding the sheriff, if sufficient personal property could not be found, to sell the land, etc. The sheriff, for want of sufficient personal property, duly levied upon the land in controversy, being the same described in the said judgments and in the execution issued thereon, and sold said land on 5 March, 1888, when the plaintiff became purchaser, and the sheriff executed to the plaintiff the deed bearing date 5 March, 1888, which is put in evidence, reciting the judgments, execution, etc., and conveying the land in controversy to the plaintiff.

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

W. A. Hoke and R. McBrayer for plaintiff.
B. F. Wood for defendant.

AVERY, J., after stating the facts: When a grantor recovers judgment against his grantee on a note given for the purchase money of land previously conveyed to the latter, and purchases the land at sheriff's sale under execution issued thereon, it is competent for the former, on the trial of an action brought against the grantee for possession, to prove by parol testimony that the note was given for the purchase money of the land in controversy, in order to show that such sale was valid, though made without a previous allotment of homestead. Constitution, Art. X, sec. 2; *Durham v. Bostick,* 72 N. C., 353; *Toms v. Fite,* 93 N. C., 274; *Dail v. Sugg,* 85 N. C., 104.

Where a judgment is rendered in a court of competent jurisdiction for purchase money of land in pursuance of sections 234, 235, and 236 of the Code, it is conclusive between the parties as to the consideration of the debt on which the recovery was had. *Toms v. Fite, supra.*

But the defendant contends that these sections do not apply to
(598) actions brought before a justice of the peace. Section 234 pro-

vides that "In an action for the recovery of a debt contracted for the purchase of land it shall be the duty of the plaintiff to set forth in his complaint that the consideration of the debt sued on was the purchase money of certain land, describing said land in an intelligible manner, such as the number of acres, how bounded and where situated." In the next section it is enacted that when the defendant "shall deny that the obligation sued on" was incurred "for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury." The Constitution, Art. IV, sec. 27 (after giving the justices of the peace original jurisdiction of "civil actions, founded on contracts, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy) provides that when an issue of fact shall be joined before a justice of the peace on demand of either party thereto he shall cause a jury of six to be summoned who shall try the same; and, further, that the losing party shall in all cases have the right of appeal." If a defendant, after having been duly summoned, fails to appear and answer before a justice of the peace he thereby waives and loses the right to demand a trial by jury, given by the Constitution and the Code, sec. 285. When the justice calls the case for trial, and finds that the plaintiff has not filed a verified complaint, he cannot force him in the absence of the defendant to incur the expense of summoning a jury, but in the most unfavorable view, can only refuse to enter judgment by default, and compel him to make good his allegations, either oral or written, as to the existence and character of the debt, by sufficient testimony to satisfy the justice sitting as a court and jury. Code, secs. 857, 385 (1), 389, and 840, Rules II and VI. We must assume, in the absence of any evidence in the transcript to the contrary, that the judgment was (599) rendered after hearing testimony tending to prove that the notes were still due, and were executed in consideration of the purchase of the land described in the judgment.

The issue of fact, when raised by the allegation made by the plaintiff and denied on the part of the defendant, that a note was given for the purchase money of the land, is not one involving any controversy as to the title to real estate, and the Legislature had the power therefore to provide for trying it before a justice of the peace, and it was in fact obligatory to do so where the amount demanded does not exceed two hundred dollars.

The appellant did not assign error in the manner pointed out by the rule of this Court, but by giving the construction most favorable to his own statement of the case on appeal, we have allowed him the benefit of an exception to the holding of the court below, that upon the admitted facts the plaintiff was entitled to recover, and especially that it could

not go behind the judgment to inquire into the consideration of the debts upon which the judgments were founded.

Affirmed.

Cited: Buie v. Scott, 112 N. C., 376; *Everett v. Newton,* 118 N. C., 925; *Davis v. Evans,* 142 N. C., 465.

(600)

D. L. AND J. T. LOVE, EXECUTORS OF JOHN LOVE v. JOHN INGRAM, EXECUTOR *of* DILLARD LOVE.

Administration—Statute of Limitations—Pleading.

1. To enable the personal representative of a deceased person to avail himself of the limitations provided in the Code, sec. 153 (2), he must *allege* in his plea, and *prove* upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute.
2. The mere lapse of time—seven years—does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator.

CREDITORS' bill, tried by *McRae, J.,* at Spring Term, 1888, of MACON.

It was agreed that the judge might try the issue of the statute of limitations, it being the only issue of fact for a jury arising upon the pleadings.

It appears that Dillard Love died in July, 1872, leaving a last will and testament which was proven, and the defendant qualified as executor thereof.

The plaintiffs obtained judgment against the defendant as such executor, upon a debt due from his testator in his lifetime, in the Superior Court of the county of Haywood, for $362.39, on 29 May, 1876.

The present action was begun on 8 June, 1883, by the plaintiffs, in behalf of themselves and all other creditors of the testator named, to compel the defendant as such executor to an account of his administration, and to pay the plaintiffs and all other creditors of his testator what may be payable to them, respectively, as allowed by the statute (Code, sec. 1448).

The defendant in his answer denied most of the material allegations of the complaint, pleaded fully administered, no assets, and particularly, for the present purpose, "that the plaintiffs ought not now to be allowed to prosecute this action, because it was not commenced (601) within seven years after the appointment and qualification of

defendant as executor of said Dillard Love, nor was it commenced within seven years after the pretended rendition of the judgment now alleged to be due, and the plaintiff's cause of action is barred by the statute of limitations in such case made and provided."

It is stated in the case settled on appeal that "the only question presented to the court was whether this action is barred by the statute of limitations; and it appearing that this action was brought on 8 June, 1883, upon a judgment taken against the defendant as executor of Dillard Love on 29 May, 1876, in favor of J. R. Love and T. J. Love, executors of J. B. Love, deceased, and that the executors of J. B. Love qualified as such more than seven years before the beginning of this action, and the court, being of the opinion that this action is barred by the statute of limitations, gave judgment for the defendant."

Plaintiffs appealed.

G. S. Ferguson for plaintiffs.
K. Elias and Theo. F. Davidson for defendant.

MERRIMON, C. J., after stating the case: The plaintiffs obtained judgment against the defendant, founded upon a cause of action existing against his testator at the time of the latter's death, and the purpose of this action, allowed by the statute (Code, sec. 1448), is to compel the defendant "to an account of his administration and to pay the creditors (including, particularly, themselves as to their judgment) what may be payable to them respectively." The defendant relies for his defense upon the statute of limitation (Code, sec. 153, par. 2), which prescribes that an action must be brought "by any creditor of a deceased person against his personal or real representative within seven (602) years next after the qualification of the executor or administrator *and his making the advertisement required by law* for creditors of the deceased to present their claims, when no personal service of such notice, in writing, is made upon the creditor," etc., else the same shall be barred.

If it be granted that this statute embraces cases like the present one, the defendant, so far as appears, is not entitled to the benefit of it, because he has failed to allege and prove that he made "the advertisement required by law for creditors of the deceased to present their claims," or that "personal service of such notice (that prescribed by the statute, Code, secs. 1421-1424), in writing," was given to the plaintiffs, as prescribed by law. It will be observed that mere lapse of time does not of itself create the bar. It is this, coupled with notice given by advertisement or personal service, that creates and renders it effectual. The time does not begin to run from that of the notice given, but from the date of the qualification of the executor or administrator. Although the notice is only incidental, it is nevertheless essential, and must be

alleged and proven. It is reasonable and just that it should be given, and the statute expressly provides that it shall be. The statute will not help the executor or administrator if he fails to observe its requirements. *Cox v. Cox,* 84 N. C., 138; *Lawrence v. Norfleet,* 90 N. C., 533; *Glover v. Flowers,* 95 N. C., 57.

The statute under consideration is not unlike, in some respects, the similar one (Rev. Code, ch. 65, sec. 11), and in order to render the former available the party claiming benefit of it must plead it and make appropriate proof in like manner, in pertinent respects, as was necessary in pleading the latter. *Rogers v. Grant,* 88 N. C., 416; *Glover v. Flowers, supra.*

There is therefore error. The plaintiffs are entitled to an order directing an account and to have the action disposed of according to law.

Error.

Cited: Proctor v. Proctor, 105 N. C., 227; *Turner v. Shuffler,* 108 N. C., 648; *Lassiter v. Roper,* 114 N. C., 20; *Valentine v. Britton,* 127 N. C., 59.

(603)

SALLIE A. LEA v. JAMES P. LEA.

Marriage and Divorce—Alimony—Notice of Motion—Findings of Fact.

1. An action to have a marriage declared void because of a preexisting disqualification to enter into the marriage relation is an action for "*divorce,*" and *alimony pendente lite* may be allowed.

2. An order of court continuing the motion for alimony to a future term of court, made in the presence of *counsel* for *both parties,* is sufficient *notice,* under the statute, of such motion.

3. A finding by the judge that the facts set forth in a complaint are true is a sufficient finding of facts on such motion.

MOTION for alimony *pendente lite,* heard before *Brown, J.,* at RANDOLPH Spring Term, 1889.

The plaintiff served notice on the defendant on 21 September, 1888, to appear at Troy, Montgomery County, on 3 October, 1888, to show cause why alimony should not be allowed her, pending this suit. By agreement of counsel of plaintiff and defendant, the hearing was adjourned from Troy to Albemarle, in Stanly County, to be heard on 17 October, 1888, on which day the defendant and his attorney were present and resisted said motion upon the ground that said motion could not be heard and no order could be made in said cause outside of Randolph County, where the cause was pending. Whereupon, his Honor,

Judge Philips, upon his own motion, and without the consent of the defendant, ordered the same to be transferred, to be heard on the third Monday in March, 1889, it being 18 March, 1889, at Asheboro, in Randolph County. Without any further notice to the defendant, the plaintiff, in the absence of the defendant, on Thursday, 21 March, 1889, called up the case and moved his Honor to proceed with the hearing of her motion to be allowed alimony *pendente lite.* The defendant's (604) counsel, being present, objected to the court's hearing or considering the motion, on the ground that no notice had been given to the defendant, as required by law. The court proceeded to consider and hear the motion, and the defendant excepted to the same. Upon the hearing, the counsel for the defendant resisted the application and order on the ground that the plaintiff was not entitled to alimony; that it appeared from the complaint and the evidence that she was not a married woman nor the wife of the defendant, and insisted that the court should so find and declare.

After hearing the case and considering the same, the court decreed alimony to the plaintiff, from which defendant appealed.

The first cause of action alleged in the complaint charged that the marriage ceremony was duly solemnized between the plaintiff and defendant, in this State, on 4 May, 1887, the plaintiff believing that there was no obstacle to the union, and that it was in all respects valid, but that in fact the defendant was then married to a former wife, still living, from whom he pretended to have obtained a divorce in the State of Illinois; that the divorce, if ever procured at all, was void, in that it was a fraud upon the laws of this State, the defendant being, all the time the proceedings upon which it was alleged to be based, a citizen and resident of North Carolina.

The second cause of action alleged, with great particularity, long-continued cruel and inhuman treatment of plaintiff by defendant.

The prayer for relief was (1) for divorce *a vinculo matrimonii;* (2) for divorce *a mesna et thoro,* and (3) for alimony.

No counsel for plaintiff.
L. M. Scott for defendant.

SHEPHERD, J. The defendant denies his liability for alimony (605) *pendente lite,* for the reason that this is not, technically, an action for divorce from the bonds of matrimony, but an action to declare a marriage void because of a prior existing marriage on the part of the defendant.

At common law, suits for nullity were freely entertained in the ecclesiastical courts; and while they were unnecessary in cases like the present, so far as they affected the actual legal relations of the parties,

it was deemed "expedient to procure a sentence to prevent the consequences which might in future take place from the death of witnesses, or other occurrences, rendering proof of the invalidity of the marriage difficult or impossible. . . . It is a matter of duty which the courts owe to the public to declare the situation of the parties. . . . It may be necessary, for the convenience and happiness of families, and of the public likewise, that the real character of these domestic connections should be ascertained and made known." Shelford, Mar. and Div., 332. Appreciating these reasons, our Legislature has provided (Code, sec. 1283) "that the Superior Court, in term time, on application made as by law provided by either party to a marriage contracted contrary to the prohibition contained in chapter 42, Code, or declared void by said chapter, may declare such marriage void from the beginning."

Chapter 42, section 1810, of the Code, provides that all marriages "between persons, either of whom has a husband or wife living at the time of such marriage, . . . shall be void."

It was decided in *Taylor v. Taylor,* 46 N. C., 528, that the courts of this State had no power to allow alimony *pendente lite,* but this relief was subsequently given by the Legislature in 1852, and the existing law upon the subject is to be found in the Code, sec. 1291, *et seq.,* which provides that such alimony may be given where any married
(606) woman shall apply to a court for a divorce from "the bonds of matrimony or from bed and board."

It is insisted by the defendant that, as the marriage was void, there were no "bonds of matrimony" to dissolve, and therefore the plaintiff's case is not within the statute. We cannot accept this restricted interpretation. The words "from the bonds of matrimony," *a vincula matrimonii,* have a well known significance at common law, and it must be presumed that it was in this sense that they were used by the Legislature.

At common law no divorce *a vinculo* could be granted except for causes existing previous to the marriage, and which "rendered the marriage unlawful *ab initio.*" "In such cases," says 2 Blackstone, 94, "the law looks upon the marriage to have been *always null and void,* . . . and decrees not only a separation from bed and board, but *a vinculo matrimonii* itself." In view of this high authority, the argument of the defendant, founded upon the strict and literal meaning of the words of the statute, must fall to the ground. Precontract of marriage is, in common legal parlance, considered as a cause for *divorce.* For example, we have the able and discriminating Mr. Irving Browne, in his work on "Domestic Relations," 61, using the following language: "The law recognizes three kinds of divorces—first, divorce on the ground of the nullity of the marriage contract. . . . For this *divorce* there are generally five causes—lack of legal age, *former marriage,*" etc.

We could, if necessary, add a great number of authorities in which the word "divorce" is used in this comprehensive sense, but it is unnecessary to do so, as we have a decision in our own reports which we think fully settles the question. *Johnson v. Kincade,* 37 N. C., 470. There the marriage was declared a *nullity* because of the mental incapacity of the plaintiff. There was no statute conferring jurisdiction upon the courts in cases of judicial separation, except chapter 39, Rev. (607) Stat. This provided that the Superior Courts of law and equity should have sole and original jurisdiction "in all cases of application for divorce and alimony." The causes specified were: impotency at the time of the contract, adultery, and "any other just ground of *divorce.*"

It is clear from the above language that unless the case could be brought within the meaning of the word "divorce," the court had no jurisdiction. *Ruffin, C. J.,* after discussing other parts of the chapter, says: "It is plain, therefore, that the act covers the case in which the parties contracted by show of marriage, but were never, in law and truth, married, for want of capacity, for which reason the sentence pronounces the marriage *null and void,* but *because* there is a marriage *de facto* the sentence proceeds to dissolve *that.*" The Court therefore pronounces that the marriage, in fact, solemnized between Reese Johnson and Anna Kincade, "is in law null and void, for the want, at the time of solemnizing the same, of mental capacity on the part of the said Reese sufficient to understand the nature of and assent to such a contract, and that the said Reese ought to be and is set free and *divorced* from the said Anna." Here we have the court granting a *divorce* on the ground that the contract was null and void. We think that these authorities sustain us in holding that the words of the statute embrace all cases where there has been a *de facto* marriage.

The defendant further contends that, inasmuch as the plaintiff *alleges* that the marriage is void, she is estopped. This is but another form of the foregoing objection, and is, therefore, untenable. If, as we have seen, her case is within the statute allowing alimony, it would be strange, indeed, if she is to be deprived of it by alleging the very fact upon which her cause of action depends. All that the law requires is the proof or admission of a *de facto* marriage. This suggestion of estoppel comes with little grace from one who has beguiled the plaintiff into a false marriage, and who, when she is compelled to leave him by reason of his cruel treatment, as well as the discovery of her for- (608) lorn legal *status,* detains from her what little property she owns.

Such are the facts found by his Honor for the purpose of this motion. They should not, of course, work prejudice to the defendant upon the trial of his case before the jury.

In further support of the view we have adopted we add the authority of Shelford Mar. & Div., 587, which says that, "after proof of a marriage in fact, alimony pending the suit will be allotted, whether commenced by or against the husband, not only in cases of impotency, but in all cases of nullity of marriage." To the same effect is 2 Bishop Mar. & Div., 402, where the learned author fully sustains us and successfully refutes the opposing view. This author says that the right to alimony *pendente lite* grows out of the changed pecuniary relations of the parties, by which the property of the wife is practically placed under the control of the husband, and this whether the marriage is valid or *de facto* only.

This, as we have seen, is well illustrated in the present case, and we think that the plaintiff's claim for alimony *ad interim* is as meritorious as it would be were she suing for any other cause of divorce.

2. The defendant further objects to the order of his Honor on the ground that notice of this motion was not given as required by law. Granting that the motion could only have been heard in Randolph County, where the action was pending, we are still unable to perceive any force in the defendant's exception. It appears that the defendant and his counsel were both present in Stanley County, before *Judge Phillips,* when he made the order continuing the motion to be heard at the March Term of Randolph. No particular day was named, but the defendant had notice that the motion would be heard at that term.
(609) The statute does not require that a day shall be set when a motion in the cause is to be heard at term. It only provides that five days notice shall be given, and we think that this requirement was fully complied with in the present case. It is not insisted that the defendant did not, in fact, know that his case would be heard during the term. On the contrary, his attorney was present, making the objection, and also insisting that the plaintiff was not entitled to alimony because there was no valid marriage. We are entirely satisfied that the defendant had actual notice, and could have filed affidavits or made any other defense, had he desired to do so.

3. It is further objected that no facts were found by his Honor. This is incorrect, as the court found "the facts set forth in the complaint to be true." These facts are amply sufficient to sustain the order for alimony *pendente lite.* Upon a careful review of the whole case,

Affirmed.

Cited: Sims v. Sims, 121 N. C., 299; *Johnson v. Johnson,* 141 N. C., 93; *S. c.,* 142 N. C., 463; *Taylor v. White,* 160 N. C., 39; *Watters v. Watters,* 168 N. C., 413; *Jones v. Jones,* 173 N. C., 283.

E. H. MORRIS, ADMINISTRATOR of ELIZA H. FOWLER, deceased v. THOMAS A. OSBORNE and CATHERINE OSBORNE.

Insanity—Indorsement—Presumption—Payment—Judge's Charge.

1. An endorsement by the maker of a promissory note, "January 26, 1884. Renewed. T. A. Osborne," is sufficient to rebut the presumption of payment, if he had capacity to understand the nature and consequence of his acts.

2. While it is not erroneous to instruct the jury, that one whose mental capacity is drawn in question, must be shown to know the nature and consequences of his act to render it valid, it is safer to follow well established and approved rules as criterions of capacity to contract.

3. A sane man is presumed to intend the natural, immediate and inevitable results of his acts.

ACTION, tried at May Term, 1889, of IREDELL, *Brown, J.*, (610) presiding.

The bond sued upon was executed in 1867 and was payable on demand.

It was admitted that the presumption of payment had arisen, and it devolved upon the plaintiff to rebut it. For this purpose he relied upon the following entry on the back of the bond: "26 January, 1884. Renewed. T. A. Osborne." It was in evidence that the signature to said entry was in the handwriting of T. A. Osborne, the defendant's intestate, but that the remainder of the said entry was in the handwriting of his son. There was testimony tending to show that the intestate was mentally incapable to make such written acknowledgment. The issues pertinent to the exceptions were as follows:

3. "On said date, did said Osborne have sufficient mental capacity to make such written acknowledgment?"

4. "Has the plaintiff rebutted the presumption of payment which has arisen against said bond?"

His Honor charged the jury as follows: "If the jury believe, from the evidence, that the intestate, Thomas A. Osborne, had capacity to know what he was doing and the consequences of his act, and to understand such consequences, and that he signed the endorsement on the note, intending and meaning to signify and acknowledge that the debt had not been paid, the jury should answer the third and fourth issues 'Yes.'" (611)

The court further charged: "That the words on the back of the note signed by the intestate are sufficient to rebut the presumption of payment, if the jury believe said Osborne had understanding sufficient to know their meaning, import and consequences, and intended and meant to acknowledge that the said note had not been paid; otherwise

they should answer them 'No.' That the burden of proof is on the defendants to satisfy you that the said Thomas A. Osborne had not mental capacity to make alleged acknowledgment, for the defendants, alleging incapacity, must prove it by a preponderance of evidence. If the jury should find the third issue 'No,' then they should answer the fourth issue 'No,' because there is no evidence to rebut the presumption of payment, except the entry or endorsement and signature on the back of the note."

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

The error assigned is that the word "renewed" was, in itself, sufficient to rebut the presumption of payment, and that its effect should not have been qualified by submitting to the jury the intent with which it was used.

D. M. Furches and T. B. Bailey for plaintiff.
F. C. Robbins for defendants.

AVERY, J., after stating the facts: His Honor told the jury that if "Thomas A. Osborne had capacity to know what he was doing, and the consequences of his act, and that he signed the indorsement on the note, *intending* and *meaning* to signify and acknowledge that the debt had not been paid," they would find that the presumption of payment had been rebutted.

A sane person is presumed in law to intend the natural and necessary consequences of his own acts. 5 A. & E., 753, and authorities cited. It was conceded on the argument that it was not erroneous to instruct the jury, as a rule for testing mental capacity, that the person whose
(612) act is drawn in question must, in order to maintain the validity of it, be shown to know what he is doing and the *consequences of his act,* or that he must be capable, in this case, of understanding the meaning and import of the indorsement on the note signed by him. If Osborne knew what he was doing, and the consequences of his act, it would follow inevitably that he understood when he signed the indorsement, "Renewed, 26 January, 1884," that he was acknowledging that he had not paid the note, and that his obligation to pay was still subsisting; and, further, that, comprehending this, he must have *meant or intended to signify* that the debt had not been paid. This is but another method of defining the measure of mental capacity sufficient to qualify a person to make a valid contract. While it is not safe or advisable to attempt to frame formulas that are synonymous with rules repeatedly approved by the courts as criterions of capacity to contract, we see nothing erroneous or calculated to mislead the jury in the language

objected to in this case, when considered in connection with the testimony and other portions of the charge. We do not intend to approve this direction as adapted to every case involving mental capacity to contract.

The law does not demand that a person shall have unusual culture or capacity to qualify him to make a valid will, but that he shall know the "nature and character of the property disposed of, who are the objects of his bounty, and how he is disposing of the property among the objects of his bounty." *Bost v. Bost,* 87 N. C., 477.

It would not be erroneous, in speaking of a testator, to say that he must have intended or meant that one of his children should have certain stocks, another bonds, and a third land, according to the provisions of the will, after his death. If he knew what he was doing, he knew that this would be the necessary result of making such a will, and he meant to signify his intent that such natural consequences should (613) grow out of the act. So, when Thomas Osborne signed the indorsement, "Renewed, 26 January, 1884," if he knew what he was doing, he did it to show or acknowledge that the debt evidenced by the note was still due and unpaid. The power to bind one's self by an agreement cannot be made to depend upon ability to foresee the remote consequences of an act, but a sane man must intend the natural, immediate, and inevitable results that follow and grow out of his acts.

No error. Affirmed.

Cited: Fowler v. Osborne, 111 N. C., 405; *Sprinkle v. Wellborn,* 140 N. C., 181; *Lamb v. Perry,* 169 N. C., 444; *In re Rawlings,* 170 N. C., 61.

MARGARET A. BARNES v. SAMUEL W. BARNES and PHILLIP SOWERS.

Trust—Trustee—Deed, Construction of—Husband and Wife—Parties—Pleading—Relief.

1. If it is desired to attack a deed between husband and wife, upon the ground that it was executed in contemplation of a separation, that allegation must be duly made in the pleadings.

2. B., the husband, conveyed a tract of land to S., in trust "to allow the said B. and M. his wife to have the rents, etc., for their own use; and further, that out of said rents, etc., to support the said M. in such manner as she has heretofore lived," etc. *Held*—(1) that the wife could, in her name alone, maintain an action against the trustee and the husband to compel a performance of the trust, especially as it was evident the husband re-

fused to be associated with her, and it was probable the plaintiff might be entitled to some relief against him; (2) that it was the duty of the trustee, he having signed the deed, to take charge of the land conveyed and collect the incomes, and first appropriate so much (all, if necessary) as was required to the support of the wife in the manner provided—the primary object of the trust being to maintain her; and (3) that the wife could not compel the trustee to account for a failure to collect the incomes for *past* years, as the deed provided for an annual current appropriation, unless she had contracted with third parties obligations necessary for her support, and had expressly charged them upon the income for their respective years.

3. In an action equitable in its nature, the court may give such relief as the facts and pleadings may render appropriate, though it be not prayed in the complaint and it may, to that end, order the pleadings to be reformed to correspond with the facts established.

(614) APPEAL from September Term, 1889, of DAVIDSON, *Merrimon, J.*, presiding.

The following is so much of the case stated on appeal as it is deemed necessary to report:

"Upon reading the pleadings, and the introduction of the deed in trust attached to the complaint, his Honor intimated an opinion that, according to the complaint itself, and a proper construction of the trust deed, the plaintiff had no cause of action against the trustee, Sowers.

"It appeared in evidence that, at the time the deed in trust was written by the late J. M. McCorkle, the plaintiff was living with her son-in-law, Swicegood, apart from Samuel W. Barnes, her husband; that she had instituted proceedings for divorce and alimony in Davidson Superior Court; that after the deed was executed, the case was discontinued without any decree for separation, and that she continued to live with her daughter until the present time, except for a short time, when she stayed with a brother in Davie County; that she has, during this time, been dependent upon others for a support; that twice after the execution of the trust, and within a year or two after its execution, she called upon defendant Sowers and asked for help from the farm; that at one time, according to Mr. Swicegood, Sowers said, 'Yes, it is my business to haul you the grain, but I will have to be paid from the farm.' There was evidence tending to show that at one time the plaintiff was noti-

(615) fied by Barnes not to come to see her son, who lived with Barnes.

On another occasion she sent her son-in-law to Barnes to ask for grain from the farm, and he (Barnes) refused to send her any unless the plaintiff, her daughter, her daughter's husband and her brother in Davie County would all sign a receipt. It was not insisted on the part of the defendants that she had ever received anything (defendant testified that, eleven years ago, he had placed in the kitchen at home a sack

of flour and meal for her to send for, and that both sacks had been standing where he placed them ever since), or that defendant Sowers had offered to interpose and collect rent for her benefit from Barnes, who occupied the farm.

"It was alleged by Sowers that, at the time the trust was executed, Barnes and wife had agreed that Barnes should remain in possession and control of the premises, and that plaintiff should send to him for her part of the rents. The plaintiff offered evidence in contradiction of this. It was in evidence that the plaintiff was old, that she had been sick much of her time, and was now unable to attend court."

The following are the material parts of the deed of trust mentioned:

"Whereas, differences exist between Samuel W. Barnes and his wife, Margaret A. Barnes; and whereas, they are anxious and desirous to adjust such differences and to provide an adequate and sufficient support for Margaret A. Barnes, this indenture therefore witnesseth: That, for and in consideration of the premises, together with the further consideration of one dollar in hand paid to the said Samuel W. Barnes by Philip Sowers, the receipt of which is hereby acknowledged, the said Samuel W. Barnes has this day bargained, granted and sold, and by these presents doth hereby convey unto the said Philip Sowers the following tract of land, to wit, lying and being in the county of Davidson and bounded as follows, etc., etc., *to have and to hold to the said Philip Sowers, to the following uses, and none other: That the* (616) *said Sowers shall hold the said lands and to allow the said Samuel W. Barnes and Margaret A. Barnes to have the rents and profits thereof for their own use and behoof; and further, that out of the said rents and profits to support the said Margaret Barnes in such a manner as she has heretofore lived, and after the death of the said Samuel W. Barnes and Margaret A. Barnes the said Philip Sowers shall convey unto,*" etc., etc.

The plaintiff moved for judgment upon the verdict. Motion denied, and on motion of defendants the action was dismissed, from which judgment the plaintiff appealed.

M. H. Pinnix for plaintiff.
F. C. Robbins for defendants.

MERRIMON, C. J., after stating the case: No question was raised by the pleadings or on the trial in the court below, so far as appears, as to the validity of the deed of trust in question. It was suggested, but not pressed, on the argument in this Court that it was invalid, upon the ground that it was made in contemplation of a separation of husband and wife, parties to it, and with that view. If this is so—and there

exists substantial ground for the contention—the deed should be put in question, in that aspect of it, by a proper pleading. We cannot, upon the face of it, see and determine that it is or is not invalid for the cause suggested. For the present purpose, and as it appears, we must treat and interpret it as a valid deed for the chief purpose specified in it, if such purpose is sufficiently expressed.

Generally and ordinarily, when a married woman brings an action, her husband must join with her in it, except "when the action concerns her separate property," or "when the action is between herself and her husband." Code, sec. 178. But if he will not join her, as he
(617) ought to do, she may make him a party defendant, if need be. *McGlennery v. Miller,* 90 N. C., 215.

In this case it appears with sufficient certainty that the husband will not join his wife, the plaintiff. Indeed, he is hostile to her alleged rights and the remedy by which she seeks to assert the same; and, moreover, it may turn out that she is entitled to some measure of redress as against him in connection with his codefendant; so that, the action could not be dismissed upon the ground that the husband did not join in it with his wife.

We are clearly of opinion that the action, as it appears to us from the record proper and the case stated on appeal, should not have been dismissed. The plaintiff alleges the deed—the chief purpose of it to provide a support for herself—that the defendant trustee and his codefendant have wholly neglected and refused to supply her reasonable wants and a support out of the rents and profits of the land; that the trustee has wholly neglected at all times to execute the trust; that she is seventy years old, poor, sick and infirm, and has had for years to rely upon the bounty of her kinsfolk for such support as she has had; that she has demanded of the trustee that he execute the trust; that he has always refused and neglected to do so, to her great injury; that the rents and profits of the land are equal to three hundred dollars per annum, etc.

The defendants admit some of the material allegations and deny others, and particularly the defendant trustee denies that he is such in any active or responsible sense, etc., etc., and alleges that his codefendant has had possession of the land and received the rents and profits thereof, etc., etc.

The pleadings, taken in connection with the deed, make a case in which the plaintiff is surely entitled to some relief, and she is entitled to assert her rights in this action. Although a judgment at law for half the rents and profits of each year since the deed was executed is formally demanded in the complaint, general relief is also demanded, and
(618) the facts alleged, if indeed they are such, entitled the plaintiff to equitable relief.

The action is both legal and equitable in its nature and purpose, and the court can proceed therein to compel the defendants to a due execution of the trust and direct an account of the rents and profits of the land and make all other necessary inquiries and directions to that end.

The allegations of the complaint are not so definite in all respects as they might and should be; still the court can see the scope of the plaintiff's cause of action, and it may, if need be, require the allegations to be made more precise and direct.

If the complaint alleges a cause or causes of action at law, the plaintiff will be entitled only to one judgment at law; but when it alleges sufficiently a cause of action, equitable in its nature, it will give such relief as the plaintiff may be entitled to have; indeed, the court will, in a proper case, administer the principles, both of law and equity, in the same action. It seems that the defendants have misunderstood the nature, purpose and importance of the deed now to be interpreted, else they have willfully been derelict in the discharge of what it made a plain duty on the part of the trustee. It is recited in the preamble of the deed that its purpose is to adjust differences and "to provide an adequate and sufficient support for" the plaintiff. "This was the leading, chief purpose of it. To that end the land was conveyed to the defendant trustee, *to have and to hold the same* "to the following uses, and none other: That the said Sowers (the trustee) shall hold the said land, and to allow the said Samuel W. Barnes and Margaret A. Barnes (the plaintiff) to have the rents and profits thereof for their own use and behoof; and, *further,* that out of the said rents and profits to *support* the said Margaret Barnes in such manner as she has heretofore (619) lived," etc.

The defendant trustee signed this deed and thus accepted the trust and became chargeable with it, according to its true intent and meaning. This signing on his part was not a mere meaningless ceremony; it was important, and imported that he accepted the title to the land charged with the trust; he was to have and to hold it for the specified uses, to wit, particularly *to allow* his codefendant and the plaintiff to have the rents and profits thereof for their own use and benefit, but with the further express provision, as to the wife, "that out of the said rents and profits to support the said Margaret Barnes (the plaintiff) in such manner as she has heretofore lived," etc.; that is, out of such rents and profits she was to have such support, if they were adequate for that purpose, though it might take the whole. This must be so, else this *further* provision is meaningless. That this interpretation is correct is the more manifest because it harmonizes with the recital in the preamble of the deed, which declares that the purpose of the latter is "to provide an adequate and sufficient support for" the plaintiff. The clear purpose was to provide

for her such support as she had, before the execution of the deed, been accustomed to have, and that she should have devoted to that purpose so much of the rents and profits of the land as might be necessary. The surplus was intended for the husband. The deed does not provide that the plaintiff shall have one-half, one-third, or any definite part of the rents and profits or accumulations therefrom, but current "adequate and sufficient support."

What this is will depend on what she has, what she reasonably needs, her health, necessary incidental expenses, living in the like sphere and condition as she did before the provision was made for her. The plaintiff alleges that the defendant trustee has never allowed her such
(620) or any support out of the rents and profits of the land, and that she is entitled to have "her share" of the same, accumulated from year to year, ever after the date of the deed. We do not think so, because the purpose was to provide for her *current support,* and she neglected to enforce her rights, as she might have done from time to time through the courts. *Gray v. West,* 93 N. C., 442.

If, however, in good faith, she contracted, in any one or more years, debts for her support, which debts she made a charge upon the rents and profits of the land of the year in which the debts were respectively so created, she would be entitled to have such debts paid by the defendant trustee, if the rents and profits of such year were adequate for that purpose. But persons who made her gifts or entertained her gratuitously could not now be allowed to make charges against her on such account, and have the same paid as indicated above.

The effect of the deed was to give the defendant trustee control of the land embraced by it, and it charged him to let the same and see that it yielded rents and profits, and to allow the plaintiff to have the same for her support, as indicated above. He might have allowed his codefendant, if he were responsible, to occupy and cultivate the land, as it seems he did do, but he should have required him to account annually for the rents and profits thereof, and devote so much of the same as might be necessary, under the deed, to the support of the plaintiff.

It may be that he can still compel him to such account, and possibly in this action. But as to all this he will be advised by counsel.

Treating the deed as valid, and interpreting it as we have done, upon the pleadings, the court, we think, should have directed an account of the rents and profits of the land of the current year to be taken—an ascertainment of what part thereof is necessary for the plaintiff's
(621) support for that year, and what debts are outstanding against her for her support since the date of the deed, as indicated in this opinion, and report of the whole to be made, and on the coming in of the report, in the absence of valid exceptions thereto, it should have given

judgment directing the rents and profits or the value thereof to be paid to the plaintiff, and such debt created for her support to be paid, etc.

The judgment dismissing the action must be set aside and further proceedings had therein substantially as indicated in this opinion, unless and except that if the court shall see fit in its discretion to allow any proper amendments of the pleadings, in that case it shall dispose of the action upon its merits as they appear in the course of its further progress.

Error.

Cited: Collins v. Pettitt, 124 N. C., 736; *S. v. Jones,* 132 N. C., 1050; *Perkins v. Brinkley,* 133 N. C., 162.

W. L. DAMERON v. SAMUEL T. ESKRIDGE ET AL.

Specific Performance—Mortgagee—Assignee—Power of Sale—Equitable Assignment—Conveyance of Real Estate—Estoppel.

1. The assignee of a mortgagee cannot, in his own name, sell lands of mortgagor and convey title to the purchaser, unless the assignment itself was sufficient in form to operate upon and convey the interest in the land.
2. An assignment in these words, "For value received, I assign and transfer this mortgage to S., did not convey an *estate* in the land.
3. Specific performance by the equitable assignee of a mortgagee will not generally be decreed.
4. There is no equity to compel the execution of powers not conveyed. Equitable assignments ought not to carry with them the powers of sale.
5. Mortgagors—especially married women—are not estopped by the fact that they were present at the sale made under such circumstances.

ACTION, tried at September Term, 1889, of CLEVELAND, before (622) *Boykin, J.*

By consent of the parties a trial by jury was waived, and the court found the following facts, to wit:

"On 21 December, 1880, the defendants, S. T. Eskridge and wife, Mary, executed and delivered to their codefendant, W. H. Eskridge, to secure the sum of $125 borrowed money, a mortgage deed with power of sale, conveying in fee simple the land described in the complaint. Some time prior to October, 1886, the said W. H. Eskridge transferred and assigned in writing, duly indorsed on the mortgage, for value received, the mortgage and the note it was intended to secure to the defendant G. H. Simmons."

The following is a copy of the assignment:

"For value received I sign and transfer this mortgage to G. H. Simmons, 28 July, 1885. W. H. ESKRIDGE."

"On 16 September, 1886, said debt remained due and unpaid. Said G. H. Simmons advertised for sale the land conveyed in the mortgage according to the terms therein contained, and on 18 October, 1886, the lands were sold in accordance with the advertisement, when plaintiff became the last and highest bidder. Immediately thereafter the plaintiff offered to comply with the terms of the sale, and demanded a deed for the land from Simmons, tendering him the amount of his bill at the time, but Simmons refused to deliver said deed as demanded. Plaintiff was ready to comply with the terms of the sale. The defendants S. T. Eskridge and wife were in possession of the lands. The defend-
(623) ants were present at the sale. The annual value of the real estate was $75."

Whereupon the court, being of opinion that the said assignment did not empower and authorize G. H. Simmons to advertise and sell the land, and does not empower him to make title thereto, adjudged that the plaintiff was not entitled to the relief demanded in the complaint, and that the defendants recover such costs as have been expended by them.

Plaintiff appealed.

R. McBrayer for plaintiff.
M. H. Justice and Gidney & Webb for defendants.

SHEPHERD, J. S. T. Eskridge and wife executed a mortgage upon certain land to W. H. Eskridge, with power to said mortgagee or his assigns to sell upon default. The mortgagee made the following endorsement on the mortgage:

"For value received, I sign (assign) and transfer this mortgage to G. H. Simmons, 28 July, 1885. W. H. ESKRIDGE."

Simmons advertised and sold the land to the plaintiffs for the sum of three hundred dollars. The plaintiff alleges that he has tendered the purchase money and demanded a deed from said Simmons and the mortgagee, and that he has also demanded the possession of the mortgagor and wife. He prays for the possession of the land, and that the mortgagee and Simmons, the assignee, be compelled to execute title.

1. It is very plain that the plaintiff has not acquired the legal
(624) title, as the assignment to Simmons was not under seal and did not purport to convey an *estate* in the land. This is decided in *Williams v. Teachey,* 85 N. C., 402. It was suggested on the argument

that the record in that case disclosed that the mortgagee alone was authorized to sell. The decision was not based upon that ground, but assumes that the power was to be exercised by the mortgagee or his assigns. The court held that the assignment of a mortgage, in terms which do not profess to act upon the land, does not pass the mortgagee's estate, but only the security it affords to the holder of the debt. "It is the mortgage deed," says the court, "the written conveyance, and the security it affords to the holder of the debt, that is undertaken to be transferred, not the land nor any estate in it vested in the mortgagee." This authority is decisive against the plaintiff as to the legal title.

2. It is next insisted by the plaintiff that Simmons, being the equitable assignee, the court should compel him and the mortgagee to specifically perform the contract of sale. No authority for this position is cited and we are sure that none can be found in our reports. We feel at liberty therefore to consider the policy of decreeing specific performance in such cases.

We are of the opinion that the exercise of a power of sale in a mortgage should be watched with great jealousy, and that courts of equity as well as of law should require its terms to be strictly pursued. Where this is done the courts may in proper cases decree specific performance, but never in a case like the present, where the court is called upon to establish, as well as to assist, in the execution of a power against a mortgagor who prays that he may be permitted to redeem.

Again, we think that to lend the equitable aid of the court in cases like this would tend to produce confusion and uncertainty without any corresponding benefit. It is always in the power of the assignee, if he wishes to execute the power, to take an assignment by deed of the legal estate, and if he fails to do so neither he nor his purchaser (who loses nothing but a bargain) should be heard to (625) complain.

Another objection is that several notes may be assigned to different persons, each of whom may attempt to execute the power, and thus much trouble and litigation will be invited. There is no equity in favor of such a purchaser, who has paid nothing, and who has not been actually misled by the conduct of the parties. The records are open to his inspection, and he can readily inform himself as to the validity of the power under which the sale is made. Whatever may be the rulings in some of the States, where the mortgage is regarded strictly as a pledge they can have no application here where the distinction between the equitable and the legal estate is still maintained. *Williams v. Teachey, supra.*

Nor is the plaintiff's case strengthened by the fact that the defendants were present and made no objection to the sale. It is not alleged that

the plaintiff was induced to purchase by reason of their silence, or that he purchased in ignorance of any of the facts, nor would this passive silence, in any event, have estopped the *feme* defendant. *Clayton v. Rose,* 87 N. C., 106. Neither can it be urged that Simmons was acting as the agent of the mortgagee who, by his silence, ratified his acts. The record discloses that the assignee did not profess to sell in the name of the mortgagee. This is manifest from his notice of sale, in which he offers to sell *as assignee* alone. The plaintiff has purchased with a knowledge of the facts, and therefore takes the risk as to the validity of the sale. He can lose nothing but a bargain, and is met at the very threshold of the court by the equity of the mortgagor, who wishes to redeem.

We think that the court very properly dismissed the action.

Affirmed.

Cited: Hodges v. Wilkinson, 111 N. C., 63; *Atkins v. Crumpler,* 118 N. C., 538; *Strauss v. Loan Asso., ib.,* 562; *Atkins v. Crumpler,* 120 N. C., 309; *Hussey v. Hill., ib.,* 316; *Norman v. Hallsey,* 132 N. C., 8; *Collins v. Davis, ib.,* 108; *Morton v. Lumber Co.,* 144 N. C., 33; *S. c.,* 152 N. C., 56; *S. c.,* 154 N. C., 340; *Jones v. Williams,* 155 N. C., 151; *Weil v. Davis,* 168 N. C., 302; *Parrott v. Hardesty,* 169 N. C., 669; *Weathersbee v. Goodwin,* 175 N. C., 236.

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(626)

JANE MILLS, SURVIVING EXECUTRIX OF L. A. MILLS v. SHAKESPEAR HARRIS, ADMINISTRATOR ET AL.

Conversion—Will—Election—Descent—Conveyance—Administration.

1. Where realty is devised to be sold and the proceeds divided at the death of the testator, it is, by construction of law converted into personalty, and the rules governing the devolution of that species of property become applicable.

2. To constitute such constructive conversion, it is essential that the power conferred to sell shall be *imperative;* if the power is left to the *discretion* of the person charged with it, no conversion results.

3. Where the persons upon whom a discretionary power to sell was conferred by devise, contracted verbally, to sell the land, and let the purchaser into possession, who paid a portion of the purchase money. *Held*—(1) that this did not create an actual conversion, inasmuch as the contract was not enforcible; and (2) that the conveyance by an executor of the land, after the deaths of those originally entitled to it or its proceeds, could not operate retroactively, so as to change the order of descent.

MILLS *v.* HARRIS.

ACTION, tried at the September Term, 1889, of RUTHERFORD, before *Boykin, J.*, brought by the plaintiff executrix for construction of a will.

L. A. Mills died on 22 October, 1882, leaving a last will and testament, which was duly admitted to probate, and by said will be appointed Mrs. Jane Mills, the plaintiff, his wife; L. A. Mills, Jr., his son, and his daughter, Mary Jane Harris, his executors, all of whom were duly qualified as such, and letters testamentary were issued to them, and they all entered upon the duties of the office of executor previous to the sale of the tract of land hereinafter mentioned. L. A. Mills, Jr., and Mary Jane Harris were the only heirs at law of said tes- (627) tator.

The clause of said will asked to be construed in this action is in the following words, to wit:

"I authorize my executors to sell, either at public or private sale, my place, called the 'upper place,' now rented to John Smith, if they see fit to do so, and divide the proceeds of the sale equally between my son and daughter."

Soon after the death of the testator all his executors contracted verbally to sell to one A. H. Nabers the "upper place" mentioned in said clause of the will, each one of said executors agreeing to said sale.

The said A. H. Nabers paid to L. A. Mills, Jr., one of said executors, at the time of the land trade the sum of one thousand dollars of the purchase money, and afterwards made other payments to him, and said Nabers paid to Mrs. Mary Jane Harris the sum of eight hundred dollars of the purchase money, and since the death of plaintiff's coexecutors said Nabers has paid to plaintiff the sum of seven hundred and thirty-five dollars of the purchase money, and plaintiff, as sole surviving executrix, has, in pursuance of said agreement, executed to said Nabers a deed to said land, and has taken a mortgage upon the same to secure the balance of the purchase money. At the time of the land trade above mentioned Nabers took possession of the land, and has continued in possession since that time.

Mrs. Mary Jane Harris, executrix, died intestate on 11 April, 1883, leaving no children, and on 10 November, 1885, L. A. Mills, Jr., died intestate, leaving children, the defendants Ethel, Eugenia, Henry, and Ladson, leaving plaintiff the sole surviving executrix.

The defendant J. S. Harris was the husband of the deceased executrix, Mary Jane, and has been duly qualified as her administrator, and has entered upon the duties of that office.

Upon the foregoing facts, on motion, it was ordered by the (628) court that Mrs. Jane Mills, executrix, the plaintiff, pay over to the defendant J. S. Harris the one-half of the moneys arising from the sale of said land, after deducting any amount which he has received, if

any, and that the said J. S. Harris, as administrator of his wife, have judgment and recover of the plaintiff the sum of ..... dollars.

It was further ordered that this cause be referred to the clerk of this court to ascertain the amount due said Harris and the other defendants, and that he report to this court the same, that judgment may be entered accordingly.

Defendant Otis P. Mills, guardian of the heirs of L. A. Mills, Jr., appealed.

No counsel for plaintiff.

J. B. Batchelor, John Devereux, M. H. Justice, and J. A. Forney for defendant.

SHEPHERD, J. The contention of J. W. Harris, as administrator of his wife, is based entirely upon the proposition that the "upper place" was converted into personal property, either by the terms of the will or by the oral contract to sell the same during the life of his intestate.

For the first position he relies upon the doctrine of equitable conversion, insisting that such conversion occurred at the death of the testator. The authorities cited by him fully establish the proposition that where land is directed to be sold and the proceeds divided the land, at the death of the testator, is impressed with the character of personalty, and the law governing the devolution of that species of property will prevail. This constructive conversion, however, cannot take place unless there is imposed upon the trustee an *imperative duty* to sell, arising either by express command or necessary implication, "for unless the equitable *ought* exists, there is no room for the operation of the maxim that (629) 'equity regards that as done which ought to be done.'" . . .

If the act of converting (that is, the act itself of selling the land, or laying out money in land) is left to the option, discretion or choice of the trustees, or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them. 3 Pom. Eq. Jur., 1160; Adams Eq., 136.

It is too plain for argument that the language used in this will left the sale entirely to the option and discretion of the executors. The words "if they see fit to do so" (to sell) can admit of no other construction, and there is nothing in the context to qualify their plain signification.

No estate was conveyed, and the land descended to the son and daughter as heirs at law. In this character they were entitled to hold it until they saw fit to sell it for division. In other words, the will conferred only a mere power to sell, and we think that until that power was exercised the land remained in its original condition. Schouler Exrs., 217;

Walters v. Maunde, 19 Ves., 424; *Dominick v. Michael,* 4 Sandf. S. C., 374; *Bleight v. Bank,* 10 Pa. St., 132; *Pratt v. Taliaferro,* 3 Leigh, 419; *Montgomery v. Millikin,* 1 Sm. & M., ch. 495, and *Greenway v. Greenway,* 2 DeG. F. & J., 128.

It is insisted, however, that the oral contract to sell, and a reception of a part of the purchase money by the said son and daughter, was an *actual* conversion of the land. We cannot think so. In order to work such important results "the contract must be valid and binding, free from all inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser." Pomeroy Eq. Jur., 1101; 2 Williams Exrs., 108.

Even if the purchaser, who has entered and paid a part of the purchase money on the faith of the oral contract, were complaining, it is well settled in this State that equity would not decree a specific performance, and especially would this be true as against a *feme covert.*
Much less will it interfere in behalf of a party who invokes one (630) of its rules in contravention, we think, of the real intention of the testator. At the best the oral contract to sell and the reception of a part of the purchase money was but a partial conversion, the act not being complete, as we have seen, until there was conveyance or a valid contract to convey.

Nor will the court, for the purpose of working a conversion, give a retrospective effect to the conveyance of the executrix. Ever since *Ackroyd v. Smithson,* 1 Broc. C. C., 503, in which Mr. Scott (afterwards Lord Eldon) made his celebrated argument, it has been held that constructive conversion only takes place *for the purposes of the will,* and that where these cannot take effect the property is considered as remaining in its former condition. It is founded upon the *real* intention of the testator, and while some of the artificial rules which have been adopted for the purpose of ascertaining this intention may sometimes fail in accomplishing their object, the courts have certainly never gone *beyond* them to defeat the manifest purpose of the will. Such would be the case if we were to hold that the deed in question related to the date of the oral contract of sale.

It is further insisted that the conduct of the son and daughter amounted to an "election" to treat the land as money, and for this position Adams Esq., 136, and *Craig v. Leslie,* 3 Wheat, 463, are cited. As we have seen that a parol contract to sell could not have that effect, we are at a loss to understand how these authorities can help the administrator. They relate to the doctrine of *reconversion,* which, briefly stated, is the right, of a person who has the beneficial interest to choose, or "elect," whether he will take the property in its converted condition or in its original form. This principle, it is clear, can have no application

to a case like this, where there has been no constructive conversion, for you cannot reconvert that which has never been converted. Even if the principle applied in this case it would work in the wrong direc-
(631) tion for the administrator, as he is insisting that by the will the land was converted into personalty; whereas, a reconversion would impress upon it its original character, and thus defeat his claim.

Our conclusion, therefore, is that there was no conversion until the execution of the deed by the surviving executrix, *after* the death of the said son and daughter, and this being so, it follows that the representatives of Mrs. Harris must take the property as found at her death and, this being land, her heirs will take in preference to her administrator.

Smith v. Craig, 38 N. C., 204, and *Brothers v. Cartwright,* 55 N. C., 116, cited by counsel, are distinguishable from ours. In both there was a positive direction to sell, and the decision of the latter case turned, in a great measure, upon the special limitations contained in the will.

For the foregoing reasons we think the judgment should be reversed. Error.

Cited: Maxwell v. Barringer, 110 N. C., 81; *Lee v. Baird,* 132 N. C., 765; *Phifer v. Giles,* 159 N. C., 148; *Everett v. Griffin,* 174 N. C., 110.

M. W. STEEL v. MARY E. STEEL.

Divorce—Adultery—Demurrer—Incest—Fraud—Abandonment—Husband and Wife—Pleading.

1. In an action for divorce *a vinculo*, the admissions of parties are not competent evidence; but a demurrer to the petition for divorce admits that facts were alleged and can and will be proved, so as to secure the verdict of a jury.

2. Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under sec. 1285, subsection 4, of the Code, unless, pregnancy resulted; but if the application rested solely upon the ground of the fraud practiced, the court might be inclined to add another exception to the general rule restricting divorces.

3. The law, as it stood prior to 1872, whereby a husband who had turned his wife out of doors, exposed her to lewd company, and thereby caused, or contributed, to her adultery, was not allowed to avail himself of the remedy provided by statute, has no application where the wife had concealed from the husband the fact that she had been living in habitual incestuous intercourse with an uncle, for which she was liable to indictment at the time of the marriage; nor is the husband now required to allege, before he can show such adultery, that the separation and abandonment was not his fault.

4. A party seeking divorce in this State is not bound to purge himself by negative averments that he is not guilty of adultery.

ACTION for divorce a *vincula matrimonii,* tried at the August (632) Term, 1889, of SURRY, before *Gilmer, J.*

The complaint is as follows:

"1. That on 13 March, 1887, the plaintiff and defendant were married in Surry County, N. C.

"2. That at the time of said marriage the plaintiff had every reason to believe and did believe that the defendant was a virtuous woman, she being a young woman of about nineteen years of age.

"3. That shortly after the marriage the plaintiff had reason to suspect that the defendant had not lived a virtuous life, but not having proof to sustain his suspicion he continued to live with the defendant as a dutiful husband until about four months had elapsed, when, to his horror, the defendant admitted to the plaintiff that she had been seduced by her maternal uncle, Thos. Creed, who had habitually had sexual intercourse with her for a period of three years; that plaintiff never lived with the defendant as husband afterwards, but immediately carried her to her father's house and surrendered her up, she having admitted to her father the acts of adultery as alleged; that since that time the plaintiff has refused to live with the defendant.

"4. That prior to the marriage as aforesaid the defendant had committed adultery with her uncle, Thos. Creed, all of which defendant concealed from plaintiff before marriage.

"5. That prior to said marriage, as plaintiff is informed and (633) now believes, the defendant had committed adultery and incest with her paternal uncle, John Draughan, all of which had been concealed from the plaintiff at the time of the marriage.

"6. That since the marriage, and during the said separation as aforesaid, he believes the defendant had committed adultery with one W. H. Hall."

Wherefore, plaintiff demands judgment that the bonds of matrimony between plaintiff and defendant be dissolved. The complaint was verified in the form prescribed by statute.

The defendant demurs on the ground that the facts stated in the complaint do not constitute a cause of action.

"1. Because it is not charged, alleged or avered in said complaint that pregnancy resulted from the alleged adulterous intercourse that is specified in the third and fourth paragraphs thereof.

"2. Because it is not alleged in said complaint that the separation and abandonment of defendant by the plaintiff (as admitted in the complaint) was not the fault of plaintiff.

"3. Because it is not alleged in said complaint that pregnancy ensued from said adulterous intercourse as specified in the fifth paragraph of said complaint.

"4. Because the alleged adulterous intercourse with W. H. Hall, and specified in the sixth paragraph of said complaint, it is admitted therein that the same was after plaintiff had abandoned defendant, and no averment that said abandonment was not by the default of the plaintiff."

The demurrer was overruled and with leave to defendant to answer; defendant appealed.

C. B. Watson for plaintiff.
No counsel for defendant.

(634) AVERY, J., after stating the facts: The statute (Code, sec. 1285) permits a dissolution of the bonds of matrimony only on application of the *injured* party, and in one of the four following cases:

"1. If either party shall separate from the other and live in adultery.

"2. If the wife shall commit adultery.

"3. If either party was, and still is, naturally impotent.

"4. If the wife, at the time of the marriage, be pregnant and the husband be ignorant of the fact of such pregnancy, and be not the father of the child with which the wife was pregnant at the time of the marriage."

Subsection 2 was first enacted by the Legislature of 1871-'72 (ch. 193, sec. 35), and subsection 4 in the act of 1879 (ch. 132), while the other provisions of the sections are substantially the same as the old law (Rev. Code, ch. 39, sec. 2; Rev. Stats., ch. 39, sec. 2).

Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. *McQueen v. McQueen,* 82 N. C., 471. The admissions of the parties are not competent evidence, as in other actions, of the truth of the material allegations of the pleadings. Code, secs. 268 and 2888; *Perkins v. Perkins,* 88 N. C., 41. But when a defendant demurs to a petition for divorce the court here must consider the demurrer as a concession, not only that the facts alleged are true, but that they can and will be proved, so as to secure the verdict of the jury.

Pregnancy did not result from the illicit intercourse between the defendant and her uncle Creed prior to her marriage, and the application does not therefore bring the case under subsection 4. Before the enactment of subsection 2 this Court, as a rule, refused to recognize the right of a husband to divorce on the ground that his wife had practiced a fraud upon him previous to marriage by deceiving him as to her (635) character or condition. *Scroggins v. Scroggins,* 14 N. C., 535;

Long v. Long, 77 N. C., 304. The extreme case of *Borden v. Borden,* 14 N. C., 548, constitutes an exception to the general rule. There the divorce *a vinculo matrimonii* was granted on proof that the defendant induced the plaintiff to marry her by falsely representing that he was the father of a child of which she had already been delivered, when in fact it was a bright mulatto, and was exhibited to him under such circumstances as deceived him in relation to its color. If this application rested solely upon the ground of fraud practiced prior to the marriage, the unusual circumstances would naturally incline a court to add another exception to the general rule.

Under the law in force before the year 1872, the adultery of the wife, committed after separation from her husband, was held to be insufficient cause for granting a decree of divorce to him, if he had unjustly expelled her from his home, exposed her to lewd company, made her home life intolerable by cruel treatment, or deserted her without cause and left her unprovided for. *Wood v. Wood,* 27 N. C., 674; *Moss v. Moss,* 24 N. C., 55; *Whittington v. Whittington,* 19 N. C., 64. In such cases the husband was deemed guilty of the first infraction of the matrimonial contract and responsible for bringing about the separation, so that it could not be adjudged that the wife separated herself from him. In both the cases of *Whittington v. Whittington* and *Moss v. Moss* the court gave great weight to the fact that the charges of unchastity preferred against the wife as the reason for driving her from the husband's home were false, and the husbands were responsible for the separation.

It cannot be successfully contended that after the amendment of the divorce law in 1872, by inserting subsection 2, a husband seeking divorce for adultery of his wife after she had separated from him must, in order to establish the fact that he is the injured party, prove, antecedent to showing the act of adultery, precisely what he must have shown in evidence, as a prerequisite to obtaining a decree (636) if the action had been brought under the old law (subsection 1) and had been founded on the allegation that his wife had left him and lived in adultery with another. If such had been the legislative intent the law would have, in its terms, provided relief only where the wife separated herself from her husband and commits adultery. In determining how far the new provision of the act of 1872 (subsection 2) is limited in its operation by the condition contained in the previous section, that the husband must be the injured party, this Court in *Tew v. Tew,* 80 N. C., 316, gave a construction to the statute that is evidently tinged by the restrictive ideas of the older law. The Court say: "No husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of

the essential duties of the married life, or supervenient on his separation without just cause." Upon the case stated in the complaint the only question presented is whether the plaintiff appears to be the injured party. We hold that no culpability attaches to the husband who, after the open avowal by the wife, in the presence of her father, that she was guilty of habitual incestuous intercourse with her uncle for three years before her marriage, leaves her under the roof of her father and lives thereafter apart from her. The wife had not only been guilty of unchastity but of incest, habitually practiced, for which she could be indicted and punished. Her arraignment in the courts for such criminal conduct must bring shame and disgrace upon her, and dishonor and mortification upon her husband. When such an abandoned woman wins the affections of a man by inducing him to believe that she has led and is leading a virtuous life, the *wrong done him* would be better described as an *outrage* than an *injury*. The law does not hold a husband in fault for placing in her father's house a wife who, before marriage,
(637) practiced upon him such a deception that his life would be intolerable were he forced to concede her conjugal rights after the discovery of the fraud. In *Tew v. Tew* the jury found, in response to issues submitted to them, that the wife was not guilty of adultery, as charged in the complaint, before she was driven from her husband's home, but was guilty afterwards. The separation on the part of the husband was jutified in the complaint on the ground that she had previously committed adultery, and when the jury found that charge to be false the court held that the husband was not the injured party, and after depriving his wife of support, protection and conjugal association without cause, could not claim the right, given only to one not in fault, to have the marriage contract annulled, because, when deserted without cause, she fell under temptation.

A wife who is abandoned by her husband is not now left by the law in so helpless a condition as before the acts of 1869, 1874 and 1879 (Code, secs. 970, 971) were passed, for if he be within the jurisdiction of our courts and able to do so she can compel him to provide her adequate support, both for herself and children. In the case at bar the defendant, so long as she stood in the legal relation of wife, could invoke the aid of the courts and ask suitable provision for her maintenance out of the plaintiff's estate or earnings. One of the reasons for excusing the wife's moral delinquencies when separated from her husband no longer exists, when to be deserted by a husband does not necessarily mean to be deprived of pecuniary assistance from him.

A party who asks the court to grant a divorce from the bonds of matrimony is not bound to set forth or prove, as a prerequisite to granting

the prayer of the petition, the negative averment that he has not himself been guilty of adultery or is not in fault. In *Edwards v. Edwards,* 61 N. C., 534, *Chief Justice Pearson* suggests that if such a "test oath" were imposed it might prove good policy, as it would force (638) a petitioner to purge his conscience and probably prevent a great many applications for divorce. The plaintiff is not held bound to anticipate and negative in advance all grounds of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule. *Edwards v. Edwards, supra; Horne v. Horne,* 72 N. C., 530; *Toms v. Fite,* 93 N. C., 274. The demurrer was properly overruled.

Affirmed.

Cited: O'Connor v. O'Connor, 109 N. C., 142; *Toole v. Toole,* 112 N. C., 155; *House v. House,* 131 N. C., 142; *Kinney v. Kinney,* 149 N. C., 325; *Ellett v. Ellett,* 157 N. C., 164; *Page v. Page,* 161 N. C., 175; *Cooke v. Cooke,* 164 N. C., 286; *Bryant v. Bryant,* 171 N. C., 747; *Sanderson v. Sanderson,* 178 N. C., 341.

A. H. POLLOCK v. J. R. WARWICK AND K. A. HUDSON.

Mortgagor and Mortgagee — Contract — Evidence, Parol — Burden of Proof—Correction of Deed—Mistake—Issues—Costs—Appeal.

1. Plaintiff, who held chattel mortgages against defendant, took from him new mortgages, which, according to their agreement, were to take the place of and satisfy the old ones, and after they were executed he left them with defendant to be registered, with the understanding that, on their return to him, he was to surrender the old mortgages. On receipt of the new mortgages he discovered a mistake in one of them, of which he notified defendant, but he did not return the mortgage. Plaintiff then seized the mortgaged property, and took for its delivery a forthcoming bond. *Held,* that plaintiff, having treated the new mortgages as an executed contract, cannot have their terms varied, except on proof of fraud, or mutual mistake, and the burden is on him.

2. A mere preponderance of evidence is not sufficient to show mistake in a mortgage, but there must be clear and convincing proof.

3. It is the duty of counsel to assign errors in the charge of the court when taking out the case on appeal, and not wait to take exception, for the first time, before the appellate court. Following *McKinnon v. Morrison, ante,* 513.

4. Where plaintiff recovers no more than the amount tendered him by defendant before suit was brought, and, on his refusal to accept it, the latter paid into court, he should be taxed with costs.

5. If there are facts in controversy, which a party deems material, and they are raised by the pleadings, it is his duty to tender an issue thereon; it will be too late after verdict to object that this was not done.

(639) APPEAL from *Boykin, J.*, at Fall Term, 1888, of MECKLENBURG.

Action for damages for the breach of the conditions of a forthcoming bond given by defendant for the delivery of property embraced in a chattel mortgage executed by him to plaintiff. Plaintiff held mortgages on defendant's stock of goods, and afterwards they had a settlement, plaintiff taking new mortgages from defendant in satisfaction of the old ones. The new mortgages were left with defendant to be registered, and on their return to plaintiff he was to surrender the old ones. When they were registered and sent to plaintiff he discovered that the amount in one of them was wrong, and he notified defendant, but retained the mortgage. Afterwards he seized the property embraced in it and took from defendant a forthcoming bond for its delivery. In a suit on the bond there was judgment for plaintiff for less than the amount claimed by him, and he appealed.

The other facts necessary to an understanding of the questions raised are stated in the opinion.

P. D. Walker for plaintiff.
H. B. Adams for defendant.

CLARK, J. The plaintiff contends that as he had the legal title to the property under the mortgage of 1884, if the mortgages of 1885 were given in satisfaction of those of 1884 the burden was on defendant to show it. This would be true, but plaintiff's own evidence is to (640) the effect that the new mortgages were "to take the place of and go in full satisfaction" of those of 1884; that they were "executed to him" (which includes a delivery to him); that he then left them with defendant to be registered, and on their return to plaintiff when registered he was to surrender up the mortgages of 1884; that on their receipt he discovered a mistake of $200 in one of them, and notified defendant, but did not return him the new mortgage; that he seized the property recovered by them, some of which was not embraced in the antecedent mortgages, and the bond sued on was given for the forthcoming of the property covered by the new mortgages. As plaintiff does not claim that the new mortgages were given as additional security, but "in full satisfaction" of the former ones, such conduct would seem to show that

he was resting his claim on the mortgages of 1885, probably by reason of the additional property embraced in them. If at the trial, however, he wished to present for decision, as he now claims should have been done, an issue of fact as to "what was the oral agreement of the parties as to the surrender of the mortgage of 1884," whether it was conditional or absolute, executed or executory, he should have done so by tender of an issue or prayer for appropriate instructions. On the contrary, he treated the exchange as an executed agreement, and relied upon the alleged mistake as to the amount. The "case on appeal" states: "After the close of the evidence and the argument of counsel the court remarked that the whole matter seemed to depend upon whether or not there had been a mistake made in the execution of the $25 mortgage as to the amount. To this the counsel of both sides assented." This was not an admission of law, but of fact.

Treating the new mortgages, therefore, as an executed contract, as the plaintiff had done, by seizing property embraced in them (and not in the old mortgages), taking the forthcoming bond sued on for such, and by his conduct at the trial, its terms could not be varied or (641) altered as to amounts or otherwise, except upon proof of fraud or "mutual mistake." The burden to prove such is on the plaintiff. By the solemn agreement of the parties, the written agreement is strong and high proof of the true contract between the parties. The *quantum* of proof required to show mistake was correctly charged by the court. A mere preponderance of the evidence would not be sufficient. There must be clear and convincing proof. *Jones v. Perkins,* 54 N. C., 337; *Ely v. Early,* 94 N. C., 1; *Harding v. Long,* 103 N. C., 1.

The mistake, to support an equity, must be mutual mistake. *Kornegay v. Everett,* 99 N. C., 30; *McMinn v. Patton,* 92 N. C., 371. There is no evidence tending to show fraud or advantage taken of one party by the other.

The point made by plaintiff in this Court, that the *quantum* of proof charged by the court as requisite to correct a mistake applies only when both pleadings and proof are in a case strictly equitable, comes singularly enough from him. When, by his admission on the trial, *supra,* that the issue or controversy was solely as to whether there was a mistake in the mortgage, as he had pleaded no mistake, he was bound by the terms and amount of the mortgage, under which he had seized the property (part of it not being embraced in the former mortgages), for which the forthcoming bond sued on was given. He cannot complain that he was allowed, upon proper *quantum* of proof, to show a mistake when he had not entitled himself, by properly pleading it, to do so. *McElwee v. Bank, ante.*

An omission to charge is generally not ground of exception unless an instruction is asked and refused; while, if the court charges upon any point, and does so erroneously, it is deemed excepted to. *S. v.* (642) *Austin,* 79 N. C., 624; *Bynum v. Bynum,* 33 N. C., 632. None the less it is the duty of counsel to assign error in the charge when making out the "case on appeal." *McKinnon v. Morrison, ante,* 354. So mush depends upon the context that this is but fair to the other side that the judge may set out his charge fully and accurately upon that point, which he might fail to do if his attention is not directed to the error complained of, and it were allowable for the charge to be excepted to for the first time in this Court.

It appears that the defendant tendered the plaintiff, before suit brought, the amount which the jury have since found to be due him, and upon his refusal paid it into court for him. The plaintiff was, therefore, properly taxed with the cost of the action. *Murray v. Windley,* 29 N. C., 201.

Affirmed.

Cited: S. v. McKinney, 111 N. C., 685; *Smith v. B. & L. Asso.,* 119 N. C., 256; *Coward v. Comrs.,* 137 N. C., 301.

J. R. LANE v. JESSE RICHARDSON ET AL.

Homestead—Personal Property Exemptions—Assignment—Covenant—Damages.

1. As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred.

2. A note held as part of the personal property exemption of a judgment debtor loses its quality of exemption when assigned, and the assignee holds it subject to the counterclaim of judgments against the assignor owned by the maker of the note.

3. When the homestead is sold, the proceeds lose the quality of homestead exemption and become subject to the personal property exemption.

4. On the breach of the covenant against encumbrances, the covenantee is only entitled to nominal damages, unless it appears that he has extinguished the encumbrance.

(643) APPEAL from *Bynum, J.,* at February Term, 1889, of CHATHAM.

The plaintiff declared on a note, under seal, executed to J. B. Harris by defendant Richardson on 31 March, 1887, for the sum of $500, with interest at eight per cent from date, payable one day after date. This note was the balance due on the purchase money of a tract of land which had been assigned to Harris as a homestead, and which he had sold with covenants against encumbrances, etc., to Lane. On this note there was a credit of $140, paid 8 October, 1887. The note was assigned to the plaintiff after maturity.

Before the sale of the land several judgments had been docketed against Harris, one of Sikel, Hellen & Co. aggregating the sum of $283.91, and one in favor of Pope & Co. for $304.30.

The defendant Lane pleaded the two first judgments as a counterclaim, and the jury found that he was the owner of the same at the date of the assignment of the note. It was admitted that the defendants had never purchased or paid anything on the Pope judgment, but this, with the Sikel-Hellen judgments, were pleaded as a second defense, which was founded upon the breach of the warranty against encumbrances.

It was in evidence that at the date of the assignment of the note sued upon the assignor (Harris) did not then, at the beginning of the action, or at the time of the trial, possess more than $150 of personal property. It was also in evidence that when the homestead and personal property exemptions of said Harris were assigned and set apart, the note sued upon was not included therein.

Harris was made a party defendant to this action, and stated in his answer that he claimed the note as his personal property exemption in favor of his assignee, the plaintiff.

The plaintiff alleged in his replication that the sale of the land was made subject to the judgments, and that, therefore, there could be no breach of the warranty. In support of this contention he in- (644) troduced as a witness J. B. Harris, who testified as follows: "Some time in March, 1887, defendant wanted to buy my homestead; said he heard I wanted to sell, and wanted the refusal. He came repeatedly. I agreed to sell about the last of March. Said he would arrange to pay me if I would take part of the pay in two notes of $500 each; said that on three days notice he would pay them, and we made the trade. I told the defendant there were judgments against the land. He said, 'If so, judgments were not a lien on the land' and he would buy; said this after he had consulted his lawyer and he advised him he could buy. I sold to him and executed the deed. As to the Pope judgment, Pope sued Richardson and myself, and Richardson defended the suit; paid fifty dollars, and made me pay him sixty dollars for it. This was after I made the mortgage and before the deed was made."

Question: What, if anything, did the defendant Richardson say about payment of the note at the time of its execution should the judgment creditors attempt to trouble you? Objected to by defendant Richardson. Objection overruled; exception.

Answer: "Mr. Richardson said, 'Make it a due note and I will pay it on a notice of three days.'"

Plaintiff then introduced Mrs. J. B. Harris, who testified as follows: "I was present when the note was executed by my husband. When the defendant gave the notes he said to me, 'Don't let Mr. Harris take the notes and trade them off. When you want money, let me know, and I will pay them in three days.' He said if they found out we had the notes and came upon us for them to let him know, that he would pay it without further trouble. About five weeks after the notes were given I went to defendant for money. He seemed confused; said he did not have any money. I asked him if he was afraid to pay it. He said (645) Mr. Womack told him the judgments would come up against the note, but would see what he could do for me when his son-in-law came from Atlanta. He did not mention any assignment. I think $140 would cover the personal property of Harris at the time of the sale of the note to Lane. He owns about the same now, except a few hogs."

The court submitted the following issues to the jury, to wit:

"1. Was the defendant Richardson the owner of the Sikel, Hellen & Co. judgments against the defendant John B. Harris at the time of the assignment of the bond sued on to the plaintiff?

"2. Did Richardson contract with Harris, before the execution of the deed, to take the land with the encumbrances of the judgments, and was the deed executed under this contract?

"3. To what sum is the defendant Richardson entitled by reason of the encumbrance in the title conveyed by the deed of 31 March, 1887, from Harris to him?

"4. Is the plaintiff entitled to recover any part of the note sued upon, and if so, what part?"

The plaintiff asked the court to charge the jury as follows:

"1. That the Constitution vests the homestead right in the resident owner of the land, and authorizes him to convey it. The vendee must take it with the same quality annexed that had attached to it in the possession of the vendor, that is, to be exempt from executions for the debts of the vendor, at least during his life, for the homestead is a right annexed to land, and follows it like a condition into whosoever's hands it goes, without regard to notice.

"2. That if the jury shall find that at the date of the assignment of the note by Harris to Lane, said Harris only owned and possessed $140

worth of personal property, the plaintiff, being relegated to Harris's rights, is entitled to recover the amount demanded in the complaint, or so much thereof as with the $140 will make $500, be- (646) cause said Harris was entitled to the same as his personal property exemption.

"3. That he is also entitled to recover if the jury find that said Harris owned, at the time of the institution of this suit and at the time of the trial, not more than $150 worth of personal property."

Which instructions were refused.

The defendant Richardson asked the court to charge the jury as follow:

"1. That the judgments given in evidence are valid subsisting liens against the reversionary interests of J. B. Harris in the land purchased by Richardson from Harris, and for the purchase of which the bond sued on was given.

"2. That the mere knowledge of encumbrances by Richardson at the time he took the deed of 31 March, 1887, and gave his bond, does not affect his right to recover on the covenants in said deed against encumbrances.

"3. That the defendant Richardson is entitled to whatever sum would be a reasonable and fair one to extinguish the encumbrance of the judgment liens.

"4. That there is no evidence that Richardson agreed to take the land with the encumbrances, nor that the deed was executed under this contract.

"5. That if the jury find that the defendant Richardson was the owner of the Sikel, Hellen & Co. judgments at the time of the assignment of the bond in suit to plaintiff, defendant is entitled for the full amount of the judgments as a counterclaim.

"6. That the deed of 31 March, 1887, conveys a fee simple estate in the land, and not a homestead interest."

The court gave the first, second, fourth and sixth instructions as asked by the defendant Richardson; refused the third and fifth, and instructed the jury as follows:

"You answer the first issue 'Yes' or 'No,' as you may find the (647) facts to be. As to the third issue, if you find the first issue 'Yes,' then defendant Richardson is not entitled to the full amount of the Sikel, Hellen & Co. judgments, but such sum as you may find he paid for them, provided that sum is less than the whole amount of the judgment, and the evidence is that it was less, that is, $175. And in addition to this sum you may consider the Pope judgment, and say what in your opinion,

from the evidence, defendant is entitled to on account of that judgment, which the court instructs you is an encumbrance on the land."

The plaintiff excepted to the charge of the court:

1. Because it charged that there was no evidence, as to a contract between Harris and Richardson, that Richardson should take under the deed the estate of Harris simply with the encumbrances upon it.

2. Because the court failed to give special instruction requested by plaintiff.

The defendant Richardson excepted to so much of the charge of his Honor as failed to present the view of the defendant as to the counterclaim of the judgment of Sikel, Hellen & Co. in any respect.

The jury, in response to the first issue, replied "Yes"; to the second issue, "No"; to the third issue, "$479.30"; to the fourth issue, "No."

The defendant Richardson thereupon tendered to the plaintiff judgment for $48.52, with interest from 8 October, 1887, and all costs which had accrued prior to the answer.

Plaintiff moved for a new trial; motion overruled.

Judgment was signed by the court as tendered by the defendant Richardson, from which plaintiff appealed.

C. M. Busbee for plaintiff.

T. B. Womack for defendants.

(648) SHEPHERD, J., after stating the case: When the payee Harris endorsed the note sued upon to the plaintiff it was past maturity, and the plaintiff took it "without prejudice to any set-off or other defense existing at the time of the assignment." Code, sec. 177.

At the time of the assignment the defendant Richardson had become the owner of the Sikel & Hellen judgments against Harris, and these constitute a valid counterclaim against the plaintiff, unless he can show such circumstances as will except him from the general principles applicable to such a defense. *McClenahan v. Cotten,* 83 N. C., 332; *Riddick v. Moore,* 65 N. C., 386.

This, he contends, he has done by showing that at the time of the assignment of the note and up to the trial his assignor, Harris, did not possess over one hundred and fifty dollars worth of personal property, and that he, the plaintiff assigne, has a right, with the consent of Harris, to have the quality of the personal property exemption now impressed upon the note, and thus defeat the counterclaim of the said defendant.

The note had never been included in any assignment of exemption to said Harris; but even if it had been so included we are clearly of the opinion that it would have lost its quality of exemption as soon as it was transferred. In other words, that so far as personal property is

concerned the right of exemption is personal to the judgment debtor. This view is sustained by *Johnson v. Cross,* 66 N. C., 171, where it is held that upon the death of the debtor the exempted property passes to his executor or his administrator, to be administered in the same manner as other assets. To hold otherwise would present the anomaly of a judgment debtor having $500 worth of property set apart to him at the time of the levy or sale, and the quality of exemption concurrently adhering to perhaps thousands of dollars worth of *choses in action* which had been included in various previous assignments of his exemption, and which had been transferred by him. On the other hand, if the transferred *choses in action* are to be deducted in every as- (649) signment of the exemption the appraisers would be involved in the inextricable difficulty of ascertaining how many were outstanding, how much is due upon them, whether they are solvent, etc. Such absurdities were never contemplated by the lawmakers, and we cannot adopt a principle which would lead to such a conclusion.

Another contention of the plaintiff is that, as the judgments could not have been enforced against the homestead, they ought not to be enforced against the purchase money due upon a sale of the same. The answer is that when Harris sold his homestead he converted it into personal property which became the subject of the personal property exemption, while the land retained the quality of the homestead exemption in the hands of the purchaser.

It follows from what we have said that the Sikel & Hellen judgments were properly held to be a defense. They seem to have been submitted to the jury with the Pope & Co. judgment upon the counterclaim for a breach of the warranty against encumbrances. We suppose that it was in this aspect of the case that his Honor charged the jury that Richardson was entitled to only $175, the amount he paid for them. If there be any error in restricting them to this second defense and applying the rule of damages applicable thereto it cannot be corrected here, as the defendant has not appealed. He is, therefore, entitled on the Sikel & Hellen judgments to only $175 and eight per cent interest thereon from 1 April, 1887.

We think that his Honor erred in permitting the jury to consider the Pope & Co. judgment in estimating the damages for the breach of warranty. It is admitted that it has never been extinguished by the defendant Richardson, and that he has never paid anything on it.

"The rule as to the measure of damages for breach of the cov- (650) enant against an encumbrance is that the covenantee is entitled to recover the amount necessary to extinguish it; but if he has not extinguished it, and it is still outstanding, his damages are but nominal."

Delansyne v. Norris, 7 Johns, 358; *Richard v. Bent,* 59 Ill., 38; S. C., 14 Am. Rep., 1; *Johnson v. Collins,* 116 Mass., 392; *Read v. Pearce,* 36 Maine, 445; *Eaton v. Lyman,* 30 Wis., 41; *Foote v. Burnett,* 10 Ohio, 317; 2 Greenleaf Ev., 242.

We agree with his Honor that the mere knowledge of the existence of the judgments at the time of the sale would not defeat the right of the defendant to recover on the warranty. We concur also in his ruling that there was no reasonably sufficient testimony to show that the sale was made subject to the said judgments.

As the jury found that the defendant was the owner of the Sikel & Hellen judgments at the date of the assignment of the note, and as the amount paid for the same is not disputed, the errors committed may be corrected by a modification of the judgment in conformity to the principles declared in this opinion.

Modified and affirmed.

Cited: Van Story v. Thornton, 112 N. C., 209; *Pridgen v. Long,* 177 N. C., 195.

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(651)

W. P. COLE v. JOHN LAWS.

Penalty—Register of Deeds—Negligence—Marriage—Verdict—Amendment.

1. When a register of deeds issues a license for the marriage of a woman under eighteen years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information. *Held,* that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect.

2. The court has the power, and it is its duty to permit a jury, before separation, to correct their verdict, after it has been entered, so as to conform to it what they had agreed and intended it should be.

ACTION, tried at March Term, 1889, of ORANGE, *Bynum, J.,* presiding.

This action, began before a justice of the peace, is prosecuted to recover the penalty of two hundred dollars of the defendant, register of deeds, for issuing a marriage license for the marriage of the plaintiff's daughter in violation of the provisions of section 1816 of the Code.

The complaint alleged that Molly, the daughter, at the time under fifteen years of age, resided with the plaintiff as a member of his family and was subject to his control, and that the license was issued without

his knowledge and against his will, pursuant to which the marriage to James Ellis immediately thereafter took place.

It is alleged further that the license was issued without reasonable inquiry, as directed by the statute, whereby the penalty was incurred.

To this the defendant demurred for want of jurisdiction in the justice, in that the cause of action was not founded on contract so as to confer it. The demurrer was sustained and the plaintiff appealed, and on the hearing in the Superior Court of Orange the judgment (652) was reversed and the defendant allowed to file his answer.

The defendant admitted that as register of deeds in Orange County the marriage license was issued by his deputy, Merritt Cheek, at the time and in form charged in complaint, the plaintiff being then a resident of Chatham County, and without knowing the age of said Molly. He denied the allegation that the license was issued without reasonable inquiry as to the facts, and said that the deputy issued it "upon the statement of Thomas Marks, whom he knew and believed to be a man of truth and veracity, that said Mary Cole was of the age of eighteen years, and that there was no legal impediment to such marriage."

At March Term, 1889, the cause was brought to trial before the jury upon two issues, to wit:

"1. Did the defendant sign the licenses in blank and send them to Merritt Cheek as his deputy in Chapel Hill, and did Cheek deliver the license to Thomas Marks on his application?

"2. Did Merritt Cheek, acting as deputy of the register of deeds, issue the license to marry set forth in the complaint, without reasonable inquiry as to whether the female named in said license was under eighteen years of age?"

The court having refused to submit that proposed by the plaintiff, to wit: "Did the defendant, without reasonable inquiry, issue the marriage license as alleged?"

The plaintiff testified to the age of his daughter as stated in the complaint, and to his never having consented to the issue of the license or marriage.

The defendant, examined as a witness for the plaintiff, testified that he issued blank licenses to his deputy, with his signature, to be filled up when applied for at Chapel Hill; that he did not instruct his deputy to make reasonable inquiry before issuing, but did direct him in general terms to be very particular, and in that the law was com- (653) plied with.

The testimony of the duputy, Merritt Cheek, was that he lived at Chapel Hill; that defendant sent him some marriage licenses, signed, for him (witness) to fill up and issue when they were applied for, and told witness to examine the Code and be very particular; the license

issued here was one of those sent him by defendant, and that witness filled it up and issued it; that Thomas Marks, a man about sixty years old, applied for a license for James Ellis to marry Molly Cole; that Ellis was twenty-three years old, and lived in Durham County, and Molly Cole was twenty-two years old, and lived in Orange; that he did not know the general character of Marks, but had never heard anything against it; don't remember asking Marks where he lived; think he said he lived in Durham; no one present but witness and Marks; did not know Ellis or Cole, but inquired particularly where he, Cole, lived in Orange, for he did not know a family of that name in Orange; that he issued the license in the morning and married the parties in the evening of the same day.

Plaintiff then introduced two witnesses, who testified they had known Marks twenty-five years or longer; that his general character was not good. It was admitted by both parties that the defendant kept his office as register of deeds at the courthouse in Hillsboro.

The plaintiff asked the following instructions:

"1. If the jury believed the evidence of the defendant and Cheek they should answer the first issue 'Yes.'

"2. If the jury find that the license was issued and signed in blank by the register, and filled up by Merritt Cheek at Chapel Hill, the register not being present, they must answer the second issue 'Yes.'

"As a matter of law and according to the facts in this case
(654) the defendant did not exercise reasonable inquiry, and you will answer the second issue 'Yes.'"

The court gave the first instruction, and refused the second and third, and on the second issue instructed the jury as follows:

"A high and strict degree of diligence is required in inquiry before issuing marriage licenses, and it is for the defendant to show you in this case that he has exercised that diligence. Does the evidence satisfy you that the inquiry made by Cheek as to the age of the female, Molly Cole, was such that a man of reasonable prudence in the transaction of an important business matter would have been content with the information received and would have acted upon it, trusting its truth? If so, you will answer the second issue 'No'; if not, you will answer it 'Yes.'"

The jury returned a verdict, answering to the issue "Yes."

The counsel for plaintiff moved for judgment on the verdict, which was granted, but subsequently, during the term, the following order was entered:

"In this action, after the jury had returned their verdict finding both issues in the affirmative, and had tried two short cases for divorce, but had not departed or held any communication with any one, it was sug-

gested to the court by defendant's counsel that there was a mistake in the findings of the response to the second issue. His Honor proceeded to poll the jury, and each responded that they had found that Merritt Cheek had made reasonable inquiry, and that the answer made to the second issue was a mistake and did not represent their actual finding. His Honor thereupon allowed the jury to make a correction of their finding, and to respond to the second issue 'No,' and thereupon rendered the following judgment:

"In this action, the jury having found that John Laws issued (655) the license, signed by himself in blank, and that the same was filled up by Merritt Cheek, as his deputy, and that the said Merritt Cheek exercised reasonoble inquiry before filling up and issuing said license, it is adjudged that the register could not appoint a deputy for such purpose and issue to him marriage license signed in blank, to be issued to parties calling for them, and that the plaintiff recover of the defendant the sum of two hundred dollars and the costs of this action, to be taxed by the clerk."

Defendant moved for a new trial upon ground of error in court in granting a judgment on the verdict, and for error in instructions to the jury. Motion overruled, and defendant appealed from the judgment, and plaintiff appealed from the order of the court correcting the verdict.

John Manning for plaintiff.
John W. Graham, A. W. Graham and R. W. Winston for defendant.

SMITH, C. J., after stating the case: We find no just cause of complaint in the substitution of the two issues in place of the one proposed by the plaintiff. The first was unnecessary, because the facts involved in the inquiry were not contested, and so the jury were directed upon the evidence to find the affirmative.

The second and third instructions asked by the plaintiff have been rendered unimportant by the ruling of the court which, notwithstanding the change in the response of the jury, permitted after the rendition of the verdict, awards the plaintiff a recovery upon another and different ground, to wit, the invalidity of the attempted transfer of the defendant's official functions to be exercised elsewhere in the county.

The plaintiff's appeal would have been unnecessary if the judg- (656) ment was such as ought to have been given in the case, whether upon the ground assumed by the court to warrant it, or upon some other. But if the jury were rightfully permitted to amend their verdict, and the plaintiff had acquiesced in the charge given to the jury, the judgment upon the finding would necessarily have resulted in a judgment for the

defendant, and the plaintiff not have the benefit of a new trial in which to test the correctness of his instructions that were refused. We are therefore required upon his appeal to determine whether those instructions ought to have been given, which if given and followed would have led to a different result.

Upon the evidence, about which there was no dispute, were "probable" reasons furnished to authorize the defendant to believe and to act upon the belief that no legal impediment existed to the marriage? Did he make *"reasonable inquiry"* about the age of the young girl before acting favorably upon the application? The application—verbal, we suppose—comes from an old man of sixty years, not residing in the same county with that of the plaintiff, and misrepresents that of his daughter. He was personally known—but not his character or reliableness—to the deputy. His sources of information seem not to have been inquired into, nor his reasons for making the application, nor his relations to the parties. He represents a girl of fourteen years to be of twenty-two years. Nor is it shown that anything was said about her parentage and their assent to the projected marriage. In a matter involving such grave consequences and fixing her future life, did the deputy make any reasonable effort to inform himself of the fact, and act with a prudent regard to a parent's rights in granting, and so soon following the license by consummating the marriage itself?

The case cited for the defendant (*Bowles v. Cochran,* 93 N. C., 398) is not at variance with the view taken of the facts of the present case.

There a paper, without signature, however, was produced before
(657) the register, giving the age, by one known to him to be of good character and trustworthy, and the applicant stated that he knew her age to be that stated in the writing—eighteen years. There was nothing calculated to awaken suspicion in the register's mind of the truthfulness of the representations, and it was held that the penalty had not been incurred. No such favoring circumstances attend the action of the duputy to excuse his precipitate action. He manifests an inexcusable indifference to the results of his action, and risks the well-being of others upon representations, not themselves suspicious, which have no outside support.

This case is not like *Williams v. Hodges,* 101 N. C., 300, in which more diligence was shown in finding out the facts and the true age of the infant *feme,* and yet it was held that the register had been remiss and culpably careless in issuing the license. In the opinion *Merrimon, J.,* says: "To issue a license to marry, without reasonable inquiry, without care and scrutiny, and where 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."

The action of the court in permitting the jury to correct their finding after returning the verdict, and make it what they had agreed and intended it should be, was clearly competent and proper. Such a power is essential to securing a fair trial and a correct verdict, and was, in this instance, properly exercised. The cases cited in defendant's brief are direct, and positive authorities in this Court. *Willoughby v. Threadgill,* 72 N. C., 438; *Wright v. Hemphill,* 81 N. C., 33.

Without passing upon the question of the right of the defend- (658) ant to delegate his authority to another, to be exercised in a different part of the county, we declare there is error in refusing the plaintiff's instructions, and a *venire de novo* must be awarded.

This disposes of both appeals.

Error.

Cited: S. c. 108 N. C., 186; *Hodge v. R. R., Ib.,* 32; *Sutton v. Phillips,* 116 N. C., 505; *Mitchell v. Mitchell,* 122 N. C., 333; *Harcum v. Mash,* 130 N. C., 159; *Trolinger v. Boroughs,* 133 N. C., 317; *Laney v. Mackey,* 144 N. C., 633; *Drewry v. Davis,* 151 N. C., 299; *Joyner v. Harris,* 157 N. C., 300; *Gray v. Lentz,* 173 N. C., 351; *Julian v. Daniels,* 175 N. C., 553; *Snipes v. Wood,* 179 N. C., 354.

RICHMOND & DANVILLE RAILROAD COMPANY v. THE DURHAM & NORTHERN RAILWAY COMPANY AND RALEIGH & GASTON RAILROAD COMPANY.

Railroads—License—Statute of Frauds—Easement—Estoppel.

1. A parol license to enter upon the lands of another is revocable, although the licensee has entered and expended money under the license, unless the license is connected with, and necessarily incident to, the possession and enjoyment of property conveyed by a valid grant.

2. Under section 1957 of the Code, providing that railroads shall unite in forming a physical connection, and, if they cannot agree, that commissioners are to be appointed to determine the place and manner of making such connection; one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings.

3. A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is

a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements.

MOTION for injunction, before *Connor, J.*, at Spring Term, 1889, of VANCE.

(659) The Oxford and Henderson Railroad was chartered on 23 March, 1871. In August, 1881, it completed its track to a point in the town of Henderson, designated as "A" in the diagram, within a few feet of the right-of-way of the Raleigh and Gaston Railroad Company.

From the point "A" to the passenger depot of the Raleigh and Gaston Railroad Company the distance is about ..... feet. For the purpose of making a physical connection with this latter road the Oxford and Henderson Railroad Company, in 1881, through its lessee, A. H. A. Williams, entered upon the right-of-way of the Raleigh and Gaston Railroad Company, and was proceeding to lay its track longitudinally on the said right-of-way in the direction of the latter's passenger depot, when it was met by an opposing force of the Raleigh and Gaston Railroad Company which was building a track from the latter's passenger depot in the direction of the point "A." The Raleigh and Gaston Railroad Company forbade the lessee Williams from entering or further trespassing, as it alleged, upon its right-of-way. A breach of the peace between the two opposing forces being imminent, warrants were issued, at the instance of the Raleigh and Gaston Company, against Mr. Williams and some of his employees, under which they were arrested and bound over to court. The said lessee was not enjoined against further proceedings with his track but desisted, he says, in order to prevent bloodshed and the loss of life. That when the work was thus interrupted the said lessee had extended the track on the said right-of-way to a point marked "B" on the diagram, some feet from the point "A," and it is alleged that it continued in possession of the same until the present time. It does not distinctly appear to what extent this track was used, but it was never removed, and appears to have been in the possession and under the control of the said lessee.

In 1884 the lessee, Williams, extended his track along said right-of-way to the point "C" in the diagram, where it was joined to a short spur track of the Raleigh and Gaston Railroad Company, which led (660) to the latter's depot, and the whole extension from "A" to the said depot has been used ever since by the Oxford and Henderson road, both under the lessee Williams and his lessor, the R. and D. Railroad Company. This extension of the track from "B" to "C," and the use

of the track from "C" to the depot, was made and permitted under a parol agreement, the terms of which are seriously disputed by the contending parties.

The Raleigh and Gaston Company, on this point, alleges that subsequent to the extension of the track to "B" the Raleigh and Gaston Railroad Company (in 1884), finding that it suffered much delay of its trains stopping to transfer freight to the Oxford and Henderson Railroad Company, suggested to James A. White (the superintendent) that he could extend his track a short distance further, so five or six cars could be left alongside it by the Raleigh and Gaston Railroad Company.

The transfer of heavy goods could be easily facilitated, and complainants are informed and believed that the said extension was made to the point marked 'C" by the Oxford and Henderson Railroad Company under this suggestion and with the acquiescence of the Raleigh and Gaston Railroad Company.

That subsequent to this John C. Winder suggested and proposed to said White, as plaintiffs are informed and believe, that if the Oxford and Henderson Railroad Company would agree to receive the cars of the Raleigh and Gaston Railroad Company on its track without transfer of freight, and would not require the Raleigh and Gaston Railroad Company to stop its passenger train at the depot of the Oxford and Henderson Railroad Company, as said company had a right to require under the statute of the State, that the Raleigh and Gaston Railroad Company would consent that the Oxford and Henderson Railroad Company could make a physical connection with its track near the Raleigh and Gaston Railroad depot, by joining the Oxford and (661) Henderson extension track to a short spurtrack which the Raleigh and Gaston Railroad Company had put in at that point, and this proposition was accepted and agreed to by the Oxford and Henderson Railroad Company, and the track was accordingly again extended and connected with the said spurtrack, and the physical junction of the two tracks completed.

The contention of the Raleigh and Gaston Railroad Company on this question is thus set out in its answer:

"Further answering these defendants say that in the spring of 1884 the said Williams, lessee of the Oxford and Henderson Railroad Company was allowed to extend his track over this land and to make a physical connection with the track of the Raleigh and Gaston Railroad Company, upon the express condition, stipulation and agreement that the entire track laid by him on the right-of-way of the Raleigh and Gaston Railroad Company should be taken up, the connection severed, and the right-of-way restored whenever the Raleigh and Gaston Railroad Com-

pany should require this to be done, and that the said Williams expressly agreed to those provisions, and the track was accordingly extended and the connection made, the Raleigh and Gaston Railroad Company making no charge for the same."

The plaintiffs allege that the Raleigh and Gaston Railroad Company has threatened to tear up the whole of said track, by which they will be irreparably damaged, and they pray for a perpetual injunction. The alleged threat is contained in the following letter from John C. Winder, the general manager of the Raleigh and Gaston Railroad Company, to W. H. Green, general superintendent of the Richmond and Danville Railroad Company:

(662) "DEAR SIR:—I had hoped before this that you would have removed your track, now upon the right-of-way of the Raleigh and Gaston Railroad at Henderson, which I notified you some days ago had been condemned by the Durham and Northern Railway Company for its use. As nothing has yet been done towards the removal of your track, I write now to say that as the right-of-way is absolutely necessary for our use, if your track is not removed within the next ten days I will take it up and place your ties and rails at as convenient a place for you as it is possible for me to do."

The Durham and Northern Railway Company, mentioned in the foregoing letter, has had the right-of-way of the Raleigh and Gaston Railroad Company, over which the track of the plaintiffs is laid, condemned to its use as a part of its main line. No notice of the proceedings were served on the plaintiffs, and they allege that they were collusive and void.

The plaintiffs claim the right-of-way in question:

"1. By a continued possession for more than 'two years' after the road has been 'located,' which is the provision of the Western North Carolina charter, or two years after the road was 'finished,' which is the provision of the North Carolina Railroad Company's charter, because the Oxford and Henderson Railroad Company has the same 'privileges or immunities possessed or enjoyed by any other railroad in this State.'

"2. The plaintiff also claims the right to build this track to 'join or unite with the Raleigh and Gaston track.'

"3. The plaintiff also claims by estoppel against the defendants, who acquiesced in the possession and gave consent to continue the track for its convenience and advantage."

(663) There were many affidavits read on both sides which were more or less conflicting, especially as to whether the extension of the track was permitted upon an agreement that it should be removed upon the request of the Raleigh and Gaston Railroad Company.

As the court has found it unnecessary to pass upon the affidavits, they are not essential to a proper understanding of the opinion.

His Honor below granted a restraining order, and it is for this order that the defendants appealed.

C. M. Busbee and F. H. Busbee (D. Schenck by brief) for plaintiffs.
J. B. Batchelor, John Devereux, Jr., and J. W. Hinsdale for defendants.

SHEPHERD, J., after stating the case: The first two grounds upon which the plaintiffs base their right to the location in question are, to use their own language, as follows:

1. "By a continued possession for more than two years after the road has been located, which is the provision of the Western N. C. Railroad charter, or two years after the road was finished, which is the provision of the N. C. Railroad charter; because the Oxford and Henderson Railroad Company has the same privileges or immunities possessed or enjoyed by any other railroad in this State.

2. "The plaintiff also claims the right to build this track to 'join or unite with the Raleigh and Gaston Railroad track.'"

The Oxford and Henderson Railroad Company was chartered by the General Assembly of 1870-71. Its charter gave it power "to have land condemned for right-of-way according to existing laws." Under the existing laws there was no such statute of limitations as is relied upon by the plaintiffs. They must, therefore, in order to sustain their contention, connect themselves with the charters of the Western North (664) Carolina and the North Carolina Railroad companies.

These charters confer upon the said companies the right to enter upon any lands "for the purpose of constructing" their roads, "and, for want of agreement as to the value thereof or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners," etc. If there be no agreement or purchase there shall be a presumption of a grant of an easement, "and in case the owner or owners shall not apply within two years next after" the road is finished over his or their lands, or in the case of the Western North Carolina Railroad Company, within two years after the road has been located, the owner or owners "shall be forever barred from recovering said land or having any easement or compensation thereof."

In order to avail themselves of this limitation the plaintiffs rely upon an amendment to the charter of the Oxford and Henderson Railroad Company (ch. 188, Laws 1879) which provides that it "shall have all the

powers and enjoy all the privileges and immunities possessed or enjoyed by any other railroad in the State." These amendatory words, standing alone, would undoubtedly be sufficient to serve this purpose, but the act further provides that "this act shall not apply to Henderson Township." The scene of this controversy being in Henderson Township, it must follow that the statute of limitation in question had no application to this case.

Conceding, however, that the two years limitation apply to this controversy, and that entries for the purpose of *constructing* a railroad may be made before the institution of the proceedings for condemnation, we will inquire whether the above-mentioned charters or the general laws authorize an entry upon the right-of-way of another railroad where there has been no such proceeding, and where the *sole* object of such entry is to make a physical connection with such road.

(665) It is well settled in this State that the right-of-way of one road may be appropriated in part to the use of another. *R. R. v. R. R.*, 83 N. C., 489. And we think that wherever there is a right to enter upon the lands of a private person for the construction of a road before condemnation proceedings, a like right may be exercised upon that part of a right-of-way which is not in actual use, subject, however, to the restraining power of the court, which will determine whether such right-of-way is necessary and should be thus appropriated.

When land is taken for the purpose of constructing a railroad all that the commissioners in condemnation proceedings are required to do is to fix the amount of compensation which should be made to the owner; but where land is taken under sec. 1957 of the Code, the commissioners are not only to fix the amount of compensation but they must determine, in the event of disagreement, *"the points and manner"* of the physical connection which is sought to be made. This distinction finds support in *R. R. v. Love,* 81 N. C., 434.

We are of the opinion that the settlement of this important question is a condition precedent to the right of entry. To hold otherwise would encourage the very troubles of which this case furnishes such a signal example. It could never have been intended that the depot and side-tracks of a railroad company should be subjected to the invasion of another road, which could run its track according to its own will or caprice, and seriously interfere with the transaction of its business as well as the convenience of the public.

We think that the above section of the Code was enacted for the very purpose of avoiding such unseemly conflicts, and that the best interests of all concerned will be subserved by requiring a strict adherence to its provisions.

It may be argued that such harmful results may be prevented by injunction. This is open to the objection that much injury may be done, and even the peace of the State may be violated (as was apprehended in the present case) before this remedy can be obtained. (666) It may also be observed that if the court is to determine the location upon injunction proceedings it would be practically abrogating the statutory tribunal of "three disinterested and competent freeholders," which has been constituted for the very purpose of settling such disputed questions.

We are not unmindful of *R. R. v. R. R.*, 83 N. C., 489. In that case proceedings for condemnation had been instituted before entry, but before the clerk of the court had acted the defendant entered and commenced to work. The plaintiff sought to enjoin the defendant, and the judge found all the facts necessary to show that the plaintiff had no equity. The clerk afterwards appointed commissioners, from which action the plaintiff appealed, and both appeals seem to have been heard together in this Court. By reference to the opinion it will appear that some stress was laid upon the pendency of proceedings for condemnation, and it was suggested that they might be a barrier to the prosecution of the suit for injunction. It was also suggested that the facts did not present a cause of irreparable damage. The opinion then discusses the merits of the controversy, so far as they could be properly considered at that "preliminary stage of the case," stating that *"the main, if not the only important question argued,"* were whether the defendant had "a right to proceed for the condemnation of lands for its use," or whether its power for that purpose had been exhausted and whether the right-of-way "was liable, under the law of eminent domain, to be taken for the use of the defendant company." The Court then proceeded to discuss these questions, and the point whether the land was subject to entry before any proceedings whatever were commenced for the purpose of making a physical connection was not directly passed upon; nor does it seem that the attention of the Court was di- (667) rected to the section of the Code now under consideration. We cannot, therefore, regard that decision as authority upon the particular question here presented.

In the present case the Oxford and Henderson Railroad Company alleges that it had *completed* its track from Oxford to Henderson to the point marked "A" in the diagram (which was within a few feet of the right-of-way of the Raleigh and Gaston Railroad Company), and "that while preparing to extend its track over said strip of land (the said right-of-way) to a point on the Raleigh and Gaston Railroad track, *in order to make an intersection and junction therewith, as it was allowed to do*

by the statute laws of North Carolina, it was forbidden to proceed any further by the officers of the Raleigh and Gaston Railroad Company."

It thus plainly appears that the use of the land was not required for the *completion* of the road to the *terminus,* Henderson, but to make a connection, under sec. 1957 of the Code. This is the avowed purpose of the entry, and as there was no agreement or condemnation proceedings it was unlawful, and the possession under such an entry would not be protected under the limitations of the charters mentioned, even if such charters were plainly applicable to this case.

Thus have we discussed this branch of the plaintiff's contention in every aspect presented by them, and our conclusion is that the Oxford and Henderson Railroad Company and its lessee, the Richmond and Danville Railroad Company, have no title to the location in question by reason of their entry and alleged adverse possession.

We will now consider the third ground relied on by the plaintiffs, which they say in their brief is "the safest basis" upon which "to ground its equity for an injunction."

3. "The plaintiffs also claim by estoppel against the defendants, who acquiesced in the possession and have consent to continue the track for its convenience and advantage."

(668) As we propose to base our decision upon the admitted facts, we will exclude from our consideration the contention of the defendants that the track was extended from the point "B" to "C" under an agreement that it was to be removed at the request of the Raleigh and Gaston Railroad Company.

We then have the following case: The Oxford and Henderson Railroad Company, under a parol agreement, extended its track in 1884 to the point "C." The Raleigh and Gaston Railroad Company has notified it to remove the same, and the plaintiffs having failed to comply with this request, the said Raleigh and Gaston Railroad Company is about to take up the said track and place the "ties and rails at as convenient a place" (for the plaintiffs) "as it is possible for it to do." This is the threatened injury complained of. There is no pretense that there was any agreement to grant an easement, and the most that can be said is that the extension was made under a parol license, and that valuable improvements have been made.

The plaintiffs rely chiefly on *R. R. v. Battle,* 66 N. C., 546. That case was materially different from ours. The defendant Battle had executed to the plaintiff a writing which the court said could be specifically enforced so as to create an easement. "It was not," says the opinion, "a mere license; it was given for a valuable consideration and was coupled with an interest. It is true that at law no easement passed to the com-

pany, for an easement in land can be created only under seal. But the writing by which the defendant charged himself was *binding within the statute of frauds;* it was a contract which, as has been heretofore said, this Court would specifically enforce." In these few words we find the *ratio decidendi* of the case. The case of *Rerick v. Kerns,* 14 Sergt. & Rawle, 267, cited in the opinion in Battle's case, is from Pennsylvania, where the doctrine of part performance obtains, and is not good authority here, where that doctrine has long since been repudiated. The quotation from that case was unnecessary, and the principles there enunciated as to the binding effect of an executed parol license are unquestionably opposed to the decisions of this Court, as well as the (669) general current of authority.

"The doctrine of early cases, which converted an execution license into an easement, is now generally discarded as being 'in the teeth of the statute of frauds.'

"The cases of *Ricker v. Kelly,* 1 Me., 117, and *Clement v. Durgin,* 5 *id.,* 9, cited by the defendants' counsel, have now little following, and the case of *Rerick v. Kerns,* 14 S. & R., 267, also relied on, which was an action at law for damages in favor of the licenses, is followed in but few states. *Houghtaling v. Houghtaling,* 5 Barb., 383; *Jamieson v. Millemann,* 3 Duer., 255; *Washb. Easm.,* 24.

"A simple reference to some of the more important cases, in support of the views herein expressed, will suffice. *Cook v. Stearns,* 11 Mass., 533; *Mumford v. Whitney,* 15 Wend., 380; *Wolf v. Frost,* 4 Sandf., ch. 72; *Foote v. R. R.,* 23 Conn., 214; *Bridges v. Purcell,* 18 N. C., 492; *Hazelton v. Putnam,* 3 Pin. (Wis.), 107; *Woodard v. Seely,* 11 Ill., 157; *Wood v. Leadbitter,* 13 M. & W., 938; *Wiseman v. Lucksinger,* 84 N. Y., 31; S. C., 38 Am. Rep., 479."

In cases where the license is connected with a valid grant, as of chattels, or fixtures, upon the land of the licensor, susceptible of being removed, it is subsidiary to the right of property and irrevocable to the extent to protect the licensee and save to him the right of entry—the right of possession following the right of property. *Nettleton v. Sykes,* 8 Metc., 34; *Heath v. Randall,* 4 Cush, 195; *Wood v. Leadbitter, supra.* But where it is sought to couple a license with a parol grant of the interest in the realty, the attempted grant being void, the transaction remains a mere license. *Wood v. Leadbitter, supra; Johnson v. Thillman,* 29 Minn., 95 Alabama Law Journal, 18.

The following words from *Wood v. Leadbitter,* 13 M. & W., (670) 838, cited in Battle case, declare, we think, the correct principles;

"But where there is a license by parol, coupled with a parol grant, or pretended grant of something which is *incapable of being granted other-*

wise than by deed, there the license is a mere license; it is not incident to a valid grant, and it is therefore revocable. The same rule prevails in equity, with this difference: that whereas the courts of law require the *grant* to which the license is incident to be valid at law, a court of equity only requires that it shall be one that is regarded as a *valid grant in that court.*"

In our case there is, as we have said, no attempt to grant an easement, and the question is whether a parol license which has been acted upon and the enjoyment of which necessarily involves expenditure in the way of improvements, can be revoked at the will of the licensor. This is expressly decided in the affirmative in *Kivett v. McKeithan,* 90 N. C., 106.

The plaintiff, with the verbal consent of the defendant, built a milldam on the defendant's land. After the mill had been in operation for several years the defendant revoked the license and notified the plaintiff to remove the dam, which he declined to do, and the defendant himself tore it down. The plaintiff sued him for the alleged trespass and relied upon the license and that fact that in pursuance thereof he had built his milldam and expended money. The court, however, held that a parol license relating to land, whether voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages.

In speaking of the doctrine of equitable estoppel, which is invoked in this case, the court says: "In answer to a suggestion of bad faith in the defendant, in inviting the expenditure and then depriving the plaintiffs of its fruits, we must say all this is done with full knowledge of the law that the permission may be recalled, and it is the plaintiff's folly
(671) and the result of misplaced confidence for which the law makes no provision.

"The plaintiff could have guarded against the loss by purchasing and taking a conveyance of the easement from the defendant or, if this could not be done, by pursuing the remedy pointed out in the statute (Code, sec. 1749) for the condemnation of lands," etc.

It is needless for us to cite and review the many conflicting decisions upon the subject in other States, as this Court has emphatically put at rest, with us at least, all doubt upon the question.

As the doctrine is so well stated in *Kivett v. McKeithan, supra,* and *McCracken v. McCracken,* 88 N. C., 272, we think it proper, in view of the importance of this case, to reproduce a part of the language of the opinions in those cases.

In *Kivett's* case the late Chief Justice says: "The cases in which it has been held that a license acted on and expenditures made upon the

faith of its continuance, when founded on a valuable consideration, vests an interest beyond the power of revocation at the will of the owner who gives it, proceed upon the same considerations and reasoning which support the doctrine of part performance, and these are that the statute will not countenance an attempted fraud and render it successful. Many will be found collected in the notes of the learned and discriminating editor of the American Decisions appended to *Ricker v. Kelly,* 10 Am. Dec., 40; *Rench v. Kern,* 16 Am. Dec., 501, and *Mumford v. Whitney,* 30 Am. Dec., 71. But the subject of a parol contract under which improvements in good faith have been put upon the land, and the relative resultant interests and rights to and between the parties to it, has been so fully considered in the recent case of *McCracken v. McCracken,* 88 N. C., 272, but little remains but to announce the conclusion there arrived at.

The Court uses this language (*Ruffin, J.*): "If we consider (672) the contract as a license between the parties, as a license given to the plaintiff to enter upon the land and erect and enjoy the improvements, we cannot perceive that it in the least serves to help his case. If purely a license, it excused, it is true, his entry upon the land, which otherwise would have been a trespass. But it was still revocable, and its continuance entirely dependent upon the will of the owner. If intended to pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it was then not only necessary to be evidenced by writing, but would only be made effectual by deed."

In view of the reasons given and the authorities cited we are constrained to hold that the Oxford and Henderson Railroad Company has acquired no interest in the right-of-way in question. This being our conclusion, it necessarily follows that the said company cannot impeach the proceedings under which the said right-of-way was condemned to the use of the Durham and Northern Railroad Company.

In *Marshall v. Comrs.,* 89 N. C., 103, it is said that where the relief sought is the object of the action, and not merely auxiliary, the injunction should be continued to the hearing; but this rule only applies where it is possible that the plaintiff may be entitled to the relief demanded, and as we are of the opinion that upon the pleadings and the admitted facts the plaintiffs are not entitled to such relief, it would be useless to continue the injunction until the final hearing.

The late distinguished Chief Justice concurred in this disposition of the case.

The plaintiffs moved in this Court for leave to file additional affidavits. After mature consideration we declined to grant the motion,

and we have therefore decided the case upon the testimony which was heard by his Honor below. If, as the plaintiffs suggest, they have
(673) newly discovered testimony tending to show the *grant* of an easement, *valid either at law or in equity,* they may still avail themselves of it either by amendment in the court below or by a new action, but no restraining order should be granted unless a *prima facie* case is presented in strict conformity to the principles which we have declared in this opinion.

Much trouble and litigation would have been avoided had the Oxford and Henderson Railroad Company obtained a grant of an easement or, failing to do so, pursued the legal remedy provided in sec. 1957 of the Code. It may not be improper to observe that this provision of the Code is mandatory, and was not intended for the benefit of railroad companies alone. Extraordinary privileges are granted such corporations, and it has been well settled by the "Granger Cases," 94 U. S., that "when private property is devoted to a public use it is subject to public regulations." Accordingly it has been provided that railroads shall "unite" . . . "in forming connections," etc., and if they cannot agree commissioners are to be appointed to determine the "points and manner" of making the same. It is very clear that the purpose of the Legislature was to promote the convenience of the public, and this *paramount* object should not be defeated by the dissensions and conflicts of rival corporations.

There is error. Let this opinion be certified to the Superior Court, to the end that the injunction be dissolved.

Error.

Cited: Allen v. R. R., 106 N. C., 527; *Jones v. Comrs.,* 107 N. C., 265; *Hall v. Turner,* 110 N. C., 302; *Emry v. Nav. Co.,* 111 N. C., 99; *Bass v. Nav. Co., ib.,* 454; *Exp. Co. v. R. R., ib.,* 472; *S. v. Fisher,* 117 N. C., 739; *Hendon v. R. R,* 125 N C., 128; *Lumber Co. v. Hines,* 127 N. C., 132; *Power v. Wissler* 160 N. C., 274; *R. R. v. R. R.,* 161 N. C., 537; *Herndon v. R. R., ib.,* 654.

THE DURHAM & NORTHERN RAILROAD COMPANY AND THE RALEIGH & GASTON RAILROAD COMPANY v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

(674) SHEPHERD, J. The opinion of the Court above between the same parties with reversed relations practically disposes of this

appeal. We think that his Honor's order was judicious under the circumstances, but as we have determined the main question in dispute it is proper that it should now be modified to meet the changed aspects of the case. We are of the opinion that the order of his Honor, dated 13 April, 1889, should be continued, with the modification that the defendants may institute proceedings under section 1597 of the Code, or proceed as suggested in the opinion of the Court in the other appeal.

Error.

UPSHUR GUANO COMPANY v. THEO. F. MALLOY.

Contract—Vendor and Vendee—Sale.

1. Goods were sold and delivered to defendant under a contract that the vendee should deliver to the vendor the "farmers' notes," given for the purchase of such as were sold, payable May 15th; and if these notes were unpaid at maturity, the vendee should give his individual notes for the payment, and the "farmers' notes" were to be held in trust as collateral security. *Held*, that in an action of "claim and delivery" for certain of the goods unsold, that when the goods were shipped to vendee the title passed to him.

2. That this agreement did not constitute a conditional sale, but was an absolute sale of the goods.

ACTION, tried at the September Term, 1889, of RICHMOND, (675) before *Shipp, J.*

The plaintiff made affidavit in claim and delivery proceedings, alleging ownership in certain guano as per contract, which is as follows:

"DEAR SIR:—We will sell you our fertilizers at the following prices, delivered at railroad depot at Norfolk, Va., viz: 500 tons Bone and Peruvian Guano, $..... cash, $27.50 1 May, 1885; New Era Champion Guano, $..... cash, $..... 1 May, 1888.

"When the above-named goods are sold at prices payable on 1 May, and it is desired and agreed to extend the time of payment to the fall, you will give us your note or notes, when called upon for same, with interest added from 1 May to maturity at rate of nine per cent per annum; and the maturity of said notes shall be made to average not later than 15 November, 1885, unless otherwise agreed in writing. (See below.) All farmers notes and liens taken by you for sale of guano purchased from us on time are to be sent to us by 15 May. We will return same to you in ample time for collection, and all said notes and liens, and (or) any and all moneys or valuable consideration of whatever kind

realized therefrom, or from your book accounts for sales of said goods, shall be held by you in trust for us until your own notes in our favor shall have been paid. It is agreed between the parties hereto that the notes given to Upshur Guano Company for guano purchased under this contract, at prices and upon conditions above set forth, shall be made to average due not later than 15 November, 1885. (See below.)

"You can deduct ..... per cent per month for payments in advance of maturity.

"UPSHUR GUANO CO. (Norfolk, Va.)
"By Frank E. Wilcox, Secretary.

"I accept the above terms this 13 January, 1885, at Laurinburg, N. C.
"THEO. F. MALLOY."

FREIGHT AGREEMENT.

(676) The schooner's freight from Norfolk to Wilmington is to be advanced by Upshur Guano Company and included with nine per cent interest from date of payment, in notes averaging due 15 November, 1885. One-half (½) of the railroad freight from Wilmington to the interior points is also to be advanced by the Upshur Guano Company, payable, with nine per cent interest from date of payment, 1 May, 1885.

It is hereby subsequently agreed that the notes given in payment of guano and schooner's freight to Wilmington, N. C., are to be divided into four (4) equal payments, maturing as follows:

One-fourth due 1 November, 1885.
One-fourth due 15 November, 1885.
One-fourth due 1 December, 1885.
One-fourth due 15 December, 1885.

UPSHUR GUANO CO.
Per Frank E. Wilcox, Sec.
THEO. F. MALLOY.

Laurinburg, N. C., 13 January, 1885.

The defendant in his answer, denied the several allegations of the complaint:

1. That plaintiff was a corporation.

2. That plaintiff was the owner and entitled to the portion of the guano seized by the sheriff under claim and delivery proceedings by virtue of the foregoing contract.

3. That the defendant unlawfully withheld said guano when the other was bought.

The defendant admitted that the foregoing contract put in evidence was that executed by him and plaintiff at its date.

The plaintiff introduced Berry Bryant as a witness, who tes- (677) tified: That he was sheriff of Richmond County at the time this action was brought, and that he served the claim and delivery papers; that he delivered a copy of the affidavit of plaintiff to the defendant Malloy, who opened it and looked at it and, as witness thought, read it, but he was not sure about this; that McIntyre, a clerk of defendant, was present at the time, and heard what was said; that witness demanded a delivery of the guano described in the affidavit to him and McIntyre, in the presence and hearing of Malloy, the defendant, told witness it was in the warehouse near the depot; that Malloy said nothing after looking at the affidavit nor at the time witness made the demand. The witness went to the warehouse and found the guano described in the affidavit; the warehouse was used by Malloy, the defendant, for storing his goods.

The contract, a copy of which is annexed to the affidavit of plaintiff in the claim and delivery proceedings, and a part of the record in the case, was introduced in evidence and used by the plaintiff. There was no evidence other than the contract of the existence of the plaintiff as a corporation.

Upon the evidence offered by the plaintiff his Honor intimated that plaintiff could not recover; whereupon plaintiff, in deference to this intimation of his Honor's opinion, took a nonsuit and appealed to the Supreme Court.

The plaintiff made affidavit in claim and delivery proceedings, alleging ownership in certain guano, as per contract.

The action was brought 12 December, 1885.

Burwell & Walker filed a brief for plaintiff.

S. C. Weill and J. D. Shaw (W. H. Neal filed a brief) for defendant.

AVERY, J., after stating the facts: According to the agreement (678) (a correct copy of which appears in the statement of the facts) the time of payment for the guano shipped was 1 May; but if the defendant desired indulgence we find, by construing both of the memoranda signed by the parties, that the time of payment was, by the terms of the contract, to be extended, and the defendant, *"when called* upon," was to give the plaintiff his four notes, for equal installments, payable respectively, 1 November, 15 November, 1 December, and 15 December, 1885, with interest added to each, at the rate of nine per centum, from 1 May, 1885, till the date of maturity.

There is neither an allegation nor evidence that these notes were or were not executed. The plaintiff alleges that the guano has not been paid

for, but offers no testimony in support of that controverted allegation. It does not appear whether the plaintiff ever called upon the defendant to execute the notes.

When the one hundred and twenty bags of guano were delivered at the railroad depot at Norfolk depot at Norfolk the property in them passed to the defendant. Nothing was necessary to perfect the defendant's title remained to be done.

The plaintiff had no right to seize or sell the guano unless the contract could be construed to be a conditional sale or mortgage. The agreement in *Chemical Co. v. Johnson,* 98 N. C., 123, provided that the notes taken by the defendant Johnson for sales of goods were to be forwarded and held as collateral security for the payment of notes executed by him to the plaintiff company, and that "all of the goods, as well as the proceeds therefrom, were to be held in trust by him for the payment of his notes due the company, whether the same had matured or not." In our case the notes and proceeds of sale were to be held in trust, but not the guano itself. Yet the court, even in that case, held that the delivery, as in this, passed the property in the fertilizer shipped. In *Millhiser v. Erdman,*

98 N. C., 292, and same case, 103 N. C., 27, it was held that the
(679) title to the property shipped did not pass to the purchaser, nor vest in his assignee, because, by the very terms of the contract, the execution of the drafts were of its essence, and the sale was not to be complete until they were executed and delivered. It does not appear in this case whether the notes were called for, and if so, whether they were executed and forwarded.

We therefore see no error in the intimation of his Honor that the admission of the execution of the contract offered and the testimony of the witness Bryant did not make a *prima facie* case for the plaintiff.

No error.

Cited: Travers v. Deaton, 107 N. C., 504.

THE STATE v. J. C. PARISH.

Rape—Evidence—Indictment—Joinder of Counts—When Prosecutor Required to Elect.

1. Where there was testimony tending to show that a prisoner charged with rape had had carnal intercourse, forcibly and against her will, with his daughter, a girl about twelve years old, at various times, for nearly two years prior to the finding of the indictment. *Held,* that it was not error to refuse to compel the prosecution to elect between the different transactions till the close of the evidence on behalf of the State.

2. Where there are several counts, each covering separate transactions, punishable in the same way, or only one count, but testimony as to two or more transactions falling under the charge, the judge may, in his discretion, refuse of allow a motion to force the prosecutor to elect, and may determine the time when the election is to be made, if at all.

3. In the exercise of this discretionary power, the courts have generally held that the prosecutor (especially on the trial of felonies or offenses punishable with infamous punishment) should be compelled to elect at the close of the testimony for the State, except in cases where the evidence of each one of the transactions is so mixed with and dependant on the testimony as to the others, with their attendant circumstances, that the court does not deem it practicable to confine the prosecutor to one transaction without destroying what seems to be a *prima facie case* of guilt against the defendant.

4. It has never been deemed so important to enforce an election on the part of the prosecuting officer on the trial of misdemeanors, punishable at the discretion of the court.

5. Where there are several counts in an indictment, drawn merely to meet the different phases of the facts that will probably be proven, the judge will neither quash nor require an election.

6. After the prosecutrix had been impeached by cross-examination, it was competent to prove by her brother that the prisoner took her out of bed when she was sleeping with witness, at a time when she had testified that her father ravished her, and that he heard what she told their mother on that occasion to corroborate her, and, also, that his mother ordered that the prosecutrix be removed to another bed, as a part of the *res gestae.*

7. Evidence that the prisoner and his wife lived amicably together after such intercourse with the daughter did not tend to contradict the prosecutrix, and was incompetent.

8. After the prosecuting officer had elected to rely upon a particular transaction, when prosecutrix testified that prisoner penetrated her person, it was not error to instruct the jury that they could not find the prisoner guilty of an assault with intent to commit rape (under ch. 68, Laws 1885), though the testimony as to another transaction tended to prove only that offense.

INDICTMENT for rape, tried at January Term, 1889, of WAKE, (680) before *Graves, J.*

The indictment was drawn for the common-law offense.

C. E. Goodwin, of the regular *venire,* was challenged by the State, for that he had a suit pending and at issue in this court, and it being found as a fact that he was a party to an action pending and at issue, the cause was allowed and the prisoner excepted.

The State introduced Esther Parish, daughter of the defend- (681) ant, who testified that she was about eleven years old; that the prisoner would meet her and carry her down in the old field "and put

his private parts to mine. He would do this so often that I can't remember how often. The first time was in the field. I think it was more than a year ago. I ran; he caught me; I screamed; he took me to a ditch. I was scared so bad, and it has been so long ago, I can't say whether I was hurt."

The witness further testified that "one morning after that he (the prisoner) went to the field without his breakfast, and I carried it to him, with some water. He said, 'I will have to pay you for this.' He took hold of me, put me down and put his privates to mine. His privates entered mine and made me sore."

The State now offered to show an alleged rape at another time. The prisoner objected. The court ruled that the State was not confined to any particular time, but might introduce evidence tending to show other acts—tending to show that the prisoner had committed the act charged at other times—further saying that at the close of the State's testimony the solicitor would be compelled to elect which particular act he would rely upon.

The objection was overruled and the prisoner excepted.

The witness testified that at various other times and places the prisoner had violated her person: "I remember one time when he was plowing in the new ground. I went to carry him some water; he threw me over the fence and put his privates in mine. I went to the house and told my mother; she went down there and said something; she said he would have to stop this. Julia Jones was at the house scouring. When my mother called him to dinner he was a long time coming; when he came he brought a long switch, and said he intended to make his chil-
(682) dren mind him. Julia Jones was scouring the piazza; he did not say anything to her."

The prisoner objected to any evidence tending to show any offense committed at any time other than that laid down in the bill of indictment.

The objection was overruled, and the prisoner excepted.

The witness then stated that at another time the prisoner took her from her bed to his and had connection with her; that at that time the prisoner slept in a little room where there were two beds, and that the mother of witness and one Florence Stanly occupied another room in which was but one bed; that when her father took her from her bed her brother waked her mother and told her; that thereupon her mother told Florence Stanly to take the witness in bed with her, which was done.

Upon cross-examination the witness, in answer to question how frequently this occurred, said, "Every week."

The witness also stated that she never at any time consented to these acts of carnal intercourse with her father, the defendant.

Joe Parish, brother of the witness Esther, was introduced by the State to corroborate the statement made by Esther that her father had taken her from the bed where she was sleeping, and proposed to show the details of the statement made by the witness Esther to her mother in the hearing of this witness. The prisoner objected upon the ground that it was incompetent for the State to prove details of conversations overheard by witness between Esther and her mother regarding her father's treatment of her not testified to by Esther; and also on the ground that a wife's evidence is not competent against her husband, except in case of assault upon the wife by the husband, and the State could not do by indirection that which the law expressly prohibited it from doing directly; and also because the State cannot show, for the same purpose, details of other offenses of like nature to that charged in the bill of indictment and said to have been committed by the prisoner. (683)

The court, being of the opinion that the witness Esther had been cross-examined with a view to impeach her credibility, overruled the objection, admitted the testimony, and prisoner excepted.

Joseph P. Gulley, brother of defendant's wife, was a witness for the State. Upon cross-examination the prisoner proposed to show by this witness that his wife and himself lived amicably and peaceably, with the view of contradicting Esther and Joe Parish.

The State objected; objection sustained; the prisoner excepted.

Julia Jones was introduced by the State to corroborate Esther Parish.

Defendant objected because witness Esther had testified that on that occasion he did not ravish her.

It was insisted by the solicitor that under the bill of indictment it was competent to prove an assault with intent to ravish because, in an indictment for rape, the jury might find the prisoner guilty of the main charge of rape, or of the minor felony of assault with intent to ravish, or even of a simple assault and battery.

The objection was overruled, and the prisoner excepted.

The witness then proceeded to state that on the second Saturday in September, 1888, the wife of the prisoner had gone to church; he called Esther to bring him a needle and thread, when he was dressing for church, in the big house. She did not want to go, but witness made her go; that when Esther got to the door the prisoner jerked her in by the arm and choked her. She said he choked her, but did not say why he did it. "In August I was there; Esther came to the house crying. She went to carry prisoner water where he was plowing in the cotton; told her mother he put her over the fence, laid her down and did what

(684) he wanted to; said he hurt her so bad she could hardly walk. She told her mother, who went down to the field."

The prisoner objected, upon the ground taken in a previous objection, that the State could not remove the veil which the law throws over the domestic relations of man and wife, and show indirectly, out of the mouth of another, that which it was prohibited from showing directly by putting the wife on the stand as a witness in the cause.

The objection was overruled, and the prisoner excepted.

Pending the examination of medical experts, who were necessarily absent from the court, the State rested its case, and by consent the experts were examined later, and the State elected to rely on the one act, when the witness Esther said the prisoner threw her over the fence in the summertime when he was plowing. The prisoner requested the court to rule out all evidence except that bearing on the particular act relied on by the State. The request was refused, and the prisoner excepted.

The prisoner introduced testimony tending to contradict the evidence offered by the State.

Dr. Sexton, who was admitted to be a medical expert, testified for the State: "I examined the parts of Esther Parish about the time of the trial before the justice of the peace. I found the hymen ruptured; parts very sore; some bruises about the labia minora; the hymen was ruptured almost entirely. It seemed to have been recent, from the appearance of inflammation. Rupture of hymen is recognized as evidence of deflowering. The appearance of the parts was such as would most usually follow partial penetration. I examined her to-day; the parts are at present inflamed; the points are gone; the inflammation was acute; it is now subacute."

Cross-examined.—"There are other causes that will rupture the hymen; local disease may; I do not know that violent exercise in a child would rupture; I can't say that the appearance was from a bruise.

(685) I could not say that it was not produced by leucorrhœa; the rupture of hymen does not necessarily show intercourse; the hymen in this case was torn, not perforated by little holes; it was as if something had been pushed through; I can't say that it was a man's parts (not dilated); the member of a male could have been pushed in to rupture the hymen; the parts did not have the appearance of frequent penetration; I do not think it could have been that penetration had been made to reach the hymen two years; inflammation of parts and discharge is not an unusual thing in girls of this age; there is now subacute inflammation, which does not come from leucorrhœa, because it has pus in it; I cannot tell the cause of the inflammation; leucorrhœa is not produced by inflammation; it is a discharge from the vagina; it has no pus in it."

Dr. Ellis, for the prisoner, admitted to be an expert, testified: "I have examined parts of witness. The appearance of the discharge with pus—the present discharge—does not necessarily show that it comes from violence, as distinguished from what we would call natural causes. The long-continued reception of the organ of a man for two years—I do not think her parts would tolerate a male organ—that is, complete penetration, kept up for two years, with appearance of her parts—diagnosis of leucorrhœa. There have been many causes—anything that sets up irritation that does not amount to inflammation. I do not think she looks as if a man had penetrated twice or three times a week for two years."

Cross-examined.—"I mean penetration to the vagina. There may be such a thing as a mere vulvular connection. The appearance of the parts might be as they now appear. At her age I could not say, from the appearance, that there has not been vulvular penetration for twenty times. The discharge does not show what I call pus; it does not show a glutening, showing chronic."

In his charge to the jury the presiding judge said: "The State, (686) having been directed by the court, selected the one act on which the solicitor relies, so as to give the prisoner the chance to defend as to that, and the solicitor selects the time he has relied on. The evidence is to be considered with this specific charge. The jury will then strike out from their minds the allegation of the other acts of the prisoner. It is not allowed to show that prisoner has been guilty of other acts of like kind to show that prisoner is guilty of this. Such evidence coming in has been used by both the prosecution and counsel for prisoner upon the credibility of witnesses."

There was a verdict of "guilty," and thereupon the defendant moved the court for a new trial, which motion was refused. Defendant excepted and moved the court for a *venire de novo* upon the ground that his Honor erred in charging the jury that there was no evidence that would warrant them in finding the defendant guilty of an assault with intent to commit rape, under the bill of indictment in this cause; and that the counsel for the State relied upon the evidence introduced by the State to show either the commission of the rape and felony charged in the bill, or an assault with intent to commit rape, up to the time the State elected to stand or fall upon the particular act of rape, as testified to by the witness.

There was a motion in arrest of judgment. Motion denied, and exception by the prisoner. Sentence of death pronounced, from which the prisoner appealed.

Attorney-General for the State.
T. P. Devereux for defendant.

AVERY, J., after stating the facts: The first exception was not insisted on by counsel, but was not abandoned. It being found as a fact that the juror Goodwin was a party to an action pending and at issue in the court in which the prisoner was being tried, it is only necessary to re-
(687) fer to the plain language of the law (Code, sec. 1728) without citation of the cases construing it.

The prisoner objected to allowing the prosecutrix Esther to testify as to different occasions, extending over a period of more than a year, in which he, as she alleged, had had carnal intercourse with her against her will, and this is the ground upon which are based the second and third exceptions.

When the point was first presented by counsel the judge announced that he would allow the State to introduce evidence tending to show the commission of the offense charged at different times, but would compel the solicitor at the close of the State's evidence, to elect and state which particular act he would rely upon.

While the practice of requiring the prosecution to elect, in some instances, between the different counts of a bill of indictment or between distinct transactions, each constituting the offense charged in a particular count, prevails both in England and in the different States of this country, the weight of authority has established generally the rule that it rests in the sound discretion of the *nisi prius* judge to determine whether he will compel an election at all, and if so, at what stage of the trial. 1 Bishop Crim. Pro., sec. 205; *ib.*, secs. 6 to 9; 1 Roscoe Cr. Ev. marg., p. 207; 1 Wharton Crim. Law, sec. 423; *S. v. Woodard,* 21 Mo., 265; 3 Hill, 159; *S. v. Haney,* 19 N. C., 390.

The general rule, too, is that the appellate courts, except in those States where matters of judicial discretion are held subject to review, do not interfere with the discretion of the inferior tribunal in allowing or overruling motions to put the prosecutor to his election. Bish. Crim. Pro., sec. 205; Wharton Crim. Law, 423. In the exercise of their
(688) legal discretion judges have been sustained in fixing the time of election at the close of the evidence on both sides; the reason for putting a prosecutor to his election being that the prisoner may not have his attention divided between two or more charges. The better rule for the exercise of this discretion is that the election ought to be made, not merely before the case goes to the jury, as it is sometimes laid down, but before the prisoner is called on for his defense at the latest. Roscoe Cr. Ev., marg., p. 208; Bishop Cr. Pro., sec. 215; *S. v. Smith,* 22 Vermont, 74. It is true that a different rule was adopted in Michigan, and in the interpretation of one particular statute in Alabama. But the courts of those States stood almost alone in so limiting the sound discretion of the trial judge, and especially in driving the prosecution to an

election before any evidence is heard, or at an early stage in its development. *S. v. Czanikow,* 20 Ark., 160; *Kane v. People,* 8 Wend., 203; *S. v. Slye,* 26 Me., 212; *S. v. Haney,* 19 N. C., 390; *S. v. Reel,* 80 N. C., 442.

There has been less controversy about the exercise of the legal discretion where testimony as to various transactions, each one constituting, if the evidence is believed, a misdemeanor, has been heard. In such cases nearly all the courts conceded the right of the presiding judge in his discretion to refuse to drive the prosecution to the election at all, but some go so far as to doubt the power of the court to compel an election. 1 Bish. Crim. Pro., sec. 209; *Kane v. People, supra.*

This Court has repeatedly held that the presiding judge might, in his discretion, hear the evidence on a number of counts in a single indictment charging felony, or "on a number of distinct bills, treating each as a count of the same bill," and refuse to require the solicitor to elect till the close of the evidence for the State. *S. v. Hastings,* 86 N. C., 596; *S. v. Dixon,* 78 N. C., 558; *S. v. Watts,* 82 N. C., 656; *S. v. Haney, supra,* and *S. v. Reel, supra.* (689)

In *S. v. McNeill,* 93 N. C., 552, *Justice Merrimon,* delivering the opinion, says: "So that, *distinct felonies of the same nature* may be charged in *different* counts in the same indictment, and two indictments for the same offense may be treated as one containing different counts, subject to the right of the defendant to *move to quash,* in case of *inconsistent* counts, and the *power of the court* to require the prosecuting officer to elect the count or indictment on which he will insist. This certainly may be done, and we can see no substantial reason why the same rule of practice may not apply to several indictments against the same parties for like offenses, when the just administration of criminal justice will thereby be subserved." In *S. v. Haney, supra, Judge Gaston* says: "It is, however, in the discretion of the court to quash an indictment or compel the prosecutor to elect on which count he will proceed, when the counts charge offenses actually distinct and separate."

In *S. v. Morrison,* 85 N. C., 561, *Justice Ruffin,* for the Court, says: "The common-law rule is, that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect or the court may quash. But where it appears that the several counts relate to one transaction, varied simply to meet the probable proof, the court will neither quash nor force an election." This was said in reference to a case in which there was a count for larceny and one for receiving. The leading text writers who are generally recognized as authority, as will appear from the references *supra* to Roscoe, Bishop and Wharton, concur in holding that the same rule ap-

plies where there is but one count and testimony as to several transactions, either of which will be relied on to make a case under that count, and where there are several counts containing distinct charges
(690) and growing out of separate transactions all punishable in the same way.

It is conceded to have been the general but not the mandatory practice of the courts to compel an election at the close of the evidence, as his Honor did in this case. But the proposition that the judge, in instructing the jury, should tell them to attempt to discard from their minds all of the testimony touching any transaction except that which was located at the fence and was relied on by the prosecutor for conviction after the election was enforced, is a novel one, the adoption of which in practice would lead to perplexity and confusion, and, if the jury could carry out the instruction, would of necessity withdraw from their consideration evidence very important in reaching a verdict. To illustrate this view of the subject we need not go beyond this case. It is material to show that Esther did not consent when the prisoner had intercourse with her at the fence (if the jury find that he did), and any outcry she may have made, and any declarations by her as to that transaction, would, of course, be material. If the jury would otherwise have been in doubt as to whether she was willing on that particular occasion, because she did not make an alarm or offer stubborn resistance, would it not be material to know that the prisoner, being her father, had repeatedly forced her to submit prior to that time, and that on one of these occasions she was heard to cry at night? Would not any juror, from his observation and knowledge of human nature, be prepared to believe that she did not consent, upon less proof of outward manifestation of opposition before or of grief after he accomplished his purpose, if he believed the further fact that she had been forced repeatedly, and even in the presence of her mother, to submit to the same terrible ordeal, and no person had been able to prevent it? Might she not have offered less resistance or remonstrance, because she despaired of help and submitted unwillingly to the authority of a father upon whom no influence
(691) seemed to impose any restraint? *S. v. Cone,* 46 N. C., 18.

Bishop, in his work on Criminal Procedure, says: "Where several felonies are so mixed that they cannot be separated, evidence of the whole may be given." Evidently the author had in his mind some such case as this, and the rule laid down by him suggests the question whether his Honor might not have best subserved the ends of justice by refusing to enforce an election at all in this case. The judge who presided at the trial of such cases is clothed with the power to grant a new trial if upon a review of all of the evidence he has reason to believe that the prisoner

has been taken at disadvantage because he was left in doubt about the specific charge that he was to answer. In fact, we apprehend that, in practice, a defendant is not often surprised by the development of evidence as to two or more such similar transactions; and if he is, the salutary corrective is found in the unlimited discretion of the court to set aside a verdict. If the State had only offered evidence as to the alleged violation of Esther's person when the prisoner put her over the fence, it would have been unquestionably competent for the prisoner, on her cross-examination, or by other witnesses, to have shown that he had carnal intercourse with her at other times, as bearing upon the question of force. *S. v. Jefferson,* 28 N. C., 305. It would be unreasonable to deny to the State the right to show repeated acts, and that all were committed against her will, in order to explain her conduct on the particular occasion to which the attention of the jury is directed, and to throw light upon the question whether she yielded willingly to his embraces at that time. So far as our investigations have extended, it does not appear that it has ever been contended that, after election in favor of one of several transactions falling under the same charge is enforced, the jury should attempt the difficult, if not impossible, task of ignoring other evidence so intimately interwoven with the transaction relied on that an attempt to separate testimony of the other simi- (692) lar acts, with their attendant circumstances, must destroy the whole web in which the prisoner may have been involved by the testimony for the State. It has been settled, however, that the fact that a person has committed one crime shall not be admitted before or considered by a jury as tending to raise a presumption that he has committed another offense. In compliance with this principle the jury were told, in effect, not to consider evidence of the commission of a like crime at any other time as tending to prove the commission of the rape as charged when the prisoner lifted Esther over the fence. The rule is, that testimony as to other similar offenses may be admissible as evidence to establish a particular charge, where the intent is of the essence of the offense, and such testimony tends to show the intent or guilty knowledge. *S. v. Murphy,* 84 N. C., 742.

We conclude, therefore, as to the second, third and eighth exceptions, there was no error, because—

1. Where there are several counts, each covering separate transactions, punishable in the same way, or only one count, but testimony as to two or more transactions falling under the charge, the judge may in his discretion refuse or allow a motion to force the prosecutor to elect, and may determine the time when the election is to be made, if at all.

2. In the exercise of this discretionary power the courts have generally held that the prosecutor (especially on the trial of felonies or offenses punishable with infamous punishment) should be compelled to elect at the close of the testimony for the State, except in cases where the evidence of each one of the transactions is so intertwined with and dependent upon the testimony of the others, with attendant circumstances,
that the court does not deem it practicable to confine the prose-
(693) cutor to one transaction without destroying what seems to be a *prima facie* case of guilt against the defendant.

3. It has never been deemed so important to enforce an election on the part of the prosecuting officer on the trial of misdemeanors punishable at the discretion of the court.

4. Where there are several counts in an indictment drawn merely to meet the different phases of the facts that will probably be proven, the judge will neither quash nor require an election.

The prosecutrix, Esther, had been impeached on her cross-examination, and when the State offered to corroborate her by the testimony of Joe Parish as to the fact that she cried when taken out of bed by the prisoner, and to prove that he heard what she told their mother on that occasion, and afterwards heard Esther tell her what was done when her father put her over the fence, the prisoner objected, on the ground that it was not competent to introduce, in that indirect way, the declarations of the wife made in the conversation, when she was not competent or compellable to testify against her husband. The test of the validity of such objections is properly made by examining the testimony admitted, not simply the objections stated. We find that, in fact, the witness mentioned no declaration of his mother, except the order to remove Esther to another bed, and that was a part of the *res gestae* of the transaction in the house, heard before the solicitor made his election. Esther had been impeached on cross-examination, and it was unquestionably competent to corroborate her by proving former declarations consistent with her evidence. *S. v. Laxton,* 78 N. C., 564; Best on Evidence, 570 note D.

Evidence that the prisoner and his wife lived amicably and peaceably would not tend to contradict Esther or to prove the guilt or innocence of the prisoner, and therefore the objection to the testimony of Joseph P.
Gulley was properly sustained. *S. v. Jefferson,* 28 N. C., 305.
(694) If the prisoner had not forced the prosecuting officer to elect,
there would have been testimony tending to show an assault upon Esther by the prisoner, and an unsuccessful attempt to commit rape; but there was no evidence of an attempt to commit rape; when Esther was put over the fence. On that occasion, if the jury believed her, the

purpose of the prisoner was accomplished. It was not error, therefore, to refuse to instruct the jury, on the evidence, that they might find the prisoner guilty of an assault with an intent to commit rape.

It was within the peculiar province of the jury, upon this story of unnatural and almost incredible brutality, to determine whether the prisoner was guilty. We can only review the errors of the court below, and we fail to find any erroneous ruling. Evidences of such unusual occurrences between father and child, extending over so long a period of time, should have been dispassionately considered, as we must suppose it was, before the jury returned their verdict.

No error.

Cited: S. v. Weaver, post, 761; *S. v. Phillips, post,* 788; *S. v. Farmer, post,* 889; *S. v. Harris,* 106 N. C., 686; *S. v. Allen,* 107 N. C., 806; *S. v. Van Doran,* 109 N. C., 865; *S. v. Barber,* 113 N. C., 714; *S. v. Williams,* 117 N. C., 755; *S. v. Surles, ib.,* 722; *S. v. Ashford,* 120 N. C., 591; *S. v. Howard,* 129 N. C., 656; *S. v. Register,* 133 N. C., 752; *S. v. Burnett,* 142 N. C., 579; *S. v. Leeper,* 146 N. C., 660; *S. v. Davenport,* 156 N. C., 600; *S. v. Leak, ib.,* 646; *S. v. Stephens,* 170 N. C., 746; *S. v. Kirkland,* 175 N. C., 772; *S. v. Southerland,* 178 N. C., 678; *S. v. Simons, ib.,* 681; *S. v. Cline,* 179 N. C., 704.

THE STATE v. L. G. SYKES.

Criminal Practice—Justice's Warrant—Amendment—Liquor Selling.

1. Where a warrant before a justice of the peace is informal, it may be aided by the affidavit if it refers to it, the warrant and affidavit being constituent parts of the same procedure; and if the court can see from them that the offense is sufficiently charged, it will be sustained.
2. The court has power to allow either a warrant or the affidavit to be amended.
3. It is not necessary that a warrant should conclude, "against the form of the statute."
4. Where the sale of liquor is made criminal within four miles of a certain locality, and the defendant, who had a distillery more than four miles from that locality, agreed with a party within the four miles to sell him liquor, which was also delivered within the four miles. *Held,* that it was a sale within the four miles, and consequently a misdemeanor.

INDICTMENT, tried before *Bynum, J.,* at Spring Term, 1889, (695) of ORANGE.

In this action, began in the court of a justice of the peace, the defendant is charged with selling spirituous liquors in violation of the statute (Code, secs. 2640, 2646).

The following is a copy of the affidavit made before the justice of the peace, and the warrant issued thereupon by him:

"STATE OF NORTH CAROLINA—Orange County.

Chapel Hill Township.

"Before W. H. Cunningham, J. P.

"A. J. McDade, for the town commissioners, being duly sworn, complains and says that, at and in said county and in Chapel Hill Township, on or about the first day of December, 1888, L. G. Sykes did sell to Jack Barbee spirituous liquors and, directly or indirectly, received compensation therefor, at Chapel Hill or within less than four miles thereof, contrary to law and against the peace and dignity of the State.

A. J. MCDADE.

"Sworn and subscribed before me, 12 March, 1889.

"W. H. CUNNINGHAM, J. P."

"STATE OF NORTH CAROLINA,

To any lawful officer of Orange County—GREETING:

"You are hereby commanded forthwith to arrest L. G. Sykes and him safely keep, so that you have him before me, at my office in Chapel
(696) Hill, or some other magistrate of said county, immediately, to answer the above complaint and be dealt with as the law directs.

"Given under my hand and seal, 12 March, 1889.

"W. H. CUNNINGHAM, J. P."

By virtue of such warrant, the defendant was arrested, and at the trial the justice of the peace gave judgment against him, from which he appealed to the Superior Court. In the latter court his counsel moved to quash the warrant, upon the grounds, first, that it failed to charge the sale to have been made "unlawfully or willfully"; secondly, that it was void for uncertainty, in using the disjunctive "or," and did not charge either the offense of selling or receiving compensation, or that the offense was committed in Chapel Hill or within four miles of the corporate limits; thirdly, that it did not conclude, "contrary to the form of the statute in such case made and provided."

Thereupon the solicitor for the State moved to amend the warrant. The court denied the motion to quash and allowed the motion to amend the same by striking out of it the words "to answer the above complaint and be dealt with as the law directs," and inserting in lieu thereof the words "to answer the charge that the defendant L. G. Sykes did sell to

one Jack Barbee, on 1 December, 1888, spirituous liquors, within four miles of the corporate limits of Chapel Hill."

The defendant excepted and pleaded "not guilty."

On the trial, Jack Barbee, a witness for the State, testified as follows: "Last December I got liquor from the defendant. He was at Floyd's Mill, about four hundred yards from Chapel Hill; gave him a jug; said he had none, but would send it down by his wagon. A day or two after this, I met him and paid him the money, and next day I got the whiskey at his house in Chapel Hill. I paid him two dollars. Defendant had a distillery twelve miles from Chapel Hill."

On cross-examination, this witness said: "I don't know whether (697) I paid for the liquor inside of the corporation of not; I paid for it at Floyd's shop. He told me he had no liquor, but would send to the distillery and have it brought down. I got it from his wife. I asked him to send to his distillery and get the whiskey for me."

Another witness testified that "Floyd's shop is outside of the corporation and within four miles of Chapel Hill."

The defendant asked the court to instruct the jury "that, unless the jury are satisfied that the contract at Floyd's Mill was relative to a particular gallon of whiskey then set apart at Sykes' distillery, there was no sale within Chapel Hill."

The court declined to charge the jury, and the defendant again excepted.

The court then told the jury that if they found "from the evidence that the defendant, within four miles of Chapel Hill, contracted with the witness Barbee to sell him a gallon of whiskey and received the money for it, and two days after that he delivered to Barbee the gallon of whiskey in Chapel Hill, under the contract made within four miles of Chapel Hill, the defendant was guilty." The defendant again excepted.

There was a verdict of guilty and judgment against the defendant, from which he appealed.

Attorney-General and John Manning for the State.
John W. Graham for defendant.

MERRIMON, J., after stating the case: Procedure in actions and proceedings before justices of the peace are generally more or less informal and summary. They are favored by every reasonable intendment, and are to be helped by the free exercise of the large powers conferred by the statute (Code, sec. 908) upon the courts, where the actions in which they appear may be pending, to amend them as to form (698)

or substance, at any time before or after judgment. *S. v. Smith,* 103 N. C., 410, and the cases there cited.

In this case an affidavit was first made. It and the State warrant, founded and issued upon it, must be taken together. While the criminal charge might be embodied and charged, however informally, in the warrant, it may be charged in the affidavit as well, and each may and will aid the other, there being a reference in the warrant to the affidavit. They, together, constitute one, and they are constituent parts of the same procedure, and will be sufficient, if the court can see from the whole that the offense is charged. This will suffice to give the defendant such information as will enable him to make defense and to plead former acquittal or conviction, in case of subsequent prosecution. Moreover, if the court found the charge so made defective in form or substance, it had power, as we have seen, to allow proper amendments to perfect the same.

We are clearly of opinion that the grounds assigned in support of the motion to quash are untenable. The charge was sufficiently made in the affidavit taken in connection with the warrant. It is charged in the affidavit, in substance and effect, that about the time specified therein the defendant, within the county of Orange and within four miles of Chapel Hill, unlawfully sold to the person named spirituous liquors and received compensation therefor, against the peace and dignity of the State. The amendment allowed served to make the charge thus made somewhat more specific as to the distance from Chapel Hill within which the sale of spirituous liquors was made and the price thereof paid. It is certainly sufficient in criminal actions like this, before a justice of the peace, to charge that the offense charged was "contrary to law." But the sale, as charged, taken in connection with the statute forbidding such
(699) sale, implies that it was unlawful and criminal. The disjunctive "or," in the affidavit complained of, was not material, because, whether the sale was made in Chapel Hill or within four miles of that place, the offense was complete and the charge sufficient. Obviously, it was not necessary that the affidavit or warrant should conclude "against the statute." (Code, secs. 1183, 1189.)

Accepting the evidence as true, in no reasonable view of it was it agreed or understood by the prosecuting witness and the defendant that the latter sold and delivered to the former a particular gallon or any quantity of whiskey at the distillery, twelve miles distant, and hence the defendant was not entitled to the special instruction to the jury asked for.

The evidence went strongly to prove an agreement made within four miles of Chapel Hill on the part of the defendant to sell the person

named in the affidavit spirituous liquor which was not present at the time to be delivered; that afterwards, as contemplated by the parties, it was delivered and paid for within four miles of the place mentioned. This was its fair and only reasonable import, and the instructions given by the court were correct.

The statute (Code, sec. 2646) prohibits the sale of spirituous liquors in Chapel Hill or within four miles of its corporate limits, and section 2646 makes it a misdemeanor to do so.

Affirmed.

Cited: S. v. Wilson, 106 N. C., 721; *S. v. Baker, ib.,* 759; *S. v. Peeples,* 108 N. C., 769; *S. v. Norman,* 110 N. C., 487; *S. v. Davis,* 111 N. C., 732; *Cox v. Grisham,* 113 N. C., 280; *S. v. Sharp,* 125 N. C., 635; *S. v. Yoder,* 132 N. C., 1113; *S. v. Poythress,* 174 N. C., 811; *S. v. Price,* 175 N. C., 806.

(700)

THE STATE v. L. G. SYKES.

Jurisdiction—Justices of the Peace.

1. If a justice of the peace, under a mistake as to his jurisdiction, bind over one charged with a violation of a criminal law to answer in a Superior Court when he should have exercised final jurisdiction, the Superior Court will direct that the cause be remanded to the proper tribunal, and that defendant enter into recognizance for his appearance thereat.

2. Where a justice of the peace improperly exercises jurisdiction in criminal actions by a final hearing and disposition, the Superior tribunal possessing rightful jurisdiction may direct that the proceedings be brought before it, and make such orders as may be necessary to correct the error.

APPEAL from *Bynum, J.,* at Spring Term, 1889, of ORANGE.

The defendant was arrested on the warrant of a justice of the peace, charging him with selling spirituous liquors within four miles of Chapel Hill, in violation of section 2646 of the Code, and, after preliminary hearing, was bound over to answer the charge in the Superior Court.

Upon ascertaining that the sale of the liquor was alleged to have been made within six months before the issuing of the warrant, the solicitor moved to remand the case for trial to the justice of the peace who had issued the warrant, on the grounds that the punishment, by the terms of the law, could not exceed a fine of fifty dollars or imprisonment for

thirty days, and the justice of the peace, and not the Superior Court, had original jurisdiction to try the offense. This motion was allowed, and the defendant excepted and appealed.

Attorney-General and John Manning for the State.
John W. Graham for defendant.

(701) AVERY, J. We think that there was no error in allowing the motion of the solicitor to remand the case to the rightful jurisdiction.

When an inferior court, having original jurisdiction of a case, transfers it improperly for trial or hearing to a higher one, which could take cognizance of it only on appeal, an order in the nature of a *procedendo* that the case be sent to the lower tribunal for trial is the proper procedure. Rapalje and Lawrence Law Dic., p. 1016.

It is an exercise of the inherent power of the Superior Court for the purpose of preventing the escape of the guilty, or a failure of justice, by reason of the mistake of a judicial officer in determining when he has the right to try an offender, and where only the trial of a committing magistrate to hear the evidence and decide whether it shows probable cause. And if the situation were just the converse of that presented by this appeal; if a justice of the peace had assumed jurisdiction of a criminal offense cognizable only in the Superior Court, and had pronounced judgment and refused the defendant an appeal to which he was entitled, in that case the Superior Court would, on his petition, order the justice to send up the transcript of his preceedings with the original papers, restore to the defendant any costs or fine paid by him, and grant him reasonable bail for his appearance before the higher court.

If the solicitor omitted to move the court to put the defendant in the custody of the sheriff till he should give bond in a reasonable sum for his appearance before a justice of the peace on a day certain, it furnishes no just cause of complaint on the part of the defendant. When the papers go back to the justice, with a copy of the order remanding the case, he must now issue another warrant for the arrest of the defendant, which he can do without a new complaint. *S. v. Dula,* 100 N. C., 423.

The judgment of the court below is

Affirmed.

Cited: S. v. Griffis, 117 N. C., 711; *S. v. Ivie,* 118 N. C., 1230.

(702)

THE STATE v. TOM FARRAR.

Amendment—Record.

The court had the power, and did not commit error in ordering the record of the trial of a criminal action to be amended by inserting the plea of not guilty after verdict, when all the circumstances connected with the trial showed that both the State and the defendant had proceeded upon the assumption that the plea had been in fact made, but its formal entry of record had been inadvertently omitted.

APPEAL from *Bynum, J.*, at February Term, 1889, of CHATHAM.

Attorney-General for the State.
T. B. Womack for defendant.

MERRIMON, C. J. It appears that the defendant was indicted, put upon his trial and convicted for larceny at the February Term of the present year of the Superior Court of the county of Chatham; that, after the verdict of guilty, he moved in arrest of judgment, upon the ground that the plea of not guilty had not been entered of record; that this motion was denied and judgment entered against him, from which he appealed to this Court. In this Court, at the last term thereof, the transcript of the record was found to be so defective that the case was remanded, to the end the record in the court below might be perfected and a proper transcript thereof certified to this Court. *S. v. Farrar,* 103 N. C., 411.

At the present term a sufficient transcript of the record has been filed, from which appears that at the last May Term of the court below it entered the plea of not guilty *nunc pro tunc,* having found the facts that at the trial "the solicitor for the State and the defend- (703) ant's counsel all tried the case, and it was considered by all that the plea of not guilty had been formally pleaded and entered on the record, and, through mere inadvertence, the plea was not entered on the record by the clerk." This was not discovered "until the verdict had been rendered," etc.

Very certainly the court had authority, and it was its duty, to amend its record so as to make it speak the truth as to what had been improperly entered by mistake, inadvertence, neglect or fraud, and to make proper entries on the record of what was really done in the course of the action, omitted by reason of any of the causes mentioned, to be entered as the same should have been at the proper time. The court found as a fact that the plea of not guilty was really pleaded, and that the clerk inadvertently omitted to enter it. The case was tried as if it had been

entered. It was, in fact, pleaded, and the defendant suffered no prejudice by the omission. The court properly allowed the plea to be entered as of the time it was pleaded. *McDowell v. McDowell,* 92 N. C., 227; *Cook v. Moore,* 100 N. C., 294; *Brooks v. Stevens, ib.,* 297; *S. v. Harrison, post,* 728.

The records, as amended, show that there was no ground for the motion in arrest of judgment. It was properly denied.

No error. Affirmed.

Cited: S. v. Burton, 113 N. C., 658; *S. v. Currie,* 161 N. C., 279.

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(704)

THE STATE v. GEORGE W. DIXON.

Fornication and Adultery—Evidence—Trial by Jury—Judge's Charge.

1. Where a physician testified that the male defendant (Dixon), charged with fornication and adultery, employed him to attend the female defendant when sick, alleging that she was related to him, and paid charges; another witness testifies that on several nights, while she was sick, he saw the male defendant at her house, and more than once on the bed with her with his clothes on; a third witness, that as a police man, he put one C. out of her house at night at the instance of defendant Dixon, and saw Dixon go into the house soon after; said C. testified that, after he was put out of the house, he went several nights to her house and heard them, from the outside, undress and go to bed together, and that Dixon furnished her a house; and a fifth witness testified that he lived in sight of the woman's house, and that Dixon was in the habit of going to her house early in the night and leaving early in the morning. *Held,* that while the testimony, if believed as a whole, was abundantly sufficient to warrant the inference of guilt, it was error in the court to instruct the jury that, if they believed the evidence, the defendants were guilty.

2. The evidence relied upon to establish the charge of fornication and adultery is usually circumstantial, and the weight to be given to every part of the testimony, and to the combination of facts found to be sufficiently proven, must be determined by the jury.

3. It was exclusively within the province of the jury to decide whether any, or all, of the witnesses examined were to be believed, and whether the testimony of any given witness was true as a whole, or only in part, and after finding what facts were fully proven, to say whether the facts so proven satisfied them beyond a reasonable doubt that the female defendant had habitually surrendered her person to the embraces of the male defendant within two years before the finding of bill of indictment or presentment was made.

4. Where the circumstances shown in evidence are inconclusive as a whole, the court may declare as a matter of law that the defendant is not guilty, but where not *manifestly inconclusive* it is difficult to conceive of such a chain of circumstances as would warrant such instruction.

INDICTMENT charging the defendant and Margaret Robbins (705) with living in fornication and adultery, tried at BEAUFORT, Spring Term, 1889, before *Boykin, J.*, the defendant Dixon alone being on trial.

Dr. Nicholson testified that he had attended the female defendant in her sickness three times; that the defendant Dixon employed and paid him for his services; that the first time he attended her, Dixon stated, when he went after him, that the woman was kin to him, but never stated what the relation was and never referred to her as a relative afterwards; that the defendants both thought the woman pregnant on one occasion.

E. T. Stewart testified that he had frequently seen the defendants together on the streets at night, but never in the daytime; that on one occasion, at the instance of Dixon, he put one Sam Carson out of the house occupied by the woman, and shortly afterwards (this was late at night) the defendant Dixon went into the house; that the defendant Margaret was "a loose woman, or bore that name."

William Foy testified that he was at the woman's house on several occasions at night, when she was sick, and saw the defendant Dixon there at night, and several times in bed with the woman, but with his clothes on.

Daniel Kelley testified that he lived in sight of the woman's house and that Dixon was in the habit of going to the woman's house very often early in the night and leaving very early next morning about light.

Samuel Carson testified that for several nights prior to the finding of this bill of indictment the defendant Dixon, after he (Carson) had been put out of the woman's house as aforesaid, went to the house nightly and slept with the woman; that he heard them undress and go to bed; the defendant Dixon furnished the woman a house to live in; that he bought the house and put her in it about the time witness was (706) ejected, as stated.

The judge intimated to counsel for defendant Dixon, who only was on trial, that the only question to be discussed before the jury was as to the credibility of the witnesses for the State (the defendant having introduced none), and the defendant excepted; exception overruled.

Counsel for defendant did argue the merits of the case fully to the jury. The judge recapitulated the testimony to the jury in his charge, and told them if they believed the evidence the defendant was guilty.

The defendant excepted. Verdict of guilty, and from the judgment rendered the defendant appealed.

Attorney-General for the State.
No counsel for the defendant.

AVERY, J., after stating the case: This is not a case in which the judge could, without peril to the rights of the defendant, tell the jury that if they believed the testimony he was guilty.

It often happens that though a number of persons may have witnessed a breach of the peace at successive stages, or from different standpoints, every one, when examined, testifies to a state of facts sufficient, if believed, to establish the guilt of one charged with an assault or an affray. In such cases it is not erroneous to instruct the jury that if they believe the witnesses, or any of them—in any aspect of the case—the defendant is guilty. *S. v. Burke,* 82 N. C., 551. And similar intstructions might be given on the trial of persons charged with other offenses and under different circumstances. *S. v. Vines,* 93 N. C., 493; *S. v. Elwood,* 73 N. C., 189.

(707) But the evidence relied upon to establish the charge of fornication and adultery is usually circumstantial, and the weight to be given to every part of the testimony and to the combination of facts found to be sufficiently proven must be determined by the jury. In passing upon the issue the jury decided, first, what circumstances have been fully proven, and then whether all the circumstances so proven are inconsistent with the innocence of the defendant, or are such as leave the jury reasonably to infer that he is guilty. In *S. v. Poteat,* 30 N. C., 23 (which has long been considered a leading case on this subject), this Court sustained the judge below in submitting to the jury the issue of guilt or innocence upon substantially the following evidence:

"Two witnesses went early in the morning to the house of the male defendant, knocked at the door and heard the voice of the female defendant refusing admittance, and then the voice of the male defendant telling her to open the door. When she came to the door her dress was unfastened, and they found the male defendant occupying a bed that was very much *tumbled,* and was the only bed in the room, and her shoes lying near the head of the bed. They had both seen her at the house before, but did not know where she lived. A third witness testified that she had lived at the house four or five years, and had been married to another man, who was now dead. The contention of the defendant was that there was not sufficient testimony to take the case to the jury.

Our case is not unlike that. It is true that one witness swore that he saw the male defendant in bed with his clothes on, when she was sick

and was being treated by the physician, whom the male defendant had employed and paid, telling him that she was related to him (Dixon). Another witness was turned out of her house by a policeman, and both he and the policeman testify that they saw Dixon then go into the house late at night and leave early in the morning. A witness listening on the outside thought he heard them go to bed together. How (708) many of these witnesses, if any, did the jury discredit? Counsel might have contended that the manner of any of them was not such as should have won the confidence of the jury, or was such as to prove malice towards the parties, and though the jury may have believed that Dixon was on the bed with her, not undressed, during her sickness, if her counsel chose to insist to the jury that according to his declarations he was a kinsman and among people accustomed to this mode of living such conduct was not considered a breach of modesty or propriety, he had a right to do so; and so the view might have been pressed before the jury that Dixon entered the house of his relative late at night to protect her from disturbance by the witness who was ejected from her house. The jury may have allowed very little weight to such arguments, may have thought them frivolous, but still the principle remains that they were the judges of the facts, and it was exclusively within their province to decide whether all of the witnesses examined, or none of them, are credible; whether the testimony of any given witness was true, as a whole or only in part, and these inquiries were preliminary to the determination of the final question, upon which the guilt of the defendant depended, whether the facts found by the jury to be fully proven would warrant the reasonable inference that the female defendant had habitually surrendered her person to the embraces of the male defendant within two years before the bill of indictment was found or presentment made, or whether the circumstances, so proven, were consistent with the reasonable hypothesis that there had not been such habitual carnal intercourse between them.

Direct proof of actual carnal intercourse is not necessary, and where such lewd conduct is shown it does not follow that the parties to it are guilty of fornication and adultery unless the intercourse was habitual. *S. v. Summers,* 98 N. C., 702; *S. v. Eliason,* 91 N. C., 564.

There was abundant evidence to sustain a verdict of guilty (709) if the jury believed it all, or if they discredited some portion of it only. The verdict of a jury, guaranteed to the citizen by section 13 of the Declaration of Rights, and section 413 of the Code, means necessarily their conclusion as to guilt or innocence, after rejecting every link that they deem insufficient in a chain of circumstantial evidence, and examining and testing for themselves the strength of those left as

a whole. The jury should have been allowed under proper instruction as to the law to pass upon the credibility of the testimony, as well as its sufficiency, to fully satisfy them of the guilt of the defendant.

Where circumstances have been shown pregnant with suspicion, but still insufficient as a whole if true to warrant the inference of guilt, or clearly inconclusive as to guilt, the court may declare as law that a defendant is not guilty of the offense. *S. v. Waller,* 80 N. C., 401. But when the testimony in prosecutions for this offense is circumstantial, as it usually is, and not manifestly inconclusive, it is difficult to conceive of such a chain of testimony, if it is possible, as would make it the duty of the court to give the instruction to which exception is taken in the case at bar.

Error. *Venire de novo.*

Cited: S. v. Telfair, 109 N. C., 883.

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(710)

THE STATE v. D. R. PERKINS AND W. J. LANGLEY.

Larceny—Asportation—Evidence—Judge's Charge.

On the trial of an indictment for larceny of a cow, a witness swore that he saw defendant shoot down the cow and then go to it and stoop down; that, about three months thereafter, he pointed out the place to the owner of the cow. The owner testified that, at that time, there were no remains of the carcass to be found at the place where the killing had been done. *Held,* that an instruction to the jury that the single fact that no portion of the carcass was found at the place of killing three months thereafter was evidence sufficient to warrant them in finding an asportation, was erroneous, although there was other evidence which, if it had been properly submitted to the jury, and believed, would have proved that fact.

INDICTMENT for larceny of a cow, the property of William Keel, tried at March Term, 1889, of PITT, before *Connor, J.*

The prosecutor, William Keel, testified that he lost four cows before the last of November of last year; that he last saw them about the second week in November; missed them on Saturday before the fourth Sunday in November. He further testified as follows: "My cows were in the habit of going on some swamp lands about a mile from my house. On missing my cattle I went over most of this marsh, not all of it. I found two places at which it appeared that cattle had been killed in the swamp, about a mile from my house and one-fourth to one-half mile from the house of the defendants."

Samuel Page was introduced for the State, and testified as follows: "On Friday of the second week of November I started to a neighbor's house through the woods. I saw the defendants walking along. Langley was ahead of Perkins. I sat down on a log. Perkins walked off in a thick place. Langley walked a few steps and shot down the dark-red heifer with a white streak up her back. *It was Mr. William Keel's heifer.* The other cattle ran off. Langley went up to the (711) cow and stooped down. I went back home. I saw the cow plainly. I was about fifty yards from her. My cow was with them. Mr. Keel had forbidden me to go on his land and when I first saw defendants I thought one of them was Mr. Keel, and stooped down on the log. I think it was about three-fourths of a mile from Mr. Keel's, and the time was about two hours by sun. I had not spoken to Mr. Keel for two years in consequence of a misunderstanding with him. I talked about what I had seen at the log-rolling and then Mr. Keel asked me about it. Perkins attacked me about it and said, 'What sort of talk is that you had this morning? Don't handle my name; I will put balls in you. I shall not say anything about it if you don't.' This occurred a little better than two months after the shooting. The cow was not marked."

William Keel, the prosecutor, being recalled, described an unmarked cow that he missed: color about that of the cow described by Page as shot. He testified further: "Page showed me about three weeks ago the place at which he said the cow was shot, after I had asked him about it. A man sitting on the log where Page said he sat could see another where he said that the defendants were standing. I found no intestines or signs of anything having been killed there."

Moses King testified as follows: "I remember that D. A. Perkins sold me a cow with the ears cut off. It was in December, 1888. It was a brindle cow with some white on it. I could not say that she had a white streak down her back. There was another man with Perkins when he brought the beef."

A great deal of testimony was offered in behalf of the defend- (712) ants that if believed by the jury would have established an *alibi* for Perkins, and shown that the defendants were not guilty, but it is not material in deciding the questions raised by the exceptions in this case.

The defendant's counsel requested the court to instruct the jury:

1. That there was no evidence of an asportation.

2. That in criminal cases a case cannot be made out by inference from testimony on the part of the defendants.

The court declined to give the second instruction, and in response to the first request charged the jury, in lieu of the instruction asked, as follows:

1. That larceny was the felonious taking and carrying away of the personal property of another with the intent to appropriate it to the taker's use; that before they could convict they must, upon the whole evidence, be satisfied beyond a reasonable doubt that the defendants took and carried away the cow; that it was done with a felonious intent and was the property of William Keel; that they might consider the whole of the evidence in reaching a conclusion as to the defendants' guilt, and unless fully satisfied they should acquit.

2. That if there had been no other testimony as to the asportation except the evidence of Samuel Page the court should have instructed the jury that they should render a verdict of not guilty. But it was shown in evidence that the place at which the cow was shot was pointed out to the witness Keel, and as the cow was not found at that place the jury had the right to infer an asportation on the part of the defendants.

The defendants excepted to the refusal to give the instruction asked and to the instruction given.

Attorney-General for the State.
Harry Skinner, J. E. Moore and J. H. Tucker for defendants.

(713) AVERY, J., after stating the case: We think that the second instruction asked for was properly refused and that, upon the evidence, the question whether there was an asportation was one for the jury. The fact, if believed, that Perkins was in the habit of selling butchered cattle and going to the market accompained by another man, the testimony that there was some resemblance between the hide of a cow sold to a witness and that which Page testifies he saw Langley shoot in the presence of Perkins, and the evidence of Page that Perkins threatened to shoot him (Page) if he again spoke of the killing, *might have been considered, if believed by the jury,* in passing on the question of the asportation, as well as the felonious intent on the part of Perkins, and that if the jury believed that Langley shot the cow and Perkins carried away the beef, it was material testimony as to both.

But we think that the judge below erred when, instead of leaving the jury to determine whether the defendants had removed the cow, upon a consideration of all the circumstances bearing upon the asportavit, he told the jury that but for the testimony of Keel he would not have submitted the question to them, but as Keel had found no cow at the place pointed out to him by Page *the jury had the right to infer an asportation on the part of the defendants.*

The witness Keel went to the place where Page testified the cow was shot in November last, about three weeks before the court was held in

March following—not earlier than the latter part of February. The instruction given was fairly susceptible of the interpretation by the jury that the single circumstance that the prosecutor Keel failed to find any part of the carcass of a cow in February where one was killed about the last of November before, was of such weight that they might conclude from that detached fact that the cow shot by Langley had not only been removed but carried away by the two defendants.

We cannot concur in the view that because the jury conclude (714) that nothing was found after the lapse of three months since the killing, at the place where it was done, they would be justified on that finding alone (even if they discredited other testimony already mentioned as tending, if believed, to show a felonious taking as well as an asportavit) in returning a verdict of guilty. It was the right and duty of the jury to consider all pertinent evidence found by them to be true in reaching a conclusion, and the instruction may have misled them.

We think that a new trial should be granted to the defendants.

Error.

Cited: S. v. Telfair, 109 N. C., 883; *S. v. Fulford,* 124 N. C., 800.

THE STATE v. JOHN E. MOORE.

Constitution—Statutes—Police Power.

1. In the interpretation of statutes, it is the duty of the courts to resolve every doubt in favor of their constitutionality, and to assume that the Legislature, in their enactment, acted in good faith for the public good.

2. The police power—the authority to establish such rules and regulations for the conduct of all persons as may be conductive to the public interest—is, under our system of government, vested in the legislatures of the several States of the union, the only limit to its exercise being that it shall not conflict with any of the provisions of State or Federal Constitution.

3. A statute which, by its terms, is confined in its operations to a particular locality, yet may be enforced against all persons who may come within its scope, is a public local statute.

4. Chapter 81, Laws 1887 (amended by chs. 187 and 319, Laws 1889), which makes it unlawful to buy, sell, deliver or receive seed cotton in any of the counties named, in quantities less than that usually contained in a bale, unless the contract is reduced to writing, signed by the parties in the presence of two witnesses, and entered upon the civil docket of the

nearest justice of the peace within ten days thereafter, is an exercise of the police power by the legislature, and does not conflict with either the State or Federal Constitution.

(715) INDICTMENT, originating before the court of a justice of the peace, and tried on appeal at Fall Term of NORTHAMPTON, before *Boykin, J.*, for a violation of chapter 81, Laws 1887, as amended by chapter 321, Laws 1889, in selling cotton contrary to the provisions of said chapters.

The jury empaneled in the Superior Court returned a special verdict as follows:

"We find that the defendant, John E. Moore, at and in the county of Northampton, on 25 September, 1889, received and purchased of James J. Martin and James Flythe, trading as Flythe & Martin, thirteen pounds of seed cotton, for which he paid said Flythe & Martin three cents per pound; that said sale was not reduced to writing and no record was made of it, as is required by sec. 2, ch. 81, Laws 1887, and that thirteen pounds of cotton is less than what is required to make a bale of cotton; that if upon this state of facts the court is of opinion the defendant has violated the law, then we find the defendant guilty as charged; otherwise, we find him not guilty."

The court thereupon directed an entry of "not guilty" to be made, and gave judgment for the defendant. From the ruling of the court the solicitor, on behalf of the State, appealed.

Sec. 1, ch. 81, Laws 1887, declares that it shall be unlawful for any person to sell, deliver *or receive* for a price, etc., any cotton in the seed, where the quantity is less than what is usually baled, except as hereinafter provided.

Section 2 requires that every such sale of seed cotton shall be in writing, signed by all the parties thereto and witnessed by two witnesses, in a form laid down in said section; and further, said receipt shall be delivered, with a fee of twenty-five cents, to the nearest justice of the peace, whose duty it shall be to docket the same on his civil docket for the inspection of all persons.

(716) Section 3 of the same act provides that any person buying or receiving seed cotton, contrary to the provisions of this act, etc., shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty dollars, or imprisoned not exceeding thirty days, etc.: *Provided*, that this act shall only apply to the counties of Anson and Richmond.

Ch. 327, Laws 1889, provides that sec. 3, ch. 81, Laws 1887, shall be amended by inserting the word "Northampton" after the words "Counties of Anson" and before the words "and Richmond."

The Attorney-General, for the State, contended that under the police power the General Assembly had the right to make it a criminal offense to sell cotton in one of these counties named without complying with the regulations mentioned in the act.

The defendant insisted that the Legislature had not the power to pass the acts under which the indictment is drawn, because:

1. It is in violation of secs. 1 and 31 of Art. I of the Constitution, which is as follows: "Sec. 7. No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Sec. 31. "Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."

2. If the law is not in violation of the Constitution of the State it is in conflict with and is prohibited by the Fourteenth Amendement to the Constitution of the United States.

Attorney-General and W. H. Day for the State.
R. B. Peebles for defendant.

AVERY, J., after stating the case: The police power of the State (717) is the authority, vested in the Legislature by the Constitution, to enact all such wholesome and reasonable laws, not in conflict with the fundamental laws—the Constitution of the State and the United States, together with laws made in pursuance of it—as they may deem conducive to public good. *Carr v. Alger,* 7 Cush., 84. The question being whether the law-making branch of the State government has exceeded the limits of its power, as defined in that instrument, it is the duty of the courts to resolve every doubt in favor of the validity of the law, and to presume that it was passed in good faith to remedy, by regulating the manner of selling cotton, some evil not reached or corrected by previous legislation. *Powell v. Com.,* 114 Penn. State, 265.

We see nothing in the act that confers on any individual or class of persons peculiar privileges or immunities, or that imposes restrictions on any person or class of persons in the disposition of their property, or in making purchases from others. Every citizen of North Carolina who may buy or sell cotton in the counties of Anson, Northampton or Richmond is equally amenable to the penalties mentioned in the act, and liable to indictment if he fails to see that a written assignment or bill of sale, in the prescribed form, is executed, witnessed and delivered to the nearest justice of the peace.

The statute then comes within the definition of a public local law. Such laws, if they operate uniformly and subject all persons who come

within the defined locality and violate their provisions to indictment in the same way and to the same punishment are not repugnant to the Constitution of North Carolina. *S. v. Muse,* 20 N. C., 463; *S. v. Chambers,* 93 N. C., 600. But the objection that the prohibition is restricted to particular counties is met by a decision of our Court that is more directly in point. In *S. v. Joyner,* 81 N. C., 534, this Court held a statute constitutional that made it indictable for any person, ex-
(718) cept a manufacturer, to sell intoxicating liquors in the county of Northampton, and declared the manufacturer guilty of a misdemeanor if he sold less than a quart, because it did not discriminate in favor of or against any citizen in the State. In *S. v. Stovall,* 103 N. C., 416, a provision in the act incorporating an agricultural society, that it should be unlawful for any person to sell, or offer for sale, any liquors, tobacco or other refreshments within one-half mile of the ground of said society during the week of their annual fair, except persons doing regular business within the prohibited territory, was held consistent with both secs. 7 and 31, Art. I, of the Constitution. In *Intendent v. Sorrell,* 46 N. C., 49, and ordinance requiring oats to be weighed by the public weighmaster before being offered for sale in the city of Raleigh, and imposing a penalty for its violation, was held constitutional. It was decided by the Court to be a law to regulate trade, as distinguished from one in restraint of it, like the grant in a city charter of the authority to prescribe rules governing the sale of articles of food in the markets.

The courts can take judicial notice of the fact that, owing to the nature of cotton as a growing crop and the usual methods adopted in gathering and ginning, it is peculiarly exposed to theft until it is baled. It seems that sec. 1006 of the Code, forbidding the sale of cotton in the seed or lint cotton in quantities less than a bale, between the hours of sunset and sunrise, was intended to protect planters of cotton by withdrawing the temptation offered to dishonest men to take from their fields, storehouses and ginhouses a valuable product that is so difficult to identify and reclaim, and to sell it to dealers under the cover of darkness. It is the duty of the courts to assume that the Legislature enacts laws with a view to the public benefit. We must presume that the provision of the Code referred to was, in the opinion of the General Assembly,
(719) insufficient to afford adaquate protection to the producers of this great staple in those counties mentioned in the law under which the bill of indictment was drawn, and therefore persons who disposed of small quantities of loose cotton, even in daylight, were required to execute a receipt that might prove valuable in tracing the movements of a thief. We can see how the law might have been enacted with a view to afford necessary protection to property, and when it proposes upon its

face to mete out the same punishment for violation of its provisions to the seller and buyer, we cannot go behind the manifest meaning of the act, according to all legal rules of construction, and hunt for a hidden intent, under the guise of regulating trade, to restrict the rights of any class of persons to enjoy the fruits of their own labor. *Powell v. Com.*, 114 Penn. State, 276; *Soon Hing v. Crowley*, 113 U. S., 703. A statute *declaring it unlawful within certain counties to transport or move after sunset and before sunrise any cotton in the seed* has been declared constitutional and valid as an exercise of the police power by the Appellate Court of Alabama. *Davis v. S.*, 68 Ala., 58 (44 Am. R., 128).

Speaking of laws that apply only to particular localities or particular classes *Judge Cooley* says: "If the laws be otherwise unobjectionable all that can be required in these cases is that they be general in their application to the class or locality to which they apply and that they are public in their character, and of their propriety and policy the Legislature must judge." Cooley Const. Lim. marg. p. 390; *ib.*, star p. 596.

Though this Court was the first in the American Union to assert and exercise the salutary power to declare an act of the Legislature unconstitutional, it has since shown its conservative spirit by refusing to pass upon or question the power of a coordinate branch of the State government, equal in dignity and clothed with more extensive discretionary power, except when the violation of the organic law was palpable.

The police power, under our federal system of government, has (720) been left with the States, and the only limit to its exercise in the enactment of laws by their Legislatures is that they shall not prove repugnant to the provisions of the fundamental law—the State Constitution and the Federal Constitution, with the laws made under its delegated powers. Cooley's Const. Lim., star p. 574. The extent to which State laws have been sustained, when enacted under this reserved power, will appear by reference to a few leading cases: *Butchers Union Co. v. Crescent City Co.*, 111 U. S., 746; *Beer Co. v. Moss*, 97 U. S., 25; *Bertheolf v. Sully*, 74 N. Y., 509 (30 Am. R., 323); *Wood v. S.*, 6 Ark., 36; *S. v. Meigler*, 29 Kan., 252; *Phelps v. Roy*, 60 N. Y., 10; *New Orleans v. Stothard*, 27 La., 417; *Thorp v. R. R.*, 27 Vt., 140; Cooley Const. Lim., marg. pp. 587, 595.

It remains to discuss the other position, that the statute under consideration is in conflict with the Fourteenth Amendment of the Constitution of the United States. If we have shown, by the authorities cited and reasons adduced, that such local legislation does not come within the inhibition of the organic law of the State against a grant of "exclusive or separate emoluments or privileges," or the toleration of

monopolies, when every citizen who comes within the sphere of its operation is alike amenable for a violation of its provisions, it would follow that it could not be declared void, because it abridges the privileges or immunities of any citizen or class of citizens of the United States. The Supreme Court of the United States has so held in a number of cases. *Missouri v. Lewis,* 101 U. S., 22; *Mugler v. Kansas,* 123 U. S., 663.

(721) The States did not originally delegate to the government of the United States the power to protect the citizens of the State, and the duty originally assumed by the States of guaranteeing equal rights to all, remains still equally as binding as an obligation and unimpaired as a right as when the Federal Constitution was adopted. The Fourteenth Amendment extends the right of citizenship in the State and nation to all persons born or naturalized in the United State and subject to the jurisdiction thereof, and assumes for the federal government the obligation to protect all such citizens against oppression under any law enacted by a State that abridges their privileges or immunities, deprives them of life, liberty or property without due process of law, or denies to them the equal protection of the law. *United States v. Cruikshank,* 92 U. S., 542.

It has been held by the Supreme Court of the United States that no legislation is open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates, and is enforceable in the usual modes established in the administration of government, with respect to kindred matters—that is, by process or proceedings adapted to the nature of the case. *Dent v. West Virginia,* 129 U. S., 114, and cases cited. It will be admitted that the act under which the defendant is indicted not only operates generally upon all persons and classes who violate its provisions, but by its terms, is enforceable against all, by a criminal prosecution conducted in the usual way, and therefore it is not repugnant to sec. 1 of the Fourteenth Amendment to the Costitution of the United States. In further corroboration of this view we may quote the language used by the Court in *Mugler v. Kansas,* 123 U. S., 623: "But this Court has declared, upon full consideration in *Barbier v. Connolly,* 113 U. S., 27, the Fourteenth Amendment had no such effect." After observing among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property,

(722) the Court said: "But neither the amendment—broad and com-

prehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

Two of the authorities cited in support of the defendant's contention (Jacobs' case, 98 N. Y., and concurring opinion of *Justice Field* in *Bartemeyer v. Iowa,* 18 Wallace, 137) tend to establish the doctrine on the one hand that the Legislature cannot prohibit one from carrying on a lawful occupation under the guise, which is palpably false, of protecting the public health, because it is a law in restraint of trade; nor, on the other, prohibit the sale or use of property already in one's possession, because the denial of the right of enjoying it or disposing of it is depriving the owner of property without due process of law. Granting that the first of these positions is tenable, the principle is not at all analogous to that which governs our case. There can be no question about the right of the State to regulate the manner of selling any article produced or manufactured within its borders, in any portion of its territory, with the purpose apparent, from the terms of the law, of protecting the manufacturer or producer against fraud or dishonesty. Cooley's Const. Lim., star p. 587; Teideman Police Powers, sec. 89.

It is a rule, founded on reason and supported by authority (as we have already intimated), that we should hold the apparent purpose of the law to be the real objects aimed at by a coordinate branch of the State government whose duty it is to provide for the protection (723) of its citizens.

Upon the same principle as that announced in Jacobs' case the Court of Appeals of New York, in the case of *The People v. Marks,* 99 N. Y., 377, declared an act unconstitutional which prohibited the manufacture of what is commonly called oleomargerine, whether it was so made as to be wholesome food or not. On the other hand, the Supreme Court of Pennsylvania decided that a law containing a similar prohibition was clearly constitutional and valid as an exercise of the police power. *Powell v. Commonwealth,* 114 Penn., 265.

But whatever may be the proper construction of the laws, similar in their provisions to those found in New York or Pennsylvania, or whether they shall be ultimately held by our courts valid or invalid, the production of cotton is not forbidden, nor the mode of its culture prescribed, and the sale of it is not prohibited but regulated by the act of 1887, as amended by the act of 1889, and there is therefore no analogy between the cases.

There was error in the holding that the defendant was not guilty. Let this opinion be certified, to the end that a verdict of guilty be entered.

Error.

Cited: S. v. Pendergrass, 106 N. C., 666, 667; *S. v. Summerfield,* 107 N. C., 897; *Bagg v. R. R.,* 109 N. C., 281; *S. v. Tenant,* 110 N. C., 612; *S. v. Barringer, ib.,* 527; *Harris v. Scarborough, ib.,* 236; *S. v. Kittelle, ib.,* 582; *S. v. Womble,* 112 N. C., 867; *S. v. Moore,* 113 N. C., 702; *S. v. Warren, ib.,* 685; *Rosenbaum v. New Bern,* 118 N. C., 95, 97; *S. v. Thomas, ib.,* 1226; *S. v. Jones,* 121 N. C., 619; *S. v. Groves, ib.,* 633; *Caldwell v. Wilson, ib.,* 458; *Broadfoot v. Fayetteville, ib.,* 422; *Guy v. Comrs.,* 122 N. C., 474; *Hutton v. Webb,* 124 N. C., 757; *S. v. Sharp,* 125 N. C., 632; *S. v. White, ib.,* 688; *In re Applicants,* 143 N. C., 5; *S. v. Wolf,* 145 N. C., 445; *Morris v. Express Co.,* 146 N. C., 172; *S. v. Williams, ib.,* 628; *S. v. Perry,* 151 N. C., 663; *S. v. Blake,* 157 N. C., 610; *Newell v. Green,* 169 N. C., 463; *Power Co. v. Power Co.,* 175 N. C., 678, 679.

(724)

THE STATE v. H. L. HARWOOD.

Master and Servant—Enticing Servants—Indictment—Constitution—Statutes—Contract—Infants.

1. In an indictment for enticing servants to leave their employers, under section 3119 of the Code, it is sufficient if a contract with the servant, or those who may be authorized to contract on his behalf, is alleged, without specifying whether it was in writing or oral; nor is it necessary to set forth the means by which the enticing was accomplished where the words employed in the statute, are used in the indictment in describing the offense.

2. Notwithstanding the contract between the master and servant may be voidable at the option of the latter, because of his infancy, if while the relation subsists, a stranger officiously and unlawfully interferes and induces the servant to leave his employer, he is guilty of a violation of the statute.

3. The statute is not in conflict with the Constitution.

CRIMINAL ACTION, tried before *Armfield, J.,* at September Term, 1889, of WAYNE.

The defendant and one L. B. White are charged with violating the provisions of sec. 3119 of the Code in an indictment containing two counts, one for enticing, persuading and procuring three named persons in the service of the Wayne Agricultural Works, a corporation formed under the laws of this State, under contract as laborers, to leave the

service of their employer; the other for knowingly harboring and detaining them in the defendant's service after leaving the service of said corporation.

The statute under which the indictment is framed is in these words:

"If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to unlawfully leave the service of his master or employer, or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his (725) master and employer, any servant who shall unlawfully leave the service of such master or employer, then in either case such person may be sued, singly or jointly, by the master, and on recovery he shall have judgment for the actual double value of the damages assessed."

The succeeding section makes the forbidden acts a misdemeanor also, and subjects the offender to a penalty of one hundred dollars to any person suing for the same.

The indictment is as follows:

"The jurors upon their oath present that H. L. Harwood and L. B. White, late of the county of Wayne, on 19 August, 1889, at and in the county aforesaid, unlawfully and willfully did entice, persuade and procure Will Humphrey, Sam Womble and Wayland Tutor, servants, who had heretofore contracted with the Wayne Agricultural Works, a company incorporated under the laws of North Carolina, to serve said Wayne Agricultural Works as servants and laborers, which contract was then in force and subsisting, to unlawfully leave the service of the said Wayne Agricultural Works (the employers aforesaid of the said servants Will Humphrey, Sam Womble and Wayland Tutor), against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do present that the said H. L. Howard and L. B. White, on the day and year aforesaid, in the county aforesaid, unlawfully, willfully and knowingly did harbor and detain in their own services Will Humphrey, Sam Womble and Wayland Tutor, servants of the Wayne Agricultural Works, a company aforesaid incorporated under the laws of North Carolina, which servants had therefore left the services of the said Wayne Agricultural Works, their employers, against the form of the statute in such cases made and provided, and against the peace and dignity of (726) the State."

Upon the trial of his plea of not guilty it was admitted that the Wayne Agricultural Works was an incorporated company, and that the three employees alleged to have been enticed from its services were

under twenty-one years of age and had not been bound as apprentices, but were serving under a contract made by each of them with the company.

It was in evidence that these boys were working in the foundry as moulders, and had been for eleven months, and had agreed to remain for three years; that they left 17 August, 1889, up to which time they were paid their wages; that in a conversation afterwards defendant said to the secretary of the company: "I have employed all of your men, and I am going to employ others as soon as you get them, and I will pay them more wages than you will pay them. We are going to prevent the Wayne Works from making certain goods that they have a legal but no moral right to make," and that the young men went off with him; that the boys had been notified of an advance in their wages to take place in September; that the defendant is in the employ of S. R. White & Bro., who carry on a foundry at Norfolk.

A witness for defendant testified that on behalf of the company he employed the boys, who did not agree to remain for any specified time, and that their wages should be increased every six months.

There was much other testimony offered which, as not material to the present appeal, is not repeated.

The defendant objected that as the persons enticed away were under age and could make no binding contract, and the case does not come within the terms or purposes of the act, and as the infants could lawfully leave the service, the defendant could lawfully advise them to do so.

Attorney-General and C. B. Aycock for the State. (727)
W. R. Allen and W. C. Monroe for defendant.

SMITH, C. J., after stating the case: The inference drawn is not warranted for, as was said in *S. v. Daniel,* 89 N. C., 553, "the mischief which the enactment was intended to remedy was the interference of others with the servants who had thus agreed to serve by offering them inducements to depart, or with knowledge that they had so departed in disregard of their contract obligations by receiving such into their service." So the offense consists not in abandoning the service, but enticing such as were disposed to remain to leave and break their contracts.

The contract with the infants was void only at their election, and operative as to all except privies, and hence, while subsisting, is provided against interference from others as much as if obligatory on both parties to it. It cannot be treated as a nullity by the defendant, who officiously and unlawfully interfered to induce its abandonment by the seduced infants. The mischief is as great as if the contractors were adults, and the remedy is co-extensive with the mischief provided against.

Nor is the indictment defective in either of the particulars pointed out. The act, in its original form, applied to servants only by indenture, or whose contracts were in writing (Bat. Rev., ch. 70); and to bring an offender under the denunciation of the statute it was necessary to aver and prove that the service was by indenture or by virture of a written contract, since this was an essential element in the crime, and so it was held in *S. v. Rice,* 76 N. C., 194. The phraseology has undergone a change in the Code, and the provision leaving out the word "indenture" is made to embrace every case of service under contract, "whether in writing or oral," and hence it is sufficient to allege the contract without specifying whether it was in writing or oral.

Nor is it necessary to specify by what acts or words and entic- (728) ing was effected. It is generally sufficient to charge a statutory offense in the words of the statute, and it is necessary to be specific in setting out the facts only when the statute is in terms too comprehensive, and this to show that the offense is embraced in it.

In the indictment under a statute which prohibits the abducting or by any means inducing a child under fourteen years of age to leave the relative mentioned, or school where he or she may be placed, shall be guilty of a crime, etc., it was held sufficient to use the words of the statute defining the offense, nor was it needful to set out the means by which the abduction was effected. *S. v. George* 93 N. C., 567. Nor do we yield our assent to the argument, pressed with so much earnestness, that the statute violates any principle of the Constitution, because limited to laborers and servants. The evil consequences of such interference with that class of persons doubtless led to this limitation upon the enactment.

No error. Affirmed.

Cited: S. v. Anderson, post, 773; *S. v. Whedbee,* 152 N. C., 784.

THE STATE v. ALICE HARRISON.

Amendment—Finding Indictments—Record—Arresting Judgment—Appeal from Inferior Court.

The defendant was arraigned in the Inferior Court upon an indictment which purported to have been regularly presented by the grand jury as a "true bill;" she pleaded not guilty, but upon trial was convicted; before judgment she moved, upon affidavits, to amend the record so that it would show that no indictment had, in fact, been found; the court denied the

motion because not made in apt time; the defendant then moved to arrest the judgment, which being also denied, and judgment being pronounced, she appealed to the Superior Court, which arrested judgment. *Held*—

1. That while the motion in arrest was properly refused, the Inferior Court erred in not entertaining the motion to amend; it was its duty to cause the record, at any stage of the case, to be corrected so as to speak the truth, and render such judgment as the true record might require.
2. That the Superior Court erred in *arresting* the judgment of the Inferior Court; it should have reversed the judgment of the latter in ruling that the motion to amend was not made in apt time, and remanded the case, with directions to proceed with the hearing of that motion.

(729) APPEAL from judgment of *MacRae, J.*, at Spring Term, 1889, of EDGECOMBE, arresting a judgment in the Inferior Court.

It appeared by the record that at August Term, 1888, of the Inferior Court of Edgecombe County, the grand jury returned into court an indictment wherein and whereby Alice Harrison, the present appellee, is charged with "attempt to poison," and on the back thereof is the entry, "a true bill."

At the January Term, 1889, of that court, the said Alice Harrison pleaded to that indictment "Not guilty." On the trial at the same term the jury rendered a verdict of guilty; whereupon she presented before the court her affidavit stating, on information, "that the fact had come to her knowledge since the trial of the said cause that the grand jury never acted upon the bill of indictment upon which she was tried, and hence no true bill was found against her"; and also the affidavit of Thomas E. Lewis, wherein he says "that he was foreman of the grand jury of the Inferior Court of Edgecombe County at and during the entire August Term, 1888, and presided over and was present during all the deliberations of said grand jury, and no bill of any kind was acted on by said grand jury against Alice Harrison, and no true bill was returned by the grand jury in such cause; especially no bill was found charging the defendant with attempt to poison Georgia Redman, and no witnesses were examined by the grand jury in said cause"; upon the same she moved the court to amend the record of the August

(730) Term, 1888, so as to show that the said indictment was not returned "a true bill" nor acted upon by the grand jury. The court ruled that the motion was not in apt time, and declined further to consider the said motion. The defendant excepted.

The defendant then "moved in arrest of judgment, that there had been no bill of indictment found by the grand jury; that there had been no legal trial; that the court had no jurisdiction to sentence the defendant, as she had not been tried on a bill of indictment found by the grand jury." The court denied the motion, and the defendant excepted.

The court gave judgment against her and she appealed to the Superior Court, and that court gave judgment, whereof the following is a copy: "It appearing to the court from the affidavit of the foreman of the grand jury that no bill of indictment was found against the defendant, it is therefore ordered and adjudged that the judgment in the action be arrested. Let this be certified to the Inferior Court." Judgment arrested.

From that judgment the solicitor, for the State, appealed to this Court.

Attorney-General for the State.
No counsel for the defendant.

MERRIMON, J., after stating the case: The motion in arrest of judgment should not have been allowed, certainly in the present state of the record, because the matter assigned as the ground of it did not appear on the face of the record. The grounds of such motions must appear upon the face of the record proper and present, affirmatively or negatively, such fatal defects in it as render it improper to give judgment upon it. The court seeing such defect will not, cannot properly, proceed to judgment. The essential ground-work of it in such (731) cases does not appear, and there is no proper foundation on which it can rest. *S. v. Potter,* 61 N. C., 338; *S. v. Bobbitt,* 70 N. C., 81; *S. v. Roberts,* 19 N. C., 540; 1 Chit. Crim. Law, 601.

The Superior Court should, however, have sustained the exception to the refusal of the Inferior Court to consider of and grant or deny the motion of the defendant to amend its record in respect to the presentment of the indictment by the grand jury, on the ground that it was not made in apt time; that the court had power, and it was its duty at all appropriate times, and promptly, to make its record speak the truth. Records are serious things; they import verity, and while they remain they cannot be attacked collaterally. If by inadvertence, mistake or fraud an entry of record has been made which is not, in fact, true—not what the court intended and directed to be made—then, at once, it should, upon thorough scrutiny, make its record conform to and speak the truth, by striking out the false entry or adding what has been omitted from it. The presumption is that the record as it appears is true, and the court should not interfere with or modify it at all, unless upon thorough inquiry it shall be satisfied that it ought to do so. *S. v. Calhoon,,* 18 N. C., 374; *S. v. Roberts, supra; S. v. King,* 27 N. C., 203; *S. v. Davis,* 80 N. C., 384; *S. v. Swepson,* 81 N. C., 571.

It appears that at once after the verdict of the jury was entered in the Inferior Court, and before judgment, the defendant moved to amend

the record by striking from it the indictment and so much of the entry in respect thereto as showed that it had been duly presented by the grand jury. If the affidavit, produced in support of this motion, satisfied the court that it was probable that it ought to be allowed, it should have heard it upon its merits and granted or denied it. The time
(732) was not inapt; it was important to delay judgment until the motion could have been heard and determined. If, indeed, the indictment was never presented by the grand jury, as alleged by defendant, then it ought not to appear of record; it should be stricken from it, and if this was done then, in that case, the court would arrest the judgment because, in the absence of the indictment and the entries in connection with it, there could be no lawful trial and no judgment. In a case like this, if an amendment or correction ought to be made, the court ought not to hesitate to delay the judgment until the same should be done. *S. v. Roberts, supra; S. v. Scott,* 19 N. C., 35.

Regularly, before the defendant pleaded to the indictment, she should have moved to correct the record or quash the indictment, or she might have pleaded in abatement. *S. v. Horton,* 63 N. C., 595; *S. v. Cain,* 8 N. C., 352; *S. v. Barnes,* 52 N. C., 20. It seems, however, that she was not aware that the indictment had not been presented by the grand jury till after the verdict of guilty was entered against her. Then, and in that case, her remedy was the appropriate motion she made to correct the record before judgment, and this the court should have facilitated in the way already indicated. The court being satisfied that the indictment had not been presented by the grand jury might, with a view to justice, have set the verdict aside and allowed the defendant to withdraw her plea of not guilty, to the end she might avail herself of one of the regular remedies we have pointed out. We need not now advert to other possible remedies.

There is error. The judgment of the Superior Court must be set aside and judgment entered there reversing the judgment of the Inferior Court, and sustaining the defendant's exception to the order of
(733) the court refusing to hear and determine the motion of the defendant to amend the record upon the ground that the same was not made in apt time.

Error.

Cited: S. v. Farrar, ante, 703; *S. v. Burton,* 113 N. C., 658.

THE STATE v. RICHMOND PRESTON.

Appeal—Transcript—Certiorari.

1. Before the Supreme Court will entertain an appeal the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment sought to be reviewed was rendered. This transcript must show that the court from which the appeal was taken was lawfully organized and held, and all the proceedings had in the action arranged in an orderly manner.

2. Ordinarily, where a defective transcript is filed, the Supreme Court will direct the writ of *certiorari* commanding a perfect record to be certified, but where, as in this case, it is apparent the appeal is without merit it will be dismissed on motion.

CRIMINAL ACTION, commenced in the court of a justice of the peace and tried before *Boykin, J.*, at Spring Term, 1889, of WASHINGTON.

The case is stated in the opinion.

Attorney-General for the State.
No counsel contra.

MERRIMON, J. At the present term the Attorney-General moved to dismiss this appeal upon the ground that the appellant failed to file in this Court a proper transcript of the record of the case in the Superior Court.

The loose, disorderly and confused papers on file, intended, it (734) seems, to constitute such a transcript, cannot be so treated. They purport to be simply a State warrant issued by a justice of the peace against the appellant. It does not appear that he was ever arrested by virtue of it, or at all, or that he was ever tried for the offense charged in it, or that he appealed from any judgment to the Superior Court. It does not appear that a term of the Superior Court was held at a particular time or place or by a judge, as allowed and required by law. It seems that there was a trial in the Superior Court, a verdict and judgment against the appellant, from which he appealed to this Court. A detached paper-writing on file purports to be the case settled on appeal by the judge. If these papers were put together in an orderly manner, and certified by the clerk under the seal of the court, they would not embrace the essential substance of the record that it seems exists in the Superior Court. It must appear from the transcript of the record that a court was duly held by a judge, and that the court had jurisdiction in some proper way. Otherwise this Court cannot be put in relation with the court below and the action there, and proceed to correct errors assigned or affirm the judgment.

No doubt there is a proper record of the case in the Superior Court, and we might direct the writ of *certiorari* to the clerk of that court, commanding and requiring him to certify a complete transcript thereof to this Court; and ordinarily, with a view to the ends of justice, we would do so if it appeared that there were merits in the appeal. But we can see by the case settled for this Court that it is really without merit. We therefore think that the motion to dismiss it should be allowed. *Markham v. Hicks,* 90 N. C., 1; *S. v. Saunders, id.,* 651; *S. v. Butts,* 91 N. C., 524; *Rowland v. Mitchell,* 90 N. C., 649; *S. v. McDowell,* 93
(735) N. C., 541; *S. v. Johnston, id.,* 559; *Broadfoot v. McKeithan,* 92 N. C., 561; *Pittman v. Kimberly, id.,* 562.

Motion allowed.

Cited: S. v. Preston, post, 735; *S. v. Freeman,* 114 N. C., 873; *S. v. Beal,* 119 N. C., 811; *Allen v. Hammond,* 122 N. C., 755; *Russell v. Hill, ib.,* 773.

THE STATE v. RICHMOND PRESTON.

MERRIMON, J. In every essential respect this case is substantially like that of *S. v. Preston, ante,* 733, and must be disposed of in the same way.

Appeal dismissed.

THE STATE v. APPLEWHITE WATSON

Statute—Drawing Jurors—Quashing Indictments.

While the provisions of the statutes fixing the number of jurors to be drawn by the county commissioners is directory, and an indictment will not be quashed for failure to comply with them particularly, where it does not appear that such failure was corrupt, yet they are very essential to the impartial administration of justice, and their nonobservance is the subject of censure, if not punishment.

CRIMINAL ACTION for misdemeanor, tried before *Armfield, J.,* at June Term, 1889, of WILSON.

Attorney-General for the State.
No counsel for defendant.

STATE *v.* PRESTON.

SHEPHERD, J. The defendant moved to quash the indictment (736) because "it appeared from the record that the county commissioners had caused forty-four instead of thirty-six names to be drawn from the (jury) box to constitute the jury."

When the jurors who found this bill were drawn the law (Code, sec. 1727) provided that only thirty-six should be drawn for the first week of a term of court.

The limitation is so plainly expressed that we are at a loss to understand why the commissioners should have disregarded it. "It is very important that the statutory regulations in respect to the selection of jurors shall be faithfully observed. A due observance of them greatly promotes the fair and intelligent administration of public justice and, besides, the plain commands of a statute should never be neglected or disregarded by those charged with special duties." *S. v. Hensly,* 94 N. C., 1021.

"Their details should be strictly observed and followed, and any intentional nonobservance of them is the subject of censure, if not of punishment." *S. v. Haywood,* 73 N. C., 437.

While we are very sure that in this instance the commissioners were not actuated by any improper motives, we desire to express our decided disapprobation of the too frequent nonobservance of the regulation in respect to the preparation and revision of the jury lists and the drawing of jurors.

Although many of these regulations have been held to be *directory only,* a willful and corrupt disregard of them will nevertheless fall within the condemnation of the criminal law of the State. Following the cases of *S. v. Martin,* 82 N. C., 672; *S. v. Haywood* and *S. v. Hensly, supra,* we hold that the regulation in question is only directory, and as there does not appear to have been any improper motive on the part of the commissioners, or that any ineligible person was selected as a (737) grand juror, we must sustain his Honor in his refusal to allow the motion to quash.

Affirmed.

Cited: S. v. Daniel, 121 N. C., 575.

THE STATE v. WILLIAM BRADDY ALIAS WILLIAM BRADLEY.

New Trial—Discretion—Exception, When Made.

1. The objection to the competency of the evidence submitted to the jury, or to warrant a verdict, must be made in proper manner before verdict.
2. It is competent for the trial court, in its discretion, to grant a new trial if it has reason to believe injustice has been done, but from his refusal to do so there is no appeal.

CRIMINAL ACTION, which was tried before *MacRae, J.*, at September Term, 1889, of PITT.

The indictment charges the prisoner with the crime of burglary. He was tried upon his plea of not guilty, and the jury rendered a verdict of guilty in the second degree, as allowed by the statute (Laws 1889, ch. 434). Whereupon he "moved for a new trial upon the ground that there was no evidence upon which" he could be convicted. The motion was denied, and he excepted. The court gave judgment against him, and he appealed.

Attorney-General for the State.
William B. Rodman, Jr., for defendant.

MERRIMON, C. J. Numerous witnesses were examined on the trial and the evidence was voluminous. No exception was taken on the trial, or before the verdict, to its competency or sufficiency as evidence
(738) to be submitted to the jury, nor was the court requested to give any special instructions. Not until after the verdict, on the motion for a new trial, was it suggested that there was no evidence that warranted a conviction. The objection seems to have been an afterthought, and it certainly came too late. The court had received and submitted the evidence, and had certainly in effect, if not formally, passed upon its competency and sufficiency as evidence, without objection or exception. The prisoner had had ample opportunity to object to it, in any aspect of it, in apt time, and we can see nothing in his case to make it an exception to the general rule applicable in like cases. If, through inadvertence or mistake, he was about to suffer injustice, it lay in the sound discretion of the judge who presided at the trial to grant a new trial. We are sure that he would have done so if he had thought the motion for it had merit.

We may add that we have read the evidence sent up as a part of the case stated, and notwithstanding the ingenious brief of the prisoner's counsel we are sure there was evidence bearing on every aspect of the case from which the jury might not unreasonably infer the guilt of the

prisoner. Although we might readily point out its pertinency and strong bearings tending to prove his guilt, we do not think it profitable or necessary to do so.

Affirmed.

Cited: S. v. Kiger, 115 N. C., 750; *S. v. Harris,* 120 N. C., 578; *Bird v. Bradburn,* 131 N. C., 490; *Abernethy v. Yount,* 138 N. C., 341, 348; *S. v. Houston,* 155 N. C., 433; *S. v. Merrick,* 172 N. C., 872.

(739)

THE STATE v. C. C. GARDNER.

Jurors, Qualification of—Motion to Quash—Statute—Discretion—Appeal.

1. The fact that one of the grand jurors who found a true bill had at that time a suit pending and at issue in the same court is sufficient ground to support a motion to quash (Code, sec. 1741) the indictment if the motion is made in apt time.

2. If the motion to quash for disqualification of a grand juror is made *before* plea the defendant has a right to have the motion granted; if made *after* plea, but before the jury is impaneled, it may be granted or not, in the sound discretion of the judge, but if it is not made until after the jury is sworn the objection shall be deemed to have been waived.

3. Where the motion was made after the plea, but before the jury was impaneled, and the judge refused it upon the ground that it was not made in apt time. *Held* to be error. Had he put his refusal upon the exercise of his discretion, or had he simply disallowed the motion without assigning a reason, no appeal would lie from his ruling.

4. To render a person eligible to serve as a juror it must appear that he has paid the taxes due from him for the fiscal year next preceding the time when his name was placed on the jury list.

INDICTMENT for murder, tried at the September Term, 1889, of WAYNE, before *Armfield, J.*

The prisoner was arraigned on Tuesday of the first week of the court and pleaded not guilty, whereupon the court set the case for trial on Friday of same week, ordered a special venire of one hundred, had the names drawn from the jury box in accordance with the provisions of the Code, sec. 1739. When the case was called for trial, and before any juror had been drawn or sworn, the prisoner moved to quash the bill of indictment for that James H. Egerton, a member of the grand jury, had a suit pending and at issue in the said Superior Court (740) when the bill was found.

His Honor held, conceding that the said juror was at the time a party to such suit, the motion was not made in apt time, but should have been made before the prisoner was arraigned and pleaded.

The other material facts are stated in the opinion of the court.

Attorney-General and E. C. Smith for the State.
C. B. Aycock for defendant.

AVERY, J., after stating facts as above set forth: The exception to the refusal of the court to allow the motion to quash is founded upon the construction placed by the prisoner's counsel upon sec. 1741 of the Code, which is as follows:

"All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue, *by motion to quash the indictment,* and if not so taken the same shall be deemed to have been waived."

This section was first enacted as a part of the Code, and took effect in November, 1883. Prior to that time the old distinction, that a motion to quash was proper when the defect complained of was apparent on the face of the record, while a plea in abatement was the appropriate proceeding, where it was necessary to prove matters *de hors,* the record had not been uniformly observed, but had been adverted to in a number of cases. Hence there were differences of opinion as to the proper methed of raising the objection to the qualification of a grand juror, as will appear from an examination of the authorities cited and discussed by *Chief Justice Smith* in *S. v. Haywood,* 94 N. C., 847, to wit: *S. v. Haywood,* 73 N. C., 437; *S. v. Griffice,* 74 N. C., 316; *S. v. Smith,* 80 N. C., 410; *S. v. Baldwin, ib.,* 390; *S. v. Blackburn, ib.,* 474; *S. v. Watson,* 86 N. C., 624; *S. v. Barbee,* 93 N. C., 498.

(741) The departure from the old rule having in some instances received the sanction of the court, it seems to us that the intimation of the Chief Justice (in *S. v. Haywood,* 94 N. C., 847) that the section (1741) was enacted to settle the dispute by declaring definitely that a motion to quash would lie on objection to the qualification of a grand juror, foreshadowed the proper interpretation to be given it. The case last named was heard in this Court at the term next succeeding the enactment of the Code, and doubtless the evil that the law was intended to remedy was this uncertainty and conflict of opinion, as it should be the object of the legislators of every good government to make the law so plain that every citizen may understand its provisions sufficiently well to know his rights and discharge his legal duties to the State. Prior to the passage of the statute, it had been unmistakably settled that,

whether it was *proper* to file a plea in abatement or make a motion to quash, it was "in apt time" to pursue either course when the defendant was *arraigned* and *before he entered his plea* to the indictment. We cannot agree that the practice, always recognized and acquiesced in as a part of the common law, should be declared abolished by an implication that is not at all clear, when we can otherwise give effect to the statute by construing it as a remedy for an acknowledged evil. We do not believe that the Legislature intended to permit the counsel of a prisoner to lie in wait, holding in reserve information as to a juror's disqualification till a special venire has been summoned in the county where the crime was committed, or, still worse, till the same stage of the proceeding after a removal to another county. It is not probable that the law-making power intended to enact a statute inconsistent with the manifest meaning and in conflict with the just operation of other existing laws.

We are of opinion, therefore, that, according to the true import of the statute, the prisoner had the right to make the mo- (742) tion to quash up to the time when he was arraigned and entered his plea, and after the plea was entered it was within the sound discretion of the judge below to allow or refuse the motion till the jury were sworn and impaneled to try the case. This strict construction gives effect to all the provisions of the statute, but does not abrogate the established common-law practice not repugnant to them.

But the learned judge who tried the case did not make his ruling in the exercise of his discretion. He held that the motion to quash was not in apt time, whether made in the assertion of a right or as an appeal to the discretion of the court, and in this we think that he erred. It would not have been error if he had simply disallowed the motion, without giving reason or explanation, or avowedly in the exercise of his discretion.

But, as the case will go back for a new trial, it is proper to pass upon another point raised by a number of the exceptions entered on behalf of the prisoner. Six of the original panel of jurors, as they were respectively called, were asked by the solicitor whether they had paid tax for the year 1889, and, after the response on the part of each that he had not, the challenge of the State on that ground was allowed in the face of the prisoner's objection. The exceptions of the prisoner to the rulings on each of these objections was clearly well taken.

In *Sellers v. Sellers,* 98 N. C., 13, *Justice Merrimon,* for the Court says: "The first assignment of error cannot be sustained. The name of the juror challenged must, in the order prescribed by the statute (Code, secs. 1722, 1727), have been selected and placed on the jury list on the first Monday in September, 1885. To render him eligible to sit on the

trial as a juror at the Spring Term, 1886, of the court, when it took place
he must have paid tax for the fiscal year next preceding the time
(743) when his name was so placed on the jury list, which was the fiscal
year 1884. It appears he paid tax for that year; hence the objection in unfounded." *S. v. Carland,* 90 N. C., 668; *S. v. Haywood,* 94 N. C., 847.

It appeared that each of the jurors, both of the original panel and the special venire, who were challenged because they had not paid tax, had in fact paid tax, both for the year 1887 and 1888, while it was sufficient to establish their eligibility under the rule that the payment was made for the former year. Under the provisions of chapter 53 of the Laws of 1887, the same causes of challenge that were good as to a tales juror are allowed as to jurors summoned on a special venire.

For the causes mentioned, the prisoner is entitled to a
New trial.

Cited: S. v. Wilcox, post, 853; *S. v. Davis,* 109 N. C., 781; *S. v. Sharp,* 110 N. C., 605; *S. v. Fertilizer Co.,* 111 N. C., 659; *S. v. DeGraff,* 113 N. C., 690; *S. v. Banner,* 149 N. C., 521, 522.

THE STATE v. ELIJAH MOORE.

Trial—Removing Jury from Courtroom—Discretion—Evidence—Res Gestae—Public Holdings—Indictment—Statute—Constitution.

1. The presiding judge may, when he thinks the interests of justice require, direct that the jury be removed from the courtroom while a proposition to introduce evidence—involving a statement of the matters proposed to be proved—is being debated. Ordinarily, this is a matter of discretion, but its exercise, under some circumstances, may be subject to review upon appeal.

2. The prisoner, shortly before his arrest on the charge of murder, had been apprehended for an assault upon his wife; upon the arrest for murder he said he had already given bond, and expressed his surprise at being again taken into custody. *Held,* that this was not *res gestae,* and his declarations were incompetent evidence for him.

3. Evidence that the prisoner, near the time of the homicide, was engaged in a disgraceful quarrel with his wife, the deceased being present and partly the subject of the wrangle, and that prisoner then threatened to kill deceased, and was shortly thereafter seen to follow her in the direction of the place where the mortal blow was given, was competent against him to show motive and opportunity.

4. The statute (Code, secs. 3782-3784) declaring certain days public holidays, does not prohibit the pursuit of the usual avocations of citizens, nor public officers, or the courts from exercising their respective functions on those days. While it might be, the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them.

5. The indictment in this case is in conformity with the Act of 1889, ch. 58, which is not in conflict with the Constitution of the State.

INDICTMENT for murder, tried before *Bynum, J.*, at Febru- (744) ary Term, 1889, of GUILFORD.

The facts are stated in the opinion. The following is a copy of the indictment:

"STATE OF NORTH CAROLINA—Guilford County.

Superior Court, December Term.

"The jurors for the State, upon their oath, present: That Elijah Moore, late of Guilford County, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on 17 October, 1888, with force and arms, at and in said county, feloniously, willfully and of his malice aforethought, did kill and murder Laura Hiatt, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Attorney-General for the State.
J. T. Morehead for defendant.

MERRIMON, C. J. Upon his arraignment, the prisoner pleaded (745) to this indictment not guilty. On the trial the jury rendered a verdict of guilty. Thereupon he moved in arrest of judgment, but the court overruled the motion in that respect and gave judgment of death against him, from which he appealed.

On the trial, on the cross-examination of a witness by the prisoner's counsel, the latter put to the witness a question, to which the solicitor for the State objected. The prisoner's counsel at once began to state to the court what evidence he desired and expected to elicit. The solicitor objected to his making his statement in the presence of the jury, and requested the court to send it out of the court chamber until the counsel could make his statement. The court granted this request, sending the jury out, in charge of an officer sworn specially as prescribed by the statute (Code, sec. 3315, par. 22). This is assigned as error.

We think the court had discretionary authority to grant the request, as it did do. It might be that the question would elicit incompetent

evidence, if allowed, and that the mere statemnt of it, as proposed, in the presence of the jury, might make or tend more or less strongly to make a false or improper impression on the minds of the jurors, or some of them. It is the province of the court to prevent such possible evil when it can properly, and thus help to secure a fair and impartial trial. It must judge of the necessity for such an unusual step, and its exercise of a sound discretion in doing so would not ordinarily be the subject of review here. Such cautionary practice cannot of itself prejudice the State or the prisoner—we cannot see how it could; but if it should be made to appear probable that by some untoward event the prisoner was prejudiced thereby, the court would promptly enterfere for his protection; and in such case, if it should refuse to do so, its action in (746) such respect might be the subject of review. Neither the State nor the prisoner has the right to have the benefit of false impressions made upon the minds of the jurors, and it is the duty of the court to prevent such impressions, as far as it can do so consistently with the course of orderly procedure. The court should exercise such authority only when it deems it important so to do, and it should be careful to see that the jury, during its absence, is in charge of a faithful officer of the court, duly sworn. While such practice has not been common, it is within our knowledge, and that of many gentlemen of the bar of large experience, that the judges of the Superior Courts have frequently exercised such authority without injustice to parties, and in some instances in aid of the due administration of justice.

On the cross-examination of a policeman, introduced for the State, the prisoner proposed to prove by him that on the night of the homicide he had arrested the prisoner for an assault upon his own wife; that afterwards, on the same night, this witness arrested him for the alleged murder of the deceased, not telling him at first why he did so; that the prisoner remonstrated with him as to the second arrest, saying that he had already "given his bond to appear next day," and manifested surprise at the second arrest. On objection, the court excluded the proposed evidence, and the prisoner excepted.

This exception is without force. What the prisoner said to the witness was not part of the *res gestae,* and he could not be allowed thus to make evidence in his own behalf. What he said to the witness may have been a mere device to mislead the officer and help to shield himself from justice.

Another witness for the State gave evidence of a noisy, clamorous and disgraceful quarrel between the prisoner and his wife, in their own house, on the night of the homicide, the deceased being partly the subject of the quarrel; that she was present, close to the prisoner's

house, pending that quarrel; that the prisoner saw her there; (747) cursed and threatened to kill her that night; that he followed her, keeping a few steps from her, etc., etc. The evidence was objected to, on the ground that it tended to scandalize the prisoner before the jury, etc., etc.

The court properly received it. Obviously the exception is unfounded. The evidence went strongly to prove threats, motive, opportunity and pursuit of the deceased. It was not received to scandalize and unjustly prejudice the prisoner, but to prove important and material facts that the witness could not give evidence of without speaking of the scandalous quarrel; it was inseparably connected with the evidence of the crime, and the prisoner cannot justly complain that it placed him in a bad light on the trial, of tremendous moment to him.

It appears that the trial in this action began on Thursday, 21 February, 1889; that on that day all the evidence was received and the counsel began their argument to the jury; that on the next succeeding day, Friday, 22d of the same month, without objection from the prisoner or his counsel, or any person, the argument was concluded, the court gave the jury instructions and they rendered the verdict of guilty, whereupon the prisoner's counsel moved for a new trial, assigning in support of his motion, among other grounds, that the day was a legal holiday. He insisted that therefore the verdict of the jury and all proceedings in the action on that day were void. The court denied the motion and gave judgment. This is assigned as error.

The statute (Code, sec. 3784) simply declares that the 22d day of February and other days therein specified, in each year, shall be public holidays, and prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms (748) or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor, particularly for the present purpose, is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law.

It has never been understood to be the law in this State that a public holiday is *dies non juridicus*, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the Superior Courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. Frequently, however, they do not so sit, and it seems to us that ordinarily it would be better that they should not, and thus

encourage the spirit and purpose of them. It may be that suitors, jurors, witnesses and others are not bound to attend court on legal holidays; but if they do, and the court proceeds with the business before it, it is not unlawful to do so, nor is it error of the court in any particular case or matter to so hear and dispose of it, unless it shall appear that a party thereby suffered injustice or prejudice. Inasmuch as business of all kinds is generally suspended on such days, and the law so allows and permits, it may not be lawful then to sue out or execute civil process, notices and the like. But if that be so, it is otherwise as to cases and business pending before the courts, if the court proceeds in the same without prejudice to parties interested; and this is so, because the statute simply *permits* such suspension of business, but does not make it unlawful to do and transact official business, whether judicial or otherwise.

(749) The correctness of what we have thus said is made more manifest by reference to the statute (Code, secs. 3782, 3783) in respect to *Sunday,* and decisions of this Court as to judicial proceedings in certain cases on that day. The statute positively forbids every person, whether on land or water, to "do or exercise any labor, business or work of ordinary calling, works of necessity or charity alone excepted," etc., on Sunday. In view of this statutory provision, and the nature and purposes of Sunday, this Court, while holding that it is for many purposes *dies non juridicus,* has repeatedly decided that it is not assignable as error that the Superior Court sat on Sunday pending the trial of capital and other cases continued from Saturday night before that day. Thus, in *S. v. Ricketts,* 74 N. C., 187, the defendant was indicted for *perjury;* the trial began on Saturday, and the jury did not render their verdict of guilty until the next day (Sunday). It was contended for the defendant that the verdict and proceedings of the latter day were void. This Court held otherwise, that the verdict was valid. Afterwards, in *S. v. McGimsey,* 80 N. C., 377, which was a capital case, the Court said: "We think there is nothing in the objection raised, that the court was held on Sunday for the purpose of this trial, under the circumstances," citing *S. v. Ricketts, supra.* These cases were afterwards recognized in *S. v. Howard,* 82 N. C., 623. See, also, *Bland v. Whitfield,* 46 N. C., 123; *Branch v. R. R.,* 77 N. C., 347; *Devries v. Summit,* 86 N. C., 126.

It does not appear—it is not suggested—that the prisoner in this case suffered the slightest prejudice because the jury rendered their verdict of guilty and the court gave judgment against him on a holiday. He had every advantage, every safeguard about him then that he could have had on any other day. And, as we have seen, there was neither principle, nor statute, nor precedent, nor practice in this State that

made it unlawful for the court to sit, as it did do, on the holiday mentioned. Hence the error assigned is without foundation or force.

We think, also, that the motion in arrest of judgment, upon (750) the ground of insufficiency of the indictment, was properly denied. The indictment would not be good at the common law, because it does not charge the means whereby the prisoner slew the deceased, nor the manner of the slaying, but it is in every material respect such as the statute (Acts 1887, ch. 58) prescribes and declares shall be sufficient. It is, in substance an effect, a formal accusation of the prisoner of the crime specified. It was presented by a grand jury; it shows upon its face the facts that gave the court jurisdiction; it charges, in words having precise legal import, the nature of the offense charged; it specifies with certainty the person charged to have been murdered by the prisoner. By it he was put on notice and could learn of the charge he was called upon to answer; he could learn from it how to plead and make defense. The reasons of the perpetration of the crime and the manner of its perpetration are of the incidents—not of the substance—of the crime charged. To charge them might facilitate the defense, but this is not essential to it; it is essential that the substance of the crime shall be charged; this gives sufficient notice to put the prisoner on inquiry as to all the incidents and every aspect of it. Nor does this in any degree abridge or militate against the provisions of the Constitution (Art. I, sec. 12), which provides that "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment presentment or impeachment." The mere form of the indictment—any particular form—is not thus made essential. The purpose is to require that the party chargd with crime by indictment shall be so charged by a grand jury as that he can learn with reasonable certainty the nature of the crime of which he is accused and make defense. As we have said, it is not necessary in doing so to charge the particular incidents of it—the particular means employed in perpetrating and the particular manner of it—and thus compel the State to prove that it was done with such particular means and in such way, and in no other. Such particularity might defeat or delay justice in many cases, as, indeed, it has sometimes done.

The Constitution (Art. IV, sec. 12) confers upon the General (751) Assembly power to regulate and prescribe criminal as well as civil procedure, not inconsistent with its provisions, "of all the courts below the Supreme Court." The form of the indictment prescribed by the statute (Acts 1887, ch. 58) is not inconsistent with any provision of the Constitution. It is sufficient to serve the purpose intended by it, and it is not our province to determine that it is better or worse than

the common-law indictment in such cases. It is substantially such as has been adopted by statutes in murder cases in several States of the Union and in England. Laws Pa., 1860, No. 375, sec. 20; Revised Statutes Ind., (1881), sec. 1746; Annotated Stats. Ill., Div. XI, 1468; *People v. King,* 27 Cal., 507; *People v. Davis,* 73 Cal., 355; Pick. Stat. at Large (14 and 15 Vic.), ch. 100, sec. 4.

No error. Affirmed.

Cited: S. v. Brown, 106 N. C., 645; *S. v. Peters,* 107 N. C., 884; *S. v. Arnold, ib.,* 864; *S. v. Stubbs,* 108 N. C., 775; *Harper v. Pinkston,* 112 N. C., 304; *Bank v. Comrs.,* 116 N. C., 368; *S. v. Covington,* 117 N. C., 867; *Carter v. R. R.,* 126 N. C., 442; *Rodman v. Robinson,* 134 N. C., 507; *S. v. Exum,* 138 N. C., 605; *S. v. Harris,* 145 N. C., 458; *S. v. Peterson,* 149 N. C., 535; *S. v. Cobb,* 164 N. C., 422; *S. v. Southerland,* 178 N. C., 678.

(752)

THE STATE v. ALBERT L. RIPPY.

Insanity—Homicide—Judge's Charge.

When upon the trial of an indictment for murder, the defendant relied upon insanity as a defense, and produced testimony tending to show that he was laboring, at the time, under an attack of *delirium tremens;* that he was also under the influence of over doses of morphine, which were calculated to produce frenzy, and that insanity was hereditary in his family. *Held,* that an instruction to the jury which omitted to present distinctly the effect of the alleged frenzy, resulting from the overdose of morphine especially when the prisoner had asked a special instruction on that point—was erroneous, and was not cured by a general charge that "insanity was a complete defense to all criminal acts while under its influence, whether permanent or temporary, and from whatever cause produced."

INDICTMENT for murder, tried before *Bynum, J.,* at March Term, 1889, of ALAMANCE.

The defendant was indicted for the murder of Abel Rippy. He pleaded "not guilty," admitted the killing, and relied upon the defense of insanity.

Only so much of the testimony and the ruling of his Honor are here stated as is necessary to the understanding of the points passed upon by this Court.

It was in evidence that the prisoner shot his father with a gun, just before "sundown" on Friday, 1 October, 1888. The homicide was com-

mitted at some haystacks, near the dwelling house of the deceased. A witness for the State, a brother of the prisoner, testified that the prisoner was about thirty-five years of age; that "he stayed in the house of the deceased some of the time, but generally stayed in a cabin on the premises, some five hundred yards away from the scene of the homicide, with a crippled brother, named Benjamin Rippy; that he had seen prisoner almost every day for eighteen months preceding (753) the homicide, and had not, in that time, seen him sober; that prisoner had been away a day or two, and had returned to the cabin of his brother, a while after dinner, on the day of the homicide, and then stated the circumstances under which the killing was done, showing that it was unprovoked by the deceased. He stated that prisoner had a brother and sister who were crazy, and that he was drunk at the time.

The defendant introduced Benjamin Rippy, the crippled brother who occupied the cabin, who testified that defendant had stayed with him most of the time in the cabin; that he had been two days and three nights away, and came back two or three hours by sun on the day of the homicide, and "had no sense; sat flat down on the ground, in the yard, his eyes *just dancing. I said to him, 'You've got no sense'; told him to* come in the house. He said, 'I feel bad.' I asked him what was the matter; he didn't say anything. I had morphine; have been afflicted with rheumatism for ten years, and take it to ease pain. I had given it to defendant before, and it put him to sleep. I told him better have medicine, and gave him some (showing how much); he lay down on bed ten or fifteen minutes and got up. I gave him more morphine (showing how much). I gave it to him because he had no sense, and I thought it would make him go to sleep. He went off; I didn't see what he carried, because I can't turn my head. I heard a gun. Defendant came back."

Several witnesses testified that, in their opinion, the prisoner was insane at the time of the homicide. They described his appearance and conduct in detail. There was also evidence that several of prisoner's ancestors had been insane.

Dr. G. W. Long was introduced for the defense, and, having qualified himself as an expert, said that he had heard the testimony of all the witnesses in the case; that he noted the testimony of Benjamin Rippy as to the quantity of morphine he gave defendant a few hours before the homicide; that the quantity as indicated by said Benjamin was an overdose, and its effect would be to produce wildness and (754) insanity until the person should give in and sleep should intervene, and the longer sleep was deferred the more pronounced and exces-

sive the wildness and insanity would become. This witness also testified to the effect of excessive use of alcohol on the brain, and that is was calculated to produce insanity; that sometimes such insanity was temporary and known as *mania potu,* or delirium tremens, and sometimes it became permanent; that hereditary insanity is recognized in medical science, and that a person whose blood was tainted with insanity would be more liable to become insane from the excessive use of intoxicants or from an overdose of morphine.

Dr. W. G. Stafford was introduced for the defense, and, having qualified himself as an expert, testified that he had been present and had heard and gave particular attention to all the testimony in this case. This witness also testified as to the effects of long and excessive use of alcohol upon the brain, and also of the effects of morphine when given in an overdose, and said that the quantity testified to by Benjamin Rippy was excessive and would produce insanity unless sleep very soon intervened.

There was testimony upon the part of the State tending to show the sanity of the prisoner.

Several instructions on the question of insanity were asked of the court:

"6. That if the jury shall believe that the prisoner, at the time of the homicide, was in a state of mind that rendered him incapable of comprehending the criminal character of his act, and that his incapacity was the result of an overdose of a drug he had taken, then they should acquit.

"7. That if the jury believe the prisoner subject to a tendency to insanity, and that, because thereof, extraordinary effects resulted
(755) from intoxication, of which he was ignorant, and that he was thereby rendered incapable of comprehending the criminal character of the act, they should acquit.

"8. That if the prisoner, at the time of committing the homicidal act, was suffering from *delirium tremens,* although occasioned wholly by strong drink, he should be acquitted."

His Honor refused to instruct the jury as requested, and instructed and charged as follows:

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible, criminally, until the contrary is proven to the satisfaction of the jury; and to establish a defense on the ground of insanity it must be proven to the satisfaction of the jury that, at the time of committing the act, the defendant was laboring under such a defect of reason from disease of mind as not to know the nature of the act he was doing, or, if he did know it, that he didn't know what he was

doing was wrong. Voluntary drunkenness is no excuse for crime. The law recognizes the existence of a form of diseased mind known as *delirium tremens,* produced by excessive use of stimulating drink; and if the jury are satisfied that the defendant was so far insane as not to know the nature of the act he committed at the time he committed it, nor whether it was right or wrong, he would not be guilty, although such insanity be *delirium tremens* and produced by the voluntary use of intoxicating liquor. Insanity is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary, and from whatever cause produced."

The prisoner excepted. There was a verdict of guilty, and judgment, and the prisoner appealed.

Attorney-General for the State.
June Parker for defendant.

SHEPHERD, J., after stating the facts: The testimony in this (756) case presented several phases of defense, each of which should have been clearly and distinctly stated to the jury, with proper explanations. *S. v. Mathews,* 78 N. C., 537.

There was testimony tending to show hereditary insanity; permanent insanity, produced by long and continued use of alcoholic spirits, *delirium tremens,* and temporary insanity, or frenzy caused by an overdose of morphine administered as a medicine.

The charge of his Honor on the question of insanity was very general, the only one of the above theories of defense mentioned therein being that of *delirium tremens.*

We think that the instructions should have given equal prominence to all of the theories of defense legitimately arising on the testimony, and that, although the latter part of the charge was sufficiently comprehensive to embrace every view, it may not be unreasonable to infer that the deliberations of the jury were in a measure confined to the particular phase of defense mentioned by his Honor.

But however this may be, we are clearly of the opinion that there was error in the refusal of the court to give the sixth instruction prayed for by the prisoner. This instruction was as follows: "That if the jury shall believe that the prisoner, at the time of the homicide, was in a state of mind that rendered him incapable of comprehending the criminal character of his act, and that his incapacity was the result of an overdose of a drug he had taken, then they should acquit."

If the homicide was committed while the prisoner was in a frenzy, produced by an overdose of morphine administered to him as medicine,

under the circumstances detailed by his brother, it would be a complete defense. 1 Rus. Crimes, 12; 1 Hale P. C., 32; 3 Greenleaf Ev., sec 6; *Rogers v. State,* 33 Ind., 543.

(757) Notwithstanding the special prayer for instructions upon this point, which was so fully presented by the testimony, and which was of such vital importance to the prisoner, the court failed to specially instruct upon any other theory of defense than that of *delirium tremens,* leaving the other theories to be considered under a general instruction, which was as follows: "Insanity is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary, and from whatever cause produced."

The substituion of a general proposition of law, however correct it may be, for particular instructions asked, has been condemned by this Court. *S. v. Dunlop,* 65 N. C., 293; *S. v. Mathews,* 78 N. C., 537.

In the latter case, *Judge Rodman,* in delivering the opinion of the Court, says: "We think a judge is required, in the interest of human life and liberty, to state clearly the particular issues arising on the evidence, and on which the jury are to pass, and instruct them as to the law applicable to every state of the fact, which, upon the evidence, they may reasonably find to be the true one." *Nelson v. State,* 32 Tenn., 237.

As we are of the opinion, for the reasons given, that a new trial should be granted, it is unnecessary to consider the other exceptions which were argued by the intelligent young counsel who appeared for the prisoner.

Error.

Cited: S. v. Boyle, post, 822; *Blake v. Smith,* 163 N. C., 275.

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(758)

THE STATE v. JAMES WEAVER.

Larceny—Evidence—Indictment—Former Conviction and Acquittal—Grand Jury—Arrest of Judgment—Presumption—Opening and Adjourning of Court.

1. Upon a trial for larceny, it is competent, upon the question of identity, to show that other property stolen at the same time, though not charged in the indictment, was found in the possession of the defendant.

2. Where intent is of the essence of the crime charged, in order to show guilty knowledge, it is not erroneous to receive evidence of different offenses, but of the same character and connected with that alleged in in the indictment, was found in the possession of the defendant.

3. Where several articles are stolen at the same time, or stolen in the progress of a series of acts, so connected and continued that they form but one transaction, but one larceny is committed, and an acquittal or conviction upon an indictment charging one, or only a portion of the stolen articles, will be a good bar to a prosecution for the remainder.

4. It is competent to show that a declaration made by one charged with larceny, made at the time of his arrest and the finding of the stolen goods in his possession, in respect to the manner in which he obtained such possession, is false.

5. Where the record stated that the persons impaneled as grand jurors—among whom was one appointed foreman—were "duly drawn, sworn, and the court having appointed J. P. foreman, are charged," etc. *Held*, that it sufficiently appears that the foreman had been duly drawn, and the proper oath had been administered to him.

6. The recital in an indictment that "the jurors upon their oath present," etc., raises a presumption, when accompanied by the endorsement of "a true bill" signed by the foreman, that it was duly returned and presented in open court, and proof to the contrary can only be heard on plea in abatement made in apt time.

7. Where the record recited that a regular term of a Superior Court was opened and held *Wednesday*, instead on Monday, of the week fixed by the statute, it will be presumed that the sheriff had duly opened the court and adjourned it from day to day, as provided in the Code, sec. 926.

INDICTMENT for larceny, tried at September Term, 1889, of (759) GRANVILLE, before *Bynum, J.*

The defendant was charged with stealing "one pair of shoes, one pound of snuff, one pair of suspenders, one shirt, one yard of cloth of the value of one dollar, of the goods, chattels and moneys of Charles F. Wheeler," etc., and, in a second count, with receiving the same articles, knowing them to have been theretofore stolen.

One Teasley, who, together with three others, was indicted with Weaver, and as to whom the solicitor entered a *nolle prosequi*, testified that he went to the store of C. F. Wheeler and watched while the defendant Weaver and others entered and filled a number of sacks with goods, taking each a sack and carrying the goods to a party across the road, whom the witness did not know.

Charles F. Wheeler, the prosecutor, testified that on the night of 18 July, 1888, his storehouse in Granville County was broken into, and his goods, to the value of more than three hundred dollars, were stolen. Among the articles were those mentioned in the indictment and a lot of coffee, some undershirts and some pairs of pants. The defendant Weaver objected to the introduction of any testimony in relation to the pants, because they were not among the articles mentioned in the indictment, and excepted to the ruling of the court overruling his objec-

tion. The prosecutor then testified, further, that the house was entered by taking off the hinges of the window. From information received, a search warrant was issued, and at the house of defendant Teasley were some of his shoes, cloth and coffee; at defendant Timberlake's, shoes, shirts and cloth; at defendant Crabtree's snuff and coffee, and at defendant Weaver's, a pair of pants and an undershirt. Witness testified, further: "The shirts and pants found at Weaver's were just like those lost by me. I recognized them by the material out of which they
(760) were made and the buttons on them, as I had them made by an old lady in the neighborhood, and, having no buttons to furnish her, she obtained them from several old pairs of pants in her house, and they were of different varieties. The pants were found, on a second search of Weaver's house, under some dresses behind the door, and the undershirt was found between the feather and straw beds and had never been washed or worn."

The defendant objected and excepted whenever the pants were mentioned by the witness, and also when they were exhibited to the jury.

The other material facts are stated in the opinion of the court.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General and R. W. Winston for the State.
J. B. Batchelor for defendant.

AVERY, J., after stating facts above: It is an established rule of evidence that "when, on a trial for larceny, identity is in question, testimony is admissible to show that other property which had been stolen at the same time was also in the possession of the defendant when he had in possession the property charged in the indictment." Wharton Crim. L., sec. 50. This principle is sustained by reason as well as authority. When several articles are taken at one time, and "the transaction is set in motion by a single impulse and operated by a single unintermittent force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up into series of indictments, no matter how long a time the act may occupy." 2. Wharton Crim. L., sec. 1817. So that, the testimony does not tend to prove a different, but the same offense. The plea of former acquittal or conviction on this indictment would unquestionably be good as a bar
(761) upon the trial of another charge against the defendant for larceny of the pants, the property of the prosecutor, upon offering proof either that they were taken at the same time when the articles charged in this case were taken, or upon showing that testimony was

offered for the State, on the trial of this indictment, tending to show they were stolen at the same time. This Court has gone further and allowed evidence of a different offense of the same character and connected with that charged in the indictment, in order to show guilty knowledge, where the intent is of the essence of that charged. *S. v. Murphy,* 84 N. C., 742; *S. v. Thompson,* 97 N. C., 496; 1 Wharton Crim. L., sec. 649; *S. v. Parish, ante,* 679.

The officer who conducted the search, under the warrant at Weaver's house testified, among other things, as follows: "Weaver did not resist the search, but brought out many articles which Wheeler did not claim, but as soon as the shirt and pants were produced he claimed them, and said the buttons had been put on by a lady in his neighborhood. Weaver said he 'could prove where he got those things; that George Ellis had bought them from Farthing's store in Durham.' This was said in the presence of Ellis. Weaver was not under arrest at the time." Defendant Weaver objected to this evidence and insisted that he was under arrest at the time. The objection was overruled, and the defendant excepted.

If the State had shown a declaration of the defendant in itself tending directly to establish his guilt, as a confession on his part, when there was no evidence that it was made under duress, through fear, excited by threats, or under the inducement of a promise of escape from or mitigation of the punishment, the testimony would have been competent, even if the defendant had been in arrest. It is unnecessary to cite authority to sustain so plain a proposition. After the declaration was proven by the witness it was competent for the State to contradict it by testimony tending to show that the defendant Weaver (762) did not get the pants from Ellis and the latter bought no such pants from Farthing's store.

In addition to the assignments of error in the court below, it is insisted in this Court that the judgment shall be arrested on three grounds, which we will discuss *seriatim.*

1. The record of the swearing and impaneling of the grand jury is as follows: "And the aforesaid good and lawful men (among whom was named in the record Joseph B. Parham) so summoned for the first week, the following are duly drawn and sworn, and, the court having appointed Joseph B. Parham foreman, are charged as grand jurors, to wit, R. B. Best," etc., naming sixteen others. We think that it sufficiently appears from the record that Parham was drawn as a grand juror, and the presumption is that the court complied with the law by administering the oath first to him and then in the usual form, which presupposes that to have been done to the others. If such an objection

were good at all, it is questionable whether it could be entertained unless it had first been raised by plea in abatement below. *S. v. McNeill,* 92 N. C., 812.

2. The objection that the recital in the indictment, that "the jurors, upon their oath, present," etc., does not sufficiently show that it was presented by the jury in open court, cannot be sustained. The presumption is that it was properly presented, as it is endorsed as a true bill and signed by the foreman, and proof to the contrary could only be heard on plea in abatement filed in apt time.. *S. v. Gainus,* 86 N. C., 632; *S. v. Bordeaux,* 93 N. C., 560.

3. The record of the term at which the case was tried, before *Bynum, Judge,* sets forth that, "at Superior Court, continued and held in and for the county of Granville and State of North Carolina, at the courthouse thereof in Oxford, on Wednesday, 24 April, 1889, present," etc.

It is contended by counsel that the fact that the court appears to (763) have been first opened on Wednesday is fatal to the jurisdiction.

The sheriff is required by section 926 of the Code to "adjourn the court from day to day until the fourth day of the term, inclusive," etc., if the judge of the Superior Court shall not be present. It was therefore lawful to open the court as late as Thursday, and it must be presumed that it was adjourned from day to day, as the law directs, by the sheriff.

No error. Affirmed.

Cited: S. v. McBroom, 127 N. C., 530, 538; *S. v. Hight,* 150 N. C., 819; *Coble v. Huffines,* 133 N. C., 426; *S. v. Hullen, ib.,* 660; *S. v. Register, ib.,* 752; *S. v. Hankins,* 136 N. C., 622; *Robertson v. Halton,* 156 N. C., 219; *Grey v. Cartwright,* 174 N. C., 54; *S. v. Harden,* 177 N. C., 583; *S. v. Simons,* 178 N. C., 681; *S. v. Stancill, ib.,* 686.

THE STATE v. JOHN P. CRUMP.

Special Verdict—New Trial.

If a special verdict fails to find all the facts essential to a decision of the case, it is fatally defective and a new trial must be awarded.

CRIMINAL ACTION, which was tried at May Term, 1889, of GUILFORD, before *Bynum, J.,* upon appeal from a justice of the peace.

Upon a special verdict returned by the jury, the court adjudged the defendant not guilty, from which the State appealed.

Attorney-General for the State.
No counsel for defendant.

SHEPHERD, J. The defendant was charged with peddling without a license, as required by law. There was a special verdict, and this does not find whether or not the defendant had such license. Nor does it find that he was required to exhibit one by the proper authorities and failed to do so; in which case there would have been a pre- (764) sumption that he had none. Section 24, chapter 216, Laws 1889.

The verdict being thus fatally defective, there must be a new trial. *S. v. Oakley,* 103 N. C., 409; *S. v. Bray,* 89 N. C., 480.

Error.

Cited: S. v. Corporation, 111 N. C., 664; *S. v. Hanner,* 143 N. C., 635.

THE STATE v. ELIJAH D. WILLIS.

Oysters—Statute, Construction of.

"A natural oyster-bed," as distinguished from an "artificial oyster-bed," in the sense in which those terms are employed in the Code, is defined to be one not planted by man, and is any shoal, reef, or bottom where oysters are found growing, not sparsely or at intervals, but in a mass or *stratum* in sufficient quantities to be valuable to the public.

CRIMINAL ACTION, tried on appeal from a justice of the peace, before *Shipp, J.,* at Spring Term, 1889, of CARTERET.

The trial was on the warrant of a justice of the peace, issued under section 3393, last clause of said section, contained in chapter 43, Vol. II of the Code, entitled "Oysters and Other Fish," charging the defendant with taking oysters from the oyster gardens of one John D. Chadwick, on or about 20 February, 1888, without permission of said Chadwick first had.

The defendant pleaded "not guilty," contending that the said bed staked off and enclosed was "a natural oyster bed" and any citizen had a right to take oysters therefrom, under the last clause of section 3390 of the Code.

The jury returned the following special verdict: (765)

"That the prosecutor, John D. Chadwick, has had his oyster garden made and staked out in Carteret County, according to the requirements of the statute, and obtained a license, or grant, from the

Clerk of the Superior Court of Catawba County for the same; that the defendant took oysters therefrom, within the stakes where the garden was laid off, without permission of said John D. Chadwick first had; that there were no oyster rocks within the stakes where the garden was so laid off, but that there were some oysters within the same, but they were scattering, and oysters naturally grew there; that the area embraced within the stakes, which was two and three-fourths acres, was not such as would within itself induce the public to resort to it and get oysters, but, in connection with the oyster rocks and oysters near by, the public were in the habit of taking oysters from the said area and adjacent territory for livelihood and for market.

"If, upon the foregoing statement of facts, the court be of opinion that the defendant is guilty, then the jury say he is guilty; but if upon said statements the court is of opinion that defendant is not guilty, then the jury find that he is not guilty."

Whereupon, the court adjudged that the defendant is not guilty, and from this judgment the solicitor appealed.

Attorney-General for the State.
Charles R. Thomas, Jr., for defendant.

SHEPHERD, J., after stating the facts: As early as 1822 the attention of our Legislature was directed to the protection of the oyster interests in the waters of this State, and a statute was enacted inflicting a penalty upon "masters and skippers" for transporting oysters out of the State, and also prohibiting the use of any instrument except tongs in their taking.

In those days the natural oyster beds were considered amply sufficient to meet the demands of the public, and it was only deemed necessary to extend to them the protection of the law as above stated.

(766) In 1858 the lawmakers, appreciating the importance of increasing the quantity as well as improving the quality of oysters, passed a statute very similar in its provisions to those of sections 3390, 3391, 3392, 3393 of the present Code. These sections provide that any inhabitant "may make a bed in any of the waters in this State and lay down or plant oysters or clams therein, having first obtained a license" from the clerk of the Superior Court of the proper county. It is further provided that in his petition he shall describe particularly the place where he desires to make such bed, and that he may stake out such grounds, not exceeding ten acres, and that he shall hold the same in fee. If, however, he has included within his stakes any *natural oyster or clam bed,* or a space containing more than ten acres, or if he shall fail for

the period of two years, either to use such bed or keep it properly designated by stakes, he shall forfeit such license. The act also provides that if any one shall injure such bed or stakes, or shall gather or take away any oysters within the lines of the same without the permission of the owner, he shall be subject to a penalty and also to indictment. There is a *proviso,* however, "that nothing herein shall be construed to . . . authorize any person to . . . stake off and enclose any natural oyster or clam bed, or in anywise to infringe the common right of the citizens of the State to any such natural bed."

Much uncertainty existing as to what parts of the waters were subject to entry and grant under this law, a commission was appointed under ch. 119, Laws 1887, to make a survey and *finally* determine and locate the natural oyster beds, in order that such entries and grants could be intelligently and safely made. This was done, and it seems that the purpose of the law has been accomplished, so that no such question as is presented here can generally arise, except as to grants made before that time. For some reason best known to the Legislature (767) the above act was confined to the waters north of Core Sound, and has no application to this case. Core Sound and all the waters south of it, therefore, are governed by the sections of the Code referred to, thus leaving the location of the natural oyster and clam beds in said sound to the courts and juries, as the cases arise.

We are therefore directly confronted with the difficult duty of defining a "natural oyster bed."

Although the cultivation of oysters obtained among the Romans in the days of Pliny (who speaks of it in one of his writings), and has since been carried on extensively in Italy, France, England and other countries, we have been unable to obtain from them any light upon the particular question before us. In England, as with us, great care has always been taken to preserve to the public the common right of fishery, so that in granting privileges for oyster culture this public right has not been impaired to any material extent. Hence, as we have seen, the Legislature, while encouraging the cultivation of oysters, has provided that natural oyster or clam-beds shall not be subject to entry.

In 1885 Lieutenant Francis Winslow, of the United States Navy, was detailed, at the request of the Legislature, to make a "survey of the natural oyster beds and private oyster gardens, together with an examination of the waters of the State with reference to the possibilities for the culture of shell fish," etc. His report presents, with much intelligence, the different theories advanced as to what is a natural oyster bed.

He says: "In carrying out the first special requirement of the resolution a difficulty experienced in all oyster localities was at once encoun-

tered. The question arose here, as elsewhere, as to what was properly 'a natural oyster bed.' Naturally that question had to be answered before the natural beds could be surveyed and located. Very few people know what is or what constitutes a natural oyster bed. Indeed, it is only a matter of opinion at the best, and opinions are likely to
(768) be influenced largely by self-interest. A large number of persons make a distinction between oyster beds that ebb dry and those that are covered at all states of the tide—a distinction which, it is needless to say, does not have any foundation to rest upon. Many also appear to think that a natural bed is not a 'natural bed,' in the meaning of the law, because it is a little one. On the other hand, there are some whose definition of natural bed is so liberal that it not only covers all places where oysters were in the past or in the present, but includes any area where they might, could, would or should grow in the future. Arguments have been made to the effect that as the drifting 'spat' was evidently a product of nature, wherever the 'spat' attached or oysters grew that spat became a natural oyster bed. Evidently such a view would preclude any system of oyster culture. On the other hand, it has been argued that small groups and bunches of oysters, separate and distinct from any considerable area, were not natural beds within the meaning of the law. A legal decision (by Judge Goldsborough, of Maryland) defines a natural bed as one not made by man, and of sufficient area to have been profitably worked by the general public, as common property, within some recent period of time. This decision has been practically adopted by the Shelfish Commission of Connecticut, in defining the natural beds of that State, and this course has been approved by legislative enactment. Useful as a guide, however, it would not be proper to be strictly governed by the Goldsborough decision in defining the natural beds in North Carolina. In this State the oyster industry is yet in its infancy. The population is too sparse, and the present demand too slight, to have caused any continuous fishery, or even any general knowledge of the positions or arears of the natural beds. Mere testimony as to previous fishery or nonfishery would not, therefore, in all places be conclusive."

It is not easy, from these conflicting theories, to deduce a sat-
(769) isfactory definition. We think that it is the capacity of the bottom to attach what fishermen call the drifting "spawn" or "spat," which distinguishes a natural from an artificial oyster bed, but it will not do to confine this capacity to the inherent character of the soil, since many beds which are now considered natural may owe their origin to artificial causes, such as the deposit of brush, shells, driftwood and other objects to which the young oysters have adhered, and thus, after many years, resulted in the formation of a stratum which fulfils in every way

the common idea of a natural bed. Neither can it with reason be said that every part of the bottom to which oysters *may* adhere, or to which they do adhere and grow, will constitute such a bed, as they may be found scattered here and there in such small quantities as to be of but little value to the public, and such a theory would prevent entries and thus defeat the purpose of the law in encouraging their cultivation.

Something more permanent and valuable is meant by the word "bed." Webster's Dictionary (1 Ed.) and the Century Dictionary give as one of the definitions of *bed* "a layer, a *stratum,* an extended mass of anything, whether upon the earth or within it, as a bed of sulphur, a bed of sand or clay"; and so the verb *bed*—"to lay in a stratum, to stratify, to lay in order or flat, as bedded clay," etc. This view is well illustrated by the *stratum* of marl to be seen in the banks of many of our eastern rivers and the marl-pits in the eastern part of this State, the same being composed, mainly and in many cases, entirely of oyster shells with alluvial deposits above. These considerations would exclude, therefore, the "scattering" growth of oysters which is to be found in many parts of the waters, and which is too small in quantity to be of value to the public.

We think that a natural, as distinguished from an artificial (770) oyster bed, is one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing, not sparsely or at intervals, but in a mass, or *stratum,* and in sufficient quantites to be valuable to the public. This definition, we think, is more in accord with the spirit of our Legislature than that of *Judge Goldsborough.* The latter, in our opinion, lays too much stress upon the *area,* and involves an inquiry into the methods of taking oysters and remuneration for the labor and capital employed. Too many elements of uncertainty enter into it to be of practical use in this State, where the cultivation of oysters is in its infancy and their taking by the public is not exclusively for the purpose of sale and profit.

While it seems impossible to give a more particular definition, it is believed that the one we have adopted reflects the true spirit of the law and may be of some practical use in ascertaining where grants may be made.

The application of the principles we have laid down to the case before us is easy. The special verdict finds that, although oysters naturally grew within the stakes, they were scattering and insufficient in quantity to induce the public to resort to them alone as a means of livelihood or "for market." The verdict also negatives the existence of "oyster rocks," a species of oyster beds. It is very clear that the verdict does not bring this case within the definition which we have formulated, and we

are, therefore, of the opinion that his Honor committed an error when he held that the area in question was a natural oysted bed.

Error.

Cited: S. c., 106 N. C., 804; *S. v. Spencer,* 114 N. C., 775.

(771)

THE STATE v. MOSES ANDERSON.

Master and Servant—Parent and Child—Enticing Servants.

1. The statute (Code, secs. 3119, 3120) making it a misdemeanor to entice, persuade, or procure a servant to unlawfully leave the service of his master, extends only to those cases where the relation of master and servant is created either by *indenture* or by *contract,* orally or in writing, entered into by the servant himself and the employer.

2. If a minor, without the consent of his parents, enters into such relation, the latter may, without offending against the statute, command his child to quit the service of his employer—the parental right to control the child being paramount to that of the employer under the contract. It would be otherwise with one who occupied no such relation.

APPEAL from *Bynum, J.,* at August Term, 1889, of LENOIR.

The defendant is charged in the indictment with a violation of the statute (Code, sec. 3119). He pleaded "Not guilty."

On the trial the jury rendered a special verdict substantially as follows:

"The defendant, in January of 1889, hired to the prosecutor his son Lloyd, a minor, to work for him until the first of August, 1889, at $9 per month. This minor was under the control of his father, the defendant. On 13 May, 1889, the latter went to the house of the prosecutor, where his son was at work, and ordered him to quit work for the prosecutor, the latter protesting against it, and claiming the services of the son until August, under the contract, and that he had paid for more of the son's services than he had rendered, but nevertheless, under the order of his father, the son quit work in the employ of the prosecutor and did not return."

(772) The court was of opinion that the defendant was not guilty, and directed that verdict to be entered, which was done, and an order discharging the defendant was made.

The solicitor for the State excepted and appealed to this Court.

The Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J., after stating the case: The statute (Code, secs. 3119, 3120) prescribes, among other things, that "if any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to unlawfully leave the service of his master or employer, etc., . . . the offender shall be guilty of a misdemeanor and fined not exceeding one hundred dollars, or imprisoned not exceeding six months." We think that the court below held properly that what the defendant did was not a violation of the above recited statutory provision.

It will be observed that it makes it a misdemeanor to entice, persuade and procure one of two classes of servants "to unlawfully leave the service of his master or employer." First, one who is such by indenture; secondly, "one who shall have contracted in writing or orally to serve his employer." It does not in terms, or by just implication, extend to or embrace servants who become such by relations otherwise created. The two classes thus specified embrace the great body of servants employed, and it seems that the purpose of the statute is to protect masters and employers against officious and sinister intermeddlers, whatever their motives, with them. Such servants would feel more at liberty to be persuaded and procured to quit their master's employ. As to servants, not so numerous, becoming such otherwise than as so provided, the master or employer would ordinarily be helped to retain control of them by the person from whom he hired them or, in case of his unlawful interference with them, he would have his civil remedy against him.

The servant of the prosecutor, who is charged in the indictment to have been "enticed, persuaded and procured" by the de- (773) fendant to leave his service, was not such by indenture, nor was he such by any contract on his part with the prosecutor. The defendant himself hired his son, a minor, under his control, such servant to the prosecutor, and as we have seen, what he did does not come within the inhibition of the statute cited.

But if the statute were more comprehensive than it is, the defendant did not "entice, persuade and procure" the prosecutor's servant to quit his service as contemplated by the statute. He, openly and defiantly, claiming and exercising authority and control as father of the servant, a minor, commanded him to quit the prosecutor's service, and acting upon such command he did so. He did not "entice, persuade and procure." If the prosecutor had employed—contracted with—the minor son of the defendant without the latter's sanction the latter would, in that case, have had the right as father to command and require his son—the servant—to quit such service and go home, because his rights would have been paramount to that of the prosecutor, nor would this be a vio-

lation of the statute. But if the minor had so contracted and a person, other than the father, had "enticed, persuaded and procured" such servant to quit his employer's service, such person would be guilty of a violation of the statute. *S. v. Harwood, ante,* 724.

No error. Affirmed.

(774)

THE STATE v. A. B. JENNINGS.

Secret Felonious Assault—Statute—Verdict.

1. The statute—ch. 32, Laws of 1887—which provides that "any person who shall maliciously commit an assault and battery with a deadly weapon upon another, by waylaying, *or otherwise in a secret manner,* with intent to kill, shall be guilty of felony, embraces assaults made upon one who has no notice of the purpose or presence of the assailant, though it may be in a public place and in the presence of others, without any attempt on the part of the assailant to conceal his identity, as well as assaults made by lying in wait, or in such manner as tends to conceal the identity of the assailant.

2. Upon the trial of an indictment charging a secret felonious assault, the jury may be instructed that if they find that only a simple assault and battery was committed, they should return a verdict of guilty (Laws 1885, ch. 68). In such cases, however, it is suggested that the jury be directed to return a verdict of "not guilty of the felony charged, but guilty of an assault."

SECRET and malicious assault with intent to kill (under ch. 32, Laws 1887), tried at the August Term, 1889, of LENOIR, before *Bynum, J.*

The prosecutor and another witness were examined for the State. No testimony was offered for the defendant. The material parts of the testimony were, in substance, as follows: "The prosecutor was standing on the public square, eight or ten feet from the street, in Kinston, during the early part of one night in February previous to the court, with his hands in his pockets, looking at an "Indian show," when he received, in quick succession, a cut with a knife in the neck, another on the back of his shoulders and three or four on the head. He pulled his hand out of his pocket and put it in his face and felt blood, but still did not know from what quarter the blows came. He turned, getting a cut in
(775) the forehead, and recognized and grabbed the defendant, when they went down in a struggle. The assault was made from behind, without notice to the prosecutor. The streets were lighted up so that a person might be seen and recognized thirty or forty feet on the street. A large crowd of people were standing just behind the prosecutor, but he did not know who was cutting him till he turned and re-

ceived a cut in the face. The prosecutor was picked up and carried to a doctor's office and fainted. There were three or four hundred people on the square and in the street, before and behind the prosecutor. The defendant said, just as he was pulled away from the prosecutor, "I tried to kill him." There were people in the windows of the courthouse.

The other witness testified, further, in substance, that there were people standing on the streets, in the store doors, behind the prosecutor, and in such a position as to command a view of the defendant when he attacked the prosecutor. The defendant was cutting the prosecutor when that witness first saw him, and soon after some one took hold of him. Defendant did not attempt to run. The defendant offered no testimony.

Attorney-General for the State.
George Rountree and N. J. Rouse for defendant.

AVERY, J., after stating the facts: The statute under which the indictment was drawn provides "that any person who shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying, or otherwise in a secret manner, with intent to kill such person, shall be guilty of a felony," etc.

The judge in the court below was requested to instruct the jury, among other things, in substance, that the statute includes those assaults and batteries which are committed in such a manner as tends to conceal and keep from the public the identity of the assailant, and thereby evade the law and escape punishment, but does not embrace an (776) assault made without any attempt to conceal his identity, though the person assaulted may be taken at a disadvantage and stricken without notice.

In view of the instruction asked the court charged the jury, in substance, that if the attack was made in such a way as to prevent Lowery (the prosecutor) from seeing who was making the attack, or from repelling it, then that was a secret assault, and if the jury found also that defendant made the assault with a deadly weapon and with intent to kill, and was actuated by malice against the prosecutor, they would return a verdict of guilty of the felony as charged.

We concur in the construction placed by his Honor upon the statute. It was not the purpose of the Legislature to reach only men who lie in wait to wreak vengeance on their enemies, or who try to cover up their tracks and conceal their identity in order to evade the punishment. The law looks primarily to the protection of the life of the party assailed, and that consideration rises in dignity and importance above every other. Under the law of self-defense one may repel force by force

to save his person, and he may shoot down another who is attempting to commit arson or burglary upon his dwelling for the purpose of protecting his property when necessary. If the offender maliciously burn or breaks into the house with felonious intent in the night-time, the crime is punishable with death, and one of the reasons for inflicting such penalty is that the owner may be taken at a disadvantage and slain by the felon to conceal the one crime or, in the other case, the owner may perish in the incendiary flames for want of notice.

So the attempt to conceal from the owner the fact of taking and appropriating to one's use his goods is among the strongest evidences of a felonious intent. The owner, with notice, will possibly hold fast
(777) to his property, or follow and reclaim by voluntary surrender or legal process; but he is, above all persons, alive to the importance of protecting it, and the taker understands that a knowledge of the taking of his part endangers his person and imperils his success.

The idea of fair play, which commends itself to the common sense and reason of mankind, permeates the whole range of criminal law intended for the protection of the person and property, and there seems to have been a leading purpose in its origin to insure to every one not only the right, but as far as possible the opportunity by his personal presence and reasonable resistance, to prevent injury to either.

One who lies in ambush may succeed both in wounding or killing his adversary and conceal his identity, but it is no less an attempt at assassination, falling under the general description, otherwise in a secret manner (or in such a way as to surprise the party assailed) to cut and thrust one, standing with his hands in his pockets, from behind on the neck, head and shoulders with a knife. A word of warning in such cases may enable the person threatened to escape by flight or save himself harmless by resistance. This statute was intended to follow in the old wake and make it doubly dangerous to assail a person on unequal terms, and with a deadly purpose, and thus deter men who are mad with malice by the terrors of threatened punishment from inflicting injury on those who are innocent and unsuspecting, and both deserve and need to be shielded by the power of the State.

We think that this interpretation of the statute harmonizes with the whole criminal code of North Carolina, protects men from surprise by secret foes, and makes secrecy the test of the commission of another crime, as it is already a badge of fraud and evidence of evil intent in other cases.

The words of the statute should be construed according to their natural import. Potter's Dwarris, p. 127, 1 *ib.*, 122, 8 and 10. So
(778) taken it includes not only the case of one who, by waylaying,

attempts to conceal his identity from other persons as well as the party injured, but also that of a person who, otherwise than by lying in ambush, hides his purpose from the party assailed till it is too late to guard against its accomplishment. The usual, if not the only, mode of concealing identity, or attempting to do so, in order to evade detection and punishment is by laying in wait, concealed from view, or by waylaying, which is synonymous with the other expression, and the words "otherwise," in a "secret manner," must have been meant to reach just such cases as that at bar.

The act of 1868, to which reference was made by counsel in their earnest and able presentation of their grounds of appeal, was widely different in its provisions from the act of 1887. It, in plain terms, made every man who struck another, or attempted to strike him in striking distance, either with a weapon, deadly *per se,* or declared by the court to be deadly, punishable, upon conviction, with imprisonment in the State prison. So that if one used, upon a sudden impulse, and provoked by grossly insulting language, a stick that might produce death, or in the heat of passion, while willingly engaged in an affray, struck with such a stick or stone, he was guilty of an offense punishable with infamous punishment. According to the plain import of Laws 1887, if one of several persons already engaged in a general affray should covertly strike another, without warning, from behind with a deadly weapon, it is necessary to prove also, affirmatively and fully, by the declarations of the party accused, or by other facts and circumstances, that he was actuated by malice in making the secret assault. On failure of such proof he could not be convicted.

The defendant asked the court to instruct the jury "that under this indictment the jury cannot find the defendant guilty of a common assault and battery with a deadly weapon, nor of assault and battery with intent to kill."

The cutting with a knife by the defendant was admitted. The (779) court, after instructing the jury that it was necessary to prove beyond a reasonable doubt, in order to establish the guilt of the defendant in manner and form as charged in the bill, told them that if they were satisfied that the secret felonious assault had been committed as charged they would return a verdict of "guilty." But he told them further that an assault with a knife was admitted, and if the jury should determine under the instruction that the defendant was not guilty of felonious assault as charged, then they would return as their verdict "guilty of assault."

If this instruction was erroneous we cannot see how the defendant has been injured by it, because, under proper instructions, the jury found

him guilty as charged, and had, therefore, no opportunity to consider or act upon the suggestion of the judge. . . . But we agree with the court below that indictments like this come under the provisions of ch. 68, Laws 1885, "that on the trial of . . . any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to *acquit* of the felony and to find a verdict of guilty of an assault against the person indicted, if the evidence shall warrant such finding." But we suggest that the language of the law ("it shall be lawful for the jury to acquit of the felony") seems to require as the verdict of the jury "not guilty of the felony charged, but guilty of an assault," and this would be analogous to the finding in a case where a prisoner is charged with murder but convicted of manslaughter, "not guilty of the felony and murder of which he stands charged, but guilty of felonious slaying."

All discussions of this kind might be avoided in future, and inexperienced juries might be saved from perplexity by drawing the bills of indictment with two counts. Though not essential, it is not erroneous to do so.

(780) We conclude, therefore, that there was no error that would entitle the defendant to a new trial.

Affirmed.

Cited: S. v. Patton, 115 N. C., 754; *S. v. Shade, ib.,* 759; *S. v. Gunter,* 116 N. C., 1071, 1073; *S. v. Harris,* 120 N. C., 579; *S. v. Knotts,* 168 N. C., 186; *S. v. Bridges,* 178 N. C., 737.

THE STATE v. CHARLES JOHNSON

"Prejudice"—Judges—Evidence—Statute—Discretion.

1. The provision in the statute—ch. 53, Laws of 1885—that the trial of an indictment pending in the criminal courts of New Hanover and Mecklenburg may be transferred to the Superior Courts of those counties on account of the "prejudice" of the judge thereof, extends only to those cases where that judge has such settled, preconceived opinions, hostile to the party to be tried, as would render him unable to impartially discharge his functions.

2. Whether such removal should be made is ordinarily a matter of unreviewable discretion, though, in an extreme case, it might be otherwise.

3. Where the presiding judge said, in a private conversation, after hearing the testimony of a witness, who was thereafter indicted for perjury committed in giving that testimony, that the witness was "a grand scoundrel," *Held,* no evidence of such "prejudice" as would disqualify him from presiding at the trial for perjury.

STATE *v.* JOHNSON.

ACTION, tried in the criminal court of NEW HANOVER, at September Term, 1889, *Meares, J.*, presiding.

The defendant in the action was examined as a witness for the State in a criminal action pending in the criminal court of the county of New Hanover, wherein the defendants were charged with the crime of larceny. After the trial in that action, the defendants having been acquitted and after the court had adjourned, in a private conversation with one of the counsel for the prosecution, the judge of the criminal court who presided at the trial, and who presided at the trial presently to be mentioned, said of the present defendant, who had been so examined as a witness, he was "a grand scoundrel." (781)

The next morning the grand jury presented an indictment charging the defendant with the crime of perjury, committed on the trial of the action above mentioned. This was Friday morning of the term of the court. The defendant having appeared and pleaded not guilty, moved that the action be continued. The motion was denied, and it was ordered that the case stand for trial on the next succeeding day.

When the action was called for trial the defendant moved that it be transferred to the Superior Court of New Hanover County, as allowed by the statute (Acts 1885, ch. 63, sec. 16), and produced his own affidavit in support of his motion, in which he stated that the presiding judge "apparently formed a very decidedly unfavorable opinion of this affiant from the testimony of said defendants (in the action first above mentioned) and others, who are the State's witnesses against this defendant and affiant; so much so that he, the said judge, remarked to this affiant's counsel that he, this affiant and defendant was "a grand rascal or a grand scoundrel"; wherefore, this affiant and defendant alleges and declares that he has reason to believe and does verily believe that he cannot obtain a fair trial and justice at this court on account of the prejudice of the presiding judge," etc.

The court denied the motion and the defendant excepted. He was then put upon his trial. There was a verdict of guilty, and the defendant moved for a new trial, assigning as ground of his motion that the court had refused to transfer the action to the Superior Court.

Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J., after stating the case: It does not appear (782) that the presiding judge had any settled or, indeed, any ill-will or prejudice, in any legal sense, against the defendant. The latter, shortly before this action began, was examined as a witness on a crimi-

nal trial in the same court before the presiding judge, and as the latter thought, placed himself in a very unfavorable light. The judge spoke of this in a private conversation with one of the counsel, and said of him that he was a "grand scoundrel." This was a harsh remark, but it did not of itself imply malice or prejudice, or such dislike as would lead an intelligent judge to do the defendant injustice in this or any other case. It was no more than a harsh criticism made privately in the hearing of defendant's counsel without, so far as appears, any malice or prejudice to injure the defendant. Judges very often see suitors and witnesses appear before them in very unfavorable views, saying and doing things reprehensible, indicative of unjust and evil purposes. If in such a case a judge should incautiously, in a private conversation, speak harshly of a person so compromising himself, this surely could not of itself be properly regarded and treated as implying prejudice of the judge so speaking, or of itself evidence of it. Indeed, sometimes judges from the bench reprimand offending persons, but this, while it should be done cautiously and only in clear cases, could not be regarded as implying ill-will or prejudice of the judge. In such case he is presumed to speak in condemnation of the wrong and with a view to correct it. Judges in the course of their duties as to matters, cases and things that come before them are not presumed to be mean and unprincipled men, seeking to gratify feelings of malice and revenge, or to be prompted or governed by prejudice, and when it is alleged or suggested in any proper connection that they are, this should be made to appear affirmatively and clearly.

(783) The statute (Laws 1885, ch. 63) creating criminal courts in the counties of New Hanover and Mecklenburg, prescribes, in section sixteen thereof, that in cases of application for a change of venue "on account of the interest, prejudice or relationship of the judge of said court, or on account of any other legal objection to said judge, the cause shall not be transferred to another county for trial, but the judge *may* order it to be transferred to the Superior Court of said county," etc. The prejudice thus made a ground of such transfer of the action implies that the judge has such settled, preconceived opinions, adverse to the complaining party, as would lead him to prejudge the latter's case, such as would prevent him from making due examination and scrutiny of the facts and circumstances of the case and applying the law to the same, giving, in doing so, just weight to the arguments that might be made and what might be properly said in his behalf.

An intelligent judge, without motive otherwise, does not lightly or hastily form and entertain such opinions. However much in the course of his duties he may disprove of or condemn what a party does or says

in one or more cases, or on other occasions, he is careful to leave his mind clear to do such party justice when he shall be charged with crime and tried before him. If his mind is thus free he has not such prejudice as is contemplated by the statute. As we have already said, a judge condemning an offending party before him in words does not of itself imply prejudice. When, however, he is of himself sensible, or made sensible that he has such preconceived opinions—prejudice—as might prevent him from doing the party justice, he is bound, and should not hesitate, to transfer the action as contemplated by the statute. In that case he is bound in conscience and by the highest official obligation to do so. He should do so the more readily because it lies, in his sound discretion, to make or refuse to make such order of transfer, and his exercise of discretion is not ordinarily reviewable in this Court. (784) Perhaps, in an extreme case, it might be, but it certainly is not in a case like the present one. Code, sec. 196; *S. v. Duncan,* 28 N. C., 98; *S. v. Hildreth,* 9 *id.,* 429; *S. v. Hill,* 72 N. C., 345; *S. v. Hall,* 73 N. C., 134.

No error. Affirmed.

Cited: Albertson v. Terry, 109 N. C., 9.

THE STATE v. JOCK LEGGETT.

Assault—Evidence.

Where the prosecutor, a dangerous and quarrelsome man, and the defendant went into the house of the latter to make a settlement, and an altercation arising, the defendant ordered the prosecutor to leave, which he refused to do, whereupon the defendant went to another room, got his gun, and immediately on his return struck prosecutor with it, without attempting to use milder means to expel him, and it did not appear that the prosecutor was armed, or was attempting any violence. *Held,* to constitute an assault.

CRIMINAL ACTION, tried in ROBESON, at January Term, 1889, *Merrimon, J.,* presiding.

The defendant testified in his own behalf that the prosecutor came to his stable and demanded a settlement; that at his suggestion they went into the defendant's house, but failed to settle; defendant told him to go out of the house; the prosecutor replied that he would go when he got ready, saying, "Put me out if you are man enough to do it"; the defendant went and got his gun, came back and at once, without saying anything, struck the prosecutor with it; the defendant had heard from

(785) his "hands" that the prosecutor had said theretofore that if he did not settle with him he would have defendant's blood; that the latter knew the prosecutor to be a desperate, dangerous, quarrelsome character and superior to him in physical strength; that after he struck the prosecutor with the gun his wife told the prosecutor to go away, and he went. There was no evidence to show that the prosecutor had a weapon of any kind or that he offered violence to the defendant otherwise than above stated; nor was there evidence that the defendant attempted to get the prosecutor away otherwise than by ordering him out of his house, and upon his not going, getting his gun and striking him with it; he did not use milder means to get him out. The court was of the opinion that if the jury believed the defendant's own statement they should find him guilty, and so instructed them. The defendant excepted.

There was a verdict and judgment against him, and he appealed.

Attorney-General and Jno. Devereux, Jr., for the State.
W. F. French for defendant.

MERRIMON, C. J. The prosecutor was no more than insolent to the defendant; he did not strike nor offer to strike him; nor does it appear that he had any weapon of offense of any kind, nor was there any display of force nor any direct threat. He refused, when commanded, to go out of the defendant's house. The latter had the right to put him out, after he so refused to go, and to use reasonable, necessary force for that purpose, if need be, but not unnecessary or excessive force.

As the prosecutor offered no violence—had made no assault— had displayed no arms or weapon of any kind after the defendant (786) got his gun, he should not have stricken him at once; surely he should have said to him before striking, "Go out, else, as you see, I am prepared, and will use force." This he might safely have done, and the presence of the gun in the defendant's hands might—probably would—have driven him out without the blow. This he did not do. He at once struck him with the gun in a spirit of vengeance, not simply to get him out. So far as appears it was not necessary to strike the blow without first commanding him to go out. It might have been otherwise of the prosecutor had been armed, or violently moving upon or assaulting the defendant. The law does not allow unnecessary violence.

The instruction of the court to the jury complained of was therefore correct.

No error. Affirmed.

Cited: Kirkpatrick v. Crutchfield, 178 N. C., 350.

THE STATE v. ELI PHILLIPS AND DANIEL PHILLIPS.

Indictment—Election of Counts—Deadly Weapons—Serious Injury—Jurisdiction—Former Conviction.

1. Where the several counts in an indictment are obviously inserted to meet different aspects of the same transaction, the court will not compel the prosecutor to elect.

2. An indictment contained two counts, one for an assault with a deadly weapon, "with a club," and the other for an assault producing serious damage. Upon the trial it appeared that no club, or other deadly weapon, was used; that serious injury was inflicted, but that the indictment was found within less than six months after the commission of the offense, and that a justice of the peace had assumed jurisdiction and finally disposed of the charge. *Held*, (1) that the description of the instrument in the first count, with which the assault was charged to have been committed, as "a *club*," *ex vi termini* imputed a deadly weapon; (2) that although the second count was defective in that it did not set out the nature and extent of the injury inflicted, the Superior Court acquired jurisdiction under the first count; (3) that the justice of the peace never had final jurisdiction, and that the trial before him was a nullity.

INDICTMENT for an assault and battery, tried at the January (787) Term, 1889, of ROBESON, *Merrimon, J.*, presiding.

There were two counts in the indictment. The charge in the first count was "that Eli Phillips and Daniel Phillips, late of . . . etc., in and upon one W. R. Butler, with a *certain deadly weapon,* to wit, *with a club,* unlawfully," etc. In the second count it was charged "that said Eli Phillips and Daniel Phillips, on the day and year aforesaid, etc., . . . in and upon one W. R. Butler, unlawfully did make an assault upon him, the said W. R. Butler, and then and there did beat and wound, and thereby seriously damage and injure, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

This indictment was found within less than six months after the assault was committed. But it was also admitted that previous to the finding of this indictment the defendants had been tried, convicted before a justice of the peace, and punished by the payment of a fine of thirty dollars and costs on a charge of simple assault, for the same offense for which they were tried in this case.

The defendants pleaded former conviction of a simple assault before the justice of the peace, and not guilty.

The court refused to give the special instructions asked by the defendants' counsel, and defendants excepted.

The court instructed the jury that if they believed that Butler was injured by the defendants, as testified to by himself, Bryan and the other witnesses, they should find the defendants guilty.

(788) Verdict, guilty.

The defendants moved in arrest of the judgment because the second count in the bill, to which alone the testimony was applicable, was defective in that the extent of the injury done to Butler was not therein alleged. The judge refused to arrest the judgment, stating to counsel that in his opinion the first count was sufficient to sustain the verdict; that there was enough alleged in the first count to give the Superior Court jurisdiction, and the variance between the allegations of the first count and the proof was at most merely technical; that the evidence sustained the first count in its general design and purport and that this was enough; that it was clear that the justice of the peace had no jurisdiction, and that his proceedings in the case amounted to nothing. Defendants excepted.

The court gave judgment against the defendants and they excepted and appealed to this Court.

The evidence, prayer for instruction and exceptions are sufficiently stated in the opinion of the court.

Attorney-General for the State.
W. F. French for defendants.

AVERY, J., after stating the facts: The defendants moved the court at the close of the evidence for the State to compel the prosecutor to elect upon which count a conviction would be asked. The court declined to grant the motion, because it was apparent that the two counts were drawn to meet the different phases of the same transaction. In this ruling there was no error. *S. v. Morrison,* 85 N. C., 561; *S. v. Parish, ante,* 679.

(789) It being admitted that the indictment was found within six months after the offense was committed, the defendants insist that the Superior Court did not have jurisdiction because, in the first count, the description of the instrument used is not such that the court can determine that it was a deadly weapon, and the nature of the injury is not set forth in the second count. If the court can neither conclude, upon the face of the indictment, that the weapon described in the first count was one that would probably produce death when used offensively, nor that the injury, as charged in the second count, was of a serious nature, then there was a want of jurisdiction. *S. v. Russell,* 91 N. C., 624; *S. v. Porter,* 101 N. C., 713. In the latter case the court say:

"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 proportions, from which it can be seen to be a dangerous or deadly implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed."

This indictment is defective upon the same reasoning unless the word club, *exvi termini,* can be declared such an instrument as would probably produce death or great bodily harm when used to strike a blow. Worcester defines a club as "a *heavy* staff or stick, fit to be used in the hand as a weapon; a bludgeon." Bludgeon, according to the same lexicographer, is "a short stick *with one end loaded,* used as an offensive weapon." The definition of club given by Webster is "a heavy staff or piece of wood." So that the court can declare that a blow stricken with such an implement would endanger life. In *S. v. West,* 51 N. C., 509, *Judge Ruffin* says: "Whether an instrument or weapon be a deadly one is, at least generally speaking, for the decision of the court, because it is a matter of reason that it is or is not likely to do great bodily harm, which determines its character in this respect. *S. v. Craton,* 28 N. C., 164. Hence it is clear that a gun, sword, *large knife* or bar of iron, or any other heavy instrument, by a blow from which a grievous hurt would probably be inflicted, are deemed in law deadly in- 790) struments." The instrument declared to be deadly in that case was an oaken staff, nearly three feet long, and of the diameter of an inch and a half at one end and two inches at the other end. It was manifestly so heavy as to make it dangerous. 3 Gr. Ev., sec. 147, says that malice may be presumed from "casting stones or other heavy bodies over a wall, or from a building, with intent to kill," etc., "or where a parent or master corrects a child with an instrument likely to cause death," etc.

Wharton Precedents of Indictments, 244, approves a precedent for assault with "a large stick," when it was necessary to allege an intent to kill, and a charge of assault with "a large knife" has been held good under like circumstances. A club means more—not only a large, but a heavy stick.

We think that a club is such an instrument, in its weight, dimensions and character that the court must conclude that a blow stricken with it by a man would probably produce death or great bodily harm. We therefore hold that the Superior Court has jurisdiction of the offense charged in the first count, and the failure to prove that particular charge does not oust the jurisdiction acquired by virtue of the form of the indictment. *S. v. Ray,* 89 N. C., 587; *S. v. Reaves,* 85 N. C., 553.

The right to try the case being settled, his Honor in the court below proceeded to hear the evidence when it appeard from the testimony of every witness examined that serious injury had been sustained by Butler, the prosecutor. He, himself, testified that one of the defendants, Eli, knocked out three of his teeth by the first blow, and when he was made to desist he called upon Daniel, the other defendant, to kill Butler, when Daniel overtook him, beat him down, and injured one of his eyes so that he could not see out of it at all for three weeks, and could not then see well.

A second witness, Mr. Bryan, testified that the prosecutor, his
(791) grandson, was so badly beaten on the jaw that he could not eat for several days, and that his face was bruised, his left arm was bruised to his shoulder, and his back was black from his head down. All the other witnesses corroborated these two as to the extent of the injuries received by Butler, and some of them said he had the print of a shoe heel on his shoulder.

The defendant asks the court to instruct the jury, in substance:

1. That they must return a verdict of not guilty as to the first count of the indictment, because there was no proof of an assault with a club.

2. That the second count must be treated as a simple assault, and as it was not denied that the offense was committed less than six months before the indictment was found the jury should return a verdict of not guilty.

3. That as the defendants could only be convicted of a simple assault, and as they had already been tried and found guilty and punished for that offense before a justice of the peace, the jury must return a verdict of not guilty.

Though the Suprior Court had acquired the right to try the assault and battery by virtue of its powers as a court of general jurisdiction, the judge was urged to instruct the jury that they must return a verdict of not guilty on the second count, because it appeared that a justice of the peace, by fraud or mistake, had attempted to try finally a case that was palpably not cognizable in his court.

The judge must have told the jury to find for the defendants upon the plea of former conviction, and upon the admitted facts must have held that plea good, if the trial before the justice's court was a bar. We agree with his Honor that there is no rule of law that will compel a higher court to recognize as valid a trial before an inferior, when the latter did not have jurisdiction.

(792) The court could see that the trial before the justice of the peace was without authority, when the undisputed facts showed such serious injuries had been sustained, and treating it as a nullity had a right to hold the second count to be a charge of a simple assault

(the words "and thereby seriously damage and injure" being considered as surplusage), and punish the defendants just as though they had never been held to answer previously or tried before any tribunal.

No error. Affirmed.

Cited: S. v. Roseman, 108 N. C., 767; *S. v. Shields,* 110 N. C., 499; *S. v. Battle,* 130 N. C., 657; *S. v. Beal,* 170 N. C., 766.

THE STATE v. JOHN HARMON.

Larceny—Indictment—Jurisdiction.

Where the property stolen was, at the time of the taking, in a United States warehouse, where it was required by the Federal Revenue Laws to be deposited until gauged, and the tax therein paid. *Held*—

1. That the indictment properly charged the taking to be from the possession of the owner of the property.

2. That the State courts had jurisdiction of the offense.

CRIMINAL ACTION, tried at July Term, 1889, of CUMBERLAND, *Connor, J.,* presiding.

The defendant was indicted for the larceny of ten gallons of whiskey. The property was laid in one W. G. Johnson. It was in evidence that the whiskey was in the government warehouse on the premises of the said Johnson "and within the survey made by the government officer." It was also in evidence that the whiskey had been gauged but the tax had not been paid; that the key to the warehouse was in the possession of Col. W. H. Yarborough, the Collector of Internal Revenue, and that the prosecutor had no control over the said warehouse or right to enter it. It was also proved that the whiskey was the property of the prosecutor. (793)

There was testimony tending to show that the warehouse was broken open and the whiskey taken by the defendant.

The defendant asked the court to instruct the jury that "upon the testimony W. G. Johnson had not such property in or possession of the whiskey as would sustain the charge."

The court refused to so instruct the jury, and the defendant excepted.

There was a verdict of guilty, and the defendant appealed.

Attorney-General for the State.

John D. Shaw (by brief) for defendant.

SHEPHERD, J. We are entirely satisfied that the ownership was properly laid in Johnson, the prosecutor.

It is true that the United States government had the whiskey in its possession, and also a lien upon it until the taxes were paid (U. S. Rev. Stat., 3251), but the general ownership remained in the prosecutor, who had a right to take it away as soon as the lien was satisfied.

Herein lies the distinction between the parting with the right of possession for a definite time, and the parting with nothing but the possession to be resumed at the will of the owner. "In the latter case the owner does not for an instant part with the general right of possession; he confers a qualified right only, which he may put an end to when he will. In the former case he parts with the whole right of possession for the time; the bailee, the carrier, the *pawnee,* have never more than a partial right; the owner may resume the goods on satisfying their lien (794) when he will." 2 Russell Crimes, 289. The author then states that in the last mentioned cases the property may be laid in the owner. See also Wharton's Crim. Law, sec. 1824.

The next point relied upon by the defendant is that this is a federal offense and that the State courts have no jurisdiction. In support of this position he invokes the aid of sec. 3296, Rev. Stat. U. S., which makes it indictable to remove distilled spirits from a government warehouse before the lien for taxes is satisfied, or to conceal the same after such removal.

In disposing of this question it is only necessary to say that the federal statutory offense is quite distinct from the crime of larceny, although the latter includes some of the elements of the former. The principles declared in *S. v. White,* 101 N. C., 770, recently affirmed by the Supreme Court of the United States, are decisive of this point against the defendant.

Affirmed.

Cited: Bagg v. R. R., 109 N. C., 290.

THE STATE v. J. B. CONNELLY.

Embezzlement—Public Officers—Statute—Indictment—Malfeasance.

1. The word "officer," employed in sec. 1014 of the Code, defining and punishing embezzlement, is limited to those persons who occupy that relation to the corporations mentioned in the section, and do not extend to *public* officers, such as clerks of the Superior Court.

2. The Statute (Code, sec. 1016) creates the crime of embezzlement only where the money or property charged to have been embezzled is held in trust for any city, county, etc., and does not embrace the unlawful appropriation of the property of private individuals.

3. Where the clerk of a Superior Court was charged with the *embezzlement* of a sum of money paid to him by an administrator for one of the distributees of an estate. *Held*, that he could not be convicted upon an indictment for that crime of the offense created by section 1090 of the Code.

CRIMINAL ACTION, tried at August Term, 1889, of IREDELL. (795) *Merrimon, J.*, presiding.

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

The assignments of error and the facts necessary to an understanding of the questions decided are stated in the opinion. The indictment charges the defendant with the crime of embezzlement under the statute (Code, sec. 1014). It is charged therein that he was clerk of the Superior Court of the county of Iredell, and as such clerk and by virtue of his office on 18 January, 1887, received the sum of $888.52 from B. F. Sumrow, administrator of John Sumrow, deceased, the amount "being due to and the property of one Henry Sumrow," and received as such clerk by virtue of his office "in trust for and on account of the said Henry Sumrow as one of the distributees of the said estate," etc., etc.

The defendant, before pleading thereto, moved to quash the indictment "because the bill failed to charge that the money and property charged to have been embezzled was held in trust for any county." The court denied the motion, and the defendant excepted and pleaded not guilty.

Attorney-General for the State.

W. D. Turner, W. J. Montgomery, M. L. McCorkle and L. C. Caldwell for defendant.

MERRIMON, C. J. It was contended on the argument for the defendant that the indictment does not charge an offense under the statute (Code, sec. 1014), because, as was said, the latter does (796) not extend to and embrace within its meaning public officers, such as clerks of the Superior and other courts, sheriffs, constables and the like officers, nor is there any statutory provision on the subject of embezzlement that does.

Hence it becomes necessary to interpret the statute just cited in an important aspect of it. It prescribes that "if any officer, 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 secret, with intent to embezzle or fraudulently convert to his own use, any money, goods or other chattels, bank note, check or 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 any State, or any other valuable security whatsoever belonging to any person or corporation, which shall have come into his possession or under his care, he shall be guilty of felony and punished as in cases of larceny." It is to be observed that it is general and very comprehensive in its terms, scope, and purpose as to the classes of persons embraced by it, the purpose being to prevent fraudulent breaches of trust on the part of persons of the classes specified, charged by their relations of confidence and duties to others with such trusts, and to that end to punish offenders in such respects. This statute has not always, since its first enactment, been thus comprehensive as to the classes of persons or the subjects of embezzlement embraced by it. It has been amended repeatedly, and uniformly; its scope has been, in some respects enlarged. At first (Rev. Stat., ch. 34, sec. 19) it embraced only *servants,* and specified kinds of personal property. Afterwards it was amended (Rev. Code, ch. (797) 34, sec. 18) so as to embrace as subjects of embezzlements securities and choses in action. Again, afterwards, it was amended (Bat. Rev., ch. 32, sec. 136) so as to embrace officers, agents, clerks and others, as specified, as to property designated, which came into their possession and under their care by virtue of their office or employment. Afterwards it was again amended and enlarged in its provisions (Code, secs. 1014, 1018, 3678, 3705). It seems that the mischief to be remedied has continually increased as to the classes of offenders and the subjects of it. Hence such legislation, from time to time, enlarging the scope and purpose of the statute to suppress the mischief.

We are of opinion that the statute, thus enlarged in its scope, does not embrace clerks of the Superior Courts and like public officers. While its provisions are general and comprehensive within a prescribed limit, that limit is, it seems to us, clearly defined. The words "any officer," as employed in it in their orderly connection, are not used in an unlimited and independent sense, but they have a limited meaning and application. They are separated by a comma from the next succeeding word, which designates a second class of persons, and this word is likewise so separated from that which follows it, and so on, and thus they refer to and are connected with the word "corporation," as if the sentence in which they are found were "any officer of any corporation," etc. Indeed, in their proper relation and connection, this sentence expresses

their true meaning. The word "corporation" limits all the preceding words as to the classes of persons they each designate, just as the other words, "persons or partnership," next succeeding to it, limit the preceding words in their sense and application. So that the words "any officer," as used, imply any officer of any corporation, and not generally any public officers such as clerks of the Superior Courts and like officers. If the Legislature intended to embrace such public officers generally, it would, most likely, have done so in plain, direct terms, not (798) leaving its purpose to conjecture and inference. Statutory criminal offenses are not created simply by implication. The purpose to create them must appear, in terms or by necessary implication, clearly to be seen.

In interpreting the statute under consideration in another aspect of it, in *S. v. Costin,* 89 N. C., 511, we said: "The manifest purpose of the statute is to protect individuals and partnerships against frauds upon them, in respect to money, goods and chattels, and the several species of credit mentioned in it, on the part of their agents, clerks and servants; and corporations in like manner, against their officers, agents, clerks and servants; and other persons and corporations in like manner, when money, goods and chattels, and such other things, shall come into their possession, or under their care, by virtue of such office, or such other employment." This seems to us a reasonable view of its meaning and purpose, and we see no reason prompting us to modify it in any respect.

That we have properly interpreted the meaning and purpose of the Legislature in enacting the statute under consideration, is more apparent in that it repeatedly passed statutes (Code, secs. 1015, 1018, 3678, 3705), making certain specified classes of public officers indictable for embezzling moneys, and other things specified, wherewith they were charged by their offices. These enactments were wholly unnecessary, if the words "any officer," construed above, were intended to embrace all public officers.

It was suggested that, possibly, the indictment might be upheld as for a violation of the other statute (Code, sec. 1016). We cannot think so. It embraces "any officer, agent or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution," or any person having "moneys or property in trust for any city, county," etc. Granting that a clerk of the Superior Court is a county officer, as contemplated by this statutory provision, the (799) defendant is not charged with the embezzlement of any moneys or property held in trust for a county—he is charged with the embezzlement of money, the property of a private individual, and very clearly, neither by its terms nor by implication, does the statute embrace such a

case. Its purpose is to protect moneys and property of "any city, county or incorporated town, or of any penal, charitable, religious or educational institution"—not of private persons. It so expressly provides.

It was further suggested that the indictment was, possibly, sufficient as for a violation of the other statute (Code, sec. 1090). It is not framed for or adapted to that purpose. This statute makes it a misdemeanor on the part of a clerk, or certain other officers, to "willfully omit, neglect or refuse to discharge any of the duties of his office," etc. It is not charged that the defendant as clerk, etc., was charged with a particular duty, and that he willfully omitted, neglected or refused to discharge the same, etc., except indirectly, by implication and mere inference. This is obviously not sufficient.

Contrary to what we at first thought, the Legislature has not deemed it wise and necessary to make clerks of the courts, and all other public officers, subject to the statute prescribing and defining the offense of embezzlement. It seems to have been supposed that, generally, the official bonds of such officers, their amenability to public sentiment, and their liability to be indicted for nonfeasance, misfeasance, and malfeasance in office, would be sufficient check upon dishonesty in the discharge of official duties. This may be a serious mistake, but it is not the province of courts to devise further methods and means for suppressing such mischiefs. They must, and can only, apply the law as they find it prescribed by enactment of the Legislature. We are of opinion that the court (800) should have quashed the indictment, upon the ground that it failed to charge a criminal offense under any statute. There is, therefore,

Error.

Cited: *S. v. Windley,* 178 N. C., 671; 672.

THE STATE v. J. J. BOYLE.

Trial by Jury—Judge's Charge—Rape.

1. The duty imposed upon judges by the Act of 1796 (now section 413 of the Code), to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," is mandatory. The only cases in which it may possibly be dispensed with are those where the evidence is uncontradictory and the law plain.

2. This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law

applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arraign the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict.

3. Where, therefore, upon the trial of one indicted for rape there was much and conflicting evidence as to whether there was force employed by the prisoner, or that the connection with the prosecutrix—which was admitted by the prisoner—was with her consent, the court—after correctly laying down the general principles of the law and calling attention to the contradictory statements of prosecutrix and defendant—charged the jury that the only question was whether the carnal connection was had by force and against the will of the prosecutrix, and that all the other testimony was only competent as bearing on that question. *Held*, that there was error; the court should have directed the attention of the jury to, and instructed them upon, the effect, if believed, of the testimony in respects to the time, place and circumstances surrounding the alleged crime, the conduct of prosecutrix preceding and immediately following it, her condition as shown soon thereafter, and such other facts as tended to contradict or support her.

INDICTMENT for rape, tried before *Armfield, J.*, at September (801) Term, 1889, of WAKE.

The judge told the jury, in substance, after cautioning them (815) against any possible prejudice they might have against prisoner on account of his religious views,* and after stating the nature of the crime and the general principles of law applicable, "that the crime of rape was committed when a man had unlawful carnal connection with a woman, forcibly and against her will; that it was admitted by the prisoner that he had carnal connection with the prosecutrix, and that it was unlawful—that is, that he was not married to her—and that the only inquiry for them to make was, whether or not this carnal connection was had by force and against her will; that to constitute rape, the force used must be such as to entirely overpower the resistance of the woman; that she must resist to the last and the utmost of her power, unless she was prevented from resisting by fear; that fear might take the place of force, but in order to do so it must be such fear as paralyzed the will of the woman, and it must be a fear of present injury, to be inflicted then and there, and it must be fear of death, or great bodily harm; that the only direct and positive evidence of the manner in which the carnal connection was had, was the evidence of the prosecutrix and the prisoner; that the prosecutrix had testified that it took place by force, and also by fear induced by the threats of the prisoner, and that it was against her will; that prisoner had testified that there was no force used and no threats made;

*He was a Catholic priest.

that there was no fear, and it was with the consent of the prosecutrix; that all the other testimony in the case was only competent, and only used by them, as bearing on the question, whether this admitted carnal intercourse took place with the consent of the prosecutrix, or whether it was had by force, or such fear as he had before described, and against her will; that to make it rape, there must be no degree of consent
(816) or willingness to its perpetration, on the part of the prosecutrix; that it must be utterly and totally against her will; that if she was at first unwilling and resisted, but afterwards yielded to a show of force, and in the least degree consented before the perpetration of the act, it would not be rape; that they were the sole judges of the weight of the testimony, and of whom and what they would believe; that to enable them the better to judge of the credibility, of witnesses, they were produced and examined before them, that they might see their demeanor on the stand; that in weighing the testimony of the prisoner and the prosecutrix, it was proper for them to consider, also, the interest which they respectively had in the verdict; that the prisoner had the highest interest that a man could possibly have in any issue—his life—and that the prosecutrix had an interest as great as the prisoner, to-wit, to sustain her character for chastity. He then read to the jury full notes of all the testimony in the cause, and told them that he did this to refresh, and not control, their recollection of the testimony; that it was their duty to remember the testimony, and they ought to rely, in the last resort, on their own recollection."

He then told the jury, "If, from all the testimony in the cause, they were convinced beyond a reasonable doubt that the carnal intercourse, admitted to have taken place between the prosecutrix and the prisoner, was had by force, or such fear as he had described to them, and against the will of the prosecutrix, then they ought to find the prisoner guilty; if they were not so convinced, they ought to find him not guilty."

The prisoner's counsel stated, in their argument, that they would not ask his Honor, in writing, for any special instructions, but did ask his Honor to charge the jury that the credibility of the prosecutrix must be left to the jury upon circumstances of fact which attended this case; for instance, that if the witness be of good fame, if she presently dis-
(817) covered the offense, if the party accused fled for it—these, and the like, are concurring circumstances which give greater probability to her evidence; but, on the other side, if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act alleged to have been committed was where she might have been heard, and she made no outcry, these, and the like circumstances, are to be considered by the jury in determining her credibility.

His Honor did not give these instructions, not because they were not in writing, but because he considered them unnecessary and substantially embraced in the charge he gave.

The jury returned a verdict of guilty, and the prisoner moved for a new trial, and assigned as ground therefor the following:

1. For that his Honor did not, in charging the jury, eliminate the material facts of the case, array the state of facts on both sides, and apply the principles of law to them, so that the jury might decide the case according to the credibility of the witnesses and the weight of the evidence.

2. For error, because his Honor, in submitting to the jury the credibility of the prosecutrix's testimony, did not instruct the jury as to whether any particular value or any value at all, ought to be given to the fact that the prosecutrix either made or did not make outcry at the time of the alleged rape; whether she concealed or did not conceal the injury for any considerable time after she had opportunity to complain; whether the act was done in a place where other persons might have heard her cries if she made any; whether the place where the injury is said to have occurred was such as to render the perpetration of the offense there probable or improbable; whether the prisoner, after the alleged commission of the offense, had not means or opportunity of flight and did, (818) or did not flee. The court overruled the motion.

His Honor then pronounced judgment of death, from which the prisoner appealed.

Attorney-General and Mr. Thomas P. Devereux for the State.

T. C. Fuller, R. H. Battle, S. F. Mordecai and George H. Snow for defendant.

MERRIMON, C. J. In this State it has ever been the duty of the judge presiding in courts over jury trials to give the jury appropriate instructions as to the law applicable to the issues on trial; he is not allowed to "give an opinion whether a fact is fully or sufficiently proven—such matter being the true office and province of the jury," but he is expressly required by the statute (Code, sec. 413) to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." This statutory requirement, enacted first, substantially as it now appears, in 1796, has always since then been regarded as imposing on the judges to whom it applied a very important, necessary and, in many cases, difficult duty to discharge properly. The purpose of it is to have the law made intelligible to the jury—to have them on such trials instructed by the court clearly, explicitly and correctly as to the law bearing upon the evidence submitted to them as a whole, and upon every

material aspect of it, whether there be many or few such aspects, and likewise to have the court, while it carefully abstains from the slightest expression of any opinion as to the weight of the evidence, or that a fact is or is not fully or sufficiently proven, help the jury by a "plain and correct statement of the evidence to apprehend, comprehend, ap-
(819) preciate, apply and determine" the weight of it properly. Such statement of the evidence should embrace an explanation of its nature, purpose, bearings and groupings and freeing it from possible misapprehension occasioned by inadvertence, mistake or the undue zeal of counsel in their arguments to the jury, or otherwise.

The office of the judge in such connection is to help the jury to see the evidence bearing on the issue and the law arising thereon clearly, stripped of redundant, improper and merely confusing matters and things, whether of evidence, argument of counsel, or law.

Jurors are generally plain, honest, sensible men, unskilled in the law and not much accustomed to nice discriminations and distinctions in matters of evidence and fact. They need and require the superintendence, guidance and help of a learned and just judge in reaching correct conclusions. Indeed, experience has shown that without them jurors seldom render intelligent and satisfactory verdicts. Hence the duty of the court on jury trials—particularly where there is much evidence, more or less conflicting, presenting several aspects of it, and it is peculiar or unusual in its nature, purpose and application—is matter of serious moment and not to be neglected or ignored. This is especially so in cases involving human life. There can be no intelligent or satisfactory trial by jury in cases of importance without a faithful discharge of such duty on the part of the court; and when it appears that the party complaining many have been prejudiced by a neglect of it, in whole or in part, this will be ground for a new trial.

An erroneous impression seems to prevail to some extent, that it is discretionary with the court whether it will or will not in any case state the evidence to the jury and "explain the law arising thereon."

This Court seems to say so, to some extent, in *S. v. Morris,* 10 N. C.,
388, and, perhaps, there are like intimations in other cases. But
(820) such cases, properly interpreted, apply only to plain cases that do not require such statement of the evidence and explanation of the law. Otherwise, they are not in harmony with a multitude of other decisions of this Court to the contrary, nor are they consistent with the plain words of the statute cited above. In *S. v. Moses,* 13 N. C., 452, the court, after saying that the statute "restrains the judge from giving an opinion whether a fact is fully or sufficiently proven," adds: "At the same time it imposes another duty, which is to state, in a full and explicit manner, the facts given in evidence, and declare and explain the

law arising thereon. . . . . The act must be so construed as to leave the two duties compatible with each other; for neither clause must overrule the other. The full and explicit statement of the facts required from the judge cannot mean a mere repetition from his notes of the testimony, in the order in which it was delivered; that would be a vain and empty ceremony, consuming time without conveying instruction. If the judge is to say anything, and not be a mere automaton, his statement must be such as to exhibit to the jury the nature of the plaintiff's cause of action, and of the defense in point of law, the matters of fact in issue on the record, and, also, those in dispute between the parties, upon the testimony actually given, tending to maintain, on either side, the main fact controverted in the issue. To do this, with the least prospect of affording aid to the jury, the judge is obliged to present the evidence in such a light as will divest it of all those immaterial parts that necessarily, more or less, encumber every trial, and collate the residue so as to bring it to bear, with the strength of combination, on the points in controversy. He is so to present each fact that it may have its fullest legitimate operation on the conclusion sought for. And if, on each side, the evidence is thus exhibited, it cannot but ease the labors of the jury, lead them, through the convictions of their understandings, (821) to a just determination, and give certainty and dignity to the course of justice."

In *Bailey v. Pool,* 35 N. C., 404, the court said: "We do not consider a judge, under the act of 1794, in delivering his charge on the facts of a case, to be a mere machine to detail to the jury the evidence just as it occurred, and in the order it occurred; but it is his duty when he does charge upon it, to collate it and bring it together in one view, on each side, with such remarks and illustrations as may properly direct their attention."

In *S. v. Dunlop,* 65 N. C., 288, the court again said: "We concur with the counsel for the prisoner in his view of the charge of the judge; we think it did not give that distinct and plain response to the questions raised which the statute requires. On this point, the statute is only declaratory of the common law. It is impossible to frame any general formula which can supersede the distinct application of the law to the particular alleged state of facts, or dispense, on the part of the judge, with the active exercise of his intelligence. This duty is the *special* duty of the judge; for this, mainly, is he required to possess ability and learning; and to evade or slight it, is to renounce the most difficult, but also the most useful and honorable duty of his office. All lawyers know that to eliminate facts, to put those which are material in their proper order, and to apply the law to them as a whole, taxes, many times, the strongest intellect, and always requires an amount of learning and practiced

ability, which a jury is not supposed to possess, and which it is evident they cannot acquire through the bearing of any general dissertation on the law, however clearly it may be expressed. For these reasons, we think the prisoner entitled to a new trial."

In *S. v. Matthews,* 78 N. C., 523, it is also said: "it will be (822) seen from the manner in which we have reviewed the instructions of the able and learned judge who presided at the trial, that, in our opinion, a judge who presides at a trial in which human life is at stake, does not fully perform the duties which his office imposes on him by stating to the jury, however correctly, principles of law which bear, more or less directly, but not with absolute directness, upon the issue made by the evidence in the case. To do that only is easy and almost mechanical. We think he is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising in the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which, upon the evidence, they may reasonably find to be the true one. To do otherwise, is to fail to *"declare and explain the law arising on the evidence."*

In *S. v. Jones,* 87 N. C., 547, the court declines to "inquire whether there is any error in the principal of law laid down," and grant a new trial simply on the ground that the court had not stated the evidence and explained the law arising thereon. The court say, that "in his Honor's main charge to the jury there is no pretense of an array of the facts, and therefore no application of the proposition of the law laid down to the different state of facts." Numerous cases, and particularly *S. v. Rogers,* 93 N. C., 523, and *Holly v. Holly,* 94 N. C., 96, are directly and strongly to the same effect. Also, *S. v. Rippy, ante,* 752.

We thus cite and quote largely from several cases to show that it is the indispensable duty of the judges to observe, carefully, the statute cited, and that it is, as well, very important that they shall do so, and that a failure in such respect is ground for a new trial, when it appears that a complaining party may have suffered prejudice by such failure. This is too well settled in this State to be questioned, and we may add that such observance of duty is essential to just trial by jury, (823) in most cases. To discharge successfully such duty on the part of the presiding judge, in many cases, requires the exercise of a high order of ability, much accurate knowledge of the law and its application, of the rules of evidence, of the nature and purpose of the evidence, and its bearing and application upon the trial of the issues. In the discharge of scarcely any of his high duties is he called upon to display greater talent and judicial skill than his instructions to juries upon the law and evidence. Such duty is the more difficult because he cannot be governed in respect to it by any definite plan or formula. He must

be governed by the nature, circumstances and evidence of each case before him. This Court has repeatedly, in the cases cited, and others not cited, pointed out, as definitely as practicable, the nature and compass of the duty and how it should be discharged. Discussing it, in *S. v. Moses*, *supra, Chief Justice Ruffin* said: "If I were to lay down a rule growing out of this act of assembly, I would say that it was, in general, this: that the *weight* of the evidence is for the jury; they hold the scales for that; but the nature, *relevancy* and *tendency* of the evidence it is competent for the judge, and his duty, to explain. He is not only to recapitulate the testimony, but to show what it tends to prove, and he may recapitulate it in such order and connection as to give it the effect of proving the facts sought for, if, in itself, it be sufficient for that purpose. Whether it be sufficient is the province of the jury to determine, and, by this statute, it is their exclusive province, and the judge cannot give his opinion, in aid of theirs, that it is not sufficient. But, if he is to speak at all (and this act makes it his duty to speak), it is not to be supposed that his interposition is for the sake of increasing the doubts of the jury or leaving them as they were. But this discussion of the case—fair, grave, sensible and important—may enable the jury better to decide upon the sufficiency of the proof, though deprived of the advantage of his opinion on that point." (824)

There can, therefore, be no doubt as to the imperative duty of the court in the respect mentioned on jury trials, its nature and purpose, and the manner of its proper discharge.

Now, turning to the case before us, without scrutinizing the statement of the law of rape made by him, we feel constrained to say that, in our judgment, the learned judge who presided at the trial failed to sufficiently "state, in a plain and correct manner, the evidence given in the case, and explain the law arising thereon." This appears from the instructions given and the assignment of error in respect thereto.

The prisoner's counsel, in apt time, requested the court to direct the attention of the jury to specific parts of the evidence tending to discredit the evidence of the prosecutrix and instruct them as to its nature, bearing and application. The court declined to do so "because he considered them unnecessary and substantially embraced in the charge he gave." The prisoner excepted, and afterwards assigned as error that the court "did not, in charging the jury, eliminate the material facts of the case, array the state of facts on both sides and apply the principles of law to them, so that the jury might decide the case according to the credibility of the witnesses and the weight of the evidence." Thus the exception is broad and comprehensive.

Numerous witnesses were examined, both for the State and the prisoner. The evidence was voluminous, and in very material respects, di-

rectly and strongly in conflict. This was particularly so as to the evidence of the prosecutrix and the prisoner. There was evidence tending to corroborate that of the former and other evidence that of the latter, and likewise other evidence tending to discredit that of both the prosecutrix and the prisoner. Much of the evidence was peculiar to the crime of rape and required explanation as to its nature and application. A clear and lucid statement of the evidence, both for the prosecution and for the defense, and an explanation of its bearings and the law applica-
(825) ble in that connection, was necessary to enable the jury to settle and find material disputed facts of the evidence to be applied in reaching a just conclusion as to the issue submitted. Hence, the jury especially needed the important aid of the able judge who presided at the trial—not to tell or intimate to them that a fact was or was not proven, nor to express an opinion as to the weight of the evidence, but to superintend and direct their inquiries by appropriate statement of the evidence, explanations and instructions. Having stated the law of rape applicable and explained the issue submitted, he should have stated in an orderly manner the contentions and evidence of the prosecution—the principal evidence—all the material parts of it—and the corroborating evidence of whatever kind, and the law arising upon the same. The bearings of one part of the evidence upon another—its relations and purposes—should have been pointed out. The jury could not—did not—do this satisfactorily—no one but the learned judge could have done it, and the law charged him to do it. That done, the jury would have seen clearly, as the law contemplated they should do—the whole force and strength of the case for the State.

Then the court should, in like manner, have stated the contentions and evidence of, and favorable to, the prisoner—the principal evidence—and all the corroborating evidence of whatever kind, and the law arising thereon. In this connection, the court, as requested to do, should, for proper purposes, have called the attention of the jury to the evidence as to the time, the public location of the house, and the chamber in the house where the alleged rape was committed; the presence of persons in and about and near the house who could have heard, but did not hear, any outcry of the prosecutrix; that after the alleged rape she washed her face and arranged her hair in the prisoner's chamber, and at once joined her companions in the yard of the house and went a con-
(826) siderable distance with them, stopping on the way, without telling them that, she had been outraged. The court should have explained the nature and purpose of this evidence, and told them that if it were true, the law made such facts and circumstances evidence—strong evidence—to the discredit of the prosecutrix; its weight, in view of all the other evidence, to be determined by them. Of course it should,

likewise, in the proper connection, have stated the evidence intended to be explanatory and countervailing of the prosecutrix in such respects, and explained its bearings.

It appears that in the course of its charge—near its close—the court read to the jury full notes of all the testimony in the cause, and told them that he did this to refresh, and not control, their recollections of the testimony; that it was their duty to remember the testimony, and they ought to rely in the last resort on their own recollections. It has been repeatedly decided that this is not a compliance with the statute, nor does it serve the important and necessary purpose intended by it. Nor did the very general remark of the court that the evidence, other than that of the prosecutrix and the prisoner, was only "used by them as bearing on the question, whether this admitted carnal intercourse took place with the consent of the prosecutrix, or whether it was had by force, or such fear as he had before described, and against her will." The jury were substantially left to digest, classify and apply the voluminous, conflicting, evidence, much of it peculiar in its nature and force, without the valuable, necessary, superintending and directing aid of the court in stating it in an orderly manner, pointing out its nature, purpose, bearing and application. There could scarcely be a case in which such aid would be more important.

We know, from our knowledge of trial by jury, our experience and observation, that in such cases as the present one, without (827) the aid of the court, as we have indicated, the verdict of the jury, however honest their purpose, is too often the result of a lack of intelligent comprehension and application of the evidence, because of their want of knowledge of the law and experience in the application of evidence. Trial by jury is worthy of all commendation as a method for the ascertainment of truth, but to make it efficient, and what the law contemplates it shall be, requires the superintending and directing aid of the court.

We do not deem it necessary to advert to numerous other exceptions, most of which are without merit. One or two of them raise interesting questions that will hardly arise again.

There is error. The prisoner is entitled to a New Trial.

AVERY, J., concurring: Without filing a formal dissent to the opinion of the court, I prefer to rest my concurrence in the conclusion reached upon different grounds.

Dr. Hines, an acknowledged expert in all matters pertaining to surgery and medicine, was offered as a witness for the State. After he had described in his examination-in-chief, the laceration he discovered in making a private examination of the prosecutrix, and expressed the opin-

ion that her condition was caused by recent carnal connection with a man, he stated, in reply to a question on cross-examination, in reference to the nature of the apparent injuries to her person, that she presented just the appearance he would expect to find in a bride on the second or third morning after marriage, and that he heard no complaint of any bruises elsewhere on her body. On re-direct examination the prosecuting attorney asked the witness the hypothetical question, "Suppose the jury should find as a fact that there was a bruise on her right
(828) shoulder behind, finger-prints on both arms above the elbow, a bruise and blister on both elbows, a bruise on the small of her back and a red knot on the left side of her chest, would you expect to find these, together with the condition of the private parts, as testified to by you, in a young woman on the second or third day after marriage?" The witness was permitted by the court, the prisoner objecting, to answer that he would not. The prisoner excepted. Another witness had testified that she found just such bruises as counsel mentioned on the person of the prosecutrix. This Court has held that the opinion of a well-instructed and experienced medical man upon a matter within the scope of his profession, and based upon personal observation and knowledge, should possess a higher value in determining the mental as well as the physical condition of one attended by him, than that of an unprofessional man, and should be considered carefully and weighed by a jury in rendering their verdict. *Flynt v. Bodenhamer,* 80 N. C., 205; *S. v. Slagle,* 83 N. C., 630. If, therefore, the testimony was not competent, its admission was an error that tended to prejudice the rights and imperil the safety of the prisoner in a degree proportionate to the respect that the jury entertained for the opinion of a learned physician, as we must assume that they acted upon the idea that his skill and training fitted him in a peculiar manner for judging from such external bruises as were described by other witnesses, whether the admitted carnal connection between the prisoner and the prosecutrix was against her will or with her consent. Upon the decision of that question their verdict and his life depended. The courts of this country have laid down very clearly the tests for fixing the limit to the peculiar domain of expert witnesses; yet, in applying the principles to particular cases, it has often been found difficult to distinguish between expert and ordinary testi-
mony, especially to determine upon what subjects, and to what
(829) extent, educated and experienced surgeons should be allowed to give an opinion as witnesses. When the subject matter of inquiry partakes of the nature of science, art or trade, persons possessing peculiar knowledge, skill or experience derived from previous practice, study or training, are allowed to give an opinion, if such opinion calculated to assist inexperienced persons in arriving at a proper solution

of the question. When, however, the injury is of such a nature that a person of sound judgment might be reasonably expected to arrive at a conclusion as correct and just without as with the advantage of such special study or experience, then the opinion of the expert is not admissible, because it gives no new light to the jury, who are presumed to be capable of bringing to their aid a fair share of intelligence, common sense and reason in drawing inferences from the facts and thereby reaching a verdict. Rogers on Expert Test., sec. 6 and 7; Lawson on Ex. and Op. Ev., Rule 28.

An apt illustration and application of the rule we have stated, is found in *Cook v. S.*, 24 N. J. Law., 843, where it was held that a physician was not competent to testify that a rape could not have been committed in a particular manner, that had been described by the prosecutrix. The court say: "No peculiar knowledge of the human system was necessary to answer it. It was a mere question of relative strength or mechanical possibility, which an athlete or mechanic could have answered as well as a physician, and every man upon the jury as well as either." So it has been held that what is the proximate cause of the injury is not a question of science or legal knowledge, but is a fact to be determined by a jury from surrounding circumstances. *R. R. v. Kellogg,* 94 U. S., 469.

The inquiry, then, which involves the test of the correctness of his Honor's ruling, upon the admissibility of the testimony of Dr. Hines is, whether his knowledge of surgery, or experience in the practice of his profession, was such as to enable him to give a more satisfactory opinion than an intelligent and observant juror, as to the (830) question whether the bruises upon the arms and back of the prosecutrix (which had not been examined by him, but which had been described by witnesses in his hearing) could have been caused by the voluntary coition of the prosecutrix, a girl of seventeen years, with the prisoner, on the floor of his own chamber, or whether these remarks were unmistakable evidence of violence used by the prisoner to overcome resistance on her part. However the fact may be, we can see no reason why the physician should be able, from his training, to judge more accurately than any other intelligent man, whether the injuries to her person were not such as a bride might have suffered from the difficulties incident to her first act of carnal connection with her husband at the same place. Yet, it is manifest that the jury may have been misled by considering the answer of the physician to the question objected to, as an expression of his opinion, founded upon his observation and experience, that the marks upon the body of the prosecutrix must have been made in a violent struggle to protect her virtue.

In *S. v. Slagle, supra,* the physician, an expert, was permitted to give the opinion that a certain bottle contained poisonous drugs, though he had not analyzed its contents, because he had testified that he could tell the ingredients from the smell, taste and appearance. At most, in doubtful cases of this kind, the testimony should be received by the courts, as in *S. v. Clark,* 34 N. C., 151, only "when assured by the physician that the principles of their science, applicable to a particular subject of inquiry established certain results, or *"when they swear,* they can draw the proposed distinction by reason of their peculiar professional skill and training."

In *S. v. Sheets,* 89 N. C., 543, *Justice Ashe,* for the Court, says: "When the professors of science, as physicians, for instance,
(831) swear that they are able to pronounce an opinion in any particular, though they say that precisely such a case had not fallen under their observation or under their notice, in the course of the reading, it is competent to give in evidence their opinion." To the same effect is *Horton v. Green,* 64 N. C., 64.

It would have been easy to apply the test by which this Court determined the competency of expert evidence in the four cases cited, by asking the witness (Dr. Hines) if, from his observation in his practice and his reading, he thought he could tell whether the bruises described were such as could be caused by violence on the part of the prisoner or whether they might have been naturally incident to a voluntary connection with a young woman. It may be that he would have answered that his opinion upon such a subject was worth no more than that of a member of the jury, and in that event we have no idea that counsel would have insisted upon propounding the question objected to. Where the judge, being unlearned in any art or science like medicine, is in doubt whether a knowledge of such science is calculated to give one peculiar advantages in solving a question before a jury, he can be relieved of embarrassment by asking an acknowledged expert whether his professional training is such as to enable him to give a more satisfactory opinion on the subject of inquiry than an inexperienced man. This method of cutting the gordian knot in all doubtful cases of this kind has been sanctioned by this Court, and commends itself as reasonable and just.

While the jury was being selected G. H. Womble, one of the special venire, was passed by the State to the prisoner, who challenged him for cause, and after being sworn was asked by prisoner's counsel the following questions:

"Have you formed and expressed the opinion that the prisoner at the bar is guilty?" To which the juror answered "No."

(832) He was then asked by prisoner's counsel, "Have you a pres-

ent opinion that the prisoner is guilty?" To this question the State objected. Objection sustained. Exception by the prisoner.

The juror was further asked, "Have you a prejudice against Roman Catholics?" To which the juror replied "No."

These three questions were the only ones put to the juror to try his indifferency, and the answer of "No" to the first and third questions was the only evidence before the court as to his indifferency.

Another juror named Penney was asked the same questions and the same answers were elicited, and a similar ruling and exception entered for refusal to allow the second question. Both Womble and Penney were peremptorily challenged, and the prisoner exhausted his peremptory challenges before the last juror was selected.

In entering upon the discussion of this exception I premise that it is settled law:

1. That the prisoner had a right to ask the juror whether he had formed and expressed the opinion that the prisoner was guilty, and if the juror answered in the affirmative, nothing more appearing, it was good ground of challenge; but if on cross-examination he had stated that his opinion was founded on rumor only, and that upon hearing the evidence and the law applicable to it he could still render a fair and impartial verdict, the prisoner would have had no ground of challenge. *S. v. Benton,* 19 N. C., 196; *S. v. Collins,* 70 N. C., 241; *S. v. Bone,* 52 N. C., 121; Wharton Cr. L., 3069.

2. That a juror who had formed such a fixed opinion that the prisoner was guilty that it could not be so far removed, upon hearing the testimony from the witnesses and the law from the court as to enable him to render a fair verdict, was absolutely disqualified to act, and no explanation would render him eligible if the prisoner objected to him. Thompson & Merriam on Juries, secs. 207 (2), 215; *O'Mara v. Com.,* 75 Pa. St., 424; Wharton Cr. L., secs. 3068, 3073; *S. v. Kingsbury,* 58 Me., 239; Wharton Cr. L., 30, 96; *S. v. Wilson,* 38 Conn., 126.

(833)

3. It is equally well settled that if a juror gives expression to an opinion of the prisoner's guilt, formed from hearing a preliminary trial, from conversation with the prosecutor, or with witnesses who state the facts as such, the prisoner has the unqualified right to object to him. Thompson & Merriam on Juries, sec. 213, and authorities cited. We may add that when a juror has formed an opinion, and it is formed on information derived from the prosecutor, the witnesses for the State, from the testimony heard at a preliminary investigation, though he may not have expressed it, or though he may think that he would not adhere to it if the whole of the evidence on the trial should present other phases of the case, still he would not be

an impartial juror, and the prisoner should not be compelled to accept him. *Reynolds v. United States,* 98 U. S., 145; *Com. v. Webster,* 5 Cushing, 295; Thompson & Merriam on Juries, sec. 207 (2); *O'Mara v. Com.,* 75 Pa. St., 424; *Armistead v. Com.,* 11 Leigh, 657.

Where a juror was a member of the grand jury that found the bill of indictment, or a member of a jury who have already heard the case on a former trial, he is considered absolutely disqualified if objected to by the prisoner. And where it appears, from an examination of the proposed juror, that he sustained any such relation to the parties or cause as would naturally lead him to prejudge the issue unfavorably to the prisoner, it should constitute a ground of principal challenge. "The proposition that a challenge *propter affectum* involves matter of fact alone is not correct. The point was very much considered in *Benton's case,* and it was there found that the judge (834) was bound to instruct the triers as he would a jury upon matter of law whereby, supposing the facts to be ascertained, the juror offered, *though not standing in such a relation to the parties as to constitute a principal challenge, is yet held in law not to stand indifferent, because with some other connection with some person interested in the suit or question. And it was held upon these authorities that if the court erred in such instruction to the triers* the *decision* was the subject of review here." *Schorn v. Williams,* 51 N. C., 577. If this Court can review errors of the judge below in passing upon the different facts or combination of facts that prove bias as or prejudgment on the part of a juror, it is obviously improper to restrict counsel in eliciting the facts by his examination of the party challenged, so that he cannot present his objections intelligently.

Applying this principle to our case, suppose that the purpose of the counsel was to show not only that the juror had formed an opinion, but that he had formed it from conversation with the prosecutor or the witnesses, in reference to the evidence, or from hearing the investigation of the case before a judge or justice of the peace, how could he develop the facts so as to make good his cause for principal challenge on one of these grounds, unless permitted first to ask the juror whether he has in fact formed such an opinion at all? Of course, where he had refrained from expressing it, his opinion could be ascertained only by asking such question of him on his *voir dire,* and as it constituted an essential foundation for finding out whether the juror was subject to principal challenge on one of the grounds mentioned, the question was clearly competent and should have been allowed. And the authorities very generally sustain the view that it is competent, and the mere formation of the opinion disqualifies the juror, because it is necessary to know whether any definite

opinion has been formed preliminary to asking and ascertain- (835) ing other facts that constitute good ground either for a principal challenge or one to the favor. Thompson & Merriam on Juries, sec. 208; *The People v. Christie,* 2 Abbott Pr., 256; Wharton Cr. L., sec. 3108; 1 Burr, 367; *People v. Hettick,* 1 Wheeler Cr. C., 399; *Com. v. Webster,* 5 Cushing, 298; *Trent v. Williams,* 39 Ind., 18; *Com. v. Knapp,* 9 Pickering, 496; *Romaine v. S.,* 7 Ind., 63. If the question asked was necessarily incident to determining the prisoner's right to a principal challenge on any ground, it would be useless to discuss the point, to which we shall advert presently, whether the prisoner is required to give notice to the court when he proposes to challenge to the favor. On the other hand, if it was proposed to find out whether the juror had formed the opinion that the prisoner was guilty preliminary to other questions to the favor, it would seem to be as effectual a denial of the right to examine into the qualification of the latter as the ruling in *S. v Fuller,* 66 N. C., 632, that a defendant indicted for a misdemeanor had no right to challenge for cause. To the suggestion that the prisoner did not state that the challenge was to the favor we reply that this Court sustained the opposite view in *S. v. McAfee,* 64 N. C., 339, by sustaining the right to ask the juror the question whether the juror "believed he could do equal and impartial justice between the state and a colored man," in order "to test his qualification." That ruling is sustained in *People v. Christie,* 2 Parker, 579, where the Court says "the prosecutor *at the trial* did not object that the challenge assigned against the juror should have been, not for principal cause, but to the favor, and therefore he cannot take such position here." See also *People v. Rogers,* 5 Cal., 347.

Wharton Criminal Law, sec. 3125, says: "Challenges to the polls for favor take place when, though the juror is not so evidently partial as to amount to a principal challenge, there are reasonable grounds to suspect that he will act under some undue influence or prejudice. The distinction, however, between challenges for (836) favor and those for principal cause is so fine that it is practically disregarded. Consequently what has already been said under the head of challenges for principal cause is to be examined and connected with challenges for favor. When the shadowy line that divides the two kinds of challenges cannot be marked out by Wharton with sufficient distinctness to treat the two separately, it would seem scarcely reasonable to make a prisoner's life depend upon the ability of counsel to give formal notice when he is on the eve of crossing it in the course of his examination of a juror. One of the reasons for losing sight of the difference between the two kinds of objections in later years, in

this and some other States, is found in the fact that the judge is substituted in the practice for the triers, and the prisoner is not required to sound the alarm by requesting the appointment of triers whenever he submits a challenge to the favor, as he was required under the old mode of proceeding to do. Wharton Cr. L., sec. 3063. This change of practice will doubtless, too, account for some confusion in the authorities. But we cannot afford to step backwards and adopt rules predicated upon reasons no longer operative.

SHEPHERD, J., concurring: I concur with *Mr. Justice Avery* that there should be a new trial for the additional reason that the court erred in excluding the question which the prisoner proposed to ask the juror.

Cited: *S. v. Pritchett,* 106 N. C., 675; *S. v. Brady,* 107 N. C., 830; *Boon v. Murphy,* 108 N. C., 193; *Blackwell v. R. R.,* 111 N. C., 159; *Sherrill v. Tel. Co.,* 117 N. C., 362; *Blue v. R. R., ib.,* 649; *S. v. Goode,* 132 N. C., 988.

Modified: *McCracken v. Smathers,* 119 N. C., 620.

Overruled: *S. v. Beard,* 124 N. C., 813; *S. v. Edwards,* 126 N. C., 1054; *S. v. Kinsauls, ib.,* 1096; *Turrentine v. Wellington,* 136 N. C., 312; *Simmons v. Davenport,* 140 N. C., 411.

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(837)

THE STATE v. JOHN MORRIS.

Verdict, Special—Indictment—Presentment—Statute of Limitations—Grand Jury.

1. A formal verdict, in accordance with the opinion of the court, must be entered upon a special verdict before judgment can be pronounced.
2. A presentment is an accusation made by the grand jury, *ex mero motu,* and without any bill of indictment laid before them, founded either upon facts within their knowledge, or that of one of their number, or upon credible information given them.
3. Where a bill for a misdemeanor was sent to a grand jury, which began an investigation, but "continued" the case for want of material witnesses, returning the bill with that endorsement into court with their presentments, where it was entered of record, and at a subsequent term of the court, but more than two years after the commission of the offense, the bill was sent to another grand jury, which found it true. *Held,* not to be a presentment, and that the prosecution was barred.

INDICTMENT for killing a hog in an enclosure not surrounded by a lawful fence, tried at the Fall Term, 1889, of MONTGOMERY, before *Merrimon, J.*

The jury returned the following special verdict, viz: "That in the month of January, two years prior to January, 1889, the defendant shot and killed the hog of W. S. Crawford in a territory where the stock law does not prevail, and that it was shot near the residence of defendant's father, whose farm was within an enclosure including several farms, and amongst others, the farm and land of W. S. Crawford; that the land of the said Crawford and Morris (both within this neighborhood fence, but not a stock law fence) were separated by a small creek over which stock could easily pass; that this bill of indictment was drawn by the solicitor at the Fall Term, 1888, of Montgomery, and sent before the grand jury at that term, and that a subpœna issued for the de- (838) fendant, marked on the back of it to the said term, but the grand jury did not call before them and examine at the said term but two of the four witnesses, to wit, W. S. Crawford and George Henderson, for the reason that the other two witnesses were not subpœnaed to said Fall Term, 1888. The grand jury thereupon, through its foreman, made this endorsement upon the bill: 'Continued. Witnesses marked X sworn and examined; Lee Crawford (meaning Morris) and John Crawford not summoned; continued for the want of evidence. A. E. Ewing, foreman grand jury.'

"At the time the witness W. S. Crawford was examined before the grand jury, he being the prosecutor, he was informed by the grand jury that the bill could not be acted on till Lee Morris could appear.

"The bill thus continued by the grand jury was returned by them to the said court at the Fall Term, 1888, of said court, and continued as above stated, and the same was docketed along with the presentments of the grand jury made at said term, but the grand jury made no presentment of the case, and the witnesses subpœnaed by the clerk to the Spring Term, 1889, of this court, when the bill was again sent before the grand jury and found a true bill at said Spring Term, 1889.

"If upon these facts the court be of the opinion that the defendant is guilty, the jury so find; otherwise, not guilty."

Upon these facts his Honor was of the opinion that the action was not begun within two years of the commission of the offense, and it was, therefore, considered and adjudged by the courts that the indictment was barred by the statute of limitations, and that the defendant was not guilty.

From this judgment of the court the solicitor for the State appealed. (839)

Attorney-General for the State.
No counsel for defendant.

AVERY, J., after stating the facts: The court "must say upon the facts found (as a special verdict) that in law they constitute or do not constitute the offense charged, and *thereupon the verdict of the jury is entered in accordance with the opinion of the court.*" *S. v. Bray,* 89 N. C., 480; *S. v. Stewart,* 91 N. C., 566. So the law is written. The rule laid down by the Court has not been followed, and there must be a new trial.

But the defendant also relied upon the statute of limitations as a bar to the prosecution, and if that question is not discussed now the probable result of omitting to do so will be to bring the case up again on the same point. A presentment is an accusation made, *ex mero motu,* by a grand jury of an offense upon their own observation and knowledge, or upon evidence before them, and *without any bill of indictment laid before them,* at the suit of the government. The presentment is founded either upon facts of which the grand jury or some member of that body actually had knowledge, or upon specific information given in good faith and deemed by them to be credible. *S. v. Wilcox, post,* 847; Bouvier Law Dic., 4 Bl. Com., 301. "An indictment is a written accusation of an offense, preferred and presented upon oath as true by a grand jury at the suit of the government." The paper was brought into court in the regular way by the foreman of the grand jury, presented to the court and recorded on the minutes with the presentments, and if, under the accepted definitions, we could hold it sufficient in form to constitute a presentment the prosecution would not be barred. But it is a paper drawn in the form of an indictment and originating, not with the grand jury,
(840) but prepared and signed by the solicitor. This Court has held that the sending of another indictment at a term held before the prosecution was barred for the same offense, does not prevent the bar of the statute as to one sent subsequently and after the lapse of the period prescribed by statute as the limit. *S. v. Tomlinson,* 25 N. C., 32. We concur with his Honor in his holding that the prosecution was barred by the statute; but for the other defect there must be a new trial. We suppose, however, that upon the state of facts found in the verdict the solicitor, in view of the ruling of this Court, will enter a *nolle prosequi.*

Error.

Cited: *S. v. Moore,* 107 N. C., 771; *S. v. Frisbee,* 142 N. C., 676.

THE STATE v. MANLEY PANKEY.

Homicide—Malice—Judge's Charge—Trial.

1. Where the accused had formed a particular and definite purpose to kill, and, in pursuance of that purpose, armed himself, sought the deceased and killed him. *Held*, to be murder, no matter what provocation was given or how high the assailant's passions were aroused during the fight.

2. An omission to require a prisoner charged with a capital felony, who is at the bar of the court when the jury returns the verdict, to stand up and look upon the jury, will not affect the verdict or judgment thereon.

INDICTMENT for murder,, tried before *Merrimon, J.*, at Fall Term, 1889, of MONTGOMERY.

The evidence tended to show that the prisoner and deceased were at one Joe Jackson's at dinner, and got into an altercation (841) on account of something the deceased said about Austin Green; that the prisoner went out and sat upon a fence, and deceased took out his knife, opened it and went out and sat upon the fence near-by and commenced whittling; that deceased said to prisoner "he ought not to be making fun of Austin Green as he was away from home, among strangers and in a strange place," and deceased said to prisoner, "You had better take his place"; prisoner replied that he would or could, and deceased told him he had better, "damned quick"; then prisoner told deceased he would take Green's place; that Austin Green started out and said he was going home, and went some forty yards, when prisoner called him back and went to him, and called Joe Jackson to where he was; that they held a conversation, in which the prisoner said, "I am going off and get me a gun and I am going to shoot this damned negro's heart out"; that prisoner went off, a mile and a half or two miles, procured a double barrel shotgun, came back and inquired where deceased was, and said he was going to kill him, and on being informed where he had gone went in that direction some distance, stopped and waited some time (not definitely stated how long), when he saw deceased approaching; that when deceased was within about fifteen yards of him he said, "Oh, yes, God damn you, I am going to shoot your dern heart-strings loose"; that deceased came right on, but said nothing till he got within five steps of prisoner, the prisoner stepped from five to eight steps from the path he and deceased were in; deceased raised his arms, having nothing in his hands, and told prisoner to shoot, and prisoner shot and hit deceased in the right side of the neck, and he fell down and died instantly. It was admitted by the prisoner that he killed the deceased with a gun by shooting him.

The prisoner testified that he did not say that he was going to get a gun to kill the deceased; that he did not say he would kill (842)

him; that he borrowed the gun to shoot a squirrel, and had no intention of shooting deceased; that he did not go to meet him for the purpose of shooting him, but was on his way to Mr. Pool's, for whom he had been working, to settle with him; that he met deceased unexpectedly; that deceased had his knife out and opened and up his sleeve; that he, prisoner, got out of the path to avoid him; that some one exclaimed, "Look at his knife"; that he told deceased not to come to him or he would shoot him; that deceased came right on and said to shoot, and he did shoot, and for no other reason than to protect himself; that his aim was to shoot him in his legs, but in his excitement, produced by the assault upon him, he shot sooner than he intended. There was other evidence tending to show that the deceased, at the house of Joe Jackson, had said he would split the prisoner's head open; that this was after the quarrel about Austin Green.

The prisoner and deceased were both negroes, under twenty-one years of age, and had been friends up to the time of the quarrel mentioned in the evidence. They had been working together up to that time.

The court called the attention of the jury to the evidence tending to prove that the prisoner had formed a purpose to kill the deceased, and that he killed him in pursuance of that purpose, and then recited to them the prisoner's evidence tending to corroborate him, and instructed the jury, first that if they found from the evidence that the prisoner had formed *a particular* and *definite* purpose to kill the deceased, and in pursuance of that purpose procured the gun and sought the deceased and shot and killed him, he was guilty of murder, no matter what deceased was doing at the time he was shot; second, that if the prisoner had not formed the purpose to kill the deceased, but had procured the gun to kill a squirrel, and met the deceased and the deceased assaulted him with a
(843) knife in the manner described by the prisoner, and the prisoner shot and killed him when he might have avoided the assault without killing him, it was manslaughter. But if the prisoner was so closely pressed by the deceased that he could not escape the assault made upon him, and was in danger of losing his life, or of receiving serious bodily harm at the hands of the deceased, or had reasonable grounds to believe, and did believe, he was in such danger and shot and killed him to save his own life, or to avoid great personal injury, he was not guilty of any offense.

The court again recited the evidence applicable to these several propositions of law, and cautioned the jury that they must find that the prisoner had deliberately made up his mind to kill the deceased, and shot and killed him in pursuance of a definite intent to kill him, or they could not convict of murder.

The prisoner was personally present throughout the trial and when the verdict was rendered, but the formality of requiring him to stand up and look upon the jury, etc., was by inadvertence omitted.

There was a verdict of guilty, and from the death sentence pronounced thereon the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

SHEPHERD, J. We have carefully considered his Honor's instruction, and we are unable to find any error of which the prisoner can complain.

Every aspect raised by the testimony was with great particularity presented to the jury, and the law applicable thereto was correctly and intelligently explained.

Among other things the court charged the jury "that if they found from the evidence that the prisoner had formed a *particular* and *definite* purpose to kill the deceased, and in pursuance of such (844) purpose procured the gun and sought the deceased and shot and killed him, he was guilty, no matter what the deceased was doing at the time he was shot." To this part of the charge the prisoner excepted. There can be no serious question but that there was abundant testimony to support the instructions. After a quarrel with the deceased the prisoner said, "I am going off and get me a gun and I am going to shoot this damned negro's heart out." The case further states that there was testimony tending to show the following facts: That "the prisoner went off a mile and a half or two miles, procured a double-barreled shotgun, came back and inquired where deceased was, and said he was going to kill him, and on being informed where deceased had gone went in that direction some distance, stopped and waited some time (not definitely stated how long) when he saw deceased approaching. When deceased was within fifteen yards of him he said, 'Oh, yes, God damn you, I am going to shoot your dern heart-strings loose'; that deceased came right on but said nothing till he got in a few steps of prisoner; the prisoner stepped from five to eight steps from the path he and deceased were in. Deceased raised his arms, having nothing in his hands, and told prisoner to shoot, and prisoner fired and hit the deceased in the right side of the neck, and he fell down and died instantly."

The testimony surely authorized the instruction given by the judge, and the principle which he declared is so clearly correct that it is hardly necessary to cite authority in support of it.

An extract from *S. v. Gooch,* 94 N. C., 1014, will suffice our purpose. The court said: "If the jury believe from the evidence that the prisoners

went to the store of Cheatham with the purpose, under the pretense of fighting, to stab Cheatham, and either the one or the other stabbed and killed the deceased, it was murder in the assailants, no matter (845) what provocation was given of how high the assailants' passions were aroused during the fight, for the motive in such a case is express." *S. v. Lane,* 26 N. C., 113; *S. v. Hogue,* 51 N. C., 381; *S. v. Martin,* 24 N. C., 101; Whart. Crim. Law, sec. 950.

2. After the sentence was pronounced the prisoner excepted, because when the verdict was rendered "the formality of requiring him to stand up and look upon the jury was, by inadvertence, omitted." The object of this formality is to identify the prisoner, and while it is better to observe the form a failure to do so, where there is no question as to the actual presence of the prisoner, is by no means fatal to the verdict. Mr. Bishop, in his second volume Crim. Prac., sec. 829, says that "there is no reason to suppose that any minute departure from the old form will vitiate the verdict." There is no merit in the exception, and it must be overruled.

3. The remaining exception is addressed to the refusal of the court to continue the case because of the absence of an alleged material witness. It is too plain for argument that this was within the discretion of the trial judge, and that his ruling in this respect cannot be reviewed by this Court.

Affirmed.

Cited:—S. v. Burney, 162 N. C., 614; *S. v. English,* 164 N. C., 506.

THE STATE v. RICHARD SIDDEN AND CYNTHIA CAUDLE.

Evidence—Witness—Harmless Error.

Upon the cross-examination of a witness introduced by the State the defendant proposed to ask him if he had not been prompted to swear against defendants by one B., who had not been examined as a witness; the court, upon objection, excluded the question in that form, but permitted it to be put omitting B.'s name. *Held,* that while the inquiry was unobjectionable, yet as it did not seem to be material, and it did not appear that defendants were prejudiced by its rejection, a *venire de novo* would not be granted.

(846) INDICTMENT for fornication and adultery, tried before *Gilmer, J.,* at September Term, 1889, of WILKES.

Attorney-General for the State.
No counsel contra.

CLARK, J. On the cross-examination by the defendants of a witness for the State he was asked if he had not been "prompted to swear against defendants, as he had done, by one James Blivens." On objection by the solicitor the court excluded the question and the defendants excepted.

His Honor, in excluding the question, stated that he did not see that it was necessary to bring Blivens' name into the case as he had not been examined as a witness nor was present at the trial, and that the court would allow the impeaching question to be put leaving out of it Blivens' name, or in any shape defendants desired, with that exclusion. Had Blivens been examined as a witness and to impeach him had been asked this question, giving time and place, with a view to show his "bias or temper" towards the defendants, his reply would not come within the general rule that answers to impeaching and collateral questions are conclusive. In such case the defendants would have had the right to ask the witness if Blivens had not induced him to testify against them with a view to contradict Blivens as to his freedom from bias towards them. As Blivens had not been a witness we can see no purpose to be served by attacking him. No harm accrued to defendants, since the court gave permission to put the impeaching question more broadly by asking if any one whatever had prompted the witness to swear against them. Had the impeaching question been put generally, and been as to a matter not pertinent to the case in hand, the opposing side might have insisted that defendants should specify and particularize (*S. v. Gay,* 94 N. C., 814), but it can be no cause of complaint by the party asking the impeaching question that he is allowed or required to put it thus (847) broadly. While we can see no objection to the form of question insisted on by the defendants, they have not shown how they were or could have been prejudiced by the modified form of it required by the court. Such matters as these must be left largely to the sound discretion of the presiding judge. He sees the surroundings of the trial and the bearing of the witnesses on the stand and understands, better than we can do, the object and purport of the manner of the examination.

There is no other assignment of error, and the judgment must be Affirmed.

THE STATE v. J. O. WILCOX.

Grand Jury—Presentment—Residence—Irregularity in Drawing Jurors—Indictment.

1. The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror.

2. It is not only the right but it is the duty of grand jurors, of their own motion, to originate prosecutions by making presentments of all violations of law which have come under the personal observation or knowledge of each juror, or of which they have credible information.

3. They have, however, no right to summon witnesses to appear before them except by the permission of their foreman or of the solicitor, as prescribed by the Code, sec. 743.

4. A grand juror must be a resident of the county in which he is summoned to serve; but his qualification depends upon his *status* at the time of service, not the time his name was placed upon the jury lsit.

5. Where the county commissioners, while drawing the jurors, laid aside the names of several persons, otherwise qualified, for the reason that they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons. *Held*, that if there was any irregularity it did not affect the action of the jurors so drawn and summoned.

(848) INDICTMENT for perjury, tried at Spring Term, 1889, of ASHE before *Armfield, J.*

The defendant filed a plea in abatement and the solicitor agreed with his counsel as to the following facts:

"A plea in abatement having been interposed in the above-entitled case, because of the irregularity of the drawing of the grand jury which found the bill, and of the incompetency of two of said grand jurors, it is agreed upon the part of the solicitor representing the State and the defendant that the facts are:

"1. That one grand juror, to wit, J. H. Jones, acted as a juror on the trial of the indictment wherein the alleged perjury was committed.

"2. That the names of certain persons were drawn from the jury box No. 1, by the county commissioners on the first Monday of February, 1889, and said names—four or five in number—were laid aside upon the suggestion and supposition that some of said persons were absentees and nonresidents of Ashe County at the time of said drawing, and that others were unknown in said county; that one of said jurors was a citizen of said Ashe County at the time his name was laid aside, but the fact of his

residence in the county at the time was not known to the said commissioners, and it was believed by said commissioners that said person was a resident of the State of Tennessee.

"3. That James Williams, one of the grand jurors at the time said jury was drawn, was a citizen of Ashe County and duly (849) qualified to act as such juror, but afterwards and before said inquisition his home and the territory on which he lived was detached by an act of the Legislature from Ashe County and annexed to the county of Alleghany."

The court sustained the plea and ordered that the indictment be quashed. The solicitor for the State appealed.

Attorney-General for the State.
J. F. Morphew and T. R. Purnell for defendant.

AVERY, J., after stating the facts: The fact that a member of the grand jury that found the indictment was also one of the petit jury that tried the action in which, as it is charged, the perjury was committed, is not good ground for a plea in abatement. If the juror was not otherwise disqualified by law his personal knowledge or opinion that there was probable cause for believing the defendant guilty of perjury, found from what occurred under his own observation when he was required to critically and closely scrutinize the evidence, made it his duty to disclose such peculiar knowledge to his fellows for their consideration and action. The grand jury are "returned to inquire of all offenses in general in the county, determined by the court into which they are returned," and are sworn diligently to inquire and true presentment to make of all such matters and things as are given them in charge. It is the duty of the presiding judge to give them in charge the whole criminal law, whether general or local in its operation. Thompson & Merriam on Juries, 605; *United States v. Hill,* 2 Brock, 156.

"The matters which, whether given in charge or of their own knowledge, are to be presented by the grand jury, are all offenses committed within the county, the prosecution of which is not barred by statute. To grand juries is committed the preservation of the peace (850) of the county, the care of bringing to *light* for examination, trial and punishment all violence, outrage, indecency and terror; everything that may occasion danger, disturbance or dismay. Grand jurors are *watchmen,* stationed by the laws, to survey the conduct of their fellow-citizens and inquire where and by whom public authority has been violated or our Constitution or laws infringed." 24 How. St. Tr., 201. "It is their peculiar province to inform against and present all offenders against the criminal laws of the State." *S. v. Wolcott,* 21 Conn., 272; *Ward v. State,* 2 Mo., 120; *S. v. Terry,* 30 Mo., 368.

There can be no question about the fact that at common law a grand jury was charged especially with inquisitorial duties, and where there is probable cause to suspect that the law had been violated they were considered bound by their oaths to institute inquiry and investigation. They had originally "the right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses." Wharton on Cr. L., sec. 457, note (h). But our statute (Code, sec. 743) forbids the payment of the fees of any witness before the grand jury, unless summoned by direction of the foreman or solicitor, as therein prescribed, or recognized by some justice of the peace to appear and testify before that body. While the grand jury is not allowed by the laws of North Carolina to send for witnesses generally for the purpose of inquisition, it is their duty to originate presentments as to all violations of law that have come under the personal observation or knowledge of each juror, and as to the commission of any offenses of which they have information which they deem credible and which is so specific as to the nature of the offense and witnesses as to enable the prosecuting officer to frame an indictment upon it. *S. v. Ivey,* 100 N. C., 539.

(851) The old method of originating prosecutions before grand juries seems to have fallen into disuse in the Federal courts because the commissioners act under the advice of the district attorneys, and a large number of officers and detectives are engaged in bringing offenders before the commissioners for preliminary examination, and thus gathering evidence upon which prosecutions are founded. The practice is not uniform in the different States, but in the absence of legislation we must adhere to that long since adopted in our courts. The statutes in some of the States seem to have been enacted with a view to instituting prosecutions exclusively by warrant, arrest and examination before a justice of the peace, and that mode of preliminary investigation has been adopted, instead of the inquiry by the grand jury leading to punishment.

The institution of criminal proceedings, either secretly, by presentment of a grand jury or by the issue of a warrant on information by a justice of the peace, is often accompanied by abuses of power. In this State the Legislature has imposed some restraint upon the powers of both, but our law still leaves the grand jury clothed with authority to make presentments founded upon the personal knowledge of a member of the body or information deemed credible by the body, and given in good faith. As they are forbidden by their oaths from presenting any one through envy, hatred or malice on their own part, their powers are not to be used to gratify the malignity of others, and in acting on information they may scan the character and motives of those from whom it is derived. The juror Jones, therefore, having heard the defendant

testify in his own behalf in the former prosecution for carrying a concealed weapon, was bound to call the attention of the grand jury to the charge of perjury, if he believed he had committed that offense. The law which compelled him to make such a disclosure could not be construed to disqualify him from acting when the solicitor preferred the same charge in the form of an indictment. The fact that the magistrate who committed defendant was foreman of the jury (852) that returned the indictment against him was held not to be good ground for motion to quash. *S. v. Chairs,* 9 Baxter (Tenn.), 196.

The second ground for the motion to quash, embodied in the plea, is no more tenable. If the county commissioners acted in good faith, as the law presumes they did, in laying aside the names of persons who according to their best information had removed from the county, or of those whom they did not know and know to be still resident in the county, such an irregularity or mistake, by which the name of a *bona fide* resident was laid aside, would not incapacitate a grand jury composed of good and lawful men to act. *U. S. v. Ambrose,* 12 Myers Fed. Dec., sec. 1854 (p. 520.) The commissioners were evidently endeavoring to comply with the requirements of the Code, sec. 1729, by taking out the names of persons no longer resident in the county. It had been held that the drawing and summoning of one or more incompetent jurors does not contaminate the work of the grand jury if none such are actually drawn and sworn among its members.

In 2 Hawkins's Pleas of the Crown, ch. 25, sec. 16, the author says: "It seems clear that by the common law every indictment must be found by twelve men at the least, every one of which ought to be of the *same county.*" See also *Bell v. People,* 1 Scom. (Ill.) 399; *Carpenter v. State,* 4 Howard (Miss.), 163; *Wiley v. State,* 46 Ind., 363; *Fletcher v. People,* 681 Ill., 116. The section of the Code (1729) cited above requires that the scroll containing names of jurors who have removed from the county be destroyed, while the preceding sections from 1722 to 1727 provide the manner of selecting jurors from the list of tax-payers resident in the county.

The juror's qualification must be determined by his status as to the residence and other statutory requirements at the time of the service, and it is not sufficient that he was qualified when selected if he removed to another county before the grand jury was empaneled. (853) 2 Hawkins Pl. Cr., ch. 43, sec. 13; Thompson & Merriam on Juries, sec. 174; *Kelly v. People,* 55 N. Y. 565.

The plea was filed before arraignment, and was therefore in apt time. *S. v. Gardner, ante,* 739.

His Honor's ruling was doubtless predicated upon the ground that one of the jurors became a resident of Alleghany County after his name

was drawn by the county commissioners, and before he served as a member of the grand jury that acted on the indictment. Much inconvenience might be obviated if the judges below would always interrogate jurors drawn as grand jurors as to whether they were residents of the county, parties to actions pending and at issue, or had paid their tax for the preceding year. In some of the States, after the preliminary investigation, no objection is entertained by plea in abatement, or motion to quash, for disqualification of the grand jury.

Affirmed.

Cited: *S. v. Morris, ante,* 839; *S. v. Sharp,* 110 N. C., 605; *S. v. Fertilizer Co.,* 111 N. C., 660; *S. v. Smarr,* 121 N. C., 670; *S. v. Perry,* 122 N. C., 1020, 1021.

THE STATE v. COON ELLER ET AL.

Larceny—Evidence, Sufficient to Support Verdict.

1. Evidence that one of the defendants charged with a larceny committed by breaking into a store at night and taking goods therefrom, had two years prior to the taking, entered into conspiracy with the other defendants to break into the store; that he had been arrested for the larceny and had forfeited his bail, and that he was related to come of the persons who were identified as the criminals, was not sufficient to warrant a verdict, and should not have been submitted to the jury.

2. But where, in addition to this evidence, there was other testimony tending to show that another of the defendants was related to those who were identified as the thieves; that he resided in their neighborhood; that shortly after the larceny several persons were discovered at night coming away from a place where had been concealed the stolen property, and one witness recognized the defendant in the party, all of whom ran when hailed. *Held,* there was some evidence to convict defendant, and it was proper to submit it to the jury.

3. A new trial will not be awarded for the admission of irrelevant or immaterial testimony where it does not appear that the complaining party was, or might have been, prejudiced thereby.

(854) INDICTMENT for larceny and receiving, tried before *Armfield, J.,* at Spring Term, 1889, of WATAUGA.

A true bill was returned against Sherman Brooks, Henry Eller, Linville Eller, Henry Brooks, Coon Eller and George Eller, but only the last two were on trial. The charge was for larceny of coffee, the property of one S. V. Cox, and for receiving it knowing it to have been stolen.

It was in evidence that Cox's store had been broken open and the coffee and other articles stolen; that some of the articles having been found

concealed in the woods near the store; that a few days after a guard was posted on the road leading from the place of concealment, and that night five men came along the road from that direction, three of whom were carrying sacks of coffee. When halted they dropped the coffee and ran, and a witness testified that the coffee was that which had been stolen from Cox. One of the witnesses testified that he took two of the men to be Henry Eller and Sherman Brooks, and another was a tall man, as was Linville Eller. Another witness testified that he thought he identified Coon Eller, Henry Eller and Sherman Brooks as three of the party who, when halted that night, dropped the stolen coffee and ran off. He could not identify the other two.

It was in evidence that George Eller and Coon Eller, these defendants, forfeited their bond for appearance at court, and when (855) *capiases* were issued could not be found; that after the death of Henry Eller, who had been killed while resisting arrest, these defendants came in and surrendered themselves.

Another witness testified that two and a half or three years before Cox's store was robbed George Eller, Henry Eller, Linville Eller and himself had an agreement to break into that store but he left the State soon thereafter without it being done.

It was in evidence that George Eller and Coon Eller were single men and lived with their father, and Sherman Brooks and Linville Eller lived in their neighborhood; that Henry Eller, Linville Eller, Coon Eller and Jacob Eller were brothers. The same witness testified that Sherman Brooks was some kin to the defendants. To this last statement defendants excepted.

Another witness testified that the day before the coffee was captured he saw Henry Eller and Sherman Brooks going in the direction of Cox's store and in a mile and a half of it, one having a sack and the other a rope. To this evidence the defendants excepted.

Another witness testified that on the night the coffee was captured he was along and recognized Sherman Brooks, Henry Eller and, he thought, Linville Eller.

At the close of the evidence the defendants' counsel asked the court to instruct the jury that there was not sufficient evidence to justify a verdict of guilty. The court declined, and the defendants excepted.

The court charged the jury that they were the sole judges of the weight of the evidence; that the acts of Henry Eller and Sherman Brooks were not to be taken as evidence against Coon Eller, but might be considered with reference to the guilt or innocence of George, if the jury believed the testimony as to the former agreement between George Eller and others to rob Cox's store; otherwise, not. (856)

To this instruction defendants excepted. Verdict of guilty. Judgment, and defendants appealed.

Attorney-General for the State.
J. F. Morphew and George V. Strong for defendants.

CLARK, J., after stating the facts: The first exception was that a witness was allowed to testify that defendants were kin to Sherman Brooks. At the most this evidence was merely immaterial, and not ground of exception unless the defendants show that they probably suffered prejudice thereby. *Livingston v. Dunlop,* 99 N. C., 268; *Waggoner v. Ball,* 95 N. C., 323; *Jones v. Call,* 93 N. C., 170; *Dupree v. Insurance Co.,* 92 N. C., 417. It was in evidence already, without exception that the defendants were more nearly related to Henry Eller and Linville Eller. It is hard to see how the defendants could have been prejudiced or the jury misled by testimony that the defendants were "some kin" to Sherman Brooks.

As to the second exception, the judge in his charge instructed the jury not to give the testimony as to Henry Eller and Sherman Brooks any weight in passing upon the guilt or innocence of the defendant Coon Eller. Both inquiries were evidently put by the solicitor with a view of showing, if he could, a combination between these defendants and the others, and the execution by them of a common design. The charge of the judge cured the error as to Coon Eller, if any, in admitting them. *S. v. Collins,* 93 N. C., 564; *Bridgers v. Dill,* 97 N. C., 222. The exception to the refusal to charge and to the special charge given raises the question whether there was sufficient evidence to submit the case to a jury. If the evidence merely raised a suspicion or conjecture of guilt it was not legal evidence, and the court should have directed a ver-
(857) dict of not guilty. But if the evidence, considered as a whole, could in any just and reasonable view of it, warrant a verdict, it should have been left to the jury as the proper triers of the fact. As to George Eller there was no evidence beyond the statement of one of the witnesses that some two and a half or three years before he had joined in an unexecuted agreement to rob Cox's store, and his forfeiting his bond and evasion of rearrest in this case. These circumstances were sufficient to raise a conjecture or suspicion but were not, as we think, such evidence as entitled the State to have the cause as to him submitted to a jury. *S. v. James,* 90 N. C., 702.

As to the other defendant, Coon Eller, there was evidence tending to show that he was one of the men found carrying the stolen coffee at night along the road a few days after the larceny, and that when halted by a guard his whole party dropped the coffee and ran off; that after his arrest

he forfeited his bond and evaded rearrest till after Henry Eller, one of the men identified as being with him carrying the stolen coffee, had been killed, whereupon he came in and surrendered himself; that he was a brother of Henry Eller and Linville Eller and a neighbor of Sherman Brooks, the other three men testified to as being in possession of the stolen coffee. There being evidence connecting the defendant Coon Eller with the transaction, its sufficiency was a matter for the jury.

As to George Eller there is error, and as to him there must be a *venire de novo*.

As to Coon Eller the judgment is affirmed.

Cited: *S. v. Bruce,* 106 N. C., 93; *S. v. Crane,* 110 N. C., 534; *Wilson v. Mfg. Co.,* 120 N. C., 95; *Gattis v. Kilgo,* 131 N. C., 208; *S. v. Pitts,* 177 N. C., 544.

(558)

THE STATE v. SALINA CALLEY.

Nuisance—Bawdy House—Disorderly House—Evidence.

1. To constitute a bawdy house it must appear that it is a house of ill fame kept as a place of common resort and for the convenience of lewd and lascivious persons of both sexes.
2. To constitute a disorderly house it must appear that the acts charged as producing the nuisance are such as tend to annoy, disgust and offend the sense of decency of the public generally, or the inhabitants of a particular neighborhood, or the passengers on a particular highway.
3. Where it was proved that on one occasion the daughter of the defendant was seen in defendant's house in bed with a man; that the daughter had given birth to a bastard child; that on another occasion the defendant was seen in bed with a man, and her daughter at the same time in another room in bed with another man, and that on still another occasion the defendant was discovered by one who was traveling a highway, which ran near by, in the act of illicit sexual intercourse close to her house. *Held,* not sufficient to warrant a conviction either for keeping a bawdy house or a disorderly house.

CRIMINAL ACTION, tried at January Term, 1889, of CATAWBA, *Clark, J.,* presiding.

The indictment charges the defendant in the first count with keeping a bawdy house, and in a second count with keeping a disorderly house. The evidence produced on the trial went to prove that on one occasion at night a witness saw a man in the house of the defendant in bed with one of her daughters; that at that time the defendant was in a room below stairs; that at another time a witness went to the house at night, got

drunk on whiskey he did not get there, and lay across a bed until 4 o'clock next morning, and when he awoke he saw a man in bed with a daughter of the defendant and also a man in bed with herself in another room; that at another time at night a witness saw the defendant
(859) along the big road, near her house, having sexual intercourse with a man; that a daughter of the defendant had a bastard child about eighteen months old.

This was the substance of the evidence adverse to the defendant. She insisted that it was not sufficient to go to the jury to prove her guilt. The court held otherwise, and she excepted. There was a verdict of guilty and judgment against her, from which she appealed.

Attorney-General for the State.
M. L. McCorkle and F. L. Cline for defendant.

MERRIMON, C. J., after stating the case: Accepting the evidence as true, the defendant was guilty of reprehensible, vicious and disgraceful conduct on repeated occasions, but it did not prove, in any reasonable view of it, that she kept in a legal sense a bawdy house—a house as a habitation for prostitutes—a house of ill fame kept as a place of common resort and convenience of lascivious and lewd people of both sexes. It proved that she was a woman of loose morals, a lewd woman; that she sometimes—it might be inferred, frequently—had sexual intercourse with men in and about her house, and her daughters did likewise with her knowledge, but it did not prove that her house was a place of common resort for prostitutes and lewd people of both sexes. She and her daughter were lewd women doing acts of prostitution in her own house. This does not make the offense of keeping a bawdy house. *S. v. Evans,* 27 N. C., 603; 1 Bish. Cr. Law, secs. 1037, 1038.

Nor do we think the evidence sufficient to prove that the defendant kept a disorderly house as charged in the indictment. It was not sufficient to prove the nuisance charged. It did not appear, from any reasonable view of it, that she lived in a town or thickly settled neighborhood; that she kept a drinking place; that drinking and drunken men and women from time to time assembled there, as well in the night as in
(860) the day; that many such dissolute people frequently resorted thither "to be and remain drinking, tippling, cursing, quarreling and otherwise misbehaving themselves," as charged, or that the neighborhood or passers-by or about there were at all disturbed, or that they knew of the immoral conduct of the defendant and her daughter in the house of the former. *S. v. White,* 89 N. C., 462; *S. v. James,* 90 N. C., 702; *S. v. Atkinson,* 93 N. C., 519.

It is keeping the house in such way and manner—helping, encouraging, permitting or tolerating such pernicious acts, things, transactions and practices in and about it—as creates an evil example to be seen, annoys, disgusts, scandalizes, shocks the moral sense, offends against the decencies and proprieties of the public generally, or the people of a particular neighborhood or vicinity, or the passers-by on a particular highway that create and constitute the nuisance charged. As we have seen, the evidence did not prove such facts or the substance of them. It proved little more than that the defendant and her daughter were whoreish persons in and about the house of the former, of whose immoral practices the people generally in the vicinity and passers-by saw and knew but little, if anything, by observation or common reputation. It may be that the facts were far otherwise, to the great grievance of the community in which they occurred, but the evidence produced on the trial, as it comes to us, was not sufficient to so prove them. *S. v. Patterson,* 29 N. C., 70; *S. v. Wright,* 51 N. C., 25; *S. v. Robertson,* 86 N. C., 628; *S. v. Wilson,* 93 N. C., 608.

The court should have told the jury that the evidence produced was not sufficient to warrant the conviction of the defendant, and to render a verdict of not guilty. As it did not there is error and the defendant is entitled to a

New trial.

Cited: *S. v. Webber,* 107 N. C., 964; *Godwin v. Telephone Co.,* 136 N. C., 260.

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(861)

THE STATE v. J. B. HOLMAN ET AL.

Nuisance—Milldam and Pond—Proximate Cause—Possession—Statute of Limitations—Indictment—Evidence.

1. To render a mill dam and pond a nuisance, and those who maintain it indictable therefor, it must be made apparent that the whole community, not every individual, but the community *generally,* is injuriously affected thereby.

2. If the dam and pond are the proximate cause of the nuisance, those who maintain it are guilty of a violation of the criminal law, notwithstanding the fact that such nuisance is aggravated by other causes which the owners did not produce, and over which they had no control.

3. But if the nuisance is entirely the result of agencies and causes for which the owners are not responsible, operating upon the dam and pond and infecting them with pernicious qualities, those who maintain it are not criminally liable.

4. No length of possession can operate as a bar to an abatement of a nuisance on behalf of the public.

5. The form of indictment for nuisance in this case approved.

6. Evidence of the condition of the pond and adjacent lands prior to the time laid in the bill is competent upon the trial of an indictment for a nuisance arising therefrom, especially where it is charged that the pond "became, was, and still is," a nuisance to the public.

CRIMINAL ACTION, tried at November Term, 1889, of IREDELL, *Connor, J.*, presiding.

The defendants were indicted for maintaining a public nuisance, produced by the creation of a milldam and the ponding of water thereby upon adjacent lands, etc.

There were two counts in the bill, but as the court directed the jury not to consider the second only the first is set out.

"The jurors for the State, upon their oath, present that John B. Holman and Elizabeth Holman, late of Iredell County, on 1 August, 1889, at and in the county aforesaid, did unlawfully, injuriously, will-
(862) fully, and knowingly maintain and keep a certain dam across Fifth Creek, in said county, upon land of the said John B. Holman and Elizabeth Holman, and within their control; by means of the dam aforesaid the water flowing into the creek aforesaid was stopped and damned up and flowed back in upon the surface of large tracts of adjoining lands, by means whereof the mud, wood, leaves, brush and other animal and vegetable substances and other filth, collected and brought down the channel of the said water course by the natural flowing of the waters, then became and were, during the time aforesaid, collected and accumulated in large quantities in the channel of the said water course and on the lands overflowed as aforesaid; and the said mud, wood, leaves, brush, animal and vegetable substance and other filth, so there collected in said water course and on the lowlands adjacent thereto, became and were and still are very offensive, and the water became and is corrupted, and by means whereof divers nauseous, unwholesome and deleterious smells and stenches did arise, so that the air was and still is corrupted, to the great damage and common nuisance of the good and worthy citizens of this State there passing and repassing, dwelling and inhabiting, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

It was in evidence that the defendants owned and operated a mill on Fifth Creek, in said county, and for the purpose of securing the motive power therefor maintained and kept a dam about nine feet high across the creek; the dam was erected about seventy-five years ago, and had not been raised since its erection. The land along and adjacent to the creek had been cleared for agricultural purposes; some twelve years

ago the owners of the land on the creek above the mill had cut a ditch, about a half-mile long, for the purpose of draining their land; after several efforts to keep it open it was found impossible to (863) do so, and it was abandoned about two years ago; a considerable quantity of timber on the low grounds above the pond had died and fallen into the water; the grass and other vegetation was in the same condition; large quantities of sand and mud had washed into the pond, causing the water to become stagnant for two miles above the mill; holes and "duck ponds" had been formed by the stagnant water and the sand which had washed in the channel of the creek and in the low lands adjacent thereto, and the land had become wet and "sobbed," causing the water to have a green scum over it and emitting unpleasant odors. It was also in evidence that within a radius of four miles up the creek and two miles on either side of it eighty-seven families lived; that there had during the past two years been intermittent fevers, caused by malaria.

Several physicians practicing in the section adjacent to the mill testified that there had been much sickness among the families living near the creek and mill, caused by malaria, giving the number of persons so affected; and they gave the opinion that the malaria which caused the sickness was produced by the stagnant water, sand, mud and decaying vegetation in and above the pond. Several of the physicians testified that malaria was found in high land as well as swamps. There was much diversity of opinion among the physicians as to the composition of malaria and the cause producing it.

It was in evidence that Dr. Hill, Superintendent of Health of Iredell County, had made an examination of the pond in January, 1889, and on 17 July, 1889, served notice upon the defendant to remove the dam, pursuant to the provision of the act of 1885.

There was evidence of the fall per rod of the creek from the pond to the point about two and three-fourths miles above.

The defendants objected to any evidence as to the condition of the pond prior to 1 August, 1889, the day named in the indict- (864) ment. The objection was overruled, and the defendants excepted.

The defendants requested the court to charge the jury:

"1. To make the defendants' milldam and pond a public nuisance, and the defendants indictable for maintaining the same, it must injuriously affect the public, that is, it must affect the whole community. The fact that it injuriously affects individuals or families in a community is not sufficient to make defendants guilty. They should be acquitted unless the jury are satisfied the whole community is so injuriously affected—not every family or person in the community, but the community generally." The court gave this instruction.

"2. If the jury should find from the evidence that the community is so injuriously affected as to make the dam and pond a public nuisance, the defendants would not be guilty if the agencies over which the defendants had no control and no agency in producing entered into and contributed to the dam and pond in producing such injurious effects upon the community." The court declined to so instruct the jury, and defendants excepted.

* * * * * * *

"4. That although defendants' dam and pond may have contributed to produce such a state of facts as to cause a public nuisance, but other causes to which defendants did not contribute, and which did not arise from their agency, so affected the dam or pond, or either of them, as to produce such nuisance, then they are too remote to be ascribed to their acts, and the defendants would not be guilty." This instruction was not given, and defendants excepted.

"5. That if the evidence should satisfy the jury that the whole community had been injuriously affected, yet defendant would not be
(865) guilty unless it was further found from the evidence that such injury was produced directly and proximately by defendants' dam and pond, and by no other cause." This instruction was given.

The court further instructed the jury as follows:

"The defendants are liable only for such results as flow directly, naturally and proximately from the pond and dam. Therefore, if you find that the pond and dam are the cause of the nuisance, you should convict the defendants; but if other causes or agencies to which the defendants have not contributed, and which did not arise from their agency, so affected the pond and dam as to produce the cause of the sickness, then such sickness would be attributed by law to such agencies, and not to the pond or dam, and you should acquit the defendants.

"The erection of the dam is not in itself wrongful, nor is the millpond in itself a nuisance; if, however, by reason of natural causes, such as decaying vegetation which has grown or been brought into the pond by the stream or its natural tributaries, or changes in the topography of the land adjacent to the creek from the operation of natural laws, the pond produces or contributes to the production of malaria or noxious, unhealthy odors, to that extent which injures the health or comfort of the community in general, it would thereby become a nuisance and the defendants indictable for maintaining it.

"If, however, other persons not under the control of the defendants plow or bring into the pond or the lands adjacent thereto substances which decay and produce malaria; or if such persons cut ditches into the stream above the pond, thereby bringing sand and mud into the creek, or if having cut such ditches failed to keep them open, permitting them

to become choked and filled up, thereby causing malaria, such result would be attributed to such persons and agencies and not to the pond, and defendants should be acquitted.

"The defendants insist, further, that the dam is not the cause of the accumulation of the sand and mud in the creek and the (866) water in the low grounds, because the creek has not sufficient fall to convey away of its own force the sands which from natural causes and the cultivation of the land come into it. In respect to this phase of the case, if you find from the testimony that the stagnant water, sand and mud, which produce the malaria, is caused by the natural formation of the bed of the creek and not by the dam, nor contributed to by the dam, the malaria and sickness consequent thereupon would be attributed to such natural formation and not to the dam.

"But if the dam either directly causes or increases the inundation of the sand, mud and stagnant water which produces the malaria, or the water would, if unobstructed, carry off the sand, and the dam so obstructs as to prevent its doing so, the defendants would be guilty. The law will not undertake to apportion the liability for a public wrong. The question for the jury to decide, applying principles of law, is 'Does the dam and pond produce the nuisance?' If so, defendants are guilty; otherwise, they should be acquitted."

There was a verdict of guilty, and from the judgment thereon the defendants appealed.

Attorney-General and W. D. Turner for the State.
D. M. Furches and W. M. Robins for defendants.

CLARK, J. The defendants except because three of their prayers for instructions were not given. We think the charge given, while in many respects substantially the same, is more accurate and correct. *S. v. Rankin,* 3 S. C., 438. If the dam and pond, without the contribution to the pond from sources over which defendants had no control, and for which they are not responsible, would not be a nuisance, the defendants were not guilty. If, however, the dam and pond *per se* created a nuisance, the fact that such nuisance was made still greater by acts (867) which defendants could not control would not entitle them to an acquittal. The jury were properly directed that unless the dam and pond were the direct and proximate cause, *i. e.,* the *causa causans* of the nuisance, the defendant should be acquitted. The language of the judge is to be read with reference to the evidence and the points disputed on the trial, and of course construed with the context. *S. v. Tilley,* 25 N. C., 424. Upon examination of the entire charge it is a fair and clear state-

ment of the law arising upon the evidence, and we do not see that the jury were misled in any way to the prejudice of the defendants.

Nor was it error to refuse to exclude evidence tending to show the existence of a nuisance prior to the date laid in the bill. The date is not of the essence of the offense in this case, and the State was entitled to show the existence of the nuisance at any time within two years before the beginning of these proceedings.

In fact, however, the bill charges that the acts complained of "became, were and still are" a nuisance to the public, importing a prior and a continuing offense. The same words also dispose of the motion in arrest of judgment, which was made upon the ground that no *continuando* is charged. It was sufficiently set out and it was no error to allow proof of it. The bill is a copy of approved precedents. Wharton Criminal Forms and Precedents, 701.

While long possession may confer a right to land flowed, and all the proprietary incidents which follow the title to property, it cannot be set up as a bar to the abatement of a nuisance on behalf of the public. A right to violate the law is not to be presumed from any lapse of time however great. Chitty Crim. Law, 160, 16 Am. Rep., 737. Indeed, an acquiesence for seventy years has been held no bar to criminal proceedings against a nuisance.

Affirmed.

Cited: S. v. Wolf, 112 N. C., 893; *Cline v. Barker,* 118 N. C., 782; *S. v. Poyner,* 134 N. C., 611; *S. v. Lilliston,* 141 N. C., 861; *Shelby v. Power Co.,* 155 N. C., 201.

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(868)

THE STATE v. JOHN WILSON.

Homicide—Murder—Insanity—Drunkenness—Judge's Charge.

1. The judge should not encumber a case by an instruction to the jury upon a hypothetical state of facts; on the contrary, it is his duty to divest the issues, as far as practicable, of all irrelevant matter, and submit only those aspects which are presented by the evidence.

2. If one possessed of capacity sufficient to distinguish right from wrong is so mentally or physically constituted by nature, or became so by reason of some accident or affliction, that by the use of intoxicating liquors he loses his reason and becomes furious, and knowing this, he voluntarily becomes drunk, and, while thus under the temporary dethronement of reason, kills another without justification, he is guilty of murder.

3. The ruling of this Court upon drunkenness, as affecting responsibility for crime, in *S. v. Potts,* 100 N. C., 457, is reaffirmed.

STATE *v.* WILSON.

INDICTMENT charging the prisoner with the murder of Thos. Edge, tried at Spring Term, 1889, of YANCEY, *Armfield, J.*, presiding.

John W. Wilson, a witness for the State, testified: "I am a cousin of the prisoner. On 22 September, I was at Edge's store, in Yancey County, at a shooting match for a turkey belonging to prisoner. Deceased was there. After several shots had been fired a shot hit near the turkey. Deceased came down to where I was, and he and I went to the turkey and found that it was not hit. Prisoner then came from the store towards where I and deceased were, talking loud. I told prisoner not to go to the turkey that we would score it. Prisoner said he would go to it. Deceased said to prisoner, 'John, there is no use to go; I do not claim it as a hit.' Prisoner went on to the turkey, hollering and swearing and looking back towards the store. After getting to the turkey prisoner hollered back to the persons at the store, 'Shoot; any man that hits the turkey shall have it.' Prisoner then came back to (869) where deceased was standing, and some one near the store fired at the turkey and prisoner hollered twice, 'Shoot again; you have not touched it.' Deceased then started slowly towards the turkey. Prisoned turned to deceased and said to him, calling him by name, 'Where are you going?' Deceased said, 'John, I was just going to see where they hit.' Prisoner said, 'Don't go.' Prisoner then walked two or three steps towards deceased, and run his hands in the pocket of his overpants on the left side and pulled out a pistol and presented it at deceased, and told him to stop or he would shoot him. Deceased stopped, and looked back at the prisoner and said, 'Why, John, I was just going down to see where they hit.' Deceased then turned and walked towards the turkey. Prisoner then started towards him, saying he would shoot him if he went down there, and swearing. Deceased went on, and prisoner after him, until he got to about where the ball hit near the turkey. Deceased turned back. Prisoner said to deceased, 'What did you come down here for when I told you not to?' Deceased said, 'I just came down to see where the ball struck.' Prisoner said, 'You have sworn, or told, damn lies on me and I am going to kill you for it.' When he said this he held his pistol in both his hands and had it presented at the deceased. Deceased said something in a low tone which I could not understand. The prisoner then lowered his hands a little and raised them again and fired at deceased. The smoke of the pistol hid the deceased for a moment, and then I saw the deceased coming round the right of the prisoner, walking sidewise, staggering and hollering, 'O Lord! O Lord!' I ran a few steps toward the store and hollered for those up there to come down. I then looked back and saw the deceased fall and prisoner was standing over him, waving his pistol and saying, 'Damn you, I told you I would do it.' Prisoner was four or five steps from the deceased when he fired. I went

(870) back to the store and when I got there I looked back and saw the prisoner running away from the deceased and other persons. We followed him and overtook him about 400 yards from deceased. When we first approached him he turned and threw up his pistol towards us, when some one said to him 'If you don't drop that pistol we will shoot you." Prisoner then dropped his pistol on the ground and we arrested him. I said to prisoner when we arrested him, 'You have killed Tom Edge; don't you know you will be hung for it?' He replied, 'Yes, I know I have killed him; I did it because he swore a damn lie against me; and if it is right to hang me let them hang me'."

"I have known the prisoner ever since I could recollect; think he knew right from wrong when he killed Edge, and always did when I was with him."

On cross-examination witness said: "I heard no disturbance between prisoner and deceased that day; prisoner did not seem to be mad when he came down toward the turkey, but did seem to be mad when he told deceased not to go to the turkey. The prisoner was pretty drunk. I have seen him drunk a great many times before and seen him cut up when drunk."

Another witness, after testifying to substantially the same facts, said: "I saw the prisoner before the homicide drink something from a bottle. He seemed to be drunk. I have seen him drunk a few times, and when drunk he generally cuts up, talks loud and sems to be overbearing. He was hollering and cursing the day of the homicide. I have known him ever since I can recollect. I think at the time of the homicide he knew right from wrong."

There was much testimony introduced, *pro* and *con,* touching the defendant's sanity. It appeared that some time prior to the homicide he had received a blow upon the head which had for a considerable time thereafter seriously affected the brain; that when sober he was rational and knew right from wrong, but was easily excited by liquor, and
(871) that several of his near relatives were persons of unsound mind.

The counsel for the prisoner submitted in writing to his Honor the following questions for the jury, to wit:

"If the defendant drew his pistol and presented it, not intending to shoot the deceased, but to drive him away by a show of force, and by the careless and negligent handling of the pistol by the defendant it accidently fired and killed the deceased it is but manslaughter; and in investigating this case the jury must consider the want of provocation, the absence of malice, the friendly relations of the defendant and the deceased immediately preceding the act, and the mental and physical condition of the defendant at the time; and while drunkenness is no mitigation for crime, it may be taken into consideration by the jury in this

case as a circumstance to be considered by the jury for what it is worth in determining the defendant's claim that the shooting was accidental.

His Honor declined to give these instructions, but among many other things not excepted to he told the jury that if they believed from the testimony in the case that the prisoner slew the deceased in the manner, with the weapon and under the circumstances testified to by the State's witnesses, then there was no evidence for them to consider of an accidental killing, nor was there any evidence before them of any justification or excuse for the killing, and they should find the prisoner guilty of murder or nothing, according as they should find other facts, about which he should afterwards instruct them.

He further told the jury "drunkenness was no excuse or mitigation of crime, though insanity or unsoundness of mind, produced as the secondary effect of long and continued or excessive drinking of spirituous liquors, was, if it so deprived a man of reason that he could not perceive the moral qualities of actions or tell right from wrong, a complete excuse for anything he did, the same as if it had been produced by any other cause or come from the visitation of God. And, (872) further, that if the prisoner was so mentally and physically constituted by nature, or became so constituted by a blow or blows rendered on the head several years before the homicide, that when he drank liquor he lost his reason and became furious and unable to control himself, and knowing this voluntarily drank liquor at the time of the homicide, and by the immediate effects of the liquor became frantic, even to the extent that for the time being he did not know right from wrong, and in this condition slew the deceased without justification or excuse, he would be guilty of murder, and they should so find; but if they found that at the time of the homicide the prisoner, by reason of blows received on the head years before, or from the remote and secondary effects of excessive drinking, or by a hereditary taint, or the visitation of God, was so far of unsound mind that he could not judge of the moral quality of the act which he did, or know whether it was right or wrong, then they should acquit the prisoner.

There was a verdict of guilty of murder, and from the judgment pronounced thereon the defendant appealed.

Attorney-General and J. F. Morphew for the State.
No counsel for defendant.

MERRIMON, C. J. The court very properly declined to give the jury special instructions prayed for by the prisoner, because there was no evidence produced on the trial tending to prove that he slew the deceased by accident, nor was there evidence in any aspect of it that could

mitigate the offense to manslaughter. It was clearly a case of willful and unprovoked murder, unless the prisoner was insane at the time of the homicide. The deceased had given him no legal provocation; indeed, no provocation at all. He said to the deceased just before he fired the fatal shot: "You have sworn or told damn lies on me, and I am going to kill you for it," and very shortly afterwards a witness said to
(873) him he had killed the deceased, and he replied, "Yes, I know I have killed him; I did it because he swore a damn lie against me, and if it is right to hang me, let them hang me." This was evidence of motive and express malice.

The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trail, nor upon a supposed state of facts. Such instructions are not pertinent, and they generally tend to mislead or confuse the jury, more or less. The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable. If such impertinent instructions should prejudice the prisoner he would be entitled to a new trial; if they should prejudice the prosecution, there would be no remedy. *S. v. Collins,* 30 N. C., 407; *S. v. Lambert,* 93 N. C., 618.

The evidence tended thoroughly to prove that the prisoner was not an insane person, and particularly that he was not insane at the time he slew the deceased, but the court gave him the full benefit of the evidence offered and received, tending—not strongly—to prove insanity. The instructions given the jury in this aspect of the case were very favorable to the prisoner—certainly they were not such as he could justly complain of. Drunkenness and mere drunken excitement and rage constitute no excuse for crime. *S. v. Potts,* 100 N. C., 457.

Cited: *S. v. Kale,* 124 N. C., 819; *S. v. Murphy,* 157 N. C., 617; *Irvin v. R. R.,* 164 N. C., 18.

(874)

THE STATE v. SAMUEL HALFORD AND ROBERT P. WILLIS.

Indictment—Arrest of Judgment—Amendatory Statute—Burglary—Felonious Intent.

1. In an indictment for burglary it was charged, and the evidence established the fact, that the crime was committed on 11 November, 1888; on 11 March following an act of the General Assembly (ch. 434, Laws 1889) was ratified, which materially altered the existing law in respect of the crime of burglary, but it contained a provision that it should "not apply to any

crime committed before its ratification." *Held,* that the indictment sufficiently alleged the fact that the offense was perpetrated prior to the passage of the amendatory act, and that the court committed no error in refusing to arrest judgment. *S. v. Wise,* 66 N. C., 120, distinguished.

2. An averment in an indictment for burglary, that the breaking was with the intent to commit larceny, is supported by proof that the entry was made with a purpose to commit a robbery.

INDICTMENT for burglary, tried at Spring Term, 1889, of RUTHERFORD, *Clark, J.,* presiding.

The indictment charged the prisoners with the crime of burglary of a dwelling house. They severally plead not guilty. On the trial of this plea the jury rendered a verdict of guilty. They moved in arrest of judgment, assigning as cause that referred to in the opinion of the court. The motion was denied, and they excepted. There was judgment of death against them, and they appealed.

Attorney-General and M. H. Justice for the State.
H. A. Gudger and J. A. Forney for defendants.

MERRIMON, C. J. The statute (Laws 1889, ch. 434) ratified 11 March, 1889, makes important and material changes and modifications of the common law and the statutes of this State in respect to the crime of burglary. It prescribes that "If the crime be committed in a dwelling house or in a room used as a sleeping apartment in any (875) building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time the commission of said crime, it shall be burglary in the first degree. Second. If the said crime be committed in a dwelling house or sleeping apartment, not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house, or in any building not a dwelling house, but in which a room is used as a sleeping apartment, but not actually occupied as such at the time of the commission of said crime, it shall be burglary in the second degree." It further prescribes that "any one so convicted of burglary in the second degree shall suffer imprisonment in the State prison for life, or for a term of years in the discretion of the court." It further prescribes "that when the crime charged in the bill of indictment is burglary in the first degree the jury may render a verdict of guilty of burglary in the second degree, if they deem it proper so to do"; and it is further enacted "that this act shall not apply to any crime committed before its ratification, but as to such crimes the law shall remain such as it was at the time of the commission of the crime."

The prisoners moved in arrest of judgment, assigning as ground of the motion that the indictment failed to charge with sufficient certainty that

the offense charged was perpetrated before the enactment of the statute cited above, and, therefore, the court could not see from the record whether the offense was committed before or after such enactment, and could not determine the degree of the crime or the kind or measure of the punishment to inflict.

We are of opinion that the motion cannot be sustained. The statute took effect on 11 March, 1889, and it did not apply to or effect offenses of a date prior to that time. The indictment charges expressly that the offense was committed on 11 November, 1888. This charge is not (876) as explicit and formal as it might and perhaps strictly ought to be as the time so charged is not generally required to be proven certainly as laid. It would have been better—more satisfactory—to have charged that "before 11 March, 1889, to wit, on 11 November, 1888," etc.; still the court could see from the charge as made that the statute cited did not affect it, and it could certainly direct the jury as to the evidence, its bearings and application; and also determine with certainty the kind and measure of punishment to impose. *Rex v. Brown,* 22 E. C. L., 277.

This case is unlike that of *S. v. Wise,* 66 N. C., 120, cited and relied upon by the prisoners' counsel. In that case the indictment charged the offense to have been committed before the enactment of the amendatory statute there in question, the evidence produced proved that it was committed *after* that time, and this Court decided that the court below could no determine intelligently whether the punishment ought to be that prescribed by the first or by the amendatory statute, and arrested the judgment on that account. And in *S. v. Massey,* 97 N. C., 465, also cited, the offense was committed *before* the enactment of the amendatory statute, and the indictment charged that it was committed afterwards; if it had charged the offense as having been committed *before* that time the case would have been very different from what it appeared to be. In the present case the indictment charged and the evidence proved that the offense was committed *before* the amendatory statute took effect.

The indictment charged an intent to commit a larceny. After the verdict, not before, on the motion for a new trial it was assigned as error that the court had failed to instruct the jury that if they believed the purpose was to commit a robbery then they should acquit. If (877) this objection had merit it came too late, but it could not have availed the prisoners if it had been made in apt time. To rob implies to steal by force. *S. v. Cody,* 60 N. C., 197.

Cited: S. v. Fleming, 107 N. C., 909; *S. v. Brown,* 113 N. C., 647; *S. v. Coley,* 114 N. C., 883; *Fields v. Brinson,* 179 N. C., 282.

THE STATE v. W. T. MASSEY.

Costs—Criminal Proceedings—Witnesses—Constitution—Discretion.

1. The statute (Code, sec. 747) which provides that, when a defendant in a criminal action shall be acquitted, a *nol. pros.* entered, or judgment arrested, the court shall tax the county with the costs of the witnesses "necessary" for the defendant, does not extend to the case where the indictment is *quashed.*
2. The provision in the Constitution (Art. I, sec. 2) which forbids that any defendant shall be taxed with the costs of necessary witnesses summoned by him, unless found guilty, does not, *ex vi termini,* authorize such costs to be taxed against the county; it only exempts the acquitted defendant from any liability therefor.
3. The discretion conferred upon the court, in sec. 733, Code, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable.
4. *It seems* that, under the law as it now stands, an acquitted defendant's costs for witnesses can be taxed against a county only in those cases where a private prosecutor may be taxed with them.
5. While not more than two witnesses to a single point may be taxed against the *losing* party in a civil action, the liability of the party who summoned them for their compensation is not abridged.

MOTION by the defendant to tax the county with the fees and mileage of a number of witnesses, summoned for the defendant, heard before *Connor, J.,* at Fall Term, 1889, of LINCOLN.

His Honor refused to grant the motion, and the defendant and the witnesses named appealed. (878)

W. A. Hoke and W. J. Montgomery for the appellant.
Attorney-General contra.

CLARK, J. The indictment in this case was quashed and the defendant thereupon moved that his witnesses be taxed against the county. The court denied the motion upon the ground that this was not a case in which the statute authorized it to make such order.

The court is authorized, under the Code, sec. 733, in its discretion, to direct that witnesses shall receive no compensation or only a part of that which the law authorizes to be paid. The exercise of such discretion is not reviewable. It is not unfrequently the duty of the judge to take such action. The taxpayers should be protected against the payment of unnecessary witnesses and in improper cases. Judges and solicitors should carefully scrutinize the bills of costs, which make the trial of the criminal docket so very expensive. Code, secs. 733, 744, 748 and 1204.

The scrutiny and approval of bills, of costs by them is not a mere matter of form, but is required by the statute for the protection of the public and defendants. The decision in this case, however, is put upon a want of power in the court to make the order, and that presents a question for review.

At common law, in civil cases, neither party recovered costs, and each side paid its own witnesses (*Costin v. Baxter,* 29 N. C., 111); and in criminal actions the sovereign neither paid or recovered costs. *S. v. Manuel,* 20 N. C., 144. In such cases the defendant's witnesses looked to him for payment, whether acquitted or convicted, but the State's witnesses received no compensation in either event. Their attendance without recompense was one of the duties of citizenship, as still
(879) is the case with jurors summoned on a special venire, if not sworn of the panel, with workers on the public roads and the like, and with witnesses summoned by the State in excess of the number the law authorizes to be paid, or in excess of the number the court in its discretion may adjudge to be paid. Till a recent statute witnesses in criminal cases before a magistrate received no pay and still in no case from the county, and no mileage is allowed. Code, secs. 895, 3756. The duty of attending court in obedience to a subpœna is incident to citizenship, as in feudal times the duty of "attending the Lord's Court" was incident to fealty. Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court in the cases, and only within the limits authorized by the statute.

Though, at common law, the State's witnesses in no event received compensation, gradually, and without statutory enactment, a custom grew up in this State of taxing them against the defendant, if convicted, as a part of the *punishment* adjudged against him. This is first recognized, incidentally, in the act of 1762 (Swan's Revisal, 299), and next in the act of 1778, ch. 4 (Iredell's Revisal, 363). There remained no provision for the State's witnesses where the prosecution failed, and it was found necessary to hold (in *S. v. Dancy,* 7 N. C., 223, and *Whithed, ib.*), that in such event the defendant "was not liable to pay the State's witnesses, though he was bound, of course, for payment of his own." As to the State's witnesses in such contingency the act of 1804, ch. 665, and succeeding statutes, now constituting secs. 739 and 740 of the Code, provided for their being paid by the county *half fees,* except in certain cases in which they are allowed full fees. This, however, is subject to the limitation in secs. 743, 744 and 745, as to the number of witnesses to be allowed payment, and to the discretion vested in the court, by sec. 733, to reduce the number of witnesses, of their compensation, be-
(880) low that authorized by the statute.

As to defendant's witnesses, the Constitution of 1868, Art. I, sec. 11, provides that defendants shall not be compelled to pay *necessary* witness fees, or other court costs, unless found guilty. This, it seems, left defendants still liable for payment of such witnesses as they may summon who are not necessary for their defense. As to their necessary witnesses, the constitutional provision did not require them to be paid by the public, but merely deprived them of their common law right to look to the defendant for payment, and placed them, in the absence of some legislative enactment, upon the footing all State's witnesses formerly held, and some still hold, of serving without compensation. The Legislature, in 1881 (Code, sec. 747), remedied this, in certain cases, by providing "when the defendant shall be acquitted a *nolle prosequi* entered, or judgment arrested," upon a proper certificate, the court shall tax the necessary witnesses of the defendant, duly subpœnæd and in attendance, against the county, if no prosecutor is taxed with the costs, but only then with the limitations as to number and compensation applicable to State's witnesses in like cases. The statute is carefully guarded, and shows the legislative intent to restrict payment by the county of defendants' witnesses to the cases specified, and their number and amount of compensation.

The court below rightly held that there is no statute authorizing the court to tax defendants' witnesses against the county when the "bill is quashed." If this is a *casus omissus* the remedy can only be found in a legislative enactment. It would seem, however, intentional for the statute of 1799 (Code, sec. 737), authorizing the court to tax prosecutors with costs, does not extend to cases in which the bill is quashed. In *Office v. Gray,* 4 N. C., 307, the court gives the reason that the bill can only be quashed if the offense be not indictable, or is not set forth with legal precision, and the court could not, therefore, find that the prosecution was frivolous or malicious. It seems, from the simi- (881) larity of language used in secs. 737 and 747, that the intention was to allow defendant's witnesses to be taxed against the county only in the cases in which they could be taxed against a prosecutor. As to State's witnesses, the language is broader, and provides for their payment in all cases in which "the defendant is discharged" (Code, sec. 740); subject, of course, to the restrictions above cited.

It may be noted here that in civil cases witnesses, unless summoned on behalf of the State or a municipal corporation, need not attend but one day if their compensation is demanded and refused. Code, sec. 1368. While in such cases not more than two witnesses, summoned by the successful party to prove a single fact, can be taxed against the party cost

(Code, sec. 1370), this does not abridge the right of all the witnesses to recover compensation against the party summoning them.

Affirmed.

Cited: *In re Smith,* 105 N. C., 170; *Merrimon v. Comrs.,* 106 N. C., 372; *Cureton v. Garrison,* 111 N. C., 272; *Smith v. Arthur,* 116 N. C., 874; *S. v. Jones,* 117 N. C., 773; *S. v. Horne,* 119 N. C., 855; *S. v. Shuffler, ib.,* 868; *Guilford v. Comrs.,* 120 N. C., 26; *Clerk's Office v. Comrs.,* 121 N. C., 30; *S. v. Ray,* 122 N. C., 1097; *S. v. Hicks,* 124 N. C., 837; *Sitton v. Lumber Co.,* 135 N. C., 541; *S. v. Wheeler,* 141 N. C., 777; *S. v. Saunders,* 146 N. C., 598; *Chadwick v. Ins. Co.,* 158 N. C., 381; *S. v. Means,* 175 N. C., 822, 823.

THE STATE v. DICK BRADBURN.

Larceny—Robbery—Intent.

Secrecy is not an indispensable element to the felonious intent necessary to constitute the crimes of larceny or robbery.

INDICTMENT for robbery, tried at Fall Term, 1889, of CATAWBA, *Shipp, J.,* presiding.

There was a verdict of guilty, and from the judgment thereupon the defendant appealed.

Attorney-General for the State.
F. L. Cline for defendant.

(882) SHEPHERD, J. The only question discussed in this Court by the defendant's counsel is whether there was sufficient evidence of a felonious intent. The argument is based upon *S. v. Deal,* 64 N. C., 270, and *S. v. Sowls,* 61 N. C., 151, where it is said that secrecy is an indispensable element in larceny, with an intimation that it is also necessary in robbery. These views have been overruled by *S. v. Powell,* 103 N. C., 424, in which the subject is treated at some length.

The defendant and another enticed a boy of twelve years of age into the woods near the highway, knocked him down with a club and took his money. After a dispute over the spoils the defendant proposed to kill the prosecutor and put him on the railroad track, for the purpose

of concealing the crime. If these facts do not constitute robbery we are at a loss to understand how such an offense can ever be proved.

Affirmed.

Cited: S. v. Nicholson, 124 N. C., 824.

THE STATE v. P. D. GRIGG.

Slander—"Innocent Woman"—Evidence.

1. The term "innocent woman," employed in the statute (Code, sec. 1113) making it a misdemeanor to attempt to destroy the reputation of virtuous women by false declarations in respect to their chastity, means a woman who, at the time the alleged slanderous charge was made, and at the time of the trial therefor, was chaste and virtuous.

2. The fact that such woman at some former period in her life had departed from the path of virtue, while admissible in evidence on the question of her character at the trial, will not *per se* entitle a defendant, indicted under the statute, to an acquittal; on the contrary, if the prosecutrix has satisfied the jury that she has reformed and led an exemplary life, she is entitled to the protection of the law.

3. *S. v. Davis,* 92 N. C., 764, commented upon and explained.

CRIMINAL ACTION for slander, tried at October Term, 1889, of (883) CLEVELAND, *Connor, J.,* presiding.

There was evidence tending to prove the utterance of the slanderous words and that they were false.

Mrs. Mattie C. Cline, the prosecutrix, testified that she had been married twelve years and that no person other than her husband had ever had carnal intercourse with her; that her first child was born six months after her marriage and that her husband was the father of it; that she had carnal intercourse with her husband before their marriage and during their engagement; that she had never had such intercourse with Caleb Peeler or any other man except her husband.

David G. Cline the husband of the prosecutrix, testified that he had had intercourse with his wife repeatedly six months before and up to the time of his marriage; that he was the father of her child; that he was engaged to be married to her for three years.

Several witnesses testified that although the facts with reference to the birth of her first child were known the general character of the prosecutrix for virtue, truth and honesty was good.

The defendant did not introduce any testimony, and requested the court to charge the jury that they should return a verdict of not guilty for that, upon the testimony of Mrs. Cline and her husband, the prosecutrix was not an "innocent woman" within the meaning of the statute.

The court declined to so instruct the jury, and charged them that if they were fully satisfied that the prosecutrix had never had sectual intercourse with any person other than her husband, and that she had, with the exception of what occurred between her husband and herself before marriage, been a virtuous woman, she was an innocent woman within the meaning of the statute.

There was a verdict of guilty, and from the judgment thereon (884) the defendant appealed.

Attorney-General for the State.
R. McBrayer for defendant.

CLARK, J. Slander was formerly cognizable only on the civil side of the docket by an action for damages. The law under which the defendant is indicted is one of manay recent statutes making indictable acts which were previously punishable civilly only. These statutes, it is generally understood, have been passed in consequence of the decision in *Dellinger v. Tweed,* 66 N. C., 206, in which it was held (by a divided court, *Pearson, C. J.,* and *Rodman, J.,* dissenting) that the homestead and personal property exemptions were valid against *torts.*

In the absence of the civil remedy for private wrongs thus taken away statutes became necessary to make them indictable as if public wrongs. In construing the statute we are left entirely to the precedents in our own reports, as we believe no act of the like tenor has been adopted in any other State.

The statute (Code, sec. 1113) under which the indictment is brought, was originally adopted in 1879 (ch. 156), and to it was prefixed the same preamble as that to the act of 1808 (now the Code, sec. 3763), which made the same language *actionable.* The similarity of the two statutes and the identity of the evil to be remedied would seem to indicate an intention to give the woman aggrieved a remedy by indictment whenever she could have sustained an action for damages. We think, therefore, the more accurate and just definition of the words "innocent woman" is that given by *Ashe, J.,* in *S. v. Aldridge,* 86 N. C., 680, in which he defines the meaning to be a "chaste and virtuous woman." If the evidence is sufficient to satisfy the jury, beyond a reasonable (885) doubt, that at the time the words were spoken and at the time of the trial the prosecutrix was a chaste and virtuous woman, exemplary as to virtue in life and conduct, and that the defendant, in a

wanton and malicious manner, by false charges of incontinency, attempted to destroy her reputation, she is entitled to the protection intended to be given by this law. Evidence offered to show a slip from virtue at some former period by a woman who has since been altogether exemplary would be competent, as tending to shake the testimony of her subsequent good character. In *S. v. Davis,* 92 N. C., 764, the court affirmed, for the first time, a charge of the judge below in which he defined an "innocent woman" to be one "who, had never had actual illicit sexual intercourse with any man." In doing so the court intimates strongly that this rule was too stringent for the prosecutrix, but says *"the defendant has no cause to complain"*—that is, that while a woman who had never had illicit sexual intercourse with any man is an innocent woman, still, one who has had such intercourse but who has repented thereof and become exemplary, chaste and virtuous might also be an "innocent woman" within the meaning of the statute. The definition of an "innocent woman" given in *S. v. Davis* has been approved since in *S. v. Brown,* 100 N. C., 519, and *S. v. Hinson,* 103 N. C., 374, but in both instances the objection to that definition came from the defendant. All three cases are, therefore, simply authority that no conduct less than actual illicit sexual intercourse will deprive a woman of being an "innocent woman" within the meaning of the statute. Equally with *S. v. Davis* do the two supporting cases leave open the question whether a woman who falls short of that rule, but having at sometime had such intercourse, but who comes within the definition of an "innocent woman" laid down in *S. v. Aldridge, supra, i. e.,* a "chaste and virtuous woman" is entitled to the protection of law against attempts to (886) destroy her reputation by false imputations of unchastity, wantonly and maliciously made.

We assent to the strong intimation given in *S. v. Davis, supra,* and do not think it was meant "to exclude from the protection of the law every woman who has at some time of her life made *a slip in her virtue.* Every man, in the course of his life, must, have had instances brought to his knowledge of unfortunate females who have at some period of their lives been led from the path of virtue by the wiles of a seducer, who have afterwards reformed and by a course of exemplary conduct established for themselves a character for chastity above all reproach. Shall it be said that these unfortunates are not to be allowed a *locus penitentiate,* and are to be subject forever to the vile tongue of the maligner and slanderer?"

His Honor's charge in this case presents this point for decision for the first time. As given it was not in conflict with any precedent in this Court, and we think he was correct in instructing the jury that if the prosecutrix had been a virtuous woman since the illicit intercourse prior

to her marriage with one who has since become her husband, she was an "innocent woman" within the purview of the statute, and not subject to have her peace and reputation destroyed with impunity by false charges, if wantonly and maliciously made, of present unchastity.

Affirmed.

Cited: S. v. Ferguson, 107 N. C., 849, 850; *S. v. Misenheimer,* 123 N. C., 763; *S. v. Foy,* 131 N. C., 806.

(887)

THE STATE v. D. H. FARMER.

Indictment—Election of Counts—Physicians—Druggists.

1. The court has the power to compel the prosecutor to elect, before the close of the evidence for the State, upon which count in the indictment he will rely.
2. It is not necessary to aver in an indictment for a violation of chap. 215, sec. 4, Laws of 1887, that the physician who is charged with giving a false prescription was a "reputable" physician; nor is it necessary that an indictment against a druggist under that statute should contain such an averment, it being a matter of defense.
3. In an indictment against a physician under the statute it should be distinctly set out, not only that the prescription was false and fraudulent, but further, in what particulars such falsity and fraud consisted.

INDICTMENT against a physician (drawn under sec. 4, ch. 215, Laws 1887) for giving a false and fraudulent prescription for liquors, tried at Fall Term, 1889, of TRANSYLVANIA, before *Clark, J.*

There were three counts in the indictment. The material portions of the first count were as follows: "That D. H. Farmer, on 1 April, 1889 with force and arms, in Transylvania County, unlawfully and willfully did give to one G. H. a false and fraudulent prescription for spirituous liquors, he, the said D. H. Farmer, being then and there a practicing physician, contrary to the form of the statute," etc.

The second and third counts were in the same form, but charged a sale to a different person in each count, making charges of three separate sales in the three counts.

The defendant moved to quash the indictment on four grounds:

1. That it was bad for duplicity in that it charged a false prescription to three different persons.

2. That it did not charge that the defendant was a reputable (888) physician.

3. That it did not charge the name of the druggist to whom the prescription was given.

4. That it did not set out wherein the prescription was false and fraudulent.

The court, upon the first ground, held the bill bad for duplicity under *S. v. Cooper,* 101 N. C., 684, but told the solicitor he could make his election and enter a *nol. pros.* before the defendant was called upon to plead and send other bills as to the counts *nol. prossed.*

The solicitor, being of the opinion that he could not be called upon to make his election before the State closed its evidence, declined to enter a *nol. pros.* as to any of the counts at this stage.

The court overruled the second ground of the motion to quash.

Upon the third and fourth grounds set out by the defendant, the court being of the opinion, under *S. v. Watkins,* 101 N. C., 702, that the charge in the bill was not sufficiently full and specific, told the solicitor he could send a new bill remedying those defects, and in the meantime the court would hold the defendant.

The solicitor declined to send a new bill. The court thereupon quashed the bill of indictment and discharged the defendant, from which judgment the solicitor, in behalf of the State, appealed.

Attorney-General for the State.
No counsel for defendant.

AVERY, J., after stating the facts: The judge below had the power, in any view of the case, to compel an election or quash the indictment, treating the charges of sales to different persons as distinct counts. *S. v. Cooper,* 101 N. C., 684; *S. v. Parish, ante,* 685. There was (889) no error, therefore, in the enforcement by the court of election before the defendant should be compelled to plead.

We concur, too, with his Honor in the view that the law does not impose upon the State the burden of charging in the indictment and proving on the trial that the defendant was a "reputable physician," as well as that he gave a false and fraudulent prescription. The statute (ch. 215, sec. 4, Laws 1887) casts upon a druggist, indicted under its provision, the burden of showing (if he would excuse himself from a sale that is *prima facie* in violation of law) that he sold for *bona fide* medical purposes, and upon the prescription of a practicing physician, known to such druggist to be of reputable standing in his profession, or recommended as such by a physician who is so known, and that the prescription was in writing, signed by such physician. A druggist, when indicted under this statute, must prove, but the State is never required to aver in the indictment the character of the physician giving the prescription.

The transaction on which the indictment was founded should also be sufficiently identified by its terms to insure to the accused the benefit of a plea of former acquittal or conviction, if indicted a second time for the same offense. *S. v. Pickens,* 79 N. C., 652; *S. v. Burns,* 80 N. C., 376; *S. v. Stamey,* 71 N. C., 202; *S. v. Watkins,* 101 N. C., 702. We think, therefore, that all of the counts of the indictment were fatally defective in not charging that the prescription was false and fraudulent.

It is of the essence of the offense created by the law (sec. 4, ch. 215, Laws 1887) that the prescription should be false or fraudulent. The indictment should set out distinctly not only that the prescription was either false or fraudulent, but in what the falsehood or fraud consisted, as that the prescription was intended to convey and did convey the idea that in the opinion of the defendant the person to whom the prescription
(890) was given was sick and was in need of the liquors prescribed as a medicine; whereas, in fact and in truth, the said person (prescribed for) was not sick and did not need the spirituous liquor as a medicine. The prescription must be shown to be false or fraudulent (either being sufficient), and the person indicted should know before he is compelled to plead whether he is to meet a charge of giving a false prescription, or whether he is accused of giving the prescription, knowing that it was false and intending to deceive or to evade the law. *S. v. Holmes,* 82 N. C., 607; *S. v. Pickett,* 78 N. C., 458; *S. v. Fitzgerald,* 18 N. C., 408; *S. v. Watkins, supra.* The fraud or falsehood should be so distinctly charged as to give the defendant notice of the charge against him and enable him to prepare his defense, and also enable the court to see whether fraud or falsehood is in fact charged, that the defendant can be held to answer.

Affirmed.

Cited: *S. v. Harris,* 106 N. C., 687; *S. v. Davis,* 111 N. C., 733; *S. v. Smith,* 117 N. C., 810; *S. v. Tisdale,* 145 N. C., 424.

THE STATE v. HARVEY COOPER.

Criminal Proceedings—Jurisdiction.

The fact that a grand jury made a presentment of one of those offenses of which a justice of the peace has original exclusive jurisdiction—if exercised within six months after its commission—before the period when the concurrent jurisdiction of the Superior Courts arose, will not defeat the jurisdiction acquired by the latter on an indictment preferred after the expiration of the six months.

STATE *v.* COOPER.

INDICTMENT for disturbing a school (under sec. 2592 of the Code), tried under *Merrimon, J.*, at the Spring Term, 1889, of GRAHAM.

The offense was committed on 27 December, 1887, and a presentment of it was made by the grand jury at a term of the court (891) begun 4 June, 1888, within six months afterwards. The indictment was found at a term begun on 27 October, 1888. There was no evidence that any justice of the peace had taken cognizance of the case before it was tried at said Spring Term, 1889. On the trial there was evidence of such disorderly conduct on the part of the defendant as amounted to a disturbance of the school.

But after the testimony was offered the defendant moved to dismiss on the ground that the punishment prescribed by said section of the Code was a fine not exceeding fifty dollars, or imprisonment for not more than thirty days, and the presentment having been made within six months after the offense was committed it was then exclusively within the jurisdiction of a justice of the peace, and as the Superior Court had no jurisdiction to try then, it had not since acquired the right.

Attorney-General for the State.
No counsel for defendant.

AVERY, J., after stating the facts: The prosecution of a criminal action is begun when the grand jury presents in court a paper, charging that a person mentioned therein committed an offense, designated by its technical name, or by a description equivalent to giving such name, and the presentment so made is recorded in the minutes of the court. If the clerk neglects to enter it the court may subsequently cause a record of the presentment to be made, or of the time when it was brought in by the grand jury. In determining the question whether a prosecution is barred by the statute of limitations it is proper to estimate the time that elapsed between the commission of the offense and the bringing into court of the presentment. *S. v. Cox,* 28 N. C., 440; Code, sec. 1177.

An indictment can, for the purpose of preventing the bar of (892) the prosecution by the lapse of time, be connected, at the option of the solicitor, by proof with a previous presentment for the same offense; but it does not follow that the defendant can do the same thing in order to oust the jurisdiction of the court.

When the grand jury unadvisedly made the presentment within six months after the offense was committed the court of a justice of the peace had an exclusive right to try it, but the concurrent jurisdiction of the Superior Court attached immediately on the expiration of that period and before the indictment was found. Code, secs. 892 and 922, provides that the Superior Court shall have original jurisdiction "of all

offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace sall not within six months after the commission of the offense proceed to take official cognizance thereof." No justice of the peace had taken cognizance of this case so far as the testimony shows, up to the time of trial, and the bar of former acquittal or conviction was not pleaded or relied on.

But it is contended that the inadvertent act of the grand jury in making the presentment in June, 1888, could be used by the defendant to defeat the jurisdiction of the Superior Court on the trial of any indictment found within two years, and would forever prevent the punishment of the defendant unless a prosecution should be instituted in a justice's court. The presentment in the Superior Court, if made within six months, of an offense for that time exclusively cognizable in a justice's court, is like an indictment for the same utterly void for all purposes whatever. It cannot, therefore, in any way affect the validity of a prosecution subsequently instituted in accordance with law.

Affirmed.

Cited: *S. v. Carpenter,* 111 N. C., 707.

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(893)

THE STATE v. J. H. WHEELER ET AL.

Fornication and Adultery—Evidence—Examination of Witness.

1. Evidence of the conduct of defendants, indicted for fornication and adultery, before as well as after a former conviction or acquittal of the same offense, is competent as corroborative or explanatory of other testimony of their relations since.
2. Where a witness is introduced for the purpose of proving character, and declares that he does not know it, he should be stood aside; the party introducing him has no right to cross-examine him on that subject.

INDICTMENT for fornication and adultery, tried before *Moore, J.,* at July Term, 1889, of BUNCOMBE criminal court. Verdict, judgment and appeal by defendants.

It was in evidence that the same defendants had been convicted and sentenced for this crime at July Term, 1888, of Buncombe Inferior Court. A witness for the State was permitted to testify to acts and conduct of defendants tending to show illicit intercourse both before and since such former conviction. The defendants objected; objection overruled; exception. The court instructed the jury that they could not con-

sider the acts and conduct of defendants prior to their former conviction except for the purpose of determining the character of the acts committed by them since; that the guilt or innocence of the defendants depended solely upon their conduct since such conviction.

The defendant Guthrie had been examined as a witness in her own behalf. The defendants then introduced as a witness one Sarah Clark, and asked her if she knew the general character of defendant Guthrie. She replied that she did not. The defendants then asked the witness if she knew the general character of said Guthrie for truth and veracity.

On objection by the State the court excluded the question, and defendants again excepted. (894)

Attorney-General for the State.
No counsel for defendants.

CLARK, J. The evidence tending to show acts of illicit intercourse prior to the former conviction was competent as corroborative evidence and the court instructed the jury that it was only admitted as such. *S. v. Kemp,* 87 N. C., 538; *S. v. Pippin,* 88 N. C., 646; *S. v. Guest,* 100 N. C., 413; 2 Greenleaf Ev., sec. 47.

When the witness answered that she did not know the general character of Guthrie she should have been stood aside. The subsequent question was rightly excluded. A party has no right to cross-examine his own witness. *S. v. Perkins,* 66 N. C., 126; *S. v. Parks,* 25 N. C., 296; *S. v. Gee,* 92 N. C., 756.

No other errors are assigned and none appear upon the face of the record.

No error.

Cited: S. v. Stubbs, 108 N. C., 776; *S. v. Coley,* 114 N. C., 883; *S. v. Raby,* 121 N. C., 683; *Kinney v. Kinney,* 149 N. C., 326.

THE STATE v. JOHN E. McLAIN.

Escape—Officer—Evidence—Indictment—Judge's Charge.

1. The statute (Code, sec. 1022) providing for the punishment of officers permitting escapes, contemplates two kinds of escape: One the result of *negligence,* the other the *willful* act of the officer in promoting the escape.

2. It is not necessary, in an indictment for a negligent escape, to charge that it was willfully or unlawfully done—it is sufficient if the act is alleged to have been "negligently" done.

3. Where a bill had been sent to the grand jury against three persons, but was found true as to only two, upon which a *capias* was issued, and one of the parties indicted was arrested and permitted to escape. *Held*, no variance that the indictment for escape described the process as issuing upon an indictment against the two persons as to whom it was returned a true bill, instead of the three against whom it was drawn and sent.

4. Where there is no conflict of evidence, or variant aspects of the case, it is not error to charge the jury that, if they believe the testimony, the defendant is guilty.

(895) INDICTMENT, tried at Fall Term, 1889, of JACKSON, *Clark, J.*, presiding.

The indictment charged that the defendant, while sheriff of the county of Jackson, duly had in his custody, by virtue of proper process, a person named therein, charged with a misdemeanor, and that while such person was so in his custody he "was unlawfully and negligently permitted to escape and go at large, whithersoever he would," etc.

Upon a verdict of guilty the defendant moved in arrest of judgment upon the grounds: (1) Because the bill of indictment did not charge that the escape was "willful and negligent," but merely "negligent and unlawful"; (2) because the bill of indictment charged that the *capias* against H. C. Hooper had been issued upon an indictment against J. C. Hooper and Hill Hooper; whereas, the solicitor, according to the evidence, had drawn and sent a bill against J. C. Hooper, Hill Hooper and W. M. Hooper, upon which the grand jury had returned the bill into court endorsed, "A true bill as to J. C. Hooper and Hill Hooper, and not a true bill as to W. M. Hooper."

The motion was denied, and the defendant excepted.

It was assigned as error that the court instructed the jury that "they should find the defendant guilty" if they believed the evidence. There was judgment against the defendant, from which he appealed.

Attorney-General for the State.
No counsel for defendant.

(896) MERRIMON, C. J., after stating the case: The statute (Code, sec. 1022) prescribes that "when any person charged with a crime or misdemeanor, or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any *capias* issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable, jailer, *willfully* or *negligently*, shall suffer such person so charged or sentenced and committed to escape out of his custody, the

sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office and fined at the discretion of the court before whom the trial may be had," etc. Plainly the statute prescribes and intends to prescribe two distinct kinds of escape: one that is *willfully* suffered or permitted by the officers designated; the other when it is *negligently* suffered or permitted by them. The mischief to be suppressed is not single but twofold in its nature—of two distinct kinds—and hence the disjunctive "or" is used between the descriptive words "willfully" and "negligently." And escape might be willfully—on purpose—suffered; it might be negligently, carelessly, suffered. The latter is different and distinct from the former. In either case the escape is mischievous, and the purpose is to suppress both. It would be seldom that an escape would be both willfully *and* negligently suffered, and a statute intended to suppress this evil only would leave the greater and more frequent public grievance to flourish unmolested by the hand of justice. There is not the slightest reason for attributing to the disjunctive "or" the meaning of the conjunctive "and." The indictment, therefore, properly charges that the escape was negligently suffered, omitting the word willfully. The word "unlawfully" used, while unnecessary, was no more than mere surplusage. *S. v. Baldwin,* 80 N. C., 390; *S. v. Hunter,* 94 N. C., 829. (897)

The second ground of arrest of judgment assigned is without force in any aspect of it. The indictment, strictly speaking, was against only two persons as to whom it was found "a true bill." As to the third party, there was no indictment. Strictly, the indictment was but a simple bill until the grand jury presented it, a true bill, then, and not until then, it became, properly, an indictment. *S. v. Ivey,* 100 N. C., 539. Moreover, if there had been a substantial variance between the charge and the proof, this could not be taken advantage of by a motion in arrest of judgment. This motion must be based upon some matter appearing on the face of the record.

The objection that the court instructed the jury that they should find the defendant guilty if they believed the evidence, cannot be sustained, because it was not conflicting. There were no variant aspects of it to be submitted. It was true the defendant was guilty in law; otherwise he was not. The court did not tell the jury that they ought or ought not to believe it. It expressed no—not the slightest—opinion as to whether the evidence should be believed or not. *S. v. Vines,* 93 N. C., 493, and the cases there cited.

Affirmed.

Cited: *S. v. Jenkins,* 164 N. C., 529.

THE STATE v. JONCE WOODS.

Disposing of Mortgaged Property—Indictment—Statute.

1. Upon the trial of an indictment for unlawfully disposing of mortgaged property (Code, sec. 1089), it appeared that the defendant, in some way not known, obtained from the mortgagor the property included in the mortgage, and disposed of it without the knowledge of the mortgagee, with the intent to hinder him in the collection of his debt. *Held*, that these facts did not constitute an indictable offense.

2. If the offense consisted in the aiding or abetting of the maker of the lien to dispose of the property, or a purchaser with notice, the indictment should so charge.

3. The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) to those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts.

CRIMINAL ACTION, tried at Fall Term, 1889, of HAYWOOD, *Clark, J.*, presiding.

The indictment charges that E. L. Lunsford mortgaged a certain mare, to secure a debt specified, to John Turpin; that after the execution of that mortgage, and while the same was in force, the defendant "unlawfully and willfully, and with intent to hinder, delay and defeat the rights of the said John Turpin, sold and disposed of said mare which was embraced in said mortgage; he, the said Jonce Woods, then and there having knowledge of said lien on said mare," etc.

On motion of the defendant, the court quashed the indictment, upon the ground that it failed to charge a criminal offense, and the Solicitor for the State having excepted, appealed.

Attorney-General for the State.
No counsel for defendant.

(899) MERRIMON, C. J. The statute (Code, sec. 1089) prescribes that "If any person, after executing a chattel mortgage, deed in trust or other lien for a lawful purpose, shall, after the execution thereof, make any disposition of any personal property embraced in such mortgage, deed in trust, or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending, and every person with a knowledge of the lien, buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property with intent to hinder, delay or defeat the rights of any person to

whom or for whose benefit any such deed or lien made, shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court."

The statutory provision creates three distinct classes of offenses: First, such persons as make the lien, and after the same is made make any disposition of the personal property or any part thereof embraced by it, with the intent specified. Secondly, persons who buy such property with a knowledge of the lien. Thirdly, persons who assist, aid or abet the unlawful disposition of the same with the intent specified. The first class embraces only persons who make the lien. The language used to designate this class is, "If any person, after executing, etc., make any disposition," etc. It does not embrace persons who might become principal offenders at the common law by inciting offenders of the first class to commit the offense, because the statute expressly provides that such persons shall compose a third class, and they must be charged in the indictment sufficiently as offending against the statute. The language used to create the third class is very broad and comprehensive; it embraces "every person assisting, aiding or abetting the unlawful disposition of such property," etc., whether the person making the disposition be the maker of the lien or the purchaser of the property with knowledge of it. The statutory offense thus created excludes any pur- (900) pose of the statute to allow the common-law offense that might otherwise arise by inciting and procuring the direct principal offender to commit the offense.

The indictment in this case does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property. Hence no offense is charged.

No error. Affirmed.

THE STATE v. J. P. CHASTAIN AND E. H. CHASTAIN.

Appeal—Secret Assault—Aiding and Abetting—Judge's Charge—Evidence.

1. A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statute for perfecting appeals.

2. Upon the trial of an indictment against two persons—brothers—for a secret assault with an intent to kill, there was evidence tending to prove that one of the defendants made the assault under the cover of darkness and from the bushes; that the other was about one hundred and fifty yards in the rear, but in sight, armed; that upon the assault being vigorously repelled,

the two fell back to a house near by, against and from which many shots were fired. *Held*, that it was not error to instruct the jury that if the evidence satisfied them that the defendant who remained in the rear took up the position with the knowledge that his codefendant was lying in wait with intent to kill, and that it was his purpose to afford aid to his brother, if he needed it, that he was guilty as principal of the felonious assault.

INDICTMENT for a secret assault with intent to kill (drawn under chapter 32, Laws 1887,) tried at the Fall Term, 1889, of CLAY,
(901) before *Clark, J.*

Of the four defendants on trial, E. H. Chastain and J. P. Chastain were found guilty.

It was in evidence for the State that, before day, on 11 June 1889, J. S. Anderson and others were fired upon by a party lying hid in the bushes, on the creek bank; that the number and frequency of the shots (which were immediately responded to by Anderson and party) indicated the presence of more than one person; that after daylight E. H. Chastain and J. P. Chastain were recognized in falling back from the bushes to the house, and afterwards both were seen to fire from the house; that J. P. Chastain came to the house two hours before day and told his brother (E. H. Chastain) that Anderson and party were armed and tearing down the fence; that E. H. Chastain, armed, went immediately in that direction; that J. P. Chastain soon followed, with his gun, and thereafter the firing began; that it was responded to; that after daylight the Chastains fell back to the house.

The defendant J. P. Chastain testified that he did give the information to his brother, and soon after went out with his rifle, but that he took no part in the firing, but took a position on a ridge, 150 yards from his brother, and behind him; that he was in sight of his brother the whole fight; that Anderson fired first; that he (J. P. Chastain) was not aiding or abetting his brother, nor taking any part in the fight, but was only a spectator; that when the balls from the Anderson party began to fall around him he fell back to the house; that the Anderson party, for a couple of hours, rained balls on the side and roof of the house, though neither he nor his brother replied to them. There was much
(902) other evidence not necessary to state. There were no exceptions to the testimony.

The court charged, in addition to matters not excepted to, and here not set forth, that if the jury were satisfied beyond a reasonable doubt that Anderson was fired upon by a person or persons lying concealed in ambush, hid in the bushes and covered by darkness; that such shooting was with the intent to kill, and that J. P. Chastain was present, taking part in such shooting, or present, aiding and abetting, he was guilty. If he was 150 yards in the rear, but in sight of the shooting, armed with

his rifle, and he was there with knowledge that his brother was to assault Anderson, by lying in wait, with intent to kill, and his purpose was to afford aid and assistance to his brother, if hard pressed, and he was acting a second line of battle, or "backed," to his brother (the testimony being that his rifle would carry to the spot of the fighting), he would be aiding and abetting and guilty as a principal. The rest of the charge is not set out. After verdict, counsel stated there was no exception he could take as to E. H. Chastain, but he moved for a new trial as to J. P. Chastain, assigning as sole error that part of the charge that if "J. P. Chastain was 150 yards in the rear, but in sight of the shooting, armed with his rifle, with knowledge that his brother was to assault Anderson, from a lying-in-wait, with intent to kill, and his (J. P. Chastain's) purpose was to afford aid and assistance to his brother, if hard pressed, and was acting as a second line of battle and backer for his brother, he would be aiding and abetting and guilty as a principal."

Motion for a new trial denied.

After sentence, counsel entered an appeal for both the defendants.

After conferring with his counsel, E. H. Chastain, in open court, withdrew his appeal, and, in his hearing and with his assent, the withdrawal of appeal was entered of record.

It appeared that, after withdrawing his appeal, E. H. Chastain renewed it by giving notice, and perfected it by filing bond. The statement of case on appeal was therefore made by the judge (903) for both defendants, with consent of counsel.

Attorney-General for the State.
J. W. Cooper for defendants.

AVERY, J., after stating the facts: The defendant J. P. Chastain excepted to so much of the charge of the court as related exclusively to the question of his guilt, and relies solely upon the ground of error in misdirecting the jury. As to him, the case was submitted in two aspects, both of which naturally arise out of different views of the evidence.

First, the jury were told that if the testimony should satisfy them beyond a reasonable doubt that Anderson was fired upon by a person or persons lying concealed in ambush, hid in the bushes and covered by darkness, that such shooting was with intent to kill, and that if J. P. Chastain was present, taking part in such shooting, or present aiding and abetting, he was guilty.

It was not contended by counsel that the judge did not state the law correctly in the first proposition.

It was insisted that the other view submitted was erroneous, because it was not applicable to the testimony, and for the reason that it con-

tained an intimation of opinion on the facts. His Honor's additional instruction was that if he (J. P. Chastain) was one hundred and fifty yards in the rear, and in sight of the shooting, armed with his rifle, and he was there with knowledge that his brother was to assault Anderson by lying in wait, with intent to kill, and his purpose was to afford aid and assistance to his brother, if hard pressed, and he was acting as a second line of battle, or "backer," to his brother (the testimony being that his rifle would carry to the spot of the fighting), he would
(904) be aiding and abetting and guilty as a principal.

It appears from the testimony offered on both sides that J. P. Chastain went to the house of his brother two hours before daylight and told him that Anderson and others were tearing down a fence, and that E. H. Chastain immediately went out with his gun, closely followed by his brother (J. P. Chastain), who was also armed, and according to all the evidence it seems that the former opened fire on Anderson and his party under the cover of the bushes and darkness. The testimony for the State tended to prove that the latter advanced with his brother and joined actively in the attack; but he testified in his own behalf that he stopped one hundred and fifty yards short of the point from which his brother (E. H. Chastain) was firing, and did not shoot at all, though he remained in sight of his brother during the whole encounter, until the balls fell so thickly around him as to cause his retreat to the house. It appears as a fact that his gun would carry a ball from the point where he was stationed to the adversary party. We cannot examine the record of another appeal, as suggested by counsel, for conflicting testimony as to the character of the weapon. Our attention must be confined to the facts appearing in this record. It seems to us that there was abundant testimony to make it the imperative duty of the judge to instruct the jury that the defendant might be guilty as principal, because of aid and encouragement given by him to the other defendant, even if they believed that he did not actively participate in the attack made by his brother, and the instruction is couched in such language as to give them a clear comprehension of the law.

There is no intimation in the charge of his Honor that any disputed fact was or was not fully proven by the testimony, and it is not, therefore, amenable to objection as an expression of opinion on the facts. Code, sec. 413.

There was no exception, as expressly appears from the state-
(905) ment of the case on appeal, on behalf of E. H. Chastain, either to the admission of testimony or the charge of the court. The statement is that "the court charged, in addition to matters not excepted to," as already stated, and after embodying in the statement that portion of the charge objected to for J. P. Chastain the judge states that

the "rest of the charge is not set out," for the obvious reason that no exception is taken to it and no error assigned. The case on appeal appears to have been stated for both defendants. E. H. Chastain first withdrew and then renewed and perfected his appeal. He had a right to renew and reinstate it within the time prescribed by law, if he had no other object to attain but to delay the execution of his sentence. As it appears not only that he did not actually assign error, but that he did not object to any ruling of the court as a ground of motion for a new trial we must assume that there was no error and must refuse the motion for a *writ of certiorari*. We therefore conclude that judgment should be affirmed as to both defendants.

Affirmed.

Cited: Osborne v. Wilkes, 108 N. C., 666; *S. v. Green,* 119 N. C., 900; *Cowell v. Gregory,* 130 N. C., 81, 83; *S. v. Robertson,* 166 N. C., 362; *S. v. Bryson,* 173 N. C., 806.

THE STATE v. W. E. MILLS.

Forcible Entry.

Where the defendant went to a house then in the possession of the prosecutor—the latter being present—and said, "This is my house and I mean to take possession of it," whereupon the prosecutor forbade him to enter, but the defendant did enter—using no force and making no demonstration of violence—and thereupon the prosecutor, to avoid a difficulty, went away. *Held*, that defendant was not guilty of a forcible entry.

INDICTMENT for forcible entry, tried at Fall Term, 1889, of POLK, *Merrimon, J.*, presiding. (906)

The jury returned the following special verdict:

"One Perry Bomer was the tenant occupying the house of T. T. Ballinger and others, and about 1 January, 1889, went to said Ballinger and told him that he was going to move, and that he (Ballinger) might come and take possession of the house. Ballinger went to the house, went in and began nailing down the windows. While he was thus engaged in the house the defendant W. E. Mills came, accompanied by an old negro man who carried some things Mills intended to put in the house. Mills came to the door of the house and said to Ballinger, 'This is my house and I mean to take possession of it.' Ballinger forbade Mills to enter, but Mills went into the house. The reason Ballinger allowed Mills to go into the house was to avoid a difficulty. The defendant said that as

he entered the house one Garrison, from whom Ballinger and another had purchased the house, was or had acted a damned rascal; that it was his (defendant's) house, and he was going to have it. . . . Ballinger made no effort to keep Mills out except to forbid him, in a quiet way, to enter. The negro man accompanied Mills in, and Mills said to the negro, 'Bring those things in here and throw them down,' and the negro did so. Mills did not curse Ballinger or threaten to use any violence—had no weapon. In reply to what Mills said about Garrison, Ballinger told him that 'If there was any trouble between him and Garrison they could fight their own battles.' Ballinger then went away and left Mills in possession."

The court, being of opinion that upon the whole matter of the foregoing special verdict the defendant is not guilty, it is ordered by the court that a verdict of not guilty be entered, and it is adjudged that the defendant be discharged, and that the prosecutor pay the costs of (907) this indictment. State appealed.

Attorney-General and W. J. Montgomery for the State.
J. A. Forney for defendant.

CLARK, J. To constitute the offense of forcible trespass there must be either actual violence used or such demonstration of force as was *calculated* to intimidate, or alarm, or involve, or tend to a breach of the peace. *S. v. Pearman,* 61 N. C., 371. The show of force must be such as to create a reasonable apprehension in the adversary that he must yield to avoid a breach of the peace. *S. v. Pollok,* 26 N. C., 305. In the present case there was neither display of weapons, threats of violence nor unusual numbers. There was nothing said or done which should have intimidated or overawed a man of ordinary firmness.

In *S. v. Covington,* 70 N. C., 71, *Bynum, J.,* states the law so clearly and in a case so like ours that it is only necessary to cite it. In it he says that bare words, however violent, cannot constitute the offense, and though words accompanied by display of weapons, by numbers, or other signs of force are sufficient, yet the demonstration of force must be such as is calculated to intimidate or create a breach of peace, and adds, "The law does not allow its aid to be invoked, by indictment, for rudeness of language, or even slight demonstrations of force against which ordinary firmness will be a sufficient protection." This case has been cited with approval in *S. v. Lloyd,* 85 N. C., 573. In *S. v. Hinson,* 83 N. C., 640, which was chiefly relied on by the State, the act of *riding* into the yard of a house occupied only by a woman, after being forbidden by her, and remaining there cursing her, was held such demonstration of force as was calculated to intimidate or put her in fear.

It is true that here defendant left to avoid a breach of the (908) peace, but the demonstration of force was not such as to give him reasonable ground for apprehension nor to intimidate him. The facts stated in the special verdict make only a bare civil trespass or, at most, an "entry upon land after being forbidden." The defendant would not be guilty of the latter if he entered under a reasonable *bona fide* belief that he had the right to do so. *S. v. Winslow,* 95 N. C., 649.

In *S. v. Ross,* 49 N. C., 315, *Pearson, J.,* adverts to the fact that unless the demonstration of force is such as is calculated to put in fear or create a breach of the peace it is no more than a civil trespass, and adds, "The courts should keep a steady eye to this distinction, because individuals are under great temptation to convert civil injuries into public wrongs, for the sake of becoming witnesses in their own cases and *saving costs.*" Many eminent judges have given caution against this growing tendency to settle private quarrels at public expense. *S. v. Lloyd,* 85 N. C., 573.

No error.

Cited: *S. v. Davis,* 109 N. C., 812; *S. v. Leary,* 136 N. C., 580; *S. v. Tuttle,* 145 N. C., 489; *S. v. Davenport,* 156 N. C., 603.

THE STATE v. WILLIAM GRANT.

Larceny—Indictment—Ownership—Evidence—Corporation.

1. It is not necessary, in an indictment for larceny, where the articles charged to be stolen are alleged to be the property of a corporation, to aver in the bill the fact of the incorporation of the prosecutor. It is sufficient if the corporate name is correctly set forth.

2. Nor is it necessary to produce the charter of an incorporated company to prove the fact of incorporation. It is sufficient if it is established by other testimony that it carried on its business in the name set out in the indictment, and was well known by that designation.

THE defendant was tried before *Clark, J.,* at Fall Term, 1889, (909) of SWAIN, on an indictment charging the larceny of a barrel of kerosene oil, the property of "The Richmond and Danville Railroad Company."

In the course of the trial the State introduced a witness who testified "that he was the agent for the Richmond and Danville Railroad Company at Jarret's Station, in said county; that said company was publicly and universally known by that name in this section as a common

carrier, operating the only railroad in that county, running daily trains, having officers, agents," etc.

The defendant excepted to the admission of this testimony because it was not alleged in the indictment that the company was incorporated, and because the proof of the incorporation should be made by showing the charter.

There was a verdict of guilty. The defendant moved for a new trial on the foregoing exceptions. This motion was declined. The defendant then moved in arrest of judgment because the indictment did not allege that the prosecutor was incorporated. Motion refused. Judgment and appeal.

Attorney-General for the State.
F. C. Fisher (by brief) for defendant.

SHEPHERD, J., after stating the case:

1. We are clearly of the opinion that it was unnecessary to produce the charter in order to prove that the prosecutor was an incorporated company.

In *R. R. v. Langton,* L. R. 2 Q. B. D., 296, "it was held that it was not necessary to produce the certificate of incorporation of a company, but that the existence of the company was sufficiently proved by evidence that it had carried on business as such." Roscoe Crim. Ev., 868. To the same effect is Whart. Crim. Law, 1828; *People v. Swartz,* 32 Cal., 160; *People v. Davis,* 31 Wend., 309; *Reed v. State,* 15 Ohio, 217, (910) and *S. v. R. R.,* 95 N. C., 602.

2. We are also of the opinion that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment. We are aware that there is a great diversity of opinion upon this subject in the various States, but we think the better view is that such as allegation is unnecessary. In *S. v. Bell,* 65 N. C., 313, it is said that "the name of the owner of property stolen is not a material part of the offense charged in the indictment, and it is only required to identify the transaction so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The owner may have a name by reputation, and if it is proved that he is as well known by that name as any other, a charge in the indictment in that name will be sufficient." We see no reason why a conviction upon the present indictment would not be a bar to another in which the fact of incorporation is alleged. Here the name is correctly described and there could be but little trouble as to the identification of the prosecutor. In *Stanly v. R. R.,* 89 N. C., 331, it is distinctly decided that such a company may be designated by its corporate name, and that such a descrip-

tion is good upon *demurrer*. This case cites with approval the language of *Maule, J.*, in *Wolfe v. Steamboat Co.*, 62 E. C. L., 103, where he says that such a description of the prosecutor is "not at all out of the usual form. It *impliedly amounts to an allegation that the defendant is a corporate body.*"

We have read with interest the terse and pointed brief of the defendant's counsel, but he has failed to convince us that there was any error in the rulings of the trial judge.

Affirmed.

Cited: Griffin v. Light Co., 111 N. C., 437; *S. v. Turner*, 119 N. C., 849; *Fisher v. Ins. Co.*, 136 N. C., 219; *Nelson v. Relief Department*, 147 N. C., 105; *Steel Co. v. Ford*, 173 N. C., 196.

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(911)

THE STATE v. W. F. KIRKMAN ET AL.

Indictment—"Against the Peace and Dignity of the State."

1. It is not now essential that an indictment shall conclude, "against the peace and dignity of the State." The ancient rule requiring such averment is not sanctioned either by the Constitution or statutes of this State. Code, secs. 1183, 1189.

2. *S. v. Joyner*, 81 N. C., 534, so far as it conflicts with the opinion in this case, is overruled.

INDICTMENT for incest, tried before *Connor J.*, at November Term, 1889, of IREDELL.

The defendants were found guilty by a jury, and on motion of their counsel the judgment was arrested on the ground that the usual concluding words, "against the peace and dignity of the State," were omitted from the indictment. The State appealed.

Attorney-General for the State.
D. M. Furches for defendants.

CLARK, J. The conclusion, "against the peace and dignity of the King," was held in England to be necessary in all indictments. No reason was assigned for it except that it had been customary. It furnished no light to the defendant, and its employment was not required by any statute. As every criminal offense is, in its nature, "against the

peace," its use is tautology, and doubtless originated in the rhetorical flourish of some ancient and forgotten pleader.

In our Constitution of 1776 it was provided that indictments should conclude, "against the peace and dignity of the State," but this requirement is in the same clause which regulates the form in which commissions, grants and writs shall run, and was evidently intended
(912) merely to place in the organic law a provision that in all legal proceedings and documents thereafter the word "State" should be substituted for "King" in all places where the latter had till then been customarily used. The Constitution of 1868 omits this requirement.

Ever since 1784 "it has been the evident tendency," as is said by *Ashe, J.*, in *S. v. Parker,* 81 N. C., 531, "of our courts, as well as our lawmakers, to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common law, the adherence to which often resulted in the obstruction of justice and the escape of malefactors from merited punishment." The first step in that direction was the act of 1784, applicable to indictments and criminal proceedings in the county courts, and which by the act of 1811, was extended to criminal proceedings in the Superior Courts as well. This act has now become sec. 1183 of the Code, and provides: "Every criminal proceeding by warrant, indictment, information or impeachment shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligent and explicit manner, and the same shall not be quashed nor the judgment thereon stayed by reason of any informality for refinement, if in the bill of proceeding sufficient matter appears to enable the court to proceed to judgment." Then followed the provision of the Revised Code of 1854, now sec. 1189 of the present Code, that "no judgment upon any indictment shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved.

The omission in the present Constitution of the requirement that indictments shall conclude "against the peace and dignity of the State," was not made without a purpose, and is in accord with the manifest tendency to simplify criminal as well as civil proceedings, and to try all causes upon their merits, stripped of useless refinements and tech-
(913) nicalities, which never aid and often hinder the due administration of justice. This tendency is shown in many decisions of this Court, which hold to be sufficient indictments concluding "against the act of Assembly," "against the statute," "against the form of the statute," etc. *S. v. Tribatt,* 32 N. C., 151; *S. v. Moses,* 13 N. C., 452; *S. v. Smith,* 63 N. C., 234; *S. v. Evans,* 69 N. C., 40; *S. v. Davis,* 80 N. C., 384.

In *S. v. Parker,* 81 N. C., 531, above cited, the court held sufficient an indictment concluding "against the peace and dignity," omitting the

words "of the State," though it would seem that the omitted words were precisely the material ones required by the constitutional provision of 1776. At this term we have held also, in *S. v. Sykes, ante,* 694, that a conclusion "contrary to law" is sufficient.

In *S. v. Moses,* above cited, the elder *Ruffin,* than whom a greater lawyer never sat on this bench, refers to the fact that "many sages of the law had called nice objections of this sort a disease of the law and a reproach to the bench." He expresses the opinion that by the act of 1811 (now Code, sec. 1183) "the Legislature meant to *disallow the whole of them* and only require the *substance,* that is, a direct averment of those *facts* and *circumstances* which *constitute the crime* to be set forth."

We are not unaware that a contrary opinion to ours has been held in *S. v. Joyner,* 81 N. C., 534. But in view of the broad and clear expressions of the statute we cannot hold that case as authority and deem the reasoning used and the conclusion reached in the case above cited of *S. v. Parker,* in the same volume, more consonant with the expressed will of the legislative power.

Indeed, it may be noted that even in England, where the words "against the peace of the King" are held material, it is considered that their omission is not ground for a motion in arrest of judgment, but the objection must be taken at an earlier stage. Archbold Criminal Pleading, p. 58. Our statute makes the bill "sufficient in form for all intents and purposes if it express the *charge* against the defend- (914) ant in a plain, intelligible and explicit manner," and if that is done forbids that the bill should either be "quashed or judgment arrested" by reason of any informality or refinement.

The judgment in arrest must be set aside and the case remanded to the Superior Court that it may proceed to pass judgment in conformity with this opinion.

Per curiam. Error.

Cited: S. v. Harris, 106 N. C., 688; *S. v. Arnold,* 107 N. C., 863; *S. v. Peters,* 882; *S. v. Peebles,* 108 N. C., 768; *S. v. Call,* 121 N. C., 649; *S. v. Hester,* 122 N. C., 1052; *S. v. Craft,* 168 N. C., 212.

STATE v. JAMES HENRY.

Affirmation of Judgment.

Where there is no case, and no assignment of error, and no error appears on the record, the judgment will be affirmed.

INDICTMENT for assault and battery with a deadly weapon, tried at the Fall Term, 1889, of CHEROKEE, before *Clark, J.*

Attorney-General for the State.
No counsel for defendant.

AVERY, J. We have carefully examined the record and find no defect of which the court must, *ex mero motu,* take notice. There is no statement of case on appeal and no assignment of error. The judgment must, therefore, be

Affirmed.

Cited: Lovic v. Ins. Co., 109 N. C., 303.

RULES OF PRACTICE

IN THE

Supreme Court of North Carolina

REVISED AND ADOPTED AT FALL TERM, 1889

APPLICANTS FOR LICENSE.

1. *When Examined.*

Applicants for license to practice law will be examined on Friday and Saturday of the week next preceding the first week of each term.

2. *Requirements.*

Each applicant must have attained the age of twenty-one years, and is required to have read:

The Constitution of this State and the United States;
Blackstone's Commentaries (the second book, with care);
Coke, Cruise, Washburn or Williams on Real Property;
Stephen and Chitty on Pleading (first 212 pages);
Pomeroy on Civil Remedies;
Adams on Equity;
Greenleaf on Evidence (Vol. I);
Williams or Shouler on Executors;
Smith on Contracts;
Addison or Bigelow on Torts;
The Code of North Carolina, especially *the Code of Civil Procedure.*

It is not intended to confine the student to the special treaties above mentioned other than Blackstone, but any standard author on the same subjects may be used in their place.

Each applicant must have read law for twelve months at least, (916) and shall file with the clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court.

3. *Deposit.*

Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

APPEALS—WHEN HEARD.

4. *Docketing.*

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district if received before the district is called. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

Greenville v. Steamship Co., 98—163; *Rollins v. Love*, 97—210; *Pittman v. Kimberly*, 92—562.

5. *When Heard.*

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before the completion of the call of the docket of the district to which it belongs and stands for argument in its order. The transcript of the record on appeal from a court in a county in which the court shall be held during a term of this Court may be filed at such term or at the next succeeding term. If filed before the perusal of the docket of the district to which it belongs it shall be heard in its order; otherwise, if a civil case, it shall be continued unless by consent it is submitted upon printed argument; but appeals in criminal actions shall each be
(917) heard at the term to which it is docketed unless, for cause or by consent, it is continued.

Walker v. Scott, 102 N. C., 487; *S. c.*, 104 N. C., 481.

6. *Appeals in Criminal Actions.*

Appeals in criminal cases, docketed before the perusal of the criminal docket for any district, shall be heard before the appeals in civil cases from said district. Criminal appeals, docketed after the perusal of the district to which they belong, shall be called immediately at the close of argument of appeals from the twelfth district, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. *Call of Each Judicial District.*

Causes from the first district will be called on Monday of the first week of each term of the Court; from the second district, on Monday of the second week; from the third district, on Monday of the third week; from the fourth district, on Monday of the fourth week; from the fifth district, on Monday of the fifth week; from the sixth district, on Monday of the sixth week; from the seventh district, on Monday of the seventh week; from the eighth district, on Monday of the eighth week; from the ninth district, on Monday of the ninth week; from the tenth

district, on Monday of the tenth week; from the eleventh district, on Monday of the eleventh week, and from twelfth district, on Monday, of the twelfth week.

8. *End of Docket.*

The call of causes not reached and disposed of during the period allotted to each district, and those put to the foot of the docket, shall begin at the close of argument of appeals from twelfth district, and each cause in its order tried or continued, subject to Rule 6; but at the term of the Court held next preceding the end of the year, no civil cause will be called and tried after the expiration of the twelve weeks designated unless by consent of parties and the assent of the Court.

9. *Call of the Docket.*

Each appeal shall be called in its proper order; if any party (918) shall not be ready the cause, if a civil action, may be put to the foot of the district by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise the first call shall be peremptory; or at the first term of the Court in the year it may by consent of the Court be put to the foot of the docket; if no counsel appear for either party at the first call it will be put to the end of the district, unless a printed brief is filed by one of the parties, and if none appear at the second call it will be continued unless the Court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket unless for good cause assigned.

10. *Submission on Printed Argument.*

When by consent of counsel it is desired to submit a case without oral argument, the Court will receive printed arguments, without regard to the number of the case on docket or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the Court, notwithstanding, can direct an oral argument to be made if it shall deem best.

11. *If Orally Argued.*

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

12. *If Brief Filed by Either Party.*

When a case is reached on the regular call of the docket, and
(919) a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel.

13. *Cases Heard Out of Their Order.*

In cases wherein the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place in the calendar or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, may make the like assignment in respect to it.

14. *Cases Heard Together.*

Two or more cases involving the same question may, by leave of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of the argument.

WHEN DISMISSED.

15. *If Appeal Not Prosecuted.*

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant unless the same, for sufficient cause, shall be continued. When so dismissed the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Brantly v. Jordan, 92 N. C., 291; *Wiseman v. Commissioners*, 104 N. C., 330; *Bryan v. Moring*, 99 N. C., 16.

16. *Motion to Dismiss.*

A motion to dismiss an appeal for noncompliance with the re-
(920) quirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel to that effect, or unless the Court shall allow appropriate amendments.

Hutchison v. Rumfelt, 82 N. C., 425; *Barbee v. Green*, 91 N. C., 158; *Rose v. Baker*, 99 N. C., 323; *Walker v. Scott*, 102 N. C., 487; *Hughes v. Boone*, 100 N. C., 347; *Cross v. Williams*, 91 N. C., 496.

17. *Dismissed by Appellee.*

If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded, during the week appropriated to the district, at a term of this Court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of the case on appeal, if any has been filed, and filing said certificate or a certified transcript of the record in this Court, may move to have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term and after notice to the appellee, to apply for the redocketing of the cause; and if an appellant shall fail to file the transcript of the record of his appeal within the time he might do so, so that the appeal shall stand for argument at the term to which it is taken, the appellee may move, during the week assigned to the district, to dismiss the same as above provided, and his motion shall be allowed, unless reasonable excuse for such failure shall be shown within such time as the Court may direct, in which case the Court may deny the motion and allow a continuance. (921)

Wilson v. Seagle, 84 N. C., 110; *Sever v. McLaughlin*, 82 N. C., 332; *Walker v. Scott*, 102 N. C., 487; *S. c.*, 104 N. C., 481; *Bowen v. Fox*, 99 N. C., 127; *Avery v. Pritchard*, 93 N. C., 266.

18. *When Appeals Dismissed.*

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for the purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. *Transcript of the Record.*

(1) THE RECORD.—In every record of an action brought to this Court the proceedings shall set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

Perry v. Adams, 96 N. C., 347.

(2) PAGES NUMBERED.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(3) INDEX.—On some paper attached to the record there shall be an index thereto in the following or some equivalent form:

	PAGE.
Summons—date	1
Complaint—First cause of action	2
Complaint—Second cause of action	3
Affidavit for attachment, etc.	4

20. *Insufficient Transcript.*

If any cause shall be brought on for argument, and the above (922) regulations shall not have been complied with, the case shall be put to the foot of the district or the foot of the docket, or continued, as may be proper, and it shall be referred to the clerk or some other person to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

Gordon v. Sanderson, 83 N. C., 1; *Howell v. Ray*, 83 N. C., 558; *S. v. Jones*, 82 N. C., 691; *Green v. Collins*, 28 N. C., 139.

21. *Marginal References.*

A case will not be heard until there shall be put in the margin of the record, as required in the next preceding paragraph, brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. *Of Unnecessary Records.*

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the court taken during the progress of the cause shall, in all cases, be charged to the appellant unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

Grant v. Reece, 82 N. C., 72; *Clayton v. Jonhston*, 82 N. C., 123; *Tobacco Co., v. McElwee*, 96 N. C., 71.

PLEADINGS.

23. *Memoranda of.*

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. *Assigning Two or More Causes of Action.*

Every pleading containing two or more causes of action shall, (923) in each, set out all the facts upon which it rests, and shall not,

by reference to others, incorporate in itself any of the allegations in them except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. *When Scandalous.*

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record or reformed, and for this purpose the Court may refer it to the clerk or some member of the bar to examine and report the character of the same.

26. *Amendments.*

The Court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe." Code, sec. 965.

EXCEPTIONS.

27. *How Assigned.*

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, rulings or judgment of the court briefly and clearly stated and numbered. If there be no case settled then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, shall file the said exceptions in the clerk's office. No other exceptions than those so set out or filed, and made part of the case or record, shall be considered by this Court, except exceptions to the jurisdiction, or because the complaint does not state a cause of action or mo- (924) tions in arrest for the insufficiency of an indictment.

McDaniel v. Pollock, 87 N. C., 503; *McKinnon v. Morrison*, 104 N. C., 351, and cases there cited; *Thornton v. Brady*, 100 N. C., 38; *Davenport v. Leary*, 95 N. C., 203.

PRINTING RECORDS.

28. *What to be Printed.*

Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned, as appear in the record in each civil action, shall be printed.

Smith v. Fite, 98 N. C., 517; *Rencher v. Anderson*, 93 N. C., 105; *Witt v. Long*, 93 N. C., 388.

29. *How Designated.*

The counsel for the appellant shall designate such parts of the record as are required to be printed and have the same copied for the printer; if he shall fail to do so the clerk of this Court shall cause the same to be done at the appellant's cost; and such printed matter shall consist of the statement of the case on appeal and of the exceptions appearing in the record to be reviewed by the Court, or in case of a demurrer of such demurrer and the pleadings to which it is entered. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it needful to the argument, nor from reading the record in full when necessary to the proper understanding of the case.

Briggs v. Jervis, 98 N. C., 454.

30. *If not Printed.*

If the record in an appeal shall not be printed, as required by this and the next preceding paragraph, at the time it shall be called in its order for argument, the appeal shall, on motion of the appellee, be dismissed; but the Court may, after five days notice at the same term, for (925) good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals: *Provided, nevertheless,* that this and the next preceding paragraph shall not apply to appeals in criminal actions or appeals *in forma pauperis.*

Horton v. Green, 104 N. C., 400; *Witt v. Long*, 93 N. C., 388; *Walker v. Scott*, 102 N. C., 487.

31. *Costs of Printing.*

Costs of printing the record shall be allowed to the successful party in the case, at the rate of sixty cents per page of the size of the page in the North Carolina Reports, for each page of one copy of the record printed, not exceeding twenty pages, unless otherwise specially allowed by the Court, to be taxed in the bill of costs, and if the clerk of this Court shall prepare the manuscript copy of the parts of the record to be printed in any appeal he shall be allowed ten cents per copy sheet for such service, such allowance to be taxed and paid as other fees and charges allowed to the clerk by law.

32. *If Record Insufficiently Printed.*

If, after a case shall be called for argument, it shall be made to appear to the Court that it cannot be heard intelligently until additional parts of the record be printed, the Court may, on motion of appellee's counsel, continue the cause to the end of the district to give appellant time to print such additional portions, and dismiss the appeal if such order be not complied with.

After argument the Court may, *ex mero motu,* if it appear that required portions of the record have not been printed, suspend the further consideration of the questions raised by the appeal and cause the clerk to notify appellant or his counsel to furnish within a reasonable time a sufficient sum to pay for said printing, or the appeal will be continued or dismissed at the discretion of the Court.

Bethea v. Byrd, 93 N. C., 141.

ARGUMENT.

33. *Oral Argument.*

(1) The counsel for the appellant shall be entitled to open (926) and conclude the argument.

(2) The counsel for the appellant may be heard for one hour and a half, including the opening argument and reply.

(3) The counsel for the appellee may be heard one hour and a half.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the court in a case requiring such extension; but application for such extension must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

34. *Printed Argument or Briefs.*

When the cause is submitted on printed argument under Rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon classified under each assignment, and if statutes are material the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

35. *Copies of Brief to be Furnished.*

Fifteen copies shall be delivered to the clerk of the court, one (927) of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel, when he shall call for the same.

36. *Brief of Appellee.*

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. *Cost of Briefs.*

The actual cost of printing his brief, not exceeding sixty cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. *Reargument.*

The Court will, of its own motion, direct a reargument before deciding any case if, in its judgment, it is desirable.

Lenoir v. Valley River Mining Co., 104—490.

39. *Agreement of Counsel.*

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

McCanless v. Reynolds, 91 N. C., 244; *Short v. Sparrow*, 96 N. C., 348; *Office v. Bland*, 91 N. C., 1; *Mfg. Co. v. Simmons*, 97 N. C., 89.

40. *Entry of Appearance.*

An attorney shall not be recognized as appearing in any case unless he shall first sign a printed or written request by him, in his own proper handwriting, addressed to the clerk of the court, that he be entered as counsel of record in the case mentioned therein, and such request shall be attached to and filed with the transcript of the record in such (928) case; and upon filing such request the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case except by leave of the Court.

Walton v. Sugg, 61 N. C., 98.

CERTIORARI AND SUPERSEDEAS.

41. *When Applied for.*

Generally the writ of *certiorari,* as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term sufficient cause for the delay must be shown.

S. v. Johnston, 93 N. C., 559; *S. v. McDowell,* 93 N. C., 541; *S. v. Sloan,* 97 N. C., 499; *Porter v. R. R. Co.,* 97 N. C., 63; *Mayo v. Leggett,* 96 N. C., 237; *Briggs v. Jervis,* 98 N. C., 454; *Suiter v. Brittle,* 92 N. C., 53.

42. *How Applied for.*

The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

Spence v. Tapscott, 92 N. C., 576; *Bryan v. Moring,* 99 N. C., 16; *Ware v. Nisbet,* 92 N. C., 202; *Williamson v. Boykin,* 99 N. C., 238; *Briggs v. Jervis,* 98 N. C., 454.

43. *Notice of.*

No such petition or motion in the application shall be heard (929) unless the petitioner shall have given the adverse party ten days' notice in writing of the same; but the Court may, for just cause shown, shorten the time of such notice.

ADDITIONAL ISSUES.

44. *If Other Issues Necessary.*

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

MOTIONS.

45. *In Writing.*

All motions made in the Court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded and

the purpose of the same. Such motion, not leading to debate nor followed by voluminous evidence, may be made at the opening of the sessions of the Court.

McCoy v. Lassiter, 94 N. C., 131.

ABATEMENT AND REVIVOR.

46. *Death of Party.*

Whenever, pending an appeal in this Court either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and on motion be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other cases, and if such representatives shall not so voluntarily become parties then the
(930) opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first five days of the ensuing term the party moving for such order shall be entitled to have the appeal dismissed; or if the party moving shall be the appellant he shall be entitled to have the appeal heard and determined, according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

47. *When Appeal Abates.*

When the death of a party is suggested and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate unless otherwise ordered.

OPINIONS.

48. *When Certified Down.*

"The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court, which shall have been on file ten days, in cases sent from said Court."

Acts 1887, ch. 41.

THE JUDGMENT DOCKET.

49. *How Kept.*

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the pay-

ment of money—stating the names of the parties, the term at (931) which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return of an execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry and on payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

Executions.

50. *Teste of Executions.*

When an appeal shall be taken after the commencement of a term of this Court the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. *Issuing and Return of.*

Execution issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied the fact shall be certified to this Court to the end that an entry to this effect be made here.

Petition to Rehear.

52. *When Filed.*

A petition to rehear may be filed at the same term, or during (932) the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon filing of such petition the Chief Justice, or either of the Associate Justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said Court, or until the petition to rehear shall have been determined.

Watson v. Dodd, 72 N. C., 240; *Hicks v. Skinner*, 72 N. C., 1; *Haywood v. Daves*, 81 N. C., 8; *Devereux v. Devereux*, 81 N. C., 12; *Smith v. Lyon*, 82 N. C.,

2; *Earp v. Richardson*, 81 N. C., 5; *Williams v. Williams*, 71 N. C., 216; *Etheridge v. Vernoy*, 71 N. C., 184; *Grant v. Edwards*, 90 N. C., 31; *Neal v. Cowles*, 71 N. C., 266.

53. *What Contain.*

The petition must distinctly specify and assign the alleged error complained of or the material matter overlooked; and only alleged errors in law will be reviewed upon such rehearing, or a rehearing may be had for newly discovered evidence, and it must appear that the judgment complained of has been performed or sufficiently secured, and it must be accompanied with the certificate of at least two members of the bar who did not appear in the cause at the first hearing, and who have no interest in the same, that they have carefully examined the case and the law relating thereto, and the authorities cited in the opinion, and that in their opinion the judgment is erroneous and in what respect it is erroneous; but no petition to rehear shall be filed until one of the Justices of the Supreme Court shall have endorsed thereon that in his opinion the case is a proper one to be reheard.

Wilson v. Lineberger, 90 N. C., 180; *Lockhart v. Bell*, 90 N. C., 499; *Strickland v. Draughan*, 91 N. C., 103; *White v. Jones*, 92 N. C., 388; *Weathersbee v. Farrar*, 98 N. C., 255; *Dupree v. Ins. Co.*, 93 N. C., 237; *Hannon v. Grizzard*, 99 N. C., 161.

54. *Notice of.*

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be (933) given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The Court may, however, grant a temporary restraining order without notice.

CLERKS AND COMMISSIONERS.

55. *Report in Hand of.*

The clerk and every commissioner of this Court who, by virtue or color of any order, judgment or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act, was made; the amount and character of the investment and the security for the same, and his opinion as to the sufficiency of such security. In

every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment and every payment made to any person entitled thereto.

56. *Report Recorded.*

The reports required by the preceding paragraph shall be examined by the Court, or some member thereof, and with their or his approval endorsed, shall be recorded in a well-bound book kept for the purpose in the office of the clerk of the Supreme Court, entitled *Record of Funds,* and the most of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. *Books Taken Out.*

A book belonging to the Supreme Court Library shall not be taken therefrom except into the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General or the (934) head of some department of the executive branch of the State government, without the special permission of the marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives or the chairman of the several committees of the General Assembly; and in such case the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken and when returned.

CLERK.

58. *Minute Book.*

In addition to the records now kept by the clerk he shall keep a *Permanent Minute Book* containing a brief summary of the proceedings of this court in each appeal disposed of.

LIBRARIAN.

59. *Reports by Him.*

The librarian shall keep a correct *Catalogue* of all books, periodicals and pamphlets in the library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added during the year next preceding his report to the library, by purchase or otherwise.

RULES OF PRACTICE

IN THE

Superior Courts of North Carolina

REVISED AND ADOPTED BY THE JUSTICES
OF THE SUPREME COURT

AT FALL TERM, 1889, BY VIRTUE OF THE CODE, SEC. 961.

Barnes v. Easton, 98—116.

RULES.

1. *Entries on Records.*

No entry shall be made on the records of the Superior Courts (the summons docket excepted), by any other person than the clerk, his regular deputy or some person so directed by the presiding judge, or the judge himself.

2. *Surety on Prosecution Bond and Bail.*

No person who is bail in any action or proceeding, either civil or criminal, or who is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, in the docket for the court, the names of the bail, if any, and security for the prosecution in each case, or upon appeal from a justice of the peace.

3. *Opening and Conclusion.*

In all cases, civil and criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong (936) to his counsel.

4. *Examination of Witnesses.*

When several counsel are employed on the same side the examination or cross-examination of each witness shall be conducted by one counsel; but the counsel may change with each successive witness or with leave of the court in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel

so offering shall state for what purpose the witness or the evidence to be elicited is offered; whereupon the counsel objecting shall state his objections and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further unless by special leave of the court.

Olive v. Olive, 95 N. C., 485; *Dupree v. Ins. Co.*, 93 N. C., 237.

5. *Motion for Continuance.*

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate unless permitted by the court.

(*The above rules substantially prescribed by the Supreme Court at January Term,* 1815.)

6. *Decision on Right to Conclude Not Appealable.*

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, except in the cases mentioned in
(937) Rule 3, the court shall decide who is so entitled, and its decision shall be final and not reviewable.

Brooks v. Brooks, 90 N. C., 142; *Cheek v. Watson*, 90 N. C., 302; *Austin v. Secrest*, 91 N. C., 214.

7. *Issues.*

Issues shall be made up as provided and directed in the Code, secs. 395 and 396.

Wright v. Cain, 93 N. C., 296; *McDonald v. Carson*, 94 N. C., 497; *Carpenter v. Tucker*, 98 N. C., 316; *Mining Co. v. Smelting Co.*, 99 N. C., 445; *Davidson v. Gifford*, 100 N. C., 18.

8. *Judgments.*

Judgments shall be docketed as provided and directed in the Code, sec. 433.

9. *Transcript of Judgments.*

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

Norwood v. Thorp, 64 N. C., 682; *Farley v. Lea*, 20 N. C., 169.

10. *Docketing Magistrates' Judgments.*

Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day shall create liens on real estate, and have no priority or precedence the one over the other, if all are or shall be entered within ten days after such delivery to said clerk.

11. *Transcript on Appeal to Supreme Court.*

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Su- (938) preme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter opposite to the same.

On some paper attached to the transcript of the record there shall be an index to the record in the following or some equivalent form:

	PAGE.
Summons—date	1
Complaint—First cause of action	2
Complaint—Second cause of action	3
Affidavit for attachment	4

and so on to the end.

12. *Transcripts on Appeal—When Sent Up.*

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed or case settled by the judge is filed in the office of the clerk of the Superior Court.

Code, sec. 551; *Walker v. Scott*, 104—481.

13. *Reports of Clerks and Commissioners.*

Every clerk of Superior Court and every commissioner appointed by such court who, by virtue or color of any order, judgment or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested

for the benefit of any party to such action, or of any other person, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting
(939) forth the title and number of the action, and the term of the court at which the order or orders, under which the officer professes to act, were made; the amount and character of the investment and the security. In every report after the first he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine or cause the same to be examined, and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. *Recordari.*

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto, duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by the Code, sec. 545. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is
(940) returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. *Judgment—When to Require Bonds to be Filed.*

In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant, or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payment shall be directed only when such bonds as required by law shall have been given and accepted by competent authority.

16. *Next Friend—How Appointed.*

In all cases where it is proposed that infants shall sue by their next friend the court shall appoint such next friend upon the written application of a reputable disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

Young v. Young, 91 N. C., 359.

17. *Guardian ad litem—How Appointed.*

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must (941) file an answer in every case.

Moore v. Gidney, 75 N. C., 34.

18. *Cases Put at Foot of Docket.*

All civil actions that have been at issue for two years, and that may be continued, by consent, at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When the continuance shall be ordered, and when a civil action shall be continued, on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. *When Opinion is Certified.*

When the opinion of the Supreme Court in any cause which has been appealed to that Court has been certified to the Superior Court, such cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed.

Acts 1887, ch. 162, sec. 3.

20. *Calendar.*

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. *Cases Set for a Day Certain.*

Neither civil nor criminal actions will be set for trial on a day certain, or not be called for trial before a day certain, unless by order of
(942) the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. *Calendar Under Control of Court.*

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. *Nonjury Cases.*

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. *Appeals from Justices of the Peace.*

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. *On Consent Continuance—Judgment for Costs.*

When civil actions shall be continued by consent of parties, the court will, upon suggestions that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. *Time to File Pleadings—How Computed.*

When time to file pleadings is allowed, it shall be computed from the expiration of the term as fixed by law.

27. *Counsel Not Sent For.*

Except for some unusual reason connected with the business of (943) the court, attorneys will not be sent for when their cases are called in their regular order.

28. *Criminal Dockets.*

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state the number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at the term. Third—All presentments made at preceding terms undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. *Civil and Criminal Dockets—What to Contain.*

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter, in different columns of sufficient space, in each case:

First—the names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. *Books.*

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

APPENDIX

PROCEEDINGS IN MEMORY OF THOMAS RUFFIN

FORMERLY AN ASSOCIATE JUSTICE

The Attorney-General said:

May it please your Honors:

For the third time within the last three years it has become my mournful duty to formally announce to this Court the decease of those who have been members of it—*Ashe, Settle, Ruffin*—names which adorn the annals and illustrate the virtues of the people of North Carolina in every epoch of their history, in legislative halls, in temples of justice, and in the great forum of the people —"the broad field of battle of life"—they have been heard and recognized as leaders of thought and champions of right.

Of him of whom we now speak, it may be said, without detracting in the slightest degree from the fame of those with whom he was associated in life, or with whom he is linked in death, that he easily stood in the front rank. At the time of his death he was universally regarded as the leader of the bar in North Carolina—a preëminence accorded to him without question and without envy. His career at the bar, his distinguished services on the bench, his virtue as a citizen, are known of all men.

I move your Honors will direct the clerk of this Court to have the memorial and accompanying resolutions of the bar, which I now present, entered of record.

Chief Justice Smith said:

We share very sensibly in the sorrow of our brethren of the bar, occasioned by the death of the late *Justice Ruffin.* He was not a member of this Court at the time of his death, but he had been, and served with great satisfaction to the Court and with distinguished ability. His associates were greatly attached to and highly appreciated him as a judge and for his great personal worth. He was a learned lawyer and very able judge. He possessed a powerful intellect, well trained by study and application; he was full of energy, had a strong will and a keen sense of justice. In his appearance, habits, opinions and mental characteristics, he was strikingly like his distinguished father. He abhorred fraud and every species of dishonesty. He had strong convictions as to questions of morals, politics and law. His style was, perhaps, more ornate and concise than that of his father. No North Carolinian will live longer in the traditions of the bar and people of his own section as a powerful advocate and skillful and successful practitioner in his profession.

He was a member of the Protestant Episcopal Church, and an humble (946) and consistent Christian—bearing testimony to the truth and efficacy of the gospel of Christ to the last moment of his life.

Let the proceedings of the bar be spread upon the records of the Court and reported at an appropriate place in the forthcoming volume of the Reports.

PROCEEDINGS

At a meeting of the bench and bar, held in the Supreme Court room on Monday, 27 May, 1889, to prepare resolutions in respect to the memory of the late *Judge Ruffin,* the *Chief Justice, W. N. H. Smith,* was called to the chair, and Thomas S. Kenan appointed secretary.

APPENDIX.

In Memory of Judge Ruffin.

The Attorney-General (Mr. Davidson) moved the appointment of a committee on resolutions, to be submitted to an adjourned meeting, and the following gentlemen were selected: Theo. F. Davidson, Thos. C. Fuller, R. H. Battle, George V. Strong, and F. H. Busbee.

At the adjourned meeting, held on Saturday, 15 June, 1889 (the Chief Justice being absent), Mr. J. B. Batchelor was called to the chair, and Mr. R. H. Battle, for the committee, submitted the following report:

The committee appointed by the bar at a meeting held on 27 May, 1889, in the Supreme Court room, to prepare resolutions in relation to the life and character of *Thomas Ruffin*, late an Associate Justice of the Supreme Court, respectfully report:

Thomas Ruffin, the great lawyer, wise counsellor, successful advocate, just judge, good citizen and devout Christian, whose loss we are met to deplore, died at Hillsboro, the place of his birth, on the morning of Thursday, 23 May, 1889.

He was the fourth son of *Thomas Ruffin*, so long the distinguished Chief Justice of our Supreme Court, and Anne Kirkland, his wife, and inherited from them many of the qualities of head and heart which distinguished him. He was born 21 September, 1824. His preparation for college was obtained at the academy of Samuel Smith, one of the best teachers of his day, in Rockingham County. There he was a schoolmate of Hon. John H. Dillard, afterwards his law partner and his life-long friend. He entered the freshman class at Chapel Hill in 1840, and graduated in 1484. He studied law with his father and older brother, William W. Ruffin, Esq., at their home on Haw River, in Alamance, and obtained his license to practice in the county courts in 1845. To learn something of the practice of the law, while he was preparing for Superior Court license, he then spent a year in Morganton, where a summer term of the Supreme Court was held, and where there was a good local bar. Obtaining Superior Court license in 1846, he made Yanceyville his home for a short time; but, in 1848, moved to Wentworth and formed a partnership with Judge Dillard, who had, a short time before, been admitted to the bar. There was his home for ten years, and until his marriage with Miss Mary Cain, of Orange, in
(947) 1858, when he moved to Graham. In 1850 he represented Rockingham in the House of Commons, and in 1854 he was elected solicitor for his circuit, and continued to exercise the duties of the office until his resignation at the March Term of 1860. As solicitor he earned much distinction for his accurate legal knowledge, his force as an advocate, and the judicious exercise of the discretion vested in him by law. At the call to arms in April, 1861, he entered the army as a private, but, in a few days thereafter was elected captain of a company in the 13th regiment of North Carolina troops. Appointed a judge of the Superior Courts by Governor Clark in the summer of 1861, he rode the fall circuit of that year, and then resigned and returned to the army and was promoted to the lieutenant colonelcy of his regiment in March, 1862. In the desperate battle of South Mountain, in Maryland, in September of that year, he was wounded, and, some time thereafter, he resigned his commission. During the latter part of the war he served as a member of a corps court in the western army, a tribunal established for the trial of grave military offenses. The war having ended, and our civil courts being reëstablished, he resumed the practice of his profession at Graham, but, in January, 1868, made Greensboro his home, and formed a law partnership with his old friend, Mr. Dillard, and John A. Gilmer. That the ability of the members of this firm was generally recognized appears from the fact that Colonel Gilmer was afterwards

made a Superior Court judge, and the other two became successively, Justices of the Supreme Court. From overwork his health became so impaired that, in December, 1870, he abandoned, for a time, the practice of the law, and went to Hillsboro to live. Then he tried, for a time, the business of an insurance agent. His health being partially restored, he resumed the practice of his profession, and in 1875 formed a partnership with Major John W. Graham, of Hillsboro, which continued, except during the interval of his service on the Supreme Court bench, until his death. *Judge Dillard* having resigned his seat as judge of the Supreme Court, *Judge Ruffin* was appointed by Governor Jarvis to succeed him in February, 1881, and in 1882, having received the nomination of the democratic party, he was elected a justice of the court for the term ending 1 January, 1887. The business of the court being then very great, and there being only three judges to transact it, the strain upon the members was greater than men not of iron constitution could stand, and *Judge Ruffin's* friends soon perceived that he could not perform the work he undertook to do, *and live.* Sick or well, he continued to bear his full share of the burden until the fall of 1883, when he was obliged to resign. The opinions he delivered during his two years of service, and to be found in 84 N. C. to 88 N. C. inclusive, will be a lasting monument to his untiring industry, his logical reasoning and his great legal ability. He went on the bench with a great reputation in the profession, and all admit that he more than sustained it. His retirement from the bench was a cause of general regret to both laymen and lawyers. *Judge Ruffin* was too fond of the law and too busy in his profession to take much part in politics, though he was always in principle, a decided State's rights Dem- (948) ocrat of the Jeffersonian school. He was surprised by being elected a delegate to the Democratic National Convention in 1884, and in that body, which nominated Cleveland for the presidency, he was the leader of the delegation from this State.

Like most strong men, he had prejudices, but of this he was himself conscious, and strove to conquer them and to be always just. He was a firm believer in the truths of the Christian religion, and for many years before his death was a devout and consistent member of the Protestant Episcopal Church. The evening before his death he partook of the holy communion with members of his family with evident enjoyment of the privilege.

In manners, *Judge Ruffin* was eminently courteous and affable. To the young he was considerate and tender, and his influence with the boys of Hillsboro, and their fondness for him were such that they felt his death as that of a dear relative and friend.

Whatever *Judge Ruffin* undertook to do he did well. To the advantages of an astute and logical mind he added untiring energy and immense labor. His obligations to his clients he recognized to the fullest extent. The result was that no lawyer of this generation in North Carolina has been more successful as an advocate before courts or juries. As a counsellor, his knowledge of men, as well as of the law, made him discriminating and prudent. As solicitor he was the terror to evil-doers, but he conscientiously declined to prosecute any one of whose guilt he did not feel confident. As a soldier he was dutiful and brave. As a judge he was firm, wise, laborious, and painstaking; and as a citizen he was all that is comprehended in the term, a Christian gentleman. Therefore, be it

Resolved by the members of the bench and bar here assembled: 1st. That in the death of *Thomas Ruffin* our profession has lost one of its brightest ornaments, and the State of North Carolina one of her truest and best citizens.

2d. That these proceedings be presented to the Supreme Court at its next session by the Attorney-General, with a request that they be spread upon its minutes, and that a copy be sent by the secretary to the family of the deceased.

REMARKS OF MR. R. H. BATTLE.

Mr. Chairman: The report of your committee so fully sets forth the leading events in the life of *Judge Ruffin*, and his characteristic traits, that little need be added by me; but I feel as if I would violate the claims of a hereditary friendship were I to say nothing on this mournful occasion.

The private room he occupied while he was on the Supreme Court bench adjoined that of my near connection—*Judge Ashe*—in the Agricultural building, and I saw much of him here, and after his retirement from the bench I had the honor to be associated with him in several cases in which he was employed to protect the State's interest in the Federal Courts. I therefore had more than usual opportunity to observe *Judge Ruffin's* personal traits, and his
(949) habits of labor and of thought. His professional standards were exceedingly high. He thought the practice and administration of the law to be fully worthy the best talent and closest application of the best men, and, whether at the bar or on the bench, he gave all his powers, natural and acquired, to the matters entrusted him. His capacity for labor—for continuous thought—was immense, and his occasionally breaking down and succumbing to sickness, which seemed to be the result of a failure of digestion, were doubtless the necessary effect of his attempting to labor beyond man's capacity to work. I remember of his telling me that, soon after the war, when complicated questions were constantly arising for solution by lawyers and judges, he repeatedly spent a whole day and night in continuous study, going from home to his office after breakfast and not returning until breakfast-time next morning. While on the bench here his custom was, during the session of the Court, to spend the nights in preparation of his opinions until one or two o'clock, and resume work by gas-light next morning. His neighbor, *Judge Ashe*, worked the same way. It is no wonder that one of them, with a shattered constitution, at the solicitation of those nearest to him, and on the advice of his physician, resigned to avoid death, and the other died in harness, *worked to death;* that their associate, then and now—our honored Chief Justice—did not also succumb to the burden, is due to the fact that intellectual labor was not hard work to him, as it is to almost all other men I have known. Surely the increase of the number of judges to do the great work of the Supreme Court was delayed too long.

It is unnecessary to reiterate what is said about *Judge Ruffin* as a lawyer, an advocate, a judge, and a man; but it behooves us to contemplate his excellencies in all these capacities for an example to ourselves to follow, so far as opportunity is offered us to do so. If we look to him as an exemplar, we would never trouble the court with a suit which the facts ascertainable by the strictest inquiry would not sustain; and when we come to the argument of our cases, it would always be after the most careful preparation of the law and the most skillful array of the facts of which we are capable. We would never forget the dignity of our profession. He came to the bar at a time when it was an honor to be a lawyer in North Carolina, and in spite of the shysters and pettifoggers which the change in our system of practice, as well as the corruption of the times since the war, has tended to produce in the bar, he never ceased to value ours as a noble heritage. His influence, therefore, among the young men of the profession with whom he was thrown in contact was to elevate their standard

of what a lawyer should be. In view of the painstaking care he devoted to his pleadings and other legal instruments, his full briefs of law and facts, and his exhaustive arguments of the strong points of his causes, it was a shame to them to go into court with slipshod pleadings, with little knowledge of the law and the facts of their cases, trusting to their wits to take advantage of the contingencies of the trial, or to *luck* to win verdicts from juries, or have judges to decide in their favor. He was a genius of common sense, as well as a fine technical lawyer, and his common sense told him that, other things being equal, the chances were altogether on the side of earnest labor and careful preparation. Therefore, with his high sense of a lawyer's duty to his (950) clients, he spared himself no pains and no labor to win their causes. He never cared to cultivate the graces of the orator, but he possessed the eloquence arising from decided conviction and great earnestness. He was friendly and affable in his manners, and being a democrat, in the proper sense of the term, and recognizing true worth wherever he saw it, he had friends among all classes of the people; and in the counties where he lived at different times, his influence in and out of the courthouse was extraordinary. The result was, that in most of his cases, the odds were in his favor, and the people considered him as well-nigh invincible. His air and manner sometimes, to a casual observer, gave the impression of indolence or carelessness; but those who watched him, off and on the bench, saw in him a very marvel of industry. Work as long as his constitution would bear it seemed to be but natural to him. As was quoted by the great eulogist of his illustrious father, to him *labor est ipse voluptas.* It is not surprising, then, that with such industry added to his father's training, and guided by his logical mind and wonderful common sense, he became one of the most successful advocates of his day, and one of the most eminent jurists our State has produced.

Whatever of faults there necessarily were in a strong nature like *Judge Ruffin's,* there was a strong religious element in his nature to correct them. While on the bench here, he attended the church of which I was a member, and, however great his toil all the week, and whatever need he had of absolute rest, he was seldom absent from his place at church Sunday morning. He always came with prayer-book in hand, and he entered into the services in a manner both reverent and devout. He was fond of children, and jocose and playful with them; but those of us who knew him here as a great advocate and jurist were surprised to learn, after his death, that he had found time from his labors to devise and execute plans to influence for good the rising generation about him. It is said to have been a beautiful incident attending his funeral that some forty boys were here, among the chief mourners—the sons of his neighbors—with their badges on—members of a society he had formed, and of which he had been president, known as the Peace and Benevolent Society. It is said that the parents have acknowledged the improvement in their boys from this association. He had helped them in a way agreeable to them, by precept and example, to learn a lesson of goodwill among themselves and philanthropy to others, which will make some of them, at least, the benefactors of that community in years to come.

While in the death of him to whom I offer this feeble tribute of respect all the people of the State have cause to mourn the loss of a good citizen and a great man, and we, the older members of his profession, an honored associate, and the younger a bright exemplar, even the youth of his community have cause to deplore the loss of a wise counsellor and good friend. Of what living man can more be said?

IN MEMORY OF JUDGE RUFFIN.

REMARKS OF MR. THOMAS C. FULLER

(951) *Mr. Chairman:* Death has stricken a great name from the roll of North Carolina lawyers. *Judge Thomas Ruffin*—second of the name—on the 23d of the present month, in his own home, surrounded by wife, children and friends, peacefully passed away, and his body has been consigned by loving hands to the place appointed for the dead. His record is made up. His career, with its toils and rewards, its hopes and fears, its disappointments and triumphs, is completed, and his name and fame are now ready for history.

I have known *Judge Ruffin* quite well for about a quarter of a century, and during that time have engaged with him in the preparation and trial of several cases of the greatest importance—cases where large fortunes were involved—others where reputation were weighed in the balance, and others still where the issue was of life or death. I found him always a self-reliant man of steady purpose and iron will, but genial in his manners, and in his intercourse with all he was a gentleman. I am not so qualified to speak of *Judge Ruffin* in his social relations as some others are, nor as a soldier, nor even as a judge. To me he was the *nisi prius lawyer*. I think he was the greatest I have ever met. He was not a lawyer by accident, nor did he come to the bar the offspring of chance. He was most carefully educated at the best schools and colleges in the land, judiciously and thoroughly prepared for the profession by the special training of his father, cheered and encouraged by *his* counsels, and beckoned on to high places by his most illustrious example. With these great advantages, *Judge Ruffin* began the practice of the law in the old Rockingham circuit, and when he was admitted, it was at once felt and recognized that he was there for the master's place. There were able men at that bar *then*, as there have ever since been, and are *now*, but the prize he contended for was no less than the leadership, and he won it; and, without disparagement, I think he has no superior as a *nisi prius* lawyer. How worthily he won that great prize, and how deservedly he retained it, those perhaps only know who have seen him in breast-to-breast grapple with other great athletes of the bar.

No man knew better than *Judge Ruffin* that neither a grand ancestry, nor wealth, nor influential friends, nor all combined, can give a man success at the bar. He who contends for mastery must rely upon "God and his own endeavor." Conscious of his intellectual strength, possessed of a dauntless courage, patient of toil, wary, cautious and self-poised, and with a devotion to his clients' cause that was almost sublime, his grand success as a *nisi prius* lawyer was not phenomenal, but just a legitimate result; and it did not sound strangely to hear the plain men of the country in which he chiefly practiced declare, with assurance born of experience, "who gets *Ruffin* gets the case."

Judge Ruffin rarely, if ever, entered on the trial of a case without first having learned the facts from the witnesses, and without having personally consulted the authorities and learned the law, and when he announced himself ready to try, he *was* ready—ready to *defend* with matchless skill, and ready to *attack* with a force which in its ardor, sometimes resembled ferocity.

(952) But, after the heat of the conflict, if he found that he had done any man injustice, he was as ready to make amends as he was ready to apply the lash, with tenfold severity, to a bad man, if another opportunity offered. He tried, I know, to so conduct his practice that, at his hands, a good man should have nothing to fear and a bad man nothing to hope.

Judge Ruffin believed that a trial by a jury of twelve plain, honest men was the best tribunal for the determination of disputed facts that human ingenuity has ever devised.

IN MEMORY OF JUDGE RUFFIN.

He was not an eloquent man, as the phrase goes, but few speakers excelled him in depth of conviction or in earnestness of utterance. He possessed and exercised in an eminent degree the faculty of attracting the attention of his hearers and retaining it with unflagging interest to the end. He was not what is called a graceful speaker. He indulged not in exordium, but dashing at once into the case he drove with the force of all his resources for the adversary's strongest position, and with voice, gesture and attitude to aid his matchless logic, he rarely failed of victory where victory was possible.

But I have extended these remarks too much, and I will close with this sentence: Great as *Judge Ruffin* unquestionably was in the field and on the bench, the real theatre of his power and greatness was, I think, in the courts of *nisi prius*.

REMARKS OF MR. S. F. MORDECAI

A man of *Thomas Ruffin's* achievements and characteristics needs no eulogist to perpetuate his memory in the hearts of an appreciative people; but because it is an honored custom that we should give expression to our opinions and sentiments when a worthy member of our profession has been called to yield the last tribute exacted by nature, and because of my sincere admiration for a departed friend, I desire, in seconding the resolutions presented by the committee, to add a word to what has been said in his praise.

It is natural to gauge *Judge Ruffin*, intellectually and as a jurist, by comparing him with his illustrious father. But such a comparison cannot be fairly made. The great reputation of the Chief Justice is the accumulated result of nearly a quarter of a century spent upon the bench. The younger *Ruffin* sat for only a tenth part of that time. The great Chief Justice spent the whole of a vigorous manhood in the uninterrupted study, practice and interpretation of the law. The younger *Ruffin* spent nearly four of the best years of his life in the army. The father was blessed with sound physical health. The son was, for a considerable portion of his life in ill health, and during a large part of the time he was upon the bench his sufferings were such as to render him almost an invalid. No mind, however vigorous by nature or improved by study, can put forth its best efforts when the body is feeble and disordered.

Again, the younger *Ruffin's* judicial career as a member of the Supreme Court was at a time when the duties of the Court were exceedingly onerous and the justices greatly overworked. He participated in the labors of the Court during five terms, commencing in January Term, 1881, and (953) ending with the close of February Term, 1883. The cases disposed of during these five terms number 792, and fill five volumes of Reports, which aggregate 3,446 pages.

At the first five terms of the court in his father's official life, to wit, from December Term, 1829, to December Term, 1831, both inclusive, only 246 cases were determined, which cover 1,049 pages of the printed Reports; and, taking a like period near the close of the Chief Justice's labors on the Supreme bench, from December Term, 1848, to December Term, 1850, both inclusive, and embracing the work of the Morganton terms during this period, there were only 474 cases disposed of, covering 2,710 pages in the Reports. Take the average, and it will be seen that the task imposed upon the son more than doubled that imposed on the father for a given length of time. No comparison between an overworked man, feeble in health, and one in full physical vigor, not oppressed by excessive burdens, can be taken as the test of the abilities of either.

The case is now closed, and, as the record stands, his did not reach the top of that lofty pinnacle on which rests his father's renown as a judge. What

would have been the result had his opportunities been as great as those of his father, and their surroundings equal, we can conjecture, but never know.

Justice Ruffin was, undoubtedly, a safe, careful, conscientious and able judge. He was well versed in the fundamental principles of jurisprudence, posted as to their modern exposition and modification, and apt in their application to questions brought before him for solution. The style of his opinions is admirable. They show that he was a vigorous reasoner, and that, being convinced of the correctness of a proposition, he had confidence in his opinion and was bold in its assertion. The criticism once made upon a judicial opinion, that it read more like an apology for the decision of the Court than an elucidation of legal principles upon which the decision was based, can never be applied to any opinion of his. He never indulged in declamation upon questions which had long since passed into trite aphorisms of the law. He paid more attention to sense than to sound. He never sacrificed the point of an argument for the sake of the rotundity of a sentence. He had the good taste to appreciate the fact that a display of rhetoric was as much out of place in the discussion of legal principles as in the demonstration of a problem in geometry. He knew that it was as easy to express what he meant in plain, direct language as it was to surcharge complex sentences with polished verbiage, and leave it to the hurried lawyer and wearied judge to arrive at his meaning by a species of mental alchemy. Therefore, his opinions give forth no uncertain sound. Of him it may well be said: "He did not mystify truth by surrounding it with halo of rhetoric, and he knocked down with a bludgeon."

As a man, whether in the walks of private life or occupying official position he was most estimable. The road he traveled, whether in quest of fortune or fame, was the broad, open highway, in the full blase of the sun, exposed
(954) to the scrutinizing gaze of all men. He sought the shadows of no by-path to attain any goal, and the dust of the nigh-cut never felt the weight of his footfall. With him, honesty was more than preferment, and uprightness was above success. *Esse quam videri* was the rule of his life, and he was greater by example than in precept. He was charitable without ostentation—a Christian without fanaticism. He was no essayist in morality, but, in thought, act and purpose, he was actuated by plain, common, matter-of-fact honesty, and his was an integrity as unswerving as a pure woman's faith. He was upright, neither from fear nor hope of reward or praise, but he did the right for the right's sake, and because he was a gentleman by birth, training, and instinct. All his sentiment were purified, and his intercourse with his fellow-men was governed by that love of justice which can abide only in the breast of a man true, brave and noble by nature, and exalted by the inspiration which is born of obedience to the higher law.

"Great is the power of an unstained name in public and private life," and as long as a pure life, honesty of purpose, a spotless integrity and a loyal devotion to a great and honorable profession shall be esteemed among men, so long will his labors and his character shed lustre upon the history of the Bench and Bar of his State. "*Gloria virtutem tanquam umbra sequitur.*"

Mr. S. A. Ashe also seconded the resolutions in appropriate remarks.

The report of the committee was then adopted and the meeting adjourned.

PROCEEDINGS IN MEMORY

OF

WILLIAM N. H. SMITH

CHIEF JUSTICE

MEMORIAL PRESENTED TO THE SUPREME COURT

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(955)

Attorney-General Davidson, in presenting the memorial and resolutions in honor of the late *Chief Justice Smith* to the Supreme Court, said:

May it please your Honors:

I arise for the purpose of presenting to the Court the resolutions adopted at a meeting of a large number of the members of the Bar of North Carolina, in Raleigh, on the 3d inst., commemorative of the life, character, and public services of the late Chief Justice of this Court.

It has not often happened that the death of an individual produced such general grief and sense of public loss as that of *Judge Smith.* Throughout the State, even among those to whom his features were unknown, he was held in the highest esteem—I may say, veneration. There were happily combined in his nature those characteristics to which the people readily and cordially yielded absolute confidence. In a long life, in which he was called upon to discharge many delicate and grave duties, he preserved that confidence, and, at its close, was followed to the grave by a mourning people, who felt they had lost a wise friend, a faithful servant and a fearless guide.

Of his attainments as a lawyer, his wisdom as a judge, his virtues as a citizen, these resolutions truly speak. The love and veneration of those who were brought in close personal and official relations with the deceased for him are, perhaps, the highest tributes to his memory. To them his death is a personal bereavement which will never be obliterated. May we humbly, but faithfully, strive to imitate his virtues, public and private, and thus preserve his fame with the living and perpetuate it with those who come after us.

I move, your Honors, that these resolutions and the accompanying memorial be entered upon the records of this Court:

In accordance with appointment, the Supreme Court Bench and the Bar met on the afternoon of 3 December, at 3:30 o'clock, at the Supreme Court room, to adopt a memorial and resolutions in respect to the memory of *Chief Justice Smith.*

Hon. A. S. Merrimon, Chief Justice, and chairman of the former meeting, called the assembly to order. All the members of the Supreme Court Bench and a large number of the members of the Bar were present.

Mr. T. C. Fuller, chairman of the Committee on Resolutions, then read and submitted the following:

William Nathan Harrell Smith was born in Murfreesboro, Hertford County, N. C., on 24 September, 1812. After the usual preparatory course, he entered Yale College and graduated in the class of 1834, and then studied law at the Yale Law School, and afterwards entered upon the practice of his (956) profession in Hertford County.

In 1840 he was elected to the House of Commons from Hertford, and, in 1848, to the Senate from the district in which he resided, and the Legislature

of 1848-49 elected him Solicitor of the First Judicial District, which office he held for two terms of four years each. In 1857 he was nominated for Congress by the Whigs of his district, but was defeated; and, in 1859, he was renominated and elected. He was selected by the Southern Representatives as a candidate for Speaker of the House of Representatives of the United States, but, after a long struggle and many ballotings, he was defeated by Mr. Pennington, of New Jersey. He remained in Congress until the inauguration of Mr. Lincoln. He was a member of the Confederate House of Representatives during its entire existence. In 1865 he was again elected to the House of Commons from Hertford County. In 1870 he moved to Norfolk, Va., and, after a residence there of two years, returned to his native State and located in Raleigh, where he met with great success in the practice of his profession. In 1870-71 he was of counsel for William W. Holden in the impeachment trial, being selected, together with other eminent lawyers, by Governor Holden. He was appointed Chief Justice by Governor Vance on 14 January, 1878, to fill the vacancy caused by the death of *Chief Justice Pearson*, and was elected in the same year, and again in 1886, at the regular elections held in those years.

He received the honorary degree of LL.D. from Wake Forest College in 1874, from the University of North Carolina in 1875, and from Yale College in 1881.

He died on 14 November, 1889, at his residence in Raleigh, in the 78th year of his age, leaving to the State, which he loved with the love of a son for a mother, his life's work as his monument. It is

Resolved by this meeting, That in the death of *W. N. H. Smith* the State has lost a citizen of whose record she is justly proud.

Resolved 2d, That the Attorney-General be requested to present this memorial and these resolutions to the Supreme Court, with the request that a copy of the same be forwarded to the family of the deceased.

Respectfully submitted,

THOMAS C. FULLER,
For the Committee.

REMARKS OF MR. R. H. BATTLE

Mr. Chairman: Not being in the city at the hour when the meeting of the Bar was called, at the first tidings of the death of the late Chief Justice, I am unwilling that this opportunity should pass without more than a silent participation in this meeting on my part, and I beg to say a few words in advocacy of the resolutions offered by the committee.

(957) My admiration for the worth and ability of him whose virtues we are met to commemorate dates back to the time, years before the late war, when, as a boy at Chapel Hill, I began to take an interest in the great men of the State. There had been a homicide in high life in one of the northeastern counties of the State, and there was great excitement about it among the numerous friends of the slain man and his slayer, and the result of the trial of *S. v. Sawyer* was looked to with great interest throughout our borders. George E. Badger, the ablest advocate this State has yet produced, was employed by the friends of the prisoner as an associate in his defense with some of the ablest lawyers of that district. I do not know who assisted in the prosecution, but *Mr. W. N. H. Smith*, the solicitor for the State, upon whom the law imposed its management, made greater reputation by his closing argument than anybody else connected with the trial. A gentleman who was living at the time in Elizabeth City, where the trial was had, has told me that he heard Mr. Badger say that *Mr. Smith's* argument for the prosecution was the best speech

before a jury he had ever heard from anybody. *Laudatus a laudato viro.* From that time the profession in North Carolina accorded to him a place in the first rank of its jurists and advocates. This it was, along with the character for integrity he had formed, that caused his selection by the Whig party as a candidate for Congress against the gallant and popular Shaw, in 1857, and again in 1859, when he was elected. His reputation, and the confidence of his colleagues in him, must have been very great to cause him, a new member, to be selected as the Southern candidate for Speaker from all the able, conservative men of the South and the border States; and had he been elected, as it was at one time thought he was, it would have been, if I mistake not, the solitary instance, during the present century, of a member, at the beginning of his first term of service in our House of Representatives, being elected to preside over its deliberations. That he continued to enjoy the entire confidence and respect of his constituents appears from the fact that he was their Representative in the Confederate Congress during the whole period of the war, and, the war being ended, that he was selected by the people of his county to represent them in the Legislature convened in the Fall of 1865 to rehabilitate the State as a member of the Union under President Johnson's plan of reconstruction.

Since *Mr. Smith* came to live in Raleigh, in 1872, my acquaintance with him was intimate and cordial, and I had the opportunity of analyzing his qualities of head and heart that gave him his high stand in the profession and among the people. Undoubtedly he was a very able man, and his mind was eminently logical. He was possessed of a fine memory and had the command of an excellent vocabulary. He was a good classical, as well as English, scholar. He was conscientious as an attorney, and he always gave his best services to his clients. Honesty, of the old-fashioned sort, and unswerving integrity, seemed to be a part of his very nature. I have always regarded him as one of the most sincere and candid of men. These qualities made him very accessible to, and affable with, all whom he supposed to have like traits; and to them, with his large general information, his extensive personal observation of men and (958) affairs, his accurate legal learning, he could not but be a very entertaining and instructive companion. He was one of the most fluent talkers and speakers I have ever known. He was seldom, or never, at a loss for a word, and that the best word to express his idea. I have often thought that, if the arguments I have heard him make before courts and juries, without brief or notes, were accurately taken down by a reporter as they fell from his lips, they would read as well as if he had reduced them to writing and revised them beforehand. If any criticism is to be made of his style as a writer, it is that his sentences are generally long and sometimes rather involved. I apprehend this never arose from the fact that his meaning was not clear to his own mind, and that any sentence so criticised, if read by him, would have been quite clear to the hearer. He wrote as he spoke, and, in speaking, the inflection of his voice and his well-chosen words, made what he said perspicuous as well as impressive. He wrote as fluently as he talked, and his manuscript—the first draft—was singularly free from erasure or interlineation. Having expressed his ideas in apt phrase, he stopped not to ornament or change the form of expression.

His capacity for labor was immense, and, indeed, it seemed to be less labor for him to think and communicate his thoughts on abstruse questions than to other men, however well trained their minds might be. To any one who will take up the twenty-seven volumes of our Supreme Court Reports in which his opinions will be found, the amount of work he did will appear almost a marvel. During ten of the nearly twelve years of his service as Chief Justice, there

were only two associate justices, and it will appear that, during every term, he took upon himself a full share of the work, if not a larger share than either of his associates, while three of those associates successively succumbed to the burden—two laying it down because they could bear it no longer, and the third dying under its weight. When it is remembered that, during all those years, his physical condition was precarious and he suffered from a complication of diseases, either of which, he had reason to fear, might prove fatal to him at any time, the amount of work he accomplished is still more wonderful. His memory was exceedingly tenacious, and he had, doubtless, a more intimate acquaintance with the past decisions of the Court than any other lawyer in the State, whether on or off the bench. This, of course, lightened his labor in the investigation of the cases before him, and his facility of expression gave him another advantage over almost any associate. I but express the known opinion of his brethren on the bench when I say that the loss of one so ready as he was to recall, on the moment, almost any decision pertinent to the matter in hand made by the Court since its organization, will be felt as a great personal inconvenience, if not a calamity, to them. When the traditions of the Bench and the Bar in North Carolina of this period shall have faded away, the North Carolina Reports, from Volume 78 to 104 inclusive, will be a monument, *aere perennius*, to *Chief Justice Smith's* greatness. They will show him to posterity,

what all men now admit him to have been—a fine scholar, a logical
(959) reasoner, a learned lawyer, a wise and just judge, a good and great man.

Truthfulness was one of the foundation principles of our brother's character, and his mind ever instinctively sought the truth in all things. While in politics, he was always true to his convictions, but he could never be a partisan in the offensive sense of that term; he was ever fair to an opponent and charitable to those who differed with him in opinion. Otherwise, a lifetime Union Whig could never have received, in the tempestuous times which immediately preceded the war, the support for Speaker of secession Democrats. That Governor Holden should have selected him as his leading counsel in the impeachment trial, though a member of the executive committee of the party opposed to his own, is proof that the war and reconstruction had not made him bitter or intolerant. It is well for a State and people when we can praise the private character of our judges without reserve, as we can that of our late Chief Justice. If he was ever accused, or suspected, in his long life of any conduct unbecoming an honorable man, it has never reached the ears of one who has been his neighbor for nearly a score of years. Honest and fair in his dealings, kind and generous to all who approached him, modest in his demeanor, refined in conversation, courteous in manner, we have seen him, these many years, come in and go out amongst us. And, then, ever since I first knew him, and for how many years before I know not, he was a consistent member of a Christian church which is of the strictest in its requirements as to the character and habits of its members. How regular he was in attendance at the services of that church, and how he prized its privileges! The busy lawyer, the busier judge, never failed to hear when the iron tongue of the bell called him to the house of prayer. Perhaps his experience there made him the better fitted to perform the various duties of his profession and his office, while it was a refreshment to his wearied body and mind. Who knows? He was not one to obtrude his sentiments on such matters upon others. But we are free to judge from results.

APPENDIX.

In Memory of Chief Justice Smith.

Truly it is well to contemplate an example so worthy of imitation. A long life well spent, its many and important duties conscientiously performed, great honors modestly worn, habits of prudence lengthening the years of usefulness beyond the span usually allotted to man and preserving the mental powers to the last, falling with his armor on, and a descent to the grave without fear, but with the assurance of a reasonable, religious and holy hope.

"We need not then weep for him, who having won
The bound of man's appointed years at last,
Life's blessings all enjoyed, life's labors done,
Serenely to his final rest has passed,
While the soft memory of his virtues yet
Lingers like twilight hues, when the bright sun is set."

REMARKS OF MR. A. C. AVERY, ASSOCIATE JUSTICE

Mr. Chairman: Chief Justice Smith should rank among the foremost (960) men of his day for high Christian character, learning and intellectual power.

His elevation to positions, political and judicial, were in an eminent degree tributes to that integrity and devotion to duty that could not fail to inspire confidence. While courteous in his manner he was quiet, undemonstrative, and guilelessly frank. His influence over men was not due to natural magnetism nor was it acquired by a studied suavity or artful flattery. He was kind and careful to avoid wounding others, because his heart was tender, but above all because he was a meek follower of Him who taught the lesson of love to man as next of that of worship, obedience and devotion to God. Well might he go to his eternal rest with the prayer on his lips, "That mercy I to others show, that mercy show to me."

While it has been the habit of our educated men of other vocations to jeer at the legal profession for the want of a high religious, if not moral, tone among its members, we can point with pride to the pure and blameless lives of *Ruffin, Nash, Smith, Ashe,* and *Battle* among the dead, and *Reade* and *Dick* among the living, who have honored their profession and their State by service in its highest Court.

Chief Justice Smith, like General Lee, considered duty the grandest word in our vocabulary. His life was a steady struggle to leave undone no duty, whether to God, to the State under which he held a great trust, or to his fellowman. Economical upon principle, because he considered that man holds wealth by the permission of his Maker, he was liberal without stint, but without ostentation, in the cause of Him whom he esteemed the giver of every good gift, and in relieving the necessities of the poor, to whom Christ came to preach the gospel.

North Carolina has produced no man of more varied and extensive legal learning than the late Chief Justice. Able, astute and ready in the application of legal principles, he had the capacity and the training as scholar and lawyer to have built a system upon the broadest foundation, if he had occupied a position like *Mansfield, Hardwicke,* or *Ruffin.* But there had been no limit to his research and there could be no failure in his resources when authorities were needed. A leading lawyer of the State has suggested that it was his misfortune to have acquired too much knowledge of books, because it led him to follow authority sometimes almost blindly.

The legal friend to whom I refer, and who presides in our Superior Court, said of him but a few weeks since, that he was too modest to realize how great

a man he was, and often cited the opinions and adopted the language of judges in other States, when he could have crystalized the principle in clearer and more forcible terms himself, or recurring to the reason of the thing, have formulated a broader and better rule than that borrowed from one inferior to himself in intellect and attainments.

(961) In political life it is said that he was careful, conservative, indeed often so cautious that he seemed to shrink from responsibility as to questions of public policy. But whether in political life, in his social relations, or the Bench, when a question of right or duty arose, he was prompt to decide and firm and immovable in adhering to his convictions.

He was permitted to go in and out before the people of North Carolina for more than three score years and ten. He has spent a long and useful life among them and left them the heritage of a splendid example.

He has now gone to join the innumerable caravan, with the blessed assurance of knowing "the peace that passeth all understanding."

REMARKS OF MR. EDWIN G. READE, EX-ASSOCIATE JUSTICE

I knew *Judge Smith* personally and as a practical lawyer for thirty years. We were of the same political party. We were in Congress together. When he came upon the Bench as Chief Justice I was Associate Justice, and sat with him for a year. I have known his as Chief Justice ever since.

When Moses was judge of Israel the labor was too much for him, and he was instructed to select from "all the people able men, such as feared God, men of truth, hating covetousness," to be judges with him. Those were the qualities of a judge prescribed by God himself; and *Chief Justice Smith* had them all.

I was an officer with him in a business institution, and we were members of the same church, and our social relations were always kind. With these opportunities of knowing him, I bear earnest testimony to his virtues in all the relations of life.

REMARKS OF MR. J. J. DAVIS, ASSOCIATE JUSTICE

Mr. Chairman: It was a source of painful regret to me that, by reason of protracted sickness, from which I had not entirely recovered, I was not able to be present in Raleigh to take part in the last sad funeral rites in honor of the revered late Chief Justice, who has so long and so faithfully served the public, and to whom I was greatly attached: for, in my services with him on the bench, I had learned to esteem him as an elder brother and to admire him for his great learning and ability—his devotion to principle—his strict adherence to right and justice, and, if possible, still more for his unswerving fidelity to duty. I have not the ability, if I had the strength, to do justice to his memory and character, but I desire to say a few words in tribute to his worth as a man, a judge, and a Christian, and to unite with my brethren in expressions of sorrow at his loss to the State, as well as to his family and friends.

Judge Smith was born and reared in the town of Murfreesboro, in the county of Hertford, and to the last of his long, useful and honored life, he cherished a fond attachment for the home of his birth. I have often thought that

(962) the home is the fountain from which all true affection—all real and true patriotism—must flow, and a man's love for his whole State and country is small, indeed, and of little worth, if this fountain be dried up. Love and affection for the home of his birth never grew cold in the heart of *Judge Smith*, and from this source there flowed a continually broadening stream of patriotic devotion to his State and whole country which made him at all times the advo-

cate and defender of justice and of the rights and liberties of the people; for, whether in the halls of the State Legislature, long years ago, or as solicitor in his judicial circuit, prosecuting criminals in behalf of the State in the Superior Courts, or in the Congress of the United States before the late war, or whether in the Confederate Congress, when the strength of the law was greatly weakened by war and its voice was well-nigh drowned by the roar of artillery, or whether on the bench administering justice as the head of the highest Court in the State—in every position and at all times—the Constitution and the law, under which alone the rights and liberties of the poorest and humblest, as well as of the richest and proudest, can safely and securely rest, were his guides—by these his conduct was always governed—it was these that he had sworn to support, and it was to these that he was ever faithful and true. As a loyal, faithful and patriotic citizen, he knew no higher law than these.

The vast and profound legal attainments of the late Chief Justice are known to the profession and to the public, but his industrious and laborious habits are, perhaps, not so universally known. He was a man of much general learning and knowledge, and, I think, the most studious and industrious man I ever knew. As is known, he was born in 1812, and, though considerably past his "three score and ten," he could do more work, and did more work, as the Reports of the Courts will show, than any judge on the bench. He loved work and never shirked it. It has long been the custom of the Court to take an hour's recess for dinner—from 2 to 3 o'clock—but the Chief Justice rarely went home to his dinner at that hour, but spent it in the conference room or the library, and, on my return from dinner I usually found him busily engaged in the investigation of some legal question under consideration before the Court.

I often felt ashamed that I could not keep up with him and could not do as much work as he did, for it was as much as I could do to get through with the share of work allotted, in the division of labor, to each judge, but he always voluntarily did more. He was punctual, systematic, and regular in his habits, and unless providentially kept away, he was always at his post of duty in this Court when the clock struck 11 in the morning or 3 in the afternoon.

He was a sincere Christian, a pious and devoted member of the Presbyterian Church, and prompt and strict in the discharge of his religious duties. In him there was no false pretense, no hypocrisy, no sham. He never did anything for mere show—he was no mere pretender, but was earnest, candid, and sincere. Though he never vaunted or proclaimed his charities, few men were more charitable than he. In giving he observed the precept of our (963) Saviour: "When thou doest alms let not thy left hand know what thy right hand doeth."

He despised all devious and doubtful ways and everything like pettifoggery, and his professional life presents a high and noble example for the emulation of the young.

He had little toleration for violations of the law and as little for the voilation of the rules prescribed for the trial of causes in court, and if he sometimes seemed impatient with some brother of the bar, who desired the Court to make an exception and depart from any one of these rules, it was not from an unkind heart, but from a love of system and order. He loved justice and was a scrupulous adherent to the rules and methods which, by experience, had been found safest and surest in its administration.

An upright and a just judge and a faithful Christian man has left us, and to him, I feel assured, death was but the opening of the gate to an abode of eternal rest and happiness.

APPENDIX.

IN MEMORY OF CHIEF JUSTICE SMITH.

REMARKS OF MR. W. J. PEELE

Coming from the same section of the State as our late honored, Chief Justice, and having enjoyed to a certain extent an intimacy with him, it is not inappropriate that I should add my testimony to what has already been so well said.

The first time I ever saw him was in the trial of the "Crocker Will Case," one of some local celebrity in Northampton, in which he was opposed by Governor Bragg and other distinguished lawyers. Though I did not then understand the issues involved, I felt instinctively that it was a contest among giants. It was the first time my attention had ever been given to a purely civil matter. I never forgot him. His strong earnest face, his freedom from affectation, his even flow of elegant language, impressed me then as always since.

The testimony of the old men in the counties where he practiced most and was best known is practically unanimous as to his sterling integrity and great legal attainments.

When the question of his renomination was last before the people I was told by Mr. Winborne, of Hertford, and Mr. Gay, of Northampton, that they had never seen the old men take so much interest in the primaries and the elections. The late Mr. Bagley used to talk with me often of the Chief Justice and always in terms of the greatest respect. Speaking of his great powers of enduring labor as compared with his late illustrious compeers and associates, he would say with earnestness, "the old Chief beats them all." And he was right—he has outlasted them.

Standing far down in the valley, it is not for me to judge between these peaks of legal eminence. I have no hesitancy in saying, however, that he was the most widely-read lawyer I ever knew, not only in law, but in the branches collateral thereto. When I was, as I thought, specially posted on some subject off the beaten track, I had a few times attempted to sound him. But I (964) cannot remember that he ever failed to throw a flood of new light upon it. The last time I made such an attempt was just before the end of the term last summer. I had lately read a learned disquisition upon the colonial meaning of the word "regulate" as used in the Constitution of the United States. After the adjournment for the day, I sprung my new mine of information. He listened patiently until I had finished, and then, without the slightest hesitation, took up the discussion, and finally referred me to a book (which he afterwards gave me) which contained the fullest treatment of the whole subject.

In undertaking to estimate the factors of his greatness, I should say they were integrity and industry coupled with a strong understanding and a most retentive memory. His integrity was tried in the fiery crucible of politics in three generations, and was never questioned. Of his industry it is enough to say that he labored side by side with his illustrious compeer, *Judge Ashe*, and did his full share of the work of an overburdened Court. A shrewd observer of men, who has known him for forty years, has told me that at the age of thirty-five he was intellectually the strongest man he ever knew—could cope with any man in anything.

In manner he was kind and affable; but there was a touch of severity in his smile when some of us would attempt to get in some facts before the Court which were not of record.

In his charities he used the same discrimination that characterized him in other matters. A young lawyer who read law in his law office told me that while he gave freely to the needy and deserving, he would, by a few well-directed inquiries, discover the unworthy, and to them he would give only

advice. The example of this old man, patient, frugal, industrious, scourged by disease, yet toiling on in uncomplaining silence almost up to the very last day of his life, is one of the brightest and most encouraging chapters in life's history that has yet been unfolded to me.

It was fit and proper then that at the sunset of a beautiful Indian Summer day they should have laid him away, "cool and sweet" in his grave, in Oakwood Cemetery, where sleep the hallowed forms of so many of North Carolina's distinguished sons who, like him, have been an honor to their State, and whom, like him, she in her turn hath delighted to honor. A day which was a fit emblem of his full-orbed day of life, which rose to the noontide of a splendid mahood, and then slowly sank away to the genial evening of a kind, a useful, and an uncorrupt old age. And now his memory, like a slow-fading twilight, long shall dwell in the minds and hearts of a people he served so faithfully and well.

RESPONSE OF CHIEF JUSTICE MERRIMON

The members of the Court join heartily in the well-deserved tribute of (965) the Bar to the memory, life and character of the late Chief Justice. Too much can scarcely be said in praise of his great virtues and multiplied excellencies.

We are very sensible of the great loss the Bar, the people, and the State have sustained by his death, but we feel and realize in a much keener sense the loss the Court itself has sustained, in that it no longer has the advantage of his guidance, great learning, extraordinary industry, large experience and sound judgment in expounding the law and applying its principles in the decision of cases and in the general conduct of the business of the Court.

He possessed fine native talents, strengthened, and enriched by liberal education. He had varied and extensive learning, and, especially, he was very thoroughly versed in the principles of the common and statute law. He had a thorough knowledge of the laws of this State, and of the practice of the courts, and hence, in large measure, his promptitude and correctness in applying them to cases. He was unusually familiar with decided cases, and could promptly cite the leading ones without consulting a digest or book of citations. Generally, upon the statement of a case, at a glance, he saw the correct application of the law to it.

His opinions are able—strong in their reasoning; many of them are learned, and all bespeak a noble spirit of justice. These will be consulted and cited by courts and lawyers in all the future, and they constitute the principal record that will transmit his name in honor to posterity. He was a great lawyer, a very able, learned and just judge.

His was a fine type of human nature. In stature he was above medium height, inclined to corpulency, manly and dignified in his appearance and bearing, while his face, features and eyes suggested great intelligence, resolution, and firmness. His intellectual faculties were of a high order, capable of steady and prolonged efforts. He was guided by the sternest principles of morality and integrity. He believed firmly in God, and unostentatiously professed faith in Jesus Christ as the Saviour of mankind. Although an earnest member of a religious denomination, he was catholic in his religious views and tolerant of other like denominations. He was charitable without display, and his ear and heart were ever open to the cry of the wretched.

He was patriotic—the firm friend of free constitutional government—and took deep interest in whatever concerned the welfare of his country, whether of statesmanship or the administration of its laws. He was orderly, prompt

and exact in all his labors and dealings; he was modest—never obtrusive—courteous, brave and honorable in his intercourse with men. His friendships were sincere and warm without parade; his conversations, ever pure in their tone, were agreeable, interesting and profitable to all who heard them. The example set by his whole life was salutary, and of him it may appropri-
(966) ately be said: "Mark the perfect man and behold the upright, for the end of that man is peace."

He shared largely in the honors of this life, reaching them without intrigue or questionable efforts. He filled many important public stations, always successfully and with distinguished credit to himself. In all respects he was highly exemplary, in many he was great. His whole record is stainless. He lived a long, eminently useful and honorable life, and at last, in the order of nature, died quietly, and, as he desired to do, in the midst of his labors. His end was peace!

Let the memorial proceedings of the Bar be spread upon the record and reported in an appropriate place in the forthcoming volume of the Reports.

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CONTRACT.

1. B. contracted to sell J. land. In the agreement it was provided that title should be retained till purchase money was paid, when the land should be conveyed to vendee by the vendor "or his lawful representatives." It was also stipulated that, in default of payment, the vendor, "or his lawful representatives," might sell the land and apply the proceeds to the satisfaction of any sums due. *Held*, that the words "lawful representatives" meant the executors or administrators of the vendor, and conferred upon them not only the power to sell, but the power to convey. *Overman v. Jackson*, 4.

2. When, at a sale under a deed in trust executed to secure debts, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt. *Held*, that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. *Jones v. Mizell*, 9.

3. An *executory* contract for the sale of land will not be reformed, by enlarging the subject-matter upon parol testimony, upon the ground of fraud, and enforced with the variation; but it may be *rescinded* upon such ground. *Davis v. Ely*, 16.

4. *Quaere*, whether such reformation will be made even where the subject-matter is not enlarged. *Ibid.*

5. Parol testimony may, however, be received to show such matters in *defense* of an action for specific performance. *Ibid.*

6. *Executed* contracts may, in proper cases, be corrected, either by enlarging or restricting the subject-matter. *Ibid.*

7. A parol contract for the sale of lands, or any interest therein, is good *inter partes*, and will be enforced if the party charged does not plead the statute of frauds; but where the plaintiff seeks to enforce such contracts, and the defendant denies its existence, or sets up another and different agreement, or specially relies on the statute, the contract will not be enforced. *Thigpen v. Staton*, 40.

8. J. conveyed to C. lands, reserving a life estate—both occupying the premises—and it was agreed between them, in parol, that C. should have the rents and profits in consideration that she would support J. for his life. In an action by C. against a stranger for a conversion of the rents. *Held*, that it was competent to show the agreement with J., and being proved, the courts would sustain it. *Ibid.*